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APPRAISING TAXATION AND THE NIGERIAN OIL INDUSTRY

Prof. Richard Idubor (Ph.D)
Dean, Faculty of Law, University of Benin, Nigeria

Prof. Dominic Asada (Ph.D)
Faculty of Law, University of Jos

Olong Matthew Adefi,(Ph.D)
Associate Professor, Dept of Business Law, Faculty of Law, University of Benin, Nigeria.

Abstract
Taxation and oil ordinarily could be argued to have the semblance of source of income to power any economy. But in the larger picture there becomes the imperative to segment the terms to appraise the import each plays in a developing or fledging economy like Nigeria. The study therefore sought to look at ownership, management, control and the distinct nature of the oil industry whilst juxtaposing tax legislation, incentives and allowances accruable to players in the oil industry. In this lucid preparation, case law, reported and unreported cases were utilized. Text books, statutes, and opinions of jurists analyzed and internet materials resorted to. The position reflected the fact that taxation in the Nigeria oil industry should be effective as the pinnacle to reflecting the lives of the people as evidenced in the economy.
Keywords: Taxation, Oil Industry, legislation, incentives, ownership, management, control.

Introduction

Oil[1] is central to the administration of national and international economic both as a source of energy for generation of electricity (a source of power for machines) and as gas (fuel) for transportation of finished products to the ultimate consumer.

Oil is a major source of foreign exchange and income for countries with oil resources within their enclave. The economies of oil are therefore a major factor in shaping of economic, political and foreign policies of nations. The pricing of oil in international market has been institutionalized. The organization of Petroleum Exporting Countries (OPEC) constitutes a powerful bloc in oil and energy sector of world economy.

The importance of oil in world economy cannot be overemphasized. Indeed as has been noted by an erudite scholar,[2] that the role of oil in world economy is a major feature of the second half of the 20th century. It is both the most important source of energy and the largest internationally traded commodity. The scale of capital involved in oil development and exploitation, the scope of the trade in oil, the size, the sophistication and complexity of the organization involved and the potential financial rewards make the industry unique.

It is this importance of oil that led to the scramble for control of oil and energy resources of the World. The scramble for control of oil resources led to the emergence of a new term in the economic and political lexicon referred to as neocolonialism. The neocolonial blocs were represented by the International Oil Companies[3] (IOCs) or Multinational Oil Companies (MNOC's)[4] These IOCs' interest in virtually all instances run incongruous with that of the Host Communities (HC's) which is the oil producing community.

The clash of interests between the Host Communities (HC's) on the one part and the IOCs' of the other part led to the evolution of management and control policies by the HC for the effective harmonization and control of the resources within its territory. However, it must be stated that the relationship between the HC's (also known as Oil Producing Communities OPC) are mutually beneficial in that the OPC's which own the oil resources lack both the financial resources and the technology for mining, exploration and exploitation of crude oil. The IOC's on the other part require the oil if they are to maintain their position as industrialized nations of the world. Though the terms of such relationship are sometimes tilted in favour of the IOC.

The aim of this paper is to take a look at the following areas, ownership, management and control of the oil resources, the distinct nature of the oil industry. Tax legislation regime and aim of taxation in the oil industry and tax incentives and allowances accruable to players in the oil industry for the overall effectiveness of taxation in the oil industry.

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[1] Oil means crude oil as defined in Section 15 Petroleum Act Cap P10 LFN 2004. However reference to oil will also include petroleum as also defined in the section. Crude oil means oil in its natural state before it has been refined.

[2] Atseghua, L. *Oil and Gas Law in Nigeria. Theory and Practice* (Nigeria: New Era Publication, 2003) at p. 33.
[3] Ibid.
[4] Nwete, B.O. N.: "How Can Tax Allowances Promote Investment in the Nigerian Petroleum Industry" (Internet:last, accessed 23/8/2013)

Ownership, Management and Control

The ownership, management and control of oil resources in Nigeria is recognized by the United Nations Organization (UN). In 1962, the General Assembly of the United Nations deliberated and adopted Resolution 1803, (xvii) titled "Permanent Sovereignty over Natural Resources".[5]. this resolution changed the ownership structure of natural resources from investor ownership to state control of natural resources and in the 1970s, this led to the expropriation and nationalization of some of the IOC's by the HC's.

