

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

TAT/LZ/004/2014

Between

The Shell Petroleum Development Company of Nigeria Ltd

Appellant

And

Federal Inland Revenue Service

Respondent

Judgment

Introduction

The Respondent assessed the Appellant to withholding tax (WHT) on its gas-income dividends for 2010 and 2011 years of assessment (YOAs). The Appellant objected, claiming that section 60 of the Petroleum Profits Tax Act (PPTA) exempts it from paying any further tax. The Appellant says that the taxation of its gas income at 30% CITA rate is an incentive against the 85% tax rate under PPTA. The Respondent reasons that since the Appellant's gas income was taxed under CITA, the dividends paid out from its gas income should be equally governed by CITA.

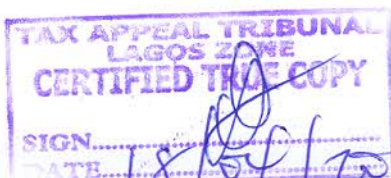
Issue for determination

The main issue for determination in this appeal is:

Are dividends paid out of profits from gas income subject to WHT as provided under CITA?

Facts and Proceedings

The Respondent audited SPDC in October 2012 for the 2006 – 2011 YOAs and discovered that SPDC had failed to apply WHT on the dividends paid from its gas income for 2010 and 2011 YOAs. On 28th October 2013, FIRS served a WHT assessment notice of US\$16,275,081 on the Appellant's gas-income dividends for the 2010 to 2011 YOAs. The Demand Note of US\$16,275,081 is marked **Exhibit IO2**. The Appellant objected to the Demand Note on 18 November 2013.



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The Respondent conveyed to the Appellant its refusal to discharge the Demand Note on 13th December 2013 (**Exhibit IO13**). But the Respondent served the Appellant a revised Demand Note of US\$12,206,310.75. The Respondent invoked the provisions of the Tax Treaty with SPDC's parent company's country to issue the revised assessment.

On 10th January 2014, the Appellant filed a notice of appeal, supported by:

1. A list of witnesses;
2. Ijemai Ojebuovboh's witness statement and additional witness statement;
3. A list of documents including:
 - a) The Respondent's demand letter,
 - b) Withholding tax demand note No. LD/OG/US/WHT/13/41,
 - c) The Appellant's letter of objection to the Demand Notices;
 - d) The Respondent's notice of refusal to amend,
 - e) The Appellant's PPT Returns for 2010, and
 - f) The Appellant's PPT Returns for 2011

The Respondent replied and filed:

1. Frank Bawa's witness statement;
2. Notice of Assessment No PDBA 257

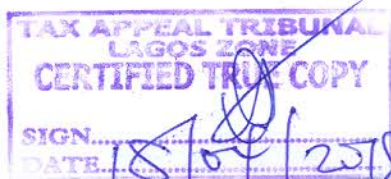
Parties' Positions

The Appellant argues that apart from the section 11(2) (d) incentive, PPTA governs its gas income.

The Appellant argues that FIRS was mistaken to have served a demand note for CITA-based withholding tax on gas-income dividends. The Appellant avers that PPTA, not CITA, governs its taxation. The Appellant claims it paid gas-income tax under CITA because of the section 11(2) (d) PPTA incentive. The Appellant believes the incentive allows the CITA-based taxation at a lower rate of 30% than the 85% provided by PPTA. The Appellant maintains that taking advantage of the incentive under section 11(2) (d) of PPTA does not remove the section 60 PPTA umbrella beneath which the Appellant shields itself.

The Respondent says that CITA governs the Appellant's gas income completely.

The Respondent counters that since the Appellant's gas income was taxed under CITA, its gas income is subject to CITA, not PPTA. The Respondent argues that the effect of section 11 (2) (d) of PPTA is that the taxation of all associated gas profit would follow CITA. The Respondent contends that any dividend paid out from gas income could not enjoy the protection section 60 PPTA offers against further tax.



The Respondent submits that sections 80 and 9(1) (c) of CITA render The Appellant liable to withholding tax on dividends from its gas income.

Analysis

What is the interpretation of section 11 (2) (d) of PPTA?

