IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NOS: TAT/LZ/001/2012 &
TAT/LZ/002/2012 (CONSOLIDATED APPEALS)

BETWEEN:

1. SHELL NIG. EXPLORATION AND PRODUCTION CO. LTD
2. ESSO EXPLORATION AND PRODUCTION NIG (DEEP WATER) LTD
3. NIGERIA AGIP EXPLORATION LTD
4. TOTAL EXPLORATION & PRODUCTION NIG. LTD — APPELLANTS

AND

FEDERAL INLAND REVENUE SERVICE — RESPONDENT

JUDGMENT

INTRODUCTION

The Appellants filed these appeals on the 6th January, 2012 and later were consolidated. There were series of interlocutory applications involving the NNPC. The Appellants amended the Notices of Appeal pursuant to the leave of this Tribunal on the 10th July, 2015. The Respondent filed its response on the 13th August, 2015.

The Appellants based the appeal on the following grounds:

(a) The Respondent erred when it issued the Notices of Assessment, PPTBA 40 and PPTBA/ED 37, for petroleum profits tax on the Appellants based on principles which are incorrect in law.

(b) By listing only the name of the NNPC on NOA PPTBA 40 and NOA PPTBA/ED 37 and serving same on only the Corporation, the Respondent improperly issued and served NOA PPTBA 40 and NOA PPTBA/ED 37.

The Appellants asked for the following reliefs:

(a) A declaration that the Realisable/Selling Price should be used by the Respondent in computing the fiscal values in arriving at the assessable profit.

(b) A declaration that the Appellants' costs and loan interest incurred in respect of the OML 118 Contract Area in the 2010 year of assessment, amounting to the sum of USD47,411,786 being costs wholly, exclusively and necessarily incurred in petroleum operations, ought to have been treated as deductible expenses in NOA PPTBA40 and NOA PPTBA/ED37.

(c) A declaration that qualifying capital expenditure amounting to the sum of USD138,131.00, in respect of OML135, OPLs 803,806 and 809 ought to be included in the PPT computation by the Respondent for the OML118 Contract Area.

(d) A declaration that capital allowances shall be allowed at 20% in the year in which qualifying capital expenditure is incurred.

(e) A declaration that pending resolution of the dispute with DPR on the applicable Royalty rate by the NNPC in line with section 61(2)(a) of the Petroleum Act, the royalty rate of 1% is to be applied in assessing PPT for the OML118 contract area.

(f) A declaration that qualifying capital expenditure is not to be reduced by Investment Tax Credit before capital allowances is computed.

(g)A declaration that , although chargeable tax for the 2010 year of assessment is USD2,042,706,851 by virtue of the over-payment of PPT in previous years of assessment, the PPT for the OML 118 Contract Area in 2010 accounting period is nil.

(h) An Order setting aside NOA PPTBA40 and NOA PPTBA/ED37.

(i) An Order directing the Respondent to re-issue fresh Notices of PPT and EDT Assessments in accordance with the PPT returns prepared by the Appellants for the 2010 accounting period.

(j) An Order directing the Respondent to issue individual tax receipts in the names of each of the Appellants in respect of PPT and EDT paid for the 2010 accounting period.

(k)An Order directing the Respondent to refund the sum of USD1,972,462,067 wrongly overpaid as Petroleum Profits Tax in respect of the OML118 Contract Area to the Appellants or, alternatively allow this sum as a credit for future tax liability.

(l) A declaration that EDT for OML118 Contract Area in the 2010 accounting period is the sum of USD90,887,925.

THE HEARING:

At trial, the Appellants called Mr. Dapo Otunla whose Written Statement on Oath and an Additional Written Statement on Oath respectively dated 28th June 2012 and July 2015 were admitted in evidence as Exhibits DO and 2DO. The Appellants also called Mrs. Ifeoma Ujomu, whose 1st Written Statement on Oath and 2nd Written Statement on Oath both deposed to on 13th July, 2015 and further Written Statement on Oath dated 28th October,2015 were admitted in evidence as Exhibits IU ; ZIU and 2IU.

The Appellants again called Mr. Victor Onyenkpa, whose Written Statement on Oath and an Additional Written Statement on Oath respectively deposed to on 7th September 2012 and 10th July 2015 were admitted in evidence as Exhibits VO and BVO.

Documentary exhibits admitted in evidence in addition to written statements on Oath were Exhibits DO1 to DO11; 2DO to 2DO14 and VO1; Six compact discs(CDs) 2DO15 to 2DO15F.

The Respondent did not call any witness.

THE BACKGROUND:

The 1st Appellant prepared PPT returns for the 2010 year of assessment in respect of the OML 118 Contract Area and, by letter dated 3rd May 2011, forwarded the returns to NNPC for onward filing with the Respondent. The PPT returns prepared by the 1st Appellant was admitted as Exhibit 2DO.

The NNPC however, did not file the PPT returns prepared by the 1st Appellant with the Respondent. Rather, NNPC prepared its own PPT returns and filed the same with the Respondent. Subsequently, NNPC, by letter dated 5th July 2011, forwarded to the 1st Appellant, the PPT returns for the 2010 year of assessment which it had filed with the Respondent.

