DEDUCTIBILITY OF PAYMENT FOR GAS FLARING IN COMPUTING TAX UNDER PETROLUEM PROFITS TAX ACT IN NIGERIA*

Abstract

In computing the profit of a company engaged in petroleum operations, there are certain deduction of outgoings and expenses allowed. The outgoings and expenses to be deductible must have been incurred wholly, exclusively and necessary for the purpose of the operations. The issue of whether or not the payment made by an oil and gas producing company in Nigeria for flaring of gas is qualified for tax deductions under section 10 (1) (L) of the Petroleum Profits Tax Act (PPTA) has for some time been controversial. The intervention by court in interpreting the statutes has always elicited criticisms. This work examined the propriety or otherwise of deducting the charge or fee paid for flaring of gas in computation of Petroleum Profits Tax. The provisions of section 10(I) (L) of PPTA and section 3 (1) & (2) of the Associated Gas Re-injection Act were reviewed to achieve this. The paper utilized doctrinal methodology in analyzing the relevant provisions of related statutes, tax laws, case laws, legal opinions of experts in textbooks and articles to the subject matter. It is the author's view that the outgoings and expenses incurred while flaring gas is not incurred or carried out wholly, exclusively and necessarily during petroleum operations. Further that the rules of interpretation of taxing statutes should be strictly followed and adherence to it will always enrich Nigerian tax jurisprudence.

Keywords: Flaring of Gas, Deduction, Petroleum Operations, Petroleum, Computation, Tax.

1. Introduction

Taxation spans over a wide gamut of human activity and is essentially aimed at providing the requisite revenue for the socio-economic development of a nation[1]. Taxation is an indispensible tool at the government's disposal for effective delivery of economic and social dividends to the citizens. This was captured in *Nicholas v Ames*[2] thus; that there is great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air man breathes to the natural man. It has not only the power to destroy; it also has the power to keep alive. Tax therefore is a pecuniary burden laid upon individuals or persons or property to support the government and it is a payment exacted by legislative authority.[3] In *Mathews v Chicory Marketing Board*[4], a tax is compulsory exaction of money by a public authority for public purposes. The tax charged on petroleum profit is charged under the Petroleum Profits Tax Act (PPTA).[5] The Petroleum Profits Tax Act regulates the petroleum profits of oil producing companies for the purpose of tax assessment. The Act[6] provides that a tax shall be charged, assessed and payable upon profits of each accounting period of any company engaged in petroleum operations. The Principal Act (PPTA) is supplemented by the agreements entered into between the Nigerian Government and the operators which include;

(a) Associated Gas Fiscal Arrangement Act (AGFA).[7]
(b) Associated Gas Re-injection Act (AGRA)[8]
(c) Production Sharing Contract (PSC)[9]
(d) Memorandum of Understanding (MOU) of 2000.

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[1] K. J. Bielu, Legal Regime for Achieving an Effective Tax Revenue Generation in Nigeria: Issues and Prospects, a PhD Research Dissertation presented to the Faculty of Law, Nnamdi Azikiwe University Awka, Anambra State, Nigeria, August.2007, p18.

[2] 173 US (2899) at 515

[3] I. A. Ayua, *Nigerian Tax Law* (Ibadan; Spectrum's Law Publishing, 1999) P.9.

[4] (1938) 60 CLR 263 at 276

[5] (as amended) LFN 2004. The principal enactment was the Petroleum Profits Tax Act (PPTA) 1959. It was amended severally and consolidated into PPTA, Cap.p13 LFN 1990 now adopted as LFN 2004.

[6] PPTA cap P13 2004 S.8.

[7] Of 1992 which was reviewed in 1997, 1998 and 1999.

[8] Cap. A 25 LFN 2004.

[9] of 1993 which deals with exploration and production in deep offshore territorial waters of Nigeria.

