

**IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS**

Consolidated Appeals: TAT/LZ/034/2013
TAT/LZ/036/2013

BETWEEN

TOTAL E & P NIGERIA LIMITED

APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE

RESPONDENT

JUDGMENT

In its tax returns for 2006 and 2007, the Appellant used Realizable Price (RP) as the formula for calculating its tax liability. The Appellant maintains that RP is the applicable formula under the 2000 Memorandum of Understanding (MOU) between the Appellant, the Federal Government of Nigeria (FGN), and Nigerian National Petroleum Corporation (NNPC).

INTRODUCTION

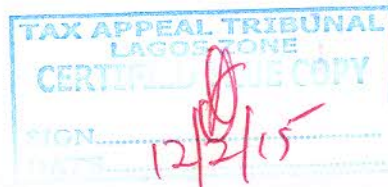
Rejecting the Appellant's resort to RP in filing its PPT returns for 2006 and 2007, the Respondent served the Appellant with additional assessments. The Respondent used OSP to calculate the Appellant's PPT liability. The Respondent's OSP computation yielded a higher tax burden. The Appellant argues that RP is the appropriate pricing methodology. The Appellant sued the Respondent for discharge of the additional assessments.

What is the correct formula: OSP or RP?

Parties' positions

The Appellant argues that the MOU governed PPT computation for 2006 and 2007. It says the MOU sprang from sections 9(2)(a) and 23(5) of PPTA.

The Appellant maintains that clauses 2.1 and 2.4 of the MOU provide for the method for computation of Royalty and PPT, and OSP is not that method. But



clause 2.4.1 defines RP. Besides, the mathematical formulas strewn across clauses 2.4 to 2.7 incorporate RP. The Appellant further submits that clause 2.6 states 'oil prices (RP)' and this denotes that oil prices refer to RP. Finally, The Appellant adds that clauses 2.11, 2.12, and 2.13 of the MOU, as well as its Appendix A, show that RP is the agreed fiscal-price formula under PPTA.

The Respondent argues that there is no agreement between FGN, NNPC, and the Appellant on the pricing methodology for computing PPT for 2006 and 2007.

It contends that the MOU is no such agreement, having been terminated under its clause 7. The Respondent argues that even if the MOU was valid for those years, PPTA overrides it. The Respondent submits that PPTA is the relevant tax law for computing PPT and it specifies OSP as the standard practice.

Analysis

The Respondent submits that the MOU was invalid during 2006 and 2007. It argues the MOU had been terminated. Relying on *Mobil Producing (Nig.) Unlimited v FIRS* (Appeal No. TAT/LZ/004/2011, decided on 21 June 2013), the Respondent submits that PPTA is the regime for computing PPT.

The Appellant argues that the MOU is the applicable regime for calculating its PPT returns. The Appellant submits that the MOU represents the financial agreement contemplated in sections 9(2)(a) and 23(5) of PPTA.

Section 9(2)(a) of PPTA provides that the value of chargeable oil is determined according to the "provisions of any *applicable enactment thereto and any financial agreement or arrangement between [FGN] and the company*" to be assessed. Section 23(5) of PPTA defines "posted price" in relation to crude oil exports as "the price F.O.B. which is *from time to time established by the company after agreement with the Government of Nigeria* as to the procedure to be followed for the purpose."

The parties' agreement is thus a prerequisite for setting the price-determination formula.

The Appellant counters that the MOU remained valid during 2006 and 2007, because it had not been terminated.

Clauses 7.1 and 7.2 provide for termination of the MOU. Clause 7.3 of the MOU subjects termination of the MOU to the prior establishment of a replacement fiscal regime.

7.3 ...In the event that Government fails to provide the new fiscal regime, this Memorandum will continue to apply notwithstanding the termination



thereof until the Government comes up with the new regime in which case this Memorandum shall terminate forthwith.

In *Mobil Producing (Nig.) Unlimited v FIRS*¹, the Federal High Court held that the Department of Petroleum Resources' (DPR) 17-January-2008 letter introduced a new fiscal regime, and that this new regime terminated the MOU.

Essentially, the MOU was valid until 17 January 2008 when the new fiscal regime was introduced. Hence, the MOU governed 2006 and 2007 PPT returns.

What is the applicable pricing mechanism under the MOU?

The Appellant submits that RP is the applicable pricing mechanism under the MOU. Total argues that clauses 2.4, 2.4.1, 2.5, 2.6, and 2.7 incorporate RP. Also clauses 2.11, 2.12, and 2.13 of the MOU, along with its Appendix A show that RP is the fiscal price contemplated under PPTA.

The Respondent submits that there is no agreement on the pricing methodology between the FGN, NNPC and Total. The Respondent argues that sections 23(5) and 23(6)(a) of PPTA provide that a comparative analysis with international crude oil pricing standards should be used to arrive at a posted price. And under PPTA, the standard practice in respect of oil exports is to tag posted price OSP for computing government take.

Clauses 2.1 and 2.4 provide for the method of calculating government take in any joint venture between NNPC and oil companies. Clause 2.4.1 defines RP to mean 'Realisable Price calculated in accordance with clauses 2.11, 2.12, and 2.13 hereof to determine/mirror the crude oil market value of Nigerian Export grades'.