By a letter dated 18th July 2011, the 1st Appellant requested the Corporation to file the PPT returns prepared by the 1st Appellant and that upon the failure of the Corporation to do so, it would forward a copy of the PPT returns prepared by it to the Respondent. When the Corporation refused and/or failed to forward the PPT returns prepared by the 1st Appellant to the Respondent, the 1st Appellant by letter dated 8th August 2011, forwarded its returns to the Respondent. A copy of the letter dated 8th August 2011 was admitted as Exhibit DO3.

In preparing the PPT returns, the 1st Appellant carried out the following applications/treatments;

(a) The 1st Appellant treated costs incurred in OML 135, OPLs 803, 806 and 809, which amount to US$6,797,547 as deductible expenses in the PPT returns.

(b) The 1st Appellant treated non-Operators' costs and loan interest, amounting to US$16,972,341 and US$30,439,445 respectively, as deductible expenses in the PPT returns.

(c) The 1st Appellant did not reduce qualifying capital expenditure by Investment Tax Credit or any other item before computing capital allowances.

(d) The 1st Appellant stated qualifying expenditure to be the sum of US$178,092,810, thus leading to the following PPT computations:

i. Capital Allowances -US$280,889,727

ii. Investment Tax Credit -US$89,046,405

Consequently, the following PPT computations are in the PPT returns of the Appellants:

Assessable Profits	US$4,544,396,238
Chargeable Profits	US$4,263,506,512
Assessable Tax	US$2,131,753,256
Chargeable Tax	US$2,042,706,851

On 31st October 2011, the 1st Appellant received the Notices of Assessments PPTBA 40 and PPTBA/ED 37 dated 2nd August, 2011 ("NOA PPTBA 40 and NOA PPTBA/ED 37"). NOA PPTBA 40 contains the

petroleum profits tax liability for the OML 118 Contract Area while NOA PPTBA/ED37 contains the tertiary education tax liability for the OML 118 Contract Area. NOA PPTBA was admitted as Exhibit DO4.

The following PPT computations are in NOA PPTBA 40:

Assessable Profits	US$4,583,508,162.21
Chargeable Profits	US$4,177,230,753.22
Assessable Tax	US$2,088,615,376.61
Chargeable Tax	US$2,088,615,376.61
Balance of Tax	US$2,014,910,838.75

The Appellants observed that the computations in NOA PPTBA 40 are the same as the computations in the PPT returns prepared by NNPC. In assessing the OML 118 Contract Area to Petroleum profits tax, the Respondent relied upon the PPT returns wrongly prepared and filed by NNPC, and consequently carried out the following applications/treatments:

(a) The Respondent did not treat costs incurred in OML 135, OPLS 803, 806 and 809 as deductible expenses in NOA PPTBA 40.

(b) The Respondent did not treat non-Operators' costs and loan interest as deductible expenses in NOA PPTBA 40.

(c) In determining Capital Allowances, the qualifying capital expenditure used by the Respondent is uncertain. Furthermore, the Respondent reduced qualifying capital expenditure by Investment Tax Credit before computing Capital Allowances resulting in wrong computation of Capital Allowances in the sum of US$406,277,408.99 .

On receipt of NOA PPTBA 40, the 1st Appellant, on 9th November 2011, served on the Respondent a Notice of Objection dated 3rd November 2011, wherein it stated its objection to NOA PPTBA 40 on grounds which include the following:

(a) That NOA PPTBA 40 does not contain the names and addresses of the Appellants and NNPC and was not forwarded to each of the Appellants and the Corporation .

(b) That NOA PPTBA 40 does not contain the correct chargeable profits and assessable tax as stated in the PPT returns prepared by the 1st Appellant.

(c) That, as a result of the over-payment of PPT for the previous years of assessments, the PPT for the 2010 year of assessment should be nil. Furthermore, the OML 118 Contract Area parties are entitled to a PPT credit in the sum of US$1,972,462,067.

A copy of the Notice of Objection was admitted as Exhibit DO 5.

By a letter dated 1st December 2011 (which was received by the 1st Appellant on 7th December 2011) the Respondent informed the 1st Appellant that the Notice of Objection is *"noted for memorandum purposes only"* and that NOA PPTBA 40 was raised based on the PPT returns filled by the Corporation. The Respondent also stated that the omission of the names of the participating companies on NOA PPTBA 40 and the subsequent issuance of receipts would be resolved in accordance with the provisions of the tax law. The Respondent directed the Appellants to pay the PPT as assessed in the NOA PPTBA 40 or face sanctions. A copy of the letter dated 1st December 2011 was admitted as Exhibit DO 6.

Meanwhile, in the 2006 year of assessment, the Respondent had issued an Education Tax Notice of Assessment in respect of the OML 118 Contract Area without listing the names of the Appellants on the Notice as the taxpayers. A copy of the Education Tax Notice of Assessment for the 2006 year of assessment was admitted as Exhibit DO 7.

By a letter dated 20th July 2007, the 1st Appellant brought this omission to the attention of the Respondent. The Respondent, by a letter dated 14th August, 2007, acknowledged the propriety of listing the names of the Appellants on the Education Tax Notice of Assessments issued in respect of the OML 118 Contract Area and requested the 1st Appellant to return the faulty Notice of Assessment. The 1st Appellant, by letter dated 17th August 2007, returned the Notice of Assessment to the Respondent. AQ copy of each of the letters dated 20th July, 2007, 14th August 2007 and 17th August 2007 were admitted as Exhibits DO 8 to DO 10.

