IN THE TAX APPEAL TRIBUNAL

LAGOS ZONE

HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/003/2012

BETWEEN

CNOOC EXPLORATION AND PRODUCTION NIGERIA LTD ..... 1st APPELLANT

SOUTH ATLANTIC PETROLEUM LIMITED ..... 2nd APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE ..... RESPONDENT

JUDGMENT

The Appellants commenced this Appeal on the 13th of January 2012, which was amended on 1st March 2013, with the following Grounds of Appeal:

(a) The Education tax assessment as contained in Notice of Assessment PPTBA/ED 34 dated 2nd August, 2011 is incorrect because the gross proceeds of chargeable oil stated in NOA PPTBA/ED 34 are wrong.

(b) The education tax assessment as contained in NOA PPTBA 34 is based on principles which are incorrect in law.

© By listing only the NNPC on NOA PPTBA/ED 34 and serving same on only the NNPC, the Respondent improperly issued and served NOA PPTBA/ED 34.

The Appellants pray this Tribunal for the following reliefs:

(a) A declaration that the fiscal value of chargeable oil for the OML 130 Contract Area should be on the basis that 30,178,663 barrels of chargeable oil were sold at the prices stated in Schedule 1 of the Appellants' revised 2010 Petroleum Profits Tax returns.

(b) A declaration that the sum of USD 591, 078,410.55 was incurred as operating expenses in the OML 130 Contract Area and consequently, should be treated as deductible expenses in NOA PPTBA/ED 34.

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© A declaration that NOA PPTBA/ED 34 should have contained the names of the Appellants and the NNPC and NOA PPTBA/ED 34 should have been served on each of the Appellants and the NNPC.

(d) A declaration that education tax for the OML 130 Contract Area in the 2010 year of assessment is the sum of USD 36,284,956.92.

(e) An order directing the Respondent to amend NOA PPTBA /ED 34 in accordance with declarations (a)-(d).

(f) An order directing the Respondent to issue the amended NOA PPTBA /ED 34 and forward the amended NOA PPTBA /ED 34 to each of the Appellants and the NNPC.

THE BACKGROUND

The Appellants, NNPC and Total Upstream Nigeria Limited are the parties to the OML 130 PSC. The OML 130 PSC governs the funding and operations related to NNPC's fifty percent interest in respect of the contract area (OML 130), located offshore Nigeria and is subject to the provisions of the Deep Offshore and Inland Basin Production Sharing Contract Act. The Appellants are the contractor parties under the OML 130 PSC, and Total Upstream Nigeria Ltd is the designated Operator under the OML 130 PSC.

The Respondent is a creation of statute with powers to administer the tax laws of Nigeria.

The Operator, on behalf of the Appellants, prepared the PPT returns for the 2010 year of assessment in respect of OML 130 Contract Area and by a letter dated 19th May, 2011, forwarded the returns to the NNPC for onward filing with the Respondent. Following the determination by NNPC of the approved fiscal price of crude for the Trial Marketing Period, the actual PPT returns for 2010 were subsequently revised by the Operator and forwarded to NNPC by letter dated 7th November, 2012 for onward submission to the Respondent.

In the course of operations within the OML 130 Contract Area for the 2010 accounting period:

(a) 30,178,663 barrels of chargeable oil were sold by both the Appellants and the NNPC, which resulted in a fiscal value of USD 2,405,326,256.59.

(b) The sum of USD 591,078,410.55 was incurred as operating expenses in respect of OML 130 Contract Area.

In preparing the revised 2010 PPT returns, the Operator used the following criteria:

(a) The Operator calculated fiscal value of chargeable oil sold on the basis of 30,178,663 barrels of chargeable oil.

(b) The Operator treated the sum of USD 591,078,410.55 as deductible expenses in the revised 2010 PPT returns.

The Appellants' PPT revised 2010 PPT returns contains the following:

i. Assessable profits .....USD 1,814,247,846.04

ii. Education Tax .....USD 36,284,956.92.

NNPC did not file the revised PPT returns prepared by the Operator with the Respondent, but NNPC filed another version it prepared with the Respondent. Consequently, the Respondent computed NOA PPTBA/ED 34 based on the PPT returns prepared and filed by the NNPC. The Respondent in assessing the OML 130 Contract Area for PPT, used the following criteria:

(a) The Respondent calculated gross proceeds of chargeable oil sold on the basis that 30,264,663 barrels of chargeable oil were sold.

(b) The Respondent did not treat the sum of USD 591,078,410.55 as deductible expenses in NOA PPTBA/ED 34.

