IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/004/2012

Between

CNOOC EXPLORATION AND PRODUCTION NIG. LIMITED **1ST APPELLANT**

SOUTH ATLANTIC PETROLEUM LIMITED **2ND APPELLANT**

And

FEDERAL INLAND REVENUE SERVICE **RESPONDENT**

JUDGMENT

INTRODUCTION

The Appellants commenced this Appeal by a Notice of Appeal dated 13 January 2012 that was amended on 1 March 2013, with the following grounds of Appeal:

a) The petroleum profits tax assessment as contained in the Notice of Assessment PPTBA 37 (NOA PPTBA 37)is incorrect because the gross proceeds of chargeable oil stated in NOA PPTBA 37 are wrong.
b) The petroleum profits tax assessment as contained in NOA PPTBA 37 is based on principles which are incorrect in law.
c) By listing only the Nigerian National Petroleum Corporation (NNPC) on NOA PPTBA 37 and serving same on only it (sic), the Respondent improperly issued and served NOA PPTBA 37.

ISSUES FOR DETERMINATION

The issues for determination are:

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 to tax?
2. Whether the Respondent's calculation of deductible expenses, capital allowance and Investment Tax Credit was correct in law?

3. Whether the failure of the Respondent to list the names of each of the taxpayers under the OML 130 PSC on NOA PPTBA 37 and serve the said assessment on each of them nullifies NOA PPTBA 37?

FACTS AND PROCEEDINGS

The Appellants, NNPC and Total Upstream Nigeria Limited (the "Operator") are the parties to the OML 130 Production Sharing Contract (PSC). The Operator, on behalf of the Appellants, prepared the PPT returns for the 2010 year of assessment in respect of OML 130 PSC contract area and sent it to NNPC. NNPC revised the PPT returns and filed its revised version with the Respondent for tax assessment. The Respondent computed the PPT on OML 130 based on NNPC returns and raised NOA PPTBA 37 dated 2 August, 2011. The Notice of Assessment was served on NNPC and NNPC forwarded the notice to the Appellants vide a letter dated 21 October, 2011 – Exhibit BCN3. At this point the Respondent can be said to be in order computing the PPT based on the returns sent as per the agreement between the parties to the OML 130 PSC.

The Appellants received the NOA on 26 October, 2011 and raised their objection on 14 November, 2011 – Exhibit BCN4, claiming it did not contain the names and addresses of the Appellants and NNPC, and that it was based on inaccurate figures. The Respondent by its letter dated 3 December 2011 – Exhibit BCN5 refused to discharge the assessment or issue an amended one, informing the Operator that the Notice of Objection is noted for memorandum purposes only and directed the Appellants to pay PPT as assessed in NOA PPTBA 37 or face sanctions. The Appellants sued the Respondent.

The PPT computations contained in NOA PPTBA 37 (emanating from the returns prepared by NNPC) differ from those in the Operator's revised PPT returns for 2010 (Exhibit BCN2) in the following areas:

Areas	Operator's Returns	NOA PPTBA 37
	USD	USD
Assessable Profits	1,814,247,846.04	1,950,100,680.89
Chargeable Profits	439,813,239.21	1,577,078,273.71
Assessable Tax	219,906,619.60	788,539,136.86
Chargeable Tax	NIL	NIL

The Appellants filed the following:

1. An Amended Notice of Appeal dated 1 March 2013;

2. A Written Statement on Oath and an Additional Written Statement on Oath deposed to on 4 March 2013 and 5 September 2014 respectively by Mrs Modeloeola Jegede, the General Manager, Tax of Total E & P Nigeria Limited;
3. Documentary exhibits; and
4. A Rejoinder dated 25 March 2014.

The Respondent filed a Reply dated 11 March 2014 but did not call any witness.

PARTIES' POSITIONS

The Appellants argue that the Respondent was wrong to assess PPT on figures submitted by NNPC as those figures do not represent the actual receipts, revenue, and sales by the Appellant in the 2010 accounting period.

The Appellants submit that in compliance with the provision of section 35(2) of the PPTA, the Operator had delivered accounts and particulars to the Respondent through the NNPC, and the Respondent was copied as contained in the letters dated 19 May 2011 and 7 November, 2012 albeit forwarded to NNPC for onward submission to the Respondent.

