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Implementing General Anti-Avoidance Rules (GAAR) in Nigeria: Revisiting Oando Plc vs FIRS (Oando IV) (2014) 16 TLRN 99 and the Excess Dividend Rule Under Section 19 of the Companies Income Tax Act

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I. Introduction

This paper reviews the Excess Dividends Tax ("EDT") rule contained in Section 19 of the Nigerian Companies Income Tax Act ("CITA")[1] as a veritable means of curbing tax avoidance and/or tax evasion in Nigeria, and argues that notwithstanding the weight of argument against the EDT rule, the EDT regime ought to be strengthened, *albeit*, with sufficient and clear modifications to enable its smooth and efficient administration.[2] As presently interpreted in ***Oando Plc vs FIRS*** **(*Oando IV*)**,[3] the EDT seeks to impose additional corporate tax on retained earnings or the Franked Investment Income ("FII")[4] of a corporation, and that would amount to, in practical terms, double taxation.

In the end, we shall propose that the Nigerian legislature and the tax policy makers adopt, while retaining the EDT rule as an anti-avoidance rule, one of the three models proposed in this paper:

a. *The American Model*
The American Model contained in Section/Regulation 1-316-2(a) of the Income Tax Regulations,[5] *wherein distributions that in excess of retained earnings i.e., distributions that are not profits are first treated as recovery of the shareholder's basis in his stock, with any excess over the basis to be treated as gain from sale or exchange of the stock.*[6]

b. *Taiwo Oyedele's Pragmatic Proposed Amendments to Section 19 EDT Rule.*[7]
This seeks to eradicate the ills posed by the present Section 19 EDT clause, with proposed following amendments—a Section 19 Dividend Tax Account, under which a Nigerian company shall maintain a Dividend Tax Account in accordance with the provisions of this Section. Therein, the The initial amount in the Dividend Tax Account shall be established in accordance with subsection (6) and the balance of the Dividend Tax Account as of the date of filing tax returns in accordance with Part IX of this Act shall be carried forward to the subsequent year of income. Thereafter, the Dividend Tax Account shall be increased subsequently by:
i. the amount of profit which has been subjected to tax under the provisions of this Act;
ii. the amount of income received as Franked Investment Income by the company and to which Section 80(3) of this Act relates;
iii. the amount of any profit exempt from taxes by virtue of the provisions of the Industrial

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1. Companies Income Tax Act, Cap C21, Laws of the Federation of Nigeria of 2004 ("CITA").
2. See, M.T. Abdulrazaq, *Judicial And Legislative Approaches To Tax Evasion And Avoidance In Nigeria*, 29 Journal of African Law, Pages: 59-71 (1985) (Hereinafter "Abdulrazaq I"), where, after tracing a brief history of taxation, especially personal taxation, in Nigeria, the author defined and distinguished tax evasion and tax avoidance, looked at the reasons for their occurrence, and at the judicial and legislative attitude to the problem. In conclusion, he proffered suggestions to remedy the various anomalies in the system which aid tax evasion and avoidance. These include tightening up the law of taxation which at present remains a largely undeveloped area necessitating recourse to English legal decisions to explain purely Nigerian situations. See also, S.O. Fashokun, *An Assessment of Efforts Against Tax Evasion and Avoidance; A Legal Viewpoint*, 10 Nigerian Law Journal (N.L.J.), pp. 18, 19. (1976)
3. (2014) 16 TLRN 99.
4. See, Section 80(3) of CITA.
5. CFR Title 26 § 316-2(a).
6. See, Olumide K. Obayemi, *Taxation of Dividends, Oando Plc vs Federal Inland Revenue Service*, in ThisDay Lawyer, June 17, 2014, at Page 11. ("Obayemi").
7. See Taiwo Oyedele's Pragmatic Proposed Amendments to Section 19 EDT Rule, at Paragraph X, *infra*.

Development (Income Tax Relief) Act;
iv. the amount of any income or profit exempt from tax under this Act; and
v. the amount of any gains which has been taxed under the Capital Gains Tax Act or any other law repealing, amending or replacing the Capital Gains Tax Act.

c. *The Canadian Model*
The Canadian Model under Section 83(2) of the Income Tax Act of Canada[1] *which states:*
Section 83(2) Capital dividend [not taxable] — Where at any particular time after 1971 a dividend becomes payable by a private corporation to shareholders of any class of shares of its capital stock and the corporation so elects in respect of the full amount of the dividend, in prescribed manner and prescribed form and at or before the particular time or the first day on which any part of the dividend was paid if that day is earlier than the particular time, the following rules apply:
i. *the dividend shall be deemed to be a capital dividend to the extent of the corporation's capital dividend account immediately before the particular time; and*
ii. *no part of the dividend shall be included in computing the income of any shareholder of the corporation*

The amendments will further promote the present Nigerian economic policy to sustain the continuous economic growth. With the recent global economic downturn, international corporations are increasingly focused on exploring business opportunities in regions with significant projected growth opportunities such as Africa and Asia. Several corporations have recently flocked to Nigeria, a prominent West African country, with the recent stable political climate, immense population (about 170 million), and projected double digit growth rate, and so the country has quickly become a destination of choice for small and large international companies, alike, seeking to take advantage of the perceived business opportunities therein.[2]

II. The Nigerian Economic Policy, the Need to Curb Tax Avoidance and the Application of the Excess Dividend Tax Rule.

In addition, in the aftermath of the return to democratic government in Nigeria, on 30th May 1999, the Nigerian government embarked on the introduction of open market legislation, removal of limitations on foreign ownership, granting of financial incentives to Nigerian investors, importation tariff elimination, pioneer status and tax incentives, the elimination of restrictions placed on foreign capital importation and the reduction of import duties.[3] The post-1999 regimes adopted an economic policy styled as NEEDS, i.e., "National Economic Empowerment and Development Strategy." The new economic programs were oriented towards *laissez faire*, private enterprise, fair competition, economic freedom, liberalization and the attraction of foreign investors in all facets of the economy.[4]

Therefore, in the quest to attract Foreign Direct Investment (FDI) into Nigeria, within the context of eradicating tax avoidance and tax evasion, a revisit to the double taxation effect of the EDT might be necessary. According to Taiwo Oyedele:

> *According to the U.S. Census Bureau, the United States of America currently has a population of 318 million and over 16.5 million establishments. Compared to Nigeria, with a population of over 170 million, there are less than 1 million active companies. Assuming the same level of development, Nigeria should have about 9 million companies. Put differently we are operating at about 11% of our capacity. It is therefore not difficult to see why Nigeria has a high unemployment rate. South Africa with 54 million people (less than one-third of Nigeria), has 2.2 million companies (more than twice the number of companies in Nigeria).*
> *In the recently released 2014- 2015 Global Competitiveness Index by the World Economic Forum, Nigeria has just been ranked 127 out of 144 countries. On the ease of doing business, Nigeria ranks 147 out of 189 economies in the 2014 Doing Business Report by the World Bank which measures different aspects of business including paying taxes.*
> *The facts are quite obvious that top ranking countries fair better economically. Even if we dispute the surveys or their methodologies, why don't we imitate their reform models and see if we will get a better outcome. Our inactions and sometimes negative reforms are the reasons we are unable to achieve our*

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1. Income Tax Act of Canada (R.S.C., 1985, c. 1 (5th Supp.).
2. Olumide K. Obayemi and Oladipipo S. Alaka, *TWENTY-FIVE YEARS AFTER SECTION 72 OF CAMA AMENDMENTS TO PRE-INCORPORATION CONTRACTS LAW IN NIGERIA* in Journal of Law, Policy and Globalization, Vol. 31, 2014, pages 95-120
3. Ebunola Awosika and Olumide K. Obayemi, *Technology, Media and Telecommunications Review in Nigeria, Chapter 19, The Technology, Media and Telecommunications Review - 5th Edition. (2014)* published by *Law Business Research 87 Lancaster Road, London, W11 1QQ*
4. *Ibid*. Per Awosika and Obayemi, at Page 283.

full potential. One of the major reasons many companies, multinationals and domestic alike, choose to locate their companies outside Nigeria is to avoid the excess dividend tax exposure.[1]

Thus, this work shall revisit *Oando IV* decision, and the opinion of several commentators that have critiqued the July 2014 *Oando IV* judgment, among them Harvard-trained scholar Afolabi Elebiju,[2] Taiwo Oyedele of the Price Waterhouse Coopers (Nigeria),[3] Victor Onyenkpa of KPMG (Nigeria),[4] and a few others. For instance, in the aftermath of the *Oando IV* decision, Victor Onyenkpa had noted thus:

> *The debate over the appropriateness of subjecting Nigerian companies to tax based on dividend paid out, where such dividend is more than the company's taxable profits in any year of assessment came up for consideration by the Tax Appeal Tribunal. Application of this tax principle is thought to expose Nigerian companies to double taxation since amounts credited to retained earnings "usually" comprise profits that have been taxed in the accounting year they were transferred to retained earnings*.[5]

First, in August 2014, immediately after the *Oando IV* decision, Taiwo Oyedele opined that the *Oando IV* decision is ridiculous and anti-investment:

> *Nigerian companies are now liable to income tax at 60%...*
> *That is if the new judgement of the Tax Appeal Tribunal on excess dividend tax is sustained...*
> *THIS may be ridiculous but it is true! At a time when many countries are reducing their tax rates to attract and retain investments, Nigeria seems to be moving in the opposite direction.*
> *On 18 July 2014 the Tax Appeal Tribunal in a case between Oando Plc and the Federal Inland Revenue Service (FIRS) ruled in favour of the FIRS. The decision was based on the Tribunal's interpretation of Section 19 of the Companies Income Tax Act as applicable to dividend distribution. The decision creates more uncertainty on the issue of "excess dividends" tax as the Tribunal did not follow an earlier decision of the Federal High Court between the same parties and on almost identical facts*.[6]

Continuing, in September 2014, along the same line, Taiwo Oyedele had similarly noted that the EDT will occasion capital flight and industrial relocation from Nigeria:

> *One of the major reasons many companies, multinationals and domestic alike, choose to locate their companies outside Nigeria is to avoid the excess dividend tax exposure*.[7]

In the end, we posit that the Nigerian tax authorities may adopt the American approach to the treatment of retained earnings as stated under Section 316(a) of the Internal Revenue Code ("IRC")[8] and Regulation 1-316-2(a) of the Income Tax Regulations,[9] wherein distributions that in excess of retained earnings i.e., distributions that are not profits are first treated as recovery of the shareholder's basis in his stock, with any excess over the basis to be treated as gain from sale or exchange of the stock.[10]

We further disagree with Elebiju's *implied repeal* argument contending that since Section 19 of CITA (EDT rule) was enacted *after* the Franked Income Investment (FII) provisions under Section 80(3) of CITA, the EDT would supersede the FII. We are of the opinion that Elebiju's preference for the ***leges posteriores priores contrarias abrogant*** rule is untenable in view of the modern American approach to the ***implied repeal*** theory as was espoused by the California Supreme Court in ***Stop Youth Addiction, Inc. v. Lucky Stores, Inc.***,[11] where it was stated that to overcome the strong presumption against implicit repeal the two provisions must be so inconsistent that they cannot have concurrent operation.