Though prior to the 1962 resolution, Latin America Countries had in 1952[6] attempted to vest oil resources in HC in that contract between the HC and IOCs'. This became impossible because they issues within national laws and not international Law. This became known as the Calvo Clause.

The said Resolution 1803 (xvii) December, 1962[7] provides *inter alia:*

1. The rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of National development of the well being of the people of the state concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the people and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
3. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or national interest which are recognized as overriding purely individual or private interests both domestic or foreign. In such cases the owners shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case, where the question of compensation gives rise to a controversy the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties concerned, settlement of dispute should be made through arbitration or international adjudication.
4. The free and beneficial exercise of the sovereignty of people and nations over their natural resources must be furthered by the mutual respect of states based on their sovereign equality.
5. Violation of rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the charter of the United Nations operations and the maintenance of peace.
6. Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith.

The whole essence of Resolution 1803 (xvii) December 1962 is to vest control of the natural resources in the people of the state. It recognized the right of the people to control their natural resources and enter into contractual agreement with persons and companies for the exploitation and control of resources accruing from such natural resources. It also empowers the state vested with control of natural resources to nationalize, expropriate and/or requisition accrued rights or interest on grounds of public utility, security or public interest upon payment of appropriate compensation.

The Federal Government of Nigeria encapsulated the United Nations Resolution 1803 (xvii) 1962 on Permanent Sovereignty over natural resources into Nigerian Constitution and other statutes. The Constitutions of Federal Republic of Nigeria provides:

Notwithstanding the foregoing provision of this section, the entire property in and control of all mineral, oils and natural gas in, under or upon any land in Nigeria or in under or upon the territorial waters and exclusive economic zone of Nigeria shall vest in the government of the Federation[8]

Furthermore, the Petroleum Act[9] provides that:

"The entire ownership and control of all petroleum under or upon any lands to which the section applies shall vest in the state"

The transmutation of Resolution 1803 into municipal law is in line with the principle that for an international treaty to be binding in Nigeria, it must be incorporated into the Nigerian Municipal Laws. Section 12(1) of the Constitution of the Federal Republic of Nigeria 1999[10] provides thus:

No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. The principle was given a judicial application by the Supreme Court of Nigeria[11].

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5 Omorogbe, Y. *Oil and Gas Law in Nigeria,* (Lagos: Malthouse Law Books Publishers, 2001)p. 35
6 General Assembly Resolution No. 626 (vii) of December, 21, 1952.
7 C.J. Dakas "The Juridical Character of United Nations General Assembly Resolutions on Permanent Sovereignty over Natural Resources". (1996) CJLJ Vol. 2, No. 2 at p44
8 Section 44(3) Constitution of the Federal Republic of Nigeria 1999.
9 Section 1(1) Petroleum Act, Laws of Federation of Nigeria 2004
10 Section 12 Constitution of the Federal Republic of Nigeria 1999.

It is common ground that this law is indeed an international treaty as it was the product of the organization of African Unity of which Nigeria is a member. It is also common ground that Nigeria in accordance with the protocols enshrined in the charter, caused through the National Assembly of our municipal law, all the provisions of the African Charter on Human and People's Right. In view of the foregoing, the Federal Government of Nigeria has absolute ownership and control of the natural resources within her enclave and on about 200 nautical miles on the continental shelf.

The principle of ownership of natural resources came up for consideration before the Supreme Court of Nigeria when the Attorney General of the Federation sued the government of the littoral states of the Federation seeking constitutional pronouncement as to the status of the Federal Government and the littoral states with respect to ownership and control of natural resources.[12]

The issue before the Supreme Court was for the determination of the seaward boundary of a littoral state within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation account directly from any natural resources derived from the state pursuant to section 162(2) of the Constitution of Federal Republic of Nigeria 1999.

