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Intervention of Finance Act, 2019 As Amended on Taxation of Dividends in Nigeria: A Legal Appraisal

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Abstract

Taxation is the means through which a government imposes or levies a tax on its citizens and corporate entities as a way of raising revenue which is then used to meet their budgetary demands. Dividends on the other hand, means a reward by cash or otherwise which a company pays to its members from profits of the company. Before a company arrives at its profit which is to be declared and distributed to members as dividends, the income must have been taxed. Taxation of dividends therefore is imposition of tax on the part of profit which is distributed to members which said profit had already been taxed. The legal framework for taxation of dividends which is section 19 of Companies Income Tax (Amendment) Act 2007 has created a lot of controversies as to whether taxation of dividends amounts to double taxation or not. Finance Act, 2019 As Amended however, has exempted dividends paid from certain categories of income of a company from being taxed. The objective of this paper is therefore to examine the implication of taxation of dividends under the Companies Income Act, viz-a-viz the intervention of the Finance Act, 2019 As Amended. The work adopted the doctrinal legal Research Methodology with the use of statutes, case law, textbooks, journal articles and Internet materials. At the end, the writer concluded that, though taxation of dividends under the Companies Income Tax Act, amounts to double taxation, the Finance Act, 2019 As Amended came to ameliorate the seeming hardship likely to be caused by taxation of dividend by expanding the scope of exempted categories of dividend paid from certain categories of income of a company distributed to members. The writer recommends a further amendment of section 19 of Companies Income Tax Act and amendment of section 7 of Finance Act, 2019 As Amended to remove the power to tax dividends paid to members of company as the profit from which the dividends are paid had already been taxed.

Keywords: Dividends, Taxation, Double Taxation, Companies Income Tax Act, Finance Act.

1.0 Introduction

Taxation is a means by which government finance their expenditure by levying charges on citizens and corporate entities by way of tax. Dividend on the hand is part of the profit of a company that is paid by the company to its shareholders. This research work looked at taxation of dividends as provided under section 19 of the Companies Income Tax Act (CITA)[1] and the effect of the Finance Act[2]. Section 19 of the Companies Income Tax Act (CITA)[3] also known as "The Excess Dividend Tax Rule" provides that where a dividend is paid out as profit on which tax is payable due to no total profits or total profits which less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company, is paid by a Nigerian

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[1] Companies Income Tax (Amendment) Act, 2007

[2] 2019 As Amended

[3] *Op.cit*

company, the company paying the dividend shall be charged to tax at the rate prescribed in sub section (1) of section 40 of this Act as if the divided is the total profits of the company for the year of assessment to which the account, out of which the dividend is declared. The above section means that, where a company paid dividend from its accounting profits or total profit which was less than the divided paid out, the tax authority will treat the dividend paid out as the profit of the company and it will be subjected to 30% companies' income tax under section 40 of CITA[4]. However, where the total profit was less than the dividend, and the company had already paid tax on the total profit, the tax authority would compute the excess of the dividend over the profit, and assess the excess to tax. Although, section 19 of the Companies Income Tax Act (CITA)[5]helps in curbing tax avoidance on any income of the company on which tax is payable, applying the section no doubt will amount to double taxation on Nigerian companies. For instance, where a company delays distribution of profit to its shareholders for reinvestment over a certain period of time, and such profit when subsequently paid out as dividend by the company will be subjected to tax under section 19 of Companies Income Tax Act (CITA). Again, where a company distributes dividends from its realized capital assets, the company is expected to pay capital gain tax under the Act[6] and thereafter the company will be subjected to Companies Income Tax on the dividends paid under section 19 of CITA not minding that the company had earlier paid Capital Gains Tax on the assets of the company.

More so, when a company receives dividends from a subsidiary, or other equity investments, that dividend paid will also be subjected to tax.

However, section 19 of the Companies Income Tax Act[7] failed to recognize the fact that, outside the profit made from the business of a company, the company may have other channels of making profit which must have been subjected to tax, then paying tax on dividends as provided under section 19 of CITA[8] will create hardship for the company. This section no doubt will discourage companies to retain their profits in Nigeria and most investors will be discouraged to invest in Nigeria to avoid be taxed twice. The effect of this hardship created by section 19 CITA[9] was reduced to some extent by the enactment of Finance Act[10]. The Act provided some remedy by exempting some dividends that should not be taxed under section 19 of CITA[11].

