IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO: TAT/LZ/013/2013

BETWEEN:

CNOOC E&P NIGERIA LIMITED — 1st Appellant
SOUTH ATLANTIC PETROLEUM LTD — 2nd Appellant

AND

FEDERAL INLAND REVENUE SERVICE — Respondent

JUDGMENT

INTRODUCTION

The Appellants filed their Appeal on 16th of September, 2013 against the Notice of Assessment PPTBA/ED39 in respect of OML 130 production sharing contract (PSC) served on NNPC. The Appellants contend that the assessment is wrong and also that the assessment was improperly issued and served, and ought to be set aside. The Respondent refused to set aside the assessment thus an appeal was filed predicated on three grounds by the Appellant as follows :

GROUND 1: The education tax as contained in the Notice of Assessment PPTBA 39 is wrong.

GROUND 2: In NOA PPTBA 39, the Respondent wrongly calculated the deductible expenses in respect of the OML 130 contract area to be in the sum of USD549, 840,693.60

GROUND 3: By failing to list the Appellants on NOA PPTBA/ED 39 and by not serving NOA PPTBA/ED/39 on the Appellants, the Respondent improperly issued and served NOA PPTBA/ED/39.

The Respondent in turn contested the Appeal by filing a response as follows:
1. The Respondent was right in the issuance of Notice of Assessment NO PPTBA/ED 39.
2. The Respondent did not wrongfully calculate the deductible expenses but based same on tax returns submitted by NNPC.

3. The Respondent was right in not listing the Appellants on the NOA PPTBA/ED 39 and not serving NOA PPTBA/ED 39 on the Appellants, having complied with the law and provisions of the PSC.

ISSUES FOR DETERMINATION

The Parties formulated the following issues for determination:

1. Whether the Respondent was right to have assessed tertiary education tax on the Appellant solely on the basis of the PPT returns filed by the corporation.

2. Whether the Appellants are taxpayers and entitled to challenge the assessment issued by the Respondent.

3. Whether the Respondent applied the law correctly in the treatment of expenses incurred by the Appellants.

4. Whether failure to list the names of each of the taxpayers under PSC on the assessment and serve the NOA PPTBA/ED 39 on each of them nullifies the assessment notice.

TREATMENT OF ISSUES

ISSUE 1
Whether the Respondent was right to have assessed tertiary education tax on the Appellant solely on the basis of the PPT returns filed by the corporation.

The Appellants submit that by uncontroverted affidavit evidence of the Appellants' witness statement in paragraph 4 stated that 28, 093,409 barrels of chargeable oil were sold by the parties to the PSC at F.O.B pricing, which resulted in gross proceeds of USD3,115,334,056.04; while USD2,473,824,968.42 was calculated as assessable profits, the Respondent ought not to have relied on the returns filed by the NNPC to assess the Appellant to Education tax. The Appellants further submit that section 1(2) of the Tertiary Education Trust Fund(Establishment, Etc) Act requires the Appellants to pay 2% of their assessable profits (USD 2, 473,824,968.42) as tax(USD 49,476,499.37). The Appellants therefore contend that in the absence of any evidence before this Tribunal, the tertiary education tax assessment in the sum of USD 57,536,685.42 is wrong as it does not reflect the actual receipts, revenue and sales by the Appellants in the 2012 accounting period.

The Appellants refute the Respondent's contention in paragraph 3.3 of its final written address that the Appellants' remedies are against the NNPC under the PSC and not the Respondent.

The Appellants' claim is not based on the submission of tax returns by the NNPC but a challenge to the tax assessment issued by the Respondent. The Appellants buttressed their position by citing the Tribunal's decision in the case of Esso Exploration and Production Nigeria Ltd and Another v FIRS TAT/LZ/001/2013 delivered by the TAT, Lagos Zone on 20th November, 2014, at page 5, where it 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 Appellant's objection and confirm the genuineness of claims."

The Appellants submit that by virtue of the Tribunal's decision cited above, the Appellants have the right to institute this action since the Appellants' claims are against the Respondent. The Appellants' claims are not contractual under the PSC, for which they could have recourse to NNPC, as the Respondent became aware that the returns presented by the Appellants differed from the returns presented by NNPC in respect of the OML 130 PSC contract area.

The Respondent submitted that it was right to have assessed tertiary education tax on the Appellant based on the returns filed by NNPC. The Respondent states that NNPC is the person charged to make all PPT returns and payments in respect of the production sharing contract area OML 130, hence, the Appellants filed their returns with the NNPC and not the Respondent.
The Respondent referred the Tribunal to section 11 of Deep Offshore and Inland Basin Production Sharing Contract Act (DOIBPSCA) which states that;

1."The Corporation or the holder as the case may be, shall pay all royalty, concession rentals and petroleum profits tax on behalf of itself and the contractor out of the allocated royalty oil and tax oil.
2. Separate tax receipts in the names of the corporation or the Holder and the contractor for the respective amounts of petroleum profits 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") in accordance with the terms of the production sharing contract.

