

KAMPALA INTERNATIONAL UNIVERSITY

LAW JOURNAL (KIULJ)

KIULJ. VOL 3, ISSUE 2, 2019

© KIULJ. 2019

Journal of School of Law, Kampala International University, Kampala, Uganda

All rights reserved. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the Editorial Board of the Journal except in the case of academic research and proper acknowledgement having been made.

ISSN: 2519-9501(Print)

ISSN: 2519-9528(Electronic)

Published by:

School of Law

Kampala International University

P.O. Box 20000 Kampala

Kampala

Uganda

ABOUT THE JOURNAL

Kampala International University Law Journal is the official journal of the School of Law, Kampala International University. It is a peer-reviewed Journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between lawandsociety. The result is a high-quality account of an in-depth assessment of the strengths and weaknesses of particular legal regimes with a view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal pays high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

The Journal offers useful reference material to legal practitioners, international organisations, non-governmental organisations and the academia. It also provides multipurpose policy guide for the government.

The Journal is a biannual publication. Calls for articles and submission datelines are determined by the Editorial Board.

All correspondences are addressed to:

The Editor-in-Chief
Kampala International University Law Journal,
School of Law, Kampala, Uganda.

EDITORIAL NOTE

We are delighted to introduce the second edition of Kampala International University Law Journal (KIULJ) for the year 2019. The objective of the Journal, as usual, is to publish current legal issues, high quality, insightful and original research works. In the accomplishment of this objective the current edition contains in-depth analysis of contemporary legal issues on a wide spectrum of areas such as, the mechanisms for Alternative Dispute Resolution (ADR), criminal law and practice, constitutional law, international human rights law, commercial law and practice, among others.

We are hugely grateful to all those who assisted in the editorial process and made this publication possible. In particular, the Editorial Board will like to appreciate our team of anonymous reviewers who took time off their tight schedules to assess the works submitted by colleagues. Their observations, suggestions and general comments contributed immeasurably to the high quality of the articles published in this edition. We also appreciate the authors for thoroughly revising their works based on the reviewers' comments.

The KIULJ is a bi-annual publication of the School of Law, Kampala International University, Uganda. Contributions in the form of articles, case/book reviews, commentaries etc., are received by the Journal on a rolling basis. We therefore welcome research works on different areas of the law from academics and legal practitioners either individually or jointly. Contributors are to note importantly that the Journal adopts the Oxford Standard for the Citation of Legal Authorities (OSCOLA) and that any work that does not comply substantially with it (OSCOLA) may not be accepted for publication. Contributors are also requested to indicate their affiliations and qualifications (academic and professional) while turning in their works.

This edition of the Journal may be cited as: *KIULJ, Volume 3, Issue 2, 2019*.

Ifeolu John Koni, PhD.

EDITORIAL BOARD

Valentine Tebi Mbeli **Chairman**
School of Law,
Kampala International University

Ifeolu John Koni **Editor-in-Chief**
School of Law,
Kampala International University

Apio Esther **Secretary**
School of Law,
Kampala International University

Mahmud Sewaya **Member**
School of Law,
Kampala International University

Tajudeen Sanni **Member**
School of Law,
Kamapala International University

Jimmy Walabyeki **Member**
School of Law,
Kampala International University

EDITORIAL CONSULTANTS

Prof Tony Ijofor, SAN
Faculty of Law
Benue State University,
Nigeria.

Prof Adewale E Taiwo,
Dean, Faculty of Law,
Adekunle Ajasi University
Akungba-Akoko, Nigeria.

Prof Olaide A Gbadamosi,
Dean, Faculty of Law,
Osun State University,
Osogbo, Nigeria.

Leah Ndimiwirno, PhD
Department of Public Law,
Faculty of Law,
Nelson Mandela Metropolitan University,
South Africa.

Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

Citation

This Journal may be cited as *KIULJ Vol 3, Issue 2, December 2019.*

Disclaimer

Statements of fact and opinion contained in the Kampala International University Law Journal are those of the respective authors and contributors and are not necessarily those of the School of Law, Kampala International University, the editors or the institutions with which the authors are affiliated. Accordingly, the authors and contributors are responsible for the integrity and accuracy of the respective material contents and references. The School of Law, Kampala International University, does not make any representation, express or implied, with regard to the accuracy of the materials in the Kampala International University Law Journal and wishes to unequivocally disclaim any responsibility or liability for such materials.

