ASSESSMENT OF PETROLEUM PROFIT TAX UNDER THE NIGERIAN TAX LAWS

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DECLARATION

I Yusha'u Shaikh Uthman, declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented or published in any where and any time by anybody, institution or organization.

All quotations are indicated with specific acknowledgements and the sources of information are specifically acknowledge by means of references.

……

Yusha'u Shaikh Uthman

2008

CERTIFICATION

This thesis entitled "ASSESSMENT OF PETROLEUM PROFIT TAX UNDER THE NIGERIAN TAX LAWS by Yusha'u Shaikh Uthman meets the regulations governing the degree of master of laws (LLM.) of Ahmadu Bello University , Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my late father Alhaji Shaikh Uthman and my mother Hajiya Maryam. May Almighty Allah cover them with His infinite mercy and reward them abundantly as they did everything possible for me to grow up with sound and higher education.

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ABBREVIATIONS

CBN:	Central Bank of Nigeria
CGTA:	Capital Gain Tax Act
CITA:	Companies Income Tax Act
CLR:	Commercial Law Report
COMD:	Crude Oil Marketing Department
FBIR:	Federal Board of Inland Revenue
FIRS:	Federal Inland Revenue Service
FMTPD:	Finance Miscellaneous Tax Provision Decree
FRC:	Federal Revenue Court
GNM:	Guarantee Notional Margin
GT:	Government Take
JV:	Joint Venture
JVA:	Joint Venture Agreement
KB:	Kings Bench
LFN:	Laws of the Federation of Nigeria
MEND:	Movement for the Emancipation of Niger Delta
MNOC:	Multi-National Oil Companies
MOU:	Memorandum of Understanding
NAPIMS:	National Petroleum Investment Service

NCLR: Nigerian Commercial Law Report

NNPC: Nigeria Nation Petroleum Corporation

NTC: Notional Technical Price

NWLR: Nigerian Weekly Law Report

OML: Oil Mining License

OPL: Oil Prospecting License

PITD: Petroleum and International Tax Department

PPD: Petroleum and Pioneer Department

PPT: Petroleum Profit Tax

PPTA: Petroleum Profit Tax Act

PSC: Production Sharing Contract

RAB: Reserve Additional Bonus

RGT: Reverse Government Take

SC: Supreme Court

TC: Technical Cost

TIP: Tax Inversion Penalty

TR: Tax Report

TRP: Tax Reference Price

TTC: Total Technical Cost

VATA: Value Added Tax Act

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CHAPTER ONE

1.0 GENERAL INTRODUCTION

1.1 Introduction

Petroleum Profit Tax Act provides that:

> Assessment of tax shall be made in such form and in such manner as the Board shall authorize…[1]

But neither the Petroleum Profit Tax Act nor any other tax law in Nigeria made any provision for the definition of the term "tax" or the phrase "assessment of tax" or "the assessment of petroleum profit tax".

In an Australian case of Mathews v. Chicory Marketing Board[2], a tax has been defined as "a compulsory exaction of money by a public authority for public purposes, or taxation is raising money for the purpose of government by means of contributions from individual persons."[3] In addition, Mr. Justice Roberts, in an American case of United State v. Butler[4], defined tax as follows:

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[1] Section 37(1) Petroleum Profit Tax Act {PPTA}, Cap. P13\, Laws of the Federation of Nigeria [LFN], 2004.
[2] [1938] 60 C.L.R.263.
[3] Ayua, I.A. Nigerian Tax Laws. Spectrum Law Publishing, Ibadan, 1st edition (1996) p.3.
[4] 2279U.S 1 [1946] 61.

A tax in general understanding of the term and as used

in constitution, signifies an exaction for the support of government."[5]

Accordingly, tax is not an optional payment or voluntary donation to the government. It is rather, a kind of an enforced contribution exacted in accordance with the legislative authority. Therefore tax, in modern period takes the forms of pecuniary burden laid upon individuals or property to support government. It is normally imposed by statute.

The term "assessment" and the phrase "assessment of tax" as well, have also no statutory definition as mentioned earlier. The word 'assessment' has been defined in the Oxford Dictionary as:

"(i) A carefully considered opinions and judgment…

(ii) The action of assessing somebody or something …

(iii) An amount fixed for payment…" [6]

The Chamber Dictionary also defined 'assessment' as:

"(i) The examining of income and profit to calculate the amount of tax to be paid.

(ii) The valuing of property to calculate the amount to be paid

[5] Ayua, Loc. cit., p.4.
[6] Hornby A.S. Oxford Advanced Learner's Dictionary. Oxford University Press, 5th ed. (1995) p.61.

in rate.

(iii) The amount of a tax or charge."[7]

Longman Dictionary also defined the word as:

"(i) A process in which you make a judgment about a person or situation

. (ii) A calculation about the cost or value of something e.g. tax assessment."[8]

Furthermore, many different words are synonymously applicable with the term. Determination, calculation, estimation, evaluation, consideration appraisal and judgment inter alia, are all synonymous to it.[9]

Therefore the term "assessment" in it literal sense has a broad meaning. It is a process for taking decision and final judgment about a person or a situation or any other thing.

In its technical sense, the phrase 'assessment of tax' or 'tax assessment' in other words, has been defined as "the process of

[7] The Chamber's Dictionary. Chambers Harrap Publishers ltd, Edinburgh, (2001), p.23.
[8] Longman Dictionary of Contemporary English, Longman, 3rd ed. (2001), P.66.
[9] Martin, H.M. Chambers Dictionary of Synonyms and Antonyms. Chambers Harrap Publishers (ltd), Edinburgh, (2001), p.23.

measurement of a taxable person's tax obligation and putting him on notice in respect thereof."[10]

Another contribution on this issue came from a scholar Okonkwori. In his book, he categorically stated that "an assessment of tax could be defined as a process whereby the tax officers and tax payer come together and have discussion concerning the general state of the business in order to ascertain what to pay as tax"[11] In the same vein, professor Ayua simply defined it as "the process whereby the taxable income of taxpayers is ascertained."[12]

Assessment of tax generally involves ascertaining the base of assessable profit of the tax, granting all the relieves and allowances as may be prescribed by law and applying the relevant tax rate. Therefore, assessment of petroleum profit tax could also be defined as the process whereby profits, adjusted profit, assessable profits, chargeable profit, assessable tax and chargeable tax of an oil producing company are all ascertained.

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[10] Ogundele, E.A., Element of Taxation, Library Service Nigeria (ltd), Lagos, 1st ed. (2000),p.278. See also Ohagwa, I.C., "Assessment, Collection and Accounting for Taxes"' A Paper presented at the workshop on a Capacity Building for Finance Correspondents in Abuja. Held at Bolingo Hotels Abuja, On Tuesday and Wednesday 22nd and 23rd March, 2005, p. 6

[11] Okonkwori, S., The Importance of Tax and the Consequences of Evasion, Nigeria, 1st ed., (2002) p.7

[12] Ayua I.A., Loc.cit., p.280

Taxation emerges largely in our societies. It is now hard to see a government that does not rely on it. It is indeed of tremendous importance. It occupies a great space and significant position in the economy of the country.

The search for oil began in Nigeria in 1908. A German company pioneered it when it drilled fourteen wells in Ajebandele dry hinterland in Lagos. The World War 1 between 1914-1918 terminated this activity. But the establishment of the Shell Petroleum Development Company of Nigeria (ltd) in 1938 revived the interest in the possibility of discovering oil in Nigeria. The Royal Dutch Shell and the British Petroleum formally owned the company. It was known before as Shell D` Arcy and first situated at Owerri, Imo state. In November 1938, the company received an Oil Exploration License {OEL} covering the whole Nigeria. The operation of the company was suspended due to the Second World War. It then later resumed fully into its petroleum operations in 1956, at Oloibiri that is now in Bayelsa state.[14] In 1957 the company reduced its acreage to 40,000 square miles of the Oil Prospecting Licenses (OPLs). Of this acreage,

[14] Pearson, S.R., Petroleum and Nigerian Economy, Stanford University Press, California, (1970), p.15. See also Omotola J.A. and Adeogun A.A., Law and Development, Lagos University Press, Lagos (1995) pp.85-86

only about 15,000 square miles was converted into Oil Mining Licenses (OMLs) by the Shell B.P. The residual was returned to the Nigerian government in 1960.[15]

Towards the end of 1960, there were about nine petroleum exploring and producing companies holding Nigerian concessions (i.e. OPLs and OMLs). These are:

1-The Shell Petroleum Development Company of Nigeria Limited.

2-Gulf Oil Company Nigeria Limited.

3-Mobil Producing Nigeria Limited

4-Nigeria Agip Oil Company Limited.

5-Phillips Oil Company Nigeria Limited.

6-Safrap Nigerian Limited

7-Tenneco Oil Company of Nigeria Limited

8-Texas Overseas Oil Nigerian Petroleum Limited

9-Union Oil Nigeria.[16]

From the angle of taxation, the profits of all Nigerian and foreign companies accruing in, derived from, brought into, or received in Nigeria are normally taxed under the Companies Income Tax

[15] Ibid.
[16] Person, S.R. op.cit. pp.16-17

Act.[17]However, due to the peculiarities and complicated nature of oil industries, the profit of companies engaged in petroleum operations are not taxed under the Companies Income Tax Act.[18] They are rather, taxed under a special and separate legislation, that is the Petroleum Profit Tax Act (PPTA).[19] In other words, only the profit of the crude oil producing companies that is subject to the PPTA.[20]

It was in 1959 that the first legislation governing the taxation of revenue arising from the upstream oil sector was enacted, i.e. the Petroleum Profit Tax of 1959.It was the principal Act, which has been amended by the following legislation:

1-Income Tax (Amendment) Act no.65 of 1966.

2-Petroleum Profit Tax (Amendment) Act no.1 of 1967.

3-Oil Terminal Dues Act no.9 of 1969.

4-Petroleum Profit Tax (Amendment) Act no. 15 of 1973.

5-Petroleum Profit Tax (Amendment) Act no.55 of 1977.

6-Petroleum Profit Tax (Amendment) Act no.4 of 1979.

7-Petroleum Profit Tax (Amendment) Act no. 95 of 1979.

8- Petroleum Profit Tax (Amendment) Act no.23 of 1979.

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[17] Section 9 (1) Companies Income Tax Act (CITA), Cap. C21, LFN, 2004.
[18] Ayua I.A., Loc. cit. p.192.
[19] Ibid. p.245.
[20] Nigerian Tax Reform, Loc.cit., p.160.

It should be noted that all of these Acts were consolidated into the Petroleum Profit Tax Act. [21]Furthermore, even some of the provisions of PPTA of 1990 have been sequentially amended by the following decrees:

1- Finance and Miscellaneous Taxation Provisions (FMTP) Decrees of 1993
2- Finance and Miscellaneous Taxation Provisions (FMTP) Decrees of 1996
3- Finance and Miscellaneous Taxation Provisions (FMTP) Decrees of 1998
4- Finance and Miscellaneous Taxation Provisions (FMTP) Decrees of 1999

The current legislation in the taxation of crude oil producing companies is the Petroleum Profit Tax Act[22].

1.2 Aims and Objectives

The research mainly aims at examining the problems and identifying any loophole in the provisions relating to the tax assessment of the upstream oil sector, under the Petroleum Profit Tax Act. This could be achieved by making a critical analysis and

[21] Cap.354, Laws of the Federation of Nigeria [LFN}, 1990
[22] Cap.P13 Laws of the Federation of Nigeria, 2004

appraisal of the relevant provisions and then discussing the problems before finally giving some useful solutions and comprehensive suggestions. More light will be thrown on the recent development in this area of research.

The hope is that this research will be an important means and effective tool that simplifies the assessment of petroleum profit tax.

1.3 Problems of the Research

There are many problems affecting the petroleum profit tax in general and the petroleum profit tax assessment in particular. These include the problems relating to the PPT administration, the complexity of PPT/MOU calculation, and the problems of PPT avoidance and evasion.

There is no doubt about the significance of strong, able and effective administration in any system. It is widely agreed that one of the main aims of taxation is to raise sufficient revenue for the government to meet its needs of providing necessary services to the public. It is also agreed that tax evasion / avoidance cause government to loose a huge amount of money. Consequently, there is the opinion that the loss of revenue as the result of widespread tax evasion /

avoidance in Nigeria, is due to the weak, inept and inefficient system of tax administration.[23]

In the oil sub-sector, the Federal Board of Inland Revenue (FBIR) is vested with the power to administer the petroleum profit tax. It is also responsible for carrying out all acts deemed necessary and expedient for – inter alia –the assessment of petroleum profits tax.

The major problem existing within the tax administration of the upstream oil sub-sector lies essentially on the design of the tax administrative system and the capability of the institution. These consequently lead to low efficiency and effectiveness of not only the assessments of petroleum profit tax, but also to the collection of the tax.[24]This is a serious case considering the importance of the revenue that comes directly or indirectly from the sector. Furthermore, the issue of institutional capability is even more pervasive. This is because the tax officials dealing with the oil producing companies must be elite team of professionals that are able to carry out their tax assessment responsibilities at a highest standard of efficiency and integrity. Additionally, the widespread problems of work force; inadequate professional training, inadequate facilities and

[23] Ibid. p.165.
[24] Ibid. p.150

environment, low staff morale, lack of computerization, and lack of resources, all affect the efficiency, effectiveness and performance in the administration of petroleum profit tax. [25]

Indeed, PPT assessment entails ascertaining the profits of the oil producing companies as well as the chargeable tax. Each of these can not be actually arrived at without indulging in the profit calculation which is very involving. This is because petroleum operations are very complex in nature. Oil industry is capital intensive with high man per capital ratio. It requires the services of many different professionals, which – inter alia– include geologists, seismologists, surveyors, architects, engineers, economists, accountants, lawyers, and civil servants. Moreover, the statutes governing the taxation of the oil producing companies in Nigeria is just like a final outcome of many negotiations and agreements. The chargeable profits are not the same as the company's statutory profits for different reasons. Partly because the chargeable profits are based on the tax reference price which is known as posted price. In the past, posted price was fixed by negotiation between the government and the

[25] Ibid. p. 165

oil companies. Now, the government fixes it unilaterally. From the other part, certain expenditure items are treated differently.

Despite the fact that PPTA provides the basis for tax assessment and computation of any company engaged in petroleum operation, nevertheless the taxation of Joint Venture (JVs) companies is governed by a relatively complex document of Memorandum Of Understanding (MOU). MOU is a fiscal arrangement between the Federal Government and the Joint Ventures companies. Under the MOU, two types of tax calculation are to be made. The first one is based on the Petroleum profit tax / royalty, without any adjustment. The PPT / royalty base of calculation is referred to as Government Take (GT). The second type of calculation is referred to as Reversed Government Take (RGT) and shall be based on MOU, which is rather complicated. It is allowed for the company to choose the lower of the two calculations.

It is worthy here to note that in spite of the complexity of the MOU, it is neither incorporated in the tax legislation nor is it codified or sufficiently clear and adequately administered by the tax authorities. This is a serious problem that requires an urgent solution.

Another problem that may also affect the petroleum profit tax as well as its assessment is the tax evasion / avoidance. An oil company can evade tax by deliberately delivering false returns, refusal to pay the tax at the right time or refusal to pay the tax at all. It can also avoid tax by manipulating some provisions from the Petroleum Profit Tax Act. In other words, some oil companies may look for any lacuna in the PPT provisions so that they will make use of it to avoid tax. This is also a serious matter that may render a significant amount of revenue coming from this sector to reduce. Subsequently the government may not have enough money to use for public services. It is therefore a critical problem that has to be tackled.

Theft and illegal bunkering of oil by supposed criminal syndicates also reduce the country's oil revenue, possibly by several billion dollars every year.[26] On this ground, the amount that is normally generated from the taxation of upstream oil company is negatively affected. In March 2003 for example, political turmoil resulted in force majeure declarations by Chevron, Texaco, and Shell,

[26] Mahatni, D , Financial Times Reporter, " Fight over oil money percolates in Nigeria." Retrieved July 20, 2006 from http//www.npr.org,

the major oil producers in the country.[27] This has had a serious effect on the country's economic and fiscal situations.

Crises in Niger Delta area can also make a negative effect on the Petroleum Profit Tax and subsequently affects its assessment. For example, on January 19, 2006, a group called the Movement for the Emancipation of the Niger Delta (MEND) has grabbed four oil workers and also attacked pipelines and platforms of Royal Dutch Shell Company. Shell is the biggest oil producer in the swampland of the Niger Delta. In February 2006, MEND kidnapped 11 employees of Willbros Group Inc. Of Houston and vowed to continue disruption in Nigeria's oil production if foreign companies and the Nigerian military do not leave the Niger Delta. On March 9, 2006 militants in volatile oil producing Niger Delta kidnapped three foreign oil workers, including two Americans, in Nigeria as a disruptive campaign against the government. The MEND was also behind the kidnapping. The group has warned that t it will drive oil companies like Shell, Chevron and Exxon-Mobil out of the area.[28]

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[27] Ibid.

[28] Opele, S. "Oil and Youth Restiveness in Niger Delta.Retrieved September 10, 2006 from http //www.nigerdeltacampaign.com

The militant are sabotaging Nigerian crude oil exports in their effort to gain more benefits for people living in the oil rich delta. They have threatened to step up attacks. After the February kidnapping, the Nigeria's production of oil dropped by 458,000 barrels per day. As at September 2006, Nigeria lost about $12 billion to Niger Delta crisis in seven months alone. According to a United States based organization, the militant steals about ten percent of the Nigerian daily crude oil output from pipes.[29] The daily production output of the oil companies in the Niger Delta drops and so Nigeria loses revenue. Indeed, this is a tremendous problem of which an urgent solution should be provided.

1.4 Justification / Significance of the Research

Assessment of petroleum profit tax is one of the three main fundamental duties vested on the Federal Board of Inland Revenue. However, in spite of this significant position occupied by the PPT assessment, the materials and information related to it are very scanty. For this reason, to undertake this research is very vital and relevant.

This research will be useful and beneficial to students of Law, Economics, Business, Finance and Accounting in both the

[29] Bello, O and Alike, E. "Nigeria loses $12 bn to N / Delta crisis in 7th mths." In Business Day, page 1, Monday September 04, 2006.

undergraduate and postgraduate levels. Legal and accounting practitioners will also find this research work viable and useful for them.

Petroleum revenue, in general, plays an important role in the Nigerian economy and the development of the nation. It provides the bulk of funding for the three tiers of government. Thus, it has become the dominant driver of the nation economy. For instance, oil and gas sub-sector annually provides over 70% of the government revenue and over 95% of the nation foreign exchange earning.[30] In fact, Nigeria is one of the most influential oil exporters, not only among the Economic Communities of West African Countries {ECOWAS} but also among the entire nations of African Union {AU} and Commonwealth nations. It was the sixth most important oil producer in the Organization of Petroleum Exporting Countries {OPEC} .As at the end of June 2005, Nigeria occupied the 3rd position in the organization, as the result of Iraq war. It produces about two million and five hundred thousand (i.e.2.5 million) barrels of crude oil per day.[31]

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[30] FBIR, Main Report of the Study Group on the Nigerian Tax System. Nigerian Tax Reform, 2003, P.138

[31] Table 3a., OPEC Oil Production. Retrieved August 27, 2005, from http // www.eia.doe.gov/emeu/steo/pub/3atab.htm/ p.1

On the other hand, Petroleum Profit Tax is the major source of government revenue derived from taxation. For example, in year 2001 alone, the Federal Government raised the sum of six hundred and thirty nine billion, two million Naira (₦639,002,000,000=) from petroleum profit tax and royalties.[32] The amount was equivalent to 62.7% of the total revenue generated from taxation for that year. Therefore revenue from petroleum profit tax {PPT} is of the most important sources of revenue to the Government.

