IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 25TH DAY OF JUNE,2018
BEFORE THE HONOURABLE
JUSTICE R.M. AIKAWA
JUDGE

SUIT NO: FHC/L/1A/2017

BETWEEN:

FEDERAL INLAND REVENUE SERVICE..... APPELLANT

AND

THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA L TD } **RESPONDENT**

JUDGMENT

This Appeal is predicated upon the decision of the Tax Appeal Tribunal, Lagos Zonal Division delivered on the 27th of October, 2015wherein the tribunal upheld the appeal of the Respondent against the decision of the Appellant to disallow the tax deductions made by the Respondent in its tax returns on the grounds that the deductions are penalty for gas flared and therefore not allowable deductions.

Aggrieved, the Appellant filed a Notice of Appeal before this court dated 1st of December 2016 setting out 3 grounds of Appeal.

The Appellant's brief dated 7th February 2017 formulated three issues for determination all predicated on the three grounds of appeal in the following terms:

1. Whether the Tax Appeal Tribunal ("The Tribunal") acted Ultra-vires its powers when it held that the payments made by the Respondent to department of Petroleum Resources (DPR) for the gas flared do not constitute a penalty, thereby reversing the decision of the Minister of the petroleum?
2. Whether the Tribunal erred in law when it held that the Respondent was entitled to make tax deductions of the sums paid for the gas flared by the Respondent between 2006 and 2008 without finding that it met the requirements of being "wholly, exclusively and necessarily incurred" for Petroleum Operations as provided for under S.10 of the Petroleum Profit Tax Act?
3. Whether the Tribunal erred in law when it held that the Respondent was entitled to make tax deductions of the sums incurred as royalties paid for the gas flared by the Respondent?

The Respondent in its brief of argument formulated two issues for determination in the following terms:

1. Did the tribunal rightly exercise jurisdiction to entertain the Respondent's appeal?

2. Was the tribunal right in holding that the Respondent is entitled to make tax deductions of the sums incurred as royalties paid for the gas flaring activities for the period 2006-2007?

The Respondent's counsel also raised what he termed preliminary points.

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I will consider the "preliminary points" firstly., The Respondent raised two preliminary points namely:

1. Leave of court is required to raise fresh issues on appeal.

2. There is no legal basis to challenge the Tat's findings of fact on appeal.

In my view point no.1 is now academic in view of the fact that on 20th March 2018 Learned counsel to the Appellants moved his motion for leave of this court to argue fresh issue on appeal. The application which was not opposed by Learned counsel to the Respondent was accordingly granted.
On the second preliminary point, it was the argument of Learned counsel to the Respondent relying on the provisions of paragraph 17(1)(3) schedule 5 of FIRS(establishment) act 2007 that any party aggrieved by the decision of the tax appeal tribunal could appeal to this court on grounds of law only. Consequently it was his submission that this court lacks the jurisdiction to determine issue no.2 which he submits borders on evaluation of facts. He urged the court to discountenance issue no.2.

Counsel referred to a number of judicial decision such as **SPDC v FBIR (2009) 1 TLRN 224, v Gulf Oil FIRS (2012) 7 TLRN 163 FBIR v HALLIBURTON (WA) Ltd. (2015) 17 TLRN 1 at 32 and FIRS v TSKJ (2017) TLRN Vol.32 58 at 85.**

In reply, Learned counsel to the Appellants submits that from the wordings of issue no.2, it is clear that the grouse of the Appellants is not in relation to evaluation of facts made by the tribunal as none was carried out. Rather the

issue is that no evaluation of facts was carried out. He submits that the cases of **SPDC v FBIR,** supra and Gulf Oil FIRS are therefore not applicable.