We are also of the opinion that the ***Oando IV*** Court should have distinguished the Federal High Court

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[1]. Taiwo Oyedele, *Nigerian Companies Are Now Liable To Income Tax At 60%*, in Tax Watch, Guardian Newspaper [Nigeria], Wednesday, 27 August 2014. ("Taiwo Oyedele I"); See, *also*, Taiwo Oyedele, *Still on Excess Dividend Tax: Why is the National Assembly Slow to Act?*, in Tax Bites, Monthly Focus on Tax Related Issues, of Tuesday, 09 September 2014. Also available at: http://www.pwc.com/en_NG/ng/assets/pdf/tax-watch-september-2014.pdf. Last visited on 19 January 2015. ("Taiwo Oyedele II").

[2]. Afolabi Elebiju, *Oando Plc vs. FIRS: Excess Dividends Tax Revisited*, in Taxspectives by Afolabi Elebiju, published in *THISDAY Lawyer [Nigeria], 7th October 2014, p. 12* ("Elebiju I").

[3]. See, Taiwo Oyedele I, *supra* note 12.

[4]. Victor Onyenkpa, *Excess dividend taxation regime in Nigeria*, KPMG (Nigeria) Newsletter September 2014. Available at: http://www.kpmg.com/NG/en/IssuesAndInsights/ArticlesPublications/Documents/Newsletter%20on%20Excess%20dividend%20taxation%20regime.pdf. Last visited on January 18, 2015. ("Victor Onyenkpa").

[5]. *Ibid.* per Victor Onyekpa, at Page 1.

[6]. See, Taiwo Oyedele I, *supra* note 12.

[7]. See, Taiwo Oyedele II, *supra* note 12.

[8]. 26 USC § 316(a).

[9]. CFR Title 26 § 316-2(a).

[10]. See, Obayemi, *supra* note 6.

[11]. 950 P.2d 1086, 1096 (Cal. 1998).

("FHC")'s decision in the earlier sister case of ***Oando v. FBIR (Oando III)***,[1] because an appellate court can always review questions of law on appeal. Therefore, we further contend that the FHC's judgment in ***Oando III*** that the dividends paid by Oando in 2004 were not retained earnings and so subject to corporate tax was not a strictly a question of fact since a decision to categorize the nature and substance of income under the CITA would normally involve a question of law, or, at the minimum, a mixed question of law and facts.

Nevertheless, we must recognize that the EDT as presently enacted and enforced seeks to tax retained earnings of a corporation and so amounts to double taxation. Thus, we hasten to propose, as a balancing factor, that the use of EDT as an anti-avoidance rule must not occasion double taxation. As we know, double taxation results where a second tax is imposed on something that is already subject to tax,[2] and so, double taxation is expressly prohibited in most statutes, and in most jurisdictions. In fact, double taxation is judicially disfavoured, unless its imposition is accompanied by a clear legislative intent.[3]

Therefore, we propose that the Nigerian courts, upon making findings of double taxation, must generally construe one of the two tax legislation involved in such a manner as to eliminate the double imposition of tax.[4] This, we submit, should have been the approach that should have been adopted by the court in ***Oando IV***, with the court rejecting the EDT in favour of FII concerning the retained earnings from 2005, 2006 and 2007 in the case.

This is not to jettison the EDT and its laudable goal of eradicating tax avoidance tactics, which according to M.T. Abdulrazaq, is a problem that faces every tax system and is likely to continue to do so when rates of tax are believed to be high and the burden of tax is seen to have a major influence upon the affairs of business and upon every aspect of social and personal life.[5] Abdulrazaq went on to note that not all tax systems attempt to solve the problem in the same way, nor is there necessarily any large measure of agreement as to what is involved in the idea of tax avoidance.[6] Thus, the enactment of EDT in Nigeria, but not in other jurisdictions which have other statutory laws dealing with the same subject.

It is therefore our submission that the EDT rule as a means of eradicating tax avoidance is not an aberration, and with insightful and reformative amendments, the EDT can be properly used to curb tax evasion in Nigeria.

III. Retained Earnings, Excess Dividends and Legitimate Tax Planning As Well.

In discussing ***Oando IV***, and the question as to whether dividends can be paid in excess of retained earnings in Nigeria,[7] it is apposite to define the concept of "Dividends."

> *Dividends are income payments made to common and preferred stockholders. Some investors choose to invest in securities that have a history of regular dividend payments. Rather than waiting for a potential return on the future sale of the stock, investors realize a secondary source of income. Dividend payments are in addition to any capital gains an investor may eventually realize on the sale of the stock. They are similar to the interest payments that a bond accumulates prior to its maturity date.*[8]

The problem of EDT on retained earnings arises when a corporation makes a net profit, it may place that amount in a retained earnings account or pay its stockholders dividends. The retained earnings balance may increase or decrease depending upon several factors, a net loss reduces retained earnings, as does a dividend payment. Most companies will not declare a cash dividend in excess of retained earnings, and it is possible for companies to declare stock dividends in excess of retained earnings, even though they may not be paid until the retained earnings balance is adequate.[9]

The purpose of retained earnings being kept by a corporation arises from the fact that retained earnings is the commercial equivalent of a consumer savings account. As a company earns profit, it must decide to either save the excess money, reinvest it in its operations, or return it to its investors. Companies can also use a positive retained earnings balance to cover net losses. During a fiscal quarter or year, a company may experience an income shortage, which it covers with the excess earned from previous accounting periods. A net loss that occurs

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1. *Oando v. FBIR* (2009) 1 TLRN 61.
2. Carlos A. Saavedra, *Double Taxation of Partnership Income in Illinois*, 58 Chicago-Kent L. Rev. 137, 137-138 (1981).
3. *Old Colony Trust Co. v. Commissioner*, 346 Mass. 667, 195 N.E.2d 332 (1964); See also, *Tennessee v. Whitworth*, 117 U.S. 129, 137 (1886). See generally T. COOLEY, THE LAW OF TAXATION §§ 223, 224 (4th ed. 1924) ("COOLEY").
4. *Ibid*. *Old Colony Trust Co. v. Commissioner*, 346 Mass. 667, 195 N.E.2d 332 (1964)
5. See Abdulrazaq I, *supra* note 2, at 59.
6. *Ibid*.
7. See, Helen Akers, *Can Dividends Be Paid in Excess of Retained Earnings*,- See: http://wiki.fool.com/Can_Dividends_Be_Paid_in_Excess_of_Retained_Earnings%3F#sthash.xK3M4JoT.dpuf. Last visited January 18, 2015.
8. *Ibid*. per Helen Akers.
9. *Ibid*. per Helen Akers.

when the retained earnings balance is zero or negative results in larger negative balance.[1]

In effect, that a corporation keeps retained earnings may not have been borne out a tax avoidance motive.

Thus, while there are rules barring tax avoidance, it is generally recognized that a taxpayer has great liberty to legally and properly plan and structure his/its business, income and tax report/returns as freely as possible. In the words of Honourable Menzies of the High Court of Australia in *Peate v. Commissioner of Taxation*:[2]

> *"It is perhaps inevitable in an acquisitive society that taxation is regarded as a burden from which those who are subject to it will seek to escape by any lawful means that may be found"*.[3]

It must be acknowledged, at the onset, that it is true that a taxpayer (corporate or individual) may plan its/his tax affairs as a means of paying the minimum tax payable to the authorities. The law is that a taxpayer does *not* have a duty (*not* even a patriotic duty) to pay more taxes than he ought to—an inviolable view supported by the foremost American Jurist, Honourable Justice Billings Learned Hand[4] who opined that:

> "*Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes*."[5]

Justice Hand again repeated this tax canon in 1947, when he held that:

> "*Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant*."[6]

Also, in the United Kingdom, the same rule was laid down by Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster*:[7]

> "Everyman is entitled if he can to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them as to secure this result, then, however unappreciative the Commissioners of Inland Revenue on his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable"[8]

In sum, not all legitimate tax planning activities would amount to tax avoidance or tax evasion.

IV. The Need To Proscribe Tax Avoidance And/Or Tax Evasion

As we have stated earlier, the EDT arose from the tax authorities' efforts to curb tax avoidance. Thus, there is the need to proscribe actions that constitute illegal and pseudo-illegal conduct that amount to tax avoidance, which is the legal usage of the tax regime to one's own advantage, i.e., to reduce the amount of tax that is payable by means that are within the law, through the means of tax aggressive strategies that fall into the grey area between commonplace tax evasion techniques and well-accepted tax avoidance.

While the term "tax avoidance" is widely used in Nigeria, but its definition cannot be found in any of the definition sections of the taxation statutes,[9] and so the failure to define the term may be due to an assumption that its meaning can be readily understood; but it may yet be a reflection of the difficulties of framing an exhaustive definition of the term.[10]

Therefore, tax avoidance can be defined as the art of dodging tax without actually breaking the law[11] and the lawfully carrying out of a transaction which was either entered into or which took a particular form, for

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1. *Ibid*. per Helen Akers.
2. *Peate v. Commissioner of Taxation* (1963 - 64) III Commonwealth Law Reports 443.
3. *Ibid. Peate v. Commissioner of Taxation* (1963 - 64) III Commonwealth Law Reports 443, at p. 445
4. See, *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934).
5. *Ibid. Helvering v. Gregory*, 69 F.2d 809, at 810-11 (2d Cir. 1934).
6. See, *Commissioner v. Newman*, 159 F2d 848 (1947).
7. (1936) A.C. 1.
8. *Ibid.*
9. See, Abdulrazaq I, *supra* note 2, at 60; See, also, A.J. Easson, *Cases and Materials In Revenue Law*, Sweet & Maxwell (1973), at p. 27; *Final Report of the Royal Commission on the Taxation of Profits and Income* (1955) cmd 9474.
10. See, Abdulrazaq I, *supra* note 2, at 60.
11. See, G.S.A. Wheatcroft, *The Attitude of the Legislature and the Courts to Tax Avoidance*, 18 M. L. R. 209 (1955).

the purpose of minimising taxation.[1]

As a result, in order to discourage sharp practices by individual and corporate taxpayers alike, laws known as General Anti-Avoidance Rule (GAAR) statutes, which prohibit "tax aggressive" avoidance have been passed in several countries including Nigeria, Canada, Australia, New Zealand, South Africa, Norway and Hong Kong.

