



Introduction:

Certainty is an important element of law. Whether a particular piece of law is, in fact, good law or bad law is another issue. With certainty, business owners and managers can plan for the eventualities that may arise from the application of the law, and avoid waste of time and resources on unfruitful litigation.

In a regulated business environment, tax liability disputes are fairly common. In Nigeria, the common practice was that corporations' disputes with the taxman are usually resolved at the Tax Appeal Tribunal ("TAT"), an administrative tax complaints tribunal, from which appeals may lie to the Federal High Court. There was, however, no clarity on the issue of the forum for the resolution of intra-party disputes amongst private parties on the computation of tax returns which would be submitted to the taxman. The Court of Appeal's recent judgment in *Shell (Nig.) Exploration and Production Ltd & 3 others v. Federal Inland Revenue Service*¹ has now attempted to deal with this issue.

Facts:

This dispute arose in the Nigerian Petroleum Industry. The appellants (or Contractors) entered into a production sharing contract (PSC) with the Nigerian State Oil Company (NNPC) in respect of Deep Offshore Mining Lease (OML) 118, to enable the exploration of crude oil. By the PSC, any crude oil found is allocated to the parties in accordance with the 'lifting allocation' on the basis of 'Royalty Oil', 'Cost Oil', 'Tax Oil', and 'Profit Oil', respectively. The PSC also provided that the Contractors shall have the sole right and responsibility to compute the lifting allocation. Subsequently, the Contractors alleged that NNPC had breached the terms of the PSC by lifting crude oil in excess of its allotted entitlements. The Contractors also alleged that their tax obligations arising in the PSC, contained in the tax returns filed by NNPC with the Nigerian State tax authority (FIRS), were allegedly grossly overstated, and had led to overpayment of tax. Accordingly, and in compliance with the dispute resolution provisions of the

¹ Unreported Appeal No. CA/A/208/2012; handed down by the Court of Appeal, Abuja on 31st August, 2016.

PSC, the Contractors commenced arbitration proceedings against NNPC, seeking for declarations and reliefs *inter-alia* that: under the PSC, the Contractors were entitled to compute and allocate Tax Oil on the basis of their own prepared returns under the Petroleum Profit Tax (PPT) Act,² and that NNPC should be restrained from submitting tax returns and making tax payments that are inconsistent with the appellants returns.

Upon getting wind of the arbitration, FIRS (a non-party in the arbitration) appeared in the proceedings to raise an objection to the arbitral tribunal's assumption of jurisdiction, on grounds that the proceedings impugns on its (FIRS) statutory functions and powers to assess, collect, and account for taxes under the various tax legislations in Nigeria, particularly the Petroleum Profit Tax and Education Tax. The arbitral tribunal promptly overruled FIRS's objection.

FIRS headed to the Federal High Court, Abuja, citing both the Contractors and NNPC as Defendants, to seek for declarations *inter-alia* that the Contractor's claims before the arbitral tribunal is not arbitrable as the determination of such claims will impinge on FIRS's statutory powers, and that the reference of claims which touch on taxation, (a subject matter which is exclusively reserved for the Federal High Court under Section 251(1) of the Constitution of the Federal Republic of Nigeria 1999) to arbitration is unconstitutional, null and void. The Federal High Court upheld FIRS' arguments and granted orders which halted the arbitration proceedings. Dissatisfied, the Contractors appealed to the Court of Appeal.

Decision of the Court of Appeal:

The principal issues that fell for determination by the Court of Appeal were:

1. Whether the notice of arbitration by which Contractors/Appellants initiated the arbitration was validly issued?
2. Whether FIRS had sufficient interest or right (*locus*) in the subject matter of the arbitration?
3. Whether the claims submitted to the arbitration were contractual matters or tax matters; and if so, whether tax matters are arbitrable in Nigeria?

Dealing with the first issue; the court found that the Contractors' notice of arbitration was not signed by a legal practitioner who is qualified to practice in Nigeria, and was therefore ineffective (The significance of this point was discussed in an earlier note).³ Accordingly, it was held that the arbitration was not properly initiated, and that the proceedings before the arbitral tribunal were a nullity.

With regard to the second issue; the court disagreed with the Contractors' argument that FIRS' mere apprehension that its statutory function would be affected by the arbitration proceedings is not enough, and that FIRS ought to demonstrate how consensual arbitration proceedings between private parties to a PSC substantially impinges on its ability to assess tax. The court observed that a holistic reading of the relevant processes show that the claims before the tribunal are centrally and effectively tax disputes, being parties' disputations on the computations of various tax items in accordance with Petroleum Profit Tax Act (PPTA). The

² Chapter P13, Laws of the Federation of Nigeria, 2004.

³ See Kolawole Mayomi, *Foreign Counsel in Nigerian Arbitrations: How Far Can They Go?* available at: www.spajibade.com.

court also observed that the Contractors had sought declaratory reliefs in the arbitration and that, under the PSC, they are *solely* entitled to compute and allocate tax oil on the basis of the Contractor's own PPT returns. Meanwhile, Section 8(1)(a) and (b) of the Federal Inland Revenue Service Act (FIRSA) 2002⁴ provides that FIRS shall have *exclusive* powers of assessing, collecting, and enforcing payment of tax due to the Government of Nigeria or any of its agencies from persons, including companies and enterprises chargeable with tax. Furthermore, Section 25 of FIRSA endows FIRS with power to administer all federal tax legislations, including the Petroleum Profit Tax Act, in Nigeria. Accordingly, the court held that FIRS must necessarily have an interest in any proceeding in which disputes relating to the assessment, computing, and payment of taxes in accordance with the PPTA is to be determined.