Clauses 2.5.1, 2.5.2, 2.6, and 2.12 of the MOU, and Attachments 1a and 1b to Appendix A to the MOU confirm RP as the applicable pricing methodology under the MOU. These clauses do not even mention OSP.

The issue is certainly interesting and not free from difficulty. What is not in dispute are the provisions of S.9(2)(a) and particularly 23(5) of the PPTA which predicate pricing not on a complete specific formula provided by the statute but on any financial agreement or arrangement between (FGN) and the company S. 9(2)(a) and S.23(5). So an agreement is a prerequisite for the determination of the price. The Appellant in its address, arguing in favour of Realisable Price, based its case in paragraph 11 of its written address as follows: "... Realisable Price, being the fiscal pricing mechanism last agreed between FGN and the Appellant" inter alia. The Respondent for its part contends that there was no agreement on the pricing methodology, asserting that the MOU has become defunct since 2002 (or 2005

¹Appeal No. FHC/L/10A/2013 decided on 29 September 2014.



depending on which part of its submissions one looks at). It contends that the absence of such agreement does not mean absence of tax, but the imposition of "standard practice".

What then is the agreement between the parties that fits into the statutory requirements set out in S.9(2) and 23(5) of the PPTA for the years under review.

The proposition that an agreement cannot be substituted for legislative pronouncement is settled law. Thus Saidu J. FHC/C/10A/13 in *Mobil Producing Nigeria Unlimited v. FIRS* correctly stated the law when he held as follows:

"No matter how strong and well worked an MOU is, it cannot be used to overrule clear provision of law. Parties cannot by consent waive provision of law as held in *MENAKAYA v. MENAKAYA* (2001) 9 -10 SC1. "But this in the context of S.9(2) and 23(5) of PPTA merely begs the question since the statute itself makes agreement between the parties that is, NNPC and Mobil Nigeria Producing Unlimited in this case a condition of the pricing mechanism. Saidu J. did hold that PPTA is a new fiscal regime after the end of the MOU 2000. He predicates this on the letter of 17th January, 2008 on the facts of the particular case argued before him. The letter to which judicial endorsement been given makes certain pertinent points which should guide the determination of this appeal.

"RE: Memorandum of Understanding on Incentives for Encouraging Investments in Exploration and Development Activities and Enhancing Crude Oil Exports (2000 MOU)

Please refer to the deliberations of the joint Government/Industry Negotiating Team on the 2000 MOU.

Government has noted that:-

- 1) The 2000 MOU lapsed as at 1st January, 2003*
- 2) The 2000 MOU has become redundant and in principle no longer in use by any of the industry operators since mid-2005.*
- 3) The Government Inter-ministerial Team and Industry (OPTS) Negotiating Team deliberated extensively to seek any possible options for extension of the 2000 MOU under the chairmanship of the Director DPR.*

In the light of the above, Government has directed as follows:-

- i) To terminate the 2000 MOU forthwith in line with Clause 7.3 pursuant to Clause 7.1 of the 2000 MOU.*
- ii) Henceforth the 2000 MOU shall be replaced by the fiscal regime as contained in the petroleum Profit Tax (PPT) Act of 1959 as mended,*



including deductions (Technical Costs) as provided in Section 10 of the PPT Act.

iii) The Official Selling Price (OSP) as defined in the above Act shall be provided by NNPC (COMD).

You are please advised to abide by the above directive.

A.O. Chukwueke

Chairman MOU Inter-ministerial Committee and Director of Petroleum Resources”

Despite the termination of the 2000 MOU by effluxion of time, there was a need for agreement to activate parts of PPTA. Tacit and informal agreement by conduct continued in the industry until 2005. The informal consent by conduct was put to an end by the letter of 17th January, 2008 by the inter-ministerial committee which reasserted its replacement with the PPTA fiscal regime. Exhibit “AS 10” and “AS 4” are consistent with this conclusion.

In the result, although the life of the MOU 2000 came to an end by effluxion of time in January, 2003 as it was not extended, there was consent manifested by the conduct of the parties sufficient to be tagged an “agreement” under the provisions of S.9(2)(a), and 23(5) of the PPTA. It was brought to an end on 17th January, 2008 which is the finding of Saidu J in FHC/L/10A/13.

Conclusion

We accordingly hold that RP was the proper pricing methodology applicable to PPT returns for 2006 and 2007.

We discharge the additional assessments.

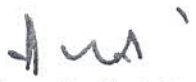
Legal Representation:

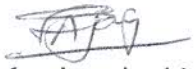
Adewale Atake with Godwin Omoaka, Dipo Komolafe, Igonikon H. Whyte
Chidi Ejiofor, Omolara Adewumi, S. Sulaiman and Biegbana Jaja for the Appellant.


Jerome Okoro for the Respondent.

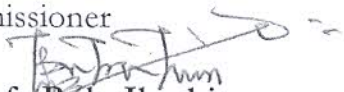


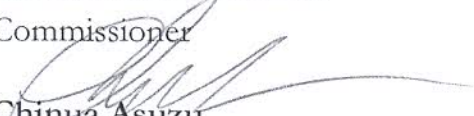
Dated at Ikeja Lagos this 23rd day of January 2015


Kayode Sofola, SAN
Chairman


Catherine A. Ajayi (Mrs)
Commissioner


D. H. Gapsiso
Commissioner


Mustafa Bulu Ibrahim
Commissioner


Chinua Asuzu
Commissioner

