IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

Consolidated Appeals:
TAT/LZ/035/2013
TAT/LZ/037/2013
TAT/LZ/038/2013

BETWEEN

TOTAL E & P NIGERIA LIMITED **APPELLANT**

AND

FEDERAL INLAND REVENUE SERVICE **RESPONDENT**

JUDGMENT

INTRODUCTION

The Appellant being dissatisfied with the Notices of Additional Assessment dated 12th October, 2012, filed Notices of Appeal on 19th December, 2013 based on a single Ground of Appeal that "The Respondent was wrong in its decisions of 21st November, 2013 refusing to set aside/discharge the defective Notices of Additional Assessment Ref. No TIN: 00198568-0001(PPTBA 61, 63 AND 64) all dated 25th September, 2012 in which it disallowed and assessed to tax, the Gas Flare Fee which the Appellant had deducted in the Petroleum Profits Tax (PPT) returns."

The Appeals herein consolidated vide an order of this Tribunal made on the 14th March, 2014 were brought by the Appellant against Notices of Additional Assessment issued on the Appellant by the Respondent in respect of the 2006, 2007 and 2008 Years of Assessment. The Notices were admitted in evidence as Exhibits TO2, TNG2 and TEP2 for the respective years.

The said Additional Assessment was raised in respect of the payments made by the Appellant for gas flaring because the Respondent claims the payment as deducted by the Appellant from its Petroleum Profits Tax in its returns for 2006 – 2008 Years of Assessment was contrary to the provisions of the Associated Gas Re-injection Act (AGRA) and the Petroleum Profits Tax Act (PPTA).

ISSUE FOR DETERMINATION

A sole issue for determination was formulated.

Whether in computing the Appellant's assessable profits for the 2006, 2007 and 2008 years of assessment, the Respondent was right to disallow the gas flaring fee incurred by the Appellant in the course of its petroleum operation.

PARTIES' POSITIONS

The Appellant submits that the Respondent was wrong for computing the Appellant's adjusted/assessable profit by disallowing the gas flare fee incurred by the Appellant which is wholly, exclusively and necessarily for the purpose of its petroleum operations. The Appellant relied on the provisions of section 10(1) of the PPTA in making its objections to the additional assessments known to the Respondent via Exhibits TO3, TNG3 and TEP3.

Section 10(1)(1) of the PPTA states thus:

"In computing the adjusted profits 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 the operations, including but without otherwise expanding or limiting the generality of the foregoing-

(l)all sums, the liability of which was incurred by the company during the period to the Federal Government, or to any State or Local Government Council in Nigeria by way of duty, customs and excise duties, stamp duties, education tax, tax(other than the tax imposed by this Act) or any other rate, fee or other like charges."

The Appellant submits that it is trite that where the words of a statute are clear and unambiguous, they ought to be given their ordinary grammatical meaning. The Appellant therefore urged the Tribunal to interpret section 10(1)(l) of the PPTA literally. The Appellant asserts that the gas flare fee incurred by the Appellant for the 2006, 2007 and 2008 years of assessment were wholly, exclusively and necessarily for the purpose of its petroleum operations, as such, the Respondent ought to allow the deduction of its gas flaring fee as deductible

expenses in line with section 10(1)(l) PPTA. The Appellant cites the Supreme Court decision in *SPDC V. FBIR*, where it held thus: "According to ordinary dictionary meaning the words "wholly" and "exclusively" have the same meaning. They can be said to mean "solely" or entirely". The dictionary meaning of the word "necessarily" is the same as the words "inevitably" and "unquestionably".

The Appellant submits that the NEITI Report admitted in evidence as Exhibits TO6, TNG6, and TEP6 acknowledges that the gas flare fee were incurred wholly and necessarily in the course of petroleum operations. The NEITI Report specifically states as follows: "...we agree with the view that these charges represent a necessary aspect of their oil operating expenditure and are supported by appropriate tax legislation based on the provisions of the Associated Gas Re-injection Act of 1990."