With regard to the third issue; the thrust of the Contractors' argument was that the claims before the arbitral tribunal are purely contractual disputes arising under the parties' contract (the PSC), and are therefore arbitrable, and that the issues relating to computation of Petroleum Profit Tax were only ancillary reliefs in the course of the determination of the private contractual rights of the parties under the PSC. Again, the court was unpersuaded. The court stood by its earlier reasoning that the Contractors' claims before the arbitral tribunal were tax disputes arising from the application of the PPTA, and not contractual disputes. Turning to the point of arbitrability of tax disputes, the court referred to Section 251(1) of Constitution of the Federal Republic of Nigeria 1999 which provides that:

- “... the Federal High Court shall have and exercise jurisdiction *to the exclusion of any other court* in civil causes and matters –
- (a) *relating to the revenue of the Government of the Federation* in which the said Government or any organ thereof or a person suing or being sued on behalf of the said government is a party;
 - (b) *connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation...*”

Relying on the above Constitutional provision, the court then stated that: “*the above provision is a clear spelling, that when it comes to the revenue of the Government of Nigeria or its organ and on matters pertaining to taxation of companies and other bodies carrying on business in Nigeria, it is the Federal High Court that has exclusive jurisdiction to adjudicate upon same. There is no dispute about it. Therefore the claim filed before the tribunal, being substantially tax disputes, the tribunal would not have jurisdiction to pronounce upon them, as they are not arbitrable.*”

Comment:

In an earlier decision which shared similar facts with the instant case; *Esso Petroleum and Production Nigeria Ltd v. NNPC*,⁵ FIRS had similarly challenged the jurisdiction of an arbitration tribunal to decide claims which touched on tax matters. The Court of Appeal had adopted a ‘split the baby’ approach by holding that a contractual dispute under a PSC which resulted in the over lifting of crude oil to satisfy royalty and tax obligations under the PPTA was in essence a tax dispute and was therefore non-arbitrable. The court however held that disputes as to the contractual right to prepare tax returns and to determine the allocation of oil lifting between the

⁴ Federal Inland Revenue Service (Establishment) Act No. 13 of 2007.

⁵ Unreported Appeal No. CA/A/507/2012; handed down by the Court of Appeal, Abuja on 22nd July, 2016.

national oil company and the Contractor in the Production Sharing Contract were contractual claims and upheld the tribunal's award in that respect.

Commenting on the *Esso v. NNPC* case, it has been said⁶ that this decision is problematic as the confirmation of the Contractors' contractual right to prepare PPT returns and to calculate lifting allocation is, in reality, a pyrrhic victory for the Contractor parties, as any breaches which will result in overlifting of crude oil Appeal has been held to be a 'tax' dispute and non arbitrable. Accordingly, the scope and effectiveness of an arbitration clause in Nigerian PSCs remained unclear as a claim before a court may be met with an objection based on the existence of an arbitration clause, and conversely, a claim before an arbitral tribunal may also be met with an objection of non-arbitrability.

Coming away from the confusion created by *Esso v. NNPC*; it will appear that the court in *Shell v. FIRS* case (handed down barely 5 weeks after the *Esso* case) deliberately attempted to settle the question of the appropriate forum for the resolution of intra-parties disputes which touches on tax claims, by declaring that tax disputes are inarbitrable in Nigeria.

Whilst *Shell v. FIRS* meets the commendable objective of bringing clarity to the question of the proper forum for intra-parties tax disputes; unfortunately, the rationale of the court in arriving at its decision that the Federal High Court has exclusive jurisdiction to resolve tax disputes in Nigeria is questionable. For instance, the court relied on Section 251(1) of the 1999 Constitution which provides that the Federal High Court shall have and exercise jurisdiction *to the exclusion of any other court* to determine matters relating to the revenue of the Federal Government of Nigeria, and taxation matters. In our respectful view, this provision only seem to imply an exclusion of other "courts" (i.e. the various State High Courts which exercise general civil jurisdiction and the National Industrial Court which exercise jurisdiction in labour and employment claims), and does not exclude "arbitration tribunals" which have always been regarded as separate dispute resolution mechanism, and have never been regarded or classified as courts under Nigerian legal jurisprudence. Furthermore, if the court's argument on the "exclusive jurisdiction" of the Federal High Court is strictly applied, it is difficult to comprehend the basis of the court's acceptance that the Tax Appeal Tribunal (an administrative tax complaints tribunal that was created by the FIRSA) somehow shares in the "exclusive jurisdiction" of the Federal High Court to hear and determine tax disputes in Nigeria.

The above-highlighted inconsistencies in the above judgments of the Court of Appeal indicate that the question of the arbitrability of tax disputes remains unsettled in Nigeria. Indeed, it appears that the Contractors in *Shell v. FIRS* have taken steps to challenge the Court of Appeal's decision at the Supreme Court of Nigeria. It is hoped that the judgment of the Supreme Court (which is not imminent) will bring about the much needed clarity and certainty to this important aspect of commercial practice in Nigeria.

For further information on this article and area of law please contact Kolawole Mayomi, Esq., at S. P. A. Ajibade & Co., Lagos by telephone (+234 1 4605091), fax (+234 1 4605092) mobile (+234 8107251110) or email (kmayomi@spaaajibade.com).

www.spaaajibade.com

⁶ Funke Adekoya, SAN and Ibifubara Berenibara, "Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v. NNPC", available at [http://www.aelex.com/media/Esso/Esso/Esso%20Petroleum%20and%20Production%20Nigeria%20Limited%20%20SNEPCO%20v%20%20NNPC%20-%20Case%20Review\(1\).pdf](http://www.aelex.com/media/Esso/Esso/Esso%20Petroleum%20and%20Production%20Nigeria%20Limited%20%20SNEPCO%20v%20%20NNPC%20-%20Case%20Review(1).pdf); accessed on 20th December, 2016.