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PPT RETURNS PREPARED BY PSC PARTIES AND NOT ONE BY NNPC SHOULD BE ACCEPTED - TAT

Tax Alert

Introduction

The Tax Appeal Tribunal (**TAT**), Lagos Zone held in the case of Total E & P Nigeria Limited & others (**Appellants**) and Federal Inland Revenue Services ("**FIRS**" or "**Respondent**") that Petroleum Profit Tax (**PPT**) returns as prepared by parties to Production Sharing Contract (**PSC**) and not as reviewed by Nigerian National Petroleum Corporation ("**NNPC**") should be accepted by the FIRS in assessing the PSC parties to PPT. The TAT held that since the appellants are the tax payers under Petroleum Profit Tax Act (**PPTA**), they have the legal right to prepare and file PPT returns with the FIRS as well as challenge the assessment.

2. Highlights of the Case

2.1 The Basis of the Dispute

The Appellants were asked to pay tax based on an assessment forwarded to the NNPC by the Respondent in respect of OML 138 PSC Contract Area in which the Appellants are the "Contractor Parties" and the 1st Appellant is the Operator. NNPC had amended the actual 2012 PPT returns forwarded to it by the Operator before filing same with the Respondent. The Operator received Notice of Assessment (NOA) PPTA 40 from NNPC and swiftly objected to the assessment on 30 July 2013. However, the Respondent replied that the operator's Notice of Objection was invalid.

On the basis of the foregoing, the Appellants appealed to the TAT. The issues for determination as raised by the TAT are as follow:

a. whether the Respondent was correct to have assessed tax on amounts other than on the basis of the Appellants' actual receipt, revenue and sales;

b. whether the respondent's calculation of deductible expenses, capital allowance and Investment Tax Credit were correct in law;

c. whether the Appellants are taxpayers and entitled to challenge the assessment issued by the respondent; and

d. whether failure to list the names of each of the taxpayers under the PSC on the assessment and serve the NOA PPTBA 40 on each of them nullifies the assessment and the notice.

2.2 Parties' Positions

The Respondent argued that the assessment for 2012 was carried out on the contract area in accordance with the manner and procedure it carried out assessment in 2007 and 2008, whereby the Appellant did not raise objections. But the Appellants disagreed and stated that assessment of a contract area to PPT should be in respect of an accounting period and not on the basis of previous assessments. They further added that there was no assessment for 2007 and 2008 accounting period because production of crude oil had not started on the contract area.

Relying on section 13 (1) of the 5th Schedule to the

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Federal Inland Revenue Service (Establishment) Act, 2007 and on the decision of the TAT in the case of Esso Exploration & Production Nig. Ltd. & Anor. V. FIRS (2012) 8 TLRN 45, the Appellants posited that they are the persons liable to pay the tax, and having been aggrieved by the Respondent's assessment, are entitled to seek redress.

The Appellants further submitted that the failure of the Respondent to serve Notice of Assessment in relation to OML 138 for the 2012 accounting year on each of the parties to the PSC renders the assessment a nullity in line with section 37 (1) of the PPTA and section 12 of the Deep Offshore and Inland Basin Production Sharing Contracts Act (**"DOIBPSCA"**). The Respondent had served the NOA only on the NNPC, stating on it that the OML 138 is operated by the 1st Appellant.

The Respondent counters that parties are not in dispute that NNPC filed the 2012 PPT returns with the Respondent since NNPC is the party empowered by the PSC to file returns with the Respondent.

The Respondent further submitted that the Appellants failed to adduce justification as to why their returns should be accepted instead of NNPC's as they have failed the burden of proof as required by paragraph 15 (6) of the 5th Schedule to the FIRS (Establishment) Act 2007 and sections 131 (1) & 132 of the Evidence Act, 2011.

The Respondent submits that its NOA PPTA 40 is based on NNPC returns and in accordance with PSC. The Respondent also submits that it has complied with the law by relying on NNPC returns to determine the expenses incurred on OML 138.

The Respondent submits that the recognised tax payer under the PSC is OML 138 contract area itself, stating further that the name and address of the operating entity i.e. the 1st Appellant are clearly reflected on the NOA. The Respondent asserts that by virtue of section 39 of the PPTA, failure to list the names of the parties to the contract area on the NOA will not render the assessment invalid.

2.3 The Law

In deciding the matter before it, the TAT referred to the following provisions of the Acts in arriving at its decision:

Section 3 (1), Deep Offshore and Inland Basin Production Sharing Contract Act (DOIBPSCA) which provides that PSC's are subject to the PPTA. The Section reads:

> *"(1) The Petroleum Profits Tax payable under a production sharing contract shall be determined in accordance with the Petroleum Profits Tax Act: Provided that the Petroleum Profits Tax applicable to the contract area as defined in the Production Sharing Contract shall be 50 per cent flat rate of chargeable profits for the duration of the Production Sharing Contracts."*

Section 30, PPTA provides for preparation and delivery of accounts and particulars, its reads:

> *"(1) every company which is or has engaged in petroleum operations shall for* ***each*** *accounting period of the company, make up accounts of its profits or loss, arising from those operations, of that period …"*

Section 35, PPTA provides for circumstances where the board can make assessment, it reads:

> *"(1) The Board shall proceed to assess every company with the tax for any accounting period of the company as soon as may be* ***after the expiration of the time allowed to such company for the delivery of the accounts*** *and particulars provided for in Section 30 of this Act."*

Section 13(1) of Fifth Schedule, Federal Inland Revenue Service (Establishment) Act (FIRSEA), provides for appeals from decisions of the Service, it reads:

> *"(1) 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."