The full panel of the Supreme Court (PER Wali JSC) Held *inter alai* that none of the littoral states is sovereign despite the historical narration by some of them. They are all part and parcel of the sovereign independent state of Nigeria. None of them can exercise any control beyond the landmass of their respective state. They cannot claim that revenue accruing from mineral resources off shore belong to any of them whatever revenue accrues from drilling belongs to the whole of the federation of Nigeria based on section 162 of the 1999 Constitution.[13]

A cursory reading of the provisions of the Constitution, the statute and the judicial exposition by the Supreme Court are pointers to the fact that the ownership, administration, management and control of natural resources lies with the Federal Government of Nigeria. It is this ownership structure that has imbued the Federal Government of Nigeria with powers to issue oil exploration licenses; oil prospecting licenses; oil mining leases etc.[14]

Nature of the Oil Industry

The oil industry is a peculiar one. The reasons for its peculiarity are obvious. These range from (1) the high risk level in the exploration and exploitation of oil (ii) the high cost of investment, (iii) the high rate of environmental pollution and the attendant opposition by the host communities (iv) lack of indigenous trained personnel.

High Risk Level

The first step is for the IOC's to apply for mining licence or oil prospecting licence and huge fees are paid to obtain these licenses. The IOC's then mobilize men and materials to the site and carry out geological survey and excavation. In the course of the survey and/or exploration, it may hit oil. Where the oil so found is in commercial quantity, the IOC then applies for oil mining lease which grants exclusive right over the lease area and covers interest over the petroleum discovered within the area covered by the lease. The fact that the IOC may not discover oil commercial quantity makes the venture dreary.

The High Cost of Investment

The cost of investment in the oil sector of the economy is so great that the host communities and the state cannot afford such a venture. The technology required is also not available to the HC's. Therefore they must partner with the IOC's for mutual benefit. A commentator on mineral and petroleum taxation[15] captured the issue succinctly when it stated:

> "From exploration to eventual production, the cost of developing and operating an oil field is very high and probably higher than any other industry. The technology needed for all activities in the industry is very expensive. The scale and size of investment is usually very high and at times higher than the mining industry. The total market capitalization of listed companies worldwide is more than $ 1000 billion, while commercial banking lending to the industry is an annual overage of US$ 1billion ranking it the biggest in terms of size and scale of investment.."

[11] Abacha v Fawehinmi (2001) vol. 51 WRN 29 at 164-165.
[12] *Attorney – General of the Federation v Attorney General, Abia State & Ors* (2002)11 NWLR (Pt. 725) 680
[13] Ibid.
[14] See Schedule 1 Petroleum Act LFN 2004.
[15] Nwete, B.O.N.: "How can Tax Allowance Promote Investment in the Nigerian Petroleum Idnsutry" – bonlawyahoo.co.uk. internet

High Rate of Environmental Population

Oil prospecting, exploration and mining activities is the single greatest factor responsible for environmental pollution in the Niger Delta of Nigeria. Environmental pollution has destroyed other ecological species thereby depriving the inhabitants of the Niger Delta of their means of livelihood. This has pitched the indigenes against the IOC's which for the umpteenth time has led to the disruption of oil exploration and mining within the Nigeria Delta Region.

It has also been observed[16] that reckless petroleum exploitation over the years has turned the Niger Delta region into what could be described as the "World's most polluted Delta or Niger Delta". The volume of pollution of the Niger Delta region was clearly illustrated by a magazine "Africa Today" which quoted a World Bank source and stated that the quantum of pollution arising from the discharge of oil contaminated water into inland and coastal waters of the Niger Delta is quite alarming. According to the said report:

The environment is also degraded by the discharge of oil-contaminated water into inland and coastal waters. One barrel of the oil is produced along with every two barrels of water. This was mixed with oil and chemicals are poorly treated before being discharged into the environment. For Nigeria two million barrels of oil per day, one million contaminated water is discharged into the environment.[17]

Lack of Indigenous Trained Professional Personnel

The oil industry is in its embryonic stage in Nigeria. The industry lacked local personnel thus the influx of artisans imported and described as impartial by the IOCs. This led to the policy by the Nigerian Regulatory agency the Department of Petroleum Resources in conjunction with the Nigerian National Petroleum Corporation that the IOC's must undertake the training of Nigerians for specialized role in the oil industry. This policy also led to the establishment of the Petroleum Training Institute in Warri, Delta State.

Taxation in the Oil Industry

Since the main discourse of this paper is taxation in oil industry, it will therefore not be out of place to attempt a brief definition of taxation. "Taxation is a monetary charge imposed by the government on persons, entities, or property to yield public revenue. Most broadly, the term embraces all governmental impositions on occupation and enjoyment of the people and include duties, imports and exercises. Although a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money"[18]

The imposition of tax by government of an independent state is incidental to the exercise of sovereignty over its subject and entitles within its geographical control.