The Appellant argues that there are no conditions under the PPTA which expressly or impliedly require that a company obtains a gas flaring certificate for fees incurred to be tax deductible for the purpose of computing its adjusted/assessable profit. The Appellant further argued that the position taken by the NEITI in its report that the Gas Flare Fee paid by the Appellant for the years of assessment is not deductible is only as implied by the NEITI, as it is extraneous to the PPTA.

The Appellant also relied on section 3 of Associated Gas Re-injection Act (AGRA) which states thus:
"3(1) subject to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1 January, 1984 flare gas produced in association with oil without the permission in writing of the Minister.
3(2) where the Minister is satisfied that after 1 January, 1984, that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in respect of a company engaged in petroleum operations in that respect to a company engaged in the production of oil or gas- (a) specifying such terms and conditions as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields, or (b) permitting the company to continue to flare gas in the particular

field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 standard cubic metres of gas flared.
Provided that, any payment due under this paragraph shall be made in the same manner and be subject to the same procedure as to the payment of royalties to the Federal Government by companies engaged in the production of oil".

The Appellant submits that section 3 of AGRA empowers the Minister to regulate and control flaring of gas by petroleum operators, such as subsection (1) makes it mandatory for the Minister to give permission for gas flaring before a company can flare gas while subsection (2) refers to a company that had been permitted to flare gas before, gives the Minister the discretion to issue certificate by using the word "may" issue a certificate to that effect stating terms and conditions for continued flaring of gas. The Appellant cited the Supreme Court decision in *Nigerian Navy v. Labinjo* (2012) 17 NWLR (Pt. 1328)56 where it held that " it is a general principle of interpretation of statutes that the use of the word "may" generally connotes permissive action, though in exceptional circumstances, it may mean mandatory or compulsory action." The Appellant also referred the Tribunal to the Supreme Court decision in the case of *Amasike v. Registrar General CAC* (2010) 13 NWLR (pt. 1211)337 where it held that "The word "may" when used in a statute may be interpreted as directory or permissive or may be interpreted as imperative depending on the context in which it is used. The context in which the word "may" appears in a statute must be looked into because it is the controlling factor whether the word is mandatory or directory."

The Appellant submits that the context in which the word "may" is used in subsection 2 of section 3 of AGRA means the Minister has the discretionary power to issue a certificate for the continued flaring of gas.

The Appellant further contends that the decision of the Minister not to exercise its power to issue a certificate to the Appellant for continued flaring of gas by the Appellant cannot be said to mean that the payment of the gas flaring fee and the continued gas flaring are rendered illegal as it is not mandatory for the Minister to do so.

The Appellant submits that section 3(2)(a) of AGRA further provides for the Minister's discretion to impose particular conditions on a company in the exercise of his discretionary powers. The Appellant argues that the conditions provided in the Regulations are descriptive of the fields on which the company operates and are not obligations which the company must fulfil prior to the application for the Minister's permission to flare gas by the company.

The Appellant further submits that the obligation of the company under AGRA is that the company shall apply to flare unutilised gas and shall make the payment of the requisite amount as a gas flaring fee in the same procedure as the payment of royalty to the Federal Government. The Appellant argues that there are no additional requirements on the company apart from the payment of gas flaring fee for the continued flaring of gas. The Appellant claimed that its field met the criteria stipulated in the Regulations. The Appellant applied to flare gas, and approval was granted to the Appellant to flare unutilized gas as evidenced in previous gas flaring certificates admitted in evidence as Exhibits CEP1, CEP2, and CEP3 and the DPR audit report also admitted in evidence as Exhibits TO7, TNG7, and TEP7.

The Appellant submits that the Minister in exercising his discretion, authorised the DPR to give approval for gas flaring by DPR conducting an audit and/or reconciliation to ascertain that exploration and production companies have complied with conditions stipulated for the continued flaring of gas in circumstances where produced gas is not appropriate for utilisation or re-injection in their particular fields.

