IN THE TAX APPEAL TRIBUNAL
LAGOS ZONE
SITTING AT LAGOS

CONSOLIDATED APPEALS
TAT/LZ/011/2012, 012/2012 AND 013/2012

BETWEEN
OANDO PLC ....**APPELLANT**
AND
FEDERAL INLAND REVENUE SERVICE ....**RESPONDENT**

JUDGMENT

INTRODUCTION

The Appellant filed this appeal on August 31, 2012 following the Respondent's refusal to amend the additional tax assessments on dividends paid out by the Appellant for 2005, 2006, and 2007 years of assessment. The grounds of the appeal are that:

a) The Respondent misdirected itself and thereby erred in law when it invoked the provision of Section 19 of the Companies Income Tax Act, Cap C21, Laws of the Federation, 2004 (as amended) (CITA) in charging the Appellant to tax on dividends paid out of Retained Profits in the 2005, 2006, and 2007 years of assessment.
b) The position of the Respondent does not take into consideration the provisions of Section 80 of CITA on taxation of dividend.
c) Section 19 of CITA is ambiguous and capable of several interpretations and as such its interpretation should be resolved in favour of the Appellant.

ISSUES FOR DETERMINATION:

The issues for determination are:

1. **Whether the sums of ₦1,144,602,000; ₦1,430,752,000 and ₦2,289,203,000 the Appellant paid as dividend in 2005, 2006 and 2007 years of assessment respectively are taxable under Section 19 of the Companies Income Tax Act, Cap C21, Laws of the Federation, 2004; and**

2. **Whether the provisions of section 19 of the Companies Income Tax Act, Cap C21, Laws of the Federation, 2004 is ambiguous and should be interpreted in favour of the tax payer.**

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SUBMISSIONS

ISSUE 1:

Whether the sums of ₦1,144,602,000; ₦1,430,752,000 and ₦2,289,203,000 the Appellant paid as dividend in 2005, 2006 and 2007 years of assessment respectively are taxable under Section 19 of the Companies Income Tax Act, Cap C21, Laws of the Federation, 2004.

The Appellant contends in its written address dated 24th February, 2014 that Section 19 of CITA does not apply to the dividends it paid to its shareholders in the 2005, 2006 and 2007 years of assessment (YOAs). The dividends were paid from retained earnings which had already been subjected to tax. And that Section 19 of CITA will only apply where dividends are paid from profits that have not suffered tax.

The Appellant refers to Section 19 of CITA that provides as follows:

> ***"Where a dividend is paid out of profits on which no tax is payable due to -***
> ***(a) no total profit; or***
> ***(b) the total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company, is paid by a Nigerian company, the company paying the dividend shall be charged to tax at the rate prescribed in subsection (1) of section 40 of this Act as if the dividend is the total profits of the company for the year of assessment to which the accounts, out of which the dividend declared relate."***

The Appellant further submits that a threshold issue in the interpretation of Section 19 of CITA is the understanding of the terms *'profits'* and *'total profits'* as used therein, stating further that *'profits'* represents a company's accounting profits while *'total profits'* represents a company's tax adjusted profits; referring to Section 31 of CITA that defines *'total profits'* as follows:

> ***"total profits of any company for any year of assessment, shall be the amount of its total assessable profits from all sources for that year together with any additions thereto to be made in accordance with the provisions of the Second Schedule to this Act, less any deductions to be made or allowed in accordance with the provisions of this section, sections 32 and of the said schedule."***

The Appellant traced how the dividends it paid out in the 2005-2007 YOAs were taken from its retained earnings, supporting the claim with a comprehensive analysis of Exhibits AOA7(i)-7(iv) and AOA8(ii)-8(iii). On the basis of the analysis, the Appellant argued that it is not liable to pay the sums of ₦343,380,900; ₦102,347,018 and ₦171,267,559 as additional tax in the2005, 2006 and 2007 YOAs.

The Appellant submits that its decision to pay the dividends in the YOAs under reference from retained earnings is consistent with the provisions of Section 380 of the Companies and Allied Matters Act (CAMA).And it claims that the taxation of dividend income is covered by Section 80 of CITA under withholding tax.

The Respondent, in its final written address dated 16th April, 2014 argues that the dividends for the YOAs were paid out of profits on which no tax is payable and that the Appellant was thus issued Additional Assessment Notices for tax to be paid on those dividends at the corporate rate of 30%. They anchored their argument on Section 19 of CITA as stated above, stressing that the Appellant had failed to satisfy FIRS that tax had been paid out of the retained earnings out of which the Appellant claimed to have paid the said dividends.

The Respondent submits that Section 380 of CAMA, which the Appellant based its decision to pay the dividends from retained earnings on, merely gives a company the discretion to determine which of the three listed sources it could pay dividends from. The legislation that governs taxation of companies in Nigeria is CITA and not CAMA. With regard to the Appellant's claim that it is section 80 of CITA that deals with the taxation of dividend income, the Respondent argued that Withholding Tax on dividend is final tax payable on the income of the recipient of the dividend and not otherwise as the Appellant is in this case.