The Appellants cited the decision of this Tribunal in the case of **Esso Exploration & Production Nig. Ltd & Anor v. FIRS (unreported Appeal No. TAT/LZ/001/2013)** delivered by the Tax Appeal Tribunal, Lagos Zone on 20th November, 2014 at page 5, that:

> *"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 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 it is a settled principle of law that the use of the word 'may' in any legislation confers a discretionary power which the institution or authority so granted must exercise both judicially and judiciously. The Appellants referred the Tribunal to the case of **The Owners of the M. V. Lupex v. Nigerian Overseas Chartering and Shipping Ltd., (2003)15 NWLR (Pt. 844)469; (2003) LPELR-3195 (SC)**, where the Supreme Court stated that:

> *"An exercise of discretion is a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case guided by the spirit and principles of law."*

The Appellants therefore submit that the reason given by the Respondent for its refusal to use the gross proceeds of chargeable oil sold by the Appellants, as reflected in Exhibits BCN and BCN2, as the basis for the assessment, namely, that the NNPC is the party charged to file returns and make all tax payments in respect of the OML 130 PSC Contract Area, is both factually and legally incorrect and cannot constitute a judicious exercise of discretion. The Appellants argued that paragraph 2 of Exhibit BCN, shows clearly that the Appellants and the NNPC are the parties to the OML 130 PSC. The Appellants further argued that paragraph 4 of Exhibit BCN states that it is the responsibility of the Contractor party (the Appellants) to prepare the returns for the contract area while NNPC is to forward the returns prepared by the Contractor party (the Appellants) to the Respondent.

The Appellants further submit that Section 11(1) of the Deep Offshore Act states that the NNPC cannot be the sole taxpayer as far as the OML 130 PSC contract area is concerned. Section 11(1) of the Deep Offshore Act states thus:

"The Corporation or the holder, as the case may be, shall pay all royalty, concession rentals and petroleum profit tax on behalf of itself and the contractor out of the allocated royalty oil and tax oil."

The Appellants submit that though the Respondent is not bound to accept the returns filed by the Appellants, the Respondent has not justified its failure to accept the returns filed by the Appellants under the circumscribed circumstances envisaged by section 35(3) of the PPTA. The Appellants further submit that based on their witness' unchallenged evidence, the fiscal value or gross proceeds of chargeable oil in 2010 accounting period is USD 2,405,326,256.59, which ought to have resulted to an assessable tax of USD 219,906,619.60 and not USD 788,539,136.86 as alleged by the Respondent.

The Appellants further submit that their basis of calculating PPT is as contained in section 3 of the Deep Offshore Act, which provides that the petroleum profits tax payable under a production sharing contract is 50% of the chargeable profits for the duration of the production sharing contract. The Appellants also rely on section 20 of the PPTA which provides that

> *"the chargeable profits of any company of any accounting period shall be the amount of the assessable profits of that period after the deduction of any amount to be allowed in accordance with the provisions of this section."*

The Appellants submit that the adjusted profit as envisaged in section 16(1) of the PPTA is the profit after the deduction of allowable expenses as contained in section 9(3) of the PPTA.

The Respondent argues that its assessment was rightly based on the returns filed by NNPC.

The Respondent countered that it had a legal basis for refusing to use the gross proceeds of chargeable oil sold by the Appellants to assess the OML 130 PSC on NOA PPTBA 37 and that the Appellants' reliance on section 35(2)-(3) of PPTA was out of context and the said provision is not applicable in this appeal. The Respondent further submits that the Appellant did not file any returns with the Respondent, but rather NNPC did as it is NNPC that is charged with the responsibility to make all PPT returns with the Respondent.

The Respondent submits that the Appellants failed to comply with clause 10.1c and 10.2 of the PSC agreement by filing this Appeal against the Respondent. Clause 10.1c and 10.2 of the PSC contain provision for dispute resolution between parties to the PSC agreement. The Respondent further asserts that the Appellant 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 its basis for arriving at the assessable tax in the sum of USD788,539,139.86 in NOA PPTBA 37 is the returns filed by NNPC. The Respondent argues that the Appellants arbitrarily attached values and their claim is not sustainable and urged the Tribunal to so hold.

The Appellants submit that the Respondent's calculation of deductible expenses, capital allowances and investment tax credit was not correct in law.

The Appellants submit that 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 wholly, exclusively and necessarily for the purpose of carrying out petroleum operations in respect of the OML 130 PSC Contract Area for the 2010 accounting period. Exhibit BMJ supports the Appellants' argument.

The Appellants submit that there is no provision in the PPTA, particularly section 13 of the PPTA that disallows expenses incurred by contractor parties who are not the operators of a contract area. The Appellants further submit that the Respondent failed to give evidence to support its assertion that the Appellants' costs were not wholly,

exclusively and necessarily incurred for the purpose of petroleum operations for the contract area. The Appellants submit that such expenses were deductible and therefore urged this Tribunal to hold that the Respondent was wrong to have disallowed the Appellants' costs in NOA PPTBA 37.

