

IN THE TAX APPEAL TRIBUNAL
IN THE LAGOS ZONE
HOLDEN AT LAGOS

APPEAL NO. TAT/LZ/044/2013

BETWEEN

CHEVRON NIGERIA LIMITED

APPELLANT

AND

FEDERAL INLAND REVENUE SERVICE

RESPONDENT

JUDGMENT

This Appeal was filed on the 20th of December, 2013 and later amended and filed on the 25th November, 2014 as a result of the Respondent's refusal to amend the additional income tax assessment notices served on the Appellant for the accounting period ended 31st December, 2007 and 2008 respectively. The additional assessments were issued because the Respondent disagreed with the methodology that the Appellant adopted in determining the fiscal value of crude oil in the Years of Assessment. While the Appellant used the Realizable Price (RP) methodology in determining the fiscal value of crude oil, the Respondent contends that the acceptable methodology is the Official Selling Price (OSP) and alleged additional fiscal revenue of USD3,411,490.50 for 2007 and USD4,052,294.80 for 2008.

The additional tax liabilities imposed on the Appellant was USD2, 899,766.93-PPTBA41 for 2007 and USD3,444,450.58-PPTBA44 for 2008. Dissatisfied with the additional assessments, the Appellant issued two Notices of Objection, both dated 10th October, 2012 contending that it acted in full compliance with the provisions of the PPTA in filing its tax returns in the Years Of Assessment.

The Appellant in this Appeal sought the following reliefs:

- i. A declaration that the additional tax assessments on the Appellant in the sums of USD2,899,766.93 and USD3,444,450.58 for the years ended 31st December, 2007 and 2008 respectively, based on an alleged additional fiscal revenue of USD3,411,490.50 and USD4,052,294.80 respectively, are arbitrary and not in accordance with the provisions of PPTA.
- ii. An Order discharging the Appellant of the assessments or quashing assessments Nos. PPTBA41 and PPTBA44.
- iii. An Order directing the Respondent to amend or revise the assessment made on the Appellant in respect of the above as same is inconsistent with the provisions of applicable laws.



iv. An Order prohibiting the Respondent from assessing the Appellant on the above subject matter.

RELEVANT FACTS AND EVIDENCE.

On 3rd October, 2012, following on an industry-wide audit carried out by the Nigeria Extractive Industries Transparency Initiative (NEITI), the Respondent served two Notices of additional Petroleum Profits Tax Assessment Numbers PPTBA41 and PPTBA44 imposing additional petroleum profits tax liabilities of USD2,899,766.93 and USD3,444,450.58 for the years ended 31st December, 2007 and 2008 respectively on the Appellant.

In filing its returns in the Years Of Assessments, the Appellant had applied the RP against actual price in determining the fiscal value of crude oil. The actual revenue derived from sales of crude oil for the Years Of Assessments were USD3,904,382,841 for 2007 YOA and USD5,129,053,482 for 2008 YOA while the RP values of the crude oil sold were USD3,904,130,490 and USD5,136,251,403, for the respective YOAs. Relying on the provisions of sections 9(2)(a) and 23 of the PPTA, the Appellant subjected the revenue to tax on the basis of which is higher between the RP and the actual price.

The additional assessments arose because the Respondent disagreed with the methodology the Appellant adopted in determining the fiscal value of crude oil in the respective YOAs. The Respondent contended that the Appellant ought to have applied the OSP and not the RP. The Respondent further argued that the use of the OSP in determining the fiscal value of crude oil in the YOAs is in accordance with the provisions of section 23 of the PPTA. The Respondent's position is that the Appellant's failure to apply the OSP resulted in the additional fiscal revenue of USD3, 411,490.50 and USD4,052,294.80 in the YOAs.

The Appellant's case is that it acted in accordance with the provisions of sections 9(2) and 23 of the PPTA in using the RP as the methodology for determining the fiscal value of crude oil in the YOAs. Section 9(1) and (2) of the PPTA provides as follows:

(1) "Subject to any express provisions of this Act, in relation to any accounting period, the profits of that period of a company shall be taken to be the aggregate of-

(a) The proceeds of sale of all chargeable oil sold by the company in that period;

(b) The value of all chargeable oil disposed of by the company in that period; and

(c) All income of the company of that period incidental to and arising from any one or more of its petroleum operations.