The Respondent submitted that the Appellants failed to comply with the provisions of clause 10.1c and 10.2 of the PSC agreement, which clearly spelt out how dispute of this nature should be resolved between parties to the PSC. The Respondent added that if the Appellants had any dispute with NNPC in respect of the contract area, the parties should resolve it without involving the Respondent in computing the tax in the contract area.

The Respondent further submits that the Appellants arbitrarily attached values, and their claims could not be supported with the invoices that made up the sum of USD 3,115,334,056.04 as filed by the concessionaire, the party with the legal responsibility to file returns on behalf of

the contract area. The Respondent claims that the Appellants failed to comply with the provisions of section 23 of the PPTA which in determining the fiscal values for the purpose of the computation of EDT payable. The Respondent therefore urged the Tribunal to disregard the argument of the Appellants that their witness's evidence is unchallenged because the claim and substance of the Appellants' evidence is untenable in law and in fact having failed to back it up with documentary evidence and provisions of the law.

ISSUE 2

Whether the Appellants are tax payers and entitled to challenge the assessment issued by the Respondent.

The Appellants submit that they are tax payers because they are persons liable to pay tax, and are aggrieved by the Respondent's assessment, as such are entitled to seek redress against the notice of assessment before the Tribunal. The Appellants referred the Tribunal to section 13(1) of the 5th Schedule to the Federal Inland Revenue Service (Establishment) Act, which states thus:

" A person aggrieved by an assessment or demand notice made upon him by the service or aggrieved by any action or decision of the service under the provisions of the tax laws referred to in paragraph 11, may appeal against such decision or assessment or demand notice within the period stipulated under this Schedule to the Tribunal"

The Appellants cited the decision of this Tribunal in the case of **ESSO E&P NIG. LTD V FIRS (2012)8 TLRN 45,** where the Respondent argued that the Notice of Appeal filed by the Appellants was incompetent and an abuse of process because it is the NNPC that can file returns with the Respondent. The Tribunal held that the filing of returns is not what clothes the Tribunal with jurisdiction, but rather what triggers an appeal before this Tribunal is what the Respondent has done or not done that affects the taxpayer. Part of the decision reads: " The Appellants are impacted by the assessment which they are liable to pay. Accordingly, any allegation of wrong in that process will give rise to corresponding right to seek redress by the Appellants. We accordingly hold that the Appellants have the capacity to approach the Tribunal under section 13(1) of the 5th Schedule of the FIRS Establishment Act, 2007."

The Appellants urged the Tribunal to disregard the assertion and claims of the Respondent and hold that the Notice of Appeal is competent and not frivolous.

ISSUE 3:

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

The Appellants submit that the Respondent did not apply the law correctly by disallowing the expenses incurred by the Appellants in the course of their petroleum operations. The

Appellants further submit that 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. The Respondent did not present any evidence to contradict the Appellants' claim that USD 641,509,087.64 was incurred as expenses (including interest on loan facility to fund the costs relating to the petroleum operations, rent, employees' salaries and partner's audit) by the Appellants. The Appellants again submit that the Operator also gave unchallenged evidence that the sum of USD641,509,087.62 amounts to expenses incurred wholly, exclusively and necessarily for the purpose of petroleum operations.

The Appellants submit that the responsibility for making an assessment is that of the Respondent and cannot be delegated to any other person, as doing so is contrary to section 35(2)(a) of the PPTA, as such, the Respondent is not bound to accept the assertion of any third party as correct . Consequently, NNPC has no capacity to certify whether or not the Appellants satisfied the WEN test. The Appellants contend that the unchallenged evidence adduced by them is in conformity with section 10 (1) of the PPTA.

The Appellants submit that the Respondent did not present any evidence supporting the fact that the Appellants failed the WEN test, but the Respondent only made an allegation in its pleadings without proof. The Appellants referred the Tribunal to the Court of Appeal decision in the case of **ABE & ANOTHER V DAMAWA & ANOTHER (2011)LPELR-5007 (CA):** where it was held that " 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 argue that no provision in the PPTA disallows expenses incurred by non-operators that constitute the contractor party in the PSC, to the contract area. The Appellants further submit that the PPTA does not categorise expenses as operator's expenses which are allowable expenses and treat non-operator's expenses as non-deductible. The Appellants assert that their expenses are in agreement with section 10(1) of the PPTA as supported by the Supreme Court decision in the case of **SDDC PDC V FBIR (1996) 8 NWLR (Pt.466) 256 at 295** where it was held that "Once there is a statutory or contractual obligation, and in this case it is the former, for a company engaged in petroleum operations to perform, such obligation is wholly, exclusively and necessarily for the purpose of the operations of the company."