A GAAR is typically a statutory rule that empowers a revenue authority to deny taxpayers the benefit of an arrangement that they have entered into for an impermissible tax-related purpose. For instance, a generic GAAR in Nigeria is contained in Section 22 of the Companies Income Tax Act ("CITA")[2] thus:

> *S. 22(1) : "where the Board is of opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company concerned shall be assessable accordingly*."

Similar GAAR are contained in Section 17 of the Personal Income Tax Act ("PITA")[3]; Section 20 of the Capital Gains Tax Act ("CGTA")[4]; and Section 15 of the Petroleum Profits Tax Act ("PPTA"),[5] respectively.

Further, there are several judicial doctrines that have developed rules that invalidate tax avoidance schemes which maybe technically legal but are not for a business purpose or where such are in violation of the spirit of the tax statute. Thus, in the twin decisions of *W. T. Ramsay Ltd. v. Inland Revenue Commissioners*[6] and *IRC v. Burmah Oil Co. Ltd.*,[7] the House of Lords held that where companies had made substantial capital gains but had entered into complex and self-cancelling series of transactions that had generated artificial capital losses, for the purpose of avoiding capital gains tax, the tax authorities were correct to look into the substance and tax the entire transactions as a whole. In effect, where a transaction has pre-arranged artificial steps that serve no commercial purpose other than to save tax, the proper approach is to tax the effect of the transaction as a whole. The legal rationale/effect of *Ramsay* and *Burmah* are not limited to capital gains tax, but applies to all forms of direct taxation, and is an important restraint on the ability of taxpayers to engage in creative tax planning.

V. The Balancing Principle of Tax Integration

Yet, there is another tax principle of tax integration which states that income earned by a corporation and distributed to its shareholders should be subject to approximately the same amount of tax as if the income had been earned by the shareholders directly. A corollary is that it is integral to the principle of tax integration that an amount which would have been tax-free if received directly by a shareholder should not be subject to tax if received by a corporation after which such will flow to the shareholder. This principle of tax integration, we believe, is clear from Nigerian "Franked Investment Income" (FII) rule under Section 80(3) of CITA.

The purpose of tax integration policy, is to treat different taxpayers engaging in similar activities alike, i.e., to maintain horizontal equality.

VI. The *Oando Plc vs FIRS* (*Oando IV*)[8] Decision

At this juncture, we shall examine the vexed "Excess Dividend Tax" rule[9] under Section 19 of CITA and the July 18, 2014 decision of the Lagos Zone Tax Appeal Tribunal ("TAT" or "Tribunal") in *Oando Plc vs FIRS* (*Oando IV*).

The facts of *Oando IV* were that Oando (a conglomerate with several subsidiaries) had retained earnings from years that preceded 2005. However, it declared and paid dividend for the taxable years of 2005, 2006 and 2007, at a time when there were no profits and/or when the dividends paid out were more than profits declared, and so, FIRS issued notices of additional tax assessments on the Appellant for years in which it recorded no total profits or where it recorded total profits less than dividends paid, and so, the following issues were submitted for determination to the TAT:

(i) Whether the sums paid as dividends are taxable under Section 19 of CITA

(ii) Whether the provisions of Section 19 of CITA is ambiguous and should be interpreted in favour of

1. M.C. Flesch, *Tax Avoidance - the Attitude of the Courts and the Legislature*, 21 C.L.R. 215 (1968).
2. Companies Income Tax Act, Cap C21, Laws of the Federation of Nigeria of 2004 ("CITA").
3. Personal Income Tax Act, Cap P8 LFN 2004 and the 2011 amendment thereto ("PITA").
4. Capital Gains Tax Act, Cap C1, LFN of 2004 ("CGTA").
5. Petroleum Profits Tax Act, Cap P13, LFN of 2004 ("PPTA").
6. [1982] A.C. 300.
7. [1982] S.T.C. 30, H.L.(Sc.).
8. *Oando Plc vs FIRS (Oando IV)* (2014) 16 TLRN 99.
9. See, Taiwo Oyedele I, *supra* note 12.

the taxpayer.[1]

Oando was able to establish that the amounts posted to its retained earnings account were derived from its annual Income Statements after paying corporation tax thereon, although there would always be a timing difference between the accounting treatment of taxation and the actual tax computation filed on behalf of the company based on the difference between the governing rules.[2]

In this regard, Section 19 of CITA provides that:

"Where a dividend is paid out as profit on which no tax is payable due to-

(a) no total profits; or

(b) 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, 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 is declared, relates".

The *Oando IV* court also considered Section 80(3) of CITA, i.e., that dividend received by a company after deduction of withholding tax constitutes "Franked Investment Income" (FII), which should not be subjected to further tax (income tax) and by extension withholding tax (WHT). In this regard, Section 80(3) of CITA specifically provides that:

"Dividend received after deduction of tax prescribed in this section shall be regarded as franked investment income of the company receiving the dividend and shall ***not*** be charged to further tax as part of the profits of the recipient company................"

Nevertheless in addition to the fact that some of the dividends were paid out of retained earnings that had accrued ***prior*** to 2005, pursuant to which Oando had previously paid the 30% corporate tax under CITA, Oando also had received dividend income from some of its subsidiaries of which Oando was also a shareholder—a clear case of franked[3] investment income. Yet, the Federal Inland Revenue Service (FIRS) disagreed, and sought to levy additional 30% tax by relying on the Excess Dividend Rule under Section 19 of CITA.

Oando put forward three major arguments.[4]

a. *First, the dividends were paid out of retained earnings which had already been taxed in prior years.*
b. *Secondly, FIRS should have considered and applied Section 80 of CITA which exempts dividend income that has been subjected to withholding tax from further tax. This is relevant given that the company earns dividend income from its subsidiaries.*
c. *Third, if Section 19 is considered ambiguous then it should be interpreted in favour of the taxpayer in line with the contra fiscum rule*.[5]

Therefore, Oando, in its defence, referred the TAT to an earlier decision by the Federal High Court (FHC) in the tax appeal: *Oando Plc Vs. FIRS*,[6] and also to the provisions of the *Explanatory Notes on the Critical Tax Issues for the operation of Bank Holding Company Structure in Nigeria" (the Bank Holding Company Guidelines)*[7] issued by the FIRS, to support the view that Section 19 CITA may be ambiguous.[8]

In its defence, the FIRS appeared to agree that dividends paid from retained earnings should not be subjected to excess dividends tax, but the FIRS submitted that Oando had not satisfactorily convinced the FIRS that tax had been paid on the retained earnings out of which the dividends were paid.[9] Finally, the FIRS also argued that the provisions of Section 19 were clear and unambiguous, and therefore they should be given their

1. See, Victor Onyenkpa, *supra* note 15, at page 1.
2. *Ibid*. Victor Onyenkpa, *supra* note 15, at page 1, wherein he also noted that he TAT also correctly identified that there would be different tax principles to be considered and adjusted for in determining actual tax in contradistinction to tax under accounting principles.
3. "Franked Income" means income that has been subjected to tax already, i.e., the company had already paid taxes to the tax authorities on the income.
4. See Taiwo Oyedele I, *supra* note 12.
5. *Ibid.* per Taiwo Oyedele I.
6. (2009) 1 TLRN 61
7. See, the January 2012 EXPLANATORY NOTES ON THE CRITICAL TAX ISSUES FOR THE OPERATION OF BANK HOLDING COMPANY STRUCTURE IN NIGERIA. This circular is made to address issues arising in connection with the taxation of Bank Holding Companies and their Subsidiaries pursuant to Section 61 of the Federal Inland Revenue Service (Establishment) Act, 2007, Cap F36, Laws of the Federation of Nigeria, 2004. The circular shall apply to all Bank Holding Companies and their Subsidiaries in Nigeria. Available at: http://www.firs.gov.ng/Resource-Centre/Tax%20Circulars%20Document%20Library/Bank%20Holdco%20Information%20Circular%20IMD%20No%20PC-T12.2.3.%201027.pdf. Last visited on 20th January 2015.
8. See, Victor Onyenkpa, *supra* note 15, at page 1.
9. See Taiwo Oyedele I, *supra* note 12.

literal interpretation.[1]

The Tribunal, in interpreting Section 19, held that dividends paid from retained earnings, where there is no taxable profit or taxable profit is less than the dividends, should be taxed at 30% regardless of whether the earnings had been taxed previously.[2] Thus, the Tribunal outlined four steps to be followed before subjecting a company to tax under Section 19.[3] According to the Tribunal:

a. *the first step was to ascertain why no tax was payable – which could either be due to no taxable profits or taxable profits less than dividend paid.*
b. *The second step is to regard any such dividends paid as the taxable profits of the company.*
c. *Thirdly, the actual taxable profit for the current year should be deducted from the dividend (deemed taxable profit) to determine the excess.*
d. *The final step is to apply the tax rate of 30% to the excess established under step 3.*[4]

The Tribunal further held that since the FIRS had complied with all the four steps Oando was rightly assessed to the additional tax,[5] and that the relevant question to ask is why the company had either no total profits or total profits which are less than the dividend declared in any year of assessment.[6] The Tribunal also held that reference to the *Bank Holding Company Guideline*[7] is irrelevant since the source of profits in question is not dividend income received by Oando from its subsidiaries which would be franked under Section 80 of CITA.[8] Therefore, in view of the above, Victor Onyenkpa submitted as follows:

> *The TAT ruling, that the FIRS' invocation of section 19 to declare dividend as profit implies the profit has not suffered tax, is somewhat confusing. Where the dividend is paid out of retained earnings / reserves on which tax had been previously paid, should the dividend still be regarded as 'profits on which no tax is payable' and therefore reassessed to income tax?*
>
> *Prior to this ruling, a position had been established based on the decision of the FHC Lagos on a similar issue. The FHC had in that case, concluded that dividends paid out of profits that have already suffered tax should not be liable to tax again under Section 19 of the CITA. This decision is, in our view, consistent with the opening sentence of Section 19 ("Where a dividend is paid out of profits on which no tax is payable…").*
>
> *Furthermore, there is no information to suggest that the Appellant, being also a holding company, made a case for exclusion of any portion of the dividends paid, which may have been sourced from dividends received from its subsidiaries. It would have been interesting to see how the conflict between section 19 and section 80 of CITA, would have been resolved by the TAT.*
>
> *The TAT ruling somewhat provides a constructive endorsement of the Bank Holding Company Guidelines issued by the FIRS, which is consistent with Section 80 of CITA that deems dividend received by a company to be franked (after tax) income on which no further tax should be accounted for. Nevertheless, we look forward to a much more direct endorsement in future.*
>
> *In common law, binding precedents have to be followed according to the hierarchy of courts. However, a lower court may depart from a binding precedent in certain circumstances. What is important is that, such a court should demonstrate why it did not follow that judicial precedent. This allows for consistency and, to some extent, prevents judges from exercising personal prejudice.*
>
> *Although the TAT is not a court, appeals from the TAT are submitted to the FHC. Therefore, one would expect that the TAT would consider the FHC's position on the issue. Interestingly, the TAT did not make any reference to the FHC decision in deciding the case.*
>
> *In the final analysis, the main question remains unresolved and the lingering debate will likely continue,*

[1]. *Ibid*. per Taiwo Oyedele I.
[2]. *Ibid*. per Taiwo Oyedele I.
[3]. *Ibid*. per Taiwo Oyedele I.
[4]. *Ibid*. per Taiwo Oyedele I.
[5]. *Ibid*. per Taiwo Oyedele I.
[6]. See, Victor Onyenkpa, *supra* note 15, at page 2.
[7]. See, the EXPLANATORY NOTES ON THE CRITICAL TAX ISSUES FOR THE OPERATION OF BANK HOLDING COMPANY STRUCTURE IN NIGERIA, supra note 58.
[8]. *Ibid.* Victor Onyenkpa, *supra* note 15, at page 2.

until a definitive ruling is delivered.[1]

The main unanswered question remains as to whether in a clearly pleaded case involving franked investment income, such would be subject to EDT. We submit that when, and if the Nigerian lawmakers adopt and enact either the American, Canadian or the Oyedele model, such FII would not be subject to tax again in Nigeria

Further, according to Oyedele, the Tribunal appeared not to have considered the 2008 decision of the Federal High Court (FHC)[2] between the same parties on similar facts-- *Oando v. FBIR (Oando III)*.[3] In *Oando III*, argued Oyedele, the import of the FHC decision was that dividends paid from retained earnings were not subject to excess dividends tax because such retained earnings would have already been taxed in prior years.[4]

Let us now patiently discuss the ***Oando IV*** case.

VII. Evaluation of the Excess Dividend Rule as Applied in *Oando IV* Case.

Several authors have critiqued the ***Oando IV*** decision, among them, Afolabi Elebiju, who ruffled a lot of feathers with his radical views,[5] and Victor Onyenkpa of KPMG (Nigeria).[6] Also, Taiwo Oyedele of Price Waterhouse Coopers (PWC) submitted thus:

> *Before this decision, many companies had relied on the sentiment expressed in the FHC decision of 2008 in establishing that their dividends in excess of taxable profits were paid from retained earnings and should not be taxed twice. This judgement by the Tribunal serves to question this position.*
>
> *The Tribunal's decision also raised a couple of fundamental questions –*
>
> > *1. Why would the law seek to impose double taxation on companies for delaying their dividend distribution or simply reinvesting their profits?*
> > *2. Why did the Tribunal not apply the doctrine of judicial precedent by following the earlier decision of the FHC?*[7]

The practical implications of the present Section 19 EDT rule and the *Oando IV* decision have been exhaustively stated by Taiwo Oyedele thus:

> *Implications*
>
> *The implications of the above provision is that while it is was designed to prevent companies from avoiding tax on any income on which tax is payable, the current interpretation and application by the Federal Inland Revenue Service (FIRS) is to the effect that companies suffer double taxation in many cases or are made to pay tax on their legally exempt profits. This has the following specific effects:*
>
> > *• A company that delays the distribution of profit to its shareholders for reinvestment in one period will be subject to tax again on such profit when subsequently paid out as dividend.*
> > *• A company that distributes dividends from realised capital gains after paying the applicable capital gains tax will be subject to companies income tax on the dividends paid notwithstanding that the applicable tax has already been paid.*
> > *• A company that receives dividends from a subsidiary, associate and other equity investments will suffer tax when it further distributes the dividends to its shareholders. This is contrary to the provisions of Section 80(3) of CITA which provides that dividend received by a company in this situation shall not be subject to any further tax.*
> > *• Under the Industrial Development (Income Tax Relief) Act, the pioneer profits of a company are exempted from income tax regardless of the timing of distribution by way of dividend. These profits should therefore not be subject to tax under section 19 where the dividends are*

[1]. *Ibid.* Victor Onyenkpa, at page 2.
[2]. Elebiju disagreed with these "Departure Proponents." See, Elebiju I, supra note 13.
[3]. *Oando v. FBIR* (2009) 1 TLRN 61
[4]. See Taiwo Oyedele 12, *supra* note 6.

[5]. *See,* Afolabi Elebiju, *Rethinking Excess Dividend Tax in Nigeria,* in Taxspectives by Afolabi Elebiju, published in *THISDAY Lawyer 29th March, 2011, p. Vii* ("Elebiju II"); and Afolabi Elebiju, *Excess Dividend Tax: Why It Needs To Go, Yesterday,* in Taxspectives by Afolabi Elebiju, published in *THISDAY Lawyer 26th November 2013, p. Vii* ("Elebiju III").
[6]. See, Victor Onyenkpa, *supra* note 15, at page 2.
[7]. See Taiwo Oyedele I, *supra* note 12.

paid post-pioneer if such dividend is more than the taxable profits for the year.[1]

In the present age, the tax policy of most countries is towards the removal of all incidents of double/multiple taxation. Nigeria must also adopt this tax policy. Therefore, it is very clear that the overreaching effect of the present EDT is to make the Nigerian economic inimical to the attraction of foreign direct investment to the Nigerian economy.

Further, it is Elebiju's view that the TAT in *Oando IV* "put the correct slant on Section 80(3)." Without bothering to discuss the anti-avoidance policy underpinning the EDT, Elebiju went on thus:

> *I maintain the view that EDT provisions should be repealed, as they effectively operate a "supervisory jurisdiction" over other provisions of CITA that enables a company arrive at a position where it has no tax payable or taxable profit is lower than the dividend declared in a particular year. EDT is a sticky point, exemplifies "taxation by stealth" and should be done away with*.[2]

However, there is a great danger in wholesale abolition of the EDT rule. This, with respect, is against the rule of tax integration and the need to design tax integration schemes, and so, we shall propose that the Nigerian legislature and the tax policy makers adopt, while retaining the EDT rule as an anti-avoidance rule, one of the three models proposed in this paper.

Second, Elebiju went on to argue that since the franked income provision preceded the EDT rules, based on the rules of statutory construction, the EDT as a later in time legislation would supersede the earlier law:

> *My additional theory, is that even if the Appellant had been recipient of the dividends, s.80(3) would still not have shielded the dividend income from EDT, as s.80(3) is "subservient" to s. 19 CITA. The reason is simple: s.80(3) was part of CITA Cap. 60 LFN 1990, whilst s.19 was enacted in 1996. Resolving the conflict between the two provisions mean that s.80(3) - being earlier in time - has to give way to the later provision of s.19, in consonance with established rules of statutory interpretation*.[3]

It would appear as if Elebiju's preference for the *leges posteriores priores contrarias abrogant* rule is oblivious of the modern American approach to the *Implied Repeal* theory as was laid down by the California Supreme Court in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*,[4] where it was stated that to overcome the strong presumption against implicit repeal the two provisions must be so inconsistent that they cannot have concurrent operation.

We submit that both the EDI and FII can mutually operate together, in so far, as they do not occasion double taxation.

It is correct to state that, at common law, the doctrine of implied repeal is a concept in constitutional theory which states that where an Act of Parliament or an Act of Congress (or of some other legislator in a common law system) conflicts with an earlier one, the later Act takes precedence and the conflicting parts of the earlier Act are repealed (i.e., no longer law).

However, in the United States, the *implied repeal* theory is strictly a disfavoured doctrine, and so, if a court can reconcile the two statutes with any reasonable interpretation, that interpretation is preferred to one that treats the earlier statute as invalidated by the later one. Even then, in the United Kingdom, the implied repeal theory has been jettisoned in certain cases. For instance, in the 2002 English case *Thoburn v Sunderland City Council* (the *Metric Martyrs* case),[5] involving Section 2(2) of the European Communities Act,[6] Lord Justice Laws expressed the view that some constitutionally significant statutes held a higher status in UK law and were not subject to the doctrine of implied repeal. Further, Lord Justice Laws also named the Parliament Act[7] and the Human Rights Act[8] as "*constitutional statutes*" and that are therefore not subject to the doctrine of implied repeal,

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1. See, Taiwo Oyedele II, *supra* note 12.
2. See, Elebiju I, *supra* note 13
3. *Ibid.* per Elebiju I.
4. 950 P.2d 1086, 1096 (Cal. 1998)
5. [2002] 3 WLR 247, [2002] EWHC 195 (Admin), [2003] QB 151. Delivered on 18 February 2002.
6. The European Communities Act 1972 (c. 68) is an Act of the Parliament of the United Kingdom providing for the incorporation of European Union law (originally Community law) into the domestic law of the United Kingdom. The Republic of Ireland has a law of the same name, Act No. 27 of 1972
7. The Parliament Acts 1911 and 1949 are two Acts of the Parliament of the United Kingdom, which form part of the constitution of the United Kingdom. Section 2(2) of the Parliament Act 1949 provides that the two Acts are to be construed as one.
8. The Human Rights Act 1998 (c 42) is an Act of Parliament of the United Kingdom which received Royal Assent on 9 November 1998, and mostly came into force on 2 October 2000. Its aim is to "give further effect" in UK law to the rights contained in the Convention for the Protection of Human Rights and Fundamental Freedoms, but more commonly known as the European Convention on Human Rights. The Act makes a remedy for breach of a Convention right available in UK courts, without the need to go to the European Court of Human Rights in Strasbourg.

which can only be expressly repealed if Parliament so wishes. In addition, in 2012, in a case before the Supreme Court of the United Kingdom, *BH v The Lord Advocate (Scotland)*,[1] Lord Hope said in paragraph 30 of the judgment that

> "*the Scotland Act can only be expressly repealed; it cannot be impliedly repealed; that is because of its 'fundamental constitutional nature'*."[2]

In sum, Elebiju's *implied repeal* argument is misplaced.