(2) For the purposes of subsection (1)(b) of this section, the value of any chargeable oil so disposed of shall be taken to be the aggregate of-

(a) The value of that oil as determined, for the purpose of royalty, in accordance with the provisions of any enactment applicable thereto and any financial agreement or arrangement between the Federal Government of Nigeria and the company

(b) Any cost of extraction of that oil deducted in determining its value as referred to in paragraph (a) of this subsection; and

(c) any cost incurred by the company in transportation and storage of that oil between the field of production and the place of its disposal."

Section 23(3)(5) of the PPTA further provides:

(3) "For the purposes 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 in writing between the Government of Nigeria and the company....

(5) In this section, "posted price", in relation to any crude oil exported from Nigeria by a company, means the price F.O.B at the Nigerian port of export from crude oil of the gravity and quality in question which is from time to time established by the company, after agreement with the government of Nigeria as to the procedure to be followed for the purpose, as its posted price for Nigerian crude oil of that gravity and quality".

The Appellant contends that, based on the above, RP is the only methodology agreed between the Government and the Appellant, as well as other companies doing similar business, in the YOAs. The Appellant relied on the following:

(i) the provisions of the Memorandum of Understanding executed in year 2000 between the Government of Nigeria and the Appellant ;and

(ii) letters issued by the Department of Petroleum Resources (DPR) dated 17th January, 2008 and 19th June, 2013 respectively.

The Appellant further contends that on the basis of the MOU, the appropriate methodology for determining the fiscal value of crude oil for the YOAs is the RP. The Appellant also relies on DPR's letter dated 19th June, 2013, for the year ended 31st December 2008. The DPR letter contains the following position as to the methodology for determining the fiscal value of crude oil:

"The Department after going through the OPTS and Government positions, has decided to adopt a midway approach on the dispute as a way forward to resolve the issues as follows.

1. That Realizable price should be used as fiscal price from January 2008 to June 2010.



2. The OSP be used as fiscal price from July 2010 to December 2012.

3. The weighting Ratio of 50% platts, 30% Argos and 20% LOR be adopted for the new pricing mechanism for the first 2 years and thereafter changed to 40% Platts Argos and 20% LOR.

Accordingly, the above is for your implementation, while the new pricing mechanism takes effect from January 1, 2013”.

The Appellant called one witness, Mr. Babatunde Ebenezer Ale, the Tax Manager of the Appellant. The Respondent did not call any witness or tender any documentary evidence.

ISSUES FOR DETERMINATION

Two issues were formulated for determination.

i. Whether based on the provisions of the PPTA and the MOU, the RP is the appropriate methodology for determining the fiscal value of crude oil in the year ended 31st December, 2007.

ii. Whether based on the provisions of the PPTA, the MOU and the letter written to members of the OPTS by DPR dated 19th June, 2013, the RP is the appropriate methodology for determining the fiscal value of crude oil in the year ended 31st December, 2008.

ARGUMENT

ISSUE ONE

Whether based on the provisions of the PPTA and the MOU, the RP is the appropriate methodology for determining the fiscal value of crude oil in the year ended 31st December, 2007.

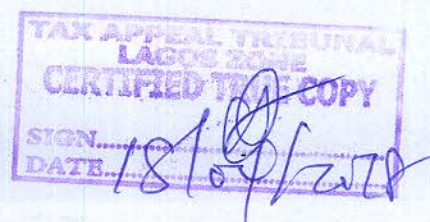
The Appellant submits that it acted in accordance with sections 9(2)(a) and 23 of the PPTA in adopting the Realizable Price (RP) as the methodology for determining the fiscal value of crude oil in 2007.

Section 9(1)(2) of PPTA

(1) Subject to any express provisions of this Act, in relation to any accounting period, the profits of that period of a company shall be taken to be the aggregate-

(a) The proceeds of sale of all chargeable oil sold by the company in that period;

(b) The value of all chargeable oil disposed of by the company in that period; and



(c) All income of the company of that period incidental to and arising from any one or more of its petroleum operations.

