Rethinking Nigeria's Excess Dividend Tax

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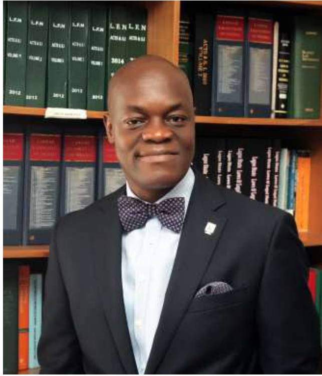

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In recent times, one Nigerian tax provision closely scrutinized by investors and advisers is *section 19 Companies Income Tax Act (CITA)* which prescribes "excess dividends tax" on Nigerian companies. It states: *"where a dividend is paid out as profit on which no tax is payable due to – (a) no total profits; or (b) total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company,… the company paying the dividend shall be charged to tax at the rate prescribed… (30%) as if the dividend is the total profits of the company for the year of assessment to which the accounts, out of which the dividend is declared relates."*

This provision curiously seeks to nullify a result presumably achieved from valid application of (other provisions of) the tax law. It tacitly acknowledges that "no tax is payable", yet in reversal, goes on to make tax payable - an approach akin to tampering with validly computed election results!

Section 19: Topical Issues

Section 19, introduced as amendment to *CITA*, vide *section 15 A, Finance (MTP) Decree No. 30 1996*, was obviously intended to achieve a "claw back" effect. A company can only be in a position *"where no tax is payable"* because of other (applicable) CITA/statutory provisions: allowable deductions, capital allowances, non-applicability of minimum tax, loss carry forwards, sector specific tax exemptions/reliefs, franked investment income, etc.

Illustrative incongruency of *section 19* includes: (a) the relevant dividend could have arisen from applicable *section 23 CITA* profit exemptions; (b) circumscription of a company's full enjoyment of tax holiday, e.g. *section 14(2) Industrial Development (ITR) Act* provision that capital expenditure incurred during the tax holiday is *"deemed to have been incurred on the day next following the end of the tax relief period"* - and thus potentially produce lower/nil taxable profits than declared dividends; (c) the dividend could have been from PPT source income, putatively defeating *section 60 PPTA* stipulation that income/profits subjected to PPTA shall not be liable to any other tax; (d) would *section 19* frustrate *sections 2 and 8, NLNG (Fiscal Incentives Act)*, which provides *inter alia: "notwithstanding the provisions"* of *IDTRA* and *CITA* respectively?

According to Arogundade, (2010) under *section 19, "dividend paid by a Nigerian company… will be regarded as trading receipt if declared from a profit on which no tax is payable…, the dividend… is no longer regarded as income from a wholly or mainly investment transaction as the principal part of the income is not derived from the business of the company making the distribution for the year."*

Claw-Back vs Tax Benefits: Is Section 19 Superior?

It could be argued *section 19* was enacted by the legislature, subsequent to, and with full knowledge of, prior provisions - e.g. *section 80(3)* [previously section *62(3) CITA 1990*] which provides that: *"dividend received after the payment of tax prescribed in this section shall be regarded as franked investment income of the company receiving the dividend and shall not be charged to further tax as part of the profits of the recipient company. However, where such income is re-distributed and tax is to be accounted for on the gross amount of the distribution… the company may set-off the withholding tax which it has itself suffered on the same income."*

Arguably, the legislative intention behind *section 19*, therefore, must have been a whittling down of such prior provisions. Furthermore, *section 20 CITA* seemingly supports strict application of *section 19* by: (a) stating that no tax shall be charged on foreign company recipient of dividends from Nigerian companies apart from WHT pursuant to *section 80 CITA*; (B) imposing excess dividend tax in terms of *section 19*, notwithstanding *"whether the recipient of the dividend is a Nigerian company or not"*; and (c) providing that *"nothing in this Act"* shall confer the right to repayment of tax paid pursuant to *section 20*.

