

**IN THE TAX APPEAL TRIBUNAL**

**LAGOS ZONE**

**HOLDEN AT LAGOS**

**APPEAL NO. TAT/LZ/CIT/024/2018**

**BETWEEN:**

**ECO BANK NIGERIA LIMITED .....APPELLANT**

**AND**

**FEDERAL INLAND REVENUE SERVICE ..... RESPONDENT**

**JUDGEMENT**

**FACTS OF THE CASE**

The Appellant is a public limited company established as a bank holding company while the Respondent is charged with the responsibility of assessing, collecting and accounting for tax revenue accruing to the Federal Government of Nigeria. The Respondent carried out a field audit exercise on the Appellant between the periods of 20<sup>th</sup> October, 2016 to 28<sup>th</sup> October, 2016. The field audit exercise covered the Appellant's 2014 to 2015 accounting years. During the field audit exercise, the Respondent discovered the following, that the Appellant had been declaring losses since 2009 till 2016 Years of Assessment (YOA) and that the Appellant paid out the sum of **N5,545,000,000** (Five Billion, Five Hundred and Forty Million Naira) as dividend to its shareholders for the 2016 YOA. Consequent upon this discovery, the Respondent wrote a letter dated 27<sup>th</sup> Day of March, 2017 to the Appellant informing it of its intention to issue assessment on it in line with the provision of **Section 19 of Company Income Tax Act (CITA) (Exhibit A1)**. Upon the receipt of **Exhibit A1**, the Appellant responded through a letter dated 4<sup>th</sup> April, 2017 (**Exhibit A2**) through its tax consultant **KPMG Advisory Services** wherein it stated that the dividend paid was paid out of income earned from treasury bills and bonds already exempted from tax imposed under **CITA**.

The Respondent replied the Appellant via a letter dated 10<sup>th</sup> April, 2017 (**Exhibit A3**) and requested that the Appellant furnishes it with detailed breakdown of its line

of income earned attributable to the whole sum of the dividend paid out in the 2015 accounting year. In the Appellant's letter of 14<sup>th</sup> July, 2017 (**Exhibit A4**), it contested the Excess Dividend Tax liability of **N2,079,375,000.00** (Two Billion, Seventy-Nine Million and Three Hundred and Seventy- Five Thousand Naira) inclusive of interest and penalty for the 2016 **YOA**. During the exchange of correspondences and reconciliation meetings between the Appellant and the Respondent, the Appellant stated that the income from which the dividend was paid are attributable to profits from treasury bills and bonds and also from other trading profits. It stated further that the profits from bonds and treasury bills amount to the sum of **N4,372,244,556** while that which is attributable to other trading profits amounts to the sum of **N1,172,755,444** which in total is **N5,545,000,000** being dividend paid out in 2015 accounting year.

The Appellant however agreed to pay the sum of **N351,826,663** claiming that the said sum is the Excess dividend tax payable for the 2016 **YOA**. The Appellant still delayed the payment of the undisputed tax liability in the sum of **N351,826,663** until the 18<sup>th</sup> September, 2017 when the Respondent led its team for debt recovery purpose. It was after the Respondent led its team for debt recovery purpose that facilitated the payment of the undisputed sum of **N351,826,663** and this is a tax liability that ought to have been paid by the Appellant since it declared dividend in 2015 accounting year. By the letter dated 21<sup>st</sup> September, 2017 (**Exhibit A6**), the Respondent however demanded for the immediate payment of the outstanding excess dividend tax liability of **N1,311,673,367**. The Appellant objected to the said demand for the payment of its outstanding excess dividend tax liability in the letter dated 21<sup>st</sup> November, 2017 (**ExhibitA7**). Consequent upon the above, the Respondent assessed the Appellant to excess dividend tax in the sum of **N2,145,822,000.00** inclusive of interest and penalty for the 2016 **YOA**. The Appellant objected to the above stated assessment issued on it by the Respondent via a letter dated 5<sup>th</sup> April, 2018 (**Exhibit A9**).

The Appellant being dissatisfied with the Respondent's Notice of Refusal to Amend (**NORA**) has now appealed against the assessment in the sum of **N1,663,428,000** via the Notice of Appeal filed on 13<sup>th</sup> August, 2018.