Like any other type of taxation, petroleum profit tax basically aims at raising sufficient revenue for the Government. This includes the provision of services like defense and security of the nation; maintaining law and order; and providing health services and education to the people of the nation. Revenue from the taxation could also be used on capital projects, creating social and economic infrastructures, which improves the life of people and enable the economy of the country to grow. In other words, PPT can also be used in shaping the economic growth and development of the nation. Furthermore, in many countries, oil is treated as a patrimonial inheritance, belonging to the whole nation, including future

[32] Ogundele, E.A. Loc.cit.

generations. Therefore, taxing it becomes a way of achieving government's objective of exercising right and control over this public asset. Government may impose (very high) tax as way of regulating the number of participants in the Industry and discouraging its rapid depletion, in order to conserve some of it for future generation. This in effect will also achieve government's aim of controlling the petroleum sector development.[33] Moreover, petroleum taxation has become an instrument for wealth re-distribution between the wealthy and industrialized economies represented by the Multi- National Oil Companies (MNOCs), and the poor and emerging economies from where the petroleum resources are extracted. The MNOCs own the technology, expertise and capital needed to develop the industry. They repatriate their earnings and often very huge profit to their wealthy countries. Extracting rent from them in the form of petroleum taxation is a way of achieving the objective of wealth re-distribution, among these nations. Petroleum profit tax can also be utilized to guide the behaviors of economic agents. The high potential for environmental pollution and degradation stemming from industry activities in the upstream oil sub-sector, makes it a target for taxation. This can serve

[33] See Nwete B.O.N. Miniral and Petroleum Taxation. Retrieved January 29, 2007, from http// www.dundee.ac.uk/cepm/p/car/html/car8-article14.pdf

as a way of regulating its activity and promoting government's quest for a cleaner and healthy environment. Cleaner production may be achieved by imposing tax on it for pollution and other environmental offences.[34]

1.5 Scope of the Research

Geographically, the research covers only Nigeria. It also contains the historical background of crude oil exploration in the country. History and development of Petroleum Profit Tax Act (PPTA), from the principal Act of 1959 to recent amendment of 2004, are also incorporated into this thesis.

The term " Petroleum" has been defined by the PPTA as " any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in Nigeria, but does not include liquefied natural gas, coal, bituminous shale or other stratified deposits from which oil can be extracted by destructive distillation." [35] But for the purpose of research limitation, this thesis will not touch the issues related to the taxation of gas even though the PPTA is applicable to it. It will only focus on the issues and problems that are specifically related to the petroleum profit tax assessment. As a matter of fact, these issues shall

[34] Ibid.
[35] Section (2), PPTA, Loc.cit.

be traced and examined based on the Petroleum Profit Tax Act,[36]. However Companies Income Tax Act [CITA], [37]may also be in use. This is because of the strong link and close relation that exist between the PPTA and the CITA. It is due to the peculiarities of the oil producing companies that the Petroleum Profit Tax Act was enacted. Furthermore, references to the Nigerian cases which are relevant to the research will be made. English cases are also used where it becomes necessary.

1.6 Literature Review

In spite of some few textbooks available on Petroleum Profit Tax legislation, it is hard to see a book or a legal research specifically bearing the title of this thesis. Tax assessment of the upstream oil sector and related issues, are only available under some headlines in different books of taxation.

For instance Oremade, T. in his book[38], discussed some vital issues, which are connected to the assessment of PPT. These include additional assessment, notice of assessment, objection to assessment and appeal against assessment.

[36] Cap.p13, Laws of the Federation of Nigeria [LFN] 2004
[37] Cap.C21, LFN, 2004
[38] Oremade, T. Loc cit., pp 127-131

In relation to the topic, Ayua I.A. also touched some issues. In his book entitled the "Nigerian Tax Laws"[39], he completely devoted chapter 12 to the petroleum profit tax. He therefore, categorically states when a PPT assessment is raised, who is to make the assessment, the right of an oil company to raise an objection in writing against any assessment made by the Federal Board of Inland Revenue in the event of dispute. He also talked on the issues of errors and defects in assessment and notice of assessment. Additionally, he treated the issue of appeal against assessment.

The book entitled "Income Tax Law and Practice in Nigeria"[40] has also treated some issues related to the assessment of PPT. Issues like peculiarities of assessment of petroleum profits, administration of the tax, persons liable to pay the tax as well as assessment of petroleum tax are all touched. In order to buttress his points on PPT assessment the author of the book Ola C.S. brought some examples on PPT computation.

[39] Ayua, I.A. Loc cit., pp 203-206
[40] Ola, C.S. Income Tax Law and Practice in Nigeria, Heinemann Educational Book (Nigeria) Plc, Ibadan, (2001), pp. 534-544

The same issues were also discussed by the above author in another different book known as "Income Tax Law for Corporate and Incorporated Bodies in Nigeria."[41]

Olisa M.M. also treated some other issues relevant to the research topic. In his book entitled the "Nigerian Petroleum Law and Practice"[42], he briefly explained on how to ascertain the chargeable profits, the assessable profits as well as the chargeable tax.

It can be seen from the above that problems connected to the assessment of PPT have not been extensively discussed. The books fail to pinpoint some loopholes in the provisions governing the taxation of oil producing companies. Furthermore problem of PPT avoidance/evasion have not been specifically pointed out. Additionally, most of the above books were written in 70s and 80s they are therefore, devoid of discussing many contemporary problems in the oil sub-sector particularly those that are connected with the assessment of PPT. For these reasons, there is a need to make a research specifically on this topic.

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[41] Ibid, Income Tax Law for Corporate and Unincorporated Bodies in Nigeria, Heinemann Educational Books (Nig.) Ltd, Ibadan, (1984), pp.436-453

[42] Olisa M.M. Nigerian Petroleum Law and Practice, Fountain Books Limited, Ibadan. (1987), pp.167-171.

1.7 Research Methodology

Doctrinal or priori research method shall be adopted in this work. In other words, this thesis would be embedded on the visualized and conceptual method. It will therefore depend on the research from textbooks written by scholars and legal sages. In order to buttress relevant points, legal statutes shall be quoted. Nigeria or foreign cases would be cited to explain or support any point deemed necessary. Journals and articles related to the research topic shall be used. Newspapers may also be in use. Reports and conference papers on the topic or any other topic related to it would also be utilized. Relevant materials available in the Internet websites shall also be employed.

Thereafter, the materials shall be studied and properly arranged. The findings will then be critically analyzed. In addition, illustrations and examples would be frequently given. All these are to simplify the relevant points and make them clearer and understandable.

Finally, solutions to the problems of the research shall be proffered by way of recommendations.

1.8 Organizational Layout

This work entitled the "Assessment of Petroleum Profit Tax under the Nigerian Tax Laws" is an attempt to explain the process of

making the PPT assessment properly. It aims at tracing and examining the problems related to the PPT assessment. It is also an attempt to identify the loopholes in provisions related to PPT assessment, under the Petroleum Profit Tax Act.

The first chapter in this work begins with general introduction to the research. It examines the definition of PPT assessment. Significance of the crude oil to the Nigerian economy as well as the historical development of the oil exploration in Nigeria and the Petroleum Profit Tax Act is also discussed. It equally examines the problems of the research. These include the administrative problems of the PPTA, the problems related to the taxation of the oil companies operating joint venture with NNPC which include the complexity of the MOU agreement that is neither clearly codified nor incorporated in the PPTA. It also treats the problems of PPT avoidance / evasion. Furthermore, aims and objectives of the research, the priori research method employed in the research are clearly explained. So also the scope of the research geographically and historically is treated. Justification of the research as well as its organizational layout is also stated.

Chapter two of the thesis deals with the issues related to the administration of PPT. It therefore, explains the role of the Federal Board of Inland Revenue in relation to the PPT in general and the PPT assessment in particular. The difference between the terms "inland revenue" and "internal revenue" is explained. Historical background of the board as well as the Board's structure is also included. Other issues discussed under the chapter include: the functions of the Board; the establishment of the operational arm of the Board; the function of the Petroleum and International Tax Department of the Board in relation to the petroleum profit tax. It generally discusses the administrative problems of the Board in relation to the PPT.

Chapter three discusses the process of making the PPT assessment. It therefore, explains the method whereby the profit, adjusted profit, assessable profit, chargeable profit, assessable tax, and chargeable tax are all ascertained. Furthermore the process is explained under the provision of PPTA as well as the MOU arrangement with the Federal Government. For proper understanding, examples are cited. Right of appeal for both the oil companies and the Federal Board of Inland Revenue are similarly discussed.

Chapter four treats the issues related to the offences and penalties against the PPT. Several offences related to the tax avoidance / evasion are mentioned. In the same vein, penalties are also discussed in detail.

Finally, chapter five summarizes the findings of the work and provides some suggestions as workable solutions to the problems discovered in the research.

CHAPTER TWO

THE ROLE OF THE FEDERAL BOARD OF INLAND REVENUE (FBIR) IN RELATION TO THE ASSESSMENT OF PETROLEUM PROFIT TAX

2.1 Introduction

Petroleum Profit Tax Act provides that:

> The due administration of the Act and the tax is
> Under the care and management of the Board[43]

According to the Act the Board means the Federal Board of Inland Revenue.[44] The term "Inland Revenue" is defined to mean "Internal Revenue". Both are used interchangeably at the level of semantic. For example the Oxford Advanced Learner's Dictionary defines "Inland Revenue" (in Britain) as the government department responsible for collecting taxes.[45] This is almost the same definition given to the term "Internal Revenue Services" in the United State of America (USA). According to the Dictionary, it is the government department responsible for collecting domestic taxes.[46] In the same line, the Chambers English Dictionary defines the term "Inland Revenue the same as "Internal Revenue" which is the department

[43] Section 3 (1) (a) PPTA, Loc.cit.
[44] Section 1, Ibid.
[45] Hornby A.S. Loc.cit. p.614.
[46] Ibid, P.624.

responsible for collecting taxes such as income tax and stamp duty.[47] Consequently, the above definitions make the distinction between the two terms clear and apparent. The term "Inland Revenue" is applied in Britain, while the term "Internal Revenue is used in the United State of America (USA). But in Nigeria the terms are used differently. "Inland Revenue" is used only at the Federal level. The Federal Board of Inland Revenue and the Federal Inland Revenue Service are typical example to illustrate this point. On the other hand, the term "Internal Revenue" is used to refer to the same government agency responsible for collecting taxes at the state level. State Internal Revenue Services is an illustration to this. In other words, all 36 State Government responsible for tax collection in Nigeria are addressed as Internal Revenue. Subsequently, there are Kaduna State Internal Revenue Service, Kano State Internal Revenue Service, Kogi State Internal Revenue Service, Oyo State Internal Revenue Service, and etc. Therefore in Nigeria, currently there are 36 State Board of Inland Revenue.

Essentially, there are four main Boards responsible for the administration and collection of revenue in Nigeria. These are:

[47] See the Chambers English Dictionary, Loc.cit.p.735.

1- The Federal Board of Inland Revenue

2- The State Board of Internal Revenue

3- The Joint Tax Board

4- The Board of Customs and Excise

The above Boards are primarily responsible for generating revenue for the three tiers of government.[48]

It is important to know that unlike some countries that advocated expenditure tax which considers expenditure on consumption as the base for taxation, Nigerian tax system takes income to serve as the basis for taxation. In other words, a taxpayer's income is use as the base for his tax liability. This is because, it has been considered anti-social to live on one's capital. Furthermore the tax collector requires his money next year as well as this one. He does not want to kill the goose that lays the golden eggs.[49]

It is equally important to note that the late Lord Fredrick Luggard in 1904 initially introduced income tax in Nigeria. He effected some changes in the then "Community Tax" which was in operation in northern part of the nation. These changes culminated in

[48] Sermorin, O.A., The Origin and Status of Revenue Board in Nigeria, The Nigerian Tax Journal, (Oct-Dec. 2002, p.25.
[49] Ayua I.A. Loc.cit. p.13.

"Native Revenue Ordinance" of 1917. In 1918, an amending Tax Ordinance was passed. The ordinance extended the provisions of the 1917 ordinance to Southern Nigeria. Another tax ordinance was enacted in 1927. It was known as the Tax (Colony) Ordinance of 1927. The Company Income Tax Ordinance No.4 of 1939 was later on enacted. It introduced the word "person" to the tax legislation for the first time. In 1940, the earlier 'Native Ordinances" of 1917, 1918, 1927 and 1939 were incorporated into the "Direct Taxation Ordinance" No.4 of 1940.[50]

From the above, it could be seen that the earlier tax laws did not separate individuals from companies let alone the oil producing companies. Therefore taxable persons were taxed as persons and references were made to companies or individuals where the statutes so provided.

The economic development of the country posed some technical challenges to Income Tax Administration. Obviously, there was a need to have tax laws effectively coded. Consequently, there was a serious need of experts in the area of taxation to embark on the assignment. Accordingly, the colonial tax office appointed Mr. J.C.

[50] Sermorin O.A., Loc.cit. p.25.

Mundy, who had acquired vast experience in Income Tax Law and its practice, to help in drafting the Revised Tax Legislation. The drafting was based on the Tax Model Ordinance supplied by the Colonial Tax Office in London to Mr. Mundy. Later Sir Arthur Richards the then Governor of Nigeria, appointed a committee of legislative council to consider and deliberate on Mundy Income Tax Report. The committee performed their work and submitted a draft of Income Tax Bill which was approved and enacted into law as Income Tax Ordinance of 1943, No.29, Cap.92.[51] Prior to this period the Colonial Tax Office appointed Mr. Walter B. Dare as the first commissioner of Income Tax for West Africa of which Nigeria is included. The commissioners of Ghana (known by then as Gold Cost), Sierra Leone and Gambia were appointed as the deputies to him. The tax offices under the British colony in West Africa were then known as Inland Revenue Department. The first Deputy Commissioner of Income Tax in Nigeria was Mr. Frank G. Lloyd. Mr. Franser G.S. who was considered the first assistant commissioner of Income Tax assisted

[51] Ibid. p.26.

him. Nigerian Inland Revenue was not autonomous until 1943. Mr. W.A.B. Carter was the first Nigerian Commissioner of Income Tax.[52]

Prior to the establishment of the Federal Board of Inland Revenue, Native Authorities later on the Local Government Council were in charge of assessment and collection of income tax. Under the Nigerian Order in Council 1954, regions were given powers to impose tax at regional levels. Consequently they introduced finance laws that were revised and updated from time to time. In 1958, a revised edition of the tax laws as it then existed was made under Cap.85.of the Laws of Federation of Nigeria and Lagos. They were effective from June, 1958. [53]These laws provided for the appointment of a commissioner and his deputy by the Governor General. Section 3 (2) thereof provided that the commissioner may, by notice in the Gazette or in writing, authorize any person to perform or to assist in performance of any duty imposed upon the commissioner by this ordinance.[54]

In 1950s, Nigeria created a body known as Scutineer Committee. It was made up of a number of experienced professionals lawyers, accountants and individuals who had a fair knowledge of taxation. The duty of the committee was to meet periodically, review

[52] Ibid.
[53] Ibid
[54] Ibid.

taxable profits prepared by inspectors and make recommendations or give approvals before assessments were finalized. Their work was discontinued for it created more problems than they were meant to solve.[55]

In 1958, the Federal Board of Inland Revenue came to exist. It was, for the first time, established under the Income Tax Administration Ordinance of 1958. The Board was re-established under section 4 of the Companies Income Tax Act No.22 of 1961. The Board is now established and constituted in accordance with the provision of the Companies Income Tax Act Cap.C21, Laws of the Federation of Nigeria {LFN}, 2004. In other words, it is a statutory creation of the Companies Income Tax Act (CITA). The Board is responsible for the administration and managing not only the PPTA, but also the whole income tax as specified by the series of guidelines issued by the Federal Ministry of Finance and the Joint Tax Board {JTB}.[56]

In accordance with the provision of the CITA, there shall continue to be a Board of which the official name shall be the Federal

[55] Ochei B.B., Tax Administration in Retrospect, Nigerian Tax News (2002), Vol.6, No.1, p.24
[56] ibid.

Board of Inland Revenue.[57] The significance of the Board can not be overemphasized. This is because the administration of tax of which include PPT forms, part of the various statutory functions of the Board. Furthermore, the success or failure of every tax system depends on the administration of that system. If the Board can efficiently administer the tax, it will certainly increase the revenue base of the government. This in turn, will guarantee more revenue to finance the much-needed developmental project in the field of social, economic, and political spheres.[58]

It is noted that the Board is not established under the PPTA. It was rather established under the CITA. It therefore appears to be an incidental matter in the Companies Income Tax Act. This may subsequently create a wrong impression that the Board is specifically for the administration of the companies' income tax.

2.2 Structure and Powers of the Federal Board of Inland Revenue

Originally, the Board of Inland Revenue was, under the Income Tax Administration Ordinance of 1958, made up of the following members:

[57] Section 1 (1), CITA, Loc. Cit.
[58] Ayua,I.A.,Loc.cit, p.

i. The Resident appointed by the governor.

ii. Chief and elders in each district

iii. Any Native Authority which by Native Law and Custom was recognized as the Tax Collection authority.

iv. Any village council or group of Persons appointed by the Governor.[59]

But under the CITA OF I961, the Board was made up of six members. These include:

i- A Chairman

ii- A Deputy Chairman

iii- A Senior Assistant Sectary (with responsibility for revenue matters in the Federal Ministry of Finance).

iv- A Legal Adviser in the Federal Inland Revenue Department.

v- Chief Inspectors of taxes (or officer of

[59] Samorin O.A., Loc.cit. p.27.

equivalent rank).

vi- One additional member (to be appointed by the Minister by Notice in the Gazette).[60]

With retrospective effect from 1st April 1977, the CITA 1979 No.28 repealed and re-enacted, with sundry amendments, the CITA 1961. The Act increased the number of the members of the Board to reach up to ten. This was done to include some members from Ministries and other organizations whose functions are very close to the duties of the Board. They comprised the followings:

a. A Chairman, who shall be the Director of the Federal Inland Revenue Department;

b. Four Deputy Directors of the Federal Inland Revenue Department;

c. The most Senior of those officers holding or acting in the post of Legal Adviser and

[60] Ibid. pp.27-28

Assistant Legal Adviser in the Federal Inland Revenue Department who is available from time to time on duty in Lagos;

d. The officer from time to time holding or acting in the office of Principal Assistant Secretary with responsibility for revenue matters in the Federal Ministry of Finance;

e. A representative of the Nigerian National Petroleum Corporation;

f. A representative of the Department of Customs and excise; and

g. The Registrar of Companies.[61]

Since 1979, this has been the effective legislation although it has spontaneously undergone a series of amendment. For example in

[61] Ibid. p.28

1990, all the amendments on the CITA were consolidated as Companies Income Tax Act Cap 60 Law of the Federation of Nigeria. Even this has been amended by the Finance (Miscellaneous Taxation Provision) Decree{FMTPD} No.21 of 1993; FMTPD No.30 of 1996; FMTPD No.31 of 1996; FMTPD No.18 of 1998; FMTPD No.19 of 1998; FMTPD No.21 of 1998; FMTPD No.40 of 1998; FMTPD No.30 of 1999. The current legislation enacted which deals with the issue of composition and structure of the Federal Board of Inland Revenue is the CITA, Cap.C21, LFN, 2004. According to the Act, the Board members consist of:

a. An Executive Chairman who shall be a person within the service experience in taxation to be appointed by the President;

b. The directors and Heads of Departments of the service;

c. The officer from time to time holding or acting in the post of Director with responsibility for Planning, Research and Statistics matters in the Federal Ministry of Finance;

d. A member of the Board of the National Revenue

Mobilization Allocation and Fiscal Commission;

e. A member from the Nigeria National Petroleum Corporation not lower in Rank than Executive Director;

f. A Director from the National Planning Commission;

g. A Director from the Nigerian Customs Service;

h. The Registrar-General of the Corporate Affairs Commission; and

i. The Legal Adviser to the Service.

It could be observed that the Board has been reorganized and expanded to include new members from Ministries and other organizations whose functions are very close to the statutory functions of the Board.[62] This is a good attempt in order to enhance the effectiveness of the Board's performance.

