IN THE COURT OF APPEAL
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

ON TUESDAY DAY 24TH OF MARCH, 2015
BEFORE THEIR LORDSHIPS:

UZO .I. NDUKWE-ANYANWU	JUSTICE, COURT OF APPEAL
SAMUEL CHUKWUDUMEBI OSEJI	JUSTICE, COURT OF APPEAL
ABIMBOLA OSARUGUE OBASEKI-ADEJUMO	JUSTICE, COURT OF APPEAL

APPEAL NO. CA/L/409/2008

BETWEEN:-

OANDO PLC .... APPELLANT

AND

FEDERAL BOARD OF INLAND REVENUE .... RESPONDENT

JUDGMENT

(DELIVERED BY SAMUEL CHUKWUDUMEBI OSEJI, JCA)

This appeal is against the judgment of the Federal High Court, Lagos Division delivered by Abdulahi Mustapha CJ. On the 4th day of February 2008. The said court having sat in its appellate jurisdiction over the Decision of the Body of Appeal Commissioners. The Body of Appeal Commissioners had in its decision given on 24th November 2006 dismissed the appeal brought before it by the Appellant.

The facts of the transaction that led to the dispute which gave rise to this appeal was that by two Notice of Assessment dated 29-8-2005 (Assessment Notice Nos: IID/CT/BA/AS/188 and IID/CT/BA/ ADD/189)

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Date.. NOSA OMOSIGHO 24/4/2015
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issued by the Respondent. The Appellant was assessed to tax in the sum of N172,416,369.00 and N23,279,331.00 respectively as tax for the 2004 year of assessment.

The Assessment for the sum of N172,416,369.00 is an additional assessment on the Appellant and is based on the Respondent's finding that the Appellant is not solely engaged in the manufacture of lubricants but also engage in extensive marketing in which case it is not entitled to claim full capital Allowance of 100% as per paragraph 24(7) of the 2nd schedule to the Companies Income Tax Act, Cap 60 Laws of the Federation 1990 (CITA).

The second Assessment for the sum of N23,279,331 is based on the Respondent's stance that the from the Appellant's financial returns for the year it paid the sum of N652,319,000 as dividend out of profit of N1,009,830,000 for 2004 year of Assessment even though it paid no Tax for the said year. The Appellant raised an objection to the said additional Assessment, to the Respondent and this was rejected. The Appellant thus appealed to the Body of Appeal Commissioners challenging the refusal of the Respondent to reverse or withdraw the additional Assessment. At the conclusion of hearing during which both parties participated, the Body of Appeal Commissioners (hereafter referred to as BAC) dismissed the Appeal and ordered the Appellant to pay the Taxes.s assessed by the Respondent.

Not satisfied with the decision, the Appellant appealed further to the Federal High Court, now (the lower court) which after a review the facts and relevant laws as presented before it allowed the appeal in part and ordered the Appellant to pay the total assessed sum as presented by the Respondent but less 5% of the said sum of N172,416,369.00. Also

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to pay the sum of N23,279,331 being tax on the dividends declared by the Appellant.

The Appellant being dissatisfied with the decision of the Federal High Court filed a Notice of Appeal unto this court. An amended Notice of appeal subsequently filed on 21-10-11 but deemed properly filed on 23-5-2012 and it contains five grounds of appeal.

Briefs of argument were subsequently filed and served in compliance with the Rules of this court. In the Appellant's brief of argument which amended version was filed on 21-10-11 but deemed properly filed on 23-5-12 two issue were formulated for determination as follows:-

> **(1). Whether the Federal High Court was right to have held that the Appellant is only entitled to claim full capital allowance on spercent of it's assessable profits, having also held that the law does not impose any condition of threshold on the level of manufacturing activity that a company is required to meet in order to be exempted from the restriction imposed under paragraph 24(7) of the second schedule to CITA. (Grounds 1, 2 and 3).**
>
> **(2). Whether the Federal High Court was right in holding that the dividend paid out by the Appellant in the 2004 year of Assessment is liable to be taxed in accordance with the provision of Section 19 of CITA. (Section ISA of CAP 60 LFN 1990) (Grounds 4 and 5).**

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The Appellant also filed a reply to the Respondent's amended brief. It is dated 15-10-12 and filed on 18-10-12 but deemed properly filed on 21-10-14.

In the Respondent's brief of argument dated 4-10-12 and filed on 5-10-12, two issues were also formulated for determination. They are:-

> **(1). Whether, in the circumstance of this case and in the light of the evidence before the Body of Appeal Commissioners, the Federal High Court was not right when it held that the Appellant is only entitled to 5% capital allowance having regard, particularly to the fact that Appellant's contribution of lubricant blending activity to profit before tax is between zero to 5%.**
>
> **(2). Whether the Federal High Court was not right when it held that the dividend paid out by the Appellant in the year 2004 year of Assessment is liable to be taxed in accordance with the provision of Section 15A of Companies Income Tax Act Cap. 60 LFN 1999.**

The two issues raised by both parties are not dissimilar. In this regard, I will adopt those in the appellant's brief to consider this appeal.