2.4 Analysis of the Conflict

The TAT in its analysis to arrive at its decision held that DOIBPSCA is a fiscal incentive legislation that governs petroleum and gas operation activities under the PSC subject to PPTA. PSC therefore 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 **intact.**

Clause 7.1 (h) says the Contractor shall submit estimated and final PPT returns to the Corporation in accordance with the PPT Act. Paragraph 2(a) of Article III says "*The Contractor shall compute the PPT payable by Corporation pursuant to Clause 8.1 of this contract in accordance with the provisions of the PPTA…"* Paragraph 2(e) 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 Board of Inland Revenue…"*

The Appellants submitted PPT returns to NNPC in accordance with the PSC. However, NNPC filed a different version of PPT returns with the Respondent. The Respondent relied on the PPT returns prepared and filed by NNPC to assess the Appellants to PPT for 2012 year of assessment. The PSC accorded NNPC the right to attach competent staff to the Appellants to give effect to Clause 13.1 of the PSC. And by virtue of Clauses 12.4 and 13.1, NNPC is deemed to have participated in the preparation of the PPT returns by the Appellants.

The Appellants' PPT returns are the foundation for the determination of their tax affairs by the Respondent. NNPC is incompetent to interfere with the Appellants' tax documents. No provision in the PSC empowers NNPC to amend or vary the PPT returns filed with it by the Appellants. The PPT returns filed by the Appellants with NNPC are meant to be delivered to the Respondent and must be so delivered.

The TAT commenced its ruling by reiterating the current global trend of cooperative Compliance. It relied on the judgment delivered in *Esso v. FIRS (TAT/LZ/001/2013),* stating that if NNPC has cause to file returns other than the one submitted to it by the Appellants, then it owe the Appellants explanation or consultation. It went on to emphasize that the Respondent must make conscious efforts at building cooperative relationships with taxpayers. It also stated that the Respondent must view the taxpayer's claims and objection within the overriding objective of its responsibilities for the entire tax regime.

The TAT in distinguishing between assessment under Section 30 and assessment under section 35 PPTA, stated that taxation is about law not contract or agreement. It stated that the Respondent have not established that the Appellants' PPT returns have failed to meet the requirements of section 30 of PPTA, in order for section 35 of PPTA to apply. **The TAT in the light of the foregoing nullified the Respondent's NOA PPTBA 40 and directed the Respondent to accept the Appellants' PPT returns for 2012 and use its inherent powers under the PPTA to assess the Appellants to PPT.** Relying on Section 13 (1) Fifth Schedule, FIRSEA, the TAT further held that the Appellants have legal right to challenge the assessment.

The TAT in responding to the issue as to whether failure to list the names of the each of the tax payers under the PSC on the assessment and serve the NOA PPTBA 40 on each of them nullifies the Assessment, section 37 (1) of 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 therefore resolved the issue in favour of the Appellant.

3. Comments

3.1 Contract over Law

Operators have in the past been challenged with this aspect of their operation, considering that the NNPC is the owner of the leased area also called contract area OML 138 which is being operated by the contractors like Appellants. The contractors and the NNPC are bound by the PSC, which

mostly provide that the contractor is to compute and submit their PPT returns to NNPC for onward filing with the FIRS, this provision of their contract we believe, is for ease of determining the cost of operating the asset.

3.2 Procedural Impropriety

The Appellants contested that the NOA did not list the names of all the contractors operating OML 138 and that the NOA was not served on each of the Appellants (contractors). In this case the TAT considered this very important and ruled in favour of the Appellants, and further advised that it would be expedient to serve the notice of assessment on each relevant party in order to leave this issue out of contention. The import of this is that the Respondent is bound to obey the procedural aspect of the laws and not only rely on the substance of matters.

Conclusion

The TAT has continuously demonstrated fairness and seems to be bent on upholding the course of justice adding this to the list of its credible decisions. Filing of PPT returns is an integral part of operation within the upstream sector of the oil and gas industry. It is our position that parties must contract within the law. The FIRS should also ensure that they uphold regulatory procedures in their various operations.

However the right of appeal has not been exhausted, the Respondent can still approach the relevant court to test the decision of the TAT otherwise, this remains the correct interpretation and the position of the law.

Disclaimer

Please note that this memorandum is not intended to give specific technical advice and it should not be construed as doing so. It is designed to alert clients to some of the issues. It is not intended to give exhaustive coverage of the topic. Professional advice should always be sought before action is either taken or refrained from as a result of information herein. In any case, Ascension does not accept any responsibility for any decision whatsoever made based thereon or any liability incurred for failure to consult with professionals on any specific area of issues raised.

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