The number of the directors in the Board has been made to cover the duties of:

(i) Tax assessment audit and

[62] Ibid.

investigation;

(ii) Tax collection, computerization and litigation;

(iii) Management, planning and research; and

(iv) Petroleum profit tax, training and intelligence.[63]

Apparently, the aim of the above is to ensure an effective tax administration in the country.

It is also provided that any seven members of the Board present constitute a quorum. This is on condition that the chairman or a director from any department of the FIRS is among the attendants. The Board shall also nominate its secretary that must be an ex-officio of the Board. He must be from the Federal Inland Revenue Service.[64] It is the duty of the secretary to summon a meeting of the Board. This shall be in a situation whereby the business requiring the Board's attention so warrants, or upon any request of a member of the Board.[65] A decision from the majority of Board's members on any matter can be obtained by the secretary. Such decision shall be treated in all

[63] Ayua, I.A.,
[64] Section 1 (4), CITA, Loc.cit.
[65] Section 1 (6), Ibid.

respect as though it were a decision of the Board in actual meeting unless any member requested the submission of that matter to such meeting.[66]

It should be known that the legal adviser to the Board is at any time a member. He can appear for and represent the Board in his professional capacity in any proceeding in which the Board is party. Nevertheless, he shall not give evidence on behalf of the Board in such circumstance.[67]

It has been categorically stated in the PPTA that:

> The due administration of this Act and the tax shall be under the care and management of the Board which may do all such acts as may be deemed necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in a manner to be prescribed by the Minister.[68]

Accordingly, the Federal Board of Inland Revenue plays the role of administrator and caretaker of the Petroleum Profit Tax Act. It is responsible for the management and proper implementation of the Act. It is to assess, collect and account the petroleum profit tax.

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[66] Ibid.
[67] Ibid.
[68] Section 3 (1) (a) PPTA, Loc.cit.

In order to enable the Board to carry out its duties perfectly, considerable powers have been conferred to it. Subsequently, the Board may sue and be sued in its official name.[69] It can do any act deemed necessary and expedient for the assessment and collection of the petroleum profit tax.[70] From time to time, it can specify the form of returns, claims, statements and notices related to the PPT.[71] It may call for further information, returns, books, documents, accounts and particulars deemed necessary.[72] It is also the duty of the Board to prescribe the form of return of estimated tax.[73] It authorizes the form and manner in which the assessment of petroleum profit tax shall be made.[74] To give any relief in respect of any error or mistake occurred in the account and particulars or any other written information supplied to the Board for PPT assessment, is a duty of the Board.[75] In respect of any offence or proceedings under the Act, the Board may compound or even stay the proceeding so long as it is before the judgment.[76] It may prosecute, and has power to disregard any insignificant interest and artificial transaction as deductible

[69] Section 3 (1) (c), Ibid.
[70] Section 3 (1) (a), Ibid.

[71] Section 6 (2), Ibid.
[72] See section 32 (1), Ibid.
[73] See Section 33 (1), Ibid.
[74] See Section 37 (1), Ibid.
[75] See Section 49 (1) & (2), Ibid.
[76] See Section 52 (3) and Section 53 (2), Ibid.

allowance.[77] Where the tax or penalty has not been paid the Board can acquire, hold and certainly dispose of any property taken as security for or in satisfaction of any such tax or penalty.[78]

The above powers and duties are listed and specified under the first schedule of the Petroleum Profit Tax Act. It is only the Board that can exercise these powers.[79]

The Board may, by notice in the Federal Gazette or in writing, authorize any person within or without Nigeria to perform or exercise its power other than the powers or duties specified in the first schedule. Furthermore, it shall carry out any ministerial direction or instruction provided that such direction or instruction does not have the effect of requiring the Board to raise an assessment upon a limited company or increase or decrease any assessment made or to be made or any penalty imposed or to be imposed or any relief giving or even to defer the collection of any tax, penalty or judgment debt due by the company.[80]

From this, it could be understood that in matters of broad policy, the Board works under the directives of the Minister of

[77] See Section 13 (1) and Section 14, Ibid.
[78] Section 3 (1) (b), Ibid.
[79] Section 3 (1) (e), Ibid.
[80] See section 3 (1) (f), Ibid.

Finance. Nevertheless this broad policy direction should not interfere with the assessment made under in accordance with the provision of the Petroleum Profit Tax Act,

In a nutshell, the statutory functions of the Federal Board of Inland Revenue in relation to the PPT are:

i- To assess the petroleum profit tax of the oil producing companies;

ii- To deal with claims objection and appeals of the oil producing companies;

iii- To impose penalty for unpaid petroleum profit tax; and

iv- To take instructions from the Minister of Finance.

The Companies Income Tax Act also made a provision for the establishment of a technical committee for the Board. Thus according to it:

> There shall be a technical committee of the Board…which shall comprise:
>
> (a) The Executive Chairman of the Board as chairman

(b) All Directors and heads of departments of the service(i.e. FIRS)
(c) The legal adviser of the service, and
(d) The secretary to the Board.[81]

The duty of the committee is to consider all tax matters that require professional and technical expertise and make recommendations to the Board. It can also give advice to the Board on all the powers and duties specifically listed in section 3 of the Companies Incomes Tax Act as well as the ones specified in the 1st schedule of the Act.[82] Moreover, the committee can attend to any matter referred to it by the Board.[83]Finally, it may also exercise a discretional power in respect of staff to be employed from the FIRS in order to discharge its functions.[84]

It is obvious from the above that the top management staff of the FIRS dominates the membership of the Board. The case is also the same in respect of the technical committee of the Board.

2.3. The Operational Arm of the Federal Board of Inland Revenue

The Federal Inland Revenue Service (FIRS) is the operational arm of the Federal Board of Inland Revenue. The arm is established

[81] Section 2 (1), CITA, Loc cit
[82] Section 2 (3) (a) & (b), Ibid.
[83] Section 2 (3) (c), Ibid.
[84] Section 2 (2), Ibid.

together with the Board. It is to carry out all the duties of the Board as stipulated by the tax legislation. Accordingly, the provision of the CITA stated that:

> There shall continue to be a Board of which the official name shall be the Federal Board of Inland Revenue… whose operational arm shall be called and known as the Federal Inland Revenue Service[85]

The FIRS is therefore an offshoot of the Federal Board of Inland Revenue. Consequently, by the virtue of the powers conferred upon the Board the duties of examining accounts, raising an assessment and collecting taxes are all delegated to the arm. It was initially composed of an Executive Director and four Directors. But in order to enhance the performance of the tax administration the FMTPD No.30 increased the number of the members to make them six. Each manning one of the following Directorates:

1. Directorate of Human Recourses, Management, Planning, Research and Statistic;

[85] Section 1, CITA, Ibid.

2. Directorate of Finance, Supplies and related operational matters;
3. Directorate of Assessment, Intelligences, Tax Audit and Special Investigation;
4. Directorate of collection, Accounting for the tax collected and Computerization;
5. Directorate of Petroleum Profit Tax and Related operations; and
6. Directorate of Value Added Tax (VAT).

A part from the six directorates, there are other specialized service units which include:

i- The Inspection Division;

ii- The Corporate Affairs Division;

iii- The Tax Audit Branch; and

iv- The Internal Audit Branch.[86]

Through the above Directorates and Units the Federal Inland Revenue Service performs numerous functions of assessment, collection and accounting for the following taxes:

1. Petroleum Profit Tax;
2. Companies Income Tax;
3. Stamp Duties
4. Withholding Tax;
5. Capital Gain Tax;
6. Education Tax;
7. Value Added Tax;
8. Personal Income Tax of Non residents and members of the Armed Forces, the Police and the residents of the Federal Capital Territory, Abuja.[87]

Presently the FIRS operates three levels of administrative structure. These are the National Headquarters, the Zonal Headquarters and the Area Tax Offices. It has 6 six Directorates, 8

[86] Samorin O.A. Loc.cit., p.28.
[87] Ibid.

Zonal Offices, 36 Area Offices, 4 Stamp Duties Offices, 158 Local VAT Offices and 8 VAT Tribunals.[88] The National Headquarters is now situated at the Revenue House at Wuse Zone 5, Federal Capital Territory, Abuja.

It is observed that the Chairman of the FIRS is the Chairman of the Board as well as the Chairman of the Technical Committee of the Board. This arrangement can cause the system to be closed on the ground that it could be regarded as the affair of one man. Subsequently fresh ideas for the enhancement of the tax administrative system could be shut out.

2.4 The Petroleum and International Tax Department

This is a department under the FIRS, the operational arm of the Board. It was formerly known as the Petroleum and Pioneer Department (PPD)

It is true that assessment, collection and accounting of the petroleum profit tax is under the care and management of the Board. Nevertheless these duties are only performed through this department. The department is therefore the Government Inspector of the petroleum profit tax. It's staff assess taxes and examine

[88] FIRS Web site. Retrieved July 1st 2005 from http // www.firs.nig.org

returns delivered by oil producing companies. This is to ensure that the upstream oil companies comply with the provision of the law under the Petroleum Profit Tax Act Cap.P13, LFN, 2004.

This explicitly pinpoints the significant role of the department within the service of the Board. It is even more apparent when the revenue arise from the Petroleum Profit Tax is compared with the other tax revenue e.g. the Companies Income Tax, Personal Income Tax, Capital Gain Tax, etc. Petroleum Profit Tax is the major source of Government Revenue derived from taxation. More than 60% of the tax revenue comes from the taxation of the upstream oil companies.[89] But in spite of this, the department lacks the quality and quantity of highly trained professionals. Moreover, even the available staff of the department are not given adequate economic rewards and career opportunities in order to bring assessment and collection in the petroleum sector to acceptably high performance standard.[90]

It is pertinent to note that apart from PITD in the FIRS, there are some other various agencies which deal with upstream oil sector. These agencies are also relevant and related to the national

[89] Nigerian Tax Reform, Loc.cit. p.13
[90] Ibid

revenue generation and taxation of the oil producing companies. These include:

1. Central Bank of Nigeria (CBN): It is the depository for royalties, PPT and other direct taxes. It also provides collection information which reconciles with tax assessment managed by the FIRS.
2. Department of Petroleum Resources (DPR): This is a department which is responsible for monitoring and collecting royalties and gas flaring penalties. It is also responsible for the records of taxes calculated under the PPTA.
3. Nigerian National Petroleum Corporation (NNPC): Under the NNPC there are two departments that are involved in the activities of the upstream oil companies. These are:

   i- Crude Oil Market Department (COMD): This department is responsible for

marketing crude oil and verifying production and sales data.

ii- National Petroleum Investment Services (NAPIMS): This agency is responsible for planning and approving capital expenditures as well as monitoring operating and financial results for the Joint Ventures (JVs) and Production Sharing Contracts (PSCs). NAPIMS also receives management report and audited accounts from the oil producing companies which position it for audit and review of the PPT fillings.

4. Crude Oil and other Revenue Reconciliation Committee: The committee is responsible for reconciling funds expected from crude oil sales, PPT, royalties and gas flaring penalties with actual receipts recorded by CBN.

5. Petroleum Products Sales Reconciliation Committee: This is to reconcile the amounts received with respect to production sales and the revenue associated with the domestic crude allocation.

The last two Committees work directly under the Federal Ministry of Finance. The committees are composed of members from CBN, DPR, NNPC, NCS and FIRS.[91]

In line with the above, there are a lot of discrepancies in the oil sector which affect the assessment of petroleum profit tax in one way or another. Several lapses have been discovered as bane of the oil sub-sector. These include:

i- Losses and unaccounted of proceeds of oil sales. For instance, it was revealed that around ten million barrels of crude oil were lost between the flow-stations and the loading terminals over the period of five years (1999 - 2004).[92]

[91] Nigerian Tax Reform, Loc.cit pp.161-162

[92] Akinsile, A. and Ezigbo, O. Reported in ThisDay Newspaper of April 12,2006. Retrieved August 30,2006 from http // www.community.nigeria.com/nspce

The discrepancies were, however, more in the figures of payment being claimed by the oil companies and the CBN, which are completely different. In some cases, the CBN claimed to have received what the oil companies never paid. According to an audit report the CBN, claimed it received $55 million in 1999 less than what the oil companies allegedly paid into its accounts. But a year later in 2000, CBN had a 'surplus' of $90 million, which the oil companies, from their accounts, did not pay. In 2001, the CBN account revealed $120 million less than allegedly receipted from the oil companies. In 2002, the figure rose to $250 million. In 2003, the less receipted figure dropped to $10 million and $25million less in 2004.[93]

ii- Weak accounting system and control, which creates an enabling environment for the spread of corruption in the oil companies.

iii- Lack of volume reconciliation in some areas where the amount of crude oil from the flow stations significantly differs from what eventually gets to the crude oil terminal.

iv- Weakness in the oversight/regulatory agencies.

[93] Ibid.

v - Losses and unaccounted for proceeds of oil sales.

vi -Discrepancy between the Crude Oil Marketing Department (COMD) figures used for financial audit and the Department of Petroleum Resources (DPR) figures.

vii- Use of different approaches to measure and report volumes of royalty and Petroleum Profits Tax (PPT) calculation process.

viii -Differences in data received from Nigeria National Petroleum Corporation and National Petroleum Investment Management Services (NNPC-NAPIMS) and multinational oil firms.[94]

These are critical problems that require a hard and fast solution. On this ground there is a need to ensure that the petroleum profit tax is fully assessed and collected. This can not be achieved unless when integrated coordination and information sharing among the agencies related to the revenue collection and taxation of the oil companies are provided.

[94] Ibid.

CHAPTER THREE

THE PROCESS OF MAKING THE ASSESSMENT

OF PETROLEUM PROFIT TAX

3.1 Introduction

Petroleum Profit Tax Act explicitly stated that:

> Assessment of tax shall be made in such form and in such manner as the Board shall authorized[95]

Accordingly, making of assessment must be based on the form and manner prescribed by the Federal Board of Inland Revenue. In other words, it is an incumbent duty upon the Board to specifically provide an approved format of making the petroleum profit tax assessment.

It is good to understand that nature and mechanics of making any type of assessment depends on the underlying provisions of the specific tax laws of the system. For instance, the provision of Companies Income Tax Act (CITA)[96] on assessment would be quite different from that of Value Added Tax Act (VATA)[97], or Capital

[95] Section 37(1), PPTA, Cap-P13, LFN, 2004

[96] See Companies Income Tax Act, Cap-C21, LFN, 2004

[97] see Value Added Tax Act N0 102 of 1993, Cap 6, LFN, 2004

Gain Tax Act (CGTA)[98]. So also the basis and mechanics of tax assessment under the CITA is quite different from that of PPTA. This is because all Nigerian companies are taxed and assessed under the CITA unless when it is an oil producing company, it will then be taxed and assessed under the PPTA. Moreover even within the petroleum profit tax, the assessment depends on the signed Memorandum of Understanding (MOU) between the Federal government and oil companies.[99]

Therefore the nature of PPT assessment is very complicated. The legislation that governs it, is a clear source of confusion to potential investors. Merely obtaining a copy of the PPTA will do nothing to a person. This is because the more you look into it, the less you see. The best that can be said is that the PPTA merely provides a framework for the understanding of the Nigerian petroleum tax regime.[100] To fully understand the manner in which the PPT could be assessed there is a need to comprehend the various contractual arrangements subsisting in the oil and gas industry. These arrangements inter alia include:

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[98] See Capital Gain Tax Act, Cap-C1, LFN, 2004

[99] See Ohagwa I.C., Loc.cit, p:6

[100] Ale, B.E. Petroleum Profit Tax in Nigeria: Issues and Options, Nigerian Taxation. The Official Journal of the Chartered Institute of Taxation of Nigeria. Vol.4. No.3 & 4 July-Dec.(2000), p.35.

1- Joint Venture Agreement

2- Service Agreement

3- Production Sharing Contract (PSC)

1. Joint Venture Agreement (JVA)

This is an arrangement which creates legal relationships between two or more parties for the common ownership of assets. In the case of oil and gas industry the assets are the mineral rights.[101] Generally no partnership is formed in its strict sense. Each venture partner merely owns defined right to mineral rights in a given concession for a defined period. The relationship is defined in a Joint Venture Agreements which spells out in details, the rights and obligations of parties. A party is appointed as the field operator and is given the responsibility for producing the oil from the concession. The JVA also provides for an Operating Committee that oversees the approval of budgets and operational plans of the operator. Each party to the Joint Venture is expected to fund his equity share in the operations. This is done when the operator makes a call for the needed cash. Each party lifts crude oil in accordance with its equity

[101] Ibid.

interest in the JV. Each partner accounts for and pays his tax liabilities. Almost 95% of Nigeria's crude oil is produced by the JV partners at the moment. The NNPC owns about 57% of the JV interests. At the beginning the incomes of JVs were liable to the strict provisions of PPTA. This changed in 1986 when the need to provide tax incentives to these operators arose. Effectively therefore, any consideration of the tax regime for JVs in oil and gas in Nigeria will focus on the Memorandum Of Understanding.[102]

2. Service Agreement

The Service Agreement is an agreement between one who owns a mineral right and the other who is an oil service provider. Under the agreement, the service provider undertakes to carry out on behalf of the mineral right owner, the exploration, and development as well as production operations. The payment plan is established under the service agreement. The contractor is entitled to take oil from the contract area in lieu of cash payment for his services. All assets acquired under the contract belong to the mineral rights owner. At present, contract agreement between NNPC and Agip is the only existing service contract in Nigeria. The mineral right owner, the

[102] Ibid.

NNPC, is responsible for the payment of PPT and royalty. The service contractor is liable to income tax under the CITA on its service.[103]

3. Production Sharing Contract (PSC)

PSC is similar to the service contract in the sense that the funding of petroleum operations is provided by the operator. However, unlike under the service contract, the contractor is guaranteed a share of production to cover his cost and his share of profits. Oil recovered in the contract is split into four. These are:

1. Royalty Oil
2. Cost Oil
3. Tax Oil
4. Profit Oil

The essence of PSC is that NNPC engages a competent contractor to carry out petroleum operations on NNPC's wholly held acreage. The contractor undertakes the initial exploration risks and recovers his costs if and when oil is discovered and extracted.

[103] Ibid.

Under the PSC, the contractor has a right to only that fraction of the crude oil allocated to him under the cost oil (oil to recover production cost) and equity oil (oil to guarantee return on investment). He can also dispose of the tax oil (oil to defray tax and royalty obligations) subject to NNPC's approval. The balance of the oil, if any (after cost, equity, and tax), is shared between the parties (profit oil).[104]

The current direction in the petroleum operations in the country is the production sharing contract. It should be noted that the term of the contract is for 30 years (inclusive of 10 years exploration and 20 years OML period). However, the contract may be terminated if at the end of the 6th year (from the effective date of the contract) the agreed Work Programme has not been substantially executed, or either party gives a notice of not less than 90 days for termination of the contract (on grounds permitted by the contract terms). Termination of the contract will also take place if no petroleum is found in the contact area after 10 years from the effective date of the contract.[105]

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[104] Oil ans Gas. Retrieved September 1,2005 from http // www.nipc-nigeria.org/mrgul.htm

[105] Ibid.

It is also important to know that the minimum work Programme during the exploration period shall be as follows:

Contract Years		**Amount to be Expended**
(i)	1 – 3	$24 million
(ii)	4 – 6	$30 million
(iii)	7 – 10	$60 million

If during any period of the contract years, the contractor spends less than the required expenditure, an amount equal to such under-expenditure shall be carried forward and added to the amount to be expended in the following period of contract years. A Management Committee must be established within 30 days from the effective date of the contract. The Committee is made up of 10 persons appointed by the parties on a 50/50 basis. The NNPC appoints the Chairman of the Management Committee while the contractor appoints the Secretary who will be a non-member of the Committee. The available crude oil from the contract area shall be allocated in accordance with the Accounting Procedure, the Allocation Procedure and other applicable provisions of the contract.[106]

[106] Ibid.