Further, Elebiju then moved against the "Departure Proponents"[3] who had attacked the Oando IV decision, since it did not follow the earlier 2008 ruling in *Oando v. FBIR (Oando III)*.[4] According to Elebiju:

> *Secondly, the TAT had been accused of not following an earlier decision of the Federal High Court: Oando v. FBIR (2009) 1 TLRN 61 which purportedly held that EDT will not apply where dividends are declared out of retained earnings. My thorough review thereof, shows that contention is not accurate. The aspects of the ruling on retained earnings that the "departure proponents" rely upon to argue that the TAT departed from the FHC ruling, amounted to nothing but obiter dictum. It is trite law that remarks in the course of rendering a decision, not being the rationes decidendi constitute obiter, and they only have persuasive, non-binding effect on inferior tribunals*.[5]

Respectfully, we disagree with Elebiju, because the Pre-2004 Nigerian tax appeal practice[6] states that it was well settled that when the Board of Appeal Commissioners, ("BAC") have ascertained the facts of a case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (a) that they had before them evidence, from which such conclusion could properly be drawn, and (b) that they did not misdirect themselves in law in any of the forms of legal error which would have amounted to misdirection.[7]

In the instant case, there were the facts before the BAC and FHC in *Oando III* to enable them reach such a conclusion that the profits did not amount to retained earnings. In sum, they misdirected themselves and their findings were subject to reversal.

Specifically, Elebiju quoted copiously from *Oando III*, thus:

> "*it was argued before the Body of Appeal Commissioners [BAC] that the dividend for the year 2004 was paid out of retained earnings and not from profit for that year. The [BAC] rejected the argument on the ground that the profit and loss account of the Appellant for the period 2003 did not support the claim. …I have no cause to disturb this finding. I hold therefore that the dividend paid by the Appellant in the year 2004 was not paid out of retained earnings....having declared dividends and paid same to its shareholders, the Appellant has in my view represented to its shareholders and indeed the whole world that it has made profit. It must therefore pay tax. Since the Appellant paid dividend on accounting profit on which tax was not paid, I hold that it is taxable under section 19 of CITA…*"[8]

The issue that will therefore arise from Honourable Mustapha of Federal High Court ("FHC")'s findings in *Oando III* above is whether, the BAC's findings that the dividend for the year 2004 was not paid out of retained earnings and, also, not from the 2004 profit, would constitute either findings of fact, findings of law, or "mixed" findings of fact and law.[9] This is because where such BAC's findings were findings of law or mixed law and facts, such can be disturbed on appeal. It is on this basis that we submit that the BAC's findings in *Oando III*, i.e., that the dividend for the year 2004 was not paid out of retained earnings and not from profit for that year *clearly* constituted findings of law and/or "mixed" findings of fact and law.[10] In other words, the FHC in *Oando III* ought to have reviewed the BAC's findings. It was the wrong application of appellate review standards by the FHC that led Elebiju to surmise thus:

> *Clearly there was no direct holding on retained earnings being exempt from EDT. Accordingly, the TAT's decision is sound because inferior courts are at liberty not to follow obiter. Indeed, in the determination of FIRS' preliminary objection to the consolidated appeals (on the ground that they constitute abuse of process given the FHC decision), the TAT held (Oando v. FIRS II (2013) 11 TLRN*

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1. [2012] UKSC 24.
2. *Ibid.* at Paragraph 30 of the judgment.
3. See, Elebiju I, *supra* note 13.
4. *Oando v. FBIR* (2009) 1 TLRN 61.
5. See, Elebiju I, *supra* note 13.
6. See M.T. Abdulrazaq, *Tax Appeals*, in The Chartered Institute of Taxation of Nigeria Tax Practice Series, No. 20, ISSN-1596-1397, (2003 ed.) at Page 1 ("Abdulrazaq II").
7. *IRC v Lysaght* [1928] A.C. 234 at Page 243.
8. See, Honourable Abdulahi Mustapha, CJ, (as he then was) in *Oando v. FBIR* (2009) 1 TLRN 61, at 80-81 (*Oando III*).
9. See Abdulrazaq II, *supra* note 89, at 2.
10. *Ibid*. per Abdulrazaq II.

169, at 173) that "but neither the [BAC] nor the [FHC] resolved this issue in Oando v. FBIR. Issue estoppel is thus precluded."Failure of FIRS' preliminary objection foreshadowed, and enabled the TAT to reach the present decision.[1]

We reiterate that the FHC's position in *Oando III* above was erroneous. First, generally, a decision of the BAC to be appealed usually sets out the primary facts as found, which are followed by the conclusions arrived at from those facts, the question for the Appellate Court would then be whether, given the primary facts stated, the BAC was justified in law in reaching the conclusions so reached.[2] In this regard, primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as the original documents.[3] Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding.[4]

Further, whenever the correct conclusion to be drawn from primary facts requires for its correctness a determination by a trained lawyer, the conclusion is one of law, as was held in *British Launderers' Research Association v. Borough of Hendon Rating Authority*.[5] Therein, a finding had been made that the British Launderers' Research Association was not an institution established "for the purpose of science, literature or the fine arts exclusively" and hence was not entitled to an exemption from rating under the *Scientific Societies Act, 1843*. This finding was reversed by the Divisional Court and before the Court of Appeal it was argued that this was a fining fact with which the Divisional Court should not have interfered. Of this argument, Denning L.J. commented:

If, and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer - as, for instance, because it involves the interpretation of documents or because the law and facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer - the conclusion is a conclusion of law in which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.[6]

Applying those principles to the facts of the case before him, Denning L.J. concluded that the finding was one of law because it involved an examination of the memorandum and articles of association of the Research Association and involved questions of interpretation to those documents and the Act.

Subsequent cases where this need for the skills of a lawyer has served as sufficient reason to label a finding as one of law include the proper status of an employee where that status depended entirely on the construction of a written agreement[7] and again where the finding depended upon what was said to be "the reasonable inferences based on the legal interpretation of the contract."[8] A question of law is also involved in determining an issue of causation of injury for the purposes of compensation.[9]

The distinction between questions of fact and of law is vital to appeals in tax disputes,[10] because, on appeal, the decisions as to the facts by the BAC are conclusive.[11] This was noted by Lord Denning, MR, in *Griffiths v J.P. Harrison (Watford) Ltd*.[12] thus:

"*Now the powers of the High Court on an appeal are very limited. The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous on point of law.' Now here the primary facts were all found by the Commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusions from them. And it is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion....*"[13]

To this end, a distinction is often made between findings of fact, findings of law, or "mixed" findings of fact and

[1]. See, Elebiju I, *supra* note 13.
[2]. See Abdulrazaq II, *supra* note 89, at 2.
[3]. *British Launderers' Research Association v Borough of Hendon Rating Authority*, CA [1949] 1 K.B. 462; [1949] 1 All E.R. 21.
[4]. *Ibid.* [I949] 1 K.B. 462, at 471-72 per Denning L.J.
[5]. *Ibid.* at 471-72 per Denning L.J.
[6]. *Ibid*. at 472.
[7]. *Gould v. Minister of National Insurances*, [I9511 1 All E.R. 368.
[8]. *Morren v. Swinton and Pendlebury Borough Council*, [I965] 1 W.L.R. 576, at 583 per Lord Parker C.J.
[9]. *Hoveringham Gravels Ltd v. Secretary of State for the Environment*, [I975] 1 Q.B. 754. 126.
[10]. See, Salter & Ker, *Eason: Cases and materials on Revenue Law* (Sweet & Maxwell: 1990) at pages 30-35.
[11]. See Abdulrazaq II, *supra* note 89, at 2.
[12]. [1963] A.C. 1; [1962] 40 TC 281.
[13]. See, Lord Denning, MR, in *Griffiths v J.P. Harrison (Watford) Ltd*[1963] A.C. 1 at 16-17.

law.[1]

In Nigeria, the Supreme Court in *Ogbechie & Ors v. Onochie & Ors*,[2] has set out the approach to the determination whether a ground of appeal involves a question of law or of fact or of mixed law and fact thus:

> *" .... what is required is to examine thoroughly, the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case, it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law, in which case, it would amount to question of mixed law and fact."*[3]

These are useful guidelines but it is evident that they are not meant to be exhaustive,[4] and so, where the ground of appeal complains that the tribunal has failed to fulfil an obligation cast upon it by law in the process of coming to a decision in the case, such a ground would involve a question of law, namely: whether or not there is such an obligation or whether what the tribunal did amount to an infraction in law of such obligation, provided that all the facts needed are there on the record and are beyond controversy.[5]

Further, a ground of appeal would involve a question of law alone where in answering the question raised by the ground of appeal, the appellate tribunal can determine the issue on the admitted or uncontroversial facts without going beyond a direct application of legal principles.[6]

Where it is contended by a party on appeal that the principle of law on which the complaint is based is nonexistent or misconceived, that goes to the merit of the complaint and not to the threshold question as to whether or not the question involved is one of law.[7] However, the question of the merit of a ground of appeal is to be distinguished from one as to the nature of question involved in the ground.[8]

Again, for clarity, the issue raised in *Oando III* involved mixed question of facts and law or question of law, the FHC should have reviewed the BAC. In effect, the reaffirmation of the findings in *Oando III*, in the later case of *Oando IV* was erroneous.