<u>ISSUE I</u>

Herein learned counsel for the Appellant referred to the finding of the lower court at pages 322 – 323 of the Record to submit that it is contradictory because the proviso to paragraph 24(7) of the 2nd

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schedule to CITA does not set any threshold that a company that is engaged in the business of manufacturing will meet to be entitled to the exemption from the restriction on Capital Allowance. But it's effect is that once a company is found to be engaged in the trade or business of manufacturing, it is entitled to claim full Capital Allowance on 100% of its assessable profits irrespective of the level of manufacturing activity it is engaged in compared with other lines of business that the company may be into.

It was submitted that where a company is engaged in more than one line of business, the assessable profit of that company is the profit of the company from all sources minus allowable expenses and plus disallowable expense as per the provisions of Section 27 of CITA. Hence the use of the words "Assessable profits" and not "Assessable profit" in paragraph 24(7) of CITA.

It was further submitted that a proper interpretation and construction of paragraph 24(7) will show the following.

> **(i). The general rule is that what companies are to deduct as Capital Allowance is not expected to exceed 66.6% of their assessable profits of the relevant year of assessment.**
>
> **(ii). However, companies in the agro allied industry or that are engaged in the trade or business of manufacturing are entitled to claim 100% of Capital Allowance of the assessable profits and therefore expressly exempted from the above restriction.**

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(iii). Whether or not the company is into another line of business is immaterial.

(iv). The object of the proviso to paragraph 24(7) of the 2nd schedule to CITA is to encourage companies to go into manufacturing and the agro allied industry.

In was further submitted that where the words of a taxing statute are plain, precise and unambiguous, they should be given their ordinary and natural meaning **SPDC CO. NIG LTD VS FBIR (1996) 8 NWLR (?) 256 and AHMADU VS GOVERNOR, KOGI STATE (2002) 3 NWLR (NO PART) 502 at 522, HALLIBURTON WEST AFRICAN LTD VS FBIR (2006) 7 CLRN 138 at 158.**

Learned counsel further argued that, once it is established that the appellant carries on business of manufacturing, the words of paragraph 24(7) do not require any further inquiry regarding the extent of manufacturing business carried on by the Appellant and whether the company is at the same time engaged in another line of business is immaterial. Vide **KILMARNOCK EQUITABLE CO-OPERATIVE SOCIETY VS IRC 42 TC. 675.**

Reference was later made to paragraphs 6(1) and 7(1) of the 2nd schedule to CITA to submit that they do not set any threshold on the level of manufacturing activity a company must meet to claim capital allowance on hundred percent of its assessable profits. It was however emphasised that paragraphs 6(1) and 7(1) aforementioned are commenced with the phrase "subject to the provision of this schedule which phrase connotes a limitation as per the case of **TEXACO PANAMA INC. VS SPDC (NIG) LTD (2002) 5 NWLR (PT?) 209 at 228.** In

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this regard paragraphs 6(1) and 7(1) are subject to paragraphs 24(7) of the 2nd schedule to CITA which exhaustively determines the amount of assessable profits upon which capital Allowance is claimable.

Furthermore, it was submitted that the lower court drew a wrong reference from the undisputed and admitted evidence of the Appellant, to hold that the Appellant is only entitled to five percent (5%) Capital Allowance on the premises that the turnover of a company is the same as its profit before tax. This court was then urged to set aside the finding of the lower court or in the alternative hold that the Appellant is only entitled to pay the sum of N172, 416, 369 minus fifty percent (50%) of the sum as additional tax for the 2004 assessment year.

ISSUE 2

Dwelling on the issue, learned counsel referred to the holding of the lower court at page 329 of the Record as regards the finding of the BAC to submit that the position of the lower court took for granted the position of the law in respect of sources from which a company may pay its dividend as provided by PART XIII (sections 379-380) of the Companies and Allied Matters Act (CAMA) Cap 59 Laws of the Federation of Nigeria 1990.

Particulars reference was made to section 380 of CAMA which provides for the source of dividend payable to shareholders to contend that the lower court was therefore wrong to hold that dividend are payable from Accounting profits and relied on the provisions of CITA.

Also relying on the following cases, **SCHROEDER VS MAJOR (1989) 2 NWLR (PT 101) (?) AND UNIVERSITY OF AGRICULTURE, MAKURDI VS JACK (2004) 5 NWLR (PT 886) 208 at 229.** Learned counsel argued that

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where there is a special provision in the statute, other general provision in the same or other statutes covering the same subject matter are not to be interpreted to derogate from or to defeat the essence of such special provision in this regard, PART XIII of CAMA specifically covers issues relating to dividends and it is the law that ought to be considered in determining where dividends are payable from and not other laws.

He added that the fact that the Appellant profit for the 2004 year of assessment was not enough to pay its shareholders dividend does not preclude the Appellant paying its dividend from its retained earnings and even if it is legally permissible to pay dividend from Accounting Profit, the Appellant can still elect to pay from retained earnings which the Appellant did in the 2004 Assessment year.

It was further submitted that for section 19 of CITA to apply to any dividend, the dividend must be paid out of profits on which no tax is payable.