The Appellants submit that the Respondent, contrary to section 2 of PPTA and Paragraph 6(1) of the 2nd Schedule to the PPTA, did not calculate annual allowances on the basis of Qualifying Capital Expenditure (QCE) incurred by them. The Appellants argue that USD 4,349,035,837.00 was incurred as QCE and this was uncontroverted by the Respondent. They argue that the rate for calculating annual allowance as provided for in Table II of the 2nd Schedule of PPTA requires that 20% be used for each of the first four years and 19% used for the fifth year. They state that if the Respondent had calculated it like that, it ought to have arrived at USD 869,807,167.36.

The Appellants further submit that they have shown by Exhibits BCN and BCN2 that their capital allowance for the 2010 accounting period is USD 1,374,434,606.83, while the Respondent's Notice of Assessment does not provide the basis for calculating capital allowance. They therefore assert that the sum stated by the Respondent in NOA PPTBA 37 as capital allowance is unjustifiable and wrong as the Respondent did not calculate annual allowances on the basis of QCE incurred by the Appellants.

The Appellants aver that the Respondent did not calculate Investment Tax Credit in compliance with the provisions of section 4(1) of the Deep Offshore Act that requires investment tax credit to be calculated at 50% of QCE. After applying the 50% to the QCE, the Respondent ought to have arrived at USD 2,174,517,918.00 as the total ITC brought forward into 2010 accounting year.

The Respondent submits that its calculation of deductible expenses, capital allowances and investment tax credit was correct in law. The Respondent further submits that the Appellant never filed any returns with the Respondent but rather NNPC did, and the Respondent did the calculations based on the returns filed by the NNPC. The Respondent asserts that the law and practice is for the Appellants to submit returns to NNPC who shall in turn file with the Respondent.

The Respondent argues that it is not all uncontroverted facts deposed to by a witness that will be taken as the whole truth as decided in the case of **Ojeme v. Momodu (1995) NWLR(Pt. 403) 583** Per Galadima JCA in **Adeyanju v. WAEC (2002)13 NWLR(Pt. 7854)479 at 502**.

The Respondent submits that NNPC having the legal responsibility under the OML 130 PSC to file returns with the Respondent and having done that, the assessable tax in NOA PPTBA 37 was in accordance with the law and figures submitted by NNPC. The Respondent submits that it cannot act on what is not directly filed with the Respondent.

Therefore, the Respondent submits that the Appellants' claim of barrels of crude oil sold and the fiscal value vis-a-vis the sum spent was not wholly, exclusively and necessarily incurred for the purpose of petroleum operations in the contract area in the accounting period.

The Respondent referred the Tribunal to clause 10.1 (1) and 10.2 of the PSC agreement which spelt out the procedures for resolving price dispute. The Respondent submits that apart from placing reliance on the law and PSC agreement in disallowing the expenses, the Respondent has other mechanism for verifying compliance with the WEN test. The Respondent asserts that the non-operators' cost having failed to pass the WEN test, was excluded from tax computation submitted to the respondent by NNPC.

The Appellants submit that the Respondent's failure to list the names of each of the taxpayers under the OML 130 PSC on NOA PPTBA 37 and serve the said notice of assessment on each of the parties to the PSC nullifies NOA PPTBA 37.

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 the 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 effected only 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. Uzoh (2008) All FWLR (Pt.399)456 at 473-474.**

The Appellants contend that the effect of section 37(1) of the PPTA entitles each company participating in OML 130 to be separately assessed, and the particulars of assessment clearly stated on the respective assessments. The Appellants argue that by virtue of section 12 of the Deep Offshore Act, the Respondent is bound 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 to the PSC and split the chargeable tax in the notice of assessment accordingly. The Appellants submit that failure of the Respondent to comply with the requirement of the law renders the assessment ineffective.

The Respondent counters that it was not in violation of any law to have issued the notice of assessment on OML 130 PSC (PPTBA 37) 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 provision of section 37(1) of the PPTA.

The Respondent also referred the Tribunal to section 39(1)-(2) which provides that:

"39(1)"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 duly 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 therefore submits that section 39 of PPTA provides that no assessment should be deemed void or voidable for want of form, and urges the Tribunal to uphold the NOA PPTBA 37 and dismiss the appeal in its entirety for being frivolous and constituting an abuse of court process.

ANALYSIS AND DECISION:

The Deep Offshore and Inland Basin Production Sharing ContractAct (DOIBPSCA) is a fiscal incentive legislation that governs petroleum and gas operation activities under the PSC subject to the PPTA. Section 3(1) of (DOIBPSCA) says PPT on the Contract Area shall be determined in accordance with PPTA and prescribes 50 per cent tax rate. The PSC vests the Appellants with the right to prepare PPT returns for the contract area while NNPC reserves the right of delivery of the PPT returns to the Respondent.