Court had mentioned that once there is a statutory or contractual obligation for a company engaged in petroleum operations to perform, such obligation is wholly, exclusively and necessarily for the purpose of that operation[10]. In *Shell Pet. Dev.Co. v FBIR*,[11] the question is whether or not the payment of exchange losses on Petroleum Profis Tax, Central Bank Commission for payment of Petroleum Profits Tax, Scholarships expenses and Gifts and donations are deductible. The present issue is whether payment for flaring of gas is inevitable and necessary for petroleum operations. Can it be said that flaring of gas is a fall out of the normal gas utilization and gas re-injection and is it performed as a result of statutory or contractual obligation? The obligation for companies under the Associated Gas Re-injection Act (AGRA)[12] is to utilize and re-inject gas produced along with the oil. It is non-compliance with the statutory or contractual obligation to utilize or re-inject gas that causes flaring of gas. Hence, flaring of gas became an option only when it is not appropriate or feasible to utilize or re-inject gas[13]. The interpretation of the provisions of section 10 (1) (2) of the PPTA[14] and AGRA[15] in relation to the deduction of the payment by oil producing companies in the computation of tax has remained vague. The effort made in this paper will help subsequent cases to be determined.

2. Legal Framework for Taxing Petroleum Profits in Nigeria

The Petroleum Profits Tax Act[16] regulates the taxation of petroleum profits in Nigeria. The tax is levied upon the profits of each accounting period of any company engaged in petroleum operations during that period. It is to be charged, assessed and payable in accordance with the provisions of the Act[17]. Petroleum under the Act means 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's or other stratified deposits from which oil can be extracted by destructive distillation[18]. Petroleum operations[19] 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 by any of 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 of or any disposal of chargeable oil by or on behalf of the company.

3. Administration of Petroleum Profits Tax

The administration of Petroleum Profit Tax is vested in the Federal Inland Revenue Service (FIRS).[20] The FIRS is statutorily charged with the assessment and collection of taxes in the oil and gas sector of the economy on behalf of the Federal Government.[21] By the provisions of section 3 of the PPTA, the boards are vested with the following powers;

(i) Due administration of the Act.[22]

(ii) Acquisition, holding and disposal of any property taken as a security for or in satisfaction of any tax or any judgment debt due to respect of any tax and others.[23]

(iii) The Service may by notice in the federal gazette direct that any information, returns or documents required to be supplied, forwarded or given to the revenue service be supplied to such other person as the service may direct.[24]

[10] *Shell Pet. Dev. Co. v FBIR* (1996) NWLR (pt.466) 256.
[11] Supra.
[12] AGRA Cap 25 LFN 2004.
[13] Ibid, section 3 (1) & (2).
[14] PPTA, cap P[13] LFN, 2004, S.10 (1) (L).
[15] AGRA, cap A25 LFN 2004, S.3 (1) (2).
[16]PPTA, op cit, it is a law to impose a tax upon profits from the winning of petroleum in Nigeria, to provide for the assessment and collection thereof and for purposes connected therewith in line with the objective, section 3 of the Act established the Board for the due administration.
[17] PPTA, 2004, S.8.
[18] Ibid, S. 2.
[19] Ibid,
[20] Federal Inland Revenue Service (Establishment) Act, FIRS (E) A, 2007, S.2, First Schedule to the Act.
[21] FIRS (E) Act, 2007, S.8 (1), PPTA, 2004, S. 3(1).
[22] PPTA, 2004, S.3 (1) (a).
[23] Ibid, S.3 (1) (b).
[24] Ibid S.3 (1) (d) – However, this is done with regard to the minister's certain directions and control as expressed in subsection (e-h).

(iv) Performance of certain duties conferred on it in the first schedule to the Act.[25]
(v) The Board may from time to time, specify the form of returns, claims, statements and notices under the Act.[26]

The scope of the FIRS[27] powers over tax administration and enforcement covers three types of companies in the oil and gas industry namely;

(a) Crude Oil and Natural Gas Producing Companies
(b) The Petroleum Marketing Companies and
(c) Servicing Companies.[28]

The Act regulates the upstream activities as opposed to downstream. Upstream operations involve all activities carried out in the exploration, that is, drilling, extraction, development, production, transportation and sale of crude oil.[29]

4. Computation and Deductions under PPTA

In computing the adjusted profit of any accounting period from its petroleum operations some deductions are allowed.[30] The outgoings and expenses wholly, exclusively and necessarily incurred whether within or outside Nigeria, during that period by such company for the purpose of the operations is allowed for deduction. They include but without otherwise expanding or limiting the generality of the foregoing:

(i) Rents incurred by the company for that period in respect of land or building occupied under an oil prospecting license or an oil mining lease for disturbance of surface rights or for any other like disturbance;[31]
(ii) All non-productive rents, the liability for which was incurred by the company during that period.[32]
(iii) All royalties, the liability for which was incurred by the company during that period in respect of natural gas sold and actually delivered to the Nigerian National Petroleum Corporation or sold to any other buyer or customer or disposed in any other commercial manner.[33]
(iv) All royalties the liability for which was incurred by the company during that period in respect of crude oil or of casing head petroleum spirit won in Nigeria.[34]
(v) All sums the liability for which was incurred by the company to the Federal Government during that period by way of customs or excise duty or other like charges levied in respect of machines, equipment and goods used in the Company's Petroleum Operations and;[35]
(vi) Sums incurred by way of interest upon money borrowed by such company, where the Board is satisfied that the interest was payable on capital employed in carrying on its petroleum operations.[36]
(vii) All sums incurred by way of interest on any inter-company loans obtained under terms prevailing in the open market, that is, the London Inter-Bank offer rate by companies that engage in crude oil production operations in the Nigerian Oil Industry;[37]

[25] Ibid, S.4 (1-4).
[26] Ibid, S.6 (2).
[27]The powers and functions of the service are also being regulated by sections 7 and 8 of the Federal Inland Revenue Service (Establishment) Act 2007.
[28] Such services include drilling, seismic survey, logging, data interpretation from oil fields etc.
[29]Downstream operations on the other hand involve conversion of crude oil into usable form such as premium motor spirit, diesel, kerosene, gas utilization project and the like.
[30] PPTA, 2004, S.10 (i-L).
[31] Ibid, S.10(1) (a)
[32] Ibid, S.10 (1) (b)
[33] Ibid, S.10 (1) (c)
[34] Ibid, S.10 (1) (d)
[35] Ibid, S.10 (1) (e)
[36] Ibid, S.10 (1) (f)
[37] Ibid, S.10 (g)

(viii) Any expense incurred for repair of premises, plant machinery or fixtures employed for the purpose of carrying on petroleum operations or for the renewal, repair or alteration of any implement, utensils or articles so employed;[38]

(ix) Debts directly incurred by the company and proved to the satisfaction of the Board to have become bad or doubtful in the accounting period for which the adjusted profits is being ascertained notwithstanding that such bad or doubtful debts were due and payable prior to the commencement of that period.[39] However there is the proviso;[40]

(x) Any other expenditure including tangible drilling costs directly incurred in connection with drilling and appraisal of a development well but excluding an expense or deduction in respect of a liability incurred which is deductible under any other provision of this section.[41]

(xi) Any contributions to a pension, provident or other society, scheme or fund which may be approved with or without retrospective effect by the Board subject to such general conditions or particular conditions in the case of any such society, scheme or fund as the Board may prescribe;[42]

(xii) All sums, the liability of which was incurred by the company during that period to the Federal Government or to any customs and excise duties, stamp duties, education tax, tax (other than the tax imposed by this Act) or any other rate, fee or other like charges,[43]

(xiii) Such other deductions as may be prescribed by any rule under this Act.[44]

5. The Scope of section 3 of the Associated Gas Re-injection Act (AGRA)

The Act[45] is made to compel every company producing oil and gas in Nigeria to submit preliminary programmes for gas-re-injection and detailed plans for implementation of gas re-injection. It regulates the re-injection and utilization of associated gas in the fields and prohibits flaring of gas in Nigeria except as permitted by the minister.[46] The permission for the flaring of gas is only for the associated gas for which re-injection or utilization was not appropriate or feasible.[47] The provisions of section 3 AGRA reads: 'Subject to subjection (2) of this section, no company engaged in the production of oil and gas shall after 1, January 1984 flare gas produced in association with oil without the permission in writing of the minister'.[48] The condition for grant of permission by the minister is stipulated thus;

> Where the minister is satisfied that after 1, January, 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that respect to a company engaged in the production of oil gas;[49]