Thomas M. Coiley[19] stated that "taxes are the enforced proportional contributions from persons and property levied by the state by virtue of its sovereignty for the support of government and public needs". Thus it is sovereignty that confers the power to levy tax by the government of a state.

The Federal Government of Nigeria is a sovereign state and is empowered (under the United Nations Resolution on Permanent Sovereignty over Natural Resources which has been enacted into municipal laws) to pass laws aimed at controlling its resources i.e the Petroleum Act. Sequel to this, the Government also imposes tax, levies, royalties, bonuses and other diverse forms of tax in the Nigerian Petroleum/oil industry.

The Revenue Generation Function of Taxation in the Oil Industry

The Government is obliged to provide certain infrastructure to its citizenry. One of the mode of raising capital for such projects include levying of tax. The essence of such tax is to enable the government fund public corporations which provide infrastructure and services to the people.

It is trite that oil is a national wealth which belongs to the entire nation. Indeed a writer stated that:[20]

> Before oil became the major foreign exchange earner for Nigeria, apart from taking a premier place as the nation's product, the principle of sharing moneys paid into the distributable pool revolves a sound derivation. This was when Nigeria relied on cocoa and groundnut as the main revenue earners for the country… When, however, oil was discovered in large quantities in the area which constituted the southern minorities and the revenue from this source became the mainstay of the country, the same political leaders from the majority tribes who had piously preached the principle of

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[16] S.C. Peters: Niger Delta: Why the quest for Resource Control: Centre for Publications (2002) page 11.
[17] See Africa Today, Voice of the Continent September/October 1996 page 31 also ibid.
[18] Blacks Law Dictionary, 7th edition 1469.
[19] Corley, T.M. *The Law of Taxation* 4th ed. P. 61.
[20] Though the Niger Delta people do not accept the notion that oil is a national wealth which does not belong to any section of the nation even though the Federal Government has sought to ameliorate the hardship by intruding the principle of derivation whose percentage is now a contentious issue

derivation began to introduce elements which would be beneficial to themselves in sharing funds accruing to the distributable pool.[21]

Taxation is therefore a veritable tool for the exercise of control over natural resources with a view to discouraging rapid depletion of those resources by the IOCs and providing necessary infrastructures and services for the welfare of its citizens.

Taxation is a medium for the redistribution of wealth of nations. It has been stated earlier that the relationship between the HCs and the IOCs was mutually beneficial in that the HCs had the natural resources while the IOCs had the finance and expertise. The HC's imposed tax rent and royalties on the profit made by the IOCs and by the method realized revenue for her national development.

Some scholars have stated that the primary purpose of taxation is to generate revenue for government expenditure. It has been further reiterated that the importance of taxation lies primarily in "its ability to raise capital formation for the public sector for the development and growth of the economy. Taxation also assists in the regulation of the consumption pattern resulting in economic sterilization and effective redistribution of income…[22]"

It is important to note here that in the Nigerian oil industry, tax is regulated by five principal legislations depending on the nature and scope of operation of such companies. These are namely:

1. Petroleum Profit Tax Act Cap p 13 LFN 2004
2. Companies Income tax Act LLLFN 2004
3. Personal Income Tax Act LFN 2004
4. Education Tax Act
5. Value Added Tax Act LFN 2004

In stating the scope or ambit of the Petroleum Profit Tax Act (PPT) it preamble stated thus:

An Act to impose a tax upon profits from the winning of petroleum in Nigeria, to provide for the assessment and collection thereof and purposes connected therewith.

Apparently, oil companies involved in oil mining are taxed under the Petroleum Profit Tax Act (PPT), While companies involved in transporting, marketing and servicing companies are taxed under the Companies Income Tax (CITA) regime. The Personal Income Tax Act (PITA) regulates tax payable by employees in the oil industry.

Since our main in this paper is on the perspectives of taxation under Petroleum Profit Tax Act, section 8PPT is reproduced hereunder. It provides that:

There shall be levied upon the profits of each accounting period of any company engaged in petroleum operations during that period, a tax to be charged, assessed and payable in accordance with the provision of this Act.