After setting out the provisions of the section 19 of CITA (section 15A of CITA) it was argued that a threshold issue in the interpretation of section 15A is the understanding of the terms "profits and total profits" as used therein. He then contended that the provisions of section 19 of CITA (section 15A of Cap 60 LFN) 1990 do not apply to the dividend paid by the Appellant out of retained earnings in respect of the 2004 year of assessment and to uphold the interpretation of section 19 by the Respondent in this case would be to subject profits, which had suffered tax in previous years, to tax again when they are paid out of dividend in subsequent years. This he added will result in the unjust consequence of double taxation. R. (Edison) **CENTRAL VALUATION OFFICER (2003)** 4 **ALL E R 209.**

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This court was then urged to resolve Issue 2 in favour of the Appellant and hold that the Appellant is not liable to pay tax at the rate prescribed under section 19 of CITA in respect of the dividend declared and paid out of retain earnings, by the Appellant in the 2004 year of assessment.

Responding on the Appellant Issue 1, learned counsel for the Respondent referred to paragraph 24(7) of the 2nd schedule to the CITA to submit that there are two exemptions for the general rule, namely those companies whose nature of business fall under Agro-Allied Industries and the companies which are engaged in the trade or business of manufacturing which categories are entitled to unrestricted Capital Allowance (i.e 100%) which other business outside the two categories are allowed restricted Capital Allowance of (66 2/3%).

It was then submitted that the Appellant having presented itself by virtue of its self-assessed return filed previously with the Respondent and particularly for the 2004 year of assessment, as a marketer of petroleum products, cannot claim benefits applicable to companies that are solely into Agro-Allied or manufacturing business. This is premised on the fact that the Appellant had always represented itself to the Respondent as a marketer of petroleum products, yet in their accounts return, they claimed an unrestricted capital Allowance as a manufacturing concern.

Learned counsel added that, going by the Appellant's financial statement for the year under review which the Appellant filed with the Respondent along with other necessary documents as part of the 2004 year of assessment tax returns, which document are tendered and admitted in evidence as Exhibit B at the BAC sitting, the Appellant is

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bound by the contents therein in which case the Respondent was right in raising Additional Notice of Assessment NO 11/CT/BA/A5/188. Thus Appellant having filed returns for the business of marketing of petroleum products only, and no other separate return for its alleged manufacturing activities, cannot turn around to claim otherwise because it is not allowed in accounting to offset the claims of one line of trade on business from another. **FBIR VS ADENU (1963) SCNLR 112.**

PARAGRAPHS 6 and 7 of the 2nd schedule to CITA was referred to by learned counsel, as a guide on how companies can claim and be allowed to claim Capital Allowances on expenditures incurred in an asset.

This court was then invited to note the operative words "incurred in respect thereof a qualifying expenditure wholly, exclusively, necessarily and reasonably" in the said provisions because they are a condition precedent to granting Capital Allowances when applied for by a tax payer.

In other words, the Capital Allowance claimable should be on a capital Expenditure in use for the source of assessable profit which in turn means expenditure on blending will be restricted to blending aspect of the trade or business while that of marketing is restricted to marketing with applicable threshold.

Also relying on section 151 of the Evidence Act and the following authorities:- **JOE IGA VS CHIEF EZEKIEL AMACHEREE (1976) 11 SC 1 at 12-13 and TOTAL (NIG) PLC VS CHIEF ELIJAH OMORUYI AJAYI (2004) 3 NWLR (PT 860) 270 At 274** it was submitted that the Appellant having held itself out in the Annual Returns and Financial Statements as a

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marketing company. It cannot turn around to describe or claim to be a manufacturing concern.

It was further submitted that, by not filing a separate return to distinguish between marketing and manufacturing activities, the Appellant claim that it is a manufacturing entity is like sitting on a fence so as to avoid or evade tax, and this clearly negates and offends against the clear intention of the tax legislations.

He added that the principle guiding the grant of Capital Allowance is to ensure that expenditures incurred relate to the class of fixed assets used, the intensity at which it is put, the particular use of it and of course the nature of the business or trade the expenditure being claimed emanate. But the Appellant failed to put across succinct evidence at the lower court to sustain its claim that it deserve a hundred percent (100%) Capital Allowance, vis-à-vis the guiding principles applicable in considering claims with particular reference to paragraphs 6 and 7 and paragraph 19(1) (a) and (b) of the 2nd schedule of the CITA. Therefore, he argues, that the lower court was right to hold that in order to be exempted from the restriction imposed under paragraph 24(7); there must be ascertained, the level of manufacturing being carried on by the Appellant vis-à-vis the level of marketing of petroleum products.

Learned counsel also contended that the evidence of the Appellant's second witness at the BAC hearing, that the contribution of manufacturing activity to the profit before tax is between the ranges of about 38 to 50 percent and under cross-examination stated that it is between zero and fifty percent (50%), the claim for hundred percent (100%) Capital Allowance becomes unrealistic and the lower court was

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magnanimous to have granted five percent (5%) Capital Allowance inspite of their failure to file any separate return on the manufacturing activity which return would have shown the Capital Allowance computation and adjustment by the Appellant. This court was then urged to disregard the Appellant's interpretation of paragraph 24(7) for being contrary to the intention of the legislature on taxation.

Responding on Issue 2, learned counsel for the Respondent submitted that the lower court was right to have concluded that the dividend which the Appellant paid to its shareholders are subject to tax having declared profit in the same year. This is so, given the provisions of section 15A of the CITA.