ISSUE 2:

Whether the provisions of section 19 of the Companies Income Tax Act, Cap C21, Laws of the Federation, 2004 is ambiguous and should be interpreted in favour of the tax payer.

The Appellant submits that if the Tribunal does not resolve Issue 1 in its favour, the inevitable conclusion that will follow is that Section 19 of CITA is ambiguous and capable of several interpretations, stating that the interpretation given by the Respondent in a related appeal (**Oando Plc. v Federal Board of Inland Revenue (2009) 1TLRN 61 at 76**) and its Information Circular titled ***Explanatory Notes on the Critical Tax Issues for the Operation of Bank Holding Company Structure in Nigeria*** (dated April 2014) are both different from the Appellant's interpretation.

The Respondent submits that the provision of section 19 of CITA is very clear, free of any ambiguity and applicable to the YOAs in this appeal. They referred to the decisions in Mobil Oil Nigeria Ltd v Federal Board of Inland Revenue (1977)1 NCLR at 17 {that where the words of a statute are clear, the court should give effect to their literal meaning} and Timber Trading Co Ltd v Federal Board of Inland Revenue (1966) NCLR 416 at 422-3 {that in construing tax statutes, the courts are to look strictly into the language of the tax statutes as there is no equity about tax}. The Respondent states further that the Information Circular titled ***Explanatory Notes on the Critical Tax Issues for the Operation of Bank Holding Company Structure in Nigeria*** (dated April 2014) is not applicable to the Appellant.

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ANALYSIS

Dividends are appropriations out of profit after tax and not a charge to the profit and loss account. The dividend declared in respect of a financial year is payable in the following year just as the accounting profit of a financial year forms the basis of computation of tax for the following year. The liability for such a dividend used to be stated as a liability in the year's financial statements having been debited to the Appropriation section of the Profit and Loss Account. In the case of taxation, there is provision for taxation in the Profit and Loss Account as well as Tax Payable and Deferred Tax in the Balance Sheet. These constitute the accounting aspects of both taxation and dividend.

It was a change in accounting policy of the Appellant in the year 2005 {See Note 38.1on page 68 of Exhibit AOA7(ii)} that led to the dividend being shown in the Retained Earnings Section with a note stating that "Dividend distribution to the company's shareholders is recognised as a liability in the Group's financial statements in the period in which the dividends are approved by the company's shareholders" {See Note 2.18 on pages 52, 61 and 63 of Exhibit AOA7(ii), Exhibit AOA7(iii), and Exhibit AOA7(iv) respectively}.

When it comes to the computation of the amount of income tax payable there are rules to apply. These rules are provided for in CITA whereas the accounting aspect is governed by generally accepted accounting principles.

There is usually a difference between the Profit after taxation as per the Profit and Loss Account and the Total Profits computed for taxation purposes from the accounting profit of each financial year. This is a normal difference that occurs as long as there are items (such as disallowable expenses, non-taxable income, balancing charge/allowance, prior-year losses, and capital allowances) needing adjustment before arriving at the total profits. The various adjustments take the Accounting Profit (i.e. Profit before taxation) through Adjusted Profit, Assessable Profit, to Total Profits, as required by CITA. Furthermore, there are conditions to be met in arriving at the Tax Payable by a company. These items and conditions are provided for in different sections of CITA, including Section 19.

S 19 of CITA assumes a deemed profit when dividend is declared out of retained earnings due to no total profits or total profits being less than the dividend so declared. Thus, the dividend figure becomes an assessable profit by a deeming order of the Tax Authority. This is different from the conventional accounting profit. When the tax authority invokes S19 of CITA to declare dividend as profit, it is implicit in the deeming order that such profit has not suffered taxation. For that is the foundation for justifiably taxing the profit so declared.

Commenting on the implications of S15A (now S19) of CITA, Professor Abdulrazaq, M. T. in CITN Nigerian Tax Guide and Statutes posits that "... A company that pays

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dividend not out of profits but from its reserves (retained earnings) is deemed to be declaring profits."

The Appellant's reliance on Section 380 of CAMA cannot stand. CITA is the governing statute for companies' income tax. Thus, the provisions of Section 380 of CAMA and other related sections are meant to prevent capital depletion and insolvency. The Appellant's submission that it is section 80 of CITA that deals with the taxation of dividend income is not applicable to the instant appeal as the dividend in question in this appeal is the dividend paid out by the Appellant and therefore not an income. Even the reference to the circular issued by the Respondent in respect of Bank Holding Company Structure in April 2014 is not applicable to the Appellant as the issue is that of dividend received by a bank holding company from its operating subsidiaries for onward distribution to its ultimate shareholders.

