IN THE TAX APPEAL TRIBUNAL

LAGOS ZONE

HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/019/2014

BETWEEN:

MOBIL PRODUCING NIGERIA UNLIMITED **APPELLANT**

AND

FEDERAL INLAND REVENUE SERVICE **RESPONDENT**

JUDGMENT

The Appellant filed this Appeal on the 4th February, 2014 contesting the refusal of the Respondent to allow it make interest expense deductions in the sum of USD 63,525,752 in respect of loans which it obtained from ExxonMobil Capital N.V..

FACTS

The Appellant is a crude oil producing company in Nigeria and an affiliate company of ExxonMobil Corporation. In the years 2006 to 2011, the Appellant obtained a loan from ExxonMobil Capital N. V. ECNV, another affiliate company of Exxon Mobil Corporation. During the 2006-2011 accounting period, loan interest in the total sum of USD 63,525,752 were paid by the Appellant to Exxon Mobil Capital N. V. ECNV in respect of the loan obtained by it. In the 2006-2011 accounting period, the Appellant treated these interest payments totaling USD 63,525,752 as deductible expense in computing its petroleum profits tax liability. However, the Respondent disallowed the deduction of USD63, 525,752 on the basis that the entire sum was non-deductible by virtue of section 13(2) of PPTA which disallows deduction of interest incurred on inter-company loans in their entirety. As a result of this the Respondent issued the Appellant with an additional assessment for petroleum profits tax of USD 52,938,127 and an additional assessment for tertiary education tax of USD1,245,603. The Appellant received the Notices of Assessment on 1st November, 2013 and objected to the Notices of Assessment by its Notice of objection dated 19th November, 2013, in which the Appellant stated that the said interest is deductible by virtue of section 10(1)(g) of the PPTA. The Respondent by a letter to the Appellant dated 26th November,2013, refused to amend its additional assessment as requested by the Appellant.

ISSUES FOR DETERMINATION

Two issues were formulated for determination:

1. **Whether the Appellant is entitled to deduct interest expenses in respect of its intercompany loans as provided for in section 10(1)(g) of the Petroleum Profit Tax Act.**

2. Whether the Respondent's Notice of Assessment Nos. PPTBA/99 and PPTBA/ED89 are lawful or valid in law.

PARTIES' POSITIONS

ISSUE ONE

Whether the Appellant is entitled to deduct interest expenses in respect of its intercompany loans as provided for in section 10(1)(g) of the Petroleum Profit Tax Act (PPTA).

The Appellant submits that charges on related party loans are valid deductions under section 10(1)(g) of PPTA. The Appellant further submits that section 10(1)(g) was added to PPTA in 1999 pursuant to the Finance Miscellaneous Taxation Provisions Decree 30 of 1999. The Appellant argues that section 10(1)(g) clearly supersedes the prior law, section 13(2) on deductibility of interest expense on related party loans.

The Appellant submits that contrary to the Respondent's attempt to distinguish an intercompany loan from a loan from a related company, that while the former would attract interest expense deductions , the latter would not; there is no conflict with the provisions of section 10 (1)(g) and section 13(2) of the PPTA. The Appellant further submits that section 10(1)(g) provides for interest expense on intercompany loans in general, while section 13(2) addresses the fact that interest on related party loans are non-deductible expenses.

The Appellant adopts the definition of intercompany by Business Dictionary.com as "A term used to describe activities that are conducted between two or more affiliates or business units of the same parent company" and asserts that the Respondent neither disputed nor gave evidence to contradict the Appellant's witness (Mr. Salako) evidence contained in paragraph 3 of his written statement on oath that "The Appellant is a crude oil producing company in Nigeria and an affiliate company of ExxonMobil Corporation. In the year 2011, the Appellant received a loan from ExxonMobil Capital N.V. ECNV, another affiliate company of Exxon Mobil Corporation." The Appellant cites the decision of the Supreme Court in the case of **IFEANYI CHUKWU OSONDU V AKHIGBE (1999) 11 NWLR (Pt. 625) 1 S.C.** where it was held that a court of law is bound to rely on evidence that is neither challenged nor contradicted and deem same as admitted.