## ISSUES FOR DETERMINATION

The parties have formulated the following issues for determination;

1. Whether the Respondent was correct to assess the Appellant to tax under **Section 19 of CITA** where the dividend paid out by the Appellant was derived from income earned from Bonds, Treasury Bills and other Government Securities which are exempted from tax under the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order, 2011**.
2. Whether the Respondent misdirected itself by failing to take into account the **CIT** paid by the Appellant in respect of the portion of dividend declared from non-exempt income streams.
3. Whether by the rules of Interpretation of Statutes, the Respondent has erred in law in its application of **Section 19 of CITA**.

## PARTIES SUBMISSIONS

### THE APPELLANT

The Appellant in presenting his case states that, **CITA** regulates the imposition and administration of corporate taxes for corporate entities. That **Section 23(2) CITA** empowers the President to exempt profits of any company from tax under the Act. That pursuant to this power the President through the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order, 2011**, the Order exempts Treasury Bills, Bonds, Short-term Government Securities and interest earned thereof, from taxes under **CITA**. That the import of the Order is that, the profits of a Company derived from Bonds, Treasury Bills and Short-term Government Securities are exempt from taxes imposed under **CITA**. That **Section 84 of CITA** defines “tax” to mean the tax imposed by this Act, which is the entirety of Companies Income Tax (**CIT**) and as such includes the provisions of excess dividend tax under **Section 19 of CITA**. The Appellant submits further that, although the provisions of a tax statute are to be interpreted strictly, a singular provision of a tax legislation cannot be interpreted strictly in isolation from other provisions. That the doctrine of strict interpretations of tax statutes cannot be applied selectively. That where the provisions of **Section 19** is to be interpreted strictly, the Court must ensure that all other provisions of the **CITA** including **Section 23** is interpreted with the same level of strictness. That where an ambiguity results in the interpretation of a statute, the law must be interpreted *contra fiscum* – in favor of the tax payer. That

where there is a conflict, in the possible interpretations that could be given to a particular provision, then the Court must adopt the interpretation which favors the tax payer. Therefore that, where an ambiguity arises from the interpretation of **Section 19** and **Section 23 of CITA**, the Tribunal is obliged to adopt the interpretation which favors the tax payer.

The Appellant submits that, the import of **Section 19 of CITA** is to charge Companies to **CIT** and not otherwise. That the provision is an Anti-avoidance provision which is intended to bring under the tax net, companies that are ordinarily subject to **CIT**, but which due to tax avoidance mechanisms have no total profits on which they may be assessed to tax. That the Section applies to income which is intended to be taxed under the **CITA** and not income which is expressly exempt under the **CITA**. The Appellant urges the Tribunal to undertake a mischief rule of interpretation on the purpose of **Section 19 of CITA** to determine its true intendment. That **Section 19 CITA** seeks to curb activities of Companies declaring losses and paying out huge dividends to their shareholders notwithstanding that they were making losses. That to prevent this tax avoidance, scheme, the Federal Government through the **Finance (Miscellaneous Tax Provisions) (No3) Decree No 30 1996 (Finance Decree)** introduced **Section 19** into **CITA** to dissuade distribution of dividends where Companies had no taxable profit. That the Respondent agrees with this submission in paragraph 4.21 of his Written Address. That the Respondent undertook a speculative exercise when it asserted that the Appellant has been in loss making position since 2012 that whereas the relevant **YOA** was 2016 and there was no evidence before the Tribunal to back this assertion. That the combined provisions of **Section 19, 23(2) and 84 of CITA** is to exclude the application of Excess Dividend Tax to profits declared under **Section 23(2) of CITA**. The case of **Best Children International Schools Ltd V. FIRS (2018) LPELR 46727** is cited by the Appellant.