The Respondent subsequently re-issued the Education Tax Notice of Assessment for the 2006 year of assessment stating the names of the Appellants and the Corporation. A copy of the re-issued Education Tax Notice of Assessment for the 2006 year of assessment is admitted as Exhibit DO 11.

In the course of preparation of the 2010 PPT Returns, the 1st Appellant took into account the costs incurred by the Appellants with the respect to the OML 118 Contract Area. These costs referred to above were wholly, exclusively and necessarily incurred in order to carry out petroleum operations in the OML 118 Contract Area ("the WEN test"). It is for this reason that the 1st Appellant, in preparing the 2010 PPT Returns, deducted these expenses and costs from the adjusted profits.

In carrying out its computations in NOA PPTBA 40 and NOA PPTBA/ED 37, the Respondent failed to treat costs incurred in OML 135, OPL 803, 806 and 809, as well as contractor costs and loan interest as deductible expenses in NOA PPTBA 40 and NOA PPTBA/ED 37, which costs were disallowed by the NNPC in its version of the returns which it submitted to the Respondent. A copy of the 2010 PPT returns filed by NNPC with the Respondent was admitted as Exhibit 2DO 1.

The Appellants submit that had the respondent based its tax assessment of the Appellants on the PPT returns prepared and forwarded to it by the 1st Appellant instead of that forwarded to it by the NNPC, the Appellants would have been entitled to a refund of the sum of US$1,972,462,067 previously overpaid as petroleum profits tax in respect of the OML 118 Contract Area and would thereby have been correctly assessed to nil tax in the 2010 year of assessment.

ISSUES FOR DETERMINATION:

Parties formulated five issues for determination:

(a) Whether the Respondent was right in law in refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants to tax?

(b) Whether the Respondent applied the law correctly in its treatment of expenses incurred by the Appellants?

(c) Whether the Respondent's calculation of capital allowance was correct in law?

(d) Whether the failure of the Respondent to list the names of each of the taxpayers under the OML118 PSC on NOA PPTBA 40 and NOA PPTBA/ED37 and serve the said assessments on each of them nullifies NOA PPTBA 40 and NOA PPTBA/ED37?

(e) Whether the Appellants are entitled to a refund of the sum of USD1,972,462,067 in respect of the OML 118 contract area and nil assessment for the 2010 year of assessment?

PARTIES' POSITION:

ISSUE ONE:

Whether the Respondent was right in law in refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants to tax?

The Appellants submit that under the PSC, the 1st Appellant has the responsibility to prepare the PPT returns and forward same to the NNPC for onward transmission to the Respondent but NNPC unilaterally set aside the returns prepared by the Appellants and substituted its own contrary to Clause 7.1(h) and Article III(2)of the PSC . The Appellants assert that the Respondent failed to act in accordance with section 35(2)(b) of the PPTA .

The Appellants cite the decisions of this Tribunal in the following cases of Esso Exploration & Production Nig. Ltd & Anor v FIRS, Appeal No. TAT/LZ/001/2013 delivered on 20/11/2014 and Total Exploration &Production Nig. Ltd v FIRS, Appeal No. TAT/LZ/010/2013 delivered on 20th March 2015 which held that:

> *"The Appellants' PPT returns are the foundation of the determination of their tax affairs by the Respondent. If NNPC has cause to file returns other than the one submitted to it by the contractors of OML 138, it owes the contractors explanation or consultation."*

The Appellants submit that the pricing mechanism of OSP used by the Respondent to determine the applicable fiscal value, does not accord with the gross proceeds of the chargeable oil sold by the Appellants as is evident from both Exhibits DO2 and 2DO1. The Appellants further submit that their use of RP in calculating fiscal values accords with the provision of section 13(1) of the Deep Offshore and Inland Basin Production Sharing Contract Act which states thus:

> *"The Realisable Price as defined in the production sharing contract established by the corporation or the holder in accordance with the provision of the production sharing contract,*

shall be used to determine the amount payable on royalty and petroleum profit tax in respect of crude oil produced and lifted pursuant to the production sharing contract."

The Appellants submit that the use of OSP by the Respondent in calculating the fiscal values has no basis in law and is not supported by any evidence led by the Respondent, neither did the Respondent call any evidence to rebut the evidence of the Appellants and cite the decision of the Court of Appeal in the case of Abe & Another v Damawa & Anor (2011) LPELR 5007(CA),as ;

"The converse is also true that pleadings do not constitute evidence and therefore pleadings in respect of which no evidence is adduced are deemed abandoned."

The Appellants rely on section 23(3) of the PPTA which determines the price mechanism for crude oil which provides as follows:

"For the purpose of subsection (2) of this section the relevant sum per barrel of crude oil exported by a company is the posted price applicable to that crude oil reduced by such allowances (if any) as may from time to time be agreed between the Government of Nigeria and the company."