The Appellant asserts that DPR duly audited and assessed the Appellant for compliance with the conditions for continued flaring of gas provided under the Associated Gas Re-injection Act (AGRA) , as evidenced in the audit report admitted in evidence as Exhibits TNG7, TO7, and TEP7 which confirms that the Appellant fulfilled its obligations for the relevant years spanning from 1990 – 2011.

The Appellant argues that the NEITI Report, on which the Respondent relied, characterised the Gas Flare Fee paid by the Appellant in the absence of a certificate as a penalty,.has no legal basis.

The Appellant contends that section 4 of AGRA which contains provisions for sanction where gas is flared illegally, does not contemplate a situation where any gas flaring fee is payable outside the normal procedure for obtaining ministerial consent, as such the Gas Flare Fee paid by the Appellant to the DPR cannot constitute a penalty simply because a Gas Flare Certificate was not issued by the Minister as indicated in the NEITI Report and adopted by the Respondent.

The Appellant further submits that the Minister (or the DPR) which is the regulator under AGRA neither alleged that the Appellant flared gas illegally nor sanctioned the Appellant for illegal flaring of gas. The Appellant argues that it does not lie in the Respondent to assert that the Appellant's gas flaring activities are illegal.

The Appellant counters the claim of the Respondent urging the Tribunal to order the Appellant to pay a penalty of 10% of the total tax due by virtue of section 32 of the Federal Inland Revenue Service (Establishment) Act, that the Appellant is obligated to pay interest or penalty on tax if same is not paid within 21 days upon receipt of a Notice of Assessment.

The Appellant further submits that by the combined reading of the provisions of section 33 of PPTA, and paragraph 13 (3) and 16(3) of the Fifth Schedule to the FIRS (Est.) Act, where a notice of objection or any appeal has been given in respect of any assessment, such an assessment is not final and conclusive and payment of the assessed tax is put in abeyance until one month after determination of such objection or appeal. The Appellant submits that having validly filed an objection and subsequently appealed the assessment issued by the Respondent, the assessed tax does not become due until one month after the determination of the appeal against the Respondent. Accordingly, the Appellant will only become liable to pay the 10% penalty if it fails to pay the assessed tax one month after an unfavourable determination of its appeal.

The Respondent counters that the expense incurred by the Appellant is contrary to section 3 of Associated Gas Re-injection Act (AGRA) and section 19(1)(l) of the PPTA. The Respondent submits that the only medium of granting or even expressing that permission is vide the Minister's certificate as stated in section 3(2) which excludes any arrangement with the DPR, therefore, the expense incurred pursuant thereto is not legally recognised to have been incurred for the purpose of gas flaring as such the expense is not tax deductible under the Petroleum Profit Tax Act (PPTA).

The Respondent urged the Tribunal to give the provisions of section 3 of AGRA a literal interpretation as the words used are clear and unambiguous. The Respondent submits that section 3 of AGRA empowers only the Minister to permit gas flaring in writing by issuing gas flaring certificate and to prescribe the fee payable for every 28.317 Standard Cubic Metres of gas flared. The Respondent further submits that section 3(1) of AGRA makes it mandatory for the Appellant to first obtain the Minister's permission in writing before flaring gas. The Respondent submits that section 3(2) of AGRA gives the Minister discretion to permit gas flaring and determine the fee payable as well. The Respondent argues that it is untenable that AGRA has ceased to apply because the Minister stopped issuing certificate in 2006 as claimed by the Appellant in paragraph 39 of its Address.

The Respondent submits that the Minister's power to permit gas flaring under Section 3(1) of AGRA and his power to issue gas flaring certificate under section 3(2) of AGRA are one and the same. The Respondent further submits that it is trite law that when a particular section of a statute is made subject to another section, the effect thereof is to subordinate and confirm the first-mentioned section to the second-mentioned section, with the interpretative result that the former must fall within the confines of the latter and is not permitted to disagree with the latter.