PPTA also provides that

> The due administration of this act and tax shall be under the care and management of the Board which may do all such acts as may be deemed necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in a manner to be prescribed by the minister.[107]

It can be seen from this, that the main administrative function assigned to the FBIR in relation to the taxation of the oil producing companies are three in number. These are the assessment, the collection and the accounting of the PPT. These functions are specifically reserved which cannot be delegated except with the consent of the minister of finance.

Making of PPT assessment is therefore an essential duty of the Board. Looking at the tax revenue from PPT, it is of tremendous importance. It is the base and foundation when compared with the collection or accounting of PPT. There shall be no collection or accounting of PPT unless when it is preceded by the tax assessment.

[107] Section 3(1) (a) PPTA, loc. cit.

3.2.0 Preparation for Making the Assessment of Petroleum Profit Tax

3.2.1 Classification of Petroleum Profit Tax Assessment

Nigerian tax system generally categorized tax assessment into various classes. It also identifies the situation in which each type can be raised.[108] PPT assessment, like any other tax assessment, can also be classified into various categories. These include: (a) Original assessment (b) Estimated assessment (c) Additional assessment (d) Amended assessment (e) Revised assessment (f) Final assessment (g) Previous assessment (h) Current assessment (i) Official assessment and (j) Self assessment.

3.2.1.1 Original Assessment: This refers to the first form of tax assessment which the Board is required to make on any company engaged in petroleum operations. The PPTA provides that 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 for the delivery of accounts and particulars provided

[108] See Ayua I.A, Loc. Cit, P.280

for in the Act.[109]The Board can raise original assessment under three circumstances. Thus according to the Act:

> Where a company has delivered accounts and particulars for any accounting period of the company. the Board may:
> (a) accept the same and make an assessment accordingly or
> (b) refuse to accept the same.[110]

The Board can therefore, raise an original assessment on a company on the basis of the account and particulars submitted to it by the company. It is also within the Board discretional power to reject the account/returns submitted if it considers them to be in accurate or incomplete. Consequently an original assessment is to be made. Similar assessment is to be raised if the company fails to submit its accounts/return within the stipulated time.[111]

3.2.1.2 Estimated Assessment: This is defined as any assessment that is based on returns of estimated tax to be paid by an oil producing company. According to the PPTA every company engaged in petroleum operations shall make up it account at the commencement of each accounting period. In the same vein, sub-section 2 and 3 of section 35 of the Act, also provides that the Board can exercise its

[109] Section 35 (1), PPTA, Loc. cit.
[110] Section 35 (2), Ibid.
[111] Section 35 (3), Ibid.

discretion of accepting or rejecting the returns submitted by the company.[112] It can also determine what is to be paid by the company based on the best of its judgment. On this ground the Act stated that:

> Where … the company has failed to deliver account and particulars provided from within the time limited… or has failed to comply with any notice given to it … within the time provided for … the Board may estimate the amount of the tax to be paid by such company for that accounting period and make an assessment accordingly…[113]

It can be seen from the above, that estimated assessment can be raised in the following three situations:

a- If the Board suspects the account/returns submitted to be incorrect or incomplete or

b- If the company initially fails to submit the returns within the stipulated period, or

c- If it fails to comply with any notice of assessment given to it within the time provided by the Act.

It is also worthy of notice that estimated assessment is part of original assessment. It is only characterized by not being based on returns of estimated tax submitted to the Board.

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[112] PPTA, LFN, 2004.
[113] Section 35 (3), Ibid.

3.2.1.3 Additional Assessment: It is an assessment of which the Board is empowered to raise on any oil producing company discovered to have been under assessed or have not been assessed at all. Accordingly, the act provides that:

> If the Board discovers or is not of the opinion at any time that, with respect to any company liable to tax, tax has not been charged and assessed upon the company or has been charged and assessed at a less amount than that which ought to have been charged and assessed for any accounting period of the company, the Board may within 6 years after the expiration of that accounting period and as often as may be necessary, assess such company with tax for that accounting period at such amount or additional amount as in the opinion of the Board ought to have been charged and assessed and may make any consequential revision of the tax charged or to be charged to any subsequent accounting period of the company .[114]

It further stated that:

> Where a revision … results in a greater amount of tax to be charge than has been charged, or would otherwise be charged, an additional assessment or an assessment for any such subsequent accounting period shall be made accordingly… [115]

The key word in the above section is "discovers." It has no statutory definition. To clarify the actual meaning attached to it, recourse most be sought from the Nigeria court decision. In the case

[114] Section 36 (1), Ibid.
[115] Section 36 (2), Ibid.

of Commissioner of Revenue v. Attah[116], the court interpreted the word "discovers" to mean that additional assessment to the best of judgment may be based on any information the commissioner can get and as such strict legal evidence is unnecessary.[117] In an attempt to define the word, Hassan Ag. S.P.J. adopted the definition given by Bray J. in an English case of R.v. Kensington Income Tax Commissioners. [118]According to him:

> The stage preceding an appeal is not that at which legal evidence is required, and it seems to me to be clear that the word: - "discovers" cannot mean ascertain by legal evidence. In my opinion it means: <u>come to the conclusion from the examination he makes, and from any information he may choose to receive.</u> There is nothing to prevent him from getting such information as he can.[119]

The above definition can make the Federal Board of Inland Revenue to have a considerably wide authority to look for information for the purpose of assessing the profits of oil producing companies(i.e. where there had been an underassessment).[120] Consequently in the case of Western Sudan Exporters v. F.B.I.R[121]. the court pointed out

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[116] (1970), N.C.L.R. 12
[117] Ayua I.A. Loc.cit. p.285.
[118] (1913) 3 KB.P.839.
[119] Ayua I.A. Loc.cit. p.284.
[120] Ibid.
[121] Suit No.LD/41A/71.

that the word "discovers" in our Act, is capable of a wider definition than its counterpart in English Act. It was subsequently held that additional assessment may be raised … where an error of law is discovered. But in the case of Mobil oil Nigeria Limited v. FBIR[122], the Supreme Court of Nigeria, adopted the interpretation of Lord Denning M.R. of the word "discovers" in an English case of Parking v. cattle[123]. It was as follows:

> The word 'discovers' simply means "finds out" ……. An inspector of Taxes discovers …… not only when he finds out new facts which were not known to him and to his predecessors also when he finds out that he or his predecessors drew a wrong inference from the facts which were then known to him, and further, when he finds out that he or his predecessors got the laws wrong and did not assess …when it ought to have been.[124]

Apparently, this is a very wide interpretation of the word "discovered". The same decision has been taken by the Federal Revenue Court (FRC) in the case of Incar Motors limited v. FBIR.[125]

From the above cases, it can be concluded that the word "discovers" has judicially various definitions. It accordingly, means "to come to conclusion from examination or any error of law or

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[122] Suit No. SC/488/75.

[123] .[1971] TR. 77

[124] Ibid.

[125] Suit No. FRC/L/3A/77. Decided on 29/6/1977.

simply to find out." In a nutshell, these definitions can all be summarized to mean that additional assessment can be raised where an additional amount comes to light from further examination of the company's account after a lesser amount of tax has been raised or an earlier assessment or as a result of fresh information received or facts which come to light at a future date.[126]

It should be noted that it is not a condition on the Board to send a return form to the company before raising any additional assessment. In the case of Commissioner of Revenue v. Attah,[127] Hassan, Ag. SPJ stated that:

> I do not agree with the contention … that a return form must be served on the defendant before an additional assessment could be raised. I can find no such duty imposed upon the commissioner."[128]

It should also be noted that at any time the Board can raise an additional assessment on any oil company found to have been under assessed due to its under-declaration of it profits. The stipulated period is not required in this case.[129] So long as the company is under assessed as a result of fraud, wilful default or neglect on the part of the company, the Board can raise an additional assessment for these at

[126] See Ayua I.A. Loc.cit p.285.
[127] [1970], N.C.L.R.
[128] Ibid.
[129] Ibid.

any time. The issue of six years from the expiration of the accounting period has not come up here. This is to send a kind of signal to the defaulters among the oil companies. They should know that they can not escape from additional assessment at any moment in addition to the penalty they are liable to pay, once they are discovered by the Board that they are under-assessed.

3.2.1.4 Amended Assessment: The PPTA states that:

> In the event of any person assessed who has objected to an assessment made upon him agreeing with the Board as to the amount of tax liable to be assessed, the assessment shall be amended accordingly and notice of the tax payable shall be served upon such person.[130]

In accordance with the above provision, amended assessment could be defined as the assessment raised by the Board on the ground of company's valid and successful objection against the original assessment. This is to say that amended assessment is legally made as a result of company's objection to the original assessment. The objection must be valid, in writing. It must be sent to the Board within the twenty one days or any legally extended period stipulated by the Act, from the date of service of such original assessment. Additionally, the company and the Board must agree upon the amount

[130] Section 38 (5), PPTA, Loc.cit.

of tax payable after the objection. Therefore, amended assessment is replacement for the original assessment. Subsequently a notice of the tax payable must be served on the company.[131]

3.2.1.5 Revised Assessment: It is an assessment which is normally made when an oil company makes an objection against an original assessment and applies to the Board to review it. Thus the provision of the Act reveals that:

> If an applicant for revision… fails to agree with the Board the amount of the tax, the Board shall give such application notice of refusal to amend the assessment as desired by such applicant, and may revise the assessment to such amount as the Board may determine and give such applicant notice of the revised assessment and of the tax payable together with notice of refusal to amend the revised assessment …[132]

Failure of the company to agree with the Board on the amount of tax is the reason why an amended assessment is not to be made. Instead of it, the Board can raise a revised assessment which is to be based on the amount determined by the Board not by the company. Because of this, a notice of the revised assessment and the tax payable is to be served a long side the notice of refusal to amend.

Both the amended assessment and the revised assessment are raised due to the company's objection to the original assessment. The

[131] Ayua I.A. Loc.cit. p.287.
[132] Section 38 (6), PPTA, Loc.cit.

difference between them depends on the agreement and disagreement between the company and the Board on the amount of tax payable. In the case of agreement between the two parties, the agreed assessment is known as "Amended Assessment". But in the event of disagreement, the Board is empowered to take any measure it may consider necessary. This is known as revised assessment and refusal to amend.[133]

3.2.1.6 Final and Conclusive Assessment: It refers to any assessment which no valid objection or appeal is lodged against it within the time limited by the act. It can also be any assessment made, amended, revised or determined on a valid objection or appeal. Thus according to the Act:

> Where the valid objection or appeal has been lodged within the time limited by … this Act … against an assessment, as regard to amount of the tax assessed thereby or where the amount of the tax has been agreed….or where the amount of the tax has been determined on objection or revision …or appeal, the assessment as made agreed to, revised or determined appeal –shall be final and conclusive…[134]

It can be understood from this that a final and conclusive assessment can be original, amended, revised or additional assessment. As soon as the time given to the company to raise

[133] Ayua I.A. Loc.cit. p.286
[134] Section 43 (1), PPTA, Loc.cit.

objection expired, the assessment then becomes final and conclusive. So also in the case of amended and revised assessment etc.

3.2.1.7 Previous Assessment: This can simply mean the assessment made for the past accounting period (s). Section 36(3) of the PPTA says that: For the purpose of computing … all relevant facts … shall be taken into account even though not known when any previous assessment …. for that accounting period was being made or could have been made.

3.2.1.8 Current Assessment: This type of assessment refers to the tax assessment of the oil company for the present accounting period.

3.2.1.9 Official Assessment: Under this type of assessment, the tax obligation is established by the Board and communicated to the company in a standard notice of assessment. It can also be based on the return submitted to it by company or an estimate of the tax officer within the Board. According to the PPTA, the Board is empowered to assess every company for any accounting period as soon as may be possible after the expiration of the time allowed for delivery of

account and particulars/returns.[135] It should be noted that this type of assessment is also termed as government or revenue assessment.[136]

3.2.1.10 Self Assessment: The tax payers or the companies are-under this type of assessment entrusted with the responsibility to assess themselves for tax. They afterward, proceed to pay the assessment in accordance with the provision of the law.[137]

3.2.2 Preparation and Submission of Returns For Making the Assessment of Petroleum Profit Tax.

According to the Oxford Advance Learner's Dictionary, the term "return" can be used to refer to an official report or statement especially one made in reply to a formal demand. For example, it could be said "ones income tax return," if the statement or report made is particularly for the tax purpose.[138] But the PPTA describes the term as a form, which the FBIR may prescribe for any company engaged in oil producing in order to determine its tax liability for a relevant accounting period.[139] Consequently, tax return could be defined as an official report or statement made by an oil producing

[135] See Section 35 (1), Ibid.
[136] Ohagwa I.C. Loc.cit. p.7.
[137] Ibid.
[138] See Hornby A.S. Loc.cit. p.1005.
[139] See Section 33 (1) PPTA, Loc.cit.

company in reply to the formal demand of the Board in order to determine its tax liability. It may comprise the followings:

i. An audited account of the company for the relevant accounting period.[140]

ii. All particulars which the company is required to prepare for tax assessment.[141]

iii. A tax form prescribed by the Board and to be completed by the company.[142]

It is important to note that tax return form is always available at the FIRS. It is obtainable free of charge from the relevant office. It contains noting more than a declaration of income and other relevant information to be supplied by the tax payers.[143]

Although the act provides that the return's form shall be prescribed by the Board. But it also prescribes the minimum required particulars which any return must contain. The prescribed return's format is as follows:

a) -Computation of its estimated adjusted

[140] See Section 30 (2), Ibid.
[141] See Section 30 (1) Ibid
[142] See Section 33 (1), Ibid.
[143] See Notification of Assessment and Collection Guidelines, FBIR, Lagos, p.2. See also the 1992 General Tax Guide for Taxpayers, p.3.

profit or loss

-Computation its estimated assessable profit of that period

b) -In connection with second schedule to this act, a schedule showing:-

-The residues at the end of that period in respect of its assets.

-All qualifying petroleum expenditure incurred by it in that period

-The value of any of its asset (estimated by differences to the provision of that schedule) disposed of in that period.

-The allowance due to it under that schedule for that period

c) -A computation of its estimated chargeable profits of that period

d) -A statement of other sums deductible under section 20 of this Act, the liabilities for which were incurred during that

period.

e) -A statement of all amount repaid, refunded, waived or released to it as referred to in subsection (5) of section 20 of this estimated tax for that period, and

f) -A computation of its estimated tax for that period.[144]

It can be seen that the above format is based on estimate. By implication, returns are of two kinds. Returns for estimated tax and final returns. The first one is to be prepared by any company engaged in petroleum operation, at the commencement of each accounting period. While the final returns are normally prepared after the expiration of the period. The difference between the two is that the word "estimated" is not written in the final return form. It should also be noted that it is from the returns of estimate that estimated assessment is raised.

All returns should be submitted within a stipulated period. In other words, a copy of the company's account of profit and loss arising from its petroleum operation shall be delivered to the Board.

[144] Section 30 (1) PPTA, Loc.cit.

The account must bear an auditor's certificate. It shall then be attached to the copies of the remaining particulars required in the return form. Each copy must contain a declaration that the same is true and complete. It is to be signed by a duly authorized officer of the company.[145] The declaration statement is for the final returns. But as for the return of estimate, each copy must contain a declaration that such estimate was made to the best of ability of the person signing the same.[146] An ultimate of two months from the commencement of each accounting period is given to the companies for the submission. As for the final returns, the submission is to be done within five months after the expiration of the relevant accounting period.[147]

It is equally important to know that further information pertaining to the returns may be required. This is left at the discretion of the Board. It can decide to demand from the company to furnish to it further information as regard to any matter in the submitted returns or as considered to be necessary by the Board[148]. Moreover, an authorized person of the company may be called to appear before the Board. This can be done in order to obtain further information. In

[145] Section 30 (2), Ibid.
[146] Ibid.
[147] Section 30 (2) Ibid.
[148] Section 31, Ibid.

other word the Board may require an authorized representative of the company or any other person legally relevant, to attend before the Board for examinations. Additionally, the Board can also require such person to produce any book, document or accounts and particulars deemed to be necessary.[149] A notice for any of the above must be given to the company. The notice must be in writing. So also the required information which must be completed and submitted to the Board. The time limited for submission must be stated in the notice. It must not be less than twenty-one days from the date of the service of the notice.[150] In addition, the limited period provided by the act for the submission of the relevant information required is not static. The Board can extend it. In as much as the Board satisfies that the company is unable to comply with the provision of the act due to some good reasons it can extend the period. There is no provision on the minimum or maximum time to which the Board can extend. Therefore, the Board may grant-in writing- the extension, as it may consider necessary.[151]

[149] Section 32 (1), Ibid.
[150] Ibid.
[151] Section 34, Ibid.

3.3.0 Making the Assessment of Petroleum Profit Tax

3.3.1 Company's Assessment

For each accounting period, all companies engaged in crude oil production in Nigeria should complete a return form for self-assessment.[152] Generally, preparation of returns as required by the PPTA constitutes a kind of self- assessment. This is because the returns form, accounts and particulars are normally prepared by the oil producing companies. In other words every company engaged in petroleum operations is vested with the responsibility to assess itself. It is to prepare its accounts and particulars and declare its profits. It is responsible at the first stage, for the computation of its gross proceeds, adjusted profit, assessable profit, chargeable profit, assessable tax and chargeable tax. The return should thereafter be delivered to the Board for verification and approval. The Board may accept the return or reject it.[153] This depends on authenticity, reliability and acceptability of the particulars contained in the submitted returns. The PPTA provides that:

> Where Company has delivered accounts and particulars for any accounting period of the

[152] FIRS, Module vi, PPT & Pioneer Companies, Training Lecture Note for Inspectors of Taxes, p.31.
[153] Section 35 (2) PPTA, Loc.cit.

company, the Board may:
(a) accept the same and
make an assessment
accordingly, or
(b) refuse to accept the
same…[154]

As soon as the returns are accepted by the Board, it then became payable.

This system of self assessment is more autonomous for allowing the taxpayer to act independently for their tax assessment. Therefore the system is less in causing disputes. Currently self-assessment has now become mandatory not only upon the oil producing companies, but also on all Nigerian and Multinational companies. This is with effect from first January, 1998.[155]

It has been observed that this is a good attempt, but does not mean a total elimination of all kinds of dispute between the Board and the company in respect of assessment. Moreover it does not mean that the Board will not longer exercise its power in raising an estimated or additional assessment when the need arises. The Board can raise an assessment when it discovers that

[154] Ibid.
[155] See Ohagwa, I.C. Loc.cit.p.7.

the company under-assessed itself.[156] This means that a company can not actually assess itself. The Board remains the real assessor since it has the power to accept or reject the returns forms of self assessment which is to be attached to the accounts and particulars of the company.

3.3.2 Board's Assessment

It is provided under the PPTA that:

> The Board shall proceed to assess every company with tax for any accounting period of the company as soon as may be after the expiration of the time allowed to such company for delivery of the accounts and particulars provided for… in this Act.[157]

Therefore the Board is given the power to assess any company engaged in crude oil production so long as it fails to submit the required returns of account and particulars to the Board. As soon as the time allowed for submission is expired, the Board can raise the estimated assessment. Normally this assessment is based on the ground of the Best of Judgment (BOJ) of the Board. Similarly the Board has power to raise an estimated assessment on any company that fails to comply with

[156] Ibid.
[157] Section 35 (1) PPTA Loc.cit.

any notice given to it in relation to the submitted returns. Within six years after the expiration of an accounting period, the Board can equally assess a company with tax .This is in the event of discovering that the company has not been assessed or has been under-assessed. The Board may therefore assess the company at such amount or additional amount that ought to have been assessed and charged for the relevant accounting period.[158]

It is very significant to note that any assessment raised by the Board must be communicated to the company. This communication must be in a standard notice of assessment.

