IN THE TAX APPEAL TRIBUNAL
HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/021/2012

BETWEEN

JGC CORPORATION.....APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE.....RESPONDENT

JUDGMENT

INTRODUCTION

The Appellant filed its Appeal on 2nd October, 2012, sequel to the Respondent's Notices of Refusal to Amend/Revised Amendments dated 23rd August, 2012, setting out assessment of companies income tax for the years ending 31st December 2004, 31st December 2005, 31st December 2006, 31st December 2007 and 31st December 2008. The Appellant seeks the following orders:

a. A declaration that the issuance of the Notices of Refusal to Amend/Revised Assessments numbered R/A 001, R/A 002, R/A 003, R/A 004 and R/A 005, all dated 23rd August 2012 by the Respondent is contrary to law and wrongful.

b. A declaration that the Appellant has fully discharged its tax obligations to the Respondent and is therefore not liable to pay the cumulative sum assessed in the Notice of Refusal to Amend/Revised Assessments or any other sum at all.

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c. An order setting aside the Notice of Refusal to Amend/Revised Assessment and the assessments of tax contained in them.

d. An order of perpetual injunction restraining the Respondent from issuing any Notice or Notices of Assessment to the Appellant in respect of income and/or earnings forming the subject of the Notices of Refusal to Amend/Revised Assessments.

c. And such other orders as the Honourable Tribunal may see fit to make upon the hearing of this appeal.

The Respondent contended that the Notices of Additional/Revised Assessments were valid because:

1. The Appellant did business in, and derived income from Nigeria.
2. The contract for.engineering, procurement, constructing transporting, installing and commissioning of facility on the worksite, was awarded in Nigeria.The worksite was in Bonny Nigeria, payment was by a Nigeria company, fabrication was to be installed in Nigeria, contract could not have been wholly performed outside Nigeria, and profit was therefore deemed to be derived from Nigeria.
3. The Appellant had a fixed base in Nigeria.

ISSUES FOR DETERMINATION

We are of the view that the following questions arise for determination in this appeal:

(a) Whether the Appellant has a fixed base and therefore is liable to pay tax in Nigeria?

(b) Whether the Appellant can be assessed to tax under Section 30(1) of Companies Income Tax Act?

TREATMENT OF ISSUES

ISSUE 1

Whether the Appellant has fixed base in Nigeria and therefore is liable to pay tax in Nigeria?

The Respondent claims that the Appellant has a fixed base in Nigeria and therefore is liable to pay tax in Nigeria. The Respondent relied on Section 9 of the CITA as amended, which states that,

"...the Tax shall, for each year of assessment, be payable at the rate specified in Section 40(1) of this Act upon the profits of any company accruing in, derived from, brought into Nigeria in respect of- (a) any trade or business for whatever period of time such trade or business may have been carried out."

The Respondent further cited Section 13(2) of CITA to strengthen its position. Section 13(2) CITA states that;

"The profit of a company other than a Nigerian Company from trade or business shall be deemed to be derived from Nigeria,
(a) if the company has a fixed base in Nigeria to the extent that the profit is attributable to that fixed base.

(b) if it does not have such a fixed base but habitually operates a trade or on behalf of some other companies controlling interest by it; or habitually maintains a stock of goods or merchandise in Nigeria from which deliveries are regularly made by a person on behalf of the company, to the extent that the profit is attributable to the business or trade or activities carried out through that person;

(c) if that trade or business activities involve a single contract for surveys, deliveries, installation, or construction, the profit from that contract, and

(d) where the trade or business or activities is controlled by it or which has a controlling interest in it and conditions are made or imposed between the company and such person in their commercial or financial relations which in the opinion of the board is deemed to be artificial or fictitious, so much of the profit adjusted by the board to reflect arms length transaction."

A community reading of sections 9 and 13(2)(a) enables the Respondent to tax foreign companies. The word "derived" in section 13(2)(a) is a reference back to its use in section 9. Even if section 13(2)(a) does not confer power to tax foreign companies, section 9 does.