We must not forget the fact that the IOC's entered into the Nigerian oil industry by obtaining rights from the Nigerian government through its relevant agency and that there are different kinds of rights acquired in the industry. Furthermore, it is the nature of the right (concession) acquired that determines the nature of tax to be paid by the IOCs[23]

These include the Following:

a. Concession
b. Production Sharing Contract
c. Risk Service Contract
d. Pure Service Contract
e. The Technical Assistance Contract

In the Nigerian oil industry, acquisition of rights is mostly by Joint Operating Agreement and production sharing contract, while Risk Service Contract, Pure Service Contract and Technical Assistance Contract are not applicable. Concessions were mostly in the form of Joint Operating Agreement (JOA). A joint operating agreement is a contract between two or more parties establishing and setting out the terms between the parties under which petroleum exploration, development and production operations will be conducted.[24]

The joint operating agreement spells out the rights, duties and obligations of the parties with respect to the license area and the operation in its entirety.

The forms of tax imposed on petroleum activities include the following:

[21] A paper dated 24/94 titled what All Southern Minorities must know pages 5 also quoted in Niger Delta: Why the quest for Resources Control S.C. Peters.
[22] Olugbenga Shoyele & Dominic Asada: The Legal Regime of Corporate Taxation in Nigeria: An Appraisal for Management 1996 CJLJ Vol.. 2 No. 2 at pp. 66-67.
[23] Omorogbe Op. cit at p. 38
[24] Atsegbua, op. cit at p. 91.

Bonus or Premium

These are monies paid by the oil companies for the grant of oil prospecting license, production sharing contract and for marginal field allocations. The payment of signature bonus in the Nigerian oil industry is well entrenched. The Supreme Court of Nigeria Per Mohammed JSC stated thus[25] of recent:

> There was an offer on the 8th of March 1999 from, the appellant to the respondent. Three of the conditions of the offer are important (1) Payment of application and bidding fees of N50, 000.00 and N10.000 dollars respectively. (1) *Payment of signature bonus and reserved value of N0 million US Dollars* (3) and confirmation of acceptance of the offer within 30 days from 8th March 1999… (Underlining mine). Where the monies are not paid within the stimulated time and in the denominated currency, it vitiates the contract.

Fees

By the provisions of paragraph 30 of the first schedule to the petroleum Act and Regulations 58 (Part VI) of the Petroleum (Drilling and Production Regulations (as amended in statutory instrument No. 3 of 2001) the following fees are payable in respect of an oil prospecting license (Opl) and oil mining lease (Oml)

a. Application for Opl and Oml US 100,000 and US $ 50,000
b. Processing fees in respect of an OPL Application us 10,000
c. Application for renewal of an Oml US $ 1,00.000
d. Application to withdraw any of the above mentioned application… N20,000
e. Application to assign or sublet on contract an Opl or Oml…. N500,000
f. Application to terminate or effect partial surrender of an Opl or Oml.. N50,000

Rents

Rents are paid annually as consideration for the concession of the oil prospecting license (OPL) and the Oil mining lease (OML) granted to the company. In Regulation59 (Paragraph 2) of the petroleum (Drilling and Production) Regulations (as mended in statutory instrument No. 3 of 2001) they are as follows:

a. Oil prospecting Licence- for each square mile US $ 19
b. Oil Mining Lease for each Kilometer thereof US $ 20.00 for the first ten years and upon renewal… us $ 15.00

Royalties

Royalties are payments made by IOC's to the HC as compensation, for the exploitation of irreplaceable natural resources. It is paid based on a percentage of the quantity of oil produced. It is fixed as follows:

i. On shore production – 20%
ii. Off shore up to 100m – 18.5%
iii. Off shore 100m- 200m-16.6%
iv. Off shore 20lm-500m – 12.00%

Oil Terminal Dues

This is another form of tax paid by the IOCs to the Nigerian Ports Authority in respect of all oil evacuated from oil terminals in accordance with the Oil Terminal Dues act and the Nigerian Ports Act.

Education Tax

This tax is imposed under the provisions of Education tax Act 1993, on the assessable profits of the IOCs. The tax rate is 2% of the assessable profit which is assessed and collected by the Federal Board of Inland Revenue at the time of assessing the tax payable by the IOC.