[38] Ibid, S.10 (h)
[39] Ibid,S.10 (I)
[40] Provided that (l) The deduction to be made in respect of a doubtful debt shall not exceed that portion of debt which is proved to have become doubtful during that accounting period nor in respect of any particular debt shall it include any amount deducted under the provisions of this paragraph in determining the adjusted profit of a previous accounting period. (ll) All sums recovered by the company during that accounting period on account of amounts previously deducted in respect of bad or doubtful debts shall for the purposes of subsection (I) (c) of section 9 of the Act, be treated as income of that company of that period. (lll) It is proved to the satisfaction of the Board that the debts in respect of which a deduction is claimed were either:- (a) Included as a profit from the carrying on of petroleum operations in the accounting period in which they were incurred; or (b) Advances made in the normal course of carrying on petroleum operations not being advances on account of any item falling within the provisions of section 13 of this Act.
[41] Ibid, S.10 (1) (J)
[42]Ibid S.10 (1) (k)
[43] Ibid S.10 (1) (L)
[44] Ibid, S.10 (1) (M)
[45] Associated Gas Re-injection Act Cap A 25 LFN 2004, S.1.
[46] AGRA, 2004, S.2 (1).
[47] Ibid, S.3 (2)
[48]Ibid, S.3 (1)
[49] Ibid, S.3 (2), see also the provisions of paragraph 1 of Associated Gas Re-injection (continued flaring of gas) Regulations of 1984 made by the minister under sections 3 and 5 of AGRA. It provides that the issuance of a certificate by the minister under section 3 (2) of the AGRA, for the continued flaring of gas in a particular field or fields, shall be subject to any one or more of the following conditions, that is (a) Where more than 75 percent of the produced gas is effectively utilized or conserved, (b) Where the produced gas contains more than 15 percent impurities such as N_2, H_2S, Co_2 etc which render the gas unsuitable for industrial purpose, (c) Where an on-going utilization programme is interrupted by equipment failure; provided that, such failure are not considered too frequent by the minister and that the period of any one interruption is not more than three months; (d) Where the ratio of the volume of gas produced per day to the distance of the field from the

> (a) Specify such terms and conditions for the continuation of flaring of gas[50] OR
> (b) Permitting the company to continue to flare gas in that particular fields if the company pays such sum and the minister may from time to time prescribed for every 28317 standard cubic meter (SCM) gas flared,[51]

It is however the proviso that any payment due under this paragraph shall be made in the same manner and be subject to same procedure as for the payment of royalties to the federal government by companies engaged in the production of oil.[52]

6. Interpretation of Taxing Statutes

There are three main general principles of interpretation, namely, the literal or plain meaning rule, the golden rule and the mischief rule mostly involved in the interpretation. The literal is best summed up in the words of Jervis, *CJ in Abley V. Dale*[53] where he stated that if the precise words used are plain and unambiguous, in our judgment, we are bound to construct them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest in justice. This rule maintains that statutes are to be given their plain meaning. Words used in statutes are thus, to be construed in their grammatical sense. If the words are used in relation to a trade or business, they are to be given their usual meaning in the trade or business. It is immaterial that hardship would result from the literal interpretation. In *FBIR v. Integrated Data Service Ltd*[54], the Court of Appeal held that: at pg.522 of pt 755 *Ahmadu v. Gov Kogi*[55], Oduyemi JCA had the following to say on the nature of tax legislation; pecuniary burden and is under the rules of interpretation subject to the rule of strict construction. It is well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language of the statute clearly imposes the obligation, language must not be strained in order to tax a transaction which had the legislature thought of it, would have been covered by appropriate words. In a taxing legislation, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption about a tax. Nothing is to be read in and nothing is to be implied. One can only look fairly at the language used.

The above connotes that the critical part of construction of taxing legislation is to carefully look fairly at the clear language of the law in focus. In *ABEDC Plc v. Abuja Municipal*[56], the court held there is no common law of taxation neither is there any equity or presumption regarding taxation and a judge saddled with a tax dispute is obligated to look merely at what is clearly said in the tax statute. It means tax liability cannot be inferred but must be directly provided for in a statute and a clear and direct nexus must be shown to exist between the charging provision in a tax statute and the intended tax payer before any tax liability can be said to have arisen. The overarching proposition is that all charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties; the subject is not to be taxed unless the language of the statute clearly imposes the obligation.[57] Where the provisions of a statute are ambiguous and capable of two interpretations, a construction most favourable to the taxpayer should be given, but the strictness of interpretation of the language of a tax statute may not always endure to the benefit or advantage of the tax payer. In *Partingonton v Attorney General*[58], it was held that if the person sought to be taxed comes within the letters of the law, he must be taxed however great the hardship may appear to the judicial mind. Clearly,

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nearest gas line or possible utilization point is less than 50,000 SCF/KM; provided that, the gas-to-oil ratio of the field is less than 3,500 SCF/bbl and that it is not technically advisable to re-inject the gas in that field; (e) Where the minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these regulations.