The Appellants submit that the import of section 23 of the PPTA, is that where no agreement has been reached between the Appellants and the Federal Government of Nigeria on an applicable fiscal mechanism, such does not prevent the filing of tax returns or indeed the raising of tax assessments by the Respondent. The Respondent in raising assessment must not impose an arbitrary fiscal regime which does not accord with the gross proceeds of the Appellants' sale of crude oil.

The Appellants reiterate that the pricing methodology which formed the basis of NOA PPTBA 40 and NOA PPTBA/ED37 is not in accordance with the OML 118 PSC, as such, the resulting fiscal values of USD5,293,645,616.19 is wrong and untenable.

The Respondent counters that it was right in law in refusing to use gross proceeds of chargeable oil sold by the Appellants to assess the Appellants to tax. The Respondent relied on the PSC, section 35(2) of the PPTA and section 11(1) of DOIBS to assess the contract area to tax through the PPT returns submitted to it by the Corporation. The Respondent submits that it is not privy to the internal issues between the contracting parties of OML 118 and therefore could not attest to the fact that there is a disparity in the returns submitted to NNPC and the one filed before the Respondent. The Respondent further submits that NNPC is the party mandated in law and under the PSC agreement to file returns to be used in raising assessment on the contract area OML 118.

ISSUE TWO:

Whether the Respondent applied the law correctly in its treatment of expenses incurred by the Appellants?

The Appellants submit that the Respondent did not apply the law correctly in treating the expenses they incurred. The Appellants rely on Exhibit 2DO1 and submit that the Respondent acted contrary to section

35(2) and (3) of the PPTA. The Appellants cite the decision of this Tribunal in the case of CNOOC Exploration & Production Nig Ltd & Another v. FIRS Appeal No: TAT/LZ/013/2013 delivered on 17th March, 2015 where this Tribunal held that;

> *"We view with disfavour the conduct of the Respondent in assessing the Appellants to Education Tax on the basis only of returns filed by the NNPC, and its refusal to meaningfully review the situation even when the Appellants adduced evidence why the returns filed by the NNPC were wrong..The Respondent has the sole duty to attend to all tax issues and not the NNPC."*

The Appellants submit that the deductible expenses and costs incurred by the Appellants relating to OML 118 Contract Area, were wholly, exclusively and necessarily incurred in order to carry out petroleum operations as contained in paragraphs 7 and 11 of Exhibits 2DO, IU, 2IU and 2DO5A to 2DO15F.

The Appellants submit that they are only liable to pay 1% royalty in line with Regulation 61(2)(a) of the Petroleum (Drilling and Production) Regulations made pursuant to the Petroleum Act 1969(as amended), which provides that if any dispute arises as to the amount of royalty due, the licensee or lessee is only obliged to pay what it admits to be due, pending the resolution of the dispute.

The Appellants submit that their evidence on inter-company loans and interest as contained in paragraph 11(i-n)of Exhibit 2DO was neither challenged nor controverted by the Respondent. The Appellants submit that deductibility of interest on company loans is determined by law (section 10 (1) of the PPTA) and not dependent on any agreement reached by the parties. The Appellants cite the decision of this Tribunal in the case of SPDC V. FIRS Appeal No. TAT/LZ/003/2014 where it was held that by virtue of section 10(1)(g)of the PPTA , companies engaged in crude oil production in the Nigerian petroleum industry are statutorily entitled to deduct sums incurred by way of interest on inter-company loans obtained at arms' length under terms prevailing in the open market at the London Inter-Bank Offer Rate.

The Appellants submit that they incurred exploration and drilling costs in the total sum of USD149,111,770 in carrying out petroleum operations in respect of the OML 118 Contract Area, the evidence was admitted as Exhibits 2DO15A to 2DO15F.

The Appellants submit that there is no provision in the PPTA which disallows expenses incurred by contractor parties who are not the operators of a contract area. The Appellants assert that the expenses of both operators and non operators constitute all outgoings and expenses incurred by the contractor to a PSC in relation to a contract area. The Appellants cites the case of Total Exploration & Production Nigeria Ltd v FIRS, Appeal no. TAT/LZ/010/2013, where this Tribunal held that:

> *"On whether or not the Respondent applied the law correctly in the treatment of expenses incurred by the Appellants, we are of the view that the Respondent failed to present any evidence that the Appellants failed the WEN test, i.e. that the expenses were not wholly, exclusively and necessarily from its petroleum operations. The Respondent also failed to back its position with any provisions of the PPTA, any tax law or the PSC agreement that disallows expenses incurred by non-operators that constitute the contractor in the PSC to the contract*

area. Section 13 of the PPTA which contains a list of non-allowable deductions does not include expenses incurred by non-operators under the PSC for the purposes of petroleum operations in the contract area."

The Appellants urge the Tribunal to hold that in relying solely upon the tax returns filed by NNPC, the Respondent did not apply the law correctly in the treatment of deductible expenses incurred by the Appellants in respect of the OML 118 Contract Area for the 2010 accounting period.

The Respondent asserts that the Appellants filed the returns before the Respondent after the Assessments were raised, consequently the Respondent did not have opportunity to examine the records or audit the accounts presented by the Appellants, as without an audit of a company, facts cannot be obtained to contradict the records of a company. The Respondent argues that verification not having been conducted, the Appellants cannot conclude that their expenses were wholly, exclusively and necessarily incurred for the petroleum operations on OML 118.