Value Added Tax

This is a consumption tax changed and paid by both persons and companies on consumables. Companies engaged in petroleum operations pays 5% as value added tax to the coffers of the Federal Government of Nigeria[26].

[25] F.G.N v. Zebra Energy Ltd (2003) Vol. 3 WRN 1 at 29-30
[26] Report of the Tribunal of Inquiry into Crude Oil Sales (1980).

Bu it would appear that in practice the tax rarely take effect because of fear of inflation in petroleum products. The Joint Venture Agreement was the old model production sharing contract which was lopsided in favour of the IOC's and a Tribunal of Inquiry[27] stated that

The production sharing contract certainly has no benefits whatsoever as it stands today, it is lopsided in favour of Ashland Oil of Nigeria AON.

The above criticism amongst others, led to the reformation of the PSC in September 1990 and again in March 1991. The assessment for the two fiscal regimes JVA and PSC is governed by the Petroleum Profit Tax Act which puts tax rate generally at 85%. Production from joint ventures account for about 97% of the country's crude oil production. This analysis therefore centers on the two models.

Assessable Tax Under PPTA

Section 1(1) PPT Provides

The assessable tax for any accounting period of a company shall be an amount equal to 85% of its charge able profit for that period[28]. While pursuant to subsection 2 (PPT) the tax rate is 65.75% for new field before production.

The rate of taxation is also not fixed as same is determined by the nature of the right acquired i.e. whether on-shore or off—shore. A learned author[29] classified these as follows:

> …The normal petroleum profits tax rate as specified under the Act is 85%. For new fields, the rate is 65.75% before production and 85% after production has commenced. For production sharing contracts in respect of shallow water concessions the tax rate if 65.75% fr first five years before production. After production the rate of 85% applies…

Section 22 Petroleum Profit Tax Act Cap p13 LFN 2004 provides

1. A crude oil producing company which executed a production sharing contract with Nigerian National Petroleum Corporation in 1993 shall throughout the duration of the production sharing contract, be entitled to claim an investment tax credit allowance as an offset against tax in accordance with the provisions of the Production Sharing Contract.
2. The investment tax credit applicable to the contract shall be 50% that rate of charge able profit for the duration of the production sharing contract.
3. In computing the tax payable, the investment tax credit shall be applicable in full to petroleum operations in the contract area such that eh chargeable tax is the amount of the assessable tax less the investment tax credit.
4. The chargeable tax computed under subsection 3 of this section shall be split between the Nigerian National Petroleum Corporation and the crude oil producing company in accordance with the proportion of the percentage of profit of split.

The chargeable tax is the amount paid after deduction of allowable deductions made pursuant to section 10 of the PPTA which are as follows:

a. Royalties for locally disposed chargeable oil
b. All non-productive rents
c. Specified customs and excise duties in respect of plant storage tanks, pipelines, tools, machinery and equipment essential for use in the companies operation
d. Gifts and donations were deductible expenses.[30]

In determining the above issues, at the Supreme Court, upon appeals from both the high court and the court of Appeal respectively, the apex court had to consider whether[31]:

i. The exchange losses incurred by Shell were "outgoings and Expenses wholly, exclusively, and necessarily incurred for the purpose of petroleum operations" and whether they are expenses incurred in respect of tax on its profits[32]. Whether the Central Bank charges incurred by Shell were:
a. Outgoings and expenses wholly, exclusively, and necessarily incurred for the purpose of petroleum operations[33]
b. The sum the liability for which were incurred to the Federal Government by Shell Dev. Company by way of rate, impost fee or other like charge.

[27]. Section 8 Value Added Tax Act Decree No. 102 of 1993 now Laws of Federation of Nigeria 2 004.
[28] Section 21(1) Petroleum Profit Tax Act Cap p13 LFN 2004
[29] Omoregbe, op. cit at p. 70
[30] (1996) NWLR Part 466 at p. 285.
[31] The Federal High Court found for Shell Dev. Company in the affirmative.
[32] Again, the Court of Appeal found for Shell Dev. Company in the affirmative.
[33] A found by the Federal High Court

c. Whether scholarship expenses were expense outgoing incurred wholly and exclusively for the purpose of the petroleum operation

Other issues discernable in the case are:

i. The legal effect of extras statutory agreements between the Federal Government and the companies engaged in petroleum operations varying the mode of payment of petroleum profits tax whether it was illegal or contrary to public policy
ii. The application of the principle of accord and satisfaction to the law of taxation.