Section 10(1)(g) of the PPTA provides as follows:

> 10(1) "In computing the adjusted profit of any company of any accounting period from its petroleum operations, there shall be deducted all outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that

period by such company for the purpose of those operations, including but without otherwise expanding or limiting the generality of the foregoing-

(g) all sums incurred by way of interest on any inter-company loans obtained under terms prevailing in the open market, that is the London Inter-Bank Offer Rate, by companies that engage in crude oil production operations in the Nigerian oil industry."

The Appellant therefore asserts that the simple and clear interpretation of section 10 (1)(g) is that interest incurred on any intercompany loans would qualify as deductible expenses. The Appellant referred the Tribunal to its decision in the case of **NIGERIA AGIP OIL COMPANY LIMITED V FIRS (TAT/LZ/015/2014** and **TAT/LZ/016/2014** delivered on 18th September 2014, where this Tribunal held that an intercompany relationship, as anticipated by section 10(1)(g), existed between AGIP and ENI, since both are members of the same group of companies. The Appellant therefore submits that an intercompany relationship exists between the Appellant and ExxonMobil Capital N.V. and the Appellant is therefore entitled to enjoy the application of section 10(1)(g) of PPTA.

The Appellant submits that the co-existence of sections 10(1)(g) and 13(2) of PPTA need be considered carefully so as to achieve consistency. The Appellant commends the Tribunal to the decision in the case of **STATE V GOVERNOR OF OSUN STATE (2007) ALL FWLR (Pt.380) 736, particularly pages 749-750** where it was held that:

"In construction of statute or instrument, the law is that, every word or clause in an enactment must be read and construed together, not in isolation, but with reference to the context and other clauses in the statute in order, as much as possible, not only to reach a proper legislative intention, but also to make a consistent meaning of the whole statute"

The Appellant argues that even where there is no express amendment or repeal of an existing statute, where a later provision of statute which conflicts with the existing is enacted, the later one is deemed to have repealed or modified the existing or earlier provision. The Appellant cites the Supreme Court decision in the case of **ROTIMI WILLIAMS AKINTOKUN V LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE (LPDC)(2013)15 NWLR (Pt. 1376) 66**, where it was held that:

"The law is that where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them. This is because, if a later Act cannot stand with an earlier one, parliament, generally, is taken to Intend an amendment of the earlier. This is a logical necessity, since two inconsistent texts cannot both be valid. If the entirety of the earlier enactment is inconsistent, the effect amounts to an implied repeal of it. Similarly, a part of the earlier enactment may be regarded as impliedly repealed where

it cannot stand with the later. An intention to repeal an Act or enactment may be inferred from the nature of the provision made by the later enactment."

The Appellant therefore submits that section 13(2) being an earlier enactment is inconsistent with section 10(1)(g) a later enactment, and the later enactment expressly allows for the deduction of interest on intercompany loans. The Appellant further referred the Tribunal to the Supreme Court decision in the case of **EDET AKPAN V THE STATE, (1986)3 NWLR (Pt. 27) page 225** per Karibi Whyte J.S.C. that:

> "Where provisions of a statute are subsequent to general provisions, the specific provisions of the statute will apply."

The Appellant therefore submits that the specific statutory provision applicable to the Appellant's case is section 10(1)(g)of PPTA. The Appellant asserts that it is permissible for courts, in cases where a portion of legislation appears contradictory, to consider the context, history, and background in order to grasp the legislative intention surrounding its introduction, to aid in interpreting the portion of legislation as clearly held by the Court of Appeal in the case of **ONAGORUWA V THE STATE (1993)7 NWLR(Pt. 303) 49 at 102** as per Tobi JCA that:

> "It is legitimate to look back at the history of the process which brought the constitution or a particular provision or section into being. A court of law is not to be oblivious of the history behind the law or section interpreted."

The Appellant also cites the case of **NIGERIA AGIP OIL COMPANY LTD V FIRS (TAT/LZ/015/2014** and **TAT/LZ/016/2014** delivered on 18th September, 2014, where this Tribunal held that ;

> "The legislature intends that for tax purposes, related companies should, from the enactment of section 10(1)(g) begin to enjoy the tax deductions always allowed non-related companies when they transact as though unrelated.....By section 10(1)(f) of the Act, the legislative intention is to allow companies deduct tax for sums incurred by way of interest on any loan they obtain for their petroleum operations. Section 10(1)(g) of the Act then specifically entitles related companies to the same deductions as provided in section 10(1)(f), but with one important requirement: they must be transacting at arm's length, in the words of the provision, under terms prevailing in the open market."