The Respondent submits that in the absence of any agreement by the parties on the value to be used for assessment of royalty on the OML 118, NNPC using 1.75% in its returns as the Concessioner supersedes that of the Contractor. The Respondent urged the Tribunal to uphold the 1.75% used in raising the Assessment.

The Respondent submits that it disallowed the expenses because the Appellant failed to give any evidence that the NNPC/Concessioner is a party to the loan agreements or that the Concessioner approved such loans or other similar expenses undertaken by the Appellants as envisaged by Annex B Article II(h) of the PSC Agreement. The Respondent argues that contrary to the position taken by the Appellants in its address in paragraph 6.29(b)(ii) that deductibility of interest on intercompany loans is determined by the provisions of the law and not dependent on any agreement by parties, the foundation of operations on the OML 118 is the PSC agreement entered into by parties, without which there can be no operations. The Respondent referred to the Court of Appeal decisions in the case of Isiyaku vs Zwingina (2003) 6 NWLR (Pt. 817) 560 at 563 ratios 1 and 2 where it was held the terms of a contract voluntarily entered into by parties are sacrosanct and cannot be modulated by the court. Also in the case of Green Finger Agro-Allied Ltd v Yusufu (2003)12 NWLR (Pt.835)488-495 ratio 8, it was held as follows:

"Once there is a valid contract between the parties thereto, the parties are bound by all the terms and conditions of the agreement."

The Respondent submits that Education Tax is a reimbursable expense to the Appellants and Appellants have been fully reimbursed for the Education Tax paid on behalf of the Contract Area OML 118. The Respondent submits that it is the Concessioner/NNPC that reimburses the Appellants for payment, therefore it is the NNPC that is entitled to receipt for the payment of Education Tax for the Contract Area for the year under review. The Respondent submits that it disallowed the deductions because the Appellants failed to prove WEN to its satisfaction as envisaged by section 10(1)(i)(iii) of PPTA.

ISSUE THREE:

Whether the Respondent's calculation of capital allowance was correct in law?

The Appellants submit that capital allowances are computed on the basis that a full accounting period's capital allowance (at 20% for each of the first four accounting periods and 19% for the fifth accounting period) is available for the accounting period in which an asset which is qualifying expenditure is acquired or first used, regardless of when in that accounting period the asset was acquired or first used.

The Appellants further submit that the Respondent did not calculate annual allowances on the basis of the qualifying capital expenditure incurred by the Appellants as provided under paragraph 6 of the second schedule to the PPTA. The Appellants cited section 20(2) of the PPTA and paragraph 6(1) of the second schedule to buttress its point which provides thus:

Section 20(2) of the PPTA provides:

> *"There shall be computed the aggregate amount of all allowances due to the company under the provisions of the second schedule for the accounting period."*

Paragraph 6(1) of the second schedule to the PPTA provides thus:

> *"Subject to the provisions of this section, where in any accounting period, a company owning assets has incurred in respect thereof qualifying expenditure wholly, exclusively and necessarily for the purpose of petroleum operations carried on by it, there shall be due to the company as from the accounting period in which such expenditure was incurred, an allowance (in this Act referred to as annual allowance) at the appropriate rate per centum specified in Table II of this section"*

The Appellants submit that as contractor parties under the PSC, if any of them incurs any QCE for the purpose of petroleum operations, ITC shall be due to that party in line with section 4(1) of Deep Offshore Act which provides thus:

> *"Where the Nigerian National Petroleum Corporation (in this Act referred to as 'the Corporation') or the holder and the contractor have incurred any Qualifying Capital Expenditure wholly, exclusively and necessarily for the purpose of petroleum operations carried out under the terms of a Production Sharing Contract in the Deep Offshore or Inland Basin, there shall be due to the parties in respect of the production sharing contracts executed prior to 1st July 1998, a credit (in this Act referred to as Investment Tax Credit) at a flat rate of 50 percent of the qualifying expenditure in accordance with the production sharing contract terms for the accounting period in which that asset was first used for the purposes of such operations."*

The Appellants submit that in accordance with the PSC, the QCE incurred was wholly, exclusively and necessarily for the purposes of petroleum operations and that the Respondent acted in error by relying solely upon the tax returns filed by NNPC.

The Respondent submits that its calculation of Capital Allowance was correct because it worked on the returns filed before it by the NNPC and that Assessment was raised as per filed returns. The Respondent

submits that since the returns submitted to the NNPC by the Appellants were rejected by the NNPC, neither this Tribunal nor the Respondent have reason to accept the Appellants' version of the returns until such costs have been verified and authenticated by both Concessioner and Contractor.

ISSUE FOUR:

Whether the failure of the Respondent to list the names of each of the taxpayers under the OML 118 PSC on NOA PPTBA 40 and NOA PPTBA/ED 37 and serve the said assessments on each of them nullifies NOA PPTBA 40 and NOA PPTBA/ED 37?