The Supreme Court in allowing the Appeal of Shell Dev. Company held:

a. Concerning the issue of exchange losses that it is incidental for Shell to pay debt for the purpose of petroleum operations and that Shell could not have incurred the exchange losses but for the agreement between the Shell and the Federal Government directive. If the payment of tax had been made in local currency no exchange losses would have been incurred.
b. In respect of Central Bank of Nigeria charges, the apex court held that: the payment of Bank charges to Central Bank of Nigeria on the directive of the Federal Government was expenses incurred in the course of Shell business which was petroleum operations and so deductible
c. And concerning scholarship expenses the Supreme Court held that:

The creation of a scholarship scheme is a statutory obligation to be observed by the Shell. It was one of the things that had to be performed as incidental to the carrying on of its business and as such they are deductible expenses.

It would seem that the Supreme Court in constructing the provisions of the DPTA in this case did not do so strictly but applied the ordinary meaning of the phrase "petroleum operations". No doubt this is a landmark decision anchored on the principle of equity.

A year after the decision in Shell case, the same reasoning informed the courts decision in *Gulf oil Co. Nig. Ltd. V Federal Board of Inland Revenue*.[34]

Incentives and Allowances Accruable to the IOCs

The Nigerian National petroleum Corporation (NNPC) and the Ministry of Petroleum Resources are aware of the heavy financial burden with which the IOC is saddled by way of high cost of investment, tax regime and the volatile nature of the Niger Delta. In order to cushion the effect of these, certain tax allowance and incentives are made. These incentives are in the nature of:

i. Allowable deductions
ii. Capital allowance
iii. Petroleum Investment Tax Allowance/Tax Credit Allowance

Allowance Deductions

It has been stated in the course of this paper that chargeable tax is the amount of tax paid after deduction of allowable deductions made pursuant to the provisions of section 10 PPTA. Allowable deductions are treated as charges against income and not as tax offsets and are wholly incurred in the process of petroleum operations. Allowable deductions include the following:

a. Rent incurred by the IOC for the period in respect of land or buildings occupied under an oil prospecting license or an oil mining lease for disturbance of surface tights or for any other like disturbance.
b. All non-productive rents, the liability for which was incurred by the IOC during the period.
c. All royalties, the liability for which was ncurred 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 any other commercial manner.
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 IOC to the Federal Government of Nigeria during that period by way of customs or excise duty or other like charge levied in respect of machineries, equipment and goods used in the company's petroleum operation.
f. Sums incurred by way of interest upon any money borrowed by such company, where the board[35] is satisfied that the interest was payable in capital employed in carrying on its petroleum operations.

[34] (1997)7 NWLR (Pt. 514) p. 699
[35] i.e. Federal Board of Inland Revenue.

g. All sums incurred by way of interest of any inter-company loans obtained under terms prevailing in the open market, that is in London inter-Bank Offer rate, by companies that engage in crude oil production operations in Nigerian oil industry.
h. Any expenses 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, utensil or articles so employed.
i. Debts directly incurred to the company (IOC) 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 the deduction so made does not exceed the portion of the debt proved to have been doubtful during such accounting period.
j. Any other expenditure, including tangible drilling cost directly incurred in connection with the drilling and appraisal of a development well, but excluding an expenditure which is qualifying expenditure for the purpose of the second schedule to the petroleum profit Tax Act, and any expenses or deduction in respect of a liability incurred which is deductible under any other provision of the Act.
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 of fund as the Board may prescribe.
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 excuse duties stamp duties, education tax, tax (other tan tax imposed by this act) or any other rate, fee or[36] other like charges .

Capital Allowances

This is another incentive/allowance granted the IOC pursant to the second schedule of the petroleum profits tax act 1990 and section 20 PPTA.

i. The chargeable profit of any company for any accounting period shall be the amount of assessable profit after deduction of any amount allowed under the PPTA as capital allowance.
ii. In calculating the deductible amount under this head, it shall be ensured that the amount of tax chargeable on the company is not less than 15% of the tax which would be chargeable on the company for the period of no deduction, where to be made under section 20 PPTA for the period.
iii. The amount allowed as capital allowance deduction shall be an aggregate amount computed under the second schedule of the PPT or a sum equal to 85% of the assessable profits of the accounting period less 170% of the total amount of deduction allowed as petroleum investment allowance (which ever is the less).