(2) For the purposes of subsection (1)(b) of this section, the value of any chargeable oil so disposed of shall be taken to be the aggregate of-

(a) The value of that oil as determined, for the purpose of royalty, in accordance with the provisions of any enactment applicable thereto and any financial agreement or arrangement between the Federal Government of Nigeria and the company;

(b) Any cost of extraction of that oil deducted in determining its value as referred to in paragraph (a) of this subsection; and

(c) Any cost incurred by the company in transportation and storage of that oil between the field of production and the place of its disposal.

Section 23(1)(2)(3)(5)

(1) If, for any accounting period of a company, the amount of the chargeable tax for that period, calculated in accordance with the provisions of this Act other than this section, is less than the amount mentioned in subsection (2) of this section, the company shall be liable to pay an additional amount of chargeable tax for that period equal to the difference between those two amounts.

(2) The amounts referred to in the foregoing subsection is, for an accounting period of the company, the amount which the chargeable tax for that period, calculated in accordance with the provision of this Act, would come to if, in the case of crude oil exported from Nigeria by the company, the reference in section 9(1)(a) of this Act to the proceeds of sale thereof were a reference to the amount obtained by multiplying the number of barrels of that crude oil by the relevant sum per barrel.

(3) For the purposes 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 in writing between the Government of Nigeria and the company.

(5) In this section, "posted price", in relation to any crude oil exported from Nigeria by a company, means the price F.O.B. at the Nigerian port of export from crude oil of the gravity and quality in question which is from time to time established by the company, after agreement with the Government of Nigeria as to the procedure to be followed for the purpose, as its posted price for Nigerian crude oil of that gravity and quality.



The Appellant submits that the price methodology to be adopted by the Appellant must be a methodology agreed between the Government of Nigeria and the Appellant. The Appellant submits that the only price methodology agreed between the Government of Nigeria and the Appellant for the year ended 31st December, 2007 is the RP calculated in accordance with Clause 2.11, 2.12 and 2.13 of Exhibit E7(MOU 2000). The Appellant cites the decision of this Tribunal in the case of Mobil Producing Nigeria Unlimited (2015)18 TLRN 54 at 64 in respect of section 9(2) and 23(5) of the PPTA in determining the methodology to be adopted as follows:

"What is not in dispute are the provisions of Section 9(2)(a) and particularly Section 23(5) of the PPTA which predicate pricing not on a complete specific formula provided by the statute but on any financial agreement or arrangement between (FGN) and the company and S. 23(5). An agreement is therefore a prerequisite for the determination of the price."

The Appellant submits that the procedure detailed in the MOU is in agreement with the provision of Section 23(5) of the PPTA.

The Appellant argues that between 2003 and 2007, there was no new fiscal regime introduced to replace the year 2000 MOU(Exhibit E7). The Appellant further contends that based on the provisions of Clause 7.3 of the MOU(Exhibit E7), it therefore means that the Exhibit E7 was still applicable in 2007, on which basis the Appellant applied the RP in determining the fiscal value of crude oil in the year ended 31st December, 2007. The Appellant corroborated its position by citing the decision of this Tribunal in the case of Mobil Producing Nigeria Unlimited v FIRS (supra) at 65 in respect of the lifespan of the MOU as follows:

"Despite the termination of the 2000 MOU by effluxion of time, there was a need for agreement to activate parts of the PPTA. Tacit and informal agreement albeit by conduct continued in the industry until 2005. The informal consent by conduct was put to an end by the letter of 17th January, 2008 by inter-ministerial committee which reasserted its replacement with the PPTA fiscal regime. Exhibits "AS10" and "AS4" are consistent with this conclusion.

In the result, although the life of the MOU 2000 came to an end by effluxion of time on 10th January, 2003 as it was not extended, there was consent manifested by the conduct of the parties sufficient to be an "agreement" under the provisions of S. 9(2)(a), and S. 23(5) of the PPTA."