[50] Ibid, S.3 (2) (a)

[51] Ibid, S.3 (2) (b)

[52] Proviso to S.3 (2) (b) AGRA

[53] (1851) 11 CB 378 at 391

[54] (2009) LPELR – 8191 (CA), *Best Children Int'l Sch v FIRS* 2019 40 TLRN 33 at 46-45

[55] (2009)1 TLRN 319

[56] (2018) 35. TRLN 35 at 54, *Cape Brandy v IRC* (1921) 2 KB 404, *Aderawo Timber Co. Ltd v FBIR* (1996) NCLR 416.

[57] Russell v scott (1984) AC 422, *Williams v LSDPC* (1978) 3 SC 11 at 17, *Ifezue v Mbadiugha* (1984) ISCNLR 427.

[58] (1869) LR 4 HL 100 at 122.

in Ifezue v Mbadugha[59], the Court summarized what the court ought to do while interpreting a taxing statute. That if there is nothing to modify, alter or qualify in the language of a statute, it must be construed in the ordinary and natural meaning of the words and sentences used. Hence, what is important is the intention of parliament which is to be located in the words used in the Act.[60] Accordingly, where the words to be interpreted are ambiguous, it is the court's duty to interpret the words in such a manner as to avoid absurdity. In *Luke v Inland Revenue Commissioners*[61] the court held that to apply the word literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result, we must do some violence to the words. The general principle is incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must provide.It is therefore as a matter of public policy that unless there are clear provisions to the contrary, the courts are enjoined to construe a tax statute in favour of the revenue by giving due regard to the cause and necessity of the particular tax statute and put upon it such construction as would promote its purpose and arrest the mischief it is intended to deter.[62]

In the interpretation of taxing statutes, certain general principles have been recognised by English Courts as relevant guidelines for Nigerian Courts, not for the purposes of slavish imitation, but because of its common place and sensible to learn from another's experience. The principles thus formulated are:[63]

i. A tax must be expressly imposed upon the subject by the clear words in the statute.[64]
ii. The words of the Act must be given their natural meaning.[65]
iii. Where the meaning of a statutory provision is ambiguous, the taxpayer must be given the benefit of the doubt.[66]
iv. There is no equity in taxation.[67]
v. Where the meaning of the statute is clearly expressed, the court will not have regard to any contrary intention or belief of parliament.[68]
vi. Where the meaning of the statute is not clear, it should, if possible, be construed so as to carry out the expressed or presumed intention of parliament. [69]
vii. Ambiguity may be resolved by subsequent legislation;[70]
viii. In applying the appropriate statutory provision to a given set of facts, the court will not go behind the form of the transaction or document concerned and have regard to the substance unless the form is a 'mere sham'.[71]

7. Court's Interpretation of Tax Statutes in Nigeria

The approach of the Nigerian Courts to the interpretation of taxing Act has been evasive throughout the years, but it is generally recognized that taxing Act are a rather special type of statute, demanding a predictable and strict form of interpretation.[72] In interpreting taxing statute court's should see that the discretion which it is claimed to be exercised is one which falls within the taxing statute given by the legislature and to see that those discretions are exercised in good faith. Courts cannot inquire into the reasonableness, the policy, the sense or any other aspect of the tax transaction.[73] The reason is that if