ISSUES FOR DETERMINATION

1. Whether the Respondent had any legal basis for refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants for education tax?

2. Whether the Respondent had any legal basis for refusing to recognize the expenses incurred by the Appellants as deductible expenses?

3. Whether the failure of the Respondent to list the names of each of the tax payers under the OML 130 PSC on NOA PPTBA/ED 34 and serve the said assessment on each of them nullifies NOA PPTBA/ED 34?

POSITION OF PARTIES:

ISSUE ONE

Whether the Respondent had any legal basis for refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants for education tax?

The Appellants submit that the Respondent had no legal basis for refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants to education tax.

The Appellants referred the Tribunal to section 1(2) of the Tertiary Education Trust Fund Act which provides that "The tax at the rate of 2% shall be charged on the assessable profits of a company registered in Nigeria".

The Appellants submit that they have shown by uncontroverted affidavit evidence contained in paragraph 5 of Exhibit CN that assessable profits was calculated as USD 1,814,247,846.04 based on the fiscal value of USD 2,405,326,256.59 resulting from the 30,178,663 barrels of chargeable oil sold by both the Appellants and the NNPC as contained in paragraph 7 of Exhibit CN.

The Appellants submit that by its letter dated 7th November, 2012 i.e. Exhibit CN2, it forwarded the amended returns to the NNPC for onward filing with the Respondent. The Appellants arrived at the fiscal value of USD 2,405,326,256.59 by applying the NNPC's approved fiscal price of USD71.02 which was applied during the Trial Marketing Period while subsequent liftings were valued using F.O.B. prices in accordance with section 23 of the PPTA.

The Appellants submit that the Respondent's assertion that it is only mandated to accept returns filed by the NNPC was not correct in view of section 35(2) of the PPTA. The Appellant referred the Tribunal to its unreported decision in the case of **Esso Exploration and Production Nigeria Limited and Anor V FIRS NO. TAT/LZ/001/2013** which held that:

> *"The Respondent (FIRS) 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 expectations of fair treatment of their tax matters. The Respondent has the inherent capacity of directing NNPC to review the narrow areas of the Appellants' objection and confirm the genuineness of claims."*

The Appellants submit that by Notice of Objection (Exhibit CN4), it notified the Respondent that the Notice of Assessment (Exhibit CN3), was not based on the gross proceeds of chargeable oil sold by them. The Appellants further submit that contrary to section 35(3) of the PPTA, the Respondent did not show that it refused the Appellants' revised returns (Exhibit CN2) because the Appellants failed to comply with the Respondent's directives for further returns or other information as contemplated by section 35(3) of the PPTA.

Section 35(3) of the PPTA provides thus:

> *"Where, for any accounting period of a company, the company has failed to deliver accounts and particulars provided for in section 30 of this Act within the time limited by that section or has failed to comply with any notice given to it under the provisions of section 31 or 32 of this Act and the Board is of the opinion that such company is liable to pay tax, the Board may estimate the amount of the tax to be paid by such company for*

that accounting period and make an assessment accordingly, but such assessment shall not affect any liability otherwise incurred by such company by reason of its failure or neglect to deliver such accounts and particulars or to comply with such notices; and nothing in this subsection shall affect the right of the Board to make any additional assessments under the provisions of section 36 of this Act."

The Appellants submit that based on their witness unchallenged evidence, the fiscal value or gross proceeds of chargeable oil sold in the 2010 accounting period is as stated by the Appellants' witness, being USD 2,405,326,256.59 on which the Appellants should have been assessed for education tax. The Appellants therefore submit that the tertiary education tax assessment in the sum of USD 38,237,268.25, is wrong as it does not reflect the actual receipts, revenue and sales by the Appellants in the 2010 accounting period.

The Respondent counters that it has legal basis for refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants for education tax. The Respondent submits that NNPC is charged with the duty to file all PPT returns with the Respondent and the assessment was based on the PPT returns filed by the NNPC in respect of the PSC Contract Area on OML 130. The Respondent submits that by virtue of section 30(1)and (2) of the PPTA and section 6 of Deep Offshore and Inland Basin Production Sharing Contract Act, the Appellants cannot rely on section 11 of DOIBPSCA which provides:

> (1) "The Corporation or the holder, as the case may be, shall pay all royalty, concession rentals and petroleum profit tax on itself and the contractor out of the allocated royalty oil and tax oil.
>
> (2) Separate tax receipts in the names of the corporation or holder and the contractor for 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 this Act referred to as the "Service"); because the Appellants' witness also reiterated this fact under cross-examination that the Appellant filed returns with the NNPC not the Respondent.