VIII. *Oando IV* Decision Amounts to Approval of Double Taxation and a Violation of the Uniformity Clause Theory.

By allowing the retained earnings and/or franked income to be taxed twice, the ***Oando IV*** decision amounts to approving double taxation in Nigeria. Double taxation actually consists of the concurrence of four elements. At law, double taxation occurs where two taxes are imposed on:

1) by the same unit of state government,
2) for the same purpose,
3) over the same time period and
4) the objects of the two taxes--the persons, property, or privileges taxed-must partially overlap.[9]

The same rule was enunciated in *Global Marine International Drilling Corporation v FIRS*,[10] that double taxation can only happen where the same amount of income is taxed more than once in the hands of the same taxpayer.[11]

The unfavourable treatment[12] accorded to double taxation springs from an intuitive feeling that a transaction that has already been subjected to one type of tax should not be subject to additional taxes.[13] Thus, at law, this feeling is reflected in the notion that taxes should be equitably imposed.[14] According to the United States Supreme Court:

Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and,

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[1]. See, Abdulrazaq II, *supra* note 89, at 2.
[2]. (1986) Vol. 7 NSCC 443 (No.1), (1986) 2 NWLR (Pt. 23) 484 at 491
[3]. Per Honourable Kayode Eso, JSC in *Ogbechie & Ors v. Onochie & Ors* (1986) Vol. 7 NSCC 443, at Pp 445-6 (No.1), (1986) 2 NWLR (Pt. 23) 484 at 491
[4]. *Shanu v. Afribank (Nig.) Plc*. (2002) 17 NWLR (Pt.795) 185.
[5]. *Ibid*.
[6]. *Ibid*.
[7]. *Ibid*.
[8]. *Ibid*.
[9]. *Federated Mutual Implement Hardware Ins. Co. v. Commissioner*, 266 F.2d 66 (8th Cir. 1959); See, *generally* T. COOLEY, *supra* note 25, at § 223.
[10]. (2013) 12 TLRN 1 at 23
[11]. *Global Marine International Drilling Corporation v FIRS* (2013) 12 TLRN 1 at 23,
[12]. See, Carlos A. Saavedra, *supra* note 24, at
[13]. See, *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978) (the Court referring to the policy of avoiding the imposition of custom duties on the same goods by both the exporting and importing countries as based on the "intuitively appealing principle regarding double taxation").
[14]. See, Carlos A. Saavedra, *supra* note 24, at 143.

if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person.[1]

This notion of an equitable distribution of the tax burden has been incorporated into most constitutions in all common law jurisdictions in what have been termed "uniformity" clauses,[2] and these clauses generally require that all objects of a given class or type must be uniformly or equally taxed.[3] Therefore, the primary effect of these uniformity clauses has been to insure an equal tax burden distribution with respect to any one particular tax,[4] and under these clauses, if a tax is imposed on a given class or type of object, all such objects must be subject to the same tax.[5] It follows that if some objects of a class or type are taxed while others of the same type or class are not, or if the objects of the same class or type are taxed differently, the tax is found to be non-uniformly applied and is invalidated.[6] In *Flynn v. Kucharski*,[7] a county property tax was being collected in such a manner that, in some parts of the county, a small percentage of the tax funds was retained by units of local government and not paid into the county treasury.[8] The Illinois Supreme Court found that the effect of this practice was that people paid less county tax in some areas of the county than in others, thus violating the uniformity clause of the Illinois Constitution.[9]

A secondary effect of uniformity clauses has resulted from their application to situations where an inequitable tax burden distribution results not from one but from two taxes.[10] This extended application of the requirement for a uniform tax burden evolved into the doctrine of double taxation.[11]

It is in this context that the double taxation theory developed at a time when property taxes were the predominant form of state taxation.[12] The imposition of a second property tax on some but not all the property already taxed in a taxing jurisdiction was readily recognized by the courts as an unequal distribution of the tax burden and was, therefore, disallowed.[13]

For example, in *Campbell County v. Newport*,[14] the Kentucky Court of Appeals considered two real property taxes, one county-wide and the other limited to real property in cities and towns within the county.[15] The court noted that a relatively greater tax burden was placed on property located in cities and towns than on other property in the county.[16] Citing the uniformity clause of the Kentucky Constitution, the court found that this unequal distribution of the tax burden amounted to double taxation and overturned the cities-and-towns tax.[17] With the advent of new types of state privilege taxes in the first half of this century,[18] the definition of double taxation was expanded beyond its property tax context and given a more generalized form.[19]

To reiterate, as stated above, double taxation has come to be defined in terms of four elements.[20] Three

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1. *Tennessee v. Whitworth*, 117 U.S. 129, 137 (1886). *Accord*, *Schreiber v. Cook County*, 388 I11. 297, 58 N.E.2d 40 (1944).
2. See, Carlos A. Saavedra, *supra* note 24, at 143; See W. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION, at 3 (1959) [“NEWHOUSE”].
3. See, e.g., ILLINOIS STATE CONSTITUTION, Article IX, § 4(a) (real property must be uniformly taxed). See J. HELLERSTEIN & W. HELLERSTEIN, STATE & LOCAL TAXATION 27 (4th ed. 1978) [“HELLERSTEIN”]; Peairs, General Principles of Taxation: An Initial Survey, 6 TAX L.REV. 267, 292 (1951); NEWHOUSE, *supra* note 122, at 9-11. See generally Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 Ky. L.J. 31, 181, 377, 503 (1949-50) (“Matthews”).
4. *Ibid.* per Matthews, at 51-54.
5. See, Carlos A. Saavedra, *supra* note 24, at 143; *Ibid.* per Matthews, at 51-54.
6. See, e.g., *Idaho Telephone Co. v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967) (property of utilities taxed differently from other property); *In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959) (banks' capital stock taxed differently from other personal property).
7. 45 I. 2d 211, 258 N.E.2d 329 (1970).
8. See, Carlos A. Saavedra, *supra* note 24, at 143.
9. *Ibid.* per Carlos A. Saavedra, at 143-144.
10. *Ibid.* per Carlos A. Saavedra, at144.
11. See, *e.g.*, *C.F. Smith Co. v. Fitzgerald*, 270 Mich. 659, 259 N.W. 352, appeal dismissed, 296 U.S. 659 (1935). See, *also*, COOLEY, *supra* note 25, § 225 ("[T]here can be no double taxation, strictly speaking, under any constitution requiring equality and uniformity in taxation."); Wickersham, *Double Taxation*, 12 VA. L. REv. 185, 191 (1926); See also, Carlos A. Saavedra, supra note 24, at 144.
12. See HELLERSTEIN, supra note 123, at 1-6.
13. See, *e.g.*, *Chicago v. Collins*, 175 I11. 445, 51 N.E. 907 (1898) (a tax on all tangible personal property and a second property tax on automobiles results in double taxation). See COOLEY, *supra* note 25, § 223.
14. 174 Ky. 712, 193 S.W. 1 (1917).
15. See, Carlos A. Saavedra, *supra* note 24, at 144.
16. See, *Campbell County v. Newport* at 720-21, 193 S.W. at 6-7.
17. *Ibid*.
18. See, HELLERSTEIN, *supra* note 123, at 6-9.
19. See, Carlos A. Saavedra, *supra* note 24, at 144.
20. *Ibid.* per Carlos A. Saavedra, at 144.

of these elements establish that the same governmental burden is being supported by both taxes.[1] These elements require that both taxes be imposed by the same unit of state government, for the same purpose, and that both taxes be levied over the same time period.[2] The fourth element of the definition tests for the unequal distribution of this burden: both taxes must have objects that partially overlap.[3] Unless both taxes exhibit all four elements, no double taxation results.[4]

It is undeniable that in Nigeria, the EDT seeks to impose a second tax on the retained earnings as Oyedele had noted:

In essence, under Section 19 any dividend paid in the instances set out in the section will be treated as taxable profits subject to tax at the rate of 30%. If applied without measure, this invariably means an effective corporate income tax rate of 60% where previously taxed retained earnings are distributed, and at least 30% in all other cases including exempt income and gains taxable exclusively under the Capital Gains Tax legislation.[5]

IX. The American Approach on the Treatment of Retained Earnings[6]

Clearly, the issues in ***Oando IV*** relates to dividends. Under the United States Internal Revenue Code ("IRC"), "dividend" is defined as any distribution of property made by a corporation to its shareholders out of (a) earnings and profits accumulated after February 28, 1913 (accumulated earnings and profits; or (b) earnings and profits of the current taxable year (current earning and profits).[7]

Further, there are two (2) irrebuttable presumptions under the IRC, (a) that every distribution is deemed to have been made out of the earnings and profits to the extent that such exist and (b) such distribution is also deemed to have been made from the most recently accumulated earnings and profits.[8]

In this regard, CFR Title 26 § 316-2 provides thus:

§1.316–2 Sources of distribution in general.

(a) For the purpose of income taxation every distribution made by a corporation is made out of earnings and profits to the extent thereof and from the most recently accumulated earnings and profits. In determining the source of a distribution, consideration should be given first, to the earnings and profits of the taxable year; second, to the earnings and profits accumulated since February 28, 1913, only in the case where, and to the extent that, the distributions made during the taxable year are not regarded as out of the earnings and profits of that year; third, to the earnings and profits accumulated before March 1, 1913, only after all the earnings and profits of the taxable year and all the earnings and profits accumulated since February 28, 1913, have been distributed; and, fourth, to sources other than earnings and profits only after the earnings and profits have been distributed.

Rather than impose EDT, the IRC will tax all the distributions, and, if there is no retained earnings left, the initial investment in the company will decrease. Thus, the taxing authorities will first examine the most current earning and profits. It is only when the distributions exceed the current earnings and profits that the authorities would examine the previous years' records.[9]

Then comes the application of the integration principle, and so, the legal effects of distribution of operating/non-liquidating earnings, such as cash and/or property to shareholders must be taken into consideration. Tax treatment of dividends (operating distributions) is different that of return of capital to the shareholder. First, dividends must be included as income by the recipient. Second, corporate shareholders are allowed to deduct certain value of their dividends to prevent multiple taxation. Third, distributions that are not dividends are first treated as recovery of the shareholder's basis in his stock, with any excess over the basis to be treated as gain from sale or exchange of the stock.[10]

Using ABPlc as an example, let us assume that ABPlc's shareholders had invested N10,000,000.00 to start ABPlc, and, that, at the end of December 2014, ABPlc is now worth 15,000,000.00. If, in 2011 and 2012, ABPlc had made profits of N1,000,000.00 each year and then made N2,000,000.00 in 2013. Consequently, if

[1]. *Ibid.*
[2]. *Ibid.*
[3]. See, *e.g.*, *People ex rel. Hanrahan v. Caliendo*, 50 Ill. 2d 72, 277 N.E.2d 319 (1971), appeal dismissed.
[4]. See, Carlos A. Saavedra, *supra* note 24, at 144-145.
[5]. See, Taiwo Oyedele I, *supra* note 12.
[6]. See, Obayemi, *supra* note 6.
[7]. Section 316(a) of the Internal Revenue Code ("IRC") 26 USC § 316(a)
[8]. CFR Title 26 § 316-2(a), i.e., Section 1-316-2(a) of the Income Tax Regulations.
[9]. See, Obayemi, *supra* note 6.
[10]. *Ibid*.