The Finance Act[12] provides that the provision of section 19(1) of the Companies Income Tax Act[13] (CITA) shall not apply to dividends paid out of the retained earnings of a company, provided that the dividends are paid out of profits that have been subjected to tax under this Act, the Petroleum Profits Tax Act[14], or the Capital Gains Tax Act[15] ,dividends paid out of profits that are exempted from income tax by any provision of this Act, the Industrial Development (Income

[4]*Ibid.*
[5]*Ibid.*
[6] Capital Gains Tax Act Cap C1 LFN 2004 s.3.
[7]Companies Income Tax (Amendment) Act, 2007.
[8]*Ibid*
[9]*Ibid*
[10]Finance Act 2019 (As Amended) s.7
[11]*Ibid*
[12]*Ibid*
[13]*Ibid*
[14] Cap P13 LFN 2004
[15]Cap C1 LFN 2004

Tax Relief) Act, the Petroleum Profits Tax Act[16], or the Capital Gains Tax Act[17] or any other legislation, profits or income of a company that are regarded as franked investment income under this Act; and distributions made by a real estate investment company to its shareholders from rental income and dividend income received on behalf of those shareholders, whether such dividends are paid out of profits of the year in which the dividend is declared or out of profits of previous reporting periods. This research work having seen the legal problem created by section 19 of CITA[18] and the extent the Finance Act,[19] came to remedy the legal problem, the researcher went further in making some recommendations such as further amendment of the Companies Income Tax Act[20] to remove section 19 of CITA.

2.0 Meaning of Taxation

Taxation is a compulsory contribution to support the government, levied on persons, properties, incomes, commodities, transactions at a fixed rate mostly proportionate to the amount on which the contribution is levied[21]. It is a burden which every citizen must bear to sustain his or her government[22]. Taxation is also a compulsory payment imposed by legislation which is used to withdraw resources from the private sector of the economy for the government to cover the cost of providing public goods and services, law and order, health care and education amongst others[23].

Taxation can also be described as the process of collecting revenue from citizens to finance government activities[24]. Taxation is the act of levying tax. It is a means by which government finance their expenditure by levying charges on citizens and corporate entities. Taxation is a tool of social engineering of societal class, and involves structural adjustment in the hands of a responsive and sensitive government[25].Taxation is a weapon used by any government to share from the wealth of individuals, communities, families and corporate bodies. It is a forceful imposition of levy on citizens which is not voluntary. The Constitutional court of Uganda in *Uganda Projects Implementation and Management Centre v. Uganda Revenue Authority*[26] held that taxes must not only be paid but must be paid promptly for public good and service delivery by government which is dependent upon payment of taxes, levies and dues.

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[16]Cap P13 LFN 2004
[17] Cap C1 LFN 2004
[18]*Op cit*
[19]*Op cit*
[20]Companies Income Tax (Amendment) Act, 2007.
[21] M.T. Abdulrazaq, *Principles and practice of Nigerian Tax Planning and Management* (2nd edn, Stirling-Horden Publishers Ltd, Ibadan Nigeria 2013)
[22] O.D. Akintoye, "The *Nigerian Tax Administration in Perspective*: The way forward". [2015] 6 (4) *The Gravitas Review of Business and Property Law* p. 79
[23]*Ibid.*
[24] F.O. Egwaikhide, "Taxation and State Building in a Democratic System [2010] 11(1) *Journal of the Charted Institute of Taxation of Nigeria (CLTN)*
[25] U.M.J Anushiem, Effective Tax Administration in Nigeria: A Veritable Instrument for Fighting Corruption, An LLM Thesis submitted to the Faculty of Law Chukwuemeka Odumegwu Ojukwu University Igabriam Campus, Anambra State Nigeria.
[26] O. Aguolu, *Taxation and Tax Management in Nigeria* [4th edn, Enugu: Institute for Development Studies Publishers 2009] p. 3.

Taxation has also been defined as the compulsory levy by government through its various agencies on the income, capital or consumption of its subjects. These levies are made on personal income such as salaries, businesses, profits, interests, dividends, commissions and royalties. The main purpose for assessing a person, organization or property to tax is to generate revenue for the government and to be used for the needs of the public[27].