Thus the Act states that:

> The Board shall cause to be served personally on or Sent by registered post to such person whose name appears on an assessment in the Assessment List, a notice of assessment…[159]

Consequently the Board must keep a record of Assessment List. The record should contain the names of all companies engaged in crude oil production in Nigeria. It shall also contain the postal addresses and location of those companies. Subsequently, any notice of assessment must contain the name and address of the

[158] Section36 (1), Ibid.
[159] Section 38 (1), Ibid.

company or the person in whose the company has been assessed .[160] It must also state its relevant accounting period. The chargeable profit of the company, its assessable tax and chargeable tax must also be stated. It must also indicate the place at which the payment of the tax should be made.[161]

Ordinarily, the Board assessment is likely to suffer from dispute. This is because the assessor is perceived to have established the maximum tax liability.

3.3.3.0 Steps in Making the Petroleum Profit Tax Assessment

The Petroleum Profit Tax Act provides that:

> There shall be levied upon the profit of each accounting period of any company engaged in petroleum operation during that period, a tax to be charged, assessed and payable in accordance with the provision of this Act.[162]

In accordance with this provision, tax is only imposed upon the profit of crude oil producing companies. Only companies engaged in petroleum operations that are taxed an assessed under the Petroleum Profit Tax Act. This means that for a company to qualify to fall within the provision of PPT legislation as opposed to normal company

[160] Section 37 (1), Ibid.
[161] Section 38 (1), Ibid.
[162] Section 8, Ibid.

tax law [i.e. CITA], the company most engage in petroleum operations.[163]

Worthy of note that there are three types of companies in petroleum industry. These are:

i. The crude oil producing companies.

ii. The petroleum products marketing companies.

iii. The service companies that provide to the oil producing companies the service of seismic survey logging drilling, data interpretation e.t.c

From the above types only the profit of the crude oil producing companies are chargeable to tax under the PPTA. The profits of marketing companies e.g. Mobil Oil Nigeria Limited and other small independent marketing companies as well as of the servicing companies are all charged to tax under the Companies Income Tax Act. The petroleum profit tax assessment is a process for determining the amount of tax liable

[163] Oremade, T. Petroleum Operations in Nigeria,(Lagos: West African Book Publishers Limited, 1986), p.43-44.

to be paid by any company engaged in crude oil production. In other word, it is a way through which chargeable tax of oil producing companies are determined. This process involves steps to be followed and stages to be passed through. In order to arrive at the chargeable tax of any companies engaged in petroleum operation the following are to be ascertained one after the other. These are:

1. The company's profits
2. The adjusted profits
3. The assessable profits
4. The chargeable profits
5. The assessable tax
6. The chargeable tax.

3.3.3.1 Ascertainment of Profits

According to the provision of the Act, the profit of any company engaged in petroleum operation in relation to any accounting period shall be taken to be the aggregate of:

(a) The proceeds of sale of all chargeable oil sold 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 the period incidental to and arising from any one or more of its petroleum operations [164]

It should be noted that the term ‘’petroleum operations’’ has been defined according to the Act as:

> The winning or obtaining and transportation of petroleum or chargeable oil in Nigeria by or on behalf of a company for its own account by any drilling, mining, extracting or other like operations or process, not including refining at a refinery, in the course of a business carried on by the company engaged in such sale of or disposed of chargeable oil by or on behalf of the company.[165]

It therefore involves production and sale of crude oil and natural gas. Refining the crude oil in the refineries is excluded from the term petroleum operations.

Unlike the assessment under the companies Income Tax Act which is based on year of assessment, the PPT assessment is solely based on the accounting period. The PPTA also defines

[164] Section 9, Ibid.

[165] Section 2, Ibid.

the term accounting period'' in relation to any company engaged in petroleum operations to mean:

a) A period of one year commencing on 1st January and ending 31st December of the same year; or

b) Any shorter period commencing on the day company first makes a sale or bulk disposal of chargeable oil under a programme of continuous production and sales, domestic, export or both, and ending on 31st December of the same year; or

c) Any period of less than a year being a period commencing on 1st January of any year and ending in the same year when the company ceases to be engaged in petroleum operations.[166]

Therefore accounting period of company can be any of the above three periods. In order to determine the value of any chargeable oil disposed of by company, the Act also provides that it is to be taken as the aggregate:

[166] Ibid.

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 sub section; 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.[167]

3.3.3.2 Ascertainment of Adjusted profits

The Act provides the definition of adjusted profit in relation to the profit of a company in any given accounting period. Thus the Act states that:

> The adjusted profit of an accounting period shall be the profit of that period after the deductions allowed by subsection (1) of section 10 of this Act and any adjustment to be made in accordance with the provision of section 14 of this Act.[168]

[167] Section 9 (2), Ibid.
[168] Section 9 (3), Ibid.

Accordingly, the adjusted profits of an accounting period is the profits of that period after the section 10 (1) allowable deduction and any adjustment made in accordance with section 14 of the PPTA. In other words, to arrive at the adjusted profit of any company engaged in crude oil production, all outgoing and expenses listed under the section 10 (1) of the Act shall be deducted (i.e. from the gross proceeds of the company). So also some certain profits excluded by section 14 of the Act.

In accordance with the above provision, allowable deductions are all the outgoing and expenses stated underneath.

a) Any rent incurred by the company for:

i) Occupation of land or building for its petroleum operations

ii) Disturbance of surface right under the oil prospecting license (OPL) or Oil Mining License (OML)[169]

iv. Non-productive rent paid by the company

v. All royalties paid for natural gas sold or disposed in commercial manner

[169] Basically the Nigerian Government permits oil companies to commence oil exploration by issuing OPL to it. This may be converted to an OML after the discovery of oil. It should be noted that rents are payable on both the OPLs and the OMLs.

vi. All royalties incurred for crude oil casing head petroleum sprit won in Nigeria

vii. All sum paid to the federal government as customs and excise duties for machineries, equipment and goods used for petroleum operations

viii. Any interest of loans incurred on capital employed in petroleum operations

ix. Any interest incurred on inter company loans obtained under terms prevailing in the open market i.e. London inter Bank offer rate.

x. Any expenses incurred for repair or renewal of fix assets.

xi. Bad or doubtful debt as provided by the Act.

xii. Any expenditure of which intangible drilling cost inter-alia directly incurred in connection with the drilling of exploration of two appraisal and development well.

xiii. Contribution to any pension, provident or society fund or scheme approved by the Board.

xiv. All sums paid to the government as a duty customs and excise duties education tax, taxes other then PPT or other rate fees or other like charges.

xv. Such other deductions as may be prescribed by any rule under the Act.[170]

It should be noted that the Act, as a general rule, provides that:

> 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…[171]

This is a general rule for identifying whether an item of expenses is deductible or not. It is not necessary to be among the above-enumerated items by name. An item of expenses is considered deductible so long as it fulfils the conditions generally set by the Act. It has to undergo a crucible test contained in the phrase "wholly, exclusively and necessarily incurred for the purpose of its petroleum

[170] Section 10 (1), PPTA, Loc. Cit.
[171] Ibid.

operation." This is because this phrase is the yardstick for determining whether an item of expenditure qualifies to be deductible expenses or not. But the question here is how can an item of expenses be established as wholly, exclusively and necessarily incurred for the purpose of petroleum operations? But before determining the above questions it must be stated that, the phrase "wholly exclusively, reasonably and necessarily incurred'' is not only contained in the PPTA. Rather it is a common phrase in virtually all-taxing statutes in respect of direct taxes. Thus the phrase is found in the PPTA, CITA, and CGTA The only difference between them is that the term "reasonably" is omitted in the CGTA and PPTA. It has been observed that the choice of words is presumably intended to have a narrowing effect on the deductible allowances. In other words, the phrase is used so as to confine the scope of deductible expenses to only direct (i.e. wholly and exclusively) and unavoidable (necessary) outlays.[172] The only expenses that can be deducted are those that are incurred with the sole purpose of enabling the company to carry on it petroleum operations. Therefore it is only the expenses that are blatantly extravagant in nature and for personal or private benefit and selfish

[172] See Ayua I.A. Loc.cit. p.179.

interest of the companies' directors and their associates that can be readily disallowed. This is because there is no common standard in determining what is whole, exclusive and necessary. Moreover, it has been argued that no item of expenditure produces or earns income. This is because expenditure is an outgoing not incoming item.[173] But it should be understood that expenses are made to earn income.

However, in the case of Shell Petroleum Development Company (Nig.) Ltd. v. FBIR[174], the Supreme Court of Nigeria held that the first two words in the phrase i.e. "wholly and exclusively" have virtually the same meaning. Both can mean "solely or entirely." But the problem here is how to determine whether this is or not a correct statement of law. This essentially based on determining the applicability of the principle of duality on the phrase, which is under discussion.

In general, the phrase "wholly and exclusively" under the tax law contains the principle of duality. The phrase means that expenses of dual nature or purpose do not qualify as allowable except apportionment is possible so that the portion, which is not for the

[173] Ibid.
[174] (1996), 8 Nigerian Weekly Law Report, 256, pp.294-295.

purpose of business, will readily be disallowed. From this angle, the word "wholly" refers to the quantum of the money expended while the word "exclusively" refers to the motive or object accompanying it.[175] Consequently, if an item of expenditure is not solely for a business purpose or is partly for a business and partly non-business purpose the duality principle serves to disallow it, in whole or in part, only when the expense is possible to be apportioned. Therefore, it is not proper to always take the two words "wholly and exclusively" with equal meaning as the Supreme Court did. However, the issue of duality principle may in practice not arise under the petroleum profit tax act. It may be difficult for the issue to arise therein in the sense of personal motive complicity with a business motive. This may be the reason why the Supreme Court gave the two terms the same meaning. But the problem is that the Supreme Court definition may be taken as general and applicable to other taxes where the duality rule has much relevance.[176] In any case the issue of duality might be possible to arise not only in the Petroleum Profit Tax Act but also in the Companies Income Tax Act. This could be in a situation whereby staffs of MNOCs combine

[175] Kanyip, B.B. Taxation issues in Foreign Invesment. Modern Practice Journal of Finance and Investment Law. January (1998). Vol.2, No.1, Page 125.
[176] Ibid.

business with their personal pleasure trips abroad. Undoubtedly, expenses of this nature have a duality of purpose.[177]

Another issue that may also come up under the general rule of deductibility is whether the expenses incurred by a company in the course of earning the profits are deductible or not.

In the case of Shell Petroleum Development Company Nigeria Limited v. FBIR[178], the Board disallowed the amount of $75,998 or ₦ 151,996 as demurrage or dead freight charge incurred by the appellant company.

The counsel to the appellant contended that the amount should be deducted on the ground that the sell of crude oil is part of the company's business which falls under the definition of petroleum operations. On the other part, the counsel to the Respondent conceded that demurrage or dead fright charge could be a normal business expenses in the sale of crude oil. He also maintained that sale of crude oil did not fall within the definition of petroleum operations.

[177] Ibid.
[178] APP / COMM / 225 – 18 April, 1975

It was argued by the counsel to the Appellant that the PPTA provides that petroleum operations mean:

> … the winning or obtaining and transportation of petroleum or chargeable oil in Nigeria by or on behalf of a company for its own account or any drilling, mining, extracting or other like operations or process, not including refining at a refinery, in the course of a business carried on by the company engaged in such operations, and all operations incidental thereto and any sale or any disposal of chargeable oil by or on behalf of the company.[179]

The counsel for the Appellant strongly contended that the word 'sale' in the above definition includes sale of crude oil and that such sale is within the petroleum operations as defined by the Act.

But according to a legal luminary, Ola C.S., to adopt this interpretation is to wrongly construe the definition which clearly excludes sales of chargeable oil which includes crude oil. He therefore opined that the above definition has two limbs. [180] The first limb deals with operations which come within the definition. The Act states that:

> Petroleum operations means the wining or obtaining and transportation of petroleum or

[179] Section 2 PPTA, Loc. Cit.
[180] Ola, C.S. Loc. cit. p.550.

> chargeable oil in Nigeria by or on behalf of a company for its own account or any drilling, mining extracting or other like operations or process[181]

The operations are clearly set out. They form a sine qua non to extraction and transportation of crude oil within Nigeria such as drilling, mining, extracting or other like operations that may be incidental to the business of the company.

The second limb of the definition clearly seeks to isolate and allowed only those operations that are directly connected with the winning of chargeable oil. Thus the Act says:

> not including refining at the refinery in the course of a business carried on by the company engaged in such operations and all operations incidental thereto and any sale or any disposal of chargeable oil by or on behalf of the company.[182]

It was argued from the above limb that the marketing of chargeable oil is excluded. In other words, it excludes operations connected with delivery of chargeable oil by the company to a refinery even if it is by way of sale. It is in this context the word sale is used in the definition. This view is supported by the words that

[181] Section 2, PPTA, Loc. Cit.
[182] Ibid.

follows the phrase ‘ and any sale’ in the definition. These words are ‘ or any disposal of chargeable oil by or on behalf of the company.’ The term ‘ disposal’ and the phrase ‘ disposed of’ are defined under section 2 of the PPTA as:

> [a] Delivery without sale of chargeable oil to and
>
> [b] Chargeable oil delivered without sale, to a refinery or
>
> an adjacent storage tank for refining by the company.[183]

On the above ground Ola claimed that, all those processes which include refining at a refinery in the cause of a business carried on by the company engaged in such operations are excluded from the definition of petroleum operations. Similarly all operations incidental thereto are not included under the definition of petroleum operations. So also any sale of or any disposal [i.e. without sale] of chargeable oil delivered to a refinery or any adjacent storage tank for refining by or on behalf of the company is also excluded.[184]

The Body of Appeal Commissioners held that expenses connected with sale of chargeable oil fall outside petroleum

[183] Ibid.
[184] Ola, C.S. Loc. cit.

operation. Therefore the provision of section 10 of the PPTA can not be invoked by the Appellant.[185]

Critically observed, the above decision is in line with the interpretation of section 2 made by Ola in respect of the definition of petroleum operations. Nevertheless it is doubtful whether or not to accept the interpretation as the true statement of law. To understand the correct meaning of petroleum operations according to the Act, there is a need to look at the definition as a whole rather than to view it from perspective of two limbs interpretation. Thus provision of the Act should be read as follows:

> Petroleum operations means: The winning or obtaining and transportation of petroleum or chargeable oil in Nigeria by or on behalf of a company for its own account or any drilling, mining , extracting or other like operations or process, not including refining at a refinery, in the course of a business carried on by the company engaged in such operations, and all operations incidental thereto and any sale or any disposal of chargeable oil by or on behalf of the company.[186]

[185] Ibid.
[186] Section 2 PPTA, Loc. Cit.

It obvious from the above that an oil company can only comply with the definition of petroleum operations when it undertakes all of the following operations:

1. Winning or obtaining of crude oil;

2. Transportation of crude oil;

3. Incidental operations to the above mentioned; and

4. Sales or disposal of crude oil.

The two limbs interpretation fails to take two important commas into consideration. The commas come immediately before and after the underlined statement in above definition provided by the Act. Thus they are as follows:

…, not including refining at a refinery, in the course of a business carried on by the company engaged in such operations,…[187]

The commas carry the meaning of additional information in respect of the kinds of operations fall within the definition. They are purposely placed to exclude a certain operation from the definition. Thus petroleum operations do not include refining of crude oil in the refineries which is done by a company in the course of a business

[187] Ibid.

rather than winning or obtaining and transportation of crude oil together with incidental operations thereto and any sale or disposal of chargeable oil. In other words, only the operation of refining at the refineries is excluded from the definition of petroleum operations.

By inference, if a company is not winning or obtaining oil but engages only in the resale of crude oil purchased from another company that is wholly engaged in petroleum operations, the profits of the 1st company are not to be taxed under the PPTA. Therefore the issue of deductibility of expenses incurred in the process of earning the profits under section 10 of the Act could be invoked. To establish that a company sells crude oil is not enough to render its profits chargeable under the PPTA. The source of crude oil sold must be established. It must have been obtained by drilling, mining, extracting or other like operations or process. The process of winning or obtaining and transportation can not produce any income unless the crude oil produced is disposed off or sold. It is therefore apparent from definition that the Act made a clear distinction between crude oil obtained in the above manner and that obtained in any other manner. It is only when chargeable oil is sold or disposed off, the profits can be accrued. Therefore the sale of crude falls within the

definition of petroleum operations in as much as the crude oil sold is obtained in the manner prescribed by the Act.

A part from the allowable deductions provides by the Act, it also states some specific items of expenses which shall not be deducted in ascertaining the adjusted profit of a company. According to the Act, the followings are not to be deducted in computing the adjusted profit.

i. Any disbursement not been money wholly and exclusively expended for the purpose of petroleum operations

ii. Any capital withdrawn or sum employed as capital

iii. Any capital employed in improvement not for repairs

iv. Any recoverable sum under on insurance

v. Rents or cost of repairs of premises not for the

purpose of petroleum operation.

vi. Any amount incurred for income tax, profit tax, or any similar tax in or outside Nigeria

vii. Depreciation of any premises, buildings, structures, or any other fix assets

viii. Payment to any provident saving widows, and orphans or other society schemes which is not approved by the Board.

ix. Any customs duty on goods for sales or employees personal consumption or where goods of the same quality are already available in Nigeria

x. Any expenditure for the information purchased in relation to the existence and extent of

petroleum deposit.[188]

In addition, any sum incurred by the way of interest upon any borrowed money shall also be disallowed. But this should be in a situation whereby such money was borrowed from a second company, if either company has an interest in the other company. It shall also not be allowed if both companies have interest in another company- either directly or through other companies. The case is equally the same, if both of the companies are subsidiaries of another companies.[189]

In computing the adjusted profit of an oil producing companies, the Act also excludes some certain profits. Thus the Act states that:

> Where a company engaged in petroleum operations is engaged in the transportation of chargeable oil by ocean going oil tankers operated by or on behalf of the companies from Nigeria to another territory then such adjustments shall be made in computing an adjusted profit or loss as shall have effect of excluding there from any profit or loss attributable to such transportation.[190]

[188] Section 13 (1), PPTA, Loc.cit.
[189] Section 13 (2), Ibid.
[190] Section 14, Ibid.

From this provision, it could be understood that the business of transporting the chargeable oil is quite different from that of petroleum operations. Therefore the profits arise from it shall no be taxed under the Petroleum Profit Tax Act. It may be taxed in this case, under the CITA.

3.3.3.3 Ascertainment of Assessable Profit

The PPTA also states that:

> Subject to the provision of this section, the assessable profit of a company for any accounting period shall be the amount of the adjusted profit of that period after the deduction of:
>
> a- The amount of any loss incurred by that company during any previous accounting period; and
>
> b- In the case to which section 18 of this Act applies, the amount of any loss which under that section is deemed to be a loss incurred by that company in its trade or business during its first accounting period.[191]

The assessable profit is therefore the amount of the adjusted profit less the amount of losses incurred by the company. In other word, the amount of losses incurred by the oil producing company is

[191] Section 16 (1), Ibid.

to be subtracted from the amount of its adjusted profit before arriving at its assessable profits.

According to the provision of the Act, the deduction of losses incurred from the adjusted profit shall be made in the first accounting period after which the losses were incurred. It should only be deducted when it is possible. But if it is not possible, the losses should then be deducted in the next succeeding accounting period. If the aggregate of an amount of loss in a given accounting period, can not be wholly and completely relieved against the adjusted profit, the remaining unrelieved amount shall be carried forward to the next succeeding accounting periods. This can be continued until when the amount of losses is completely settled.[192] Additionally, the company can even elect to carry the losses forward to the succeeding accounting period.[193] An ultimate period of five months or any further period permitted by the Board is given to the company to elect the deferring. The lection must also be in writing.[194]

It could be understood from the above that the loss relief is advantageous. It has the effect of reducing the assessable profit of the

[192] Section 16 (2), Ibid.
[193] Ibid.
[194] Section 16 (3), Ibid.

current or future accounting period. Consequently the amount of tax payable is reduced. This has a significant cash flow consequence for the Oil Company. It should also be noted that as for now, no oil producing company operates at loss. This follows that the relevance of this provision is not much.