It was noted that the disagreement between the parties emanated from the Appellant's 2004 income tax returns (i.e. 2003 financial statement) where it reported a profit (Accounting Profit) before taxation of N1,009,830,000 and also a tax computation statement which showed a NIL total profit which indicated that tax was not paid on the Appellant's accounting profit for that year. However, the Appellant paid dividends of N652, 319, 000 out of its accounting profit of N1,009,830 on which no tax was paid and the profit and loss account for the period did not support the Appellant's claim that the dividend for that year was paid from retained earnings and not from profit of that year. It was then submitted by the learned counsel that such claim by the Appellant cannot hold in the face of the facts placed before the BAC and the lower court. More so, the fact presented to the Respondent by the Appellant show that the profit and loss account for 2003 financial year indicates that after making tax provision of N217, 866, 000 from its profit of N1,009,830,000. The Appellant appropriated the balance of N791, 964,000 as follows:-

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Proposed Dividends	**–**	**N652,319, 000**
Reserved Bonus	**-**	**40, 770,000**
Retained Profit Transferred		
To general Reserve	**-**	**98,875,000**

This added up to a grand total of N791, 964,000. It was then contended by counsel that since the Appellant paid dividend on accounting profit on which tax was not PAID, the Appellant is taxable under Section 15A of the CITA and the Respondent was correct to have so assessed it. He added that by declaring dividend, the Appellant has announced to the world that it has made profit, in which case this court should uphold the judgment of the lower court.

On the contention by the Appellant that the lower court did not properly consider their undisputed evidence that it paid out dividend from it's accumulated retained earnings. It was submitted that there is nothing on record to support the claim in retained earnings either in law or in fact on which the lower courts would have held otherwise, rather the facts presented by the Appellant duly fell within the purview of Section 15A of C.I.T.A which law the Respondent adequately applied.

It was submitted further that the provisions of Section 15A of CITA is clear and unambiguous and where the wordings of a statute are clear the court should give effect to their literal meaning; **MOBIL OIL (NIG) LTD VS FEDERAL INLAND REVENUE BOARD (1977).**

On the argument by the Appellant's counsel that it is the Company and Allied Matters Act CAMA, that should govern the payment of dividends by companies and not the companies Income Tax Act (CITA). It was

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submitted that CITA should be the applicable law and that, apart from the general provisions of Section 380 of CAMA which gives companies the option on where to pay Dividends, there is nothing therein that makes it mandatory to pay dividends from retained earnings neither was there proof that the Appellant paid the dividend from it's retained earnings. It was then urged that the view of the lower court that CITA is a specific legislation on Taxation of Companies and not CAMA which only contains a general provision on dividends and profits and that the provisions of CITA should prevail over that of the CAMA should be upheld vide **KRAUS THOMPASON ORGANISATIONS NATIONAL INSTITUTE FOR POLICY AND STRATEGIC STUDIES (NIPSS) (2004) 5 S.C. (PT) 16 at 20, 21 and 22 and ABUBAKAR VS YAR'ADUA (2008) 12 MJSC (SPECIAL EDITION)** page 1 at 154. This court was then urged to uphold the decision of the lower court and dismiss the appeal.

In the Appellant's reply brief the following authorities and statutory provisions discussed in the Respondent's brief were adequately reacted to and will be referred to in the judgment as the need arises. They are:- **FBIR VS ADENUBA (1963) SC NLR 12. Paragraphs 6(i), 7(1) and 19 of the 2ns schedule of the CITA; Section 151 of the Evidence Act; Section 29(1) of CITA; and PHOENIX MOTORS LTD VS N.P.F.M.B. (1993) 1 NWLR (PT. 272) 731.**

Now dealing with issue I and by way of recapitulation, it must be borne in mind that the object of contention is whether the Appellant is entitled to 100% Capital Allowances on expenditure incurred in the use of it's assets in making assessable profits.

In this regard the relevant statutory provisions are paragraph 24(7) of the 2nd schedule of the CITA which deals with the manner of making allowances and charges. Paragraphs 6 and 7 of the 2nd schedule of CITA deals with the criteria for granting allowances while paragraph 19

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thereof deals with assets used or expenditure incurred for the purpose of trade or business and the conditions to be met before such expenditure falls within the ambit of allowances claimable.

The various provisions of the law are hereinbelow set out:-

> **Paragraph 24(7) "In giving effect to the provisions of sub-paragraph (2) of this paragraph, the amount of capital allowances to be deducted from assessable profits in any year of assessment shall not exceed 66 2/3 per cent of such assessable profits of a company, but any company in the agro-allied industry or which is engaged in the trade or business of manufacturing, shall not be affected by the restriction under this sub-paragraph."**
>
> **Paragraph 6(i) "Subject to the provisions of this schedule, where in it's basis period for a year of assessment a company owning any asset has incurred in respect thereof qualifying expenditure; wholly, exclusively necessarily and reasonably for the purposes of a trade or business carried on by it, there shall be made to that company for the year of assessment in it's basis period for which that asset was first used for the purposes of this trade or business on allowance (in this schedule called" an initial allowance") at the appropriate rate percentum, set forth in Table I of this schedule, of such expenditure."**