3.0 Meaning of Dividend

Dividend means a proportion of the distributed profit of the company which may be a fixed annual percentage, as in the case of preference shares, or it may be variable according to the prosperity or other circumstances of the company, as in the case of equity shares[28]

Dividend refers to a reward, cash or otherwise, that a company gives to its shareholders. It can be issued in various forms such as cash payment, stocks or any other form[29]

Dividend is part of a profit of a company that is paid to the people who own shares in it. It is paid to the company's shareholders[30]. It is the sum of money which is received by a shareholder as his share of the profits earned by the company measured by his or her shareholding or as part of the assets which are divisible among shareholders[31]. Dividends are income payments made to common and preferred stockholders[32].

A company may pay dividends only out of profits available for the purpose. However, the profits of a company available for payment of dividends are its accumulated, realized profits (so far as not previously utilized by distribution or capitalization), less –its accumulated, realized loses (so far as not previously written off in a lawfully made reduction or reorganization of capital) A company shall not declare or pay dividend if there are reasonable grounds for believing that after payment of such dividend, the company will be unable to pay its liabilities as they become due[33].

A company may, in general meeting, declare dividends in respect of any year or other period only on the recommendation of the directors. The company may from time to time pay to the members such interim dividends as appears to the directors to be justified by the profits of the company[34].

Where dividends paid by a company remain unclaimed, the company shall publish in two national newspapers, a list of the unclaimed dividends, and the names of the persons entitled to the dividends and attach the list, as published in the national newspapers to the notice that is sent to the members of the company for each subsequent annual general meeting of the company.[35] After the expiration of three months of the publication and the above notice, the company may

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[27] I.U. Ibe, "An Appraisal of the Legal and Administrative Framework for Taxation in Nigeria", [2017] *African Journal of Constitutional and Administrative Law* (AJCAL) I p. 1.
[28] Companies and Allied Matters Act 2020 S.868.
[29] Bharat Bandh, Definition of Dividend available on www.cdn.ampproject.org assessed on 26th march 2021 at 12:29 pm.
[30] *Ibid.*
[31] J.O. Orojo, *Company Law and Practice in Nigeria*, (5thedn, London: Lexis Butherworths, 2008) p. 323.
[32] Ok Obayemi; "A critical Analysis of the excess Dividend Rule in Nigeria: Oando plc v FIRS Revisited"; [2015] The *Gravitas Review of Business and property law* p.56
[33] Companies and Allied Matters Act 2020 ss 427(1)(2)- 429.
[34] *Ibid* s. 426.
[35] *Ibid* s.429(1)

invest the unclaimed dividend for its own benefit in investment outside the company and no interest shall accrue on the dividends against the company[36].

4.0 Taxation of Dividend under section 19 of Companies Income Tax Act (CITA)

The Companies' Income Tax Act (CITA) [37] provides that:

"where a dividend is paid out as profit on which tax is payable due to –

a) No total profits; or

b) Total profits which less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company, is paid by a Nigerian company, the company paying the dividend shall be charged to tax at the rate prescribed in sub section (1) of section 40 of this Act as if the divided is the total profits of the company for the year of assessment to which the account, out of which the dividend is declared, relates.

Then section 40(1) [38] provides that there shall be levied and paid for each year of assessment in respect of the total profits of every company, tax at the rate of thirty kobo for every naira.

From the above section, it means that where a company paid dividend from its accounting profits or total profit which was less than the dividend paid out, the tax authority will treat the dividend paid out as the profit of the company and it will be subjected to 30% Companies' Income Tax under section 40 of CITA. However, where the total profit was less than the dividend, and the company had already paid tax on the total profit, the tax authority would compute the excess of the dividend over the profit, and assess the excess to tax.[39]

The essence of section 19 is that when the dividend paid out exceeds the total profit of the company, the dividend is deemed the profit of the company, and is taxed as such under section 40 of CITA. Therefore, it follows that, the dividend taxed under section 19 of CITA merely represents total profit on record. The rationale is to block tax avoidance channels that might be present when a company reports lower profit but pays out higher dividend[40].

In *Oando Plc v FIRS (Oando IV)*[41] where Oando a conglomerate with several subsidiaries had retained earnings from years that preceded 2005, but however, it declared and paid dividend for the taxable years of 2005, 2006 and 2007, at a time when there were no profits and/or when the dividend paid out were more than profits declared. The Federal Inland Revenue Service (FIRS) issued notices of additional tax assessments on the appellant for years in which it recorded no total profits or where it recorded total profits less than dividends paid, and so, the following issues were submitted for determination to the Tax Appeal Tribunal:

a. Whether the sums paid as dividends are taxable under Section 19 of CITA?

[36] *Ibid* s. 429(2).
[37] Companies Income Tax (Amendment) Act, 2007s.19
[38] Companies Income Tax (Amendment) Act, 2007
[39] J Okoro, 'Nigeria: Finance Act 2019 and The Excess Divided Tax Rule', available at https:11 ww.Mondaq.com assessed on 28th March 2021 at 5:48pm
[40] *Ibid*
[41] [2014] 16 TLRN 99

b. Whether the provisions of Section 19 of CITA are ambiguous and should be interpreted in favour of the taxpayer?[42]"

Oando was able to establish that the amounts posted to its retained earnings account were derived from its Annual Income Statements after paying corporation tax thereon, although there would always be issues of differences arising from tax timing which usually occur alongside the accounting treatment of taxation *viz-a-viz* the actual tax computation filed on behalf of the company based on the difference between the governing rules.[43]

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

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

Nevertheless, in addition to the fact that some of the dividends were paid out of retained earnings that had accrued *prior* to 2005, pursuant to which Oando had previously paid the 30% corporation tax under CITA, Oando also had received dividend income from some of its subsidiaries of which Oando was also a shareholder – a clear case of franked investment income[44]". Yet, the Federal Inland Revenue Service (FIRS) disagreed, and sought to levy additional 30% tax by relying on the Excess Dividend Rule under section 19 of CITA.

Oando went further to make the following arguments.[45]

a. First, the dividends were paid out of retained earnings which had already been taxed in prior years.
b. Secondly, FIRS should have considered and applied section 80 of CITA which exempts dividend income that has been subjected to withholding tax from further tax. This is relevant given that the company earned the dividend income from its subsidiaries.
c. Third, if section 19 is considered ambiguous then it should be interpreted in favour of the taxpayer in line with the *dubiocontra fiscum* rule[46].

Therefore, Oando, in its defence, referred the Tax Appeal Tribunal to an earlier decision by the Federal High Court (FHC) in *Oando Plc v. FIRS*[47], and also to the provisions of the Explanatory Notes on the Critical Tax Issues for the operation of Bank Holding Company Structure in Nigeria

[42] *Ibid.*
[43] O.K Obayemi, "A Critical Analysis of the Excess Dividend Rule in Nigeria; Oanda Plc vs. FIRS (Onada IV) Revisited" [2015] 6(1) The Gravitas Review of Business & Property Law Pp. 60 – 61.
[44] Franked Income' means income that has been subjected to tax already. i.e., the company had taxes to the authorities on the income.
[45] OK Obayemi, "A Critical Analysis of the Excess Dividend Rule in Nigeria; Oando Plc vs. FIRS (OANDO IV) Revised," [2015] 6 (1) The Gravitas Review of Business & Property Law p. 60.
[46] *Ibid*
[47] [2009] 1 TLRN 61.

(the banking Holding Company Guidelines)[48] issued by the FIRS, to support the view that section 19 of CITA may be ambiguous[49]. In its defence, the FIRS appeared to agree that dividends paid from retained earnings should not be subjected to excess dividends tax, but the FIRS submitted that Oando had not satisfactorily convinced the FIRS that tax had been paid on the retained earnings out of which the dividends were paid[50]. Finally, the FIRS also argued that the provisions of Section 19 of CITA were clear and unambiguous, and therefore they should be given their literal interpretation[51]. The tribunal, in interpreting Section 19, of CITA held that dividends paid from retained earnings, where there is no taxable profit or taxable profit is less than the dividends, should be taxed at 30% regardless of whether the earnings had been taxed previously[52]. Thus, the Tribunal outlined four steps to be allowed before subjecting a company to tax under Section 19 of the CITA[53]. According to the Tribunal:

a. The first step was to ascertain why no tax was payable- which could either be due to no taxable profits or taxable profits less than dividend paid.
b. The second step is to regard any such dividends paid as the taxable profits of the company.
c. Thirdly, the actual taxable profit for the current year should be deducted from the dividend (deemed taxable profit) to determine the excess.
d. The final step is to apply the tax rate of 30% to the excess established under step 3.[54]