The Appellant submits that it is probable that section 13(2) has been impliedly amended by section 10(1)(g) as was stated by this Tribunal in NIGERIA AGIP V FIRS (supra) that:

> "It is the law that 'seemingly conflicting parts are to be harmonized if possible so that effect can be given to all parts of the constitution" Ogundare J.S.C. of blessed memory in **ISHOLA V AJIBOYE (1994) 6 NWLR (Pt. 352)506 at 558-559**. The pronouncement applies with equal force to statutory provisions. A community reading of these two

provisions state that interest on inter-company loans are not deductible in computing adjusted profit, except as per section 10(1)(g) where such loans are obtained under terms prevailing in the open market. Thus whether deductions are deductible or not, on interest on intercompany loans, depends on that specific arms-length litmus test."

The Respondent submits that section 13(2) of the PPTA clearly disallows deduction of sums incurred by way of interest which accrued from a related party loan and section 10(1)(g) of the PPTA is inapplicable to the Appellant's case and does not avail the Appellant. The Respondent submits that assuming without conceding that section 10(1)(g) allows interest incurred on intercompany loans as deductible expenses, the claimant, in this case the Appellant must comply with the conditions as stated in section 10(1)(g) of the PPTA that:

"..all sums incurred by way of interests on any intercompany loans obtained under terms prevailing in the open market, that is the London Intercompany Bank Offer Rate, by companies that engage in crude oil production operations in the Nigerian oil industry."

The Respondent submits that LIBOR is not a constant rate, but subject to changes as admitted by the Appellant's 2nd witness, Mr. Abiodun Folorunsho under cross-examination. The Respondent submits that LIBOR is uncertain and that the Appellant failed to place sufficient materials before this Tribunal to show proof of compliance with the requirement under section 10(1)(g) of the PPTA. The Respondent submits that failure by the Appellant to prove compliance with the conditions of section 10(1)(g) disallows such interest from being tax deductible. The Respondent submits that the Appellant failed to adduce evidence that the loans were fully serviced and discharged to disclose the exact amount representing the interest on intercompany loans.

The Respondent submits with respect to the Appellant's argument that the Respondent raised the issue of compliance with LIBOR at the final address stage , and as such, should not be countenanced, that even though the issue of compliance with LIBOR was raised at the final address stage, the Appellant has joined issues with the Respondent in respect of same. The Respondent argues that the Appellant has led evidence on this issue and it is trite that every issue upon which evidence is led must be pronounced upon by the court. The Respondent cites the case of **COOKEY V FOMBO (2005) 15 NWLR Pt. 947, page 182 at 200 paragraph D** where the Supreme Court held that:

"As a matter of general principle, a court should deal with and determine all issues placed before it for determination."

The Respondent therefore urged this Tribunal to consider and pronounce on all issues properly placed before it for determination.

ISSUE TWO

WHETHER THE RESPONDENT'S NOTICES OF ASSESSMENT NOS. PPTBA/99 and PPTBA/ED89 ARE LAWFUL OR VALID IN LAW.

The Appellant submits that the Respondent's Notices of Assessment Nos. PPTBA/99 and PPTBA/ED89 and Notice of Refusal to Amend to the Appellant on the basis of the inapplicability of section 10(1)(g) as a result of section 13(2) was erroneous and unlawful, and therefore ought to be set aside. The Appellant submits that section 10(1)(g) being a later enactment, upturns the provisions of section 13(2), and allows companies to deduct interest on intercompany loans. The Appellant asserts that the Respondent erroneously interpreted the law contrary to the established principle that any tax assessment should be done in strict compliance with the clear provisions of the tax legislation. The Appellant cites the Supreme Court decision in the case of **A. O. WILLIAMS -V- LAGOS STATE DEVELOPMENT AND PROPERTY CORPORATION(1978)2 S.C** at p.11. The Supreme Court cited the ruling in the case of **GOSLING- V- VELEY 12 Q.B.** that;

> "The rule of law that no pecuniary burden can be imposed upon the subjects of this country by whatever name it may be called, whether tax, rate or toll, except upon clear and distinct legal authority....."

The Appellant also cites the decision in the case of **S. A. AUTHORITY V REGIONAL TAX BOARD (1970) ALL NLR 177**, the Supreme Court held as per Lewis J.S.C. at page 15 that:

> "...no tax can be imposed on the subject without words in an Act of Parliament clearly showing intent on it to lay a burden on him."

