

DEDUCTIBLE EXPENDITURE UNDER THE PETROLEUM PROFITS TAX ACT: *Shell Petroleum Development Company v. FBIR*¹

Abiola O. Sanni*

1. Introduction

All income tax systems generally seek to impose tax on a net income or profit.² In the simplest terms the net income or profit of a taxpayer can be defined as “the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts”.³ Hence, in ascertaining the net income or profit of a trade or business, it is necessary to determine the trading receipts and deduct from them the trading expenditure. Ordinarily, one would expect account to be taken of all receipts and expenditure during the period of assessment. However, not all receipts and expenditure are allowed to be brought into the trading account for tax purposes.⁴ Granted that the taxpayer is entitled to deduct certain expenditure from his gross receipts, the question arises: which expenditure?⁵ This question is crucial to both the taxpayer and the tax collector that most of the time may be working at cross-purposes. While the taxpayer may be seeking to claim every conceivable item of his expenditure in order to reduce his tax liability, the tax collector on the other hand may be seeking to curtail the deductible expenditure in order to maximise the tax yield.⁶

The case of *Shell Petroleum Development Company v Federal Board of Inland Revenue*⁷ typifies the usual contest of claims between the taxpayer and the tax authority over deductible expenses. The case is significant in many respects. First and foremost, it is the first pronouncement ever by the Supreme Court on the provisions of the *Petroleum Profits Tax Act*,⁸ as amended. Second, it is the only tax case decided by the court after *the Marina Nominees Ltd. v. FBIR*⁹ since 1986, a space of ten years apart.¹⁰ Third, it is one of the few cases that have gone through the entire stages of the tax appeal process from the

¹(1997) N.R.L.R. (pt.1), (1996) 9-10 S.C. N.J. p. 231, [1996]8 NWLR (pt. 466) p.256 SC. All references in this work unless otherwise stated is to (1997) 1 N.R.L.R (pt.1) p.1

²There are exceptions to the general rule, the most important being withholding taxes that are imposed on gross receipts. See V. Thuronyi, *Tax Law Design and Drafting*, Vol.2. International Monetary Fund (IMF) 1998 p. 501.

³*Russel v. Town County bank* (1888) App. Cas. 418, per Lord Herschel at p.424, 2 T.C. 321 at p.327.

⁴O. Akanle, *Nigerian Income Tax Law and Practice*, (1995) Centre for Business and Investment Studies Ltd. p.327.

⁵A. Ipaye, "Tax Treatment of Gifts and Donations", MPJFIL Vol. 2 No.1 p. 128.

⁶The history of tax legislation generally has disclosed that tax legislation is essentially preoccupied with the problem of control of tax avoidance and evasion. See A.G: Karibi-Whyte, "Interpreting and Understanding Nigerian Tax legislation", O. Akanle, ed. *Tax Law and Tax Administration in Nigeria* NIALS (1991) p.87.

⁷Supra

⁸Cap 354, *Laws of Federation of Nigeria (LFN)*, 1990 *Tax Law and Tax Administration in Nigeria*, NIALS (1991) p.87.

⁹[1986]2 N.W.L.R. (pt.20) p.48

¹⁰B.B. Kanyip, "Taxation Issues in Foreign Investment", MP JFIL, 2 (1998) No.1 p. 121.

Federal Body of Appeal Commissioners to the Supreme Court.¹¹ Fourth, the case was a *battle royale* fought by the parties for almost two decades.¹² A distinguished Scholar has rightly opined that the case is bound to become the favourite object of case comments and reviews. In his words:

*Given the topicality of the issues raised by Shell Petroleum Development Company v Federal Board of Inland Revenue and the rather unsettling decisions of the Supreme Court on aspects of the case, it is only a matter of time before the case (too) will become the favourite object of a case comment and review.*¹³

The facts of the case are brief and not in dispute. However, the analysis of the facts and the argument assumed a monstrous complexity. Lamenting his difficulty in following the argument of both parties, M.L. Uwais, C.J.N. had this to say.

*... I would like to make some observations on the briefs of argument filed by the parties. The Appellant's brief consists of 70 pages while the Respondent's brief is made up of 435 pages (including the preliminaries). Surely, these are, with respect, far from the ideal. Rather than assist the court to easily follow the argument in support of the questions for determination, they helped in making the argument complex. Had it been the circumstances herein were ordinary, we would have no difficulty in striking out the briefs for offending the Rules. Be that as it may, I consider the questions raised by the appeal as important and will, therefore, endeavour to consider the argument contained in the briefs best as I can, but not without trepidation...*¹⁴

Speaking in the same vein S.M.A., Belgore, J.S.C. said:

*I agree that but for the importance of this appeal as a revenue matter of the government on strategic petroleum tax, the Respondent's brief of argument is not a brief for the purposes of our Rules. I would have discountenanced it, but I take it for what it is worth as some aid memoire. If the energy exerted in preparing it had been devoted to the study of the issues, this court would have been greatly helped. I must confess that I find not much use much use in the brief for all its length of over five hundred pages.*¹⁵

It is clear from the above statements that the complexity of the briefs of the parties and their oral argument obfuscated the main issues and perhaps led the court into many aberrations contained in the judgement.

¹¹c/f A.G. Ogun State v. Alhaja Ayinke Aberuagba & Ors. (1984). S.C. 20 which was commenced at the High Court of Justice, Ogun State, Nigeria and referred to the Court of Appeal pursuant to section 281 of Constitution of the Federal Republic of Nigeria, 1979.

¹² The case emanated from the 1973 petroleum profits tax assessment of the appellant. The judgement in the Federal High Court was delivered on 20th June, 1984, that of the Court of Appeal was delivered on 4th October, 1989 and that of the Supreme Court was finally delivered on the 27th September, 1996. See [1996] 8 NWLR (pt. 466) p. 256 for the history of the case.

¹³A. O. Popoola, "Book Review - Nigerian Revenue Law Reports 1 NRLR pt. 1" See The Advocate, Vol. 18 (1997) p.8. The emphasis are mine.

¹⁴at pp. 11-12. The emphasis are mine.

¹⁵16 at p.33 The emphasis are mine

Against this background, the aim of this paper is to simplify the pertinent issues and the argument of the parties in this landmark case and analyse them based on established principles of the Law of Taxation.

Although there have been some earlier reflections and commentaries on the case¹⁶ it suffices to say that this work attempts a detailed review of the tax issues in the case.

2. Facts of the case

The Appellant is a Nigerian Company engaged in petroleum operations and therefore liable to pay petroleum profits tax under the Petroleum Profits Tax Act.¹⁷ Hitherto, the Appellant had been paying its tax in Nigeria in Naira. However, it was directed by the Federal Ministry of Finance to start paying its income tax in foreign currency to the Central Bank of Nigeria (CRN) account with the Bank of England in the United Kingdom. The Appellant was to ensure that "enough sterling is made available to make Nigerian Pound equivalent of the amount due". Also by another letter dated 11th March, 1972 the Federal Government further 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 lodgement into account. Furthermore, the Appellant created a scholarship scheme for Nigerian undergraduates in various disciplines in many Nigerian Universities and incurred a sum of N257,500 (Two Hundred and Fifty Seven Thousand Five Hundred Naira Only) on the scheme in the 1973 fiscal year. The beneficiaries were not bonded to work with the Appellant while the Appellant was not obliged to employ them after their graduation. However, the Appellant had a policy of employing some of the beneficiaries who graduated with First Class or Second Class Upper honours.

The Appellant submitted its Petroleum Profits Tax return for the accounting period of 1st January 1973 to 31st December 1973 to the Respondent.

The return contained the revised tax assessment which in its view was payable by it. However, the Respondent disallowed the following four items from the return on the ground that they were not deductible for the purpose of computing chargeable tax of the appellant:

- | | | |
|----|--|---------------|
| 1. | Exchange losses on payment of Petroleum Profits Tax | ₦3,355,991.00 |
| 2. | Central Bank Commission for payment of Petroleum Profits Tax | ₦2,915,429.00 |
| 3. | Scholarship expenses | ₦ 257,550.00 |
| 4. | Gifts and donations | ₦ 61,222.00 |

Being dissatisfied with the Respondent's decision, the Appellant appealed to the Federal Body of Appeal Commissioners (" the Commissioners"). At the hearing, the appeal in respect of the fourth item on "gifts and donations" was abandoned. The Commissioners upheld the ruling of the Respondent and dismissed

¹⁶See M.T. Abdulrazak "Nigerian Tax Law-A Review" (unpublished) paper presented at the launching of the Nigerian Tax Law by Prof. I.A Ayua, at the Benue Hotel Makurdi, Benue State on 21st December, 1996. See E.O A. Idowu. "The Landmark Case of Shell BPv. FBIR", Nigerian Tax News, Vol. III, No.1, 1997, pp. 12-16. B.B. Kanyip, op. cit. I.I. Emuwa, "Deductibility of Expenses in Computation of Profits" MODUS International Law and Business Quarterly, September 1997, Vol 2, No.3 p. 94.

¹⁷ Hereinafter referred to as "PPTA" or Simply "the Act"

the appeal. The Appellant further appealed to the Federal High Court against the ruling. The Federal High Court allowed the appeal in respect of exchange losses and 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.

For the sake of clarity, the summary of the argument of the parties and the decisions on each item will be separated in this paper and treated in *seriatim* as done in the case.

3. Summary of Arguments

3.1 Exchange Losses

The thrust of the Respondent's argument against the deductibility of the, exchange losses was that they were not incurred in the course of the petroleum operations of the Appellant but in the course of paying its tax after it had concluded its petroleum operations and determined its chargeable tax. Consequently, it was argued that the expenses were non- deductible under section 11 (1)(f) of the PPTA¹⁸ and should be borne by the Appellant from its after tax profit as part of its hidden compliance cost. The Appellant on its part conceded that any amount paid in respect of income tax, profits tax or similar taxes is clearly disallowed under the provisions of section 11(1)(f) of PPTA. However, in order to circumvent the provisions of the section, it forcefully argued that the exchange losses were incurred not in respect of its tax obligation but rather in the course of paying debt due from it to the Federal Government. Consequently, the variation of the mode of payment of its 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.

3.2 The Central Bank Commission

The Appellant's argument was that the CBN commission was a sum fixed by the Federal Government in exercise of its sovereign power since the payment was not made to the bank for any service rendered to it or for any consideration whatsoever. Hence, there was no reason why the commission should not be deductible under the provisions of section 10(1)(g).¹⁹ The Respondent opposed, the CBN commission on the ground that it was neither a payment by 'way of "rate", "impost" or "fee" nor' was it incurred to the Federal Government of Nigeria, State or Local Government Council as required by the provision of section 10(1)(g) PPTA. Furthermore, it was contended that since the Appellant incurred the commission after the conclusion of its petroleum operations, it ought to bear them from its after-tax profit.

¹⁸See Section 11 (1) (f) PPTA

¹⁹ See Section 10 (1) (g) PPTA

3.3 Scholarship Expenses

The question here was whether the scholarship expenditure passed the test of being "wholly", "exclusively" and "necessarily" incurred under section 10(1).²⁰ The Appellant submitted that the scholarship expenditure was "wholly" spent for its petroleum operations and that it would be wrong to hold that the expenditure was not "wholly" and "exclusively" incurred simply because all the beneficiaries were not employed by it after their graduation. It was further argued that once the requirement of being "wholly" expended has been satisfied it was irrelevant to consider whether it was also "exclusively" incurred and urged the court to distinguish between the *object* of expenditure and its *effect*. The *object* of the scholarship scheme was to employ all the beneficiaries if they had obtained First Class or Second Class Upper Divisions while the *effect* of their failure to do so was that they could not all be employed. The court was urged not to allow the effect to blur the object.

The Respondent on its part contented that the scholarship expenditure was not wholly and exclusively incurred in as much as all the beneficiaries were not bound to work and did not work with the Appellant after their graduation. The position would have been different if the beneficiaries were first employed by the Appellant and then trained in that capacity. Furthermore, the Appellant pointed out to the Supreme Court that there had been concurrent findings of fact by the Commissioners, the Federal High Court and the Court of Appeal that the scholarship expenditure was not deductible and urged the Supreme Court not to interfere with the findings.

4. Holdings

The Supreme Court noted that the exchange losses would have been early non-deductible if the case had been contested purely on the provisions of the PPTA. However, the additional obligations imposed on the Appellant by the Federal Government had introduced another, dimension to the case. Consequently, the court invoked its equitable jurisdiction to allow the exchange losses. According to Uwais C.J.N:

*.... By reasons 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.*²¹

Regarding the CBN commission, the court held that although the commission was not deductible under section 10(1)(g) of the PPTA it was under section 10(1) *simpliciter*. The CBN commission was said to be wholly, exclusively and necessary incurred in so far it was paid in the course of complying with the directive of the Federal Government. According to Uwais C.J.N:

The Appellant is expected to receive directions from the Federal Government from time to time in the course of its business which is "petroleum operations". Clearly, this is incidental to such operations. I have no doubt whatsoever in my mind that the payment of Bank charges to the Central Bank of Nigeria which had not rendered any service to the Appellant but simply because

²⁰ See Section 10 (1) PPTA

²¹at p. 23

the Federal Government had so directed was inevitable and was, therefore incurred in the course of the Appellant's business which was petroleum operations.

*In my respectful opinion, tire Bank charges qualify for deduction under the general provisions of sections 10 subsection (1) of the Petroleum Profits Tax Act."*²²

On the scholarship expenses the court observed that the creation of the Scholarship Programme was a statutory obligation, which the Appellant must perform. Consequently, the expenditure was "wholly", "exclusively" and "necessarily" incurred for the purposes of the Appellant's petroleum operations. According to the court, it was immaterial that the Appellant did not employ all the beneficiaries of the award. On the meaning of the words "wholly" and "exclusively", the court held that they mean virtually the same thing, that is "solely" or "entirely".

5. Commentaries

Having stated the facts and decisions of the case we shall now turn to a consideration of some of the issues raised in the judgement.

5.1 Is there Equity in Tax?

The invocation of the doctrine of equity in this case is curious considering the well-established principle of taxation that there is no equity in tax.²³ This principle, to our mind, essentially follows from the general nature of taxation as a compulsory levy, an extortion (albeit a justifiable one).²⁴ According to this principle, it is important for the draftsmen to press clearly and without ambiguity the tax that the citizens are liable to pay under the enactment.²⁵ But once this obligation has been discharged a taxing statute must be construed strictly by reference to its actual words without regard to what might have been the intention of the legislators. The guiding principle has been stated thus: -

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be: In other words, if there be admissible in any statute what is called an equitable construction certainly such a construction is not admissible in taxing statute, where you can simply adhere to the wards of the statute.²⁶

It is crystal clear that the Supreme Court was trying to circumvent the above well-established principle when it based its decision to allow the exchange losses not on the provisions of the Act but on the terms of the so-called agreements. A pertinent question again, is whether there is enough justification for the invocation of the doctrine of equity in this case. In our view, it is not unfair, unusual or contrary to

²² at pp. 28-29

²³ Cape Brandy Syndicate v IRC (1921) 2 K.B. 403, at 71, Aderawos Trading Co. Ltd. v. FBIR (1966) 35R.195.

²⁴ Akanle op. cit p. 88.

²⁵ AG. Karibi-Whyte, Akanle 4 op. cit. p.88

²⁶ Cape Brandy Syndicate v IRC (Supra). Emphasis are mine

principle for the Tax Authority to raise assessment in the currency in which the income was earned. For instance, section 40 C of the *Companies Income Tax Act (CITA)* provides that:

*Notwithstanding anything to the contrary in any law, an income tax assessment under Section 40A, 40B or 41 of this Act shall be made in the currency in which the transaction giving rise to the assessment was effected.*²⁷

If it is not unfair to request other companies to pay their taxes in the currency in which the transactions are effected why then should it be unfair in the case of companies engaged in petroleum operation? Furthermore, it was neither argued nor suggested by the Appellant that the exchange losses could not be accommodated from its after tax profit. Not only that, the Appellant should have used the first available opportunity to contest the legality of the directive of the Minister of Finance which purportedly varied the provisions of the PITA. The Appellant ought not to have adopted the attitude of "obey first and then complain". It is a notorious doctrine that equity aids the vigilant and not the indolent.

However, it is gratifying to note that the PPTA has recently been amended, following the spirit of section 40 C CITA to enable the Federal Board of Inland Revenue to compute and raise assessment in the currency in which the transaction giving rise to the income is effected. The amending provision, section 37A of the Finance (Miscellaneous Taxation Provisions) No. 30, 1996 is reproduced hereunder:

37 A (1) Notwithstanding anything to the contrary in any law, all income tax computation made under section 28 and 31 of this Act shall be made in the currency in which the transaction was effected.

*(2) Accordingly and notwithstanding anything to the contrary in any law, any assessment made under section 35(1) of this Act shall also be made in the currency in which the computation giving rise to the assessment was made".*²⁸

5.2 Exchange Losses

One of the issues that remain unfathomable to us is the process that allegedly led to the exchange losses. Since the Appellant's income is normally earned in the U.S. Dollar, one would have expected it to convert the Dollar equivalent of the amount due²⁹ to Pound Sterling. Hence, the conversion would have taken place once that is from U.S. Dollar to Pound Sterling without any (or minimal) exchange losses.³⁰ However, the claim of the Appellant (which was upheld by the court) was that it had to first convert from U.S. Dollar into Naira and then Pound Sterling. This was put clearly in the concurring judgment of S.M.A. Belgore (J.S.C) thus:

... The tax would have been paid in Naira and that would have been the end of the matter. However, due to the terms of these exhibits, the Appellant was saddled with the additional

²⁷ See Section 40 C, CITA.

²⁸ See Section 37 A (1) PPTA

²⁹Exhibit 11, which is the Notice of Assessment issued by the respondent on the appellant's tax liability was expressed in Naira and stated the liability to be 450,531,675.00. See p.40

³⁰This is because the exchange rate of US Dollar to Pound Sterling is relatively stable compared to that of the Naira vis-a-vis other foreign currencies.

*responsibilities. first to pay in Pound Sterling, and in furtherance of this to convert from American Dollar to Naira and then to Pound Sterling...The four exhibits aforementioned forced the Appellant to look overseas to Britain and America-to source payment in Pound Sterling.*³¹

But the question is, was there a compelling need for this circuitous process of conversion reminiscent of the "Biblical Israelites journey"?³² Our answer is no. The fact that the tax liability was expressed in Naira does not mean that the Appellant first had to convert Dollar into Naira and finally into Pound Sterling. The conversion from Dollar to Naira ought to have been done notionally, that is, mentally unless the Appellant had already converted its revenue into Naira before the directive was given which was neither canvassed by the Appellant nor revealed by the facts of the case. The Appellant as a reasonable and shrewd business entity ought to have opted for the simplest and the most cost-effective option instead of undertaking the long and costly "voyage of conversion" as it claimed it did. This reason alone, in our view, is sufficient to render the exchange losses non-deductible under section 10(1) of the PPTA for being not "necessarily" incurred.

5.4 Accords and Satisfaction

The plank of the application of the doctrine of accord and satisfaction was the submission of the Appellant that the payment made by it in Pound Sterling was not in respect of its tax obligations but rather in respect of its debt obligations under Exhibits 3 and 4. According to the Appellant:

*"It is a misconception in both law and fact for the Court of Appeal to regard such payments as tax, as envisaged under 11(1)(f) of the Petroleum Profits Tax Act, 1959."*³³

It is our humble submission that the Supreme Court's decision that the payment made by the Appellant was in settlement of the debt obligation is highly artificial to say the least. We have laboured in vain to locate the provision of section 11 of PPTA as quoted by the Supreme Court in the entire PPTA. Even if such provisions "deeming the liability of a taxpayer to pay his tax as and what due as a debt" were to exist in the PPTA it will not be strange in the Law of Taxation. The logical sense behind such provisions is not far to seek. It is ostensibly to make for easy recovery of any tax due as a liquidated money demand.³⁴ Hence, the provisions ought not to have been given a literal interpretation without some caution. This is because, if the obligation to pay tax is generally regarded as obligation to pay debt it will then be incongruous and against general legal norms to subject tax defaulters to criminal procedure and its concomitant penal sanctions.

Another curious aspect of the decision of the court, which reinforced the application of the principle of accord and satisfaction, was that Exhibits 3 and 4 amounted to an "agreement" between the Federal Government of Nigeria and the Appellant. But is this correct? Even if the answer were to be in the affirmative, the next step should have been to probe the express and or implied terms of the agreement

³¹ At pp.32-33

³²The "Israelites journey" is the Biblical Story of how the Israelites spent 40 years instead of 40 days to travel from Egypt to Canaan Land. See generally Exodus 12 to Joshua, Holy Bible.

³³at p. 32-33

³⁴The amount can be recovered with interest without the need to reopen the amount of the tax payer's liability. See S.77 (d)(1) of Personal Income Tax Decree No. 104, 1993 which provides that income tax may be sued for and recovered in a court of competent jurisdiction.

and analyse their effect on the pre-existing statutory provisions. In addressing the first issue, it will be instructive to reproduce the main body of Exhibit 4 for ease of reference. The Exhibit³⁵ reads thus:

Dear Sir,

NEW PROCEDURE FOR PAYMENTS OF ROYALTIES, PETROLEUM PROFITS TAX AND RENTS TO THE FEDERAL GOVERNMENT.

I am directed to inform you that with effect from the 1st of January, 1968 and until further notice all payments due to the Federal Government of Nigeria from your company in respect of the three items above should be made to the account of the Central Bank of Nigeria with the Bank of England. As the amount due are normally expressed in Nigerian Pound, the payer/company must ensure that enough sterling is made available to make Nigerian Pound equivalent of the amount due from the company.

This letter supersedes all previous correspondence which your company has received from any Federal Government Department regarding the method and procedure for these payments.

Yours faithfully,

Abubakar Alhaji

Exchange Control Officer.

It is an elementary principle of the Law of Contract that an agreement connotes, among other things, an offer and an unconditional acceptance the terms of the offer.³⁶ Could it be said that there was an offer and acceptance of the offer in this case? The obvious answer is no. The word "directed" used in the opening paragraph and the statement that the letter "supersedes all previous correspondence" is emphatic enough at the Federal Government's decision to introduce a new procedure for the payment of Petroleum Profit Tax was not subject to any compromise debate. This however does not preclude the fact that the Federal Government might have had a prior consultation with the oil companies, including the Appellant, before the introduction of the new policy. The point that is being made here is that Exhibit 4 could not by any stretch of imagination be said to be an agreement. It is nothing but a letter from an officer of the Ministry of Finance communicating the directive of the Federal Government to the Appellant on the latter's obligation to pay tax and other sundry fee.

Granted also, for the sake of argument, that there was an agreement between the Appellant and the Federal Government the next issue would have been to probe the terms of the purported contract. This is logical since the terms of a contract determine the extent of each party's obligations.³⁷ There was a

³⁵at p. 15.

³⁶ A recent case summarized the principle on the formation of a contract. See *Royal Petroleum Co. Ltd. v. FBN Ltd.* (1997)6 NWLR (pt. 570) p. 584. See also *UBA Ltd. v. Ozigi* [1991]2 NWLR (pt.176) 677.

³⁷A contract consists of statement, promises, stipulations, exceptions or exclusion grouped together under the word "terms". The terms of a contract may be express, that is, oral or in writing and/or it may be implied from the conduct of the parties. The terms of a contract determine the extent of each party's rights and duties and the

concurrent finding that neither the Act nor the purported contract specifically provided that the expenses incurred in discharging the various obligations were deductible. It is a settled principle of the Law of Contract that where certain terms of a contract are not expressly stated they may be implied by the court. However, the court will not unreasonably intervene in contracts and impose terms arbitrarily. The terms that can be implied by the court must be something that is so obvious that if an officious bystander were to suggest at the time of making the bargain, that some express provision be made for it, they would have suppressed him with a common "oh, of course".³⁸

The question now is what could have been the intention of the Federal Government in demanding payment of Petroleum Profit Tax in foreign currency? Apart from the fact that revenue from oil is earned in foreign currency, the government policy must have been dictated by the need to safeguard the revenue of the Federal Government from the unpredictable adverse effect of fluctuation in exchange rate of the Naira in the international market. Against this background, will it be then logical for the government to neutralise such an anticipatory precautionary measure by allowing the Appellant to deduct any exchange losses that may result from its compliance with the directive? This is most unlikely especially when the *Petroleum Profit Tax (Amendment) Act, 1973* which was enacted subsequently to give effect to the "agreements" did not expressly provide for the deduction of the exchange losses.

Still on accord and satisfaction, it may be useful to consider whether the court gave the proper effect to the application of the doctrine in the instant case. The principle of accord and satisfaction amounts to compromise which entails a mutual concession (which we have argued is absent in this case). For the principle to apply there must be a *consensus ad idem* on the terms of the new contract which is replacing the old one. The old obligation in this case was to pay Petroleum Profits Tax in Nigeria in Naira while the new obligation was to make the payment in Pound Sterling in England. The proper effect of the application of the principle of accord and satisfaction to the facts of the case ought to have been to extinguish or replace the respective obligations of both parties to pay and collect tax from Naira to Pound Sterling. Hence, either of the parties would have been *estopped* from denying that the payment of the tax due in Pound Sterling has fully and finally discharged both parties from any further obligation. It is noteworthy that the Federal Government in this case was not demanding for any additional payment whatsoever from Appellant. Rather, the issue was whether the additional cost of discharging the obligations of the Appellant under the new arrangement could be deducted from its aggregate income in calculating its chargeable profits. The adjustment of the chargeable profits of a taxpayer is determined in accordance with the prevailing business or accountancy principles subject to any express statutory provisions, and not the principle of accord and satisfaction.

5.5 CBN Commission - a curious tax burden

remedies available if the terms are broken, See O. Yerokun, *The Law of Contract* 1999 p. 67. See also. *Arta Industries Ltd. v. NBC* (1998)4 NWLR (pt.546) 357, *National Salt Co. of Nig. Ltd. v. Palmer* [1992] NWLR (pt. 218) 422.

³⁸The court can also imply terms on the basis of reason and justice or doctrine of necessity in order to give the contract a business efficacy. See *Moorock* (1989)14 P.D. 64, *Greaves v. Vaynha* 1976) 1 WLR 1095, *Liverpool City Council Irwin* 1977) AC 239, (1976)2 All E.R.39.

The Federal Government directive that the Appellant should pay commission to the CBN is remarkable in many important respects. Unlike exchange losses which as we have argued can be avoided or minimised³⁹ the CBN commission was an unavoidable expenditure fixed by Federal Government for which the Appellant received no consideration.⁴⁰ The CBN commission cannot therefore be regarded as the normal "hidden compliance cost" which is generally borne by a taxpayer. Rather, it is in our view, an additional tax burden imposed by the Federal Government on the Appellant in violation of the principle that payment of tax should not be made unnecessarily burdensome for the taxpayer.⁴¹ It is doubtful if such a directive isprecedented in the tax history of Nigeria. By this particular directive, it could be said that the Federal Government had indirectly increased the tax rate of the Petroleum Profit Tax by the margin of the CBN commission. If this had been the intention of government then, it should have simply increased the tax rate on petroleum profit or withdraw some of the concessions or incentives contained in the Memorandum of Understanding (MOU) between it and the oil companies. Consequently, there is no reason, in our view, why the CBN commission should not have been allowed except on the ground that it was incurred in respect of payments of tax obligation. Our earlier submissions on exchange losses apply here *mutatis mutandis*.⁴²

5.6 Meaning of "Wholly and Exclusively"

It is difficult for us to agree with the decision that the words "wholly" and "exclusively" mean the same thing. The English courts have interpreted the word "wholly" as referring to the "amount" or "quantum" of the expenditure while the word "exclusively" is generally taken to refer to the "purpose" or "motive" of the expenditure.⁴³ The word "necessarily" on its part has been interpreted to imply an obligation to incur certain expenditure.⁴⁴ These interpretations have been adopted by Nigerian writers⁴⁵ and applied in a number of cases.⁴⁶ It is difficult to see how the two words "wholly" and "exclusively" can suddenly be said to be synonymous. It is clearly wrong to presume that the draftsmen intended to cover only a set of circumstance by the two words. If that had been the intention they would have wasted no time in using only one of the adverbs instead of the two. This position tallies with the opinion of a writer when he commented on the issue as follows:

For present purposes, our comment relates only to "wholly" and "exclusively" in view of the Supreme Court holding that the two words have virtually the same meaning. That they can mean "solely" or "entirely". Once again, the question arises whether this is a correct statement of the

³⁹See pp. 61- 62.

⁴⁰The CBN Commission was perhaps to off-set the commission payable by Federal Government of Nigeria to the Bank of England.

⁴¹The principle of convenience simply states that every tax ought to be levied and administered at that time, or in the manner, in which it is most likely to be convenient for the taxpayer to pay it. See O. Akanle, op.cit.p6.

⁴² See pp 61 – 62 ante.

⁴³The general principle to be followed in considering whether an expenditure is incurred "wholly and exclusively ..." was set out in the classic statement of Romer L.J. in *Bentley's Stokes and Lowless v. Beeson* (1952) 33 T.C 49.

⁴⁴ See *Simpson v. Tate* (1925) 2 K. B. 214 *Ricketts v. Coloquihoun* (1912) A.C 1 e; c/ f *Michell v. Child*(1942)2 All E R. 504, 24 T.V. 511.

⁴⁵ J O. Orojo op. cit. pp 81-86. O. Akanle, *Nigerian Income Tax Law and Practice*, pp.139-142,S.M., Adesola, *Income Tax Law and Administration in Nigeria* 2nd ed. p. 80

⁴⁶*Western Soudan Exporter v. FBIR* (1913) Nig. Comm. Law Reports, 302, *Williams v. Adelaja* 1 NTC 141, *C.I.T. v Nig. Properties Ltd.* 1 NTC 15, *Williams v. RTB* 1 NTC 95.

*law... Under the tax law, the phrase "wholly and exclusively" encompass the duality principles namely that expenses of dual nature or purpose do not qualify as allowable except apportionment is...possible in which case, the portion that is for other than a business purpose will readily be disallowed, In this regard, the word "wholly" has been held to refer to the quantum of the money expended while the word "exclusively" refers to the motive or object accompanying it ... it...does seem wrong therefore to equate the word "wholly" with "exclusively" as the supreme Court have held"*⁴⁷

Furthermore, the statement of Justice Uwais CJN that "any expenditure in respect of an obligation will be wholly, exclusively and necessarily incurred is with due respect too wide."⁴⁸ The impression created by the statement is that the requirement that an expenditure must be "necessarily" incurred is the determinant or prevailing requirement and that a taxpayer has shown that he is under an obligation to incur certain expenditure, then, the entire expenditure will automatically be deductible. In our view, a company may be under a statutory or contractual obligation to incur certain expenditure yet the "entire" expenditure being claimed might not have been incurred "exclusively" for the purpose of the business of the company. It may also be necessary to limit the phrase contractual obligation contained in the statement to contractual obligation with the Federal Government or its agencies.

5.6 Scholarship expenses

The finding of the court that the Appellant had a legal duty to incur the scholarship expenses is perhaps the most puzzling of all. The Supreme court arrived at this decision ostensibly because the Appellant gave evidence that "the government will not permit its operations if it had failed to award the scholarship for its non employees".⁴⁹ It may be instructive to reproduce the provisions of Regulations 26-28 of Petroleum and (Production) Regulation, 1969.⁵⁰

- 26(1) *The license of an oil prospecting license shall within twelve mouths of grant of his license and the lessee of an oil mining lease shall on the grant of his lease submit for the Minister's approval, a detailed programme for the recruitment and training of Nigerians.*
- (2) *The programme shall provide for the training of Nigerians in all phases of petroleum operations whether the phases are handled directly by the leasee or through agents and contractors.*
- 27. *Any scholarship shown prepared, and any scholarships proposed to be awarded by the licensee or leasee whether or not related to the operations of the licensee or lessee or to (the oil industry generally) shall be submitted for approval of the Minister.*

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⁴⁸ at p. 31

⁴⁹ See (1997) N.R.L.R (pt. 1) p. 30

⁵⁰ Cap. 350 LFN, 1990.

28. *Once a programme under regulation 26 of these regulations or a scholarship scheme under regulation 27 of these regulations has been approved by the Minister, it may not be varied without all this permission.*⁵¹

A closer scrutiny of the above provisions reveals that while Regulation 26 which relates to the training of the Appellant's employees is couched in an imperative language that of Regulation 27 relating to scholarship scheme is permissive. The phrase "Any scholarship scheme prepared" seems to suggest in our view, that the Appellant has discretion whether to prepare a scholarship scheme or not. It is only where the Appellant has prepared one that it then becomes imperative for it to submit it for the approval of the Minister. And once approved it cannot be varied without the Minister's permission. Therefore, if it was not compulsory for the Appellant to incur the scholarship expenses, then certainly it has not been "necessarily" incurred. The scholarship expenses is nothing more than a voluntary /charitable contribution or donation. Unlike *Companies Income Tax Act* (CITA), the PPTA does not contain provision for deductible donations.⁵² Even under CITA, donations and gifts can only be allowed if they are made into any of the public funds or institutions specified in the 5th schedule.⁵³ It is difficult to see how scholarships given to a disparate number of students individually in various universities could have even satisfied the strict requirements under CITA.