The Appellant also cites the decision of this Tribunal in the case of Mobil Producing Nigeria Unlimited v FIRS (supra) 34 at 41 in respect of the appropriate methodology to be used in determining the value of crude in 2007 as follows:



"After going through the submissions of counsel and the statutory references, we hold that section 23(3) of PPTA enabled the FGN, NNPC and the Appellant to come up with an agreement, which the parties did with the MOU. The MOU clearly contains the price methodology and states Realizable Price (RP) as the applicable pricing mechanism. The words used in the MOU and section 23(3) of the PPTA are very clear and unambiguous.

As we have earlier held both in terms of the agreement by conduct and the judgment of the Federal High Court, Saidu J. in suit no FHC/C/10A/13 MPNU V FIRS, the MOU was terminated on 1st January, 2008, PPTA is therefore the applicable pricing mechanism only for 2007 YOA. The PPTBA 46 based on OSP is untenable and is hereby set aside".

The Appellant also cites the decision of this Tribunal in the case of Total Exploration and Production Nigeria Ltd v FIRS (2015)18 TLRN 73 at 84 where this Tribunal, for reasons stated above, held inter alia that the RP is the proper pricing methodology applicable to PPT returns for 2006 and 2007 YOAs. The Appellant urged the Tribunal to resolve issue one in its favour that RP is the appropriate methodology to be adopted in determining the fiscal value of crude oil in 2007 and that the Appellant is not liable to pay the sum of USD2,899,766.93 or any sum at all as additional tax in the year ended 31st, 2007.

ISSUE TWO

Whether based on the provisions of the PPTA, the MOU and the letter written to members of the OPTS by the DPR dated 19th June 2013, Realizable Price is the appropriate methodology for determining the fiscal value of crude oil in the year ended 31st December, 2008.

The Appellant submits that it acted in accordance with the provisions of Sections 9(2)(a) and 23 of the PPTA in its use of the RP in determining the fiscal value of crude in the 2008 YOA, and the agreement between the OPTS and the FGN as to the price methodology to be adopted as set out in DPR's letter of 19th June 2013 (Exhibit E9).

The Appellant submits that Exhibit E9 implies that firstly, the agreed price methodology for determining the fiscal value of crude oil for 2008 between the Government of Nigeria and the Appellant is the RP. Secondly, Exhibit E9 overrides DPR's letter of 8th January, 2008, which had stated that OSP should be the methodology for determining the fiscal value of crude oil for 2008. The Appellant asserts that Exhibit E9 satisfies the requirement of section 23(5) and pursuant to the provisions of section 9(2)(a) of the PPTA. The Appellant referred the Tribunal to its decision in the case of Total Exploration and Production Nigeria Ltd v FIRS(2015) 18 TLRN 73 at 84 held as follows:

"The proposition that an agreement cannot be substituted for legislative pronouncement is settled law. Thus Saidu J. FHC/C/10A/13 in Mobil Producing Nigeria



Unlimited v FIRS correctly stated the law when he held as follows: "No matter how strong and well worked an MOU is, it cannot be used to overrule clear provision of law. Parties cannot by consent waive provision of law as held in Menakaya v Menakaya (2001)9-10 SC1. "But this in the context of sections 9 (2) and 23(5) of PPTA merely begs the question since the statute itself makes agreement between the parties that is, NNPC and Mobil Nigeria Producing Unlimited in this case a condition of the pricing mechanism."

The Appellant submits that the above position was affirmed by the Supreme Court of Nigeria in Hilary Farms Ltd. And Others v M/V "Mahtra" (sister vessel to M/V 'Kadrina') and Others (2007)14 NWLR (PART 1054)210 at 236 paras D-E in Ogbuagu, JSC's concurring Judgment at page 311, paragraphs 10-15.

The Appellant submits that the Respondent's position on OSP, which only has its root in the letter of the DPR dated 17th January, 2008, as the methodology to be adopted for 2008 YOA is not supported by agreement between the Appellant and NNPC or based on any provision of law.