3.3.3.4 Ascertainment of Chargeable Profits

The definition of the chargeable profit has been provided by the PPTA. In accordance with the provision of the Act, the chargeable profit is the amount of the assessable profits after the deduction of any amount to be allowed in accordance with the provision of section 20 of the Act.[195]

Subsequently, the Act provides the amount of deduction to be allowed under this section. Thus it states that:

> There shall be computed the aggregate amount of allowances due to the company under the provisions of the second schedule for the accounting period.[196]

The allowances provided under the Second Schedule of the Petroleum Profit Tax Act are termed as Capital Allowances.

[195] See Section 20 (1), Ibid.
[196] Section 20 (2), Ibid.

Therefore, chargeable profit of any company engaged in crude oil production can be simply defined as the amount of assessable profit after the deduction of the capital allowances of the company. In other words, Assessable Profit (AP) less the Capital Allowance (CA) is the Chargeable Profit (CP) of a company [i.e. AP - CA = CP].

It is relevant to know that capital allowances is a kind of accelerated depreciation allowances that covers all rapidly writing off of the original cost of new capital equipment less any salvage value in the early period of investment.[197] It is therefore allowed in lieu of depreciation of fixed assets. Under the PPTA , depreciation of fixed assets is one of the charges disallowed from being deducted in determining the assessable profit of any company engaged in petroleum operation. The reasons is that such company may write off the cost of its assets either in a lump sum in one accounting period or spread it over two or more succeeding accounting periods.[198]As a matter of fact, fixed assets used wholly exclusively and necessarily for the purpose of petroleum operations suffer wear an tear or exhaustion. Consequently the Act provides uniform rates for writing off various

[197] See Ayua, I.A. Loc.cit. 309.
[198] See Oremade T. Loc.cit p.52.

assets.[199] Furthermore, it has been recognised, as a general principle of taxation, that relief should be given in respect of wastage of assets that are used up or consumed in their course of carrying on a business. [200] Therefore the basic reason for the grant of capital allowances is to encourage the oil producing companies to develop and equip their business. In addition to this, real commercial profit cannot be properly determined without providing allowances for capital wastage.[201]

Capital allowances involve any cost or expenses incurred on assets acquired for the sole purpose of contributing to the operations of oil producing company on long-term basis. It also involves the cost of utilizing the assets as a result of certain types of leasing arrangements. Additions, extensions, major renewal and improvements to existing assets can inter-alia, be included within the scope of capital expenditure.[202] It is worthy to note that such assets, on which the company incurred cost and expenses, may be basically classified into two viz. tangible and intangible assets. Tangible assets comprise lands, buildings, plants and machineries. While intangible assets embraces oil rights and concession e.g. Oil Prospecting

[199] Ibid.
[200] See Ayua, I.A. Loc.cit. p.144.
[201] Ibid.
[202] See Oremade T , Loc.cit. p.57.

License, Oil Mining License etc. Capital Expenditure does not involve any cost incurred by an oil company in respect of assets that are of minor value. In the same way, expenses on maintenance, repairs, renewals or improvement of a minor nature are equally not to be included.[203]

It is only when some certain conditions are fulfilled, an oil producing company can qualify for the grant of capital allowance. The capital expenditure has to fulfil these conditions. These include –inter-alia that the capital expenditure must be:

i- Incurred on assets owned by the company and in use at the end of its accounting period

ii- Incurred wholly, exclusively and necessarily for the purpose of petroleum operations.

iii- The qualifying expenditure as defined under Para. 2 of the second schedule of the PPTA, Cap.P.13 LFN, 2004.

[203] Ibid.

An initial or an annual allowance is a kind of qualifying expenditure incurred in respect of asset. An oil company is only due and entitle to this type of capital allowance if it was the owner of the asset which was in use at the end of its accounting period for the purpose of petroleum operations carried on by it.[204] An asset is deemed to be in use during a period of temporary disuse.[205] Where an asset consists of building, structure or works, the owner thereof shall be taken to be the owner of the relevant interest in such building, structure or works.[206] The term "relevant interest" here means the interest in such building structure or works to which the company was entitled when incurred the expenditure.[207] But where the company is entitled to two or more interest therein, and one of these interests is an interest which is reversionary on all the others, that interest shall be the relevant interest for the purposes of capital allowance.[208] Before the commencement of the first accounting period, an expenditure, which has not brought any asset in existence, could be incurred. Such

[204] See Para. 7, 2nd Schedule, PPTA, Loc.cit.
[205] Para. 15(1), Ibid.
[206] Para. 3 (1), Ibid.
[207] Para. 3 (2), Ibid.
[208] Para. 3 (3), Ibid.

expenditure would have been treated as qualifying petroleum expenditure if it has been incurred in the first accounting period. According to the Act, it shall be deemed to have brought an asset owned by the company and the asset is in use for the purpose of petroleum operations.[209]

Capital expenditure must also be incurred wholly, exclusively and necessarily for the purpose of petroleum operations.[210] This implies that expenditure can be of a dual nature. It can be partly for the purpose of petroleum operation and partly for other purposes. In this case capital allowance is only given in respect of the part of expenditure incurred for the purpose of petroleum operations.

In addition, capital allowance is also granted if the capital expenditure is qualifying. The Second Schedule to the Act defines the term qualifying capital expenditure to mean the expenditure incurred by the company in an accounting period which is:-

[209] Para. 2, Ibid.
[210] Para. 5 & 6, Ibid.

a) Capital expenditure (called qualifying plant expenditure) incurred on plant, machinery or fixtures

b) Capital expenditure (called qualifying plant pipeline and storage expenditure) incurred on pipelines and storage tanks;

c) Capital expenditure (called qualifying building expenditure) incurred on the construction of buildings, structures or works of a permanent nature;

d) Capital expenditure (called qualifying drilling expenditure) incurred in connection with petroleum operations in view of:

i. The acquisition of or right in or over- petroleum deposit;

ii. Searching for or discovering and testing petroleum deposits, or winning access thereto; or

iii. The construction of any works or buildings which likely to be of little or no value when the petroleum operations for which they were constructed cease to be carried on.[211]

Any expenses that may be deducted under the provision of section 10 of the PPTA should not be included within the context of qualifying expenditure.[212] This is because the expenses under the section are deducted in order to arrive at the adjusted profit of the company. But the deduction here aims specifically, at arriving at the chargeable profit of the company.

Expenditure could be incurred before the first accounting period of a company. If it had been incurred on the first day of the first accounting period, it would have been treated as qualifying expenditure. Such expenditure is deemed to be qualifying expenditure if it is incurred in respect of an asset owned by the company.[213] But if such expenditure is incurred in respect of an asset which has been disposed of before the

[211] Para. 1 Ibid.
[212] Ibid.
[213] Para. 1 (2) (a), Ibid.

beginning of the first accounting period then any loss suffered by the company on the disposal, shall be deemed to be qualifying petroleum expenditure incurred on that first day. Further more the expenditure shall be deemed to have brought into existence an asset owned by the company and used for the purpose of petroleum operations. Moreover, any profit realised by the company on such disposal shall be treated as income of the company of its first accounting period for the purpose of ascertaining the profit of the company.[214]

The capital allowances commonly known under the PPTA are Petroleum Investment Allowance and Annual Allowance. The Act provides that:

> Where a company has incurred any qualifying capital expenditure wholly, exclusively and necessarily for the purpose of petroleum operation… There shall be due to that company, for the accounting period in which that asset was first used … An allowance (… called "petroleum investment Allowance") at the appropriate rate per centum set forth in the Table I to this schedule of such expenditure.[215]

[214] Para. 2 (b) Ibid.
[215] Para. 5 (1), Ibid.

Accordingly the table indicates the appropriate rate of the Petroleum Investment Allowance as follows:

Qualifying expenditure in respect

i. On-shore operation……...5%

ii. Operations in territorial waters and continental shelf areas up to and including 100 metres of water depth ……5%

iii. Operations in territorial waters and continental shelf areas in water depth between 100meres and 200 metres….5%

iv. Operation in territorial waters and continental shelf areas beyond 200metres of water depth……5%.[216]

As for the Annual Allowance, the Act also provides that:

> Where in any accounting period a company owning any assets has incurred in respect therefore qualifying expenditure wholly, necessarily and exclusively for the purpose of petroleum operations carried on by it, shall be due to that company as from the accounting period in which such expenditure was incurred, an allowance (… referred to as '' annual allowance'') at appropriate rate

[216] Table I, Ibid.

percenturm, specified in table II of this schedule.[217]

The table gives us the details on the rate of Annual Allowance as follows:

1st year	- 20%
2nd year	- 20%
3rdyear	- 20%
4th year	- 20%
5th year	- 19%
6th year and after	- 20%. [218]

It could be understood from the above, that the system of capital allowance has been designed to stimulate development in the upstream oil sector. This is because the above two forms of allowance are similar in granting a given amount to the company in the relevant accounting period.

The computation of capital allowance is based on the provision of the second schedule of the PPTA as amended. A limitation has

[217] Para. 6 (1), Ibid.
[218] Table II, Ibid.

been imposed in calculating the capital allowances of the company. It must be ensured that the amount of the tax chargeable on the company for that period shall not be less than 15% of the tax, which would be chargeable if no deduction were to be made.[219] In other words, the amount is limited to be not less than 15% if no capital allowances were to be granted.[220] The Act also provides that the capital allowances allowed to be deducted shall be:

a) The aggregated amount of the capital allowances computed; or

b) A sum equal to 85% of the assessable profits of the accounting period less 170% of the total amount of the deduction allowed as petroleum investment allowances computed under the second schedule whichever is the less.[221]

Where the full amount of capital allowance cannot be deducted due to insufficient assessable profit or because of the above restriction, the excess shall be carried forward. It will then be set off in the

[219] Section 20 (3), Ibid.
[220] See Section 20 (4), Ibid.
[221] Ibid.

succeeding accounting period, until when the full amount is deducted.[222]

For illustration, the following extracts were obtained from the books of Oliwo Petroleum Company (ltd) at the end of its 1982 accounting period.

Assessable profit as computed for tax purposes = ₦15, 000,000

Qualifying drilling expenditure capitalised for 1982= ₦30, 000,000

Customs duty on essential/equipment = ₦2, 000,000

Investment Tax Credit = ₦1, 500,000

Royalties on local crude oil sales = ₦500, 000

What is required here is to compute the capital allowance of the period, which the company is entitled for the petroleum profit tax purposed. It has been subsequently suggested that the answer should be as follows:

[222] Section 20 (5) Ibid.

Oliwo Petroleum Company Ltd

Computation of capital allowance for accounting period

1st January To 31st December, 1982

Capital allowance (annual allowance) an current years qualifying drilling expenditure

- i.e. 20% of N30,000,000 =₦6,000,000

- Restriction under the act: 85% of N15, 000,000= ₦12, 000,000

- Less 170% of Tax offsets:-

- Custom duty on essential tools = ₦ 2000,000

- Investment tax credit = ₦1, 500,000

- Royalty on local crude oil sales = ₦500, 000

-Total = ₦4, 000,000

- i.e. 170% of 4,000.000 = ₦6,800,000 = ₦5, 950,000

The capital allowance allowed by the Act is restricted

to ₦5, 950,000.[223]

It should be noted that the capital allowance allowed by the Act is limited here to ₦5, 950,000. This amount is subsequently less than the capital allowance of ₦6, 000.000 as at 31st December, 1982. Therefore the balance of ₦50, 000 is to be carried forward to 1983 accounting period.

In addition, if the capital allowances (as restricted) are granted, the computation will be as follows:

- Assessable profit = ₦15, 000,000
- Less capital allowance (as restricted) = ₦5, 950,000
- Chargeable profit = ₦9, 050,000

-Assessable tax @85%

-Therefore 85/100 x 9,050,000 = ₦7, 692,500

- Less tax offset (as above) = ₦4, 000,000
- Chargeable tax = ₦3, 692,500 [224]

[223] See Oremade, T. Loc.cit. p.28.
[224] Ibid, p.29.

In order to ensure that the amount of any tax chargeable on the company for the relevant accounting period is not less than 15% of the tax, which would be chargeable if no capital allowance was granted, the following computation is needed:

Assessable profit	=₦15, 000,000
Less: Capital allowance	-
Chargeable profit	=₦15, 000.000

Assessable tax @ 85% i.e.85/100 x 15,000,000

=₦12, 7500,000

Less: Tax set off (as above)	=₦4, 000,000
Chargeable tax	=₦8,760,000

15% of chargeable tax if no capital allowance was granted is N1, 312,500. [225]

From the above, it can be seen that the chargeable tax of ₦3, 692,500 is not less that ₦1, 312,500 which is the 15% that would have

[225] Ibid.

been the Chargeable if no capital allowance was granted. The provision of the Act has been duly satisfied.

3.3.3.5 Ascertainment of Assessable Tax

The assessable tax for any accounting period of a company shall be an amount equal to 85% of its chargeable profits of that period.[226] But where a company has not yet commenced a sale or bulk disposal of chargeable oil under a programme of continues production and sale, as at 1st Apri,1977, its assessable tax is 65.75% of the chargeable profit for that period.[227]

Historically, assessable tax has experienced different changes as regard the tax rate. This is due to the various amendments through which the PPTA underwent in different years. From 1958 to 19/3/1971, the assessable tax of any company engaged in petroleum operations was 59% of its chargeable profit. 55% of it was the rate between 20/3/1971 and 30/9/1974. The rate was amended to 60.78% from 1st October 1974. 65.75% of the chargeable profit of the company was the rate as at 1st December, 1974. With effect from 1st

[226] Section 21 (1), PPTA, Loc.cit.
[227] Section 21 (2), Ibid.

April, 1975, 85% of the chargeable profit has been the assessable tax of any company engaged in crude oil production.

To sum up the above, an assessable tax is the amount of chargeable profit multiplied by the relevant tax rate.

For further illustration, the following could be given as an example:

If the chargeable profit of Oliwo petroleum ltd is ₦90,500,000 then its assessable profit (if it is from 1st April, 1975) shall be 85% 0f ₦9,050,000 =85/100 x ₦9050000/1 = ₦7692500

Therefore the assessable tax is equal to = **₦7, 692,500**[228]

3.3.3.6 Ascertainment of Chargeable Tax

The term "Chargeable Tax'' refers to the tax due of which a company is liable to pay. For petroleum profit tax purpose, the chargeable tax of a company is the amount of its assessable tax after the investment tax credit is deducted.[229]

It should be noted that investment tax credit is an allowance. Only crude oil producing companies that executed a Production

[228] Oremae,T. Loc.cit., p:29
[229] Section 22 (3), PPTA, Ibid.

Sharing Contract (PSC) with the NNPC in 1993 shall be entitled to claim this type of allowance. It is paid by way of set off against tax in accordance with the provision of the PPTA.[230] Under the PSC the contractor is guaranteed a share of production to cover his cost and his share of profits. The oil recovered in the contract area is split into four: Royalty Oil; Cost Oil; Tax Oil; and Profit Oil.[231] The investment tax credit rate applicable to the contract area shall be 50% flat rate of chargeable profit for the duration of the PSC.[232]

Unlike the initial or annual allowance, investment tax credit is an allowance which is not deducted from the cost of the asset. It is not considered as capital allowance and therefore not deducted from the assessable profit of the company. It is only deducted from the assessable tax. It is an allowance, which is given once and for all.

[230] Section 22 (1), Ibid.
[231] Ale, B.E. Petroleum Profit Tax in Nigeria: Issues and Options. Nigerian Taxation. The Official Journal of the Chartered Institute of Taxation. July – Dec. (2000) Vol.4, No.3 & 4, p.35.

[232] Section 22 (2), Ibid.

3.4.0 Memorandum of Understanding (MOU) and the Assessment of Petroleum Profit Tax

3.4.1. Concept of Memorandum of Understanding

It is true that assessment of the PPT is governed by the PPTA. Nevertheless the Act is considered to be a source of confusion particularly to the investors. It does appear that the more you look into it the less you see. Merely obtaining a copy of PPTA will do no one any good.[233] The best that can be said is that the PPTA provides only a framework for the understanding of the petroleum tax regime. Recourse must had to various contractual agreements existing in the upstream oil sector.[234] Memorandum of Understanding (MOU) is one of these agreements.

In line with this, the significance of MOU in relation to the PPT is undeniable. It is therefore vital to all tax practitioners to understand it. This is because no proper assessment of PPT can be judiciously done without a thorough knowledge of it. It is therefore necessary to explain how MOU relates to the PPT assessment.

[233] Ale, B.E. Loc. cit.
[234] Ibid.

In the context of upstream oil companies, MOU is an arrangement worked out between the Federal Government of Nigeria and each of the oil producing (Joint Venture) companies. Joint Venture partners produce almost 95% of Nigeria's crude oil. The NNPC now, owns about 57% of the JV interest.[235] It was in 1986 that the worldwide oil glut made it almost impossible for the Federal Government to lift its equity oil. The payment of tax and royalty became very difficult for the oil producing companies. This is because the crude oil in the market was about $12 per barrel, while the then posted price was $28 per barrel. The oil producing companies are required under the PPTA to pay for tax / royalty on posted price. When it became apparent that the companies could not comply with the tax law, the Federal Government through the NNPC then entered into the first MOU with the oil producing companies. In January 1986 the arrangement was signed. It was to guarantee the oil companies a profit margin irrespective of market conditions. It therefore allows crude oil to be fiscally valued at realised prices instead of posted price.[236]

[235] Ibid.
[236] See Year 2000 MOU, an Examination by the Department of Tax Administration, Finance and Account Division NNPC – NAPIMS, p.1.

3.4.2 Historical Background of Memorandum of Understanding

Worthy of mention is that MOU is an incentive arrangement. Prior to 1986 MOU, various incentives were introduced so as to enhance the oil exploration activities in the country. Between 1960s and 1970s, Nigerian Government observed that the oil producing companies were slowing down in oil exploration activities. That was not unconnected with the companies claim that the PPTA of 1959 and the then prevailing royalty rates reduce their profit margin to the level that discouraged further investment. Consequently in 1977, the Federal Government announced a package of petroleum incentives. Government's aim was to boast petroleum exploration and development activities. The oil companies on their side satisfied the government expectations by drilling more wells in unproven areas. This subsequently resulted in commercial discoveries.[237] The package of incentives included:

i. The cost of exploration well and two first appraisal wells were to be expensed in the year of drilling;

[237] See Olisa M.M. Loc cit. P.174.

ii. Approval of annual allowances to companies for the amortization of their investments in five equal instalment;

iii. Reduction of tax imposed on oil companies engaged in exploration but not yet producing to the lowest operating level in all the OPEC member state to 65.75% ;and

iv. Approval of investment tax credit according to a prescribed rate.[238]

But the oil companies that engaged in joint venture operation with NNPC were allowed a special profit margin in their share of crude oil obtained. The margins have been increased from time to time when it is established that economic forces and fiscal measures have seriously eroded the prevailing profit margin. Historically, the trend of allowances given to the oil companies in order to offset the assumed technical costs of production per barrel is as follows:

[238] Ibid. pp 174-175.

DATE	TECHNICAL COST OF PRODUCTION PER BARREL	PROFIT MARGIN PER BARREL
From 1st April, 1977- January, 1979	$ 1.00	$0.08 -
From 1st January, 1979 – July 1982	$1.10	$0.80
From 1st July, 1982 to 1st February, 1982	$1.60	$1.60
From 1st February, 1983 to 1st January, 1986	$2.00	$2.00 [239]

Before 1982, the oil companies in Nigeria were under the obligation to supply, on pro rata basis, 30% of the 250,000 barrels per day of the crude oil required for domestic refineries. The prices of such supplies were below world market prices. As further incentives,

[239] Ibid. p.177.

the oil companies were relieved of that obligation as from 1982. Around 1983, there was a gradual decline in the world market situation and a steady increase in technical cost of crude oil production per barrel. This situation became serious in 1984 and climaxed in early 1986. Consequently it led to negotiation between the oil companies and the NNPC for a review of the existing fiscal measures and incentives. Thus in January, 1986, another package of incentives was granted to the oil companies. This package was embodied in the first MOU between the federal government and each of the oil companies.[240]

The 1986 version of MOU guaranteed a minimum profit margin of $2 per barrel to the oil companies, after the tax and royalty. This is to say that from 1st January, 1986 the fiscal regime applicable to the oil industry in Nigeria was modified to ensure that each of the oil companies reaches not less than the profit margin in force since 1st February, 1983. The version similarly guaranteed a minimum of $1/bbl after tax and royalty on the NNPC equity oil, which a company

[240] Ibid.

lifts under the agreement. This was on a condition that the technical cost of operation does not exceed $2/bbl.[241]

It is noteworthy that the package of incentives contained in the 1986 MOU was not a gift. Under the memorandum, each of the oil companies undertook to carry out specified exploration seismic and enhanced oil recovery and gas utilization work programmes. The programmes should be carried out within a given period not more than five years from the 1st January, 1986. The NNPC and the companies were to fund the programmes in their respective shares and interest. Any modification of the programmes must be with the multi consent of the parties.[242] If the company fails to perform any of the work programmes, the NNPC was given a written notice of the failure by the company. But if the failure persists the incentives provided by the MOU will cease to apply. Therefore the computation of the PPT shall not be based on the provision of the MOU. Subsequently the computation will be based on the higher of the actual proceeds or posted price.