ABPlc distributes N3,500,000.00 to its shareholders in 2014, FIRS will assume that the total distribution would leave a balance of N500,000 from 2011 as retained earnings, after having exhausted 2012 and 2013's earnings. If, later, ABPlc incurs a loss of N2,000,000.00 at the end of 2014, but goes ahead and distributes 2,000,000.00 to its shareholders, of this, N500,000.00 would be earnings and profits from 2011. The remaining distribution of N1,500,000.00 would be treated as recovery of basis by the shareholders of their investment in ABPlc. Their original investment of N10,000,000.00 would be reduced by N1,500,000.00—leaving a basis of N8,500,000.00.

If, in 2015, ABPlc is now worth N20,000,000.00, and ABCPlc's shareholders decide to sell ABPlc to XYZ, ABPlc's shareholders would have realized ordinary income of N11,500,000.00, i.e., N20,000,000.00 — N8,500,000.00.[1]

X. Taiwo Oyedele's Pragmatic Proposed Amendments to Section 19 EDT Rule.

In eradicating the double taxation posed by the present Section 19 EDT clause, Taiwo Oyedele has proposed the following amendments to the CITA that will create a *Dividend Tax Account*:

Proposed changes...

Section 19 Dividend Tax Account

1. A Nigerian company shall maintain a Dividend Tax Account in accordance with the provisions of this Section.

2. The initial amount in the Dividend Tax Account shall be established in accordance with subsection (6) and the balance of the Dividend Tax Account as of the date of filing tax returns in accordance with Part IX of this Act shall be carried forward to the subsequent year of income.

3. The dividend Tax Account shall be increased subsequently by:

a. the amount of profit which has been subjected to tax under the provisions of this Act;
b. the amount of income received as Franked Investment Income by the company and to which Section 80(3) of this Act relates;
c. the amount of any profit exempt from taxes by virtue of the provisions of the Industrial Development (Income Tax Relief) Act;
d. the amount of any income or profit exempt from tax under this Act; and
e. the amount of any gains which has been taxed under the Capital Gains Tax Act or any other law repealing, amending or replacing the Capital Gains Tax Act.

4. The Dividend Tax Account shall be decreased by an amount equal to the dividends paid by the company to its shareholders in any accounting period commencing from the creation of the Dividend Tax Account.

5. Where the balance in the Dividend Tax Account is decreased below zero in any year of assessment as a result of the deduction made under subsection (4) above, the balance shall be charged to tax at the rate prescribed in subsection (1) of section 40 of this Act.

6. The initial balance in the Dividend Tax Account shall be determined as follows

a. In the case of a company which has no distributable reserve as at the commencement of this Section, zero; and
b. In the case of a company which has distributable reserves as at the commencement of this Section, such amount of the undistributed profits accrued in accordance with Subsection 3 of this Section.[2]

The proposed amendment to CITA, by Oyedele attempts to shield all income and gains that have been previously subjected to any type of tax to be shielded from a second subsequent tax.

XI. The Canadian Model: Combined Capital Dividend Account And Anti-Avoidance Model.[3]

[1]. *Ibid*.
[2]. See, Taiwo Oyedele II, *supra* note 12.
[3]. See, generally, Kim G. C Moody, Moodys Gartner Tax Law LLP Canada: Capital Dividends And Anti-Avoidance Considerations, Last Updated on January 23 2013. Available at:

In Canada, most accountants and lawyers who deal with Canadian private corporations know that certain amounts can be received by shareholders tax free.[1] Specifically, tax free capital dividends can be paid to the shareholders of Canadian private corporations pursuant to subsection 83(2) of the Income Tax Act (the "Act")[2] which states:

> Section 83(2): Capital dividend [not taxable] — Where at any particular time after 1971 a dividend becomes payable by a private corporation to shareholders of any class of shares of its capital stock and the corporation so elects in respect of the full amount of the dividend, in prescribed manner and prescribed form and at or before the particular time or the first day on which any part of the dividend was paid if that day is earlier than the particular time, the following rules apply:
>
> (a) the dividend shall be deemed to be a capital dividend to the extent of the corporation's capital dividend account immediately before the particular time; and
>
> (b) no part of the dividend shall be included in computing the income of any shareholder of the corporation.

Thus, the tax free capital dividend relies on a positive balance in the corporation's "capital dividend account" which is defined is subsection 89(1) of the Act. To define "capital dividend account," involves looking at tax free profits and gains that may accrue to to the corporation. Thus, in general, the computation of the "capital dividend account" would include the tax free portion of capital gains (the 50% non-taxable amount) and certain life insurance proceeds realized by a corporation. The policy reason behind the capital dividend account is to preserve the integrity of tax free amounts that would otherwise be tax free if such amounts were realized directly in the shareholder's hands.[3]

In Canada, the payment of tax free capital dividends, however, are subject to an anti-avoidance rule in subsection 83(2.1) which says:

> 83(2.1) Idem [anti-avoidance] — Notwithstanding subsection (2), where a dividend that, but for this subsection, would be a capital dividend is paid on a share of the capital stock of a corporation and the share (or another share for which the share was substituted) was acquired by its holder in a transaction or as part of a series of transactions one of the main purposes of which was to receive the dividend,
>
> (a) the dividend shall, for the purposes of this Act (other than for the purposes of Part III and computing the capital dividend account of the corporation), be deemed to be received by the shareholder and paid by the corporation as a taxable dividend and not as a capital dividend; and
>
> (b) paragraph (2)(b) does not apply in respect of the dividend. [Emphasis added]

In Kim Moody's opinion, Section 83(2.1) is,

> "*...like most anti-avoidance rules, very broad, and it utilizes words like "main purposes" and the phrase "series of transactions". Accordingly, if a capital dividend is paid on the share of a capital stock of a corporation and the share is acquired in a transaction or as part of a series of transactions one of the main purposes of which was to receive the capital dividend then the capital dividend shall be deemed to be a taxable dividend*."[4]

When the Canadian Department of Finance introduced subsection 83(2.1) into the Income Tax Act in 1988, it revealed the policy intent behind the provision in its Technical Notes:

> *New subsection 83(2.1) provides an anti-avoidance rule which applies where one of the main purposes of an acquisition of shares is to acquire a right to a capital dividend. For example, a private corporation controlled by non-residents who would be taxable on capital dividends may be willing to*

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http://www.mondaq.com/canada/x/217466/Income+Tax/Capital+Dividends+And+AntiAvoidance+Considerations. Last visited on 20th January 2015

1. *Ibid.* Per Moody.

2. Income Tax Act of Canada (R.S.C., 1985, c. 1 (5th Supp.).

3. See, Moody, *supra* note 153. To the extent that the "capital dividend account" did not allow such amounts to be removed from the corporation tax free, there would be a large disincentive to realize capital gains in a company since the otherwise tax free portion of capital gains could only be removed to the shareholders by way of a taxable dividend. US citizens who are resident in Canada should be aware, however, that the receipt of capital dividends are taxable for US purposes.

4. See, Moody, *supra* note 153.

> *sell shares to another corporation and thereby transfer its capital dividend account in order to permit that other corporation to reduce the taxes payable on distributions to its domestic shareholders. In addition, a corporation not in a position to pay dividends itself may be willing to sell shares and thereby transfer its capital dividend account to another corporation the shareholders of which would not be taxable on the distribution. New subsection 83(2.1) is intended to apply to dividends paid in these circumstances.*[1]

On September 4, 2012 the Tax Court of Canada released its decision in *Groupe Honco Inc. et. al v. The Queen*.[2] There, Mr. Bédard owned all the shares of "Old Supervac". Mr. Bédard was terminally ill and given his illness "Old Supervac" had serious financial problems in 1998. In late 1998, Mr. Bédard accepted an arm's length offer from Mr. Lacasse which provided that one of Mr. Lacasse's companies, "New Supervac", would purchase inventory from "Old Supervac" and lease all of Supervac's business assets for a dollar. It also provided that "New Supervac" would have the right to acquire all of the shares of "Old Supervac". In 1999, Mr. Lacasse exercised his right to have "New Supervac" buy the business assets that had been rented until then and to buy the shares of "Old Supervac".

"Old Supervac", had tax losses being carried forward and therefore one of the objectives of Mr. Lacasse was to utilize "Old Supervac's" tax losses against the future income of "New Supervac". Accordingly, following the acquisition, "New Supervac" and "Old Supervac" were amalgamated into "New Supervac Amalco".

It appears that "Old Supervac" must have owned a life insurance policy with a death benefit of $750,000 on the life of Mr. Bédard. After Mr. Bédards passing, the life insurance death benefit appears to have been received by "Old Supervac" (or perhaps "New Supervac Amalco"...this was not entirely clear from the case). Accordingly the capital dividend account of "New Supervac Amalco" would have been increased by such amount. Capital dividends were then paid to the shareholders of "New Supervac Amalco". The Canada Revenue Agency then reassessed the recipients of the capital dividends on the basis that "New Supervac Amalco" did not have a capital dividend account because of the application of subsection 83(2.1).

It was the taxpayer recipient's position that the principal purpose for which "New Supervac" acquired the shares of "Old Supervac" was:

1. to perfect and complete its plan to recover its substantial investment in Supervac's structure;
2. to avoid the requirement for New Supervac to obtain certain certification that it required to carry on its business; and
3. to acquire Old Supervac's business loss carry-forwards and deduct them from its future income.