The Appellant states further that, the Respondent does not contend that the sum of **N4,372,244,556.00** declared by the Appellant as dividend was not from Bonds and Short-term Government Securities as pleaded in paragraph 7 of the Appellant's Statement on Oath and adopted as **Exhibit A** in this appeal. That this fact haven been admitted need no further proof. The case of **Chukwu & Ors V. Akpelu (2013) LPELR (21864)** is relied upon by the Appellant in this regard. That it is the

Respondent's contention that **Section 19 of CITA** is applicable and therefore the Appellant should account for additional tax liability of **N1,663,428,000** as Excess Dividend Tax. That, it is trite that the law cannot approbate and reprobate at the same time. That this is a clear contravention of the principles of a good tax system to grant a tax incentive on the one hand and on the other hand then seek to deny the tax payer the benefits of the tax incentive. The case of **AG Rivers State V. AG Akwa Ibom (2011) 29 WRN 1** is relied upon. That this principle applies *mutatis mutandis* to statutory provisions. That the provision of a statute does not approbate and reprobate. That the Respondent is in concurrence with the submissions of the Appellant in paragraph 4.15 - 4.17 of its Final Written Address, but only misconstrued the combined reading of **Section 19 and 23(2) of CITA** and the case of **Oando V. FIRS (2016) TLRN 1** decided by the Federal High Court.

It is the submission of the Appellant that, the Respondent is estopped from making arguments that the Appellant's stream of income from Bonds, Treasury Bills and other government securities declared as dividend is taxable. That the Respondent is an agent of the Federal Government who announced and declared to the general public via the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order 2011** that income and interest derived from the listed sources therein are tax-exempt for the period stated. The provisions of Section 169 of Evidence Act 2011 and the case of **Nigergate Limited V. Niger State Government & Ors (2007) LPELR 8847** are relied upon. That the Executive Order was not promulgated to serve as a subsidiary legislation, but rather, it derives from and anchors its validity on **Section 23 of CITA**. That it is important to distinguish the Exemption Order from a mere subsidiary legislation which essentially establishes administrative policies. That the primary purpose of the Order is not to clarify or elaborates on the principal provisions of **CITA**, rather it lends credence to the powers of the President to prescribe exempt income, which is at par with the statutorily prescribed exempt income in **Section 23 of CITA**, to the extent that it does not deviate from the intendment of the principal Act. That the provisions ought to be enforced in tandem with the principal Act. That the provisions of **Section 23(2) of CITA** and the Exemption Order were enacted to encourage widespread investment in the Country as well as promote economic growth in certain sectors. That it is noteworthy that, the benefit of **Section 23 (2) of CITA** and Exemption Order goes to a Company or the Appellant and the liability under **Section 19 CITA** which the Respondent seeks to leverage upon is also on the Appellant.

The Appellant maintains that, as a responsible corporate citizen, understands the import of both **Section 19 and 23 of CITA**, that any streams of income specifically not exempt under **Section 23(1) and (2) of CITA** are intended to come under the purview of **Section 19 of CITA** under the instant circumstances. That the Appellant having realized this fact made a payment of **N351,826,633.00** in recognition of the portion of its income from other trading activities realized from non-exempt income streams. That the Appellant evidenced the payment with e-ticket admitted by this Tribunal as **Exhibit G** in the course of the proceedings. That the Respondent failed to take cognizance of this payment in the alleged Notice of Assessment (**LTO/NON-OIL/ADD/SRRC/CIT/GA/016**) and **NORA** which bear the sum of **N1,663,500,000.00**. That this fact is evidenced in paragraph 21 of the Respondent's witness Statement on Oath and **Exhibit B1**. The Appellant submits that, an Assessment Notice serves two important purposes to wit; Notice of alleged liability and Demand notice to satisfy the alleged liability. That a careful consideration of the Respondent's Notice of Assessment and **NORA** before this Tribunal reveal that the two documents do not reflect the correct figures of the alleged Appellant's liabilities. That the Respondent admitted the receipt of the payment of the sum of **N351,826,633.00** in their Reply and paragraphs 12,13 and 14 of the Respondent's witness Statement on Oath and paragraphs 4.43-4.45 of their Final Written Address filed on the 16<sup>th</sup> August, 2019. That the Respondent backtracked and submitted that due to their internal mechanism, the sum would only be recognized after the complete payment is made. That it needs to be stated that the Appellant is contesting the other component of the Assessment before this Tribunal. That while the Appellant concedes that the law empowers the Respondent to issue an assessment, the content of the assessment which also serves as demand notice to the Appellant, must be proven beyond balance of probability. That the onus of proof rest on the Respondent to show to the Tribunal the alleged tax liability in the sum of **N1,663,500,000.00**. That failure to do so is fatal to the case. The cases of **Yesufu V. Adama (2010) LPELR 3523** and **Olly V. Tunji & Ors (2012) LPELR 7911** are relied upon by the Appellant. That, the Respondent's case before this Tribunal established by the documentation presented and admitted which both the Notice of Assessment and **NORA** form part of, shows that the Appellant's tax liability is in the sum of **#1,663,500,000.00**. That the Respondent's attempt to contradict the content of their documents is unknown and total aberration. The Appellant cites the cases of **FBN PLC V. J.O Imasuen & Sons NIG LTD (2013) LPELR 20875** and **Ekundu Community Bank (NIG) LTD V. Pasun Global Concept Ltd & ORS (2016) LPELR**. to buttress his point.