Section 13(2)(a) would be useful for assessing the tax liability of a foreign company with a fixed base in Nigeria, for any year in which that company makes profits attributable to that fixed base.

The Respondent claims that though the Appellant is a non-resident company, the Appellant entered into a contract in Nigeria with Mobil Producing Nigeria Unlimited for work performed for East African Area Project (EPC) Bonny River Terminal Expansion Project which is located in Bonny Nigeria. Respondent claims the contract

was not wholly performed in Japan as clearly seen in various clauses in Exhibit JGC 1/1.

The Respondent contends that the definition of WORK as contained in page 8 of Exhibit JGC 1/1 implies that the main obligation of the contract is the work which, was performed in Bonny Nigeria.

The respondent claims that the Exhibit JGC 1/1 is only binding on the Appellant & MPNU as such the Respondent is not duty bound to rely exclusivelyon the terms and conditions of the contract. The Respondent cited the case of OFFSHORE INTERNATIONAL v. FBIR (2011) 4. TLRN 84 where the court held that:-

"A provision in a contract agreement is merely a term in contract, is only binding upon parties to the said contract and has no binding effect on any third party or any person who is not party to the contract."

The definition of the term in exhibit JGC1/1 COUNTRY OF OPERATION page 7 is "Country where FACILITY will be permanently installed, onshore Nigeria, West Africa". This indicates that part of the WORK was performed by the APPELLANT in Nigeria.

The term FACILITY is defined as "Any of the structures, equipment or materials to be engineered, furnished, constructed and permanently installed or assembled by the CONTRACTOR (APPELLANT) at the final installation site specified in HOB SPECIFICATION." The definition of both terms indicate that the work was completed in NIGERIA by the APPELLANT. The parties in this contract better

described as PRINCIPAL DOCUMENT are the Mobil Producing Nigeria Unlimited (COMPANY) and the Appellant (CONTRACTOR) only.

Article 6.1.2 states that "Company, at its expense, shall obtain from governmental authorities from the country of operation, the licenses and permits that it must posses to locate, build, maintain and operate FACILITY. In the principal document, the COUNTRY OF OPERATION is Nigeria where the FACILITY is to be finally and permanently installed. The APPELLANT has not adduced any evidence to establish that Mobil Producing Nigeria Unlimited obtained the licenses and permits in Japan and that Japan is the country of operation.

Article 2.1.14 states that Mobil Producing Nigeria Unlimited is entitled to perform work or let other contractors perform work on the facility. Appellant shall provide and cause its subcontractors and suppliers to provide Mobil Producing Nigeria Unlimited and other contractors of Mobil Producing Nigeria Unlimited reasonable access to WORK SITE. From this Article, it is evident that the facility or WORK SITE is the fixed base where both the Appellant and other CONTRACTORS of Mobil Producing Nigeria Unlimited who perform work for Mobil Producing Nigeria Unlimited independent of the contract between Mobil Producing Nigeria Unlimited and the APPELLANT.

Article 2.1.15 states that CONTRACTOR (Appellant) is responsible for ensuring that its employees, suppliers, subcontractors and all others permitted by contractor to enter the property of Company/Mobil Producing Nigeria Unlimited and other sites made available by Mobil Producing Nigeria Unlimited for construction related activities shall comply with the regulations and requirements of Mobil Producing Nigeria Unlimited. The Contractor (Appellant) shall also require said persons to go to

and from WORK SITE within such sites via a route prescribed by Company/Mobil Producing Nigeria Unlimited and not to deviate therefrom.

Article 2.1.16 highlights the power of Mobil Producing Nigeria Unlimited to terminate and or suspend any or all activities of the Appellant (Contractor) from the WORK SITE.