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Paragraph 7(1) "Subject to the provisions of this schedule, where in its basis period for a year of assessment, a company owning any asset has incurred in respect thereof qualifying expenditure, wholly, exclusively, necessarily and reasonably for the purpose of a trade or business carried on by it, whether or not an initial allowance was made in respect of that qualifying expenditure, there shall be made to that company for each year of assessment, in it's basis period for which that asset was used for the purpose of that trade or business, an allowance (hereinafter called "an respect thereof in Table II of this schedule of such expenditure after deduction of initial allowance where applicable. Provided that an amount of N10 shall be retained in the accounts for tax purposes while the asset is disposed of:
Provided further that where the basis period for any year of assessment is a period of less than one year and such allowance for that year of assessment shall be proportionately reduced."
Paragraph 19(1) "The following provisions of this paragraph shall apply where either or both of the following conditions apply with respect to any asset:-
(a) the owner of the asset has incurred with respect thereof qualifying expenditure partly for

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the purpose of a trade or business carried on by him and partly for other purposes.

(b) the asset in respect of which qualifying expenditure has been incurred by the owner thereof issued partly for the purpose of a trade or business carried on by such owner and partly for other purposes.

19(2) "Any allowances and any charge which would be made if both such expenditure were incurred wholly, exclusively, necessarily and reasonably for the purposes of such trade or business and such asset were used wholly and exclusively for such trade and business shall be computed in accordance with the provisions of this schedule."

For the appellant, the proper interpretation and construction of paragraph 24(7) of the 2nd schedule of CITA is that the deductible entitlement as capital allowance by companies is not to exceed 66.66% of their assessable profits of the relevant year of assessment, but in the case of agro-allied industries or those engaged in the trade or business of manufacturing they are entitled to 100% claim as capital allowance, so they are not affected by the above Restriction. This is so whether or not such company is into another line of business because the object of the proviso to paragraph 24(7) is to encourage companies to go into manufacturing and agro allied industry.

To my mind, a careful and dispassionate reading of the provisions of paragraph 24(7) show that it is very clear and unambiguous as to it's intent and purpose and as such does not need any embellishment, decoration or caress in order to make it succumb to a different

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interpretation. The operative words of qualification in paragraph 24(7) states:-

> **"but any company in the Agro-Allied industry or which is engaged in the trade or business of manufacturing shall not be affected by the restriction under this subparagraph."**

My stance here is that for any company to be exempted from the restriction and enjoy 100% relief of Capital Allowance, it must be clearly and wholly shown that it is in the agro-allied industry or engaged in the trade or business of manufacturing as a matter of indisputable fact not speculation. Paragraphs 6 and 7 of the 2nd schedule of CITA clearly stated the requirements for the claim of capital allowance.

It is trite and well established principle of construction of statutes that where the provisions of statute are clear and unambiguous, effect should be given to them as such unless it would be absurd to do so having regard to the nature and circumstance of the case. See **AWOLOWO VS SHAGARI (1979) 6-9 SC 51; FRN VS OSAHON & ORS (2006) 5 NWLR (PT. 973) 361** and **BRONIKS MOTORS LTD VS WEMA BANK LTD (1983) 1 SC NLR 296.** In **NWAKIRE VS COP. (1992) 6 SC NJ1, the Supreme Court** per **NWAEMEKA AGU JSC** held that:-

> **"After all, the primary rule of construction is the literal construction which requires that we give the words used in the statute, and only those words, their ordinary and natural meaning, omitting no words and adding none; in the construction we arrive at, save in accordance with recognized rules of construction."**

See also **OLARENWAJU VS GOVERNOR OF OYO STATE (1992) 11 – 12 SC NJ 92** and **EGBE VS YUSUF (1992) NWLR (PT. 245) 1.**

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I must also add that where an interpretation of statute will result in defeating the object of the statute, the court will not lend it's weight to such interpretation. Thus the language of the statute must not be stretched to defeat the aim of such a statute. See **ANSALDO (NIG) LTD VS NATIONAL PROVIDENT FUND MANAGEMENT BOARD (1991) 3 SC 29.**

In the instant case, there is no disputing the fact that the main business of the Appellant is marketing of petroleum products but had also delved into blending to produce lubricants. This has been taken to constitute manufacturing. The said manufacturing aspect of the business of the Appellant is at a low level compared to their marketing aspect. This is reflected in their own evidence at the Board of Appeal Commissioners (BAC) sitting where the Appellant's second witness testified during cross-examination that manufacturing contribute between 38% and 50% in the Appellant's business but added subsequently that for the year under consideration that the blending activity (i.e. manufacturing) contributed zero to 5% to turnover. He also testified that for the 2003 assessment year the total expenses for the whole company was N5.3 billion out of the which the expense for the blending plant was N76 million. The nagging question that arises herein is, why should the appellant claim 100% Capital Allowance for the 2003 Assessment year for the whole company when the total expenses from the manufacturing section was only N76 million out of the total expense of N5.3 billion for the whole company? This to my mind will indeed amount to robbing Peter to pay Paul and if allowed to go unchecked defeat the whole essence of granting unrestricted capital allowance to agro-allied and manufacturing companies. The intent of the law in making provision for such a relief of 100% capital allowance is to encourage investors in the two sectors by way of recouping

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expenses made on plant and machinery used in the production process. Hence the discrimination between other sectors and the two aforementioned sectors of agro-allied and manufacturing. Thus, while the former is restricted to a 66 2/3 claim for Capital Allowance, the latter enjoys 100% claim.