The Appellants submit that the Respondent having failed to serve the notice of assessment on each of them, the service effected only on NNPC should be regarded as a nullity just as non-service of defective service on a party in a civil action renders such an action a nullity. The Appellant cite the case of Daewoo Nig. Ltd v Uzoh (2008) ALL FWLR 9 Pt. 399 456 at 473-474, where the Court of Appeal held thus:

> *"Non-service and/or defective service of process, where service of process is required, renders all proceedings in a suit a nullity, as a fundamental condition precedent to vesting jurisdiction to entertain the suit has been breached."*

The Appellants referred this Tribunal to section 37(1) of the PPTA which provides that assessment of tax shall be made in such form and in such manner as the Respondent shall authorize and shall contain the names and addresses of the companies assessed to tax. The Appellants also referred this Tribunal to its decision in the case of Esso Exploration and Production Nigeria Ltd & Anor v FIRS TAT/LZ/001/2013 delivered on the 20th November, 2014 thus:

> *"Thus, it is the respondent's duty to issue receipts for taxes collected from OML 133 contract area to all parties....The Appellants are co-tax payers of NNPC and entitled to be issued with receipts bearing their respective names stating the pro rata taxes paid by each party."*

The Appellants submit that section 11(2) of the Deep Offshore Act require the Respondent to issue tax receipts to both NNPC and the contractor for their respective amounts of PPT paid. The Appellants also rely on section 38(1) of the PPTA which require the Respondent to serve personally on or send by registered post to each person whose name appears on an assessment in the assessment list, a notice of assessment. The Appellant referred this Tribunal to its decision in the case of CNOOC Exploration and Production Nig. Ltd v FIRS TAT/LZ/013/2013 delivered on the 17th March, 2015 where it was held as follows:

> *"On whether the failure to list the names of each of the tax payers under the PSC on the assessment and serve the NOA PPTBA/ED 39 on each of them nullifies the Assessment, section 37(1) of the PPTA offers the answer as it makes it mandatory by using the word "shall" on the part of the Respondent to list all the names and addresses of each of the tax payers assessed to tax on the assessment."*

The Appellants submit that failure of the Respondent to comply with the requirements of the law renders the assessments ineffective and ultimately invalid.

The Respondent submits that the tax payer in the OML 118 is the Contract Area, therefore receipts are issued in favour of the concession area not to the Appellants in accordance with Clause 2(2.1). The Respondent argues that Clause 8 states that upon completion of exploration and recovery of crude oil products from the contract area, tax oil is separated before parties are allocated their own profit oil, and that it is the Concessioner that is mandated to pay the taxes on behalf of the Contract Area. The Respondent relying on Clause 7.1(h) and 2 of the PSC asserts that while the Contractor is mandated to prepare and submit the PPT returns to the Corporation, the Corporation is not foreclosed from amending same and it is not under compulsion to accept whatever has been prepared by the Contractor. The Respondent argues that it is the Concessioner who pays the taxes and therefore entitled to have its name on the receipts, thereafter the Corporation is mandated to make copies available to the Contractor in line with the provisions of the DOIBS and the PPTA.

ISSUE FIVE:

Whether the Appellants are entitled to a refund of the sum of USD1,972,462,067 in respect of the OML 118 contract area and nil assessment for the 2010 year of assessment?

The Appellants submit that they are entitled to refund of the sum of USD1,972,462,067 in respect of the OML 118 contract area and nil assessment for the 2010 year of assessment because section 23(2)and (3) FIRS(Establishment) Act says so, which states thus:

> *"(1) There shall be refunded to tax payers, after proper auditing by the service, such over-payment of tax as is due.*
>
> *(3)Any tax refund shall be made within 90 days of the decision of the service made pursuant to subsection (2) of this section..."*

The Appellants submit that Exhibit 2DO is unchallenged and uncontroverted, therefore such evidence ought to be acted upon as decided in the case of Trade Bank Plc v Deen-Mak Construction Co Ltd & Another (1996)2 NWLR (Pt.432) 577 at 591. The Appellants submit that they have proved that they are entitled to a refund of the said sum. The Appellants urged this Tribunal to grant the reliefs sought in this appeal.

The Respondent submits that the Appellants are not entitled to refund because the Assessment was issued and served on the Concessioner for the Contract Area and the tax was paid without objection thereby making the Assessment final and conclusive.

The Respondent submits that in the course of the Appellants' witness giving evidence, this Tribunal asked whether the costs incurred had the prior approval of the Concessioner and which the witness answered in the negative. The Respondent asserts that the PSC agreement requires approval before expenses are incurred. Therefore these costs having not been approved by the Concessioner and verified by the Respondent render the expenses illegal and urged this Tribunal to so hold.

The Respondent submits that the Appellants' accounts were not submitted for audit to the Respondent to warrant any refund as envisaged by section 23(1)(3) of the FIRS (Establishment) Act, therefore the

The Respondent submits that the tax payer in the OML 118 is the Contract Area, therefore receipts are issued in favour of the concession area not to the Appellants in accordance with Clause 2(2.1). The Respondent argues that Clause 8 states that upon completion of exploration and recovery of crude oil products from the contract area, tax oil is separated before parties are allocated their own profit oil, and that it is the Concessioner that is mandated to pay the taxes on behalf of the Contract Area. The Respondent relying on Clause 7.1(h) and 2 of the PSC asserts that while the Contractor is mandated to prepare and submit the PPT returns to the Corporation, the Corporation is not foreclosed from amending same and it is not under compulsion to accept whatever has been prepared by the Contractor. The Respondent argues that it is the Concessioner who pays the taxes and therefore entitled to have its name on the receipts, thereafter the Corporation is mandated to make copies available to the Contractor in line with the provisions of the DOIBS and the PPTA.