[241] See the Year 2000 MOU. Loc. cit. p.2.
[242] See Olisa M.M. Loc.cit. pp.i77-178.

Under the MOU, a company also had to undertake to lift certain volumes of crude oil of NNPC available share which it was unable to lift it out. The memorandum also provides the procedure for the determination, timing, pricing and manner of payment for the crude oil, which the company lifts. Where the company is unable to lift all or part of the crude oil that it is obligated to lift, the company must pay the NNPC a penalty of 2% of the "average realisable price" for each barrel of crude oil which it fails to lift. This penalty is not applied if the unlifted volume for each calendar quarter is less than 5% of the volume which the company is obligated to lift during the relevant quarter. There is also no penalty if the unlifted volume is lifted within 15 days from the beginning of the succeeding quarter or if it is in the event of force majeure.[243]

It is obvious from the above that the main objectives of the 1986 MOU incentives are as follows:

i. To reduce the tax burden on the company

ii. To encourage the oil companies to invest more money in exploration and production of crude oil

[243] Ibid. p.178.

iii. To ensure increased lifting and sale of NNPC's equity crude oil.

In 1991 the 1986 MOU was improved by giving the oil companies some additional incentives. These include:

i. Reserve Addition Bonus (RAB)

ii. Addition capital investment allowance

iii. Increased margin

iv. A higher Notional Technical Cost(NTC)

Under the 1991 MOU version, a minimum guaranteed notional margin (M) of $2.30/bbl after the tax and royalty, has been granted to the oil companies. So also a minimum of $1.15/bbl after tax and royalty has accorded on the NNPC equity crude oil which a company lifts under the agreement.[244]

In 1995, it became necessary to renew the 1991 version of MOU. Therefore the government requested that the document should be reviewed so that an acceptable position to both parties (i.e. the government and companies) could be found. The Federal

[244] Ibid.

Ministry of Petroleum and Natural Resources, Department of Petroleum Resources (DPR) and FIRS in conjunction with NNPC were to review the MOU with the operators. While the negotiation on the review was going on, the Federal Government made an important pronouncement. It was related to the taxation of the upstream oil companies. It was made during the 1995 budget speech. It involved that all items previously treated as tax offsets should be treated as allowable deductions. RAB and Additional Investment Allowance were excluded from this treatment.[245] The aim of the government here was to enhance the revenue.

In spite of the above budget speech, the review of the MOU went on. The review was eventually prolonged for five years which was finally concluded in year 2000. It was consequently called "the year 2000 memorandum of understanding."

The year 2000 version of MOU is characterized with the following peculiarities: RAB has been removed; Tax Reference Price (TRP) has been introduced. Further more, to control high operating cost and reward operators with low operating cost, Tax Penalty (TIP) is introduced, royalties calculated at (TRP). The version is somehow

[245] Ibid. p.3

simplified since it contains no much-complicated formulae. To avoid penalising operating companies for high costs that may be due to environment and community disturbance beyond control of the companies, hardship clause is introduced. Other peculiarities include that the

- Notional Technical Costs is $4
- Guaranteed margin is $2.50 when actual investment T2 is less than $2/bbl
- Guaranteed margin is $2.70 when T2 is more than $ 2/bbl.
- Tax penalty introduced with penalty thresholds at $3.00 and $ 2.30 for small and big producing companies respectively.[246]

[246] Ibid.

3.4.3 Computation of Chargeable Tax under the year 2000 MOU Version

The computation of the tax liable to be paid by any oil producing company in joint venture with the NNPC, is governed by the PPTA and the year 2000 reviewed MOU version. The calculation is based on the ascertainment of the adjusted profit from the proceeds of hydrocarbon less allowable deductions less capital allowances. The chargeable profits then taxed at applicable rate.[247]

It is relevant at this juncture to explain two terms, viz. Total Technical Cost (TTC) and Guaranteed Notional Margin (GNM).

A- Total Technical Cost (TTC)

Under the year 2000 MOU document all the allowable deduction enumerated under section 10 of the Act, in order to arrive at the adjusted profit of the company, are called Total Technical Cost (TTC). It is only the royalty that is exempted from this term. Only expenses and cost reported in the corporate account for joint venture during the period of calculating the actual production cost per barrel shall be referred to as total technical cost per barrel.

[247] Ibid.

Total technical cost is categorised into two. These are Technical Cost (T1) and Technical Cost (T2).

Technical Cost (T1) refers to production operating expenses. These involve:

i. Direct production expenses

ii. Portion of administrative and general expenses allocated to production

iii. Custom duties and gross rentals allocated to production

iv. Extraordinary/prior year expenses/incomes.[248]

Technical cost (T2) is the capital Investment costs which qualifies for expensing for PPT calculation and also chargeable to production costs. These include:

i. Exploration drilling costs;

ii. Appraisal drilling costs (1st and 2nd wells);

iii. Intangible drilling and development costs; and

[248] Ibid. p.7.

iv. Capital allowances.[249]

B. Guaranteed Notional Margin (GNM)

The year 2000 MOU also provides various mechanisms to be applied for establishing Guaranteed Notional Margins for Realisable Prices (RP). This is based on the following ranges.

i. Below $13.48/bbl

ii. Between $13.48 and $15/bbI

iii. Greater than $19/bbI and less than or equal to $30/bbI

According to the MOU, the Minister of Petroleum Resources shall advice any change in applicable margin when oil prices (RP) exceed $30/BbI. Such advice shall only be necessary when RP exceeds $30/bbL for at least 45 days continuously.[250]

To arrive at the guaranteed notional/Margins the following formulae are to be applied:

[249] Ibid.
[250] Ibid. p.3.

i. For Realisable Price below $13.48/bbI the applicable formula is M= (1 - FC)/RP x (RP1a1 + RP2a2 + RP3a3)

Where

M = Applicable guaranteed notional Margin for RP less than $13.48/bbI

RP = Realisable Price

FC = Notional Fiscal Technical Cost of $4.00.bbl

A = company's percentage share of field profit

ii- For Realisable Price between $13.48 and $ 15/bbI the formula is M = M16 + (RP- 15) x a

Where:

M = Applicable guaranteed notional margins for $13.48 if it is =/< RP < $15.

M15= $2.50/bbl where actual capital investment cost (T2)

is $2/bbI or less

= $2.70/bbl when actual capital investment costs (T2)

is greater then $2/bbI

RP = Realisable price

A= company's percentage share of field profit.

iii. Realisable price greater then $19/bb and less then or equal to $ 30/bbI

Where:

M = Applicable Guaranteed national Margin for $ 19<RP <=$30

M19 = $2.20/bbl when actual capital investment cost (T2)

is $2/bbI or less

= $2.70/bbl is greater then $2/bbI

RP = Realisable price

a = Company's percentage share of field profit.[251]

[251] Ibid. p.9.

For illustration, Sela Nigeria limited, an operator of the joint venture operations in Nigeria, has provided the following in formation in relation to its equity operations for the month of May, 2000:

	Forcados	Bonny
Net production (bbls).Roy.	124,700	1,190,000
Net lifting (bbls) PPT.	124,700	1,190,000
Realisable price ($)	13.00	13.00

			$
Capital Allowance costs	(T2)	=	706,685
Intangible Drilling costs	(T2)	=	1,806,004
Exploration cost	(T2)	=	1,463,233
1st Two Applicable Wells	(T2)	=	2,548,786
Investment Allowance	(T1)	=	105,800
Administration Expenses	(T1)	=	1,585, 200

Custom duties _ Essentials (T1) =29,600

Others – operation cost (T1) =2,073,000

Others Income =2,000,000

Required here is to compute the PPT for Government take (GT) and Revised Government take (RTG) based on year 2000 MOU version.

It has been suggested that the answer should be as follows:

A. PPT Government Take (GT):

Fiscalised Barrels : =1,314,700

Forcadus Blend = 124,700

Bonny Medium = 1,190,000

Total =1,314,700

Income $

Crude oil sales =17,091,100

Others =2,000,000

Total income (A)		=19,091,100
Deductions		
Intangible drilling costs	= 1,806,004	
Exploration Costs	=1,463,233	
1st Two Appraisal wells	=2,548,786	
Investment allowance	=105,800	
Administrative expenses	=1,585,200	
Royalty on Export	=3,418,220	
Custom Duties	=29,600	
Education Tax	=118,995	
Other Costs	=2,073,000	
Total Deduction (B)		**=13,148,838**
Assessable profit		=5,942,262
Less capital Allowance		=706,685
Chargeable Profit		**=5,235,577**

Chargeable Tax @ 85% of the chargeable profit

i.e. 85/100x 5,235,577 **=4,450,240.**[252]

B. PPT Revised Government Take (RGT)

Fiscalised Barrels (bbl)		=1,314,700
Income:		**$**
Crude Oil Sales		=15,024,392
Gas Sales		-
Others		=2,000,000
Total Income		=17,024,392
Deductions:		
Intangible Drilling Costs	=1,806,004	
Exploration Costs	=1,463,233	
1ST Two Appraisal wells	=2,548,786	
Investment Allowance	= 105,800	
Administrative Expenses	=1,585,200	
Royalty on Export	=3,004,878	
Custom Duties	= 29,600	
Education Tax	= 86,565	

[252] Ibid. pp.10-11.

Other Costs	=2,073,000
Total Deductions	**=12, 703, 066**

Assessable Profit = 4,321,326

Less Capital Allowance = 706,685

Chargeable Profit = 3,614,641

Chargeable Tax @ 85% of the Chargeable Profit = 3,072,445

T2 = 1,806,004 + 1,463,233 + 2,548,786 + 706,685 = 6,524,708

T2/bbl = 6,524,708/1,314,700 = $4.9629

T2/bbl > $2/bbl

M = (1-FC) x (RP1a1 + RP2a2 + RP3a3)

RP = $13.00

RP1 = 5.00

a 1 = 0.365

RP2 = $5.00

a 2 = 0.28833

RP3 = $3.00

a 3 = 0.08286

Margin (M) = $2.343

TRP = RP-(M+0.15Xfc) / 0.88

= 13 - (2.343 + 0.15x4) / 0.88

= 13 – (2.343 + 0.6) / 0.88

= 13 – (2.943) / 0.88

TRP = $ 11.428 [253]

3.5.0 Appeal Against the Assessment of Petroleum Profit Tax

3.5.1 Companies Right Prior to the Appeal

If the Board makes a PPT assessment, a notice of the assessment must either be served personally or sent by registered post to the company.[254] If the company disputes the assessment, it may apply to the Board by notice of objection in writing to review and revise the assessment so made on it. A period of twenty one days from the date of the service of such assessment is given to the company for such application.[255] The Board can extend this period if it is satisfied that the company was prevented from making the application within

[253] Ibid, pp.12-13
[254] Section 38 (1), PPTA,Loc.cit.
[255] Section 38 (2), Ibid

the stipulated period as a result of reasonable cause.[256] The application must contain the following information:

(i) The amount of chargeable profit of the company for the accounting period in respect of which the assessment is made.

(ii) The amount of the assessable tax

(iii) The tax which the company claims should be stated in the notice of assessment.[257]

After consideration of the objection, the board and the company may reach an agreement as regards the amount of tax liability. Subsequently, the assessment shall be amended. A notice of the tax payable is then accordingly served on the company.[258] But if the company fails to agree with the Board on the amount of tax liable to be paid, the Board gives the applicant company a notice of refusal to amend.[259]

3.5.2 Companies' Right of Appeal to Appeal Commissioners

Any company or person aggrieved by an assessment made upon him and fails to agree with the Board on the amount of tax liability,

[256] Section 38 (3) ,Ibid
[257] Section 38 (2), Ibid.
[258] Section 38 (5), Ibid.
[259] Section 38 (6), Ibid.

may appeal against the assessment to the appropriate Appeal Commissioners. The aggrieved company is required to give notice of appeal in writing, to the Board and to the Secretary of the Body of Appeal Commissioners. This should be done within thirty days after the date of the service of the notice of refusal of the Board to amend the assessment as desired.[260] But if as a result of a reasonable cause, a company fails to give the notice of appeal within the stipulated period, it can then give it within seven days, provided that the lapse of the period is not by more than a further period of sixty days.[261] This shall depend on the satisfaction of the Body of Appeal commissioners that there has been no unreasonable delay on the part of the company. [262]

A notice of an appeal against an assessment shall contain the followings:

i- The official number of the assessment and the accounting period for which it was made.

ii- The amount of the tax charged by the assessment.

iii - The date upon which the appellant was served with the notice of refusal of the Board to amend the assessment as desired.

[260] Section 41 (1), Ibid.
[261] Ibid
[262] Ibid.

i- The precise ground of his appeal against the assessment.

ii- An address for service of any notices, precepts or other documents to be given by the Secretary to the appropriate Appeal Commissioners to the appellant.[263]

It should be noted that the appropriate Appeal Commissioners and their secretary to whom an appellant may give notice of appeal against the PPT assessment, shall be the body of Appeal Commissioners established under the provision of the Companies Income Tax Act (CITA),[264] Thus the CITA provides that: "The Minister may establish by notice in the Federal Gazette, a body of Appeal Commissioners.[265]

According to the Act, the body of Appeal Commissioners shall consist of not more than twelve person. None of the members of the Body shall be a public officer. Furthermore, the Minister of Finance shall designate one of them as the chairman of the Body.[266]

Before a person becomes an Appeal Commissioner, he has to fulfill the following conditions:

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[263] Section 41 (2), Ibid.
[264] Section 41 (3), Ibid
[265] Section 71 (1), CITA, Cap C21, LFN, 2004.
[266] Section 71(2), Ibid.

i- He must be appointed by the Minister.

ii- His appointment must be by notice in the Federal Gazette.

iii- He must be from among persons that have had experience and shown capacity in:

a- The management of a substantial trade or business; or

b- The exercise of the profession of law or accountancy in Nigeria.[267]

Each Appeal Commissioner holds office for a period of three years from the date of his appointment.[268] He can resign at any time before the end of his tenure. Nevertheless it must be by notice in writing to the Minister. On the other hand, the Minister may request him to continue to act on the post and sit at any further hearing of a case, in which he has already sat before the date of his resignation to hear, until a final decision has been given.[269] The remuneration and allowances of the Commissioners shall be determined by the Minister but with the approval of the President.[270]

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[267] Section 71 (3) (a), Ibid.
[268] Section 71(3) (b), Ibid.
[269] Section71 (3) (c), Ibid.
[270] Section 71 (3) (d), bid.

In addition to the twelve Appeal Commissioners, the Minister shall also designate a public officer to be the secretary of the body. The official address of the secretary must be published in the Federal Gazette.[271] The Minster may also make an ad hoc appointment in writing, from among the eligible person to feel the vacancies if there is an insufficient number of Appeal Commissioners to hear one or more particular appeals.[272] He may also make rules prescribing the procedure to be followed for the examination of witnesses.[273]

In accordance with the provision of the CITA, Appeal Commissioners meet to hear appeals in the town in which an office of the Federal Inland Revenue Service is situated.[274] Any three or more Appeal Commissioners may hear and decide on appeal. The Chairman of the Body presides in any meeting. But where he is absent the present Appeal Commissioners should elect one from among them to be the Chairman of the meeting.[275]

It should also be noted that every company appealing shall appoint an authorized representative. His duty is to attend before the court in person on the day and at the time fixed for hearing of its

[271] Section 71 (6), Ibid.
[272] Section 71 (5), Ibid.
[273] Section 41 (7), PPTA, Loc. Cit.
[274] Section 73 (1) CITA, Loc. Cit.
[275] Ibid.

appeal. The hearing could be postponed to any time if it is proved to the satisfaction of the Body of Appeal Commissioners that the duly appointed representative of the company is prevented from attending the hearing on the ground of a reasonable cause. Alternatively, the Body of Appeal Commissioners may admit the appeal to be made by any agent, clerk or servant of the appellant company on its behalf or by way of written statement.[276] The onus of proving that the assessment complained of is excessive shall be on the appellant.[277] The Body may confirm, reduce, increase or annul the assessment or make such order deemed to be fit thereon.[278] Finally the case is decided, a notice of the amount of tax payable under the assessment as determined by the Appeal Commissioners shall be served by the duly authorized representative of the Board.[279] Additionally, it is also provided that all appeals must be heard in camera.[280]

3.5.3 Appeals to the Federal High Court

An oil company may be aggrieved by the decision of the Body of Appeal Commissioners. Thirty days after the date of decision is

[276] Section 42 (5) PPTA, Loc. Cit.
[277] Section 42 (7), Ibid.
[278] Section 42 (8), Ibid
[279] Section 41 (5), Ibid.
[280] Section 41 (6), Ibid.

given to the company to appeal against the assessment and the decision of the commissioners to the Federal High Court. A notice of the appeal in writing must be given to the Board within the stipulated period.[281] Notwithstanding the lapse of the thirty days period by not more than a further period of sixty days, the company may appeal against the said assessment and the decision. But the judge must be satisfied that the authorized representative of the company was prevented from giving the notice of appeal due to a reasonable cause. The cause can be absence from Nigeria, sickness etc. The person must also show to the satisfaction of the judge that there has not been unreasonable delay on his part. I f the judge is satisfied with the cause, the company shall give such notice in writing, to the Board. It shall be within the period of seven days thereof.[282] A company may also appeal directly to the Federal High Court if it is aggrieved by any assessment and fails to agree with the Board. This shall only be where no appropriate body of Appeal Commissioners has been appointed with jurisdiction to hear any appeal against any assessment made upon any company.[283]

[281] Section 42 (2), Ibid.
[282] Section 42 (2), Ibid.
[283] Section 42 (3), Ibid.

Conversely, the Board too can appeal against the decision of the Body of Appeal Commissioners. It can appeal to the Federal High Court if it is dissatisfied with the decision of any Appeal Commissioners.[284]

An authorized representative must be appointed by the company to attend before the court for hearing of its appeal. The hearing can be postponed to a reasonable time by the judge, if he is satisfied with the cause prevents the representative from attending in person to hearing of the company's appeal.[285] Twenty one clear days notice shall be given to the Board from the date fixed for the hearing.[286] The onus of proving that the assessment complained of, is excessive shall be on the appellant.[287] The judge may confirm reduce increase or annul the assessment or make such order thereon as he may seem fit. Finally, all; appeals to the Federal High Court shall also be heard in camera[288]. The judge can otherwise direct on application of the appellant.[289]

[284] Section 42 (4), Ibid.
[285] Section 42 (5), Ibid.
[286] Section 42 (6), Ibid.
[287] Section 42 (7), Ibid
[288] Section 42 (8), Ibid.
[289] Section 42 (11), Ibid.