The Appellants argue that section 13 of PPTA which contains list of non-allowable deductions, does not include expenses incurred by non-operators under a PSC for the purposes of petroleum operations in the contract area.

The Appellants submit that it calculated the Education Tax in accordance with section 1 (3) of the Tertiary Education Trust Fund (Establishment, Etc) Act and the assessable profits was USD 2,473,824,968.42, calculated in compliance with section 16(1) of the PPTA and section 9(3) of the PPTA, and therefore submit that USD 49,476,499.37 is the tertiary education tax, and

consequently urged the Tribunal to set aside the tertiary education tax assessment no NOA PPTBA/ED39.

The Respondent submits that it applied the law correctly in its treatment of expenses incurred by the Appellant. The Respondent asserts that the Law and Practice is that the Appellants shall prepare their returns and submit to NNPC, thereafter NNPC shall submit returns of the contract area to the Respondent. The Respondent shall in turn raise assessment on the contract area based on the tax returns submitted by NNPC and serve same on the corporation in accordance with Section 6 of the DOIBPSCA. The Respondent further argued that the Appellants failed to comply with the provisions of section 30(1) & (2) of PPTA and misapplied the provisions of Section 11(1) of DOIBPSCA by relying on it for Education Tax Assessment, and therefore should not be heard to complain.

The Respondent again submitted that the Appellants failed to show that the expenses incurred for the purposes of petroleum operations in the contract area were wholly, exclusively and necessarily incurred, which prompted the NNPC to disallow the non-operators cost. The Respondent contended that DOIBPSCA recognises royalty oil, cost oil, Tax oil and profit oil and that any expense that is not recoverable as cost oil cannot be recovered from tax oil as claimed by the Appellants. The Respondent submits that the Appellants should have complied with clause 10 of the PSC Agreement to resolve price disputes.

ISSUE 4

Whether the failure to list the names of each of the taxpayers under PSC on the assessment and serve the NOA PPBTA/ED 39 on each of them nullifies the assessment.

The Appellants submit that the Respondent's failure to list the names of each of the taxpayers under the PSC on the assessment and serve the NOA PPBTA/ED 39 on each of them nullifies the assessment. The Appellants referred the Tribunal to section 37(1) of the PPTA- which states thus: "Assessment of tax .....shall contain the names and addresses of the companies assessed to tax or of the persons in whose name any companies (with the name of such companies) have been assessed to tax."

The Appellants cited the case of **OPARA & ANOTHER V AMADI & ANOTHER (2013) LPELR-20747(SC)** where the Supreme Court held that "The word "shall" as employed .denotes obligation or a command and gives no room for discretion. It imposes a duty."

The Appellants therefore submit that the Respondent is bound to comply with the provisions of section 37 (1) of the PPTA and the Supreme Court decision in *OPARA & ANOTHER V AMADI & ANOTHER supra*. The Appellants further argued that Section 37(1) of PPTA defines a tax payer as a company or other person recognised by law. The Appellants contend that OML 130

contract area is neither a company nor a person recognised by law, as such cannot be the tax payer.

The Respondent submits that it was right to have issued the Notice of Assessment on OML 130 contract area inclusive of the Appellants and served same on the NNPC as the appointed agent for the contract area, because the notice of assessment, the Respondent claims, was not about the tax liability of the Appellants but on the OML 130 contract area.

The Appellants submit that the OML 130 PSC Contract Area relates to more than one company that is liable to be assessed to tertiary education tax under the Contract Area. The Appellants argued that the Respondent erred by serving notice of assessment on NNPC alone. The Appellants submit that the Respondent having failed to serve the notice of assessment on each of the parties to the PSC, the service made on the NNPC should be treated as a nullity. The Appellants cite the case of **DAEWOO NIG. LTD V UZOH (2008) ALL FWLR (pt.399)456 at 473-474,** where the Court of Appeal held that: "Non-service and or defective service of process where service of process is required, renders all proceedings in a suit a nullity....."

The Appellants referred the Tribunal to section 2(1)(b) of the Tertiary Education Trust Fund (Establishment, Etc) Act which provides that in assessing and collecting tertiary education tax, the provisions of PPTA shall apply. The Appellants referred the Tribunal to section 37(1) of the PPTA which provides that assessment shall contain the names and addresses of companies assessed to tax. The Appellants submit that as per the PSC, the law is that the Respondent should take note of the parties to the PSC liable to tax and assess them to tax separately and consider the ratio of equity held by the parties in line with section 12 of the Deep Offshore Act such as contained in the PSC as follows:

NNPC -----30% =30%
SAPETRO—10%* 70%=7%
CNOOC------90%*70% =63%

The Appellants assert that the Respondent rather than split the assessment according to the ratio, the Respondent only issued one notice of assessment in relation to the OML 130 PSC Contract Area and served it only on the NNPC. The Appellants therefore submit that the Respondent's failure to comply with the requirement of the law, renders the assessment ineffective.