To my mind therefore, qualification for entitlement for such incentive is a question of fact which proof must be reflected in the annual returns and financial statements of the company seeking to claim the 100% Capital Allowance and the qualifying expenditure must show that it hundred percent relates to the manufacturing concern given my own understanding of paragraph 24(7). A company can therefore not be allowed to claim 100% Capital Allowance in the guise of engaging in the business of manufacturing when as matter of fact and record, 95% of the company's business falls outside manufacturing and as such a large chunk of the expenses relates to such other endeavors. Such practice if allowed will no doubt defeat the whole intent and purpose of enacting the law.

A company seeking to claim 100% Capital Allowance must limit it's claim to the manufacturing arm of it's business and this should be reflected in it's annual returns and financial statements. This will assist the relevant Tax agency in ensuring proper assessment.

In the instant case, the Appellant in its self assessed returns to the Respondent had from the documents on record presented itself as a marketer of petroleum products and particularly in the 2003 Annual report made no mention of any manufacturing activity. Thus having presented itself as a wholly marketing company for petroleum products cannot turn around to blame the Respondent over the additional assessment made upon discovery of under assessment of tax for the

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year in question. The lower court in this regard exhaustively addressed the issue when it held at page 280 to 282 of the record as follows:-

> "The question that arises here is whether the Appellant is engaged in the business of manufacturing.
>
> The Appellant adduced evidence through its first witness i.e. KINGSLEY CHIEJEIRO NWAKAMA and put in evidence Exhibits A. B. C. and D to wit. Certificate of Registration of Factory, Receipt of payment in respect of Licence issued by the Department of Petroleum Resources to manufacture lubricants showing that it is a BONA FIDE manufacture lubricants and grease. The fact that the Appellant is a Manufacturer was repeatedly confirmed by the Chairman of the Body of Appeal Commissioners in the course of hearing before that Body. At Page 37 of the Record of Appeal the Chairman said:
>
> "Now that you have withdrawn it, there is no dispute that you are a manufacturer. If I understand their case, they are saying, you do more marketing than manufacturing."
>
> The Chairman continued at Page 51 of the Records of Appeal as follows:-
>
> "They do not deny the fact that you manufacture, but that you do more marketing then manufacturing. That is why you must disabuse our mind, that contention is wrong.

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The issue is not how you make it, but what is related to marketing."

I hold therefore that the Appellant is a manufacturing company and is as such entitled to claim capital allowance incurred and in use wholly, exclusively, necessarily and reasonable for the purpose of blending process of lubricants and grease, no matter how insignificant the manufacturing activity is to its marketing of petroleum products. It is irrelevant the fact that even though the Appellant said it has been manufacturing since 1985, it did not claim Capital Allowance until the year 2004. I have held in the course of this judgment that there is no threshold in the level of manufacturing activity that a company is required to meet in order to be exempted from the restriction imposed under paragraph 24(7) Second Schedule of CITA. However where a company is involved in both manufacturing and marketing and a single Return is made as in the instant case we must identity the level of manufacturing being carried out by the Appellant viz a viz the level of marketing of petroleum product. This is very important because it is only a company that is solely engaged in agro allied industry or in the trade or business of manufacturing that can enjoy 100 percent Capital Allowance."

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On whether the Appellant is entitled to claim 100% Capital Allowance inspite of the limited nature of it's manufacturing activity which was subsumed under the general marketing activity, the lower court continued at page 282 to283 as follows:-

> **"Is it proper for the Appellant to claim or enjoy 100 percent Capital Allowance manufacturing company when its second witness i.e. ABUBAKAR FOLARIN though in his evidence in Chief said that the contribution of manufacturing activity to the profit before tax is between the ranges of about 38 per cent to 50 percent, he admitted under cross examination that it is between zero and 5 percent? By the Appellant's own showing it cannot be entitled to 10 per cent Capital Allowance when it has admitted that its manufacturing activity did not contribute more than 5 per cent of its profit before Tax. The claim for 100 per cent Capital Allowance is further made unrealistic in view of the evidence of the same second witness under cross examination that the Appellant spent only the sum of N76 Million on the blending plant in Kaduna as against the Company's total expenses of N5.3 Billion on marketing.**
>
> **In view of the admission that the contribution of manufacturing activity to the profit before Tax is between zero to 5 per cent, I hold that at best, the Appellant is only entitled to 5 per cent capital allowance."**

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To further hit the nail on the head, the Body of Appeal Commissioners which consists mainly of experts in Taxation held in it's decision at page 150 of the record as follows:-