The Respondent submits that the Appellants failed to comply with Clauses 10.1c and 10.2 of the PSC agreement by filing this Appeal against the Respondent. Clauses 10.1c and 10.2 of the PSC contain provisions for dispute resolution between parties to the PSC agreement. The Respondent further asserts that the Appellants should sue the NNPC and claim damages, if the Appellants feel NNPC did not file the correct returns.

The Respondent argues that it is not a party to the PSC, therefore, the Respondent should not be roped into such breach by virtue of doctrine of privity of contract as laid down in the case of **DUNLOP PNEUMATIC TYRE CO V SELFRIDGE & CO (1915) AC 847**, where it was held that only

parties to a contract can derive benefits or suffer disadvantages therefrom. The Respondent submits that the Appellants misrepresented facts by wrongly stating that the Respondent did not treat the sum of USD 591,078,410.55 as deductible expenses in NOA PPTBA/ED34 because their claims were not captured in the returns filed by the concessionaire, NNPC. The Respondent submits that the Appellants failed to contest the returns filed by NNPC. The Respondent urged the Tribunal to disregard the argument of the Appellants on this issue and in line with the decision of the Supreme Court in **Ezembe v Ibeneme (2004) 7 SC (pt. 145)** where it was held that parties are bound by their agreement.

The Respondent submits that the Appellants failed to comply with the provisions of section 23 of the PPTA which is fundamental to the determination of the fiscal values for the purpose of the computation of the EDT payable.

ISSUE TWO

Whether the Respondent had any legal basis for refusing to recognize the expenses incurred by the Appellants as deductible expenses?

The Appellants submit that the Respondent had no legal basis for refusing to recognize the expenses incurred by the Appellants as deductible expenses because the veracity of the figures given in evidence in respect of gross proceeds of the crude oil sold as well as the expenses incurred by the Appellants remain unchallenged since the Respondent did not present any evidence to contradict the Appellants' claim that USD 591,078,410.55 was incurred as operating expenses in respect of the OML 130 Contract Area.

The Appellants further submit that in paragraphs 7 to 9 of their sole witness additional witness statement on oath (Exhibit AMJ) showed that they incurred certain expenses wholly, exclusively and necessarily for the purpose of carrying out petroleum operations in the Contract Area during the 2010 accounting period, which the Respondent has not challenged. The Appellants therefore submit and urge the Tribunal to hold that the evidence of the deductible expenses presented by the Appellants is correct.

The Appellants assert that the Respondent's mere statement that it is mandated to accept returns filed by the NNPC, is insufficient to justify its refusal to recognize the expenses incurred by the Appellants as deductible expenses. The Appellants submit that the reliance on the figures presented by NNPC was wrong because the figures do not represent the correct fiscal value of crude oil sold *vis-a-vis* the sum spent wholly, exclusively and necessarily for the purpose of petroleum operations in OML 130 Contract Area in the accounting period.

The Appellants submit that, having given evidence that their expenses were wholly, exclusively and necessarily incurred, the burden of proof has shifted to the Respondent to prove that the

Appellants' expenses do not satisfy the WEN test. The Appellants cited the decision of the Court of Appeal in the case of **ALHAJI JIMOH OMOTOSHO V BANK OF THE NORTH LIMITED (2006)LPELR 7580 (CA)**, where it was held that:

> *"The law is that the burden of proof rests on the person who asserts a fact ...It is fixed at the beginning by the pleadings and rests on the party asserting an affirmative ...The burden of proof shifts when evidence given by one party gives rise to a presumption favorable to it and unless rebutted satisfies the court that the fact sought to be proved is established.* ***ELEMA V PRINCESS AKINSUA (2000)13 NWLR (Pt. 683) page 92; HIGRADE MARITIME SERVICES - V - FIRST BANK (1991)1 NWLR (Pt. 167) page 290; DAVID ITUAMA- V.- FRIDAY AKPE – IME(2000)7 SCNJ 40, (2002) 12 NWLR (Pt. 680) 156.*** *The legal burden is always fixed by the pleadings. A party is obliged to plead the facts it wants to prove in evidence. In that case, the burden does not shift. However, the evidential burden can shift from one party to another as the scale of the evidence preponderates. See* ***EDOZIE JSC*** *in* ***EZEMBA - V - IBENEME*** *supra."*

The Appellants submit that no provision in the PPTA, particularly section 13 of the PPTA which provides for deductions not allowed, disallows expenses incurred by contractor parties who are not operators of a contract area under a PSC for the purpose of petroleum operations. The Appellants argued that the expenses they incurred are deductible pursuant to section 10(1) of the PPTA. The Appellants therefore urged the Tribunal to hold that the Respondent was wrong to have disallowed the Appellants costs in assessment NO. NOA PPTBA/ED 34.