An analysis of some relevant extracts from Exhibits AOA 7(i)-7(iv) and Exhibits AOA 8(i)-8(iv) is presented in Table 1 below showing the movement in Retained Earnings Account in each of the financial years ended 31st December 2004, 2005, 2006 and 2007 and the Tax (both CIT and EDT) paid in the 2005, 2006 and 2007 YOAs.

TABLE 1

	Financial Year 2004	**Financial Year 2005**	**Financial Year 2006**	**Financial Year 2007**
	₦'000	**₦'000**	**₦'000**	**₦'000**
Profit before Taxation	988,496	2,102,921	2,855,591	3,717,196
Taxation	97,694	727,117	501,914	1,045,714
Profit after Taxation	**890,802**	**1,375,804**	**2,353,677**	**2,671,482**
Retained Earnings b/f	2,039,641	2,278,124	2,500,659	3,423,584
Less: Dividends declared in respect of previous Year and Paid in the current Year	652,319	1,144,602	1,430,752	2,289,203
Bal. of Retained Earnings after Dividends	1,387,322	1,133,522	1,069,907	1,134,381
Add: Profit after Taxation	890,802	1,375,804	2,353,677	2,671,482
Prior Year Adjustment	0	(8,667)	0	0
Retained Earnings c/f	2,278,124	2,500,659	3,423,584	3,805,863
Taxable Profit (Total Profits) computed from the Fin. Year's Accounting Profit	**Nil**	**1,088,721**	**1,718,308**	**1,707,858**
Income Tax Chargeable @ 30%	Nil	326,616	515,492	512,3577
Education Tax @ 2%	23,201	60,885	64,029	72,269
Total Tax Payable	23,201	387,501	579,522	584,626

A careful look at the analysis above shows the difference between the Profit after taxation and the Taxable Profit (i.e. Total Profits) of each of the financial years referred to. Section 19 of CITA provides for when and how a company becomes liable to pay companies income tax on a dividend that is paid out of profits on which no tax is payable. It links the determination of any dividend being paid out of profits on which no tax is payable to two possible causes. These two possible causes are clearly stated as (a) no total profit and (b) total profits which are less than the amount of dividend which is paid. Therefore the first step is to ascertain the cause of there being no tax payable on the profits; this could either be that **there is no total profit** (as in the case of 2005 YOA), or that **the total profits are less than the amount of dividend which is paid** (as in the cases of 2006 and 2007 YOAs). There is no reference to the dividend being paid from retained earnings as the issue here is actually whether the dividend is more than the total profits for the relevant YOA or not. The second step is to treat the dividend as the total profits of the company for the YOA to which the accounts, in respect of which the dividend declared relate. For instance, the dividend of ₦1,144,602,000 having been declared in respect of 2004 financial year which relates to 2005 YOA is treated as the total profits of the company for the 2005 YOA. The third step is to deduct from the said dividend any total profit computed by the company (in its self-assessment) in order to arrive at the **Excess of Dividends Paid over Total Profit**. The fourth and final step is to apply the companies income tax rate to the Excess of Dividends Paid over Total Profit.

We are persuaded that the four steps stated above were followed by the Respondent before issuing the three Notices of Additional Assessment (Exhibits AOA), as shown in Table 2 below, that resulted in the Appellant becoming liable to pay ₦343,380,900; ₦102,347,018 and ₦171,267,559 as additional tax in the 2005, 2006 and 2007 YOAs. Accordingly this appeal fails and we order the Appellant to pay the said additional tax.

TABLE 2

	2005 YOA	**2006 YOA**	**2007 YOA**
	₦	₦	₦
Dividends declared in respect of the financial year preceding the YOA	1,144,603,000	1,430,752,000	2,289,203,000
Total Profits	Nil	1,088,721,273	1,718,308,137
Excess of Dividends Paid over Total Profit	1,144,603,000	341,156,727	570,891,863
Additional Tax @ 30%	**343,380,900**	**102,347,018**	**171,267,559**

DECISION

Based on the above analysis, we hold that the provision of section 19 of the Companies Income Tax Act, Cap C21, Laws of the Federation, 2004 is clear and in no way ambiguous and that the appeal fails. Consequently, we order the Appellant to pay ₦343,380,900; ₦102,347,018 and ₦171,267,559 as additional tax in the 2005, 2006 and 2007 years of assessment.

Legal Representation:

Appellant: Maxwell Ukpebor Esq. with Samuel Esuga Esq., Joshua Akhator Esq. and Ms Adanma Ezegbulam

Respondent: B.H. Oniyangi (Mrs.) with Ms Abisola Sodipo, Mrs Patience Idakwoji and Mrs N.A. Bashir

DATED AT LAGOS THIS 18TH DAY OF JULY, 2014

Kayode Sofola, SAN
Chairman

Catherine A. Ajayi (Mrs)
Commissioner

D. H. Gapsiso Esq.
Commissioner

Mustafa Bulu Ibrahim
Commissioner

Chinua Asuzu Esq.
Commissioner