ISSUE FIVE:

Whether the Appellants are entitled to a refund of the sum of USD1,972,462,067 in respect of the OML 118 contract area and nil assessment for the 2010 year of assessment?

The Appellants submit that they are entitled to refund of the sum of USD1,972,462,067 in respect of the OML 118 contract area and nil assessment for the 2010 year of assessment because section 23(2)and (3) FIRS(Establishment) Act says so, which states thus:

> *"(1) There shall be refunded to tax payers, after proper auditing by the service, such over-payment of tax as is due.*
>
> *(3)Any tax refund shall be made within 90 days of the decision of the service made pursuant to subsection (2) of this section..."*

The Appellants submit that Exhibit 2DO is unchallenged and uncontroverted, therefore such evidence ought to be acted upon as decided in the case of Trade Bank Plc v Deen-Mak Construction Co Ltd & Another (1996)2 NWLR (Pt.432) 577 at 591. The Appellants submit that they have proved that they are entitled to a refund of the said sum. The Appellants urged this Tribunal to grant the reliefs sought in this appeal.

The Respondent submits that the Appellants are not entitled to refund because the Assessment was issued and served on the Concessioner for the Contract Area and the tax was paid without objection thereby making the Assessment final and conclusive.

The Respondent submits that in the course of the Appellants' witness giving evidence, this Tribunal asked whether the costs incurred had the prior approval of the Concessioner and which the witness answered in the negative. The Respondent asserts that the PSC agreement requires approval before expenses are incurred. Therefore these costs having not been approved by the Concessioner and verified by the Respondent render the expenses illegal and urged this Tribunal to so hold.

The Respondent submits that the Appellants' accounts were not submitted for audit to the Respondent to warrant any refund as envisaged by section 23(1)(3) of the FIRS (Establishment) Act, therefore the

argument of the Appellants claiming refund of the sum of USD1,972,462,067 should be discountenanced.

ANALYSIS AND CONCLUSION:

The Appellants relied on section 13(1) of Deep Offshore Basin Production Sharing Contract Act and section 23(3) of PPTA to justify using Realizable Price RP as the applicable pricing mechanism that the Respondent should apply in assessing the Appellants to tax. The Respondent did not base its usage of OSP on any law or contract agreement but rather on the returns filed with the Respondent by the NNPC on behalf of the Appellants.

These issues are in *pari materia* with issues this Tribunal recently pronounced upon in TAT/LZ/016 & 017/2013, Esso Exploration & Production Ltd & Anor v. FIRS decided on 1st June, 2016. The reasoning is relevant to this appeal. In that case, the Respondent argues that the parties to the Production Sharing Contract agreed that the concessioner should file returns with the Respondent, The Respondent acted upon the returns filed by the Concessioner to compute both the PPT and EDT liabilities of the parties. The Respondent quoted extensively from the Production Sharing Contract document to buttress that NNPC has the mandatory responsibility of filing returns with the Respondent. And that the returns filed by NNPC govern the basis of PPT and EDT assessment for OML 133 Contract Area. The Respondent submits that since the Appellants' claim are mostly on the tax deductibility of its various expenditures on the OML 133 Contract Area, the only option available to the Respondent would be to conduct an audit exercise on the OML 133 to ascertain the Appellants' claim. We held as follows:

> *"The Respondent forecloses the Appellants from ventilating any grievances on PPT other than through NNPC. The Respondent ignored the substantive issues raised by the Appellants and insisted that it can only rely on NNPC returns. The Respondent says that, under the PSC, NNPC has the sole right of filing returns and airing tax-related grievances before it. The Respondent also contends that the Appellants should contact NNPC for PPT receipts and that they are not entitled to EDT receipts.*
>
> *But as we have indicated in similar appeals in the past, the contractors to OML 133 Contract Area are recognised and accepted as taxable parties under the agreement and DOIBPSCA. The Respondent is well informed about this. NNPC is not a tax authority. It has no competence to test the allowability or otherwise of any expenses or costs in tax returns. NNPC's primary obligation relating to returns is to audit the veracity of the contractors' expenditure on OML 133 Contract Area, as reported in the returns rendered by the contractors. It should establish the genuineness of the income and expenses stated in the returns or any omission in them. NNPC must bring to the attention of the contractors any emanating disagreement in the contents of the returns. The contractors have the right to be informed of any consequential issues relating to their returns. This is because any alteration or modification to the contractors' returns will affect their tax positions. If NNPC has cause to file returns other than the one submitted to it by the contractors to OML 133, it owes the contractors explanation.*

The parties to the contract are clearly stated in the PSC document and include the Appellants. The Appellants are co-taxpayers with NNPC and are chargeable to pro-rata taxes in their respective names. The Respondent's acknowledgement of the tax paid is a testimony of its knowledge of the extent of the Appellants' involvement. Thus, the Appellants are taxpayers with tax base of OML 133 Contract Area. They are aggrieved by the 2012 PPT and EDT assessments and have raised the matter with the Respondent. The Appellants' claims relate to the allowability or otherwise of certain expenses/costs and the basis of royalty computation. Their protests hinge on points of tax law, which is the statutory mandate of the Respondent.