The Appellant therefore submits that the parliament intend by the later enactment of section 10(1)(g) to allow for deductions of interest on intercompany loans.

The Appellant submits that the intercompany loans were obtained with LIBOR as a basis for calculating interest sums in addition to the premiums applied which expressly reflect that the intercompany loans were obtained under open market terms. The Appellant asserts that the Respondent did not challenge or contradict the witness statement of the Appellant's witness Exhibit BMPN on paragraph 9 and therefore urged the Tribunal to hold that the Respondent is deemed to have admitted that the sum of USD 63,525,752 which it had disallowed was the interest expense incurred further to Exhibits BMPN1 and BMPN2.The Appellant cites the case of **AMERICAN CYANAMID COMPANY - V - VITALITY PHARMACEUTICALS LTD (1991)2 SCNJ 42 at 51,** where the Supreme Court held that,

> "where the evidence of a witness has not been challenged, contradicted or shaken under cross-examination and his evidence is not inadmissible in law, and the evidence led is in

line with the fact pleaded, then the evidence must be accepted as the correct version of what he says."

The Appellant therefore submits that the Notices of Assessment issued by the Respondent were not issued in compliance with the law and should therefore be set aside.

ANALYSIS AND CONCLUSION

After going through the submissions of Counsel, we observed that sections 10(1)(g) and 13(2) of PPTA require interpretation. We also realized that section 10(1)(g)of PPTA is a later provision introduced by Decree 30 of 1999. We are of the view that section 13(2)of PPTA is a general rule which disallows deduction of sums incurred as interest expense on loan obtained by a company from a related company; While, section 10(1)(g)of PPTA provides for an exceptional situation such as, that sums incurred by way of interest expense as a result of loan obtained by a company from a related company is deductible only ''when obtained under terms prevailing in an open market, that is the London Intercompany Bank Offer Rate (LIBOR),by the companies that engage in crude oil production operations in Nigerian oil Industry''.

The Appellant took refuge under section 10(1)(g) of PPTA and by Exhibits BMPN1 and BMPN2 proved the interest rate applicable is LIBOR which is verifiable worldwide. By Exhibit BMPN, the Appellant proved that USD 63,525,752 was incurred on the intercompany loans. The Respondent insists that section 13(2) of PPTA is the applicable law. The Respondent argued that the Appellant failed to prove the exact interest rate at LIBOR and did not show evidence of servicing the loans, as such, the Appellant did not comply with section 10(1)(g) which require strict compliance with the conditions of LIBOR.

There is nothing before this Tribunal by way of evidence by the Respondent contradicting the evidence of the Appellant. The Respondent failed to provide evidence showing it verified the claim of LIBOR by the Appellant. A mere statement by the Respondent alleging non compliance to LIBOR conditions without evidence contradicting the claims of the Appellant cannot stand.

We still stand by our position in the case of **NIGERIA AGIP OIL COMPANY LTD V FIRS TAT/LZ/015/2014** and **TAT/LZ/016/2014** delivered on 18th September, 2014 that:

> ''The legislature intends that for tax purposes, related companies should, from the enactment of section 10(1)(g) of the PPTA begin to enjoy the tax deductions always allowed non-related companies when they transact as though unrelated.....By section 10(1)(f) of the Act, the legislative intention is to allow companies deduct tax for sums incurred by way of interest on any loan they obtain for their petroleum operations. Section 10(1)(g) of the Act then specifically entitles related companies to the same deductions as provided in section 10(1)(f), but with one important requirement: they must be transacting at arm's length, in the words of the provision, under terms prevailing in open market''.

In the circumstance, we hold that the Appellant is entitled to deduct interest expenses in respect of its intercompany loans as provided for in section 10(1)(g) of the PPTA. We hereby grant the relief sought by the Appellant in its Notice of Appeal and set aside Notices of Assessment Nos: PPTBA99 and PPTBA/ED89.

LEGAL REPRESENTATION.

Mrs Olufunke Adekoya (SAN) with T.I. Emuwa Esq. I. Berebibara Esq., Ms A. Adewusi for the Appellant.

Mrs. B. D. Akintola for the Respondent.

DATED THIS 30TH DAY OF OCTOBER 2015

KAYODE SOFOLA, SAN *(Chairman)*

CATHERINE A. AJAYI (MRS)
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner