

INTERPRETATION OF TAX STATUTES: AN EXAMINATION OF THE SUPREME COURT APPROACH

by

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Introduction

It is disquieting to note that only one tax case, *Shell Petroleum Development Company v. Federal Board of Inland Revenue*¹ was decided by the Supreme Court during the fairly long tenure² of Mohammed Uwais as the Chief Justice of the Federation of Nigeria. Remarkably however, the lead judgment in the case was delivered by Mohammed Uwais, CJN. This writer's reflection on the significance of the case was expressed elsewhere thus:

"The case is significant in many respects. First and foremost, it is the first pronouncement ever by the Supreme Court of Nigeria on the provisions of the *Petroleum Profits Tax Act*,³ as amended. Second, it is the only case on taxation that has been decided by the court since the *Marina Nominees Ltd. v. FBIR*⁴ which was decided in 1986, a space of ten years apart. Third, it is one of the few cases that have gone through the entire stages of the tax appeal process from the Federal Body of Appeal Commissioners to the Supreme Court. Fourth, the case was a *battle royale* fought by the parties for almost two decades."⁵

This chapter examines some of the Supreme Court tax cases since inception in order to decipher the approach of the court to the interpretation of tax Statutes. The chapter is divided into seven parts. Part one introduces the work while Part two examines the general rules of interpretation of statutes in general and the ancillary aids. Part three probes whether tax statutes are interpreted specially or whether they follow the general rules. The legislative and judicial approaches to the challenges of tax avoidance and evasion are also considered in this part. Part four focuses on some of the decisions of the Supreme Court in tax cases with a view to deciphering the approach of the court. Part five is devoted to the consideration of the facts of *Shell v. FBIR* and the contributions of the Honourable Chief Justice of the Federation of Nigeria in the landmark case.

The retirement of the Honourable Justice Mohammed Uwais CJN provides a golden opportunity for critical reflection on why there is paucity of Supreme Court decisions on tax cases and the appropriate intervention that will be required to address the situation. In this regard, Part six attributes this

¹(1996) 8 NWLR (pt. 466) p. 256 SC, (1996) 9-10 S.C. N.J. p. 231, (1997) N.R.L.R. (pt. 1) p.1 Hereinafter referred to as "*Shell v. FBIR*".

²1995 - 2006.

³[1986]2 N.W.L.R. (pt. 20) p. 48.

⁴Cap 354, Laws of Federation of Nigeria CLFN) 1990.

⁵A.O Sanni: "Deductible Expenditure under the Petroleum Profits Tax Act: *Shell Petroleum Development Company v. FBIR*", (2001) LASU L.J Vol. IV Issue 1 January pp.53-4.

development partly to corruption and the long and tortuous journey of tax appeal procedure from objection to the tax authority; appeal to the Body of Appeal Commissioners; re-hearing of the appeal by the High Court to the Court of Appeal and finally to the Supreme Court. The work is concluded in Part seven.

The General Rules of Interpretation of Statutes

The general rules of interpretation of statutes are well settled under Nigerian jurisprudence. Where the language is clear and unambiguous, the court must strive to give effect to it. This approach is known as the Literal Rule.⁶ The rule is founded on the premise that the function of the judiciary is to interpret and not to make law.⁷ If judges were granted the latitude to depart from the clear and unambiguous wordings of a statute, they may substitute their own intention for that of the legislature and thus, defeat the purpose of the law. The primacy of the Literal Rule has been affirmed in a plethora of cases.⁸

The Literal Rule is simple and fair enough except that there are often circumstances where the words of a statute may not be as clear and unambiguous as one would expect. This may be due to the limitation of language as a medium of expression,⁹ inability of the legislature to foresee all natural and social possibilities in the future and or drafting errors. Therefore, the wordings of a statute may be vague or capable of more than one meaning. The golden rule may be applied where the application of the plain grammatical interpretation of a particular provision will produce absurd, inconsistent and ambiguous results. In such circumstances, the court may apply the golden rule to remove the absurdity, inconsistency and ambiguity. The assumption is that the legislature could not have intended an absurd result. In *Becke v. Smith*, Parke B. observed:

"It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further."¹⁰

The Golden rule cannot be invoked for every imaginable inconvenience or absurdity. It envisages the presence of some internal disharmony or logical inconsistency either between parts of the same statute or between a statute or some other principle of law.

⁶Dias, R.W.M: *Jurisprudence*, Butterworth (London) 5th ed., 1985, p.171.

⁷The office of a judge is *jus dicere*, not *jus dare*, Per Bairamian, J.S.C. in *Okumagba v. Egbe* [1965] 1All N.L.R. 62.

⁸*Ifezue v. Mbadugha* [1984] 1SCNLR 427, *Chief Obafemi Awolowo v. AlhajiShehu Shagari Ors.* (1979) 6-9 S.C. 51, *Adegbenro v. Akintola*, (1962) 1 All NLR 465, *R v. Bangaza*, (1960) 5FSC1, *Okumagba v. Egbe* [1965] 1All NLR 62, *A.G. of Ondo State v. A.G. of the Federation* [1983] 2 SCNLR 269, *Lawal v. Ollivant* [1972] 3SC 124, *Animashaun v. Osuma* [1972] All NLR 363, *Toriola v. Williams* [1982] 7 S.C.27, *Ogbuyiya v. Okudo* [1979] 6-9 sc 32, *Mobil Oil v. FBIR* [1977] 3SC 53.

⁹English is not an instrument of mathematical precision. "Per Lord Denning" in *Seaford Court Estates Ltd. v. Asher* [1949] 2 KB 481.

¹⁰(1836) 2 M & W at p.195.

Any other form of inconvenience resulting from other circumstances that the party concerned would thereby be under a burden or suffer any personal discomfort would not suffice.¹¹ The Golden rule was applied in *Council of the University of Ibadan v. Ademolekun*,¹² *R v. Eze*,¹³ *Ejor v. IGP*.¹⁴

Where the court finds the literal and golden rules unhelpful, it may resort to yet another rule known as the Mischief Rule. This rule considers the historical antecedent of a statute and the purpose(s) of the law, that is, the shortcoming which the law is meant to address. The rule prescribes that the court should interpret the statute in such a way as will advance the purpose (remedy) and minimize the mischief (shortcomings). This Mischief Rule was laid down in *Heydon's case*.¹⁵ According to Tindal C.J. in the *Sussex Peerage Case*:¹⁶

"If any doubt exists from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute and to have recourse to the preamble which according to the Chief Justice is a key to open the minds of the maker of the Act and the mischief which they intend to redress."

In addition to these rules, the courts have developed other ancillary rules to serve as aids in the interpretation of statutes. These include the *ejusdem generis* rule,¹⁷ *expressio unis est exclusio alterius*,¹⁸ *Nositur a sociis*,¹⁹ *lex non cogit ad impossibilia*,²⁰ *ut res magis valet quam pareat*.²¹

It is noteworthy that a judge is not bound to follow any particular rule. This has some advantages and disadvantages. One of the advantages is that it gives a judge a measure of flexibility in coming to a decision depending on which of the rules he considers appropriate in the circumstances of each case. One of the disadvantages, however, is that it might make the task of statutory interpretation so uncertain that no one is sure of the exact meaning of a statutory provision until it has been interpreted by the highest court.²²

¹¹ J.O. Asein: *Introduction to Nigerian Legal System*, Ababa Press Ltd. 2nd ed., 2005, p.54.

¹² (1967) 1 All NLR p.213.

¹³ (1950) 19NLR 110.

¹⁴ [1963] 1 NLR 250

¹⁵ (1584) 3 Co. Rep. 7.

¹⁶ (1884) 11 c1 & Fin 8S.

¹⁷ Where there is a list of particular species which falls under an identical class followed by general words, the scope of the general words is restricted to things which belong to the class to which all the specific or particulars fall.

¹⁸ The express mention of one thing results in the exclusion of others.

¹⁹ This principle simply means that a word should be interpreted in the context in which it appears.

²⁰ The principle means that a statute is to be construed in such a manner as not to command the doing of what is humanly impossible because the law does not compel the doing of impossibilities.

²¹ Where a provision, for instance, is capable of two mutually exclusive interpretations one of which will make the provision valid and effective, while the other will make it invalid and ineffective the provision ought to be interpreted in such a manner as to make it valid.

²² The Realists in their analysis of the concept of law focused mainly on the court system. They posited that law is what is declared by the judiciary as such. The exponents of American realism are Oliver Wendell Holmes, Justice Jerome Frank, John Chipman Gray and Karl Llewellyn. The School developed in the 1920's and reached its zenith in the 1930's. See F. Adaramola: *Adaramola Basic Jurisprudence*, Nayee Publishing Co. Ltd., 2003, pp.318-9.

In practice, a judge does not just discard a rule for another without rationalizing why he prefers one to another. For instance, where a Judge adopts a golden rule, he must show his difficulty in applying the Literal Rule and the absurdity that would result therefrom. Also, a judge must show why he prefers to apply the Mischief Rule in a particular case rather than either the Literal or Golden Rule. Judges may not be bound by law to expressly declare their preference for a particular rule of interpretation, they are nevertheless obliged to rationalise their judgment in order to help litigants, their counsel and members of the public to appreciate the basis of their judgments.²³

Interpretation of Tax Cases

Having provided an overview of the general principles of statutory interpretation in Nigeria, the question is whether tax statutes are interpreted in a similar way or whether they are given special treatment?

Tax is a compulsory exaction of money by a public authority for public purposes or raising money for the purposes of government by means of contributions from individual persons.²⁴ In the same vein, Akanle defines a tax as "a compulsory levy imposed on a subject or upon his property by the government having authority over him."²⁵ Like all statutes imposing pecuniary burdens on the subject, tax statutes are construed strictly. This is due to the expropriatory nature of taxes and their impact on the right to property.²⁶ The principle was expressed by Rowlat J in *Cape Brandy Syndicate v. IRC*²⁷ thus:

"In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One has to look fairly at the language used."

²³When a case comes before the court, the judge will have to resolve the conflicting interests of the parties and that of the society by coming to a decision in form of a judgment or ruling. In making his decision, the judge will obviously be influenced in varying degrees by factors such as the probative value of the evidence adduced; the rhetoric and logicity of the argument of the counsel to the parties and how compatible those positions are with established legal standards and principles. In the final analysis, the judge will have to justify his decision in a reasoned judgment. B. Odunsi: "Legal Reasoning and Approach to Problems" in *Introduction to Nigerian Legal Method*, ed. A.O. Sanni, Kuntel Ltd., 2002, p. 59.

²⁴*Matthews v. Chicory Marketing Board* (Vict), (1938) 60 C.L.R. 263 at 276 per Justice Latham of the Australian Supreme Court. In the same vein, Akanle defines a tax as "a compulsory levy imposed on a subject or upon his property by the government having authority over him. See O. Akanle: *Nigeria Income Tax Law and Practice*, Centre for Business and Investment Studies Limited, Nigeria, (1991), p. 4.

²⁵See O. Akanle: *Nigeria Income Tax Law and Practice*, Centre for Business and Investment Studies Limited, Lagos, Nigeria, (1991), p. 4. Naiyeju also defined "tax" as "a compulsory payment levied on the citizens by the government for the purpose of achieving its goals. See I.K. Naiyeju: *Value Added Tax: The Facts of Positive Tax in Nigeria*, Kupag Public Affairs, Nigeria, (1996), p. 12.

²⁶Section 44 of the Constitution of the Federal Republic of Nigeria, 1999 (Hereinafter referred to as the "1999 Constitution") guarantees the right to property. Section 44(2)(a) however, further provides that "the prohibition of compulsory taking of property shall not be construed as affecting any "general law for the imposition or enforcement of any tax, rate or duty." See section 44 of the 1999 Constitution.

²⁷[1921] K.B. 64.

The same sentiment was echoed by the Judicial Committee of the Privy Council in *Crawford v. Spooner*²⁸ thus:

"We cannot aid legislature's defective phrasing of an Act, we cannot add and mend and, by construction, make up deficiencies which are left there."

This judicial attitude to the interpretation of tax statutes promotes certainty, which is one of the most important requisites of a good law. A tax payer ought to be able to determine the tax consequences of his transaction beforehand and then decide whether or not he wants to proceed with it.²⁹ For instance, if a tax is imposed on "income" it must clearly define what is meant by "income" under the Act³⁰ otherwise a person will not be liable if he is able to show that what accrues to him is not an "income" within the meaning of the Act but a "capital gain" or "realization of capital."³¹

It must be noted however, that the application of a literal rule is a double edged sword in the sense that it may work in favour of a tax payer or to his detriment. Where the language of a taxing statute is clear, the taxpayer is liable to pay no matter how harsh or burdensome it may be. In *Coltness Iron Company v. Black*,³² Lord Blackburn said:

"No tax can be imposed on the subject without words in any Act of Parliament clearly showing an intention to lay a burden on him. But when that intention is sufficiently shown, it is, I think, vain to speculate on what would be the fairest and the most equitable mode of levying that tax."

Danckwerts, L.J. was no less emphatic in *Mapp v. Oram*³³ when he posited that:

"In my view, it is not admissible by speculatively attributing to Parliament an intention on the ground that it might be fair and reasonable to bring into a statute provisions which are not to be found in the statute. The provisions of the statute must be taken as they are and the court is not at liberty to improve them because a situation which might be anticipated is not provided for."

Opportunities for Tax Planning - Evasion v. Avoidance

A vibrant industry known as tax planning or tax avoidance has developed in the field of taxation as a consequence of the cardinal rule of interpretation of taxing statutes. No one seems to have a precise idea of what is meant by the term "tax avoidance" or "tax planning". The term can be defined as a

²⁸(1846) 6 Moore PC 189.

²⁹S.O. Fashokun: "An Assessment of Efforts Against Tax Avoidance and Evasion in Nigeria: The Legal Viewpoint," Vol. 10 (1976) *Nigerian Law Journal*, pp. 17-18.

³⁰Section 3 of the Personal Income Tax Act Decree No. 104 of 1993 now Cap P8 LFN 2004 defines "income" widely to include gains or profits from trade, business, profession, vocation, salary, wage, fee, allowances, compensation, bonuses and other perquisites.

³¹The Capital Gains Tax Act was enacted in Britain and in Nigeria in order to plug avoidance techniques of turning what is really taxable profits into capital gains. See A.K. Ibigbami: "An Assessment of Capital Gains Tax in Nigeria", *Tax Law and Tax Administration in Nigeria*, eds, M.A Ajomo & O. Akanle, NIALS, 1991, pp. 204-207.

³²(1881) App Ca, 315 at p.330.

³³(1968) 3 All E.R. 1 at p.5.

systematic way of organising one's affairs with a view to minimising one's tax obligation, as much as possible.³⁴ To borrow from Wheatcroft's aphorism, it is "the art of dodging tax without actually breaking the law."³⁵ To Flesch, it is the "lawful carrying out of a transaction which was entered into, or which took a particular form for the purpose of minimising taxation."³⁶ The attainment of this end requires a good knowledge of the tax laws and careful consideration of alternative means of effecting a transaction and their tax effects.

Tax avoidance excites different reactions in different people - including judges. It is nevertheless accepted by most people that a tax payer is entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the tax authority.³⁷ Tax avoidance is what all sensible people do in order to reduce their tax liabilities.

Tax avoidance is legal while tax evasion is illegal. This is because tax evasion involves deliberate dishonesty on the part of a taxpayer which is illegal.³⁸ The boundaries between tax avoidance and tax evasion are shadowy at best, what matters is the boundary between successful and unsuccessful tax planning. For instance, if two people marry in order to reduce tax burden they are practising tax avoidance; but if they tell the tax authority that they are married when they are not, they are guilty of tax evasion.³⁹

In *IRC v. Duke of West Minister*,⁴⁰ the Duke covenanted to pay his Gardeners a yearly sum by a deed of covenant in lieu of wages. The payment was without prejudice to the right of the Gardeners to claim the wages to which they may be entitled. However, the Gardeners understood that they were not expected to claim any wage for the duration of the covenant so long as payments were made under it in lieu. The object of the scheme was to make the Gardeners' wages deductible in arriving at the Duke's total income.

The House of Lords upheld the scheme saying that in deciding the consequences of a transaction, the courts will look at the legal effect of the bargain which the parties have entered into and not take account of any supposed artificiality. With the advantageous tax result, the Duke escaped paying higher rate taxes on the covenanted sums.

Need for Legislative and Judicial intervention

The Westminster case may be a triumph for the tax planners; it is not without a negative effect on tax revenue. Consequently, the legislature and judiciary have adopted different interventions for restricting tax avoidance opportunities.

³⁴*Black's Law Dictionary* defines tax avoidance as the minimisation of one's tax liability by taking advantage of legally available tax planning opportunities. See *Black's Law Dictionary*, ed Bryan A. Garner, West Group, St. Paul, Minn., 5th ed, p. 1310.

³⁵G.S.A. Wheatcroft: "The Attitude of the Legislature and the Courts to Tax Avoidance" (1955) 18 *M.L.R.* 209.

³⁶M.C. Flesch: "Tax Avoidance - The Attitude of the Courts and the Legislature" (1968) *C.L.P.* 215 at 215-216.

³⁷S.T. Mayson & S. Blake: *Mayson on Revenue Law*, Blackstone Press Ltd., 1980, p.8.

³⁸*Ibid.* p.8.

³⁹M.T. Abdulrazaq: *Abdulrazaq Nigerian Revenue Law*, Malthouse Press Limited, (2005), pp7-8.

⁴⁰[1936] AC 1. Hereinafter referred to as the Westminster case.

Legislative Approach

No matter how careful the legislature might have been in crafting a tax law, an adroit tax planner may still be able to exploit certain loopholes which the legislature may not have envisaged. As soon as a particular loophole is successfully exploited by the planner, the legislature is likely to go back to the drawing board and plug the loophole through appropriate amendment of the statute. Such an approach will take the form of a specific anti-avoidance provision aimed at curbing a particular scheme or arrangement.⁴¹ However, experience has shown that in the course of plugging an existing hole, another one may be unwittingly created which is soon exploited by ingenuous tax planners. Consequently, a legislative intervention may take the form of general anti-avoidance provision.

This strategy is to vest the tax authority with the power to disregard any transaction which in its own opinion is artificial or fictitious which reduces or will reduce the amount of any tax payable and give such direction which will counteract the reduction of liability to tax. The general anti-avoidance provision is contained in section 17 of the Companies Income Tax Act⁴² thus:

(1) Where the Board is of the 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 adjustment 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.

(2) For purpose of this section:

(a) disposition - includes any trust, grant, covenant, agreement or arrangement;

(b) Transactions between persons one of whom either has control over the other or, in the case of individuals who are related to each other or between persons both of whom are controlled by other persons shall be deemed to be artificial or fictitious if in the opinion of the Board those transactions have not been made on terms which might fairly have been expected to have been made by persons engaged in the same or similar activities dealing with one another at arms length.;

(c) A company in respect of which any direction is made under this section, shall have a right of appeal in like manner as though for the purposes of Part X of this Act such direction were an assessment.

The scope of this general anti-avoidance provision is so consumingly frightening that one may conclude, on the face of it, that it must catch both the guilty and the innocent avoidance schemes.⁴³

⁴¹For a discussion of the different forms of specific anti-avoidance provisions under the Nigerian tax law see s.o. Fashokun, *op. cit.*, pp. 19-27.

⁴²Cap 60 LFN 1990

⁴³S.O. Fashokun, *op. cit.*, p.27.

Judicial Approach

The principle in the *Westminster* case has sometimes induced taxpayers to split up their transactions, hoping that the court will look at each part of the transaction in isolation, rather than considering the substance of the overall transaction.⁴⁴ Subsequent to the *Westminster* case, a new approach has been developed by the court in interpreting tax cases. Under this new approach, the court will not treat as conclusive the name by which the parties chose to call a transaction and thus, disregard mere nomenclature. Rather, it will also look at the surrounding circumstances in order to determine the rights and liabilities under a genuine transaction.⁴⁵ An arrangement will be upheld if it is *bona fide* and has been given proper legal operation while sham or artificial transactions will be disregarded. In *Johnson v. Jewitt*,⁴⁶ it was held that the court will not give effect to transactions which are not *bona fide* or which are used as a cloak to hide the real transactions.⁴⁷

Furthermore, where there is a series of transactions, the court will not consider the legal effect "step-by-step" but will take a holistic view of the entire transaction in order to determine whether a step has been inserted in a transaction solely for a fiscal purpose.

In *Floor v. Davis*.⁴⁸ Eveleigh L.J. in the Court of Appeal said in his dissenting judgment that "I see this case as one in which the court is not required to consider each step taken in isolation."

In *W. T. Ramsay Ltd. v. I.R.C.*,⁴⁹a case involving artificial use of self-cancelling transactions, the court held that the principle in the *Westminster* case must not be over-stated or over-extended.

According to the court, the principle does not compel the court to look at a document in blinkers, isolated from any context to which it properly belongs." Rather than examine each document or transaction in isolation, the court will only give effect to it if it is intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole."

The new approach has been applied in *I.R. C. v. Burmah Oil Co. Ltd.*⁵⁰and *Furnish v. Dawson*⁵¹ and the consolidated appeal by the House of Lords in *Craven v. White, IRC v. Bowater Properties Limited and Baylis v. Gregory*.⁵²In these cases, the House of Lords made it clear that the new approach is applicable where there is a pre-ordained series of transactions entered into with no purpose other than to mitigate tax, but does not apply in cases where the whole scheme is not pre-ordained. Therefore, the question is whether the transaction constituted a single and indivisible whole.

⁴⁴Mayson, *op. cit.* p.10.

⁴⁵*I.R. C. v. Horrocks* [1968] 3 All ER 296.

⁴⁶(1961) 40 TC 231.

⁴⁷*Johnson v. Jewitt* (1961) 40 TC 231.

⁴⁸[1978] Ch 295.

⁴⁹[1982] A.C. 300.

⁵⁰[1982] STTC 30.

⁵¹[1984] AC 474.

⁵²[1988] 3 All ER 495. HL.

The series will not be pre-ordained if at the time the first transaction was entered into, it was not clear that the whole series would be followed through. That is, when the first step in the scheme was taken it was not clear that the other steps would necessarily automatically follow.

The Approach of The Supreme Court

This section is devoted to the examination of some of the Supreme Court cases on the Law of Taxation with a view to deciphering whether the court can be said to have consistently adopted the same approach, if any, over the years.

Rejection of English Cases as Authorities

It suffices to point out that as early as 1962, the Supreme Court had attempted to cultivate the attitude of not sheepishly following English tax cases. In *Chairman of the Board of Inland Revenue v. Joseph Rezcallah & Sons Ltd.*⁵³ the question was whether a taxpayer can impugn the validity of an assessment after the time prescribed by the Income Tax Act has lapsed. The Supreme Court held that the special procedure for disputing an assessment under the Act (in Nigeria) does not preclude the court from inquiring into the validity of an assessment in the absence of any express provision to that effect. According to the court:

"I have found the case mentioned by counsel helpful in considering the general principle involved, but it is to the wording of the Nigerian Act that I have looked in deciding that the High Court has not been deprived of its jurisdiction to consider the validity of an assessment on a claim for recovery of tax alleged to be due. I will refer briefly to the three cases on this point cited by counsel for the appellant. The case of *Inland Revenue Commissioners v. Pearberg* related to the wording of the United Kingdom Finance and Income Tax Acts and wording of these Acts differ from the Nigerian Law under consideration here....."

This decision has had a salutary effect on the articulation of the rights of the taxpayer to challenge any arbitrary assessment at any time even when he has omitted or failed to object within the time prescribed under the tax laws.⁵⁴ If the Supreme Court had not taken a proactive view of the law, the tax officials would have been able to force arbitrary assessments down the taxpayers' throats even if the assessments had been issued without jurisdiction.

Also in *Mobil Oil (Nig.) Ltd v. FBIR*,⁵⁵ the Supreme Court held:

"It may be observed that the relevant provisions of the English Income Tax Act, which are counterparts of our s.50, are not identical with our s.50 and consequently, it may be postulated that making reference to the English decisions may generally serve little purpose or no purpose at all. Nevertheless, guidance may be sought in English decisions which were concerned with the

⁵³Nigerian Tax Cases (hereinafter NTC) 78.

⁵⁴See cases on the meaning and scope of "final and conclusive." See *Aboud v. Regional Tax Board* NTC 124. *FBIR v. Ibadan Bus Service NTCLR* p. 165, *Ilorin Native Authority v. Mallam Musa Ajao* NTCLR P. 127.

⁵⁵(1977) 1 N.C.L.R. 1.

meaning given to the word "discovers" in the English section of the Income Tax Acts which permit making additional assessment upon discovery."

Rejection of Undue Technicality

The Supreme Court has consistently rejected technical argument or sham transactions to evade tax obligations. In what is perhaps the first reported tax case by the Supreme Court, *Godson Okoli v. Commissioner of Internal Revenue*,⁵⁶ the Appellant received 2,855 pounds commission from UAC Nigeria Limited as a servant of a company known as "The Produce and General Service Company".

The commission was deemed to be part of his personal income. An assessment notice dated 15th March 1958 was served on the Appellant about three months later on 23rd June 1958. There was an alteration of the date on the assessment notice to 23rd June but the circumstances of the alteration were not made clear to the court. Rather than producing sufficient evidence of his income, the Appellant contended that the assessment notice was time barred having been served on him three months after it was dated. The Respondent on its part contended that the proper date of the assessment was 15th March and that the appeal was not time barred. It was held the appeal was not time barred as it was released 3 months after it was written to the appellant and no fixed date of payment appeared on the Notice. In any case, since the Appellant did not give sufficient evidence of the income of the company on behalf of which he received the income, he had not discharged the onus of proof of his income.

The taxpayer in *Effiong Uwaltah v. CIR*,⁵⁷ fared better by producing an audited account to prove excessive assessments. In that case, the appellant was engaged as a factor to two firms on which he received commission. His tax for the 1959/60 assessment year was first assessed at 143 pounds based on income of 1648 pounds 5 shillings and 3 pence. He objected to the assessment and forwarded audited account computed by an accountant, which put his income at 433 pounds 16 shillings and the tax at 16 pounds 10 shillings. The account was rejected and another assessment was computed based on the income of 1106 pounds and tax payable of 70 pounds. The Appellant contended that his account as computed by the accountant ought not to have been rejected and that his status as a married person with six children should be recognised and reflected in the tax relief granted to him.

It was held that although the onus of proof of excessive assessment rested with the taxpayer, no evidence was led to show that there was an increase in the taxpayer's income in the year 1959/60 as compared to 1958/59 and 1960/61 when he was assessed to pay lower taxes. The assessment for 1959/60 was therefore, excessive. Re-assessment was ordered to the limit of 70 pounds. Being dissatisfied, the CIR appealed to the Supreme Court. The order of the High Court was set aside and the matter was referred back to the Assessment Authority with directions to make a fresh assessment acting in consultation with the Respondent and his advisers but without any limit on the total at which the ascertained annual income may be fixed. It was obvious from this decision that the Supreme Court was

⁵⁶NTC 64. Ademola CJ delivered Judgment in the case on October 31st 1960. The appeal went from the decisions of Palmer AG.J. of the High Court Enugu.

⁵⁷NTC 73.

concerned that assessment should be based on law and not the whims and caprices of the tax officials or even the law court.

In *G.M. Akinsete Syndicate v. Senior Inspector of Taxes, Akure*,⁵⁸ the Appellant, Chief GM. Akinsete was a licensee of certain timber extraction rights. He had an agreement with Coast Timber Company Limited for the extraction, management and sale of the timber of the land over which he had concession. The agreement which was signed in June 1953, permitted the sharing of profits among the parties. Another supplemental agreement was signed in January 1959, between the Appellant, the company and a joint licensee made up of four individuals. The supplemental agreement which created a partnership between the licensee and the joint licensee provided that the interests and benefits of the licensee under the first agreement "now belongs" to the joint licensee called "G. M. Akinsete Syndicate".

The Respondent assessed the Appellant to tax for the income accruing to him out of the timber business for the accounts of the year ended 1958. The Appellant contended that the partnership had existed as a matter of fact since the signing of the first agreement although the partnership agreement itself was signed only in 1959.

Furthermore, it was argued that because of the phrase "now belongs" in the second agreement, the income and other benefits accruing to him had reverted to the joint partnership with effect from the date of the first agreement in 1953 and therefore, the appellant cannot be taxed on the income of the timber business accruing in 1958.

The Respondent on its part contended that there was no agreement in fact and in law by the year 1958 on which the assessment was based. And that if there was any, the transaction was artificial and fictitious and should be disregarded in accordance with section 15 of the Income Tax Law of Western Nigeria. It was found on evidence that (i) there was no partners' account and (ii) the share of profits of the syndicate was paid into the account of Chief Akinsete who withdrew and used the money as he pleased.

Affirming the decisions of the Body of Appeal Commissioners and the High Court, the Supreme Court held that the existence of the syndicate before 1959 was not proved. The supplemental agreement of 1959 only created the partnership on that date. The Appellant was rightly assessed as the *bona fide* owner of the income accruing to him from the venture in 1958. Bairamian, J.S.C. remarked that:

"It is trite that a person may use lawful means to avoid tax; what he may not do is to try to evade it. What he does should be genuine - not merely a veil to hide or dissemble the reality of things ..."

In *Mobil Oil (Nig.) Ltd v FBIR*,⁵⁹ the Respondent examined the accounts of the Appellant for 1968/69 and 1969/70 and discovered that the Appellant made losses for the two years in question. The Respondent raised assessments which were paid by the Appellant.

⁵⁸NTC 109.

⁵⁹(1977) 1 N.C.L.R. 1

The Respondent subsequently raised additional assessments under section 30A of the Companies Income Tax Act, 1961(CITA) at the rate of 10% of the turnover of the accounts submitted. The section empowered the respondent to raise additional assessments if it was of the opinion that profits declared by the Appellant in the accounts was less than expected from the business carried on by the Appellant, The additional assessments were raised by considering the rate of profits on the turnover and other income of the Appellant, the operational returns of the Appellant over the preceding years from 1962 to 1969.

The Appellant appealed to the Body of Appeal Commissioners, which dismissed the appeal and upheld the assessments. On further appeal to the Federal Revenue Court, the rate of the assessment was reduced from 10 per cent to 8 per cent as the court was of the opinion that the Respondent took extraneous matters into consideration in raising the additional assessments. The Appellant further appealed to the Supreme Court, *inter alia*, on the ground that (i) the Respondent can only raise additional assessment if there is evidence of discovery of new facts to reopen the assessments, (ii) there was no basis for the respondent to impose a turnover assessment under section 30A since the profits of the Appellant were known as shown by the accounts and (iii) that the profits were not less than expected to arise from the business considering the prevailing circumstances.

The court found that the Respondent did not make the assessment solely on the performance of the company's competitors. Rather, the principal basis of the assessment had been the size and magnitude of the company's business as revealed by the returns it had submitted to the Respondent over the years and accounting interpretation and projection of those returns made by the Respondent. It was held that the Respondent has power to make an assessment or additional assessment not only on discovery of new facts but also on discovery of new issues which, though, founded on the same facts, have not previously been determined. There were grounds that the Appellant's profits for the years of assessment were less than might be expected. This being the case, the Board has power to correct its error by making an additional assessment under section 30A. According to Bello 1.S.C (as he then was):

"The literal meaning of s.30A is clear and unambiguous. It empowers the Board to assess a company subject to the conditions prescribed therein on such fair and reasonable percentage of the turnover of the company as the Board may determine. In our view, there is no injustice in assessing a company on a percentage of its turnover. Such legislation has received the approval of democratic societies, for example, s.28 of the Australian Income Assessment Act, 1922 and s.80 of the English Taxes Management Act, 1970. Furthermore, the literal meaning of the section is compatible with the social policy rule of interpretation of a statute, conservatively known as the mischief rule, which may be epitomised thus: In construing a statute, regard shall be given to the cause and necessity of the Act and then such construction shall be put upon it as would promote its purpose and arrest the mischief which it is intended to deter . . . some companies have been manipulating their accounts with intent to hide their true assessable profits and in that manner have been avoiding tax which they ought to have paid. The purpose of section 30A (of the Companies Income Tax Act) is to deter companies from engaging in such a fraudulent practice. "

Undoubtedly, the decision of the Supreme Court is sound based on the facts of the case. However, the reference of the learned Justice to the "mischief rule" might give the impression that the court had applied the mischief rule in interpreting the provisions of s. 30A in question. A careful reading of the facts of the case and the above quotation would reveal that the learned Justice in fact applied the literal rule. First, the quotation began with a statement that the "literal" meaning of the section was "clear and unambiguous."

Second, the literal meaning of the section was said to be compatible with the social policy rule of interpretation of a statute. The social policy rule of interpretation of tax statutes to our mind is still the literal rule. Against this background, it is submitted that the reference by the learned Justice to the mischief rule is not sufficient to come to the conclusion that the mischief rule was applied in the case.

In *Marina Nominees Ltd. v. FBIR*,⁶⁰ Peat Marwick Casselton Elliot & Co ("Peat Marwick") a firm of Accountants, acted also as secretaries to a number of limited liability companies. Peat Marwick, while acting as Secretaries to their clients was making use of members of their staff as such Secretaries. But whenever those employers left the services of Peat Marwick, it became necessary to file returns with the Registrar of the Companies to satisfy the requirements of the Companies Act. According to the provisions of the Companies Act, 1968, whenever there is a change of Secretaries of a limited liability company, the company concerned is obliged to file returns with the Registrar.

In order, therefore, to take advantage of perpetual succession and to prevent frequent filing of returns of change of Secretaries, Peat Marwick incorporated the appellant company - the Marina Nominees Limited in March 1964, to act as Secretaries to limited liability companies on their behalf. The subscribers of the Appellant were two senior partners of Peat Marwick. The company had other objects. It had no staff of its own. All the staff who carried on secretarial duties were employees of Peat Marwick. Therefore, the secretarial work was done by Peat Marwick in the name of the Appellant and all the bills for services rendered by the appellant were raised in favour of Peat Marwick. Peat Marwick was of the view that since the Appellant did not actually run the services, it had no right to the income. Consequently, the Appellant neither filed any income tax returns nor paid any company tax since its inception.

That situation continued from 1964 to 1973 when the Respondent raised for the first time, assessment of company tax payable by the Appellant from the year 1964/65 to 1972/3. A dispute arose between the Appellant and the Respondent on whether the Appellant should be liable to pay tax on income it earned. The Appellant contended, in the Federal High Court and the Court of Appeal, that it merely acted as agents of Peat Marwick and that the income it earned belonged to Peat Marwick which had already paid tax on such income. Both courts rejected the contention and a further appeal to the Supreme Court was taken.

The crux of the appeal was whether the profits derived from the secretarial jobs concerned were chargeable as part of the profits of Peat Marwick or as part of the profits of the Appellant. It was held that: (i) the device of agency by using one incorporated company for the purpose of carrying on an

⁶⁰ [1986] NWLR (pt.20) 48

assignment for another company or person must not overlook the fact that the incorporated company is a separate legal entity which must fulfil its own obligations under the law; (ii) whatever might have been the arrangement between the Appellant and Peat Marwick for the use of its staff for performing those services, it does not affect the fact that it has earned its own income; (iii) the Appellant is liable to pay the assessed tax. Once the tax is paid, it is then up to the Appellant to Peat Marwick which is not a party to this appeal, to approach the Lagos State Government for any adjustment that can be made in respect of the income tax it has already paid for the period covered by the assessment.

Mohammed Uwais Contribution - *Shell v. FBIR*

Due to the strategic importance of the oil sector, the Petroleum Profits Tax Act⁶¹ was enacted as a separate regime for the taxation of companies engaged in petroleum operations in 1959 while other companies are subject to the Companies Income Tax Act.⁶² Since the enactment of the PPTA, the provisions of the Act were interpreted by the Supreme Court for the first time in the case of *Shell v. FBIR* in which the lead judgment was delivered by Mohammed Uwais, C.J.N.

In that case, the Appellant was a Nigerian company engaged in petroleum operations and therefore, liable to pay Petroleum Profits Tax under the Petroleum Profits Tax Act (PPTA). Hitherto, the Appellant had been paying its Petroleum Profits Tax in Nigeria in Naira, which is the official currency of the country. However, the Federal Government directed the Appellant to start paying its tax together with other allied payments in foreign currency to the Central Bank of Nigeria (CBN) account with the Bank of England in the United Kingdom. The Appellant complied with the directives and later claimed that it incurred losses in the process of converting Naira into Pounds Sterling to meet the obligation. The Federal Government, by another letter dated 16th March 1972, directed the Appellant to start paying a commission of 0.5 percent to the CBN with effect from December 1971, in respect of the Pound Sterling lodgements into the bank's account with the Bank of England.

Pursuant to regulations 26 and 27 of the Petroleum Drilling and (Production) Regulation 1969,⁶³ the Appellant created a scholarship scheme for Nigerian undergraduates in various disciplines in many Nigerian universities and incurred a sum of N257,500.00 (Two Hundred and Fifty Seven Thousand Five Hundred Naira only) on the scheme in the 1973 fiscal year. The beneficiary was neither bonded to work with the Appellant nor was the Appellant obliged to employ them after their graduation. The Appellant had a policy of employing some percentage of the beneficiaries who obtained either First Class or Second Class Upper Degrees while the rest had to seek employment elsewhere.

The Appellant submitted its Petroleum Profits Tax returns for the accounting period 1st January 1973 to 31st December 1973, to the Respondent. The returns contained the revised tax assessment which, in the view of the Appellant, was payable by it. The Respondent disallowed four items from the returns on the ground that they were not deductible for the purpose of computing the chargeable tax of the

⁶¹Cap 354 LFN, 1990 (hereinafter referred to as "PPTA").

⁶²Cap 60 LFN, 1990 (hereinafter referred to as "CITA")

⁶³Cap 350 LFN, 1990.

Appellant. These were (i) Exchange losses - N3, 355,991.00, (ii) Central Bank commission - N2, 915,429.00, (iii) Scholarship expenses - N257, 550.00 and (iv) Gifts and donations - N61, 222.00.

Being dissatisfied with the Respondent's decision, the Appellant appealed to the Body of Appeal Commissioners ("the Commissioners"). At the hearing, the appeal in respect of the fourth item on "gifts and donations" was abandoned. The Body of Appeal Commissioners upheld the ruling of the Respondent and dismissed the appeal. The Appellant further appealed to the Federal High Court against the ruling of the Commissioners. The Federal High Court allowed the appeal in respect of exchange losses and Central Bank of Nigeria (CBN) commission but dismissed the appeal against the scholarship expenditure. Both parties were dissatisfied with the decision of the Federal High Court and appealed to the Court of Appeal. The Appellant appealed against the confirmation of the assessment on scholarship expenditure while the Respondent cross- appealed against the annulment of the assessment on exchange losses and CBN commission. The Court of Appeal dismissed the appeal by the Appellant and allowed the cross-appeal by the Respondent and thereby restored the ruling of the Appeal Commissioners. Being dissatisfied, the Appellant finally appealed to the Supreme Court.

The thrust of the Respondent's argument against the deductibility of all the items was that the Appellant must bear the expenses from its after-tax profit since they were not specifically exempted under the PPTA. The Appellant argued that the variation of the mode of payment of Petroleum Profits Tax by the Federal Government and its compliance with the directive constituted an accord and satisfaction of its prior obligation to pay tax in Naira under the Act. Furthermore, all the expenses were incurred in the course of obeying the directive of the Federal Government and were, therefore, incurred in the course of its petroleum operations.

Uwais CJN in his lead judgment held that the exchange losses would have been clearly non-deductible if the case had been contested purely on the provisions of the Act. However, the additional obligations imposed on the Appellant by the Federal Government had introduced another dimension to the case. Since the Appellant would not have incurred the exchange losses if not for the directive, there was no reason why the exchange losses should not be allowed. Furthermore, CBN commission was "wholly, exclusively and necessarily" incurred by the Appellant in the course of its petroleum operations having been paid in the course of complying with the directive of the Federal Government and therefore, deductible under section 10(1). Also, in as much as the scholarship expenses were statutory obligations, which the Appellant must perform, they were "wholly, exclusively and necessarily" incurred for the purposes of the Appellant's petroleum operations. It was immaterial that the Appellant did not employ all the beneficiaries of the award.

While this judgment has been praised by practitioners,⁶⁴ it has received knocks from academics.⁶⁵ The portion of the judgment which has attracted the most severe criticism is where the learned Chief Justice of the Federation declared that:

⁶⁴See E.O. A. Idowu: "The Landmark Case of *Shell BP v. FBIR* ", *Nigerian Tax News*, Vol. III, No.1, 1997, pp. 12-16. 1.1. Emuwa: "Deductibility of Expenses in Computation of Profits" *MODUS International Law and Business Quarterly*, Vol. 2, No.3 p. 94.

" ... By reason of the agreements and not the provisions of the Petroleum Profits Tax Act, 1959, as amended, the doctrine of equity will apply to compensate the Appellant for the exchange losses it incurred."⁶⁶

The basis of the criticism was that the decision derogated from the well-established principle that there is no equity in tax and also gave administrative directives overriding effect in the interpretation of a tax statute.⁶⁷ Apparently, the mortal fear of commentators was that going by the doctrine of judicial precedent, the Supreme Court may have unwittingly discarded the principle that tax statutes must be interpreted literally.

A painstaking reading of the judgment will however reveal that this fear may not be justified. This is because, the learned CJN made it categorically clear that he was interpreting the provisions of the extra-statutory agreements and not the provisions of the PPTA. That being the case, the pertinent question to ask is whether it is appropriate to invoke the doctrine of equity in the interpretation of the extra-statutory agreement. In answering this question, it is necessary to reflect more on the background and facts of the case.

In the early 1970s, the Federal Government consciously entered into a Memorandum of Understanding (MOU) with the companies engaged in petroleum operations during a period of oil glut and threat of massive disinvestment from Nigeria. The thrust of the MOU was to grant a series of incentives to the companies which were not given statutory backing including a guarantee of a minimum percentage of profit per barrel. When the reasons for granting the incentives may have ceased, instead of reviewing the agreements or terminating them, the Federal Government started dishing out unusual directives which imposed financial burdens on the companies. Since virtually all the expenses were incurred sequel to government directives why should they not be allowed for tax purposes on the technical excuse that they were not specifically deductible under the PPTA? Should the government be allowed to eat its cake and have it? These considerations must have influenced the decision of the learned CJN in the case. Having found the provisions of the PPTA unhelpful, rather than leave the taxpayer helpless, the learned CJN ingenuously turned to the provisions of the agreement which then provided a platform for invoking the principle of equity.

On the Dearth of Tax Cases

The determination of both parties in *Shell v. FBIR* to see the case to a logical conclusion is salutary. For many years, the case will be a guiding light on the interpretation of the relevant provisions of the Petroleum Profits Tax in particular and tax cases in general. Nigeria's tax jurisprudence would definitely have been poorer without it. This is because, unlike other commercial subjects, it is very rare for tax cases to get to the Supreme Court in Nigeria. We hasten to say however, that the paucity of tax cases is

⁶⁵See M. T. Abdulrazaq: *Nigerian Tax Law - A Review* (unpublished) paper presented at the launching of the Nigerian Tax Law by Prof. LA. Ayua, at the Benue Hotels, Makurdi, Benue State on 21st December, 1996. A.O Sanni: "Deductible Expenditure under the Petroleum Profits Tax Act: *Shell Petroleum Development Company v. FBIR*", [2001] *LASU Law Journal* Vol. IV Issue 1 January pp.53-4.

⁶⁶*Supra*, p. 286, para. E.

⁶⁷M.T. Abdulrazaq: *Abdulrazaq Nigerian Revenue Law*, Malthouse Press Limited, (2005), p.12.

not peculiar to the Supreme Court but cuts across all courts of competent jurisdiction. This may not be essentially bad. It may mean that most taxpayers are not unnecessarily litigious and are alive to their civic responsibility to pay their tax as and when due. In that case, the less tax cases go to court, especially the Supreme Court, the less expensive the cost of tax administration and recovery would be.

However, the paucity of tax cases in Nigeria can hardly be attributed to positive values on the part of the taxpayers, the administrators or the tax system. Rather, the problem is due to a combination of factors including the prevalent practice whereby unscrupulous tax officials and taxpayers, either directly or through a representative,⁶⁸ clandestinely resolve tax disputes through corrupt practices to the detriment of the development of Nigerian tax law and administration.⁶⁹ Many taxpayers seem to prefer this option rather than going through the rigour and expenses of litigation, especially against the background of lack of prosecution for tax offences in Nigeria. Besides, the journey to the Supreme Court is quite long and requires the spirit of a long-distance runner.

A taxpayer who is aggrieved with the assessment by a tax authority is obliged to first object and wait for a decision whether to review or otherwise before he can appeal to the Body of Appeal Commissioners if dissatisfied with the decision. The onus of proving that the assessment is excessive is on the taxpayer.

Therefore, both the taxpayers and the tax authority are obliged to call evidence and establish the fact of their cases. If either the taxpayer or the tax authority is dissatisfied with the decision of the Body of Appeal Commissioners, it may appeal to the High Court. Unlike a normal appeal, the appeal from the decisions of a Body of Appeal Commissioners to the High Court involves a rehearing of the facts and not just a review of the records as it is the case in normal appeals.