[59] (1984) SCNLR 427 at 430
[60] Inland Revenue *Commissioners v Hinchy (1960)* AC 748.
[61] (1963) AC 557 at 577
[62] *Mobil oil Ltd v FBIR* (1977) 1 NCLR 1 at 17, *Phoenix Motors Ltd v National Provident Fund Mgt Board (1993) 1* NWLR (pt 272) 718 and *FBIR v ID Sam Nig Ltd* (2009) 8 NWLR (pt. 1144) 615.
[63] MT Abdulrazaq, *Revenue Law and Practice in Nigeria*, zed, (Lagos, malthouse Press Limited, 2015) p.31.
[64] *Coltnes Iron Company v Black* (1881) 1 APP: Cas. 315.
[65] *Pryce v Monmuothshire Canal and Railway Company* (1879) 4 App. Cas. 197.
[66] *Adamson v Attorney – General* (1938) AC 257.
[67] *Cape Brandy Syndicate v Inland Revenue Commissioners* (1921) 1 KIB 64, Federal Board of Inland Revenue V Omotosho (1973) N, comm. LR 369.
[68] *Inland Revenue Commissioners v Ayshire Employers Mutual Insurance Association Ltd* (1946) 1 All ER 637.
[69] *Asfor v Perry* (1935) AC 398, *Luke v IRC* (1936) AC 557.
[70] *Ormond Investment v Betts* (1928) AC 143
[71] *Inland Revenue Commissioners v Duke of West minister* (1936) AC.1.
[72] *MT Abdulrazaq. Revenue Law and Practice in Nigeria*, op cit p.31
[73] *Carltona Ltd v Commissioner of works and others* (1934) 2 All ER 560 at 564.

they step beyond this line, they no longer construe men's deed, but make deeds for them. This paper agrees with the observation of Abdulrazaq[74] on the abysmal interpretations in Nigeria thus that it is well known that the converse of extra ordinary is ordinary; hence, the Supreme Court decision was made. No new principles were laid down. No innovative idea was canvassed. No pointer to the future was given. Certainly, Nigeria Tax Jurisprudence was poorer for it and every student of Nigerian taxation must be ordinarily shell-shocked beyond mere gas flaring. The learned professor's observation is a pointer that all is not well with the Nigerian Tax Jurisprudence. Those who canvass tax issues before the court do not always seem to either know the problem involved or grasp the concrete issues of the problem. Tax issues are always narrow, avoiding fiscal technicalities and paying under attention to general civil or criminal procedural technicalities. It is trite law that to address the meaning and application of a statute or its provision is to look at the very words of the provision. In *Nigerian Breweries Plc v the Governor of Oyo State & Ors*,[75] it was held that the cardinal principle of interpretation of words in a statute is that, where the words of a statute are clear, the court must give effect to the literal meaning. However, if the literal meaning may result in ambiguity or injustice, a court of law which is as well a court of justice may seek internal aid within the body of the statute or external aid from the statute in *pari materia* in order to resolve the ambiguity or avoid doing injustice.

The test of deductibility of payment for flaring of gas in the computation of tax under Petroleum Profit Tax Act was seen in *FIRS v Mobol Production Nigeria Unlimited*.[76] The Appellant in this case issued an Additional Assessment for Petroleum Profit Tax on the respondent for the 2006, 2007, and 2008 years Assessment. The respondent appealed to the Tax Appeal Tribunal Lagos Zone, wherein the Tribunal held that the Petroleum Profits Tax Act (PPTA) and the Associated Gas Re-injection Act (AGRA) do not expressly require that a company must obtain gas flare certificate before expense incurred can be tax deductible. On appeal, the court reviewed the case thus; the respondent's case was that it flared its gas in 2006, 2007 and 2008 and made payment purportedly as gas flaring fees. That the Nigerian Extractive Industries Transparency Initiative (NEITI) carried out an audit exercise on the respondent, deducted the so-called gas flaring fee from tax in its PPT returns for 2006 to 2008. Receipts were issued by DPR to the respondent for the payments it claimed to have made for the gas flaring in accordance with section 3 of AGRA. However, the Appellant insisted that the Respondent's payment for gas flaring is not qualified for tax deductibility under section 10 (1) (L) of PPTA for the reason that the Respondent was not sanctioned by the Minister of Petroleum Resources hence the act is illegal gas flaring. In its judgment the court held that considering the provisions of both AGRA and PPTA, it would appear that any payment made by an oil company pursuant to section 3 of the AGRA is tax deductible under section 10(1) (L) of PPTA. However, because the Respondent's action is illegal for flaring gas without permit or certificate, it amounts to an invalid act and therefore cannot benefit from the provisions of section 10 (1) (L) PPTA.