I will reproduce issue no.2 as formulated by the Appellants:

> "Whether the tribunal erred in law when it held that the Respondent was entitled to make tax deductions of the sums paid for the gas flared by the Respondent between 2006 and 2008 without finding that it met the requirements of being wholly exclusively and necessarily incurred petroleum operations as provided for under section 10 of the petroleum profit tax act. "

Having studied the framing of issue no.2, I am inclined to agree with Learned counsel to the Appellant that issue no.2 is clearly an issue of law alone and therefore within the sphere of the provisions of the FIRS act referred to earlier.

I therefore overrule the submissions of Learned counsel to the Respondent. Issue no. 2 therefore stands for consideration.

Now to the issues. Issue no.1, which has been formulated by counsel to the Appellant and which I think is encapsulated in issue no.1 raised by counsel to the Respondent is as reproduced earlier, " whether tax appeal tribunal acted ultra vires when held that the payments made by the Respondent to department of petroleum resources (DPR) for the gas flared do not constitute a penalty thereby reversing the decision of the minister of petroleum?"

The powers of the tax appeal tribunal are spelt variously in the tax appeal tribunal act. In section 59 it was provided as follows:

"59.-(1) A Tax Appeal Tribunal is established as provided for in the fifth Schedule to

this Act. ' ..

(2) The Tribunal shall have power to settle disputes arising from the operations of this Act and under the First Schedule"

In the first schedule the items for application under the act were listed as;:

"1. Companies Income Tax Act Cap. 60 LFN, 1990.

2. Petroleum Profits Tax Act Cap. 354 LFN, 1990.

3. Personal Income Tax Act No. 104, 1993.

4. Capital Gains Tax Act Cap. 42 LFN, 1990.

5. Value Added Tax Act 1993 No. 102, 1993.

6. Stamp Duty Act Cap. 411 LFN, 1990.

7. Taxes and Levies (Approved List for Collection) Act 1998 No.2, 1998,

8. All regulations, proclamation, government notices or rules issued in terms of these legislation.

9. Any other law for the assessment, collection and accounting of revenue accruable to the Government of the Federation as may be made by the National Assembly from time to time or regulation incidental to those

laws, conferring any power, duty and obligation on the Service.

10. Enactment or Laws imposing Taxes and Levies within the Federal Capital Territory.

11. Enactment or Laws imposing collection of taxes, fees and levies collected by other government agencies and companies including signature bonus, pipeline fees, penalty for gas flared, depot levies and

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licenses, fees for Oil Exploration License (OEL), Oil Mining License (OML), Oil Production License (OPL), royalties, rents (productive and non-productive), fees for licenses to operate drilling rigs. Fees for oil pipeline licenses, haulage fees and all such fees prevalent in the oil industry but not limited to the above listed.

In section 11(1) fifth schedule the powers of the tax appeal were listed as follows:

"11.-(1) The Tribunal shall have power to adjudicate on disputes, and controversies
arising from the following tax laws (hereinafter referred to as 'the tax laws) -

(i) Companies Income Tax Act, CAP. 60 LFN ; 1990.

(ii) Personal Income Tax Act No.1 04, 1993.

(iii) Petroleum Profits Tax Act CAP. 354 LFN ; 1990;

(iv) Value Added Tax Act No. 102; 1993;

(v) Capital Gains Tax Act CAP. 42 LFN; 1990, and

(vi) any other law contained in or specified in the First Schedule to this Act or
other laws made or to be made from time to time by the National Ass~mb1y.

(2) The Tribunal shall apply such provisions of the tax laws referred to in subparagraph (I) of this paragraph as may be applicable in the determination or
resolution of any dispute or controversy before it."

My view is that a review of these provisions would show that the powers of the tribunal are to settle disputes arising from these classes of taxes. In this case, the complaint of the Appellant is that the tribunal has exceeded its

powers by determining the class of taxes payable by the Respondent. In other words by holding that the payments made by the Respondent were royalties not penalties as inscribed in the receipt of payment.