The Appellants submit that they have shown by unchallenged evidence that the fiscal value or the gross proceeds of crude oil sold during the year 2010 accounting period was USD 2,405,326,256.59; that USD 591,078,410.55 was incurred as deductible expenses. Consequently, based on section 10 of PPTA, a deduction of the operating expenses from the fiscal value, gave rise to the adjusted profits of USD 1,814,247,846.04. The Appellants therefore submit that the calculation of USD 36,284,956.92 is the established tertiary education tax and urged the Tribunal to hold that the assessment of tertiary education tax on NOA PPTBA/ED 34 should be set aside.

The Respondent argued that it had legal basis for refusing to recognize the expenses incurred by the Appellants as deductible expenses, because it applied the relevant provisions of the law correctly in its treatment of expenses incurred by the Appellants.

The Respondent submits that the Appellant failed to comply with the provisions of section 30(1) & (2) of PPTA, as such, should not be heard to complain. The Respondent further submits that the Appellants failed to show that the interest on the loan facility taken by the 1st Appellant for the purpose of acquiring part of 2nd Appellant's contractor interest, payment on

loan facilities obtained by the Appellants were incurred for the purposes of the petroleum operations in OML 130 Contract Area. The Respondent asserts that the deductions sought by the Appellants are clearly not allowed under section 13 of PPTA. The Respondent submits that to determine whether an expense passed WEN test, the expense must reveal the purpose and supported by law as decided in the case of **SHELL PDC V FIRS (1996) 8 NWLR 256**.

ISSUE THREE

Whether the failure of the Respondent to list the names of each of the taxpayers under the OML 130 PSC on NOA PPTBA /ED34 and serve the said assessment on each of them nullifies NOA PPTBA34?

The Appellants assert that the Respondent did not serve them with any notice of assessment in relation to the OML 130 PSC Contract Area for 2010 accounting period. The Appellants submit that the Respondent having failed to serve the notice of assessment on each of the parties to the PSC, the service only effected on the NNPC should be treated as a nullity, in the same way that non-service or defective service of court processes renders proceedings a nullity, as held by the Court of Appeal in the case of **DAEWOO NIGERIA LTD V UZO (2008) ALL FWLR (Pt. 399) 456 at 473-474.**

The Appellants referred the Tribunal to the provisions of section 37(1) of the PPTA which require that each company liable to petroleum profits tax in respect of the OML 130 PSC should be separately assessed, and the particulars of assessment clearly stated on the respective assessments. The Appellants also relied on section 12 of Deep Offshore Act which mandates the Respondent not only to take note of the parties to the PSC that are liable to tax and assess them to tax separately, but that the Respondent must consider the ratio of equity held by the parties. The Appellants submit that failure of the Respondent to comply with the requirement of the law, renders the assessment ineffective. The Appellants therefore urged the Tribunal to grant all reliefs sought by them.

The Respondent counters that it was right in law to have issued the notice of assessment on OML 130 PSC NOA PPTBA/ED34 and by serving same on NNPC. The Respondent asserts that section 37(1) of the PPTA recognizes the contract area as the taxable entity, and that the Respondent complied with the provisions of section 37(1) of the PPTA.

The Respondent also referred the Tribunal to section 39(1) which provides that:

> *"no assessment, warrant or other proceeding purporting to be made in accordance with the provisions of this Act shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this*

Act or any Act amending the same, and if the company assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.

(2) an assessment shall not be impeached or affected –

(a) by reason of a mistake therein as to –

(i) the name of a company liable or of a person in whose name a company is assessed; or

(ii) the amount of the tax;

(b) by reason of any variance between the assessment and the notice thereof;

If in cases of assessment, the notice thereof be dully served on the company intended to be assessed or on the person in whose name the assessment was to be made on a company, and such notice contains, in substance and effect, the particulars on which the assessment is made,"

The Respondent submits that section 39 of PPTA compliments and justifies the NOA PPTBA/ED 34 and urged the Tribunal to uphold the NOA PPTBA/ED34 and dismiss the Appeal in its entirety for being frivolous and constituting an abuse of court process.