The Appellant states further that, in the instance of the Respondent's failure to prove the content of document tendered to satisfy the amount stated therein before this Tribunal, the pertinent question according to the Appellant is whether it is the duty of the Tribunal to embark on a mathematical calculation of the sum to be added and subtracted in arriving at the Appellant's alleged accurate tax liability, that the answer is in the negative. That the consequences of the Respondent's failure to prove its case is that the case must fail as was stated in **FIRS V. Mega Tech Software LTD**. That based on the submissions above, the Respondent's case before this Tribunal is liable to fail for its failure to establish the Appellant's alleged tax liability of **N1,663,500,000.00** and **NORA** dated 12<sup>th</sup> July, 2018 and served on the Appellant on 13<sup>th</sup> July, 2018 should be set aside.

## **THE RESPONDENT**

The Respondent on the other hand argues that, **Section 19 of CITA** provides that, where dividend is paid out of profit which is not taxable as a result of either no total profit for that year or total profit is less than the amount of dividend paid out, the said dividend shall be charged to tax as if the dividend is the total profit of the Company for that year of assessment. That the section is applicable whenever the dividend paid out by a Company in a year of assessment exceeds its total profit (taxable profit) for that year. That it does not matter to **Section 19 of CITA** where the dividend came from provided it exceeds the Company's total profit for the **YOA** in which it is paid out. That the application of **Section 19 of CITA** is not dependent on any other consideration than those clearly stated in the section itself, and that its application certainly cannot be impeded by **Companies Income Tax (Exemption of Bonds and other Short-Term Government Securities) Order 2011**. That the section is an anti-avoidance provision which seeks to prevent Companies from twisting the tax laws to suit their own ends. That it aims at preventing shareholders from sharing dividend without payment for whatever reason. That the provisions of the said section are very clear and unambiguous. That once there is no total profit or total profit is less than dividend paid, the provision would be activated. That the reasons why tax may not be payable on profit are many, including losses exempted income, already taxed income etc. That all these reasons were not mentioned or contemplated by **Section 19 of CITA**, but that the section only specified two conditions and nothing more.

The Respondent submits further that, in the application of the said section, it is fundamental to note that **Section 19 of CITA** does not consider the source or the

nature of the dividend income before its application. That in the Oando case, the Federal High Court ruled that **Section 19 of CITA** does not consider the source of the dividend being paid and would apply to profits from all sources. That the Appellant's case is that, the income from which the dividend was paid are attributable to profits from Treasury Bills and Bonds which in its opinion is not taxable under **Section 19 of CITA** because it is tax exempt in accordance with the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order 2011**. That this is not the appropriate interpretation/application of **Section 19 of CITA** as the section does not consider the source or nature of the dividend income before its application. That a look at the provisions of the section shows that it refers specifically to profits where "*no tax is payable*" in the first place, either as a result of "*no total profits*" or total profits are less than the dividend paid out. That the section best suits the situation of the Appellant herein because the Appellant has not made any total profits for the 2016 **YOA** but yet paid out dividend in the sum of **N5,545,000,000** to its shareholders in that same year. That it is needless to say that the provision of **Section 19 of CITA** did not exempt any source of profits from which the dividend is declared. That the argument of the Appellant that the source of profits from which the dividend was declared is tax exempt holds no water. The case of **Oando V. FIRS (2016)26 TLRN 1** is relied upon by the Respondent in this regard.