In *Mobil Oil (Nig.) Ltd v. FBIR*,⁷⁰ the Respondent, purporting to act in exercise of its power under section 30A of the Companies Income Tax Act, 1961, as amended, assessed the Appellant to tax at the rate of 15% of what it described as "turnover as per accounts" for the year 1968/69 and 1969/70. After further communication and correspondence between the parties, the assessment was reduced to 10%. The Appellant was dissatisfied with the assessment and objected. Upon the Respondent's refusal to revise the assessments, the Appellant appealed to the Body of the Appeal Commissioners. On 23rd March 1973, the Body of Appeal Commissioners upheld the assessments subject to some deductions. Still dissatisfied with this decision, the Appellant appealed to the High Court of Lagos State from where the record of proceedings was forwarded to the Federal Revenue Court then newly established to hear and determine matters pertaining to the revenue of the Federal Government.

The Appellant appealed on six grounds and set out the facts on which it proposed to rely in 20 paragraphs in compliance with rule 5(2) of the Income Tax Appeals (Lagos) Rules. The Respondent denied some of the averments contained in the Appellant's pleading and "put the Appellants to the strictest proof thereof." The Appellant applied pursuant to rule 15, *inter alia*, to call additional evidence.

⁶⁸CITN is in the vanguard of safeguarding the tax profession and the filing of tax returns.

⁶⁹Other reasons include the poor enforcement of the tax laws, non-establishment of the Body of Appeal Commissioners and the Revenue Committees at the State and Local Government levels, dependence of the country on oil revenue leading to the neglect of other sources of revenue including taxation.

⁷⁰(1977) NSCC 110.

His application was opposed by the Respondent. In a considered ruling, the Federal Revenue Court held that the application will be granted upon the condition that the Appellant will "fully inform the court of the nature and the extent of the evidence which the Appellants proposed to adduce and the reasons why it was not called at the earliest opportunity which the appellant had of doing so. The court held:

"Despite the extraordinarily wide provision of section (15(2) in so far as an appeal to this court is concerned, I do not share the view of the Appellant's learned counsel nor do I think that the sub-rule confers a 'carte blanche' on an Appellant or a Respondent to transgress all the known principles of law, which govern adduction of further or new or additional evidence on the hearing of an appeal. To my mind, any such view will make a complete mockery of the exercise by this court of its appellate jurisdiction in respect of decisions from the Appeal Commissioners.... "

Being dissatisfied with the ruling, the Appellant appealed with the leave of the Federal Revenue Court to the Supreme Court. It was held that in an action before the High Court, both the Appellant and the Respondents are entitled to call evidence, if they so desire, in support of the facts stated in the grounds of appeal and in the Respondent's answer as the case may be. The court has no power to force the Appellant to give particulars of the nature and extent of the evidence which he proposes to call in the exercise of that right.

The appropriate procedure to be adopted by a High Court when hearing appeals from the decisions of the Body of Appeal Commissioners has also been considered in *FBIR v. Daib A. Nasr*,⁷¹ where the Supreme Court stated thus:

"The reference to the onus of proof makes it clear that an appeal to the High Court is an appeal on fact as well as law and the High Court of Lagos (Income Tax Appeal) Rules assimilate the procedure on an appeal to that in an action and provide for the adduction of evidence. The position is thus different from that in England, where the High Court is bound by the Commissioner's finding of fact, provided there was any evidence to support them. The reference to the onus of proof also means that if the taxpayer wishes the court to hold that the assessment complained of is excessive, he must produce sufficient evidence to enable the court to decide not merely that the assessment is excessive but how much it is excessive. "

If either a taxpayer or the tax authority is not satisfied with the decision of the High Court, appeals goes to the Court of Appeal and finally to the Supreme Court. Therefore, by the time a tax case gets to the Supreme Court, the parties would have had about five opportunities to argue their cases. While this may be good for some lawyers, we cannot ignore the cost and benefit analysis in terms of cost of administration. Against this background, it is suggested that the High Court (Income Tax Appeal) Rules of various states should be amended along the lines of the English position where the High Court is bound by the Commissioner's finding of fact, provided there was any evidence to support them.

⁷¹(1964) 1 All NLR 408.

Alternatively, we may draw inspiration from the Constitutional provision which makes the Court of Appeal the final court with respect to election petitions by making the Court of Appeal the final court for tax cases.⁷²This will however require a constitutional amendment in order not to run foul of the provision of the 1999 Constitution which vests the Supreme Court with jurisdiction to hear and determine appeals from the Court of Appeal.⁷³In this regard, an express provision may be inserted in the Constitution along the same lines as the provision of section 246(3) of the 1999 Constitution that "The decisions of the Court of Appeal in respect of appeals arising from taxation shall be final." Either of these suggestions would significantly reduce the duration of tax appeals generally and save the time and resources of the government and the taxpayers in their pursuit of justice. It is trite that tax revenue goes to the soul of a nation;⁷⁴hence, it is injurious to the good health of the government and tax development for tax cases to be delayed for unduly technical reasons.

Conclusion

Although, in most of the cases examined in this chapter, the Supreme Court does not profess to adopt any particular rule, it is clear, however, that the court leans more in favour of the literal rule which is the cardinal rule in the interpretation of tax statutes. An examination of the cases reveals a general reluctance by the court to allow either the taxpayer or the tax authority to use undue technicality to evade their respective obligations without upsetting the literal rule. An attempt has been made to rationalize the basis of the lead judgment of Mohammed Uwais, CJN in the case of *Shell v. FBIR*.⁷⁵If a company incurs expenses as a result of carrying out the directives of the Federal Government, it will be unfair for such expenses to be disallowed by the tax authority on technical grounds.

For instance, can there be a logical basis for disallowing expenses of a scholarship scheme under which several Nigerian undergraduates have benefited and continue to benefit? Oil companies (and corporate bodies generally) would have been discouraged from providing scholarship schemes as part of their corporate social responsibilities if Mohammed Uwais CJN led Supreme Court had not allowed the scholarship expenses as deductible. The current and future beneficiaries of such scholarship schemes owe their good fortunes to the judicial sagacity and ingenuity of Mohammed Uwais CJN. Against this background, the decision of the learned CJN in *Shell v. FBIR*⁷⁶ should therefore, be understood based on its peculiar facts.

⁷²See section 246(3) of the 1999 Constitution.

⁷³See section 233(1) of the 1999 Constitution.

⁷⁴According to Justice Latham of the United States' Supreme Court, taxing power is " ... the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as the air he breathes to the natural man. It is not only the power to destroy, it is also the power to keep alive." See *Nichols v. Ames* (173 U.S. 509 (1929)), p. 505

⁷⁵ *Supra*

⁷⁶ *Supra*