The Appellant urges the Tribunal to hold that the RP is the appropriate methodology to be used in determining the fiscal value of crude oil in the year 2008 and that the Appellant is not liable to pay the sum of USD3,444,450.58 or any sum at all as additional tax for the year ended 31st December, 2008.

The Respondent counters that the Appellant's case is anchored on the MOU of 2000, therefore submits that Clause 7 of the 2000 MOU which the Appellant relies on is inapplicable to the subject matter of this Appeal because the Respondent opted to invoke the PPTA. The Respondent submits that the 2000 MOU ceased to exist since 2002, and cites the case of Mobil Producing Nigeria Unlimited v FIRS Appeal NO. TAT/LZ/004/2011 (unreported) at page 3 of the judgment where this Tribunal considered Clause 7 of the 2000 MOU and decided thus:

"A community reading of these 3 clauses constrains the following construction:

A. Clause 7.1:-

a. In the first instance, the 2000 MOU is for a 3-year term (1st January 2000-31st December 2002).

b. Unless expressly extended by mutual consent, it terminates at the end of the 3-year term.

B. Clause 7.2 is self – explanatory and clearly never came into play.



C. Clause 7.3: indeed there is no new fiscal regime yet. The provision of the MOU cannot subsist because the Respondent has, in its assessment, opted to invoke the provisions of the Petroleum Profits Tax Act (PPTA), a principal legislation. Thus the PPTA is the legislation in force and cannot be subordinated to the mere contemplation of the MOU”.

The Respondent submits that section 23(5) relied upon by the Appellant, mentions an agreement on the price FOB of the crude oil, the said agreement is only on the procedure to be followed in establishing the price FOB of the crude oil at the Nigerian port of export, and not that in the absence of such agreement, there would be no price FOB of the crude oil. The Respondent referred the Tribunal to section 23(6) which provides thus:

“Every posted price established as aforesaid must bear a fair and reasonable relationship-

(a) to the established posted prices of Nigerian crude oils of

(b) comparable quality and gravity, if any; or

(c) if there are no such established posted prices for such Nigerian crude oils to the posted prices at main international trading export centers for crude oil of comparable quality and gravity.”

The Respondent submits that since the 2000 MOU is no longer in existence since 2002, and in the absence of a new fiscal price regime, the PPTA takes over. Therefore section 23 of the PPTA contemplates OSP as the posted price. The Respondent submits that tax liability is an issue of statute and not contract as laid down by the Supreme Court in the case of *Shell Petroleum International Mattschappij B. V. v FBIR* (2011) 4 TLRN 97 thus:

“Payment of tax or who is entitled to pay tax is an issue of law, not of agreement, contract or compromise.”

The Respondent relied on the provisions of sections 9 and 23(1) of the PPTA, and cites the decision of this Tribunal in *Addax Petroleum Development (Nigeria) Limited v FIRS* (2012) 7 TLRN 108 where it considered the sections 9 and 23(1) of the PPTA at page 85 as follows:

“The correct assessment is of course the assessment that complies with the relevant tax law. With regards to Petroleum Profits Tax, the PPTA is the relevant litmus test”

The Respondent submits that the PPTA prevails over the MOU of 2000.

The Respondent submits that the 2000 MOU was terminated by a letter dated January, 2008 as contained in a decision of the Federal High Court in the case of *Mobil Producing Nigeria v FIRS* (supra) which the Tribunal is bound to follow being a decision of a higher court. The Respondent submits that the Appellant’s reliance on the DPR’s letter of 19th June, 2013



amounts to urging this Tribunal to review the judgment of the Federal High Court with regards to the termination of the MOU of 2000 in January, 2008. The Respondent urges this Tribunal to hold as follows:

a. That the Notice of Additional Assessments PPTBA 41 and PPTBA 44 are valid and in accordance with the law.

b. An order for the immediate payment by the Appellant the sum of USD2,889,766.93 and USD3,444,450.58 for years 2007 and 2008 respectively.

c. An order mandating the Appellant to pay the tax due by virtue of section 32 of the Federal Inland Revenue Service (Establishment) Act.