In articulating the roles of tax authorities, paragraph 2.9 of the National Tax Policy states that "the authorities should create a conducive tax atmosphere and environment which will engender taxpayer confidence at all levels of tax administration. In this regard, tax payers shall be provided adequate time and space to review, challenge, and appeal every tax assessment or demand made by the tax authorities and every claim, objection, appeal, representation or the like made by any taxpayer must be sufficiently considered."

Section 8 (2) of the FIRS Establishment Act, 2007 states that:

"The Service may, from time to time, specify the form of returns, claims statements and notices necessary for the due administration of the powers conferred on it by this Act"

Since tax is charged on the Appellant's income from OML 133 Contract Area, their grievances cannot be suppressed by both NNPC and the Respondent. The Appellants are entitled to fair hearing on the on their protests on PPT and EDT of OML 133 Contract Area. The Respondent owes listening duty to taxpayers whose tax affairs are placed before it. The Respondent must not discountenance taxpayers' grumbles when they come forward crying for justice and fair treatment of their tax affairs.

The Respondent is required to view taxpayers' claims and objections within the overriding objective of its responsibilities for the entire tax regime. It is not fair for the Respondent to use NNPC as a sham to deny the Appellants their legitimate expectation s of fair treatment of their tax matters. The Respondent has the inherent capacity of directing NNPC to review the areas of the Appellants' objection and confirm the genuineness of claims. It equally has capacity of inviting all parties to OML 133 Contract Area for round table discussion on the tax affairs where conflicting returns are presented to it. We believe, it is in the overall interest of the tax regime, for the Respondent, to exercise such powers, if only to stimulate the confidence of taxpayers on the tax regime.

Accordingly we direct the Respondent to liase with NNPC to ascertain the veracity of the Appellant's claims and address them on points of tax law. We also direct the Respondent to conduct a comprehensive tax audit on the OML 133 Contract Area to ascertain the correct PPT and EDT assessments." for the 2012 YOA.

We adopt our reasoning in that case to the present appeal, Section 11(2) of DOSIBPSCA provides that

"Separate tax receipts in the names of the Corporation or the Holder and the contractor for the respective amounts of petroleum profit tax paid on behalf of the Corporation or the holder and contractor shall be issued by the Federal Inland Revenue Service ... in accordance with the terms of the Production Sharing Contract."

NNPC is a mere messenger for the delivery of receipts to the contractors. The Respondent did not say it has issued PPT receipts in favour of the Appellants. NNPC's delivery of receipts to the contractors is dependent on the Respondent's action. Where the Respondent neglected or failed to issue receipt, NNPC cannot transmit what it has not obtained from the Respondent. The Appellants are co-taxpayers of NNPC and entitled to be issued with receipts bearing their respective names stating the pro rata taxes paid by each party.

Accordingly we direct the Respondent to abide by section 11 (2) of DOSIBPSCA and issue appropriate receipts.

Again, in summary we hold that the non-consideration of the objections of the Appellant merely because the Respondent takes refuge under the returns filed by NNPC is not tenable for the reasons which we have alluded to in this decision.

1. We direct the Respondent to apply the provisions of extant laws including section 13 (1) of the Deep Offshore Basin Production Sharing Contract Act and section 23 (3) of the PPTA in determining the pricing mechanism, namely the Realisable Price.

2. On the issue of royalty payable, Regulation 61(2)(a) of Petroleum (Drilling and Production) Regulations made pursuant to the Petroleum Act, 1969 as amended permits the Appellants to pay the percentage admitted pending resolution of the dispute. We direct compliance with the enactment.

3. On interest on inter-company loans, the Respondent cannot abdicate its duty to deal with this issue and placing reliance on the position of NNPC is flawed. The crux of this issue is whether the loan was actually taken on an arms taught basis.

4. The Respondent has a duty to address the substance of the issues raised by the Appellant according to law. The channel of raising the objection is not a bar to prevent the ventilation of the grievances of the taxpayer. The statutory remit of the Respondent requires it to objectively evaluate the objections. Accordingly we direct the Respondent to deal with the substance of the Appellants' objection and ascertain veracity of these claims.

We set aside the Notices of Assessment NOA PPTBA 40 and NOA PPTBA/ED 37 and direct the Respondent to conduct a comprehensive audit of the contract area to ascertain the correct tax liabilities of the Appellants.

We also direct the Respondent to issue receipt to each party to the contract area on a pro-rata basis as they are the taxpayers for the relevant year of assessment.

Legal Representation:

Mrs O. Adekoya, SAN with T. I. Emuwa Esq., G. Etim Esq. and Ms A. Adewusi for the Appellants.
Mrs A. A. Iriogbe for the Respondent.

DATED AT LAGOS THIS 3RD DAY OF JUNE 2016

KAYODE SOFOLA, SAN (Chairman)

CATHERINE A. AJAYI (MRS)
Commissioner

D. HABILA GAPSISO
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

CHINUA ASUZU
Commissioner