Articles 11.1.17 and 11.1.18 place the obligation of paying VAT, SHIPMENT CHARGES, CUSTOM DUTIES, all importation levies and undertaking operational function in respect of the importation of the FACILITY in Nigeria on the APPELLANT. Articles 24.1.1 and 24.1.3 give the COMPANY Mobil Producing Nigeria Unlimited discretion to suspend the CONTRACTOR (APPELLANT) from work by written notice and Mobil Producing Nigeria Unlimited has power to recall the APPELLANT to resume work at the work site. Article 26.1.6 reveals that the contract between the two parties (Mobil Producing Nigeria Unlimited and APPELLANT) had a latter part which states that "CONTRACTOR (Appellant) shall submit to the COMPANY/Mobil Producing Nigeria Unlimited for approval its plans for demobilization from work site. The Contractor shall not depart from WORK SITE until completion of FACILITY has been achieved, remaining work has been completed and COMPANY/Mobil Producing Nigeria Unlimited approves CONTRACTOR (Appellant's) departure.

We are persuaded from the content of the Principal Document that all the obligations in the document bind only Mobil Producing Nigeria Unlimited and CONTRACTOR (Appellant) and that part of the WORK was carried out by the Appellant in Nigeria and the WORK SITE was at Bonny Nigeria.

We agree with the Respondent that it was not possible for the whole WORK to have been wholly carried out offshore as reflected in some part of the Principal Document.

The Respondent submits that the Appellant is liable to pay companies income tax, based on the trade or business from which it derived profit and whatever agreement the Appellant and Mobil Producing Nigeria Unlimited has on mode of execution of the contract does not affect its liability to pay tax in Nigeria.

The Respondent submits that the Appellant does have a fixed base in Nigeria, and points to the worksite used by the Appellant and its subsidiary as that fixed base. In Addax Petroleum Services v. FIRS, Appeal Number TAT/LZ/016/2011, we held that a fixed base was "a definite address." Continuing we held, "To establish a fixed base in within the meaning of the statutory provisions, any significant territorial connection to Nigeria will suffice if the Nigerian location is a place of regular resort for the foreign company, for business purposes."

The Appellant counters that it is a foreign company with no fixed base in Nigeria, and thus not subject to Nigerian taxation under section 13(2)(a). Besides, the subject contract was performed wholly outside Nigeria, the Appellant maintains.

The Appellant cited Shell International v. FBIR (2004) 3 NWLR (part 859) without referring to or quoting from any of the judgments of the Court of Appeal. Instead, the Appellant cited from the law reporter's summary of the decision, wrongly called ratios by many members of the profession.

In that case Shell International rendered technical services to Shell Nigeria. Shell International staff only visited Nigeria to render services to Shell Nigeria and used the

premises of Shell Nigeria whenever they were in Nigeria. The Court of Appeal upheld the trial court's finding that these visits, combined with the use of local facilities of the client company, sufficed to satisfy the requirement of a fixed base in Nigeria (63D-64B, Per Chukwumah-Eneh JCA). On the authority of the Shell case and our earlier decision in Addax, we hold that the Appellant has a fixed base in Nigeria.

ISSUE 2

WHETHER THE APPELLANT CAN BE ASSESSED TO TAX UNDER SECTION 30(1) OF THE COMPANIES INCOME TAX ACT?

2.1 The Respondent submits that it is trite law that every company is required to file returns containing some other information as stated in section 55 of CITA, whether or not the company is liable to pay company income tax. Companies which have submitted their returns are assessed based on their returns.

However, where a company fails to file its self-assessment returns, section 30 of CITA empowers the Respondent to assess and charge companies to tax, on turn over basis and this power applies to both resident and non-resident companies section 30(1)(b) states that:

"Notwithstanding section 40 of this Act where in respect of any trade or business carried on in Nigeria by any company (whether or not part of this operations of the business are carried on outside Nigeria) it appears to the board that for any year of assessment, the trade or business produces either no assessable profit or assessable profit which in the opinion of the board are less than might be expected to arise from that trade or business, or as the case may be, the true amount of the assessable profit

of the company cannot be ascertained, the board may, in respect of that trade or business and notwithstanding any other provision of this Act;

b) If that company is a company other than a Nigerian company and -- 1 that company has a fixed base of business in Nigeria, assess and charge that company for that year of assessment on such fair and reasonable percentage of that part of the turnover attributable to the fixed base.