The Tribunal further held that since the FIRS had complied with all four steps Oando was rightly assessed to the additional tax[55], and that the relevant question to ask is why the company had either total profits or total profits which are less than the dividend declared in any year of assessment[56].Tribunal also held that reference to the Bank Holding Company Guideline[57]is irrelevant since the source of the profits in question is not dividend income received by Oando from its subsidiaries which would be franked under section 80 of CITA[58]. According to Okoro[59], dividend received by a company from its investment in another company and which it shall re-distribute to its own shareholders is franked investment income and section 80(3) of the CITA

[48] The January 2012 Explanatory Notes on the Critical Tax Issues for the Operation of Bank Holding Company Structure in Nigeria. This circular is made to address issues arising in connection with the taxation of Bank Holding Companies and their Subsidiaries pursuant to Section 61 of the Federation Inland Revenue Service (Establishment) Act, 2007, Cap F36, Laws of the Federation of Nigeria, 2004. The circular shall apply to all Bank Holding Companies and their Subsidiaries in Nigeria. available at <http://www.firs.gov.ng/Resource-Centre/TAX%20Circulars%20Document%20Library/Bank%20Holdco%20Information%320Ciruclar%20LMD%20No%20PC-T12.2.3.%201027.pdf.>accessed on 20 January 2021 at 03:00pm.

[49] OK Obayemi, "A Critical Analysis of the Excess Dividend Rule in Nigeria; Oando Plc vs. FIRS" (OANDO IV) Revisited," [2015] 6 (1) *The Gravitas Review of Business & Property Law* Pp. 60 - 61.

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid*

[58] *Ibid.*

[59] J Okoro, Nigeria : Finance Act 2019 and the Excess Dividend Tax Rule, available at https://www.mondaq.com assessed on 30th March 2021 at 4:24pm.

frees such income from tax. Yet, franked investment income when re-distributed can contribute to dividend paid out exceeding total profit. Also profits of earlier years carried forward to a later period and dividend is paid on them is retained earnings. The postponement of dividend on them to a future year finds support in section 380 of the Companies and Allied Matters Act which enables a company to pay dividend from its revenue reserve. These reserved profit-retained earnings might have suffered income tax in the years of assessment relating to the accounting years in which they arose. Again, it might be that the profit giving rise to the excess dividend is profit from the pioneer period of the company. By the Industrial Development (Income Tax Relief) Act, the profit of a company enjoying pioneer status is free of Companies Income Tax[60]. The common question to be asked is would section 19, by taxing the dividend *in lieu* of profit not taxing what ought to be free from tax[61]. The answer is in affirmative. In *Actis Africa (Nigeria) Limited v. Federal Inland Revenue Service (FIRS)*[62]Actis a Nigerian company recorded no taxable profits during 2014 financial year. However, in 2014, Actis paid out dividends to its shareholders from its prior years (2013) profits, which had already been subjected to tax. Subsequently, the Federal Inland Revenue Service (FIRS) relying on section 19 of CITA, issued a notice of assessment of the company, subjecting the dividends paid out in 2014 to Companies Income Tax at 30%. The company objected to the said assessment and subsequently appealed to the Tax Appeal Tribunal. The main issue for determination before the tribunal was whether Actis was liable to Companies Income Tax on dividend paid out in the 2014 financial year based on the provisions of Section 19 of CITA. The FIRS contended that the company was liable to tax based on section 19 of the CITA, because it distributed dividends which exceeded its total profits in 2014. Thus, it argued that the dividends in 2014 financial year should be subjected to tax at 30%. On the other hand, the company argued that having paid tax on its profits in 2013, any dividends distributed from its after tax profit of 2013 should not be subjected to further tax as this would amount to double taxation. The Tax Appeal Tribunal, however, ruled in favour of the FIRS holding that Actis was liable to Companies Income Tax and the dividends paid out in 2014 by virtue of section 19 of CITA[63]. The implication of the above ruling is that, if a company distributes dividends which is more than the profit made by the company, the excess dividend will be subjected to companies' income tax at the rate of 30% notwithstanding that the company had already paid tax on its earnings.

There is no doubt that section 19 of CITA, is designed to prevent companies from avoiding tax on any income that ought to be subjected to tax, its application by the tax authority will amount to double taxation. This is because one can argue that a company's dividend can be traced to various other sources other than the trading profit of the company. In other words, some of these sources must have already been subjected to tax. Apart from amounting to double taxation on the Nigerian companies when applied, section 19 of CITA will also discourage companies to retain other profits in Nigeria. It will also discourage investors to invest in Nigeria looking at the tax implications of section 19 of CITA. Despite the hardship caused by section 19 of the CITA on Nigerian companies, the legislature enacted a new law (Financial Act, 2019 As Amended) to remedy some of the hardships.

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[60] *Ibid.*
[61] *Ibid.*
[62] Decision of the Tax Appeal Tribunal Lagos Division on 5th July 2019.
[63] Andersen, Tax Appeal Tribunal Holds that excess Dividend Tax Applies to previously Tax Earnings, available at https://ng.anderson.com assessed on the 1st April 2021 at 5:03pm.

5.0 The Intervention of Finance Act 2019 As Amended, on Taxation of Dividends.

Section 19 of the Companies Income Tax Act (CITA) also known as the Excess Dividend Tax Rule (EDTR) provides that, the dividend which the company pays in any year is to be deemed as the company's profit which is liable to tax for that year, if the total profits of the company or the actual taxable profits are less than the dividend paid. This provision is an anti-tax avoidance rule which is aimed at addressing the problem of corporate tax avoidance. At the same time, this rule has been viewed as having an undesirable effect of imposing double taxation on the companies who are liable to pay such tax on the dividends distributed to members of the company.

This incidence of double taxation occurs each time there is a tax on the dividends paid out of the retained earnings of a company to its shareholders, which dividend had earlier been subjected to Income Tax[64]. It is even worse when its provision is applied to dividends that are paid out of tax exempt profits which is tantamount to giving with one hand and taking back with the other, thereby, indirectly rescinding the tax exemption on those profits[65]. The Finance Act[66] however, came and addressed some of the controversies created by section 19 of Companies Income Tax Act[67] (CITA) by expanding the frontiers of the exempted profits that would have been taxed under section 19 of Companies Income Tax Act (CITA).[68]

The Act[69] amended section 19 of Companies Income Tax Act (CITA)[70] by providing thus:

The provision of section 19(1) of the Companies Income Tax Act (CITA) shall not apply to:

a) Dividends paid out of the retained earnings of a company, provided that the dividends are paid out of profits that have been subjected to tax under this Act, the Petroleum Profits Tax Act, or the Capital Gains Tax Act[71];

b) Dividends paid out of profits that are exempted from income tax by any provision of this Act, the Industrial Development (Income Tax Relief) Act,[72] the Petroleum Profits Tax Act[73], or the Capital Gains Tax Act [74]or any other legislation;

c) Profits or income of a company that are regarded as franked investment income under this Act; and

d) Distributions made by a real estate investment company to its shareholders from rental income and dividend income received on behalf of those shareholders, whether such dividends are paid out of profits of the year in which the dividend is declared or out of profits of previous reporting periods.

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[64] Cyril Ikechukwu Obika, "A Review of the Key Amendments to the Companies Income Tax Act by the Finance Act 2020," [2020] "(3) *The Gravitas Review of Business and Property Law* p. 114.
[65]*Ibid.*
[66] The Finance Act, 2019 As Amended s.7
[67]*Ibid*
[68]*Ibid*
[69]*Ibid*
[70]*Op cit*
[71]*Op cit*
[72]*Op cit*
[73]*Op cit*
[74]*Op cit*

The Finance Act[75], in its quest to expand the frontiers of the categories of income that will not be caught up by the excess dividend tax rule made provisions removing the application of section 19(1) of the Companies Income Tax Act,[76]

From the provisions of Finance Act, the provisions of section 19(1) of Companies Income Tax Act,[77] shall not apply to dividends paid out of returned earnings of a company provided that dividends were paid out of profits that have been subjected to tax under the Companies Income Act,[78] the Petroleum Profits Tax Ac[79]t or the Capital Gains Tax[80]. What the above exemption means is that once tax is paid out of profit of a company under the Companies Income Tax Act[81], Petroleum Profit Tax Act[82] and Capital Gains Tax Act[83], dividends paid from retained earnings of the company upon which any of those taxes have been paid shall no longer be liable to be taxed under section 19(1) of Companies Income Tax Act.[84]

However, where there is no evidence that tax has been paid on the profit of the company from where the earnings were retained, the dividends paid out of the retained earnings will be liable to be taxed under the excess dividend tax rule pursuant to section 19(1) of the Companies Income Tax Act.[85] In other words, the condition precedent for a company to enjoy or take advantage of the exemption created in section 7 of Finance Act,[86] is proof of payment of tax on the profit from which the earnings were retained. Once the proviso is not met the provision of section 7 will become *non sequitur*. This is because of the import and effect of a proviso in a statute. In the case of *Baba Panya vs. President,* FRN[87] held that a proviso in a provision of a Law is a clause of exception or qualification and it speaks the last intention of a legislature in a statute. The purport of a proviso in any enactment is to qualify the intendment of the main section of the statute. In the instant case, the proviso to section 147(3) of the Constitution of the Federal Republic of Nigeria, 1999 is very crucial. A search light must be pointed to the proviso so as to give the proper intendment of the farmers of the Constitutional provision. The *raison d' elre* for this proviso is to promote national unity and sense of belonging by all Nigerians. The essence of this provisions, was made manifest by the director that the appointment of minister must be in conformity with the provisions of section 14(3) of the Constitution which is under chapter 11 of the Constitution which covered fundamental objectives and Directive principles of state policy.[88]

Also the court in *F.R.N vs. Nwosu*[89]held that a proviso of necessity serves to cut down or qualify the general provision in the body of the section to which it relates. It would however be contrary

[75] The Finance Act, 2019 As Amended s.7
[76]*Op cit*
[77]*Op cit*
[78]*Ibid*
[79]*Op cit*
[80]*Op cit*
[81]*Op cit*
[82]*Op cit*
[83]*Op cit*
[84]*Op cit*
[85]*Ibid.*
[86]*Op cit*
[87] (2018) 15 NWLR (Pt. 1643) 395 at 400.
[88]*Baba Panya vs. President,* FRN, *supra.* See also *N.D.I.C vs. O' SilvawaxInt' l Ltd* [2006] 7 NWLR (Pt. 980) 588; *A.B.S.U vs. Otosi* [2011] 1 NWLR (Pt. 1229) 605; and*Ougha vs. Ezeigwe* [2011] 13 NWLR (Pt. 1263) 184.
[89] [2016] 17 NWLR (Pt. 1541) 255

to the ordinary operation of a proviso to give it an effect which could cut down the general provision beyond what compliance with the proviso necessarily requires. Thus, a proviso only creates exceptions, relaxes limitations or throws light on any ambiguous aspect of the general enactment. It is certainly not the aim of a proviso to wholly neutralize the general; provision it has created exceptions to.[90]

The Supreme Court also in *F.R.N vs. Nwosu*[91] reiterated the effect of the proviso to Order 9 Rule 3(1) of the Supreme Court Rule.[92]

From the two case above cited, the proviso in the provision of section 7 (a) of Finance Act[93] to the effect that taxes must be paid in the profit from which the retained earnings are derived must be proved before section 19(2) of Companies Income Act[94], will become inapplicable.

It is worthy of discourse to state that section 7(b) of the Finance Act[95] watered down the effect of section 19 of Companies Income Tax Act,[96] by exempting dividends paid out of profits that are exempted from income tax by Industrial Development (Income Tax Relief) Act[97], the Petroleum Profit Tax Act[98] and the Capital Gains Tax Act.[99]

By this exemption, the excess dividend tax rule will no longer apply to dividends paid out of profits exempted from income tax under those Acts or any other legislation exempted that certain profits from income tax. Also, the Finance Act[100] watered down the erstwhile controversial conclusion that the excess dividend tax rule renders the exemption in the Companies Income Tax Act[101] a gift from the devil who gives with one hand and collects it back with another hand. The Finance Act[102] expanded the scope of profits exempted from the excess dividend tax rule.