3.5.4 Right of Appeal to the Court of Appeal

The decision of the judge of the Federal High Court is not the final and conclusive. Rather, any person – be it the company or the Board- who is aggrieved by the decision of the judge may appeal against it to the Court of Appeal. Thus the PPTA states that:

> An appeal against the decision of the judge shall lie to the Court of Appeal:
> a) at the instance of the appellant where the decision of the judge is to effect that the correct assessment of tax is in the sum of one thousand naira or upward; and
> b) at the instance of the Board where the decision of the judge is in respect of a matter in which the Board claimed that the correct assessment of tax was in the sum of one thousand naira or upwards.[290]

But the question here is whether an oil company has right to appeal to the Supreme Court if it is aggrieved by the decision of the Court of appeal in respect of any PPT assessment.

In the case of Shell Petroleum Development Company Nigeria Limited v. FBIR[291], the Board in 1973 disallowed the deduction of certain expenses claimed by the Shell. The expenses in question fell under the following categories:

[290] Section 42 (14), PPTA, Loc. cit.
[291] [1997] 3MILBQ, P.94

(a) Currency Exchange Losses

(b) Central Bank Commission

(c) Educational Scholarship Expenses

Dissatisfied with the ruling of the Board, the company appealed over the next twenty-three [23] years. The appeal worked it way through the Body of Appeal Commissioners, the Federal High Court of Appeal before it finally reached the Supreme Court.

In September 1996, the Supreme Court held that where there is a statutory or contractual obligation to incur, an expense is deductible even where it is not directly related to the taxpayers petroleum operations. In the instant case, it was found that statutory obligation existed. Consequently the Supreme Court held – reversing the Court of Appeal – that Shell was entitled to deduct all the above three categories of expenses.[292]

The above case vividly answered the question of whether an oil company has right to appeal to the Supreme Court after the decision of the Court of Appeal.

[292] Emuwa, T.I. Deductibility of Expenses in Computation of Profits. Modus International Law and Business Quarterly, September [1997] Vol.2, No.3, p.94.

It is pertinent to know that where there is no valid objection or appeal lodged -within the stipulated period- against an assessment, it has then become final and conclusive. Similarly where an objection has been lodged and the Board revised the assessment to the satisfaction of the company. PPT assessment has also become final and conclusive when it is determined – on appeal – by the Appeal Commissioners, or the Federal High Court or the Supreme Court as the case may be .

Where the assessment becomes final and conclusive it then becomes payable. Normally the tax due for any accounting period is paid in equal monthly instalment together with the final instalment. The payment starts from the third month from the commencement of the accounting period of the company. The last two instalments of the previous accounting period are paid in the first and second month of the succeeding accounting period.

CHAPTER FOUR

4.0 OFFENCES AND PENALTIES IN RELATION TO THE PETROLEUM PROFIT TAX

4.1 Introduction

Another issue in connection with the assessment of petroleum profit tax is that of enforcing the payment of PPT. It is clear that one of the obstacles that face the payment any tax is the problem of tax avoidance and evasion. It is a widespread problem not only in the Nigerian tax system but also in every tax system. For instance the Nigerian government has repeatedly complained of widespread incidence of tax avoidance / evasion in the country. Taxpayers use different devices in order to escape or minimize their ax liability.[293] Companies deliberately employ fraudulent means of evading tax. Moreover the tendency of some corrupt tax officials does not help the matter. It is with connivance with them that the tax defaulters perpetrate the PPT offence or tax avoidance / evasion.

It is important to note that the two terms "tax avoidance" and "tax evasion" are not the same in meaning. However none of them

[293] See Ayua, I.A. Loc.cit. p.245.

has a statutory definition. In other words, neither the PPTA nor any tax law provides for the definition of the terms in general not to talk of the PPT avoidance / evasion.

The Oxford Advance Learners Dictionary defines tax avoidance as "the ways of paying only the smallest amount of tax that you legally have to."[294] It also defines the terms "tax evasion" as the crime of deliberately not paying all the taxes that you should pay.[295] Ayua defines tax avoidance as the minimization of tax liability by so arranging ones affairs as to take advantage of provisions in the tax law. In the same vein, he stated that tax evasion is usually defined to mean the failure to pay one's tax or the reduction of one's tax liability through illegal or fraudulent returns or failure to make a return or even failure to pay tax on time.[296]

Therefore the PPT avoidance can be defined as crafty and dubious ways which could be employed by the oil producing companies, through the manipulation of taxing provisions in order to minimize their tax liability. While the PPT evasion could be defined to mean any of the followings:

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[294] Hornby A.S. Loc.cit. p1227.
[295] Ibid.
[296] Ayua, I.A. Loc.cit. p.245.

1. Illegal means of limiting the tax liability of oil producing companies by delivering false returns.
2. Refusal of oil producing companies to pay the tax at the right time.
3. Refusal to pay the PPT at all.

4.2 Statutory Offences Against the Petroleum Profit Tax

In accordance with the provision of the Petroleum Profit Tax Act, a person is guilty of an offence against the Act if he is found to have committed any of the following statutory offences:-

i- Failure to comply with the requirement of any notice served to him under the Act.[297]

ii- Failure to render returns or deliver account and particulars.[298]

iii- Failure to attend or answer to a notice or summon served on a person under the Act; or having attended, failure to answer question lawfully put.[299]

iv- Failure to submit any returns of estimated tax.[300]

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[297] Section 51 (2) (a), PPTA, Loc.cit.
[298] Section 51 (2) (b), Ibid.
[299] Section 51 (2) (c), Ibid.
[300] Section 51 (2) (d), Ibid.

v- Making or causing to be made, incorrect accounts by omitting or understating any losses.[301]

vi- Preparing any incorrect schedule by overstating any expenditure or by overstating any royalties or other sums or by omitting or understating any amounts repaid, refunded, waived, or released.[302]

vii- Giving or causing to be given any incorrect information in relation to any matter affecting a person's tax or liability to tax.

viii- In order to obtain any deduction, making any false return, account, particulars or statement with reference to tax or false representation or forges or fraudulently leads or allows to be used by any by any other person any receipt or token evidencing payment of tax under the Act.

ix- Aiding, abetting, assisting, counselling, inciting or inducing any other person to:

1- Make or deliver any false return or statement

[301] Section 52 (1) (a), Ibid.
[302] Section 52 (1) (b),Ibid.

2- Keep or prepare any false accounts and particulars affecting the tax.

3- Refuse or neglect unlawfully to pay tax.

x- Being a member of FBIR:

(a) Demands from any person an amount in excess of the authorized assessment of the tax payable.

(b) Withholds for his own use or otherwise, any portion of amount of tax collected.

(c) Renders a false return, whether verbal or in writing, of the amount of tax collected or received by him.

(d) Defrauds any person, embezzles any money, or otherwise uses his position so as to deal wrongfully either with the Board or any other individual.

xi- Not being authorized under the Act to do so, collect or attempt to collect the tax under the Act.

xii- Engaging in petroleum operation on own or in partnership with any other person with a view to sharing profits arising from the operations, not being a company so regarded.

4.3 Penalties Against Petroleum Profit Tax Avoidance / Evasion

Penalties of various offences have been stated under the Petroleum Profit Tax Act. Specifically the Act provides that every person, who – without any reasonable excuse – makes up or causes to be made up any incorrect accounts, by omitting or understating any profits or overstating any losses…, shall be guilty of an offence and shall be liable to a fine of one thousand naira, and double the amount of tax has been or would have been undercharged as the result of such account.[303] The same penalty applies to any person or company that prepares or causes to be prepared an incorrect schedule by overstating any expenditure. So also the person who prepares any incorrect statement required by the Act through means of overstating any royalties or understating any amount repaid, refunded, waived or

[303] Section 52 (1), Ibid.

released.[304] Additionally, if a person guilty of giving any incorrect information in relation to any matter affecting his tax liability he shall also be guilty of an offence. He shall also be liable to the same penalty as the above.[305]

It can be understood that the aim of the above provision is to deter the officers in charge of signing returns on behalf of a company from being responsible for under declaration of profits. This is because, it can easily implicate them and subsequently incur personal liability. But the question here is whether this penalty can effectively serve as deterrent for curtailment of the offence or not.

It should be noted that this part of the Act has never been amended since the enactment of the PPTA of 1959 which was the principal Act. Therefore it might have previously served the purpose considering the value of the amount of one thousand Naira by then. But nowadays the amount is too small particularly when looking at the huge amount which the oil companies pay their officers. To tell this kind of officers that they are liable to a fine of one thousand Naira if they are found guilty of under declaration of profit of their companies is absurd.

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[304] Ibid.
[305] Ibid.

It is worthy of note that no person shall be liable to the above penalty unless the complain on such offences was made within six years after the end of the accounting period in which the offence was committed.[306] However, the Board has right to compound any offence or proceedings as long as it is before judgment.[307]

It is also provided under the Act that making of false statements and returns for the purpose of obtaining any deduction, rebate, reduction or repayment in respect of tax constitutes another offence. Likewise aiding, abetting, assisting, counseling, inciting or inducing any person to make false statements and return, prepare false account and particulars or to unlawfully refuse to pay the tax. Any person found guilty of committing any of the above, shall be liable to a fine of one thousand naira and the amount of tax for which the person assessable is liable for the accounting period in which the offence was committed, or to six month imprisonment or both the fine and imprisonment.[308]

This takes care, inter alia, of lawyers and accountants who may be hired by oil producing companies to give them advise on how to evade or avoid tax in any of the above mentioned ways. The company

[306] Section 52 (2), Ibid.
[307] Section 52 (3), Ibid.
[308] Section 53 (1), Ibid.

also has another discretion here to decide on whether to not to compound any of the offences under the Act

Failure to withhold tax also attracts penalty. It is pertinent to understand that withholding tax is not a particular different tax. Rather it is a scheme of advance payment of tax introduced in Nigeria under Decree No. 4 of 1985. Under this scheme, the taxpayer is legally required to claim credit later when completing his tax return for the year.[309] According to the provision of the Act, any person who is required to deduct withholding tax and fails to deduct or remit the deducted amount to the FBIR within thirty days from the time of deduction, shall be guilty of an offence. On conviction, he shall consequently be liable to a fine of 200% of the tax not withhold or remitted plus interest at the prevailing commercial rate.[310] The relevant tax authority shall cause to be served on or sent by registered post, to any person fails to withhold or remit, a notice stating the amount of tax not withheld or not remitted, and the place at which payment should be made.[311]

It should be observed that the Board has a number of discretions to exercise in connection with the offences and penalties.

[309] Nigerian Tax Reform, Loc. Cit., p.118.
[310] See section 54 (1), PPTA, Loc.cit.
[311] See section 54 (2), Ibid.

It has the power to compound offence. It also has a power in its discretion to stay proceeding as well as compounding it. This may create an avenue for the tax officials to abuse the power. Bribery and corruption and undue exploitation of influence can be spread among the tax officials of the Board. In order to discourage these, PPTA provides that:

> Any person who:-
> (a)- being a member of the Board charge with the due administration of this Act, or any assistant employed in connection with the assessment and
> Collection of the tax who:
> i- Demands from any person an amount in excess of the authorized assessment of tax payable;
> ii- Withholds for his own use or otherwise any portion of the amount of tax collected;
> iii- Renders a false return, whether verbal or in writing, of the amount of tax collected or received by him;
> iv- Defrauds any person, embezzles any money, or otherwise uses his position so as to deal wrongfully either with the Board or any other individual;
>
> Or
>
> (b) – not being authorized under this act to do so, collects or attempts to collect the tax under this Act;
> (Any person perpetrates any of the above) shall be guilty of an offence and be liable to a fine of six hundred naira, or imprisonment for three years or both.[312]

The above fine of six hundred naira is too small. Hardly can it deter the officials from committing such offence. It necessary for the

[312] Section 55, Ibid.

tax officials to understand that total and complete honesty is demanded from them. An effective way of getting that honesty is to apply a severe punishment on dishonesty. Each tax official, especially in the assessment and collection section of the Board should be required to submit a net worth statement at his employment. The statement should be checked periodically especially when suspicion arises about him or his life style has changed beyond that which his salary and previous wealth can afford.

Generally, any person guilty of an offence under the PPTA or any rule made there under, for which no other penalty is specifically provided, shall be liable to a fine of ten thousand naira. In addition to this, the offender shall be liable to a further sum of two thousand naira for each and every day during which any of the following offences continues:

(1) Where a person, other than a company, engages in petroleum operations, either on his own or jointly with any other person with a view to sharing the profits arising from those operations.

(2) Failure to submit a return of estimated tax.

(3) Failure to deliver account, particulars, information or kept records required by the Act.

The liability for such further sum of two thousand naira commences from the day following the day for conviction or any day thereafter as the court may order.[313] But where the person defaults to pay the fine he shall be liable to imprisonment for six months.[314]

It appears from the above that the main objective of the provision is to compel the staff of the company such as accountants that play a key role in determining the actual tax liability to cooperate with the Board officials. This is to avoid facing any negative consequence of such acts. Furthermore the amount of fine is inadequate compare to the huge amount of money they earn from the oil companies. The amount must be increase so that the desired goal could be achieved.

[313] Section 51, Ibid.
[314] Ibid.

CHAPTER FIVE

5.0 SUMMARY OF FINDINGS AND SUGGESTIONS/ RECOMMENDATIONS

5.1 Summary of Findings

It has been observed that neither the PPTA nor any other Nigerian tax law provides for the definition of the term "tax" or the phrase "tax assessment" let alone the "petroleum profit tax assessment. In its technical sense, tax assessment has been defined by various scholars and legal sages. It is "the process whereby the taxable income of the taxpayers is ascertained"[315]. It involves ascertaining the base of assessable profit of the tax, granting all the and allowances as may be prescribed bylaw and applying the relevant tax rate.[316] Therefore, assessment of PPT could be defined as the process whereby the profits adjusted profits, assessable profits chargeable profits,, assessable tax, chargeable tax of an oil producing company are all ascertained.

Assessment of PPT is one of the most important functions of the FBIR. Revenue raised form PPT plays a significant role in the development of the nation. It is the major source of government

[315] Ayua I.A., Loc .cit p.280.
[316] Ogundele, E.A. Loc. Cit., p.6.

revenue derived from taxation. Revenue derived from the PPT can also be used to provide public services such as security, defence, health, education and maintaining law and order. It can also be in capital project as well as in shaping the economic growth and development of the nation.

The search for oil in Nigeria began in 1908. But oil in commercial quantity was not discovered until 1956. This discovery was pioneered by the Shell Petroleum Development Company Nigerian Limited. This was followed by the enactment of the PPTA of1959 which regarded as the principal in taxation of the crude oil companies. The current legislation on the taxation of the oil producing companies is the PPTA as amended.

Assessment of the PPT is therefore governed by the PPTA. But merely obtaining a copy of PPTA will do no one any good. The PPTA provides only an outline for the understanding of the petroleum tax system. Recourse must be sought from various contractual agreements existing in the upstream oil sector.[317] MOU is one of these agreements. It is a relatively complex document which is not incorporated in the Act. This is a problem that has to be tackled.

[317] Ale, B.E., Loc cit. p.35.

The Federal Board of Inland Revenue is vested with the responsibility of managing the PPTA. The Board has an operational arm known as the Federal Inland Revenue Service (FIRS). It is through the Petroleum and International Tax Department (PITD) that the operational arm carry out the duty of PPT assessment. Inept tax administrative system also to affect the PPT assessment. The Board lacks autonomy which can makes it to function more effectively. It has also been observed that the chairman of the Board is the same person as the chairman of the FIRS and the technical committee of the Board. This can make the post to be of one man affairs and can subsequently be a hindrance for the fresh brains to give their own quarter of contribution. It can also make it to be a target for the politician considering the huge amount of money which is generated by the Board. This is because the appointment of the chairman is assigned to the president that may have his own interest in the person to be appointed. This will have a negative effect in the performance of the Board. Consequently the PPT assessment could also be affected. Furthermore the salary scale of the staff of the Board is in adequate. Their salary is too meager to deter them from corrupt practice. They deal with money while the are hungry. Hardly for

such kind of people to turn their face from collecting any bribe for their official duty. Additionally the staff also need more training for efficient performance. It is even more important to the staff that work in the PITD, considering the significance of crude oil revenue to the Nigerian economy and the complexity of the petroleum operations. Therefore there is a need of high skilled and professionals to oversee the department. Failure to do this will subsequently affect the assessment of petroleum profit tax which will have a negative effect in the revenue comes from the oil taxation.

Another problem that is also connected with the assessment of petroleum profit tax is the issue of PPT avoidance / evasion. Oil companies can manipulate the provision of the PPTA on Capital Allowance to avoid tax. According to the Act, it is only when an oil company owned an asset which was in use during the accounting period, that will be due and entitle to the capital allowance.[318] In order to be given a capital allowance, a company may claim an asset which is not owned by it. It can also claim that the asset was in use during the accounting period. This is a PPT avoidance. It can drastically reduce the amount of chargeable profit. Subsequently the

[318] Para. 7, 2nd Schedule, PPTA, Loc. cit.

amount of the tax due will be mitigated. This is a serious problem that also affects not only the assessment of PPT but also the Nigerian economy in general. The case of the lost barrels of crude oil is a typical example on how some oil companies perpetrate the offence of PPT evasion.

Some amount of money provided as fine in the PPTA to serve as penalty against the PPT offences are not adequate. For example the sum of six hundred naira provided as fine in section 55 of the Act can not deter the tax officials from perpetrating the PPT offences. The case is the same with the provision of section 52 (1) of the Act. It provides one thousand naira as fine for any person found guilty of making up an incorrect account. Similarly the amount of one thousand naira is provided as a fine for any person aids or assists in making false statement. The amount is too small. It has to be reviewed.

Crisis in the Niger Delta area is another problem that is related to the PPT assessment. Most of the Nigerian oil production is from the area. Lack of peace and stability in the area paralyses the activities of oil producing companies. Nigeria lost 25% of the number of the barrels of crude oil production per day. It was due to the cessation of the Shell Petroleum

Development Company Nigeria Limited from production in the area due to the crisis. This is another serious issue that require an urgent attention.

5.2 Suggestions / Recommendations

1. The Federal Board of Inland Revenue is the government agent for the assessment, collection and accounting of the PPT. The Board lacks autonomous power. If this could be given to it, it will certainly enhance the performance of the duties of the Board, and make it to perform its duties efficiently. This will definitely affect the assessment of PPT, since it is part of the duties assigned to the Board. Consequently the revenue generated by the Board will increase and the government will have more money for public services

2. The salary of the staff of the operational arm of the Board should also be reviewed. Professionals of a high quality should be attracted with a fat salary that will make them not to think of conniving with taxpayers to perpetrate the offence of tax avoidance / evasion. Furthermore, training programme for the staff of the operational arm of the Board, particularly of the PITD, must be emphasized. This will equally enhance their

performance and enable them to effectively perform not only the duty of the assessment but also the collection and accounting of the tax in general and the PPT in particular.

3. Most of the oil producing companies in Nigeria operate joint venture with the NNPC. Their taxation is governed by the relatively complex document of MOU. In order to enhance the understanding of the PPT assessment, the agreement should be clearly codified and incorporated in the PPTA.

4. Since the enactment of the PPT principal Act (i.e. the PPTA of 1959), the amount of six hundred naira and one thousand naira provided as penalties against the PPT offences provided under Part X of the Act, has not been changed. The amount is too meagre. It has to be reviewed and the provision should be subsequently amended. This is because the value of N1,000 in 1959 worth more than N100,000 nowadays.

5. The crisis in the Niger Delta also has a negative effect on the revenue comes from PPT. In order to enhance crude oil production so that the PPT assessment could be positively affected, youth restiveness in the area, must be reduced. This can only be achieved when leaders lead by good example, when

poverty is eradicated in the area and when there is a hope for the youth. Therefore leaders at all levels (i.e. national, state and local levels) should be transparent and have open policy from the top to the bottom. Government should therefore, create job opportunities for the youth. It can equally join hand with private sector and make it as a policy, to train youth in their locality in different vocations. This is to enable them to be industrious and self employed. Furthermore, if a youth is trained in a particular vocation he may require the service of another youth. This can consequently reduce the burden of unemployment syndrome and youth restiveness. Subsequently peace and stability will reign in the area so that the oil producing companies can fully resume to their activities in the area.

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