I agree entirely with the Learned counsel to the Appellants. Indeed going by the provisions which I have just reproduced, it is within the tribunal's power to determine what amount is payable by the Respondent as penalty of gas flaring. But it would be acting ultra vires if it proceeds to substitute the class of payment from penalty to royalty. This would be a direct encroachment on the administrative powers of the minister.

Learned counsel to the Respondent has referred to the decision of my Learned Brother Buba, J. in the case of **NNPC v TAT (2013) 13 TLRN 39 and CNOOC exploration v NNPC (2017) TRLN Vol.30 1 at 26-27.** I have read both cases and I think my views are not in conflict with those decisions. The respective decisions speak in abstract about the jurisdiction of the tax appeal tribunal on tax matters and the subsequent right of appeal to this court by any aggrieved party. That is not in dispute and is not the issue here.

The powers of the tax appeal tribunal on tax matters are not powers at large. They are powers defined by statute and in the exercise of its powers the tribunal must do so within the confines of the statutory provisions.

I therefore resolve this issue in favour of the Appellant.

The second issue formulated by the Appellant which in my view is also captured in the second issue raised by the Respondent is whether the tribunal

erred in law when it held that the Respondent was entitled t make tax deductions of the sums paid for the gas flared by the Respondent between 2006 and 2008 without finding that it met the requirements of being "wholly, exclusively ad necessarily incurred" for Petroleum Operations as provided for under S.10 of the Petroleum Profit Tax Act.

Petroleum operations has been described as "the global processes of exploration, extraction, refining, transporting (often by oil tankers and pipelines), and marketing of petroleum products"

Gas flaring on the other hand has been described as "the burning of natural gas that cannot be processed or sold. Flaring disposes of the gas while releasing emissions into the atmosphere."

Section 10 of the petroleum profit tax act provides:

"(1) In computing the adjusted profit of any company of any accounting period from its petroleum operations, there shall be deducted all outgoings and expenses wholly, exclusively and necessarily incurred, whether within or without Nigeria, during that period by such company for the purpose of those operations, including but without otherwise expanding or limiting the generality of the foregoing-

(a) rents incurred by the company for that period in respect of land or buildings occupied under an oil prospecting licence or an oil mining lease for disturbance of surface rights or for any other like disturbance;

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[1996 No. 31.]

(b) all non-productive rents, the liability for which was incurred by the company during that period;

[1999 No. 30.]

(c) all royalties, the liability for which was incurred by the company during that period in respect of natural gas sold and actually delivered to the Nigerian National Petroleum Corporation, or sold to any other buyer or customer or disposed of in any other commercial manner;

[1996 No. 31.]

(d) all royalties the liability for which was incurred by the company during that period in respect of crude oil or of casing head petroleum spirit won in Nigeria;

(e) all sums the liability for which was incurred by the company to the Federal Government of Nigeria during that period by way of customs or excise duty or other like charges levied in respect of machineries, equipment and goods used in the company's petroleum operation; and

[1999 No. 30.]

(f) sums incurred by way of interest upon any money borrowed by such company, where the Board is satisfied that the interest was payable on capital employed in carrying on its petroleum operations;

(g) all sums incurred by way of interest on any inter-company loans obtained under terms prevailing in the open market, that is the London Inter-Bank Offer Rate, by companies that engage in crude oil production operations in the Nigerian oil industry;

[1999 No. 30.]

(h) any expense incurred for repair of premises, plant, machinery, or fixtures employed for the purpose of carrying on petroleum operations

or for the renewal, repair or alteration of any implement, utensils or articles so employed;

(i) debts directly incurred to the company and proved to the satisfaction of the Board to have become bad or doubtful in the accounting period for which the adjusted profits is being ascertained notwithstanding that such bad or doubtful debts were due and payable prior to the commencement of that period:

Provided that-

(i) the deduction to be made in respect of a doubtful debt shall not exceed that portion of the debt which is proved to have become doubtful during that accounting period, nor in respect of any particular debt shall it include any amount deducted under the provisions of this paragraph in determining the adjusted profit of a previous accounting period;