More so, profits and income regarded as franked investment income under the Finance Act[103] are clearly excluded from the application of the excess dividend tax rule under section 19(2) of the Companies Income Tax Act.[104]

Distributions made by a real estate investment company to its shareholders from rental income and dividends, income received on behalf of those shareholders whether such shares are paid out of profit of that year in which dividends are declared or out of profits of previous reporting year

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[90]*F.R.N vs. Nwosu, supra*. See also *Alli vs. Ikusebiala* [1985] 1 NWLR (Pt. 4) 630; *Ekwunife vs. Wayne (W.A) Ltd* [1989] 5 NWLR (Pt. 122) 422; *F.I.B Plc vs. Pegasus Trading Office (GMBH)* [2004] 4 NWLR (Pt. 863) 369; *Abasi vs. State* [1992] 8 NWLR (Pt. 260) 383.
[91]*Supra.*
[92] See also *Nwosu vs. Board of Customs & Excise* [1988] 5 NWLR (Pt. 93) 225; and N.D.I.C vs. Okem Enterprise Ltd [2004] 10 NWLR (Pt. 880) 107.
[93]*Op cit*
[94]*Op cit*
[95]*Op cit*
[96]*Op cit*
[97]*Op cit*
[98]*Op cit*
[99]*Op cit*
[100]*Op cit*
[101]*Op cit*
[102]*Op cit*
[103]*Op cit*
[104]*Op cit*

is also exempted from the operation of excess dividend tax rule by virtue of section 7(d) of Finance Act[105]

6.0 Conclusion

From that above analysis, it is crystal that the Finance Act[106] indeed intervened to water down the application of section 19(2) of Companies Income Tax Act[107] by expanding the scope of certain profits and incomes that dividends derived from and paid out to members will not be subjected to tax unlike the position under the Companies Income Tax Act[108].

The intervention of Finance Act[109] has therefore rendered the decisions *Oando Plc vs. FIRS*[110] otiose as the decision in the cases and similar case may not apply in subsequent case with similar facts and circumstances.

Having looked at the provisions of section 19 of the Companies Income Tax Act (CITA)[111]and the intention of the draftsman which is to prevent tax avoidance by the Nigerian Companies, however, interpreting and applying section 19 CITA[112] no doubt will amount to double taxation. Apart from double taxation, it will discourage companies to retain their profits in Nigeria and discourage investors to invest in Nigeria.

Despite the seeming hardship caused by section 19 CITA[113], the government in their wisdom enacted the Finance Act[114], to exempt some dividends that were subjected to tax under section 19 of CITA[115] from paying tax. Thereby coming to settle some of the controversies inherent in section 19 of CITA[116].

7.0 Recommendations

This work hereby made some recommendations.

7.1 Further Amendment of section 19 of Companies Income Tax Act[117].

There is need to further amend the Companies Income Tax Act[118] to make section 19 of the Act[119] to be applicable only to dividends paid out of profits that were not taxed.

7.2 Amendment of Finance Act[120], to remove the ambiguities in taxation of dividends generally whether dividends paid on a retained earnings of a company or not.

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[105]*Op cit*
[106]*Ibid.*
[107]*Op cit*
[108]*Ibid.*
[109]*Op cit*
[110]*Supra.*
[111]*Op cit*
[112]*Ibid.*
[113]*Ibid*
[114]*Op cit*
[115]*Op cit*
[116]*Ibid.*
[117]*Ibid*
[118]*Ibid*
[119]*Ibid*

7.3 While the Finance Act[121], remains extant, companies are advised to prepare their financial statements to obviate the risk of double taxations by bringing their profits within the exemptions in section 7 (a - d) of Finance Act,[122].

7.4 There is need to strengthen the intervention of the government to tackle the menace of corporate tax avoidance through excess dividend tax rule.

7.5 There is need to sensitive the judiciary on the conflicting need not to create a regime of double taxation and the need not to encourage corporate tax avoidance and evasion.

[120]*Op cit.*
[121]*Ibid*
[122]*Ibid*