The said capital allowance are granted for qualifying capital expenditure at a depreciating rate of 200% (1-4 years) 19% for 5th year and 1% of the asset value is retained in the account books until it is disposed.

Investment Tax Allowance/Tax Credit[37]

This is available where a crude oil producing company executes a production sharing contract with the NNPC. It is claimed as a tax offset. Again, under section 22 of the PPTA 2004 and subject to the provisions of the second Schedule to the PPTA, where a company has incurred any qualifying capital expenditure wholly, exclusively and necessarily for the purpose of petroleum operations, carried out by it, there shall be due to that company for the accounting period in which that asset was first used or for the purpose of such operation an allowance of 5% for on-shore operations and 10% for operations in territorial waters and continental shelf areas up to and including 100 metres of water depth.

Conclusion

Having so far attempted an x-ray of taxation not only as a revenue generation instrument but also a viable supporting too for the oil industry, notwithstanding, we note with dismay that the 85% Petroleum Profit Tax is on the high side. Indeed it is one of the highest in the world. The 15% minimum tax liability is a great burden on a company who is still in the process of recouping this investment capital through amortization process. The tax regime should be flexible to accommodate charges in the industry. In a similar vein, we also recommend that the judicial system should be reformed to support the industry. In a situation where a tax matter involving an oil

[36] Section 11(1) of the Act specifies the list of deductions not specifically allowed. Some of these are any capital withdrawn or any sums employed or intended to be employed as capital, any capital employed in improvement as distinct from repairs and the depreciation of any premises, buildings, furniture, works of permanent nature, plant, machinery and fixtures
[37] This investment tax credit is available throughout the duration of the production sharing contract. And it shall be fifty percent flat rate of chargeable profit.

company was litigated upon about twenty years, leaves much to be desired. Such a judicial system that crawl at snail pace does no good to the tax system and the industry as well.

The Reserve Additional Bonus (EAB) which is an incentive for oil companies, which have explored and discovered new wells (which turns increase revenue of the government) should be re-introduced. This will increase exploration activities. RAB is a financial bonus by way of tax offset against assessable tax given to a company which has added more oil to Nigeria's reserve than the quantity produced by the company in the previous year. It was discontinued in the year 2000.

Having said these, we also detest the evasive attitude of the oil companies towards the payment of tax. As recently noted by a daily Newspaper:

"The Consultants have said the amount recoverable by the government from Chevron would be $10 billion which should include penalty of $8.1 billion because all the evasions were infringement of Section 50(1) of the Petroleum Profits Tax Act (PPTA) 1959 as amended"[38].

It is the evasive attitude of the oil companies (IOC's) in payment of royalties and taxes as shown above that has prompted the Federal Inland Revenue service to embark on audit of the Oil Companies[39] to forestall rampant cases of tax malpractices in the payment of taxes by oil companies to the Federal Government. Another method adopted by the government aimed at checkmating tax evasion and other fraud in the oil industry was constituted by the Extractive Industry Transparency Initiative (EITI), aimed at compelling some oil companies to publish their Statement of Account which was hitherto shrouded in mystery. Shell Petroleum Development Co. (SPDC) and its going venture partners were made to pay N415.9 billion taxes to the Federal Government. Commenting on the efficacy of the current Federal Government Policy, Mr. Paul Omoku, Shell Spokesman said that:

Shell has published its reports in printed and Compact Disc (CD) in order to make information available to all adding that this is in line with the Federal Government's policy on Extractive Industry Transparency Initiative[40]

Finally, we once again emphasized the fact that the government must endeavors to ensure a reduction in tax payable by the IOCs. 85% is definitely on the high side. The IOCs must be encouraged to invest in the exploration of virgin wells and ancillary research projects as well as training of indigenous expertise for the industry.

[38] The Punch Newspaper edition, Monday August 15, 2005 back page
[39] The Guardian Newspaper Monday, August 15 2005.
[40] Ibid.