The Tax Court of Canada ("TCC") disagreed. Paragraphs 29, 30 and 34 of the decision concluded:

> *In all of these circumstances, I am simply unable to conclude that the taxpayers have discharged their burden of proof of establishing that the assessments were incorrect and that the acquisition of the capital dividend account, the value of which resided in its eligibility for distribution by way of capital dividend, was not among the principal purposes for New Supervac's acquiring the Old Supervac shares. In matters of intention in particular, the availability of contemporaneous corroborative evidence from written documents or from third parties takes on somewhat greater significance. In this case, it appears that the structuring and negotiation of the transactions was done by Groupe Honco's outside lawyer and Mr. Lacasse and, from the seller's point of view, by Old Supervac's lawyer, perhaps aided by its accountant.*
>
> *Clearly, Old Supervac's advisors were well aware of the existence and value of the capital dividend account. They had declared a capital dividend to Mr. Bédard's widow. It is reasonable to assume that the sellers, that is, the shareholders of Old Supervac, in trying to maximize the proceeds they received, would have sought some recognition of the value of this intangible asset in the form of a tax account. They did not testify.*
>
> *For these reasons, the taxpayers have not met their onus or satisfied their burden of proof and I am unable to be satisfied on a preponderance of the evidence that the acquisition of the capital dividend account and the payment of the capital dividends were not one of the principal purposes of the series of transactions. For these reasons the appeals must be dismissed.*[3]

The TCC thus found that subsection 83(2.1) applied and that the payment of the capital dividends were therefore

1. Technical Notes to Section 83(2.1).
2. *2009-2134 (it)(g).*
3. See, Paragraphs 29, 30 and 34 of *2009-2134 (it)(g).*

taxable dividends and not tax free. Besides making for an interesting read, the decision reminds us not to underestimate the power of anti-avoidance rules. Had the parties done a better job of establishing and documenting non-tax purposes for the acquisition of the Old Supervac shares, the TCC might have ruled differently.

On appeal, the Canadian Federal Court of Appeal ("FCA") upheld the Tax Xourt's decision. The FCA accepted the evidence of the taxpayers to the effect that the transactions had several principal purposes having no connection with the capital dividend account of Old Supervac. However, the FCA was of the view that the expression "one of the main purposes" is without ambiguity and suggests that a taxpayer may have multiple main reasons to acquire the shares. The FCA did not find a determining error that would have justified modifying the conclusions of the TCC.

Interestingly, the FCA refused to consider the possible application of subsection 83(2.3) of the Act which provides an exception to the anti-avoidance rule in subsection 83(2.1) when the capital dividend account is increased by life insurance proceeds. As a result, the scope of subsection 83(2.1) remains to be determined. For instance, it is not clear whether this exception could apply where successive payments of capital dividends are made through a chain of corporations.

The decision reached in this case is somewhat surprising, since the tax policy underlying this specific anti-avoidance rule is generally aimed at prohibiting the trading of capital dividend accounts.[1] In the *Honco* case, genuine business considerations were driving the transactions and actual assets were purchased. The scope of subsection 83(2.1) was interpreted very broadly by both the TCC and FCA. Taxpayers should consider the implication of this broad interpretation in structuring their transactions. The taxpayers have not sought leave to appeal the FCA decision to the Supreme Court of Canada. Careful planning is always needed when dealing with broad anti-avoidance rules.

XII. Conclusion

To truly raise tax revenue, government must adopt a broad base approach that simplifies the tax system, encourages voluntary compliance, expands the tax base and sanction defaulters regardless of their status in the society.[2]

In the recent times, due to the non-passage of the Petroleum Industry Bill (PIB), continuing oil theft and vandalism, tumbling oil prices, unaccounted-for oil revenue and Nigeria's loss of the United States market, among others, depicted an oil industry in a state of flux, Nigeria's oil and gas industry has been witnessing dwindling fortunes which started in 2005 when oil and gas workers and installations came under militant attacks in the Niger Delta.[3] With this low income accruing from oil and gas industry also witnessed the divestment by International Oil Companies ("IOCs")

For instance, in 2014, Royal Dutch Shell initiated and concluded the sale of its four Nigerian onshore oil blocks – Oil Mining Leases (OML) 18, 24, 25 and 29 – in addition to the Nembe Creek Trunk Line (NCTL), and this divestment followed a 2013 review of its business in the country, as part of the Anglo/Dutch giant's plan to dispose of $15 billion of assets globally in 2014 and 2015.[4]

> *In an effort to reduce its exposure to onshore operations, which are more prone to security threats, Shell and its joint venture partners – Total and Agip had in 2009 commenced the divestment of their 45 per cent stake in onshore assets.*
>
> *In 2014, Shell divested 30 per cent of its interest in the four blocks, while Total and ENI initiated the sale of 10 per cent and five per cent, respectively.*
>
> *Fifty-five per cent will be retained by the Nigerian National Petroleum Corporation (NNPC) under a Joint Operating Agreement (JOA) with the new buyers.*
>
> *The sale of these four assets brought the number of oil blocks sold by Shell to 12 in the last four years. The oil major had previously sold OMLs 4, 38, 41, 26, 30, 34, 40 and 42 to local investors and their international partners.*
>
> *Of the eight oil fields previously divested by Shell, only OMLs 4, 38 and 41 are operated by the new buyer, Seplat Petroleum Development Company, while the operatorship of the other five blocks were transferred to the Nigerian Petroleum Development Company (NPDC), the upstream subsidiary of NNPC.*
>
> *Under the 2014 divestment programme, Aiteo Group acquired OML 29, the most prolific of the oil assets offered to buyers, and the Nembe pipeline.*

1. Nathalie Marchand, Montréal, Application of Anti-Avoidance Rule to Deny Capital Dividend Treatment, in Miller Thomson - Lawyers | avocats, August 2013.
2. Taiwo Oyedele, What about the 2015 Budget?, in Guardian [Nigeria] Newspaper, Monday, 26 January 2015 ("Oyedele III").
3. See, Ejiofor Alike, An Oil Industry in Disarray, in ThisDay [Nigeria] Newspaper 30 Dec 2014.
4. *Ibid. per* Ejiofor Alike.

Other partners in the Aiteo Group-led consortium include Tempo Energy Resources, which has a 10 per cent stake and Taleveras with five per cent equity in the consortium.
The disposal of the Nembe pipeline, which moves oil through the Niger Delta to the Atlantic coast, is seen as Shell's biggest move yet to exit onshore crude production in Nigeria.
The 60-mile Nembe Creek Trunk Line is one of Shell's two key pipelines in the eastern Niger Delta, which the oil giant replaced in 2010 at a cost of $1.1 billion.
Mart Resources is part of the Erotron consortium that won the bid for OML 18. Its other partners include indigenous operator Midwestern Oil and Gas and Suntrust Oil.[1]

In fact, for OML 18, the Erotron consortium was reported to have offered $1.2 billion for the oil block; Aiteo offered $2.562 billion for OML 29 and the Nembe pipeline; Pan Ocean Corporation Nigeria Limited offered to pay $900 million for OML 24; while Crestar secured OML 25 having offered $500 million for the oil asset.[2]

With the sustained capital flight due to other reasons, there is an urgent need for statutory amendment to the EDT is the consensus among all the commentators.[3] This has been echoed by Taiwo Oyedele:

The bulk of the issues stated earlier arise due to the misinterpretation of the section by the FIRS. The lawmakers should therefore amend the law to make the section crystal clear as a solution to the problems. I have suggested the above changes to the National Assembly since 2012 to amend the provisions of Section 19 of CITA. It is difficult to understand why this has not been considered. If amended as proposed, it will ensure that the law achieves the intended purpose of subjecting taxable but untaxed profits to tax and at the same time avoid subjecting companies to double taxation or subjecting exempt profits to tax. This will encourage investments and establishment of holding companies in Nigeria.[4]

This position has been seconded by Elebiju thus:

There is no better way to close than to reiterate the conclusion in my 2nd EDT article: "I am not aware of any current legislative initiative to repeal EDT provisions, but the earlier this is done, the better. Repeal should improve Nigeria's tax competitiveness rating, provide necessary clarity as well as obviate needless tax litigation." EDT is an anomaly and should be repealed.[5]

In fact, that the *Oando IV* decision offends against the rule against double taxation was further evident from Elebiju's capitulation:

The TAT correctly noted at p.6 of the judgment that "there is no reference [in s.19 CITA] 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." Truly, since "no tax payable" is in respect of the YOA to which the dividend declared relates, it is of no moment that being retained earnings, the amounts from which the dividend is paid had previously suffered CIT. This obviously does not sound right from a double taxation point of view, but as we know so well, "there is no equity about tax", the clear provisions of statute must be applied. (Emphasis added)[6]

In fact, we find no justification for Elebiju's conclusory surmise that:

"Although double taxation offends the canons of taxation, it is the very essence of the excess dividend tax (EDT) provision of Nigerian tax law (sections 19 and 20(b) CITA)."[7]

As it is now conceded that double taxation occurred with current operation of the EDT provision, the time is definitely ripe for necessary amendments, which will simultaneously curb tax avoidance and also abolish double taxation. Nigeria has been acclaimed as the largest economy in recent times.[8] According to the Editorial in Vanguard Newspaper (Nigeria):

Nigeria recorded 89.22 per cent growth in Gross Domestic Product (GDP) in 2013, making it the largest economy in Africa and 26th in the world. The position was previously occupied by South

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1. *Ibid. per* Ejiofor Alike.
2. *Ibid. per* Ejiofor Alike.
3. See Victor Onyenkpa, *supra* note 15, at page 2; See, *also,* Oyedele I, *supra* note 12; Oyedele II, *supra* note 12; and Elebiju I, *supra* note 13.
4. See, Taiwo Oyedele II, *supra* note 12.
5. See, Elebiju I, *supra* note 13.
6. See, Elebiju I, *supra* note 13.
7. See, Elebiju II, *supra* note 73.
8. Nigeria: Africa's new Number One, April 12th 2014. Available at: http://www.economist.com/news/leaders/21600685-nigerias-suddenly-supersized-economy-indeed-wonder-so-are-its-still-huge. Last visited on 20th January 2015.

Africa.[1]

Therefore, it would not be appropriate for the income and revenue that should accrue from foreign investment to be diverted to other countries, as a result of double/multiple taxation.

[1]. Nigeria overtakes South Africa as Africa's largest economy, on April 06, 2014 in News, Vanguard Newspaper (Nigeria). Available at: - See more at: http://www.vanguardngr.com/2014/04/nigeria-overtakes-south-africa-africas-largest-economy/#sthash.hyoQHT64.dpuf. Last visited on 20th January 2015.

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