> "From the evidence of the Appellant's witness, Mr. Kingsley Chiejeiro Nwakama (AWI), the Kaduna plant has been manufacturing since 1985 for plant 1 and 1987 for plant 2, which is approximately 17 or 18 years. Yet it is only in respect of the year 2003 business that the company has claimed exemption. Even for that year, the numbers the company alleged to have achieved seriously call in question the Company's claim to being in "manufacturing" business. From the evidence of AW2 the total expenses on the plant in Kaduna is about N76.0 million as against the total expenses for the whole business of the company of N5.3 billion. In terms of overall outlay, that is a negligible percentage of 1.434. Contributions to Turnover by the same witness were put at: Total Turnover (Approximately) is N63 billion and Marketing Contribution is N61 billion. On that basis, we are talking of blending effort of only 3.17%. At those levels of performance, for a company that started the blending (manufacturing) business in 1985, it seems absurd to seriously regard it as a company engaged in the business of manufacturing when viewed alongside what has always been its main

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> **preoccupation i.e. marketing of petroleum products. In other words, the Appellant is primarily and essentially a marketing Company. Even if it subsequently veered into manufacturing, the burden is on the Appellant to establish when this occurred and the quantum of this aspect of its business in concrete terms as these are facts peculiarly within their own knowledge."**

This exhaustive finding of fact by the BAC was given a stamp of credibility and approval by the lower court and the law is very clear on the attitude of the Appellate court on concurrent finding by two subordinate courts or tribunal. This is to the effect that Appellate courts usually approached such findings from the premise that, following from the fact that making of findings on primary facts is a matter preeminently within the province of the court of trial which has the opportunity of seeking and hearing the witnesses testify, a judge's conclusion on the facts is presumed correct and such presumption must be displaced by the party seeking to upset the judgment. In other words this court will not disturb the concurrent findings of fact of the two courts below unless it is shown that there is manifest error which leads to miscarriage of justice, or a violation of some principle of law or procedure. See **AMADI VS NWOSU (1992) 6 SC NJ 59; ODOFIN VS AYOOLA (1984) 11 SC 72 IGWEGO VS EZEUGO (1992) 6 NWLR (PT. 249) 561; OGBECHIE VS ONOCHIE (1988) 1 NWLR (PT. 70) 370; WOLUCHEM VS GUDI (1981) 5 SC 291 PDP VS INEC (2012) 7 NWLR (PT. 1300) 538 and GALADIMA VS STATE (2012) 18 NWLR (PT. 1333) 610.**

In the light of the above this court agrees with and will not interfere with the finding of the Body of Appeal Commissioners as well as the

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lower court that, though the Appellant is engaged in some degree of manufacturing business, it is primarily and essentially a marketing company. The burden therefore rest on it to establish that the quantum of the manufacturing aspect of the business is commensurate with it's claim for 100% Capital Allowance. To my mind therefore, the lower court in deed bent backwards to do substantial justice by allowing a 5% reprieve on the additional Tax as assessed by the Respondent sequel to the discovery of the unqualified claim by the Appellant in it's 2004 annual returns. I will however stop there given that it is not in issue in this appeal.

On the whole, I therefore resolve this issue against the Appellant.

On issue 2, which is whether the lower court was right in holding that the dividend paid out by the Appellant in the 2004 year of assessment is liable to be taxed in accordance with the provisions of Section 19 of CITA (Section 15A of Cap. 60 LFN 1990).

The Appellant's stance is that, for Section 19 of CITA to apply to any dividend paid by a company, the dividend must have been paid from profit on which no tax is payable and that the Companies and Allied Matters Act (CAMA) prescribed sources from which a company may pay dividend and Section 19(1) CITA cannot derogate from it.

For the Respondent on the other hand, the dividend paid by the Appellant in the 2004 was not paid out of retained earnings and as such it was properly subjected to tax by the Respondent and the issue of retained earnings is not a matter of law but facts, which the Appellant failed to establish at the sitting of the BAC. Furthermore, the Companies and Allied Matters Act CAMA is not a taxing statute, therefore it cannot assume superiority over CI.T.A.

The narrow issue for resolution here is firstly whether the Appellant paid the divided of N652, 319, 000, from the retained earnings,

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simplicitier as claimed or utilized part of the profit declared in the 2004 year of Assessment, secondly, as between Section 19 of CITA and Section 380 of CAMA which of them shall take precedence over the issue of taxation on dividends.

Firstly, though the assertion by the Appellant is that it paid the said dividend for the period ended 2003 from retained earnings, evidence adduced by its witness at the BAC sitting show to the contrary that at least part of the dividend paid that year came from the declared profit. The evidence of the 2nd witness who is the Chief Finance Officer of the Appellant speaks volume on the issues as show at pages 103 to 104 of the Record:-

> **Witness: the profit after tax will be the profit after deducting the provision made for tax.**
>
> **Respondent: so, it will be correct to say that you deducted the tax, but you did not pay the tax?**
>
> **Witness: we made a provision for tax in the account, but we paid Nil tax.**
>
> **Respondent: so, it will be correct to say that you had the tax deducted but you did not pay it?**
>
> **Witness: what we did was to make a provision in the account for taxation. The provision we made was based on so many other things like deferred tax. If there is an under or over provision for tax in previous years that is what taxation in the account says.**
>
> **Respondent: The question is the profit after it is real or a provision?**

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Witness: the profit after tax is the profit we derive after deducting for tax from profit before tax.

Respondent: the dividend is it a provision or actual dividend?