The Appellants cite the decision of the Supreme Court in the case of **OKAFOR & OTHERS V AG & COMMISSIONER FOR JUSTICE AND OTHERS (1991) LPELR-2414(SC)** where it held that "A nullity is in law a void act, an act which has no legal consequence. The act is not only

bad, as was stated by Denning L. J. In **U.A.C. Ltd v Macfoy (1961) 3 AII ER 1169**, but is incurably bad."
The Appellants urged the Tribunal to consider their arguments and allow the appeal.

The Respondent submits that it complied with the law by issuing the assessment notice to the contract area and listing the parties to the PSC in the Notice of Assessment. The Respondent further submits that the Notice of Assessment NOA PPTBA/ED 39 is for Education Tax and is therefore not protected by the provisions of section 11 of the Deep Offshore and Inland Basin Production Sharing Act relied on by the Appellants. The Respondent asserts that Education Tax is cost oil recoverable expense.

The Respondent cites section 39 (1) and (2) of PPTA to support its position, particularly section 39(2) which states that 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 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 submits that the Appellants are not entitled to the reliefs sought and urged the Tribunal to:
i) Uphold the notice of Assessment No. PPTBA/ED 39
ii) Order that the Respondent was right in serving the Corporation with the Notice of Assessment, and
iii) Order dismissing the Appeal.

ANALYSIS AND CONCLUSION:

The duty to administer tax is purely statutory and the Respondent is the only statutory body saddled with the responsibility to administer tax in Nigeria. The administration of tax includes among other things creating conducive atmosphere for tax payers without compromising the national interest. The Respondent is also required to attend to grievances of tax payers and resolve same. The Appellants in this case are by all standards tax payers albeit parties to a PSC agreement. The PSC agreement stipulates that the Appellants shall prepare and submit their tax returns with NNPC for onward submission to the Respondent.

NNPC's conduct made the Respondent to charge the Appellants to a higher education tax which led to the Appellant's dissatisfaction and prompted the Appellants to approach the Respondent for redress. The Respondent rather than attend to the Appellants, referred them to

NNPC. If the complaints by the Appellants are weighty and centres on tax dispute, as in this case, the Respondent is duty bound to resolve the issue and not refer the issue to a non-tax administrator.

We view with disfavour the conduct of the Respondent in assessing the Appellant 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.. Section 11 of Deep Offshore and Inland Basin Production Sharing Contract Act which the Respondent relied on is not opposite. There is a clear difference between dispute arising out of pricing as contained in the PSC agreement and a dispute on tax matters. The Respondent has the sole duty to attend to all tax issues and not the NNPC.

On whether the Appellants are tax payers and entitled to challenge the assessment issued by the Respondent, we hold that by virtue of section 13(1) of the 5th Schedule of the FIRS Act, the Appellants were aggrieved by the Respondent's issuance of notice of assessment. The Appellants are impacted by the assessment which they are liable to pay. The Appellants are tax payers and have legal right to challenge the assessment.

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 on 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 by non-operators, that constitute the contractor in the PSC to the contract area. Section 13 of the PPTA which contains 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, 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 and use its inherent statutory powers to assess the appropriate tax liability guided by the facts and the law applicable in the matter.

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. It is noted that the Respondent asserts that it listed the parties to the PSC in the Notice of Assessment and the agreement executed by the parties stipulated a mode of service through NNPC which was sufficient/substantial compliance with S.37(1) PPTA. The Respondent also alluded to the provisions of S. 39 of PPTA to buttress the validity of the notice

of assessment. In view of our findings on issue 2 above, it is not necessary to decide the point. It would however be more expedient 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/ED 39 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.

LEGAL REPRESENTATION:

Ibifubara Berenibara Esq. and Miss Adefolake Adewusi for the Appellant

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

DATED THIS 20th DAY OF MARCH, 2015.

KAYODE SOFOLA, SAN
Chairman

CATHERINE A. AJAYI (Mrs.)
Commissioner

DENNIS H. GAPSISO
Commissioner

CHINUA ASUZU
Commissioner

MUSTAFA BULU IBRAHIM
Commissioner

TAX APPEAL TRIBUNAL LAGOS ZONE CERTIFIED TRUE COPY SIGN..... DATE 19/10/15

TAX APPEAL TRIBUNAL LAGOS ZONE CERTIFIED TRUE COPY SIGN..... DATE 18/04/2018