The Respondent posits that, the Appellant had stated that there was no total profit for the 2016 which is incidental to the non-payment of Companies Income tax for the 2016 **YOA** and that in the same year, the sum of **N5,545,000,000** was declared as dividend. That the Appellant's sources of the dividend declared to be from treasury bills and bonds and core banking activities is equally not relevant for the applicability of **Section 19 of CITA**. That under cross-examination, the Appellant's witness admitted that for the relevant **YOA**, the Appellant made no total profit but declared and paid dividend in the sum of **N5,545,000,000** to its shareholders and that he confirmed that the Appellant made losses for the same 2016 **YOA**. The Respondent submits that, the Appellant is caught under the provision of **Section 19 of CITA** since it made no total profit for the 2016 **YOA** because Companies Income tax was not payable for that year and it also declared and paid out dividend in that same year. That the Appellant seeks to lean on the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order 2011**. That the provisions of the said Order does not avail the Appellant in this case. That

the Federal Government of Nigeria issue treasury bills and bonds for so many reasons and one of the reasons is to develop and ensure liquidity in the domestic bond market on a sustainable basis and to sustain the development of other segments of the bond market. That the interest income earned from the securities are tax exempt. That the interest on Treasury Bills and Bonds was exempted from tax to improve capital market and economy but the Appellant herein has since 2009 been declaring losses and this was further corroborated by the Appellant's witness statement under cross-examination when he stated that since 2012 that he has been engaged as the Appellant's consultant, that the Appellant has not made total profit. The Respondent submits that, even though interest on treasury bills and bonds are exempted from tax, **Section 19 of CITA** will still apply because it is specifically made for profits on which no tax is payable in the first place as in the case of the Appellant which made no total profit and also declared dividend higher than the total profit for the 2016 YOA. That the Exemption Order is not an exception to the provision of **Section 19 of CITA** and should not be treated as such. More so that, the **Order** was made pursuant to **Section 23(2) of CITA** and that the said **section 23(2)** did not exempt any Company from the payment of tax once it can be ascertained that the Company has made no total profit or its total profit is less than the dividend declared for that YOA. That even though **Section 19 of CITA** is anti-avoidance provision, it is not meant to discourage companies from paying dividend to shareholders or penalize them for doing so rather it empowers government to levy tax on distributable profits for the specific reasons stated in the said section.

The Respondent argues that, at the time **Section 19 of CITA** was introduced, the **Finance (Miscellaneous Tax Provisions) (No.3) Decree No 30 of 1996**, the usual practice was for a lot of Companies to declare losses but at the same time pay out huge dividends to their shareholders, notwithstanding the fact that they were declaring losses. That to curb this aggressive tax avoidance scheme, **Section 19 of CITA** was introduced as a general avoidance provision to prevent the distribution of profits where Companies claimed that they had losses or little total profits. That this is the reason that **Section 19 of CITA** empowers **FIRS** to treat such dividends paid out as if they were the profits of the Company for that year. That the final step is to apply the Company's income tax rate to excess of dividends paid over total profit. That this was what the Respondent has done in the instant case.

The Respondent maintains that, in the interpretation of statutes, ordinary literal meaning must first be examined. That if the words are clear and unambiguous, then the ordinary literal meaning must be given to them, for then, the intention of the law maker has not been obscured. That, it is only when there is doubt or ambiguity that recourse is made to other canons of interpretation. The cases of **Awolowo V. Shagari (1979)6-9SC 51**, **Nafiu Rabiu V. State (1980)5-11 SC 130** and **Buhari V. INEC (2008)19 NWLR (Pt1120)246** are cited and relied upon by the Respondent. Therefore that, the words used in the above **Section 19 of CITA** as regards tax laws over a tax assessment is clear and unambiguous and where the express provisions of the extant laws, policies and circulars on tax assessment are clear and unambiguous, the literal and plain meaning rule will apply. The case of **Magor and St. Mellons Rural District Council V. Newport Corporation (1952) A.C 189 at 191** is relied upon.