ANALYSIS AND CONCLUSION

After going through the submissions of counsel, we are of the view that, this is a clear tax issue that falls within the exclusive purview of the Respondent as the tax authority to attend to and not shy away or abdicate its authority to another agency that has no legal backing to regulate tax matters. The Appellants in this case are legitimately aggrieved by the assessment issued which affects them directly as contractor-parties to the OML 130 PSC Contract Area. The Respondent is duty bound under the law to look into and constructively consider the objection of the Appellants.

We are persuaded by the reliance on the decision of this Tribunal by the Appellants in the case of **ESSO EXPLORATION & PRODUCTION NIGERIA LTD- V – FIRS TAT/LZ/001/2013** delivered on the 20th of November, 2014, and the unchallenged evidence of the Appellants' witness that the Respondent had no legal basis for refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants to tax. The Respondent equally failed to prove its legal basis for refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the Appellants to tax.

The Appellants' reliance on section 13 of the PPTA which contains the list of deductions not allowed is correct as, section 13 of the PPTA does not disallow expenses incurred purely for the purpose of petroleum operations as is the case in this Appeal. The Respondent neither

subjected section 13 of the PPTA to interpretation to justify its position nor adduced any evidence or relied on any provisions of law to buttress its position that its calculation of deductible expenses, were correct in law. There is no known law that bars the Respondent from addressing the grievances of tax payers like the Appellants in a situation like this.

The NNPC does not have power to address tax disputes. Any agreement authorizing NNPC to resolve tax dispute is null and void the provisions of the PPTA and the FIRS Establishment Act. The Respondent also failed to prove how the Appellants' expenses failed the WEN test.

OML 130 PSC Contract Area is the base of the petroleum operation and not a legal entity having power to sue and be sued. OML 130 PSC Contract Area is not another name for NNPC for the Respondent to serve NOA on NNPC as meaning it served NOA on OML 130 PSC Contract Area. OML 130 PSC Contract Area is not a party to the PSC, as such, the Respondent cannot in law regard OML 130 PSC Contract Area as a tax payer. If the Appellants were not legitimate tax payers, the PSC Agreement would not have saddled the Appellants with the responsibility to prepare and file returns with the NNPC for onward submission to the Respondent. The PSC does not state that NNPC is the sole party to the PSC.

We agree with the submission of the Appellants as they referred this Tribunal to section 12 of Deep Offshore Act which provides that:

> *"The chargeable tax on petroleum operations in the contract area under the production sharing contract shall be split between the corporation or the holder and the contractor in the same ratio as the split of profit oil as defined in the production sharing contract between them."*

With regard to the issue whether the failure of the Respondent to list the names of each of the tax payers on the notice of assessment we adopt the reasoning in our earlier decision in TAT/LZ/004/2012 between the parties earlier delivered today and quote the relevant conclusion and order which we apply to this appeal as follows:

> *"On whether the failure of the Respondent to list the names of each of the tax payers under the OML 130 PSC on NOA PPTBA 37 and serve the said assessment on each of them nullifies the assessment, section 37(1) of the PPTA and Section 11(2) and 12 of DOIBPSCA are relevant. It is however pertinent to note that the Respondent asserts that it listed the parties to the PSC in the Notice of Assessment, and that the agreement executed by the parties stipulated a mode of service through NNPC which was sufficient/substantial compliance with section 37(1) of PPTA. The Respondent also alluded to the provisions of section 39 of PPTA to buttress the validity of the notice of assessment. There is force in these submissions. In view of our findings on issue 2 above, it may not be necessary to decide the point. It would however be more expedient going*

forward to serve the notice of assessment on each relevant party to leave this issue out of contention. We hereby allow the Appeal and set aside the NOA PPTBA 37 subject to our earlier directive that the Respondent should accept the Appellants' returns and use its inherent statutory powers to assess the appropriate tax liability guided by the facts and the law applicable in the matter".

We therefore nullify the Respondent's NOA PPTBA/ED 34. We direct the Respondent to accept the Appellants' Education Tax Returns for 2010 and along with NNPC returns use its inherent powers under the Tertiary Education Act to assess the Appellants to Education Tax.

LEGAL REPRESENTATION:

Ibifubara Berenibara Esq. and Ms Adefolake Adewusi for the Appellants.

B. H. Oniyangi (Mrs) for the Respondent.

DATED THIS 19TH DAY OF JUNE, 2015.

Kayode Sofola, SAN
Chairman

Catherine A. Ajayi (Mrs)
Commissioner

Dennis H. Gapsiso
Commissioner

Chinua Asuzu
Commissioner

Mustafa Bulu Ibrahim
Commissioner.

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