What is worrisome about this judgment is that both the court and the legal practitioners involved in the matter are bereft of the provisions of section 10 (1) (L) PPTA and section 3 of AGRA. The issue before the court is whether the payment of fee for gas flaring qualifies as payment incurred wholly, necessarily and exclusively from petroleum operations. The court failed to interpret the clear and unambiguous provisions of the PPTA. This decision failed the test when juxtaposed with how tax statutes are construed. In *Cape Brandy Syndicate v IRC*.[77] It was held that in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. Again, *Federal Inland Revenue Service v Shell Pet. Dev. Co. Nig Ltd*[78] would have been yet another opportunity for the court to give interpretation to the claim for fees paid for flaring of

[74] MT Abdulrazaq, *Taxation System in Nigeria* (Lagos: Gravitas Legal & Business Resources Ltd; 2016) p.113. This was the learned Professor's reaction to the decision of Supreme Court in *Shell Petroleum Development Company of Nigeria Ltd v FBIR* (1996) 8 NWLR (pt.466) 256.
[75](2011) LPELR 4610 (CA), *Calabar Central Co-operative Thrift & Credit Society Ltd & ors v Bassey Ebong Ekpo* (2008) LPELR 825 (CA). *7up Bottling Co. Plc v Lagos State Internal Revenue Board* (2000) 3 NWLR (pt.610) 565 at 591.
[76] (2018) 37 TLRN 1, *FIRS v Shell pet. Dev.Co. Nig Ltd* (2018) 39 TLRN 13
[77](1921) 1 KB 64 at 71
[78] (2018) 39 TLRN 13.

gas whether same qualifies as expense deductible under the PPTA. The Court again held that expenses incurred wholly, exclusively and necessarily for the Petroleum Operations as envisaged by section 10 of the Petroleum Profits Tax Act deductible.

For the second time, the court failed to utilize the laid down principles of interpretation of taxing statutes to determine strictly whether expenses for gas flaring qualifies as one deductible. Had the court resolved the issue whether flaring of gas and payment made thereof is incurred during petroleum operations and whether the expenses made for gas flaring is one of such allowed during computation of tax under PPTA; there would be no issue to determine under the heading penalty for gas flaring. The court wasted the precious time and opportunity this second time.

8. Analysis of the Provisions of Section 3 AGRA *vis-à-vis* section 10 (1) (L) PPTA

Nigerian Courts have always deviated from interpreting the provisions of tax statutes with respect to tax deductions. For instance, in *Shell Petroleum Development Company Nigeria Ltd v FBI*R[79], the court held that once there is a statutory or contractual obligation for a company engaged in petroleum operations to perform such obligations is wholly, exclusively and necessarily for the purpose of the operations. The Supreme Court further held that since the directive given to the Appellant to pay bank charges did not come from the Central Bank of Nigeria but from the Federal Government and it did comply, this was clearly incidental to its operations. Following the holding of the Supreme Court that exchange losses qualify for deduction under section 10 (1) of the Petroleum Profits Tax Act, the court gave legal effect to the agreements entered between the appellant and the Federal Government and held that the principles of contract were applicable. It is pertinent to note that the court agreed that by reason of the agreements and not provisions of the Petroleum Profits Tax Act, the doctrine of equity will apply to compensate the appellant for the exchange losses incurred; that is abandoning the fundamental principles of taxation. The terms of the purported agreement were read into the tax statutes. This decision did not even follow the minimum rules of interpretation of taxing statutes already stated above. Had the Supreme Court adhere to the strict rules of interpretation of taxing statutes, it is obvious that the exchange losses ought not to have been allowed as a deductible item.[80] The Supreme Court left the main issue before the court which is the legality of paying Nigerian tax in foreign currency as done in other jurisdictions where the principles of interpretation were followed.[81] This paper submits that had the principles followed, the deduction of the Central Bank Commission ought not to have been allowed.

Following from the above, the Respondents in *FIRS v Shell Petroleum Dev. Co Nig Ltd*[82] and *FIRS v Mobil Production Nigeria Unlimited*[83] are not entitled to make deductions of the sums paid for flaring of gas between 2006 and 2008. The expenses incurred did not meet up with the requirements of being wholly, exclusively and necessarily incurred for petroleum operations as provided under the Act. Again, gas flaring is the burning of natural gas that cannot be processed or sold. Flaring disposes of the gas while releasing emission into the atmosphere. It must be pointed out that deductions are entirely dependent on proof that such expenses were carried out wholly, exclusively and necessarily during petroleum operations. By the provisions of section 10 and 11 of the Petroleum Profit Tax Act, companies that flare gas are excluded from both deductions and incentives.