The Appellant recognizes the power of the Respondent under sections 30(1) and 13(2) of CITA but submits that best of judgment assessment will only apply in circumstances where "it appears to the Board that for any year of assessment, the trade or business produces either no assessable profits or assessable profits which in the opinion of the Board are less than might be expected to arise from that trade or business or, as the case may be, the true amount of the assessable profits of the Company cannot be ascertained." The Appellant claims that the additional assessments are untenable as the Appellant did not have any tax liability in relation to the alleged offshore contract. The Appellant further submits that the exercise of discretion in assessing quantum will only arise where there is liability.

The Respondent relied on Exhibits JGCA5/14, 7/14 and 8/14 as the self-assessment form filed by the Appellant stating its income and tax liabilities for the years 2004 – 2007. The Respondent further submits relying on Exhibit FIRS7 where the Respondent wrote the Appellant informing it of an audit exercise on its property but the Appellant by Exhibit FIRS3 denied the Respondent access to its records on two occasions. The Respondent also relied on Exhibits FIRS 10 and 8 by which the Respondent alleged Appellant failed to file adequate tax returns on the income earned from the contract executed for Mobil Producing Nigeria Unlimited which was why the additional assessment was raised on the Appellant. The Respondent cited the case

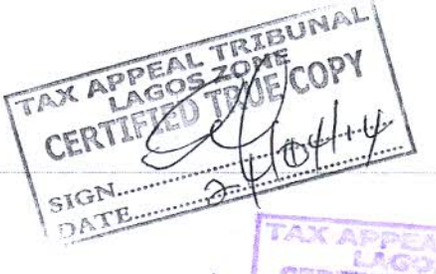
of SHELL PETROLEUM INTERNATIONAL MATTSCGAPPIJ v. FBIR (2011) 4 TLRN 97 where the Court held that it recognizes the discretionary powers of the Board in respect of turnover tax.

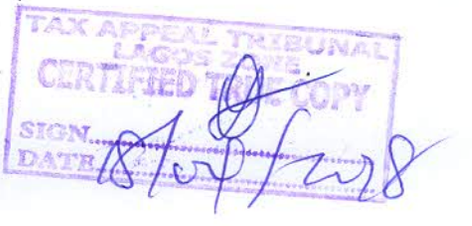
The respondent submits that section 20 confers unlimited power on the Respondent to assess companies carrying out trade or business in Nigeria whether or not part of the contract was executed outside Nigeria.

Section 13(2) and 30(1)(b) govern different scenarios and do not conflict. Section 13(2) governs the profits of a foreign company attributable to its fixed base in Nigeria this profit must exist and must be ascertainable.

If there are no ascertained or assessable profits, section 30(1)(b) will apply. Section 30(1)(b) would be the basis of assessment of a foreign company with a fixed base in Nigeria whose profits cannot be assessed or ascertained. In that case, the 'taxman looks at the portion of the turnover attributable to the Nigerian base. The taxman can look at the whole turnover attributable to the fixed base. This of course does not necessarily mean the company's entire turnover. But it does mean 100% of the turnover attributable to the fixed base, not any fraction of it.
The Appellant fits snugly into this category of foreign companies.

In the result, we find that the Appellant has fixed base in Nigeria and consequently refuse the declaratory reliefs sought. We also refuse the order to set aside the notices of refusal to amend as well as the order for perpetual injunction. The Appeal accordingly fails.





Legal Representation:

Appellant: C. Ikwuasom Esq with A. Mustafa Esq., N. Martins Okonma Esq. and H. Abdulkareem Esq.

Respondent: Ms A. Sodipo and Mrs N. A. Bashir

DATED AT LAGOS THIS 17TH DAY OF APRIL 2014

KAYODE SOFOLA SAN (Chairman)

CATHERINE AJAYI
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner

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