The Appellants submitted PPT returns to NNPC in accordance with Clause 8.1(g) and Paragraph 2(a)&(d) of Article III of Annex B to the PSC (Exhibit BCN1). But NNPC filed a different version of PPT returns with the Respondent. Clause 8.1(g) states that the Contractor shall prepare estimated and final PPT returns and submit same to the Corporation on a timely basis in accordance with the PPT Act. Paragraph 2(a) of Article III of Annex B says "*The Contractor shall compute the PPT payable by Corporation pursuant to Clause 8.2(a) of this contract in accordance with the provisions of the PPTA* ..." Paragraph 2(d) says *"The Contractor shall prepare all returns required under the*

PPT Act and timely submit them to the Corporation for onward filing with the Federal Inland Revenue Service...."

Clause 14.1 empowers the Contractor to maintain complete books of accounts consistent with modern petroleum industry and accounting practices and procedures. Officials of the Corporation shall have access to such books and accounts. The Corporation officials attached to the Contractor, pursuant to Clause 13.4 shall participate in the preparation of same. And Clause 13.4 provides that the Corporation shall attach competent professionals to work with the Contractor.

The Appellants' PPT returns were jettisoned by NNPC. The Respondent relied on the PPT returns prepared and filed by NNPC to assess the Appellants to PPT for 2010 year of assessment. The PSC has accorded NNPC the right to attach competent staff to the Contractor (Appellants) to give effect to Clause 14.1. And by virtue of Clauses 13.4 and 14.1, NNPC is deemed to have participated in the preparation of the PPT returns generated by the Appellants. NNPC only has right of participation in the preparation of the PPT returns while still in the domain of the Appellants. The Appellants' PPT returns are the foundation for 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 [130], it owes the contractors explanation or consultation.[1] But the Respondent appears to say it does not care whether the figures are wrong or not, it cares only that they were filed by NNPC who has the duty of filing it under the PSC.

Cooperative Compliance is the current global trend at stimulating voluntary compliance and enhancing the integrity of the tax authorities. The Respondent must make conscious efforts at building cooperative relationships with taxpayers. The Respondent must "view the taxpayer's claims and objection within the overriding objective of its responsibilities for the entire tax regime"[2]. The Respondent can "direct NNPC to review the areas of the Appellants' objection and confirm the genuineness of their claims"[3]. It could also "invite all parties to OML [130] Contract Area for a round table discussion on the tax affairs where conflicting returns are presented to it"[4]. The law was designed to facilitate seemly collaborative collection of the PPT returns between parties to PSC which has not been the case in this instance.

PPT returns are triggered by section 30 of PPTA to originate from the taxpayers(Appellants) and be sent to the Respondent. The power to tinker with PPT returns is the realm of the Respondent under section 35 of PPTA. Taxation is about law and not contract or agreement. The Respondent did not show that the Appellants' PPT

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[1] Judgment delivered in *Esso v FIRS* (TAT/LZ/001/2013), on 20 November 2014
[2] *ibid*
[3] *ibid*
[4] *ibid*

returns have failed to meet the requirements of section 30 of PPTA. A valid assessment in default of section 30 is the purview of section 35. The Respondent's assessment NOA PPTBA 37 meets neither. We accordingly nullify the Respondent's NOA PPTBA 37.

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 incurred from its petroleum operations. The Respondent also failed to back its position with any provision of the PPTA, any tax law or the PSC agreement that disallows expenses incurred. Section 13 of the PPTA which contains the 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 Respondent should have been guided by sections 10 and 13 of the PPTA, and section 11 of DOIBPSCA in treating the expenses incurred by the Appellants. In the circumstances, we hold that the respondent did not apply the law correctly in the treatment of the expenses incurred by the Appellants. We direct the Respondent to accept the Appellants' returns for 2010 and along with the NNPC returns use its inherent statutory powers to assess the appropriate tax liability guided by the facts and the law applicable in the matter.

The Appellants believe that they are taxpayers under OML 130 Contract Area. But the Respondent considers that the OML 130 Contract Area is the taxpayer.

OML 130 Contract Area is the "tax base" of the contracting parties for the licensed operations under the PSC or merely a "taxable entity" assessable in the names of the contracting parties. The parties to the contract are the taxpayers.

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 also 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.

CONCLUSION

We nullify the Respondent's NOA PPTBA 37. We direct the Respondent to accept the Appellants' PPT returns for 2010 and along with NNPC returns use its inherent powers under the PPTA to assess the Appellants to PPT.

LEGAL REPRESENTATION:

T. Emuwa Esq.with 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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