The case would have been different if the entire scholarship expenses have been donated in bulk to the various universities who will then apply the money based on the policy guidelines of the university or the Appellant.

6. Conclusion

A cursory examination of the Shell's case might give the impression that Federal Board of Inland Revenue was unduly harsh towards the Appellant by expecting it to bear the various expenses in question from its after tax-profit. However, attempt has been made in this paper to put the issues in the proper perspective. The main issue before the court was whether or not the various expenditure were deductible. It would be recalled that none of the expenditure was expressly allowed by the provisions of the PPTA and the so-called "agreements" between the Government of Nigeria and the Appellant. However, the Supreme in its bid to relieve the Appellant of what it considered as "unfair tax burden" curiously invoked the principles of equity and accord and satisfaction, among others, to circumvent settled principles of the Law Taxation. What the court had done in this case was to impose its own the parties under the guise of equity. What is more, no authority was cited by the court for its departure from the long established principle that there is no equity in tax. Since the time of Lord Eldon, the system of equity for good or evil had become a very precise one and an equitable jurisdiction is exercised only on well-known principles. The English Court of Appeal in the case of *Re Diplock*⁵⁴ stressed this point thus:

"If a case is said to exist in equity it must be shown to have an ancestry founded in history and in the practice and precedent of the court's administering equity jurisdiction. It is not sufficient that

⁵¹See Regulations 26-29 of the *Petroleum Drilling and (Production) Regulation*; 1969, Cap 350 LFN,1990.

⁵² See section 21(1)-(6) CITA

⁵³ See the 5th Schedule of CITA

⁵⁴ [1948] Ch. 465

*because we think that the "Justice" of the present case requires it we should invent such jurisdiction for the first time."*⁵⁵

Consequently, the Supreme Court's decisions in this regard are nothing short of legislative judgement. What the court should have done is to perceived *lacunae* in the law for the necessary legislative intervention in line with the admonition of the same court in *Okumagba v Egbe* that:

*Amendment is the function of the legislature. And the courts cannot fill a gap which comes to light by altering the words of a regulation to make it read in the way they think it should have been enacted.*⁵⁶

In the light of the foregoing discussion, it is our humble submission that the decisions in Shell's case relating to the three expenses was wrong and without regard to the principles of Law of Taxation. As a matter of fact, the judgment exposes the shallowness of most of the Learned Justices on the Law of Taxation.⁵⁷ The question now is when will another opportunity arise for the apex court to pronounce on the provisions of the Petroleum Profits Tax? Only God knows. What can be said is that based on the doctrine of judicial precedence, the case would continue to guide the development of Petroleum Profits Tax law in the country until it is either reconsidered by the court or amended through legislation.⁵⁸

However, considering the invaluable positive contributions that oil companies are making in the lives of the beneficiaries of their scholarship schemes, the legislature should move very quickly to make general provisions for deductible donations and scholarship expenses in particular, under the PPTA. Relief on scholarship expenses may be extended to other companies under CITA who for instance are willing and able to develop annual scholarship scheme of a minimum of between fifty and one hundred thousand Naira only. Furthermore, notwithstanding our position that the Supreme Court erred in law in allowing the CBN commission, a case had been made in this paper that the commission itself was unnecessary, unorthodox, unusual and unprecedented. Happily, the rate of the commission has been reduced from 0.5 percent to 0.25 percent.⁵⁹ It is suggested that the policy should be discontinued altogether, whatever it is worth. Regarding the exchange losses or gains (whichever is applicable), it is better to let it lie wherever it falls. Finally, since the PITA has recently been amended by section 37A (1) & (2) of the Finance (*Miscellaneous Taxation Precisions*) No. 30, 1996⁶⁰ in such a way that assessment for Petroleum Profit Tax can now be raised in the currency in which petroleum transaction is effected, it is doubtful if the kind of controversy relating to the exchange losses can arise in future.

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⁵⁵ Ibid at p. 481.

⁵⁶ [\(1963\) 1 All N.L.R 62](#)

⁵⁷ [It is apparent that of the Justices of the Supreme Court that heard the appeal, only M.E. Ogundare J.S.C. had a fair knowledge of tax law principles. Certainly, it would have made a difference if Justice Karibi-Whyte had sat on the Panel.](#)

⁵⁸ [The Shell's case has been followed by the Court of Appeal in Gulf Oil Company \(Nig.\) Limited v. FBIR \(1997\) 7 NWLR pt. 514 p.696 \(Unreported\) Appeal No. CA/L/306/94](#)

⁵⁹ [The rate of the commission was reduced from 0.5 to 0.25 percent with effect from 1st April, 1975.](#)

⁶⁰ [See Section 40 to CCITA.](#)