The Respondent states that, the case of the Appellant is that it paid the undisputed **EDT** in the sum of **N351,826,633** into the Respondent's bank account and that the Respondent did not take cognizance of the payment made by it before issuing the assessment in the sum of **N1,663,428,000** being **EDT** payable by it for the 2016 **YOA**. That the Respondent did acknowledge the receipt of the undisputed **EDT** in the sum of **N1,663,428,000** being payable for the 2016 **YOA**. The Respondent's procedure and the standard format of issuance of the assessment is systemized in such a way that final assessments once issued cannot be altered back and forth as a result of part payment made on it. That the Respondent would not amend the assessment issued on the Appellant to reflect the net balance outstanding because it keeps a separate record of assessment of taxes due differently while it also keeps records for payment and collection of revenue differently for appropriate accounting and record keeping. That the issuance of amended assessment on the basis of outstanding balance of **N1,663,500,000** minus **N351,826,6333** would distort the records of total assessments raised and corresponding payments received during a given reporting period. That this procedure is not alien to the Appellant herein. That the Respondent duly admitted the receipt of the sum of **N351,826,663** being part payment of the total assessment of **N1,663,500,000** made by the Appellant and as soon as the full payment is received, the total payments would nil off the total assessment issued on the Appellant.

The Respondent finally submits that based on the submissions canvassed above, the Tribunal should dismiss the appeal filed by the Appellant in its entirety.

## ANALYSIS

### ISSUE (1)

1. Whether the Respondent was correct to assess the Appellant to tax under **Section 19 of CITA** where the dividend paid out by the Appellant was derived from income earned from Bonds, Treasury Bills and other Government Securities which are exempted from tax under the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order, 2011**.

The Appellant in presenting his case states that, **CITA** regulates the imposition and administration of corporate taxes and that **Section 23(2) CITA** empowers the President to exempt profits of any company from tax under the Act. They maintained that pursuant to this power the President through the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order, 2011**, Treasury Bills, Bonds, Short-term Government Securities and interest earned thereof, were exempted from tax. They argued that by the provisions of **Section 84 of CITA**, tax is defined as the entirety of Companies Income Tax (**CIT**) and as such will necessarily include excess dividend tax under **Section 19 of CITA**. They maintained that where an ambiguity and/or conflict results in the interpretation of a tax statute, the law must be interpreted *contra fiscum* – in favor of the tax payer and that the import of **Section 19 of CITA** is to charge Companies to **CIT** and not otherwise. They said the Section applies to income which is intended to be taxed under the **CITA** and not income which is expressly exempt under the same Act. They said that the Respondent undertook a speculative exercise when it asserted that the Appellant has been in loss making position since 2012 that whereas the relevant **YOA** was 2016 and there was no evidence before the Tribunal to back this assertion. They cited as authority the case of **Best Children International Schools Ltd V. FIRS (2018) LPELR 46727**.

The Appellant stated further that the Respondent has not contested the fact that the sum of N4,372,244,556.00 declared by the Appellant as dividend was not from Bonds and Short-term Government Securities as pleaded in **paragraph 7** of the Appellant's Statement on Oath and adopted as **Exhibit A** in this appeal

and that since this fact has been admitted there is no need to prove it further. They relied on the case of **Chukwu & Ors V. Akpelu (2013) LPELR (21864)**. They said imposing additional tax liability of **N1,663,428,000** as Excess Dividend Tax will mean granting a tax incentive on the one hand and denying it on the other hand. They cited the case of **AG Rivers State V. AG Akwa Ibom (2011) 29 WRN 1**.

The Respondent on the other hand argued that by the provision of **Section 19 of CITA**, where dividend is paid out of profit which is not taxable as a result of either no total profit for that year or total profit is less than the amount of dividend paid out, the said dividend shall be charged to tax as if the dividend is the total profit of the Company for that year of assessment. They argued that the section is applicable whenever the dividend paid out by a Company in a year of assessment exceeds its total profit (taxable profit) for that year and that it does not matter to **Section 19 of CITA** where the dividend came from provided it exceeds the Company's total profit for the **YOA** in which it is paid out.