(ii) all sums recovered by the company during that accounting period on account of amounts previously deducted in respect of bad or doubtful debts shall, for the purposes of subsection (1) (c) of section 9 of this Act, be treated as income of that company of that period; and

(iii) it is proved to the satisfaction of the Board that the debts in respect of which a deduction is claimed were either-

(a) included as a profit from the carrying on of petroleum operations in the accounting period in which they were incurred; or

(b) advances made in the normal course of carrying on petro- leum operations not being advances on account of any item falling within the provisions of section 13 of this Act;

(j) any other expenditure, including tangible drilling costs directly incurred in connection with drilling and appraisal of a development well, but excluding an expenditure which is qualifying expenditure for the purpose of the Second Schedule to this Act, and any expense or

deduction in respect of a liability in- curred which is deductible under any other provision of this section-

[1996 No. 31.]

(i) any expenditure (tangible or intangible) directly incurred in connection with the drilling of an exploration well and the next two appraisal wells in the same field whether the wells are productive or not;

(ii) where a deduction may be given under this section in respect of any such expenditure that expenditure shall not be treated as qualifying drilling expenditure for the purpose of the Second Schedule;

[Second Schedule.]

(k) any contributions to a pension, provident or other society, scheme or fund which may be approved, with or without retrospective effect, by the Board subject to such general conditions or particular conditions in the case of any such society, scheme or fund as the Board may prescribe:

Provided that any sum received by or the value of any benefit obtained by such company, from any approved pension, provident or other society, scheme or fund, in any accounting period of that company shall, for the purposes of subsection (1) (c) of section 9 of this Act, be treated as income of that company of that accounting period;

(l) all sums, the liability of which was incurred by the company during that period to the Federal Government, or to any State or Local Government Council in Nigeria by way of duty, customs and excise duties, stamp duties, education tax, tax (other than the tax imposed by this Act) or any other rate, fee or other like charges;

(m) such other deductions as may be prescribed by any rule made under this Act.

(2) Where a deduction has been allowed to a company under this section in respect of any liability of the company and such liability or any part thereof is waived or released the amount of the deduction or the part thereof corresponding to such part of the liability shall, for the purposes of subsection (1) (c) of section 9 of this Act, be treated as income of the company of its accounting period in which such waiver or release was made or given."

While I do not agree with Learned counsel to the Appellant that gas flaring is out rightly illegal in Nigeria in view of statutory provisions and decided cases, I will however agree with him that fees for gas flaring is not within the category of expenses incurred wholly, exclusively from the Respondent's petroleum operations as envisaged by section 10 of the petroleum profit tax act.

I have noted that Learned counsel appears to concede on this issue when in paragraph 5.9 of his brief when he stated:

> "It is for the above mentioned reasons that Gas Flaring is in fact illegal in Nigeria as S.3 of the Associated Gas Re-Injection Act 2004 provides thus:
>
> > No company engaged in the production of oil or gas shall after I January, 1984 flare gas produced in association with oil without the permission in writing of the Minister."

I think the third issue is fully consumed by issues nos.1 and 2 raised by the Appellant as well as the two issues raised by the Respondent. It need therefore not be considered.

On the whole therefore I resolve all the issues in favour of the Appellant. The Appeal is accordingly allowed. The Judgment of the Tax Appeal Tribunal is hereby set aside. The decision of the Appellant is hereby restrained.

HON. JUSTICE R.M. AIKAWA
JUDGE
25th June, 2018.

Appearances:
M.A.Gbadebo with him S.O. Oziegbe for the Plaintiffs.

Chukwuka Ikwuazom with him O. Ogundrinde and N. Nwodo for the Defendant

Judgment delivered in open Court.

HON. JUSTICE R.M. AIKAWA
JUDGE
25th June, 2018.

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10/7/18

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