The Appellant argues that section 11 (2)(d) of PPTA is an incentive that allows it assess the tax due on profits from its gas operations with the 30% CITA tax rate.

The Respondent says that section 11 (2) (d) of PPTA transfers taxation of associated natural gas profit to CITA regime.

Section 11 (2) (d) of PPTA is not ambiguous. It states:

The incentives specified under subsection (1) of this section shall be subject to the following conditions, that is:

*(d) Expenses identified as incurred exclusively in the utilization of associated gas shall be regarded as gas expenses and be allowable against the gas income and profit **to be taxed under the Companies Income Tax Act** (our emphasis).*

Section 11(2) (d) directs that a company must set aside expenses incurred for associated gas utilization and the company's gas income and profit should be taxed under CITA. The phrase *to be taxed under CITA* means what it says. It puts gas-income tax squarely under the whole of CITA including the withholding-tax provisions. If the Act intended only the CITA tax rate, rather than the whole Act, it would have expressly stated it. The subsection states that gas income would be taxed under CITA, not merely that CITA tax rate would govern.

Is section 60 PPTA applicable to gas income and profit?

The Appellant argues that section 60 of PPTA applies to its gas income because tax assessments on its gas operations remain subject to PPTA and no other law. It contends that the incentive in section 11 (2)(d) does not affect its enjoyment of the incentives granted by section 60 PPTA.

The Respondent counters that the Appellant cannot pay taxes under one statute (CITA) and gain incentives from another (PPTA). FIRS argues that the Appellant's associated natural gas profit is not subject to PPTA and consequently it cannot enjoy reliefs from section 60 of PPTA. Section 60 of PPTA states that under the provisions of PPTA, *no tax shall be charged under the provisions of the Personal Income Tax or any other Act in respect of any income or dividends paid out of any profits which are taken into account, under the provisions of this Act, in the calculation of the amount of any chargeable profits **upon which tax is charged, assessed, and paid under this Act.***



The Respondent argues that gas income and profit are governed by CITA in all respects. Section 60 of PPTA does not account for gas income and profit because gas income is not charged, assessed, or paid under PPTA.

Is the Appellant liable to pay withholding tax on its dividends from its gas income and profit?

The Appellant resists WHT liability. It submits that The Respondent should not read section 11 (2) (d) of PPTA so widely as to mean that since its gas income is subject to tax under CITA, all the provisions of CITA will apply – including withholding tax.

The Respondent argues that sections 80 and 9 (1)(c) of CITA provide that a company subject to CITA is liable to pay withholding tax on dividends. The Respondent says that since the Appellant is subject to CITA for its gas income, it is also liable to pay withholding tax on its dividends from its gas income.

Conclusion

The Appellant's gas income is liable to tax under CITA. Section 60 of PPTA does not cover taxation of gas incomes. Thus, CITA governs gas income and all taxable gas-income derivatives. It would be odd to subject the Appellant's gas income to tax under one statute (CITA) and excuse the dividend paid out of profits from the same gas operations under another (PPTA). And CITA provides for withholding tax on dividend under sections 80 and 9 (1)(c). SPDC is therefore liable to pay withholding tax on dividend.

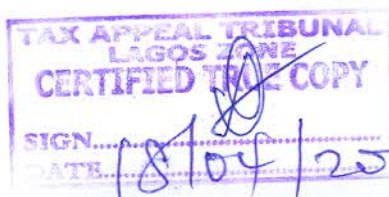
We dismiss this appeal and uphold the Respondent's withholding tax demand note. We order the Appellant to pay the assessment of US\$12,206,310.75 for withholding tax.

Legal Representation:

Chukwuka Ikwuazom with Shehu Mustafa and Oluwafikayomi Ogunrinde for the Appellant.

A.A. Iriogbe (Mrs) for the Respondent.


DATED AT LAGOS THIS 10TH DAY OF FEBRUARY 2015



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Kayode Sofola, SAN
Chairman


Catherine A. Ajayi (Mrs)
Commissioner


D. H. Gapsiso
Commissioner


Mustafa Bulu Ibrahim
Commissioner


Chinua Asuzu
Commissioner