However, post-*section 19 CITA* provisions (e.g. removal of the 4-year limitation on loss carry forwards, vide *CITA (Amendment) Act 2007*), could equally support views that *section 19* has been affected thereby. In any event, legislative sequence alone may not be conclusive of the matter. According to Imhanobe (2002), *"as we may have realised now, there is no one rule of interpretation that is superior to the other, each case is decided on its own merit. In fact it has been suggested that there could be a blend of various rules of interpretation."*

A corollary is that conflicts in tax statute should be resolved in favour of the taxpayer rather than Government (which enacted the legislation) and where the law confers a benefit and burdens which are mutually exclusive, the beneficial construction is to be preferred. *Maxwell's Interpretation of Statutes (12th ed.), 102,* cited Pole-Carew v. Craddock: *"where an Act of 1790… exempted ferry proprietors from assessment to any 'tax… whatsoever' in respect of the ferry, it was held that the exemption extended to income tax even though that tax was first imposed considerably after 1790."*

Another interpretative rule is that in resolving conflicting provisions of statute, specific provision (e.g. *section 80(3)* prevails over general provisions (such as *sections 9, 19* and *40* CITA). In my view, *section 80(3)*, being an "exemption type" provision, is more specific, relative to *section 19*, which builds on the general provisions of *section 9*. This is despite the obverse argument that *"there are exceptional cases where the dividend will be treated as business profit and taxed at the corporation tax rate of 30%..."*

The argument that *section 19* must admit of exceptions (e.g. profits paid out of retained earnings) is reinforced by the cardinal rule that the tax law generally leans against subjecting the same income/profits to double taxation. If, as it seems evident, that the object of *section 19* is tax avoidance, then it would not be permissible to stretch it to achieve the end of imposing double taxation on the company paying dividends out of retained earnings. This is particularly worrisome because, as Arogundade explains, *"profit related to retained earnings would be profit on which tax was paid which is different from profit on which tax is payable"* and since *"the emphasis of the law is on the profit on which no tax is payable… it would appear not the intention of the law to exclude distributions from retained earnings from the scope of section 19."*

Unfortunately, the only apposite reported case law, ***OANDO PLC v FIRS*** *(2009) 1TLRN 61* did not provide detailed analysis for its conclusion that section 19 applied in the circumstances of that case. The Federal High Court held in part: *"the first question that arises for determination is whether the dividend paid by the Appellant to its shareholders was paid out of retained earnings in which tax has already been paid… The Body of Appeal Commissioners rejected that argument on the ground that the profit and loss account for the appellant for the period 2003 did not support that claim… I hold therefore that the dividend paid by the Appellant in the year 2004 was paid out of retained earnings."*

The foregoing (and other *obiter* in the judgment) suggests the Court might have to come to a different conclusion if it had found that the dividends were paid out of retained earnings. The BAC's split decision against applicability of *section 19* to retained earnings, are not entirely without merit. Hopefully, the Court of Appeal will provide more clarity when it determines the pending appeal before it.

Escape Route: Capital Gains Tax (CGT)

My colleague, Atinuke Agboluaje strongly argues that where the distribution is arising from CG made by the company, then *section 19* does not apply because CG is not taxable under CITA, since it is not "profits". The key is the distinction between income ordinarily subject to CITA but exempt from same, (e.g. chargeable gains under CGTA or petroleum profits). In the UK where CGT is computed as part of corporation tax for companies, a *section 19*-type provision may be less objectionable, but not in Nigeria (or the USA) where CGT is a *"separate track tax"*. Nevertheless, *section 19* apologists would insist that it is irrelevant how you arrive at the destination of *"no tax is payable"*.

Conclusion

I cannot agree any less with Taiwo Oyedele (*Nigeria @ 50: Top 50 Tax Issues*) that *section 19 "should be deleted as it discourages holding company investments in Nigeria. Also, it negates many tax incentives in the CITA and other tax legislation as income is effectively taxed on distribution regardless of any incentives previously enjoyed."* Clearly, *section 19* was an ill-informed amendment of the CITA, a ready example of internal inconsistency in the tax law which offends against the object that the law should be a sum total of parts that "communicate" synergistically.

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