ANALYSIS AND CONCLUSIONS

The Appellant in its submissions relied on sections 9(2)(a) and 23(1)(2)(3)(5) of the PPTA. These provisions relied on by the Appellant center on agreement between the Nigerian Government and the Appellant for the methodology to be adopted in determining an applicable fiscal value of Nigerian crude oil. Exhibit E8 is the Agreement this Tribunal and the Federal High Court as per Saidu J. in the case of Mobil Producing Nigeria Unlimited v FIRS (2015) 18 TLRN 34 at 41 based their decision and that the MOU of 2000 terminated with effect from 17th January, 2008. Exhibit E8 recognized RP as the applicable fiscal price mechanism for the year ended 2007 because the MOU of 2000, which states clearly that RP is the appropriate price methodology for the fiscal value of Nigerian crude oil was still in force. We still stand by and remain bound by the decision of Saidu J. of the Federal High Court in Mobil Producing Nigeria Unlimited v FIRS (supra). We hold that the Respondent's additional Notice of Assessment PPTBA 41 is not in accordance with the relevant tax laws and RP is the appropriate price mechanism for the year ended 31st December, 2007.

On whether based on the provisions of the PPTA, the MOU and the letter written to members of the OPTS by DPR dated 19th June, 2013, the RP is the appropriate methodology in determining the fiscal value of crude oil in the year ended 31st December 2008. Again the Appellant relies on sections 9(2)(a) and 23(1)(2)(3)(5) of the PPTA and the letter to OPTS by the DPR dated 19th June, 2013 to submit that the RP is the appropriate price methodology to determine the fiscal value of Nigerian crude oil. The DPR's letter of 19th June, 2013 does not talk of the existence or otherwise of the MOU of 2000 but rather reflects the agreement reached between the Oil Producers Trade Section of the Lagos Chamber of Commerce and Industry (OPTS) and Government, the process which involved the NNPC-COMD and FIRS officials.

We are persuaded that the DPR's letter dated 19th June, 2013 is an agreement between OPTS and Government which sections 9(2)(a) and 23(1)(2)(3)(5) of the PPTA require in determining



the fiscal value of Nigerian crude oil. The DPR's letter states clearly that RP is the applicable fiscal price from January 2008 to June 2010, and OSP be used as fiscal price from July 2010 to December, 2012. We are also persuaded that the DPR's letter of 19th June, 2013 derived its strength from sections 9(2)(a) and 23(1)(2)(3)(5) of the PPTA and not the MOU of 2000. The MOU of 2000 terminated in 2008 as contained in the Federal High Court decision per Saidu J. in the case of Mobil Producing Nigeria Unlimited v FIRS (*supra*).

In the light of the above, we hold as follows;

1. That the Respondent's Additional Notice of Assessment and PPTBA 44 issued by the Respondent is not in accordance with the relevant tax laws.

2. That RP is the appropriate price mechanism to be used in determining the fiscal value of crude oil in the 2008 Year of Assessment. Consequently, the Appellant is therefore not liable to pay the sum of USD3,444,450.58, or any sum at all as additional tax for the year ended 31st December, 2008.

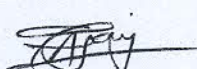
LEGAL REPRESENTATION:

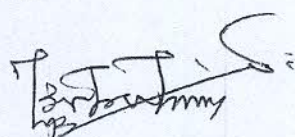
Maxwell Ukpebor Esq. with E. Esuga Esq. J. Akhator Esq. and Ms A. Ezegbulam for the Appellant.


Mrs Nneka Ezeadili for the Respondent.

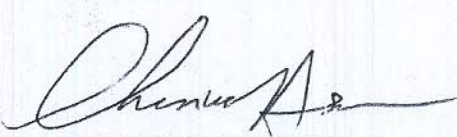
DATED AT LAGOS THIS 22ND DAY OF JANUARY 2016


KAYODE SOFOLA, SAN (Chairman)


CATHERINE A. AJAYI (MRS)
Commissioner


MUSTAFA BULU IBRAHIM
Commissioner


D. HABILA GAPSISO
Commissioner


CHINUA ASUZU
Commissioner