The Respondent stated further that the application of **Section 19 of CITA** is not dependent on any other consideration than those clearly stated in the section itself, and that its application certainly cannot be impeded by **Companies Income Tax (Exemption of Bonds and other Short-Term Government Securities) Order 2011**. They said that the said section is an anti-avoidance provision which seeks to prevent Companies from twisting the tax laws to suit their own ends. Also, that the section aims at preventing shareholders from sharing dividend without payment for whatever reason. They maintained that once there is no total profit or total profit is less than dividend paid, the provision would be activated. Also, that a look at the provisions of the section shows that it refers specifically to profits where "*no tax is payable*" in the first place, either as a result of "*no total profits*" or where total profits are less than the dividend paid out. They said that the section best suits the situation of the Appellant herein because the Appellant has not made any total profits for the 2016 **YOA** but yet paid out dividend in the sum of **N5,545,000,000** to its shareholders in that same year. And that the Appellant's sources of the dividend declared to be from treasury bills and bonds and core banking activities is equally not relevant for the applicability of **Section 19 of CITA**. They insisted that the provisions of the

said Order do not avail the Appellant in this case. They cited the case of **Oando V. FIRS (2016)26 TLRN 1**.

The Respondent submits that, even though interest on treasury bills and bonds are exempted from tax, **Section 19 of CITA** will still apply because it is specifically made for profits on which no tax is payable in the first place as in the case of the Appellant which made no total profit and also declared dividend higher than the total profit for the 2016 **YOA**. That the Exemption Order is not an exception to the provision of **Section 19 of CITA** and should not be treated as such. More so that, the **Order** was made pursuant to **Section 23(2) of CITA** and that the said **section 23(2)** did not exempt any Company from the payment of tax once it can be ascertained that the Company has made no total profit or its total profit is less than the dividend declared for that **YOA**. They cited the cases of **Awolowo V. Shagari (1979)6-9SC 51**, **Nafiu Rabi V. State (1980)5-11 SC 130** and **Buhari V. INEC (2008)19 NWLR (Pt1120)246**.

In order to give formal legal effect to tax waivers on interest earned from bonds (including corporate bonds) and short-term government securities, the National Assembly passed the **Personal Income Tax (Amendment) Act 2011** and thereafter issued the **Companies Income Tax (Exemption of Bonds and Short-Term Government Securities) Order 2011**. The act, which came into effect on the 14<sup>th</sup> Day of June 2011, exempts from tax any income earned by individuals, trusts and partnerships from bonds issued by federal, state and local governments and their agencies, as well as from bonds issued by corporate bodies and multinationals. The Order also exempts from tax any interest earned by holders of these bonds and short-term government securities (e.g, treasury bills and promissory notes).

The order exempts from tax any income earned by companies from short-term federal government securities and bonds issued by federal, state and local governments and their agencies, and by corporate bodies (including multinationals). The order also exempts any interest earned by holders of these instruments. This will mean that all categories of bonds (Federal, Sub-national, Corporate and Supra-national bonds, Mortgage-backed Securities and Asset-

backed Securities are tax exempt. Also, all bonds issued by sub-nationals, corporates and supra-nationals and bonds relating to different categories of Mortgages, as well as asset-backed securities, will be tax exempt. The combined effect of the act and the order is that interest earned and gains made from investments in all categories of bond issued in Nigeria are tax exempt.

It must be stated that companies that invest in bonds will, by virtue of the tax exemptions, become liable to pay excess dividend tax on their profits. A liability to pay tax arises where a company that seeks to pay dividends has either no taxable profits or has a distributable profit that is higher than the taxable profit. If the tax exemption granted by the order creates an excess dividend situation, the company should be liable to pay excess dividend tax on the same income that was otherwise would have been exempted from tax. A liability to pay excess dividend tax arises where a company that seeks to pay dividend has no taxable profit as in the instant case but has distributable profit that is higher than the taxable profit. In the instant case there is no taxable profit but there is N5,545,000,000 available for distribution in the form of dividend.

This Honourable Tribunal had decided in the case of **United Capital Asset Management Ltd & United Capital Trust Ltd v Federal Inland Revenue Service (TAT/LZ/CIT/007/2018)** that **Section 19** of CITA does not concern itself with the source of or origin of the dividend paid. Rather, Section 19 is applicable once the dividend declared and paid is greater than the total profit. Same position was taken in the case of **Actis Africa (Nig.) Ltd v Federal Inland Revenue Service (TAT/LZ/EDT/014/2017)**. In the case of **UAC of Nigeria Plc v Federal Inland Revenue Service (TAT/LZ/CIT/025/2018)**, this Tribunal held that excess dividend tax under Section 19 of CITA is applicable whenever the dividend paid out by a company in a year of assessment exceeds its total taxable profit for that year. Thus, the source of the dividend would not matter, provided it exceeds the company's total profit for the year of assessment in which it is paid out.