[79] *Supra. See also Gulf Oil v FIRS* (2012) 7 TLRN 163

[80] MT Abdulrazaq, Taxation System in Nigeria, op cit. at p.118.

[81] In *Grieg (Inspector of Taxes) v Ashton* (1956) 3 All ER Ch.Do.123, the taxpayer, an author resident in the United Kingdom, made profits from her vocation in the United States of America in 1946 and suffered the United States tax thereon of $24,476 in part, by deduction by her employers and in part, by payment. In 1949, the rate of exchange was altered from $4.03 to the pounds sterling to $2.30 to the pounds sterling. In 1950, the taxpayer received a refund of $12,862 in respect of this assessment, leaving her ultimate payment at $11,614. The crown computed the credit allowable to the taxpayer in respect of foreign tax on the income for income tax purposes under the Double Taxation Relief (Taxes on Income) (USA) Order; 1946, at the difference between the United States tax initially suffered ($24,476) converted at $4.03 to the pounds sterling and the refund converted allowable for the foreign tax was the amount ultimately found to be payable ($11,614) converted at $4.03 to the pounds sterling, being the rate applicable in the year in which the tax became payable, the alteration in the rate of exchange, thereafter being an extraneous circumstance having nothing to do with liability for tax; *Rhokana Corporation Ltd v Inland Revenue Commissioners* (1936) 2 All ER King's Bench Dev – at 678, *Payne v. The Deputy Federal Commissioner of Taxation* (1936) 2 All ER at p793.

[82] Supra.

[83] Supra.

The primary purpose of enacting AGRA is to discourage gas flaring or limit such practice to the nearest minimum. The Act[84] is to compel every company producing oil and gas in Nigeria to submit preliminary programmes for gas re-injection or their plans for the re-injection, hence, gas flaring was outlawed. The preliminary programmes is to ascertain, the preparedness of the company for schemes for the visible utilization of all associated gas produced from a field or groups of fields; and project or projects to re-inject all gasses produced in association with oil but not utilized in an industrial project.[85] A company flouting the provisions of section 1 and 2 of AGRA[86] shall mandatorily seek permission in writing from the minister. In the written permission, the company is expected to explain to the minister that utilization and re-injection is not feasible in a particular field or fields. It is only where the minister is satisfied with the request that he may specify the terms and sums to be paid.[87] Any action taking without the minister's authorization is regarded as an offence under section 3. It is difficult to fathom the rationale for the claim that penalty paid for flaring gas should be allowed for deductions under the Petroleum Profits Tax Act. It is pertinent to note that court seized with the powers to resolve or interpret the provisions in relation to computing tax failed to observe it at least the minimum rules of interpretation. Had the court followed the rules of interpretation of taxing statutes, it is obvious that there would be no argument whether or not payment for flaring of gas is deductible; let alone penalty for gas flared without authorization of the minister. Any decision by court ought not to be an issued for debate. They did not qualify as deductible item under the Petroleum Profit Tax Act.

9. Conclusion and Recommendations

There is no nexus between the items allowable for deductions during tax computation under the Petroleum Profits Tax Act and the provisions of section 3 of the Associated Gas Re-injection Act. The law is that all outgoings and expenses for deductions under the Petroleum Profits Tax Act must be incurred wholly, exclusively and necessarily for the purpose of petroleum operations. Again, section 3 of AGRA was not contemplated as an outgoing or expenses under PPTA. Provisions of section 3 AGRA was made to checkmate the activities of recalcitrant companies operating in the oil and gas production in Nigeria. It is therefore, illegal to allow for deduction for act that was made towards contravening the law. The judges and legal practitioners should avoid misconstruing the law and interpret the taxing statutes based on minimum standard rules of interpretation that will not be absurd, highly inequitable and manifestly produce unfair and unreasonable results.

[84]The long title of the Act is an Act to compel every company producing oil and gas in Nigeria to submit preliminary programmes for gas re-injection and detailed plans for implementation of gas re-injection.

[85]AGRA, 2004, S.1 (a) (b) and 2 (1) (a) (b) and (2). Section 2 (2) stated that the fact that some of the gas produced in association with oil has been earmarked for some alternative utilization shall not exempt compliance with sections 1 and 2 (1) AGRA.

[86]AGRA, 2004, S.3 (1).

[87]Ibid, S.3 (2) (a) (b). Even the proviso to the sections did not spell out that the payment is deductible under the law.