The Respondent submits that the legal option open to the Appellant in the absence of the Minister's issuing certificate for gas flaring is for the Appellant to approach the court for judicial review, and not to knock at the door of DPR for

permission to flare gas and make an expense in respect of same and call it gas flaring fee.

The Respondent submits that the said expense contrary to AGRA, cannot be said to have been incurred wholly, exclusively and necessarily for the appellant's petroleum operations. The Respondent urged the Tribunal to hold that the expense is illegal and offensive to the letters and spirit of AGRA.

The Respondent argues that so long as the Minister did not issue certificate allowing gas flaring, it connotes that it is not necessary that the Appellant flare gas in the course of its petroleum operations. The Respondent submits that in order to determine whether an expense is wholly, exclusively and necessarily incurred, it is not just the purpose of the expense that must be considered, but also the legality of the said purpose. The Respondent further submits that the argument that gas flaring is a necessary and unavoidable part of the Appellant's petroleum operations can only avail the Appellant if the Minister had determined that gas flaring is the only way forward for the Appellant in its petroleum operations, and issues a certificate for same, prescribing the payment to be made in respect thereof.

ANALYSIS

It is a notorious fact that an intolerable amount of gas flaring has persisted for far too long in the Nigerian territory. This carries along with it health, environmental and financial cost. For this reason the legislature enacted the Associated Gas Re-injection Act (AGRA) which is intended to discourage the practice of gas flaring. The requirement for ministerial permission in writing is not satisfied by the unilateral payment of fees by oil and gas company. Having said this, the Petroleum Profit Tax Act (PPTA) and the Associated Gas Re-injection Act (AGRA) do not expressly require that a company must obtain gas flare certificate before expenses incurred can be tax deductible. The NEITI report which states that gas flare fee paid by the Appellant for the said years of assessment is not deductible is not based on any provision of the law. NEITI

report which the Respondent relied on cannot overrule either the PPTA or the AGRA.

Section 3(2) of AGRA which the Appellant relies on, means that a company which applies for permission to continue to flare gas is not bound by the provisions of section 3(1), provided the Minister is satisfied that the utilization or re-injection of the produced gas is not appropriate or feasible, the Minister may if he so likes, issue a certificate to the company engaged in petroleum operations.

By this subsection 2, the Minister has a discretion to issue a certificate to a company to continue to flare gas. Section 4 of AGRA contains provisions for penalty whenever gas is flared illegally.

The Appellant proved by Exhibits CEP1, CEP2 and CEP3 (the gas flaring certificates for 2005) that the Minister issued the Appellant gas flaring certificates in 2005. The Appellant applied for gas flaring certificates and made requisite payments for the period from 2006, 2007 and 2008, to continue to flare gas. The Minister did not issue certificate nor sanction the Appellant for illegal gas flaring. The Respondent has not provided proof of sanction on the Appellant for illegal flaring of gas from 2006 to 2008. In the circumstances, we believe that the Minister did not consider the gas flared by the Appellant illegal. If the Minister had sanctioned the Appellant, then, the gas flare fee paid by the Appellant would be considered an illegal payment which would disqualify the Appellant from benefiting under section 10(1)(l) of the PPTA.

The Respondent's claim for 10% penalty against the Appellant cannot stand as the Respondent failed to prove that the Appellant flared gas contrary to section 3 and 4 of AGRA and section 10(1)(l) of PPTA.

Conclusion

In the light of the above, we hold that the Respondent was wrong for disallowing the gas flare fee incurred by the Appellant in the course of its petroleum operations. We hereby grant the reliefs sought by the Appellant and

set aside/discharge the Respondent's Notices of Assessment and allow the Appeal.

Legal Representation:

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

Jerome Okoro for the Respondent.

Dated this 17th day of March, 2015

KAYODE SOFOLA, SAN (Chairman)

CATHERINE A. AJAYI (MRS)
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner

TAX APPEAL TRIBUNAL
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SIGN.....
DATE 18/04/2018