In view of these facts, it is hereby decided that the Respondent was correct to have assessed the Appellant to additional tax under Section 19 of CITA.

## **ISSUE 2**

Whether the Respondent misdirected itself by failing to take into account the **CIT** paid by the Appellant in respect of the portion of dividend declared from non-exempt income streams.

The Appellant maintains that, as a responsible corporate citizen, that understands the import of both **Section 19** and **23 of CITA**, that any streams of income specifically not exempt under **Section 23(1) and (2) of CITA** are intended to come under the purview of **Section 19 of CITA** under the instant circumstances has made a payment of **N351,826,633.00** in recognition of the portion of its income from other trading activities realized from non-exempt income streams. This according to them is evidenced with e-ticket admitted by this Tribunal as **Exhibit G** in the course of the proceedings. They said that the Respondent failed to take cognizance of this payment in the alleged Notice of Assessment (**LTO/NON-OIL/ADD/SRRC/CIT/GA/016**) and **NORA** which bear the sum of **N1,663,500,000.00**.

The Respondent however has duly admitted before this Tribunal the receipt of the sum of **N351,826,663** being part payment of the total assessment of **N1,663,500,000** made by the Appellant and promised to add up everything as soon as the full payment is received. This according to the Respondent is to allow for proper record and accounting. This therefore establishes the fact that the Respondent has not failed to take into account the sum already settled by the Appellant.

## **ISSUE 3**

Whether by the rules of Interpretation of Statutes, the Respondent has erred in law in its application of **Section 19 of CITA**.

Statutory interpretation is the process by which courts interpret and apply legislation. Some amount of interpretation is often necessary when a case involves a statute. Sometimes the words of a statute have their plain and

a straightforward meaning, in which the court uses the Ordinary Rules of Interpretation. But in some other cases, there may be some ambiguities or vagueness in the words of the statute that must be resolved by the judge. To find the meanings of statutes, judges use various tools and methods of statutory interpretation, including looking at the "mischief and/or defect" that the statute in question has set out to remedy, and what ruling would "suppress the mischief, and advance the remedy". In the instant case, this Tribunal is persuaded by the argument of the Respondent when they said that the application of **Section 19 of CITA** is not dependent on any other consideration than those clearly stated in the section itself, and that its application certainly cannot be impeded by **Companies Income Tax (Exemption of Bonds and other Short-Term Government Securities) Order 2011**. They said that the said section is an anti-avoidance provision which seeks to prevent Companies from twisting the tax laws to suit their own ends and also, that the section aims at preventing shareholders from sharing dividend without payment of tax for whatever reason. This, we believe is the mischief that Section 19 CITA has set out to correct. **Lord Denning MR in Engineering Training Board v Samuel Talbot Engineering Ltd (1969)1 All E.R. 480** held that "we no longer construe Acts of Parliament according to their literal meaning; we must construe them according to their objects and intent. Similarly, the Supreme Court of Nigeria in **SPDC v Isaiah (1997) 6 NWLR (Pt. 508) 236**, held that it is trite law that a statute should be construed as a whole and should be given an interpretation consistent with the objects and general context of the entire statute. In **Abioye v Yakubu (1991) 5 NWLR (Pt. 190) 130** the Supreme Court held that in the interpretation of an Act or Law, it is relevant to consider;

- a) What was the law before the enactment of the Act or Law to be construed.
- b) What was the mischief or object for which the old law did not provide.
- c) What remedy the Act or Law intends to cure the mischief of defect.

We therefore hold that the Respondent was right in law and in equity in its application of **Section 19 of CITA** in this case, considering the mischief that it was brought in to address.

**Accordingly, this Appeal fails and is hereby dismissed.**

**DATED AT LAGOS THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2020**

**PROFESSOR A. B. AHMED ESQ (Chairman)**

**P. A. OLAYEMI ESQ**  
Commissioner

**BABATUNDE E. SOBAMOWO ESQ**  
Commissioner

**SAMUEL N. OHWERHOYE ESQ**  
Commissioner

**TERZUNGWE GBAKIGHIR ESQ**  
Commissioner