Witness: dividend was actually paid.

Respondent: your profit before tax was N1, 019,407,000 your dividend was N652, 319, 000 almost half of your profit before tax. Explain why you paid dividend from retained earnings, was it because there was no enough profit or because you choose to keep aside the profit and pay from retained earnings?

Witness: dividend is paid out of retained earnings, the profit after tax also forms part of retained earnings because it is accumulated over a period of time, you bring it forward and also carry forward. We paid divided of N652, 319, 000 out of the accumulated retained earnings.

Respondent: was the profit of your Company more than the dividend you paid in 2003?

Witness: dividend we paid was less than the profit made.

Respondent: in 2003, how much was the actual profit of the Company?

Witness: in 2003 the profit before tax was approximately N1 Billion, tax provision was

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approximately N221 Million, the profit after tax was approximately N790 Million.

Respondent: why pay from retained earnings when the profit was more than half of the dividend paid out?

Witness: dividend is paid out of retained earnings. That amount that am telling you is also part of retained earnings. The basis on which you determine how much to pay out dividend is based on retained earnings and profit for the year.

Respondent: is it correct to say your profit was more than your dividend?

Witness: the amount of dividend we paid in 2003 was less than the profit we made that year.

What is more, the BAC made a finding from the evidence before it that the profit and loss account for the financial year 2003 shows clearly that after making provision for tax to the tune of N217, 866, 000 from it's profit of N1, 009, 830, 00 the Appellant appropriated the balance of N791, 964 as follows:-

Proposed Dividend	-	N652, 319, 000
Reserved Bonus	-	40, 770, 000
Retained profit		
Transferred to general reserve	-	98, 875, 000
Total	-	791, 964, 000

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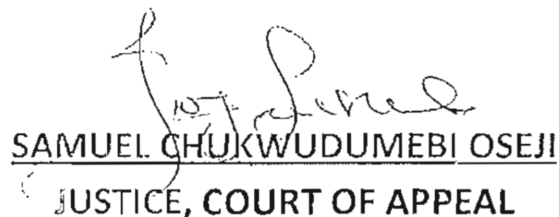
the decision of this court delivered on 2-12-2014 in Appeal **NO CA/L/320/2009** where this court per **J.S IKYEGH JCA** held that the provisions of Section 11 of CITA is a special enactment, while Section 54 of CAMA is a provision in a general enactment which must bow to Section 11 of CITA in matters relating to tax.

On premise, this issue is also resolved against the Appellant.

Consequently, I hold that this appeal lacks merit and it is hereby dismissed.

The judgment of the Federal High Court delivered by **ABDULLAHI MUSTAPHA (CJ)** on the 4th day of February 2008 is hereby affirmed.

Parties to bear their costs.



SAMUEL CHUKWUDUMEBI OSEJI
JUSTICE, **COURT OF APPEAL**

APPEARANCES:

Maxwell Ukpebor with J. Akhator for Appellant.

A. C. Akwiwu (Mrs) with B. H. Oniyangi and Jeromo Okoro for Respondent.

CA/L/409/2008

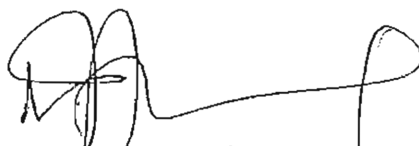
HON. JUSTICE UZO I. NDUKWE-ANYANWU, JCA

I had the privilege of reading in draft form, the judgment just delivered by my learned brother **Samuel Chukwudumebi Oseji, JCA**.

He has determined all the issues presented for determination to the court.

I agree with his reasoning and finally conclusions. I have nothing more to add.

I abide by all the orders contained in the lead judgment and adopt them as mine.



UZO I. NDUKWE-ANYANWU
JUSTICE, COURT OF APPEAL

CA/ L/409/2008

ABIMBOLA OSARUGUE OBASEKI – ADEJUMO

I had the privilege of reading in draft the judgment just delivered by my learned brother, **SAMUEL CHUKWUDUMEBI OSEJI, JCA.** I agree with the lucid reasoning and conclusions expressed in the lead judgment but wish to emphasize thus:

The provision of **Paragraph 24(7)** of the Second Schedule to the Companies Income Tax Act Cap 60 Laws of the Federation 1990 is clear and free from any ambiguity. While there is no threshold in the level in the level of manufacturing activity a company is required to meet in order to be exempted from the restriction imposed under that paragraph, it is apparent that only a company that is **SOLELY** engaged in agro-allied industry or in the trade or business of agro-allied industry or in the trade of manufacturing that can enjoy the 100 percent capital allowance thereunder.

In the instant case, there is no doubt that the intention of the draftsman will be defeated if the Appellant who is engaged in limited manufacturing activity but whose marketing activity constitutes its core business. Therefore, he cannot be entitled to the tax rebate.

For the above reason and those contained in the lead judgment, I hold that this appeal lacks merit and is hereby dismissed. The judgment of the Federal High Court delivered by **ABDULLAHI MUSTAPHA CJ** (as he then was) on the 4th of February 2008 is hereby affirmed. I abide by the order as to costs.

ABIMBOLA OSARUGUE OBASEKI-ADEJUMO JCA

JUSTICE, COURT OF APPEAL