TABLE OF CONTENTS

AN ANALYSIS OF THE LEGAL FRAMEWORK FOR SUSTAINABLE FISHERIES' FINANCING IN UGANDA

Valentine T Mbeli **1**

THREATENED MILITARY INVASION AS A MEANS OF DISPUTE RESOLUTION IN INTERNATIONAL RELATIONS: AN APPRAISAL

Godard Busingye, LL. D **23**

THE ROLE OF COURTS IN THE INTERPRETATION OF TAXING STATUTES IN NIGERIA

Hafsat Iyabo Sa'adu &Ahmed Olatunji Isau[**] **43**

COMPLICITY OF BOKO HARAM RESILIENCE AND THREAT TO SECURITY AND GOOD GOVERNANCE IN NIGERIA

Hanafi A Hammed, Ph.D **63**

IMPLEMENTATION OF SDGS IN NIGERIA: ISSUES AND CHALLENGES

OladiranAkinsola Ayodele and Maruf Adeniyi Nasir **83**

AN APPRAISAL OF COMMUNITY SERVICE AS A NON-CUSTODIAL SANCTION UNDER THE ADMNISTRATION OF CRIMINAL JUSTICE LAW OF LAGOS STATE AND THE ADMNISTRATION OF CRIMINAL JUSTICE ACT OF NIGERIA

Gloria Shajobi-Ibikunle (PhD) & Gabriel Adenyuma (PhD) **105**

AN EXAMINATION OF THE LEGAL REGIME FOR THE PROTECTION OF LIVING RESOURCES OF THE GULF OF GUINEA

Gideon N. Gasu, PhD **123**

LEGAL AND SOCIO ECONOMIC CONSEQUENCES OF IMMIGRATION AND INTERNALLY DISPLACED PERSONS IN AFRICA: A NIGERIAN PERSPECTIVE

Omolabake Ogunwande, LLM **143**

THE REGULATORY REGIME OF GENETICALLY MODIFIED ORGANISMS (GMOs) IN NIGERIA AND ITS IMPLICATIONS ON RELEVANT WTO AGREEMENTS

Afolasade A Adewumi **151**

RESOLVING DISPUTES ARISING FROM EXPROPRIATION IN NIGERIA THROUGH THE MECHANISM OF ALTERNATIVE DISPUTE RESOLUTION

Joseph I Aremo, PhD **165**

THE SUPREME COURT OF NIGERIA AND DEVELOPMENT OF LEGAL PRACTICE: THE SUPREME COURT'S VOYAGE OF DISTINCTION WITHOUT A DIFFERENCE

Mary-Ann O. Ajayi, PhD & David Tarh-Akong Eyongndi, LLM **183**

NOVELTIES AND PERPLEXITIES OF PLEA BARGAIN IN NIGERIAN CRIMINAL JUSTICE: IN DEFENCE OF HUMAN RIGHTS

William W Longpoe & Samuel Oguche **205**

JUSTIFICATION FOR THE LAW OF ATTEMPTS

Olaide A Gbadamosi & Halimat Adeniran **229**

THE ROLE OF THE JUDICIARY IN BUILDING A FOUNDATION OF CONSTITUTIONALISM IN AFRICA: A COMPARATIVE ANALYSIS OF NIGERIA AND UGANDA

Chukwuma Chinwo, PhD & Daniel Ruhweza, PhD **255**

BOKO HARAM'S ABDUCTION OF THE CHIBOK SCHOOL GIRLS IN NORTH EAST NIGERIA: FROM INSURGENCY TO CRIME AGAINST HUMANITY

O A Olaseeni, PhD & M O Mimiko, LLM ***277***

THE PROTECTION OF PERSONS *HORS DE COMBAT* AND CIVILIANS IN INTERNATIONAL HUMANITARIAN LAW

Amade Roberts Amana, PhD. **285**

THE BURDEN OF PROOF FOR THE NON-CONFORMITY OF GOODS UNDER THE OHADA UNIFORM ACT ON GENERAL COMMERCIAL LAW: A MATTER OF INTERPRETATION

Roland Djieufack, PhD **299**

THE ROLE OF COURTS IN THE INTERPRETATION OF TAXING STATUTES IN NIGERIA

HAFSAT IYABO SA'ADU* & AHMED OLATUNJI ISAU**

Abstract

The rules guiding the interpretation of statutes cannot be lightly regarded, most especially as they relate to the interpretation of tax legislations and the approach of the courts when exercising their judicial discretion to opt for one of the several rules. This is particularly imperative in the light of the fact that the interpretational rule applied by the courts often determines their interpretation of statutory provisions and ultimately the application of such provisions to the determination of tax disputes being adjudicated upon. This paper evaluates the rules of interpretation of statutes as applied by the courts in relation to tax legislations in Nigeria. The study employs doctrinal research method which entails library-based analysis of the content of both primary and secondary sources of law and information. Thus, the study found that the rule of interpretation opted for by the court determines the outcome of the judicial proceedings, and where the court has opted for the wrong rule of interpretation and consequently interpreted tax legislations wrongly, it is inevitable that its judgment and final verdict on the suit would have been reached in error (per incuriam), and would always readily be set aside on appeal. The study concluded that such wrongful interpretation and application of tax legislations by the apex appellate body (i.e. The Supreme Court), would set in an oppressive binding precedence on lower courts. The article recommended that Nigeria should device efficient and effective legal drafting of tax statutes and legislations.

Keywords: Role, Courts, Interpretation, Taxing Statues, Nigeria.

1.0 INTRODUCTION

Judges do not make laws but do possess some discretion in the interpretation of statutes. Discretion involves the choice of an alternative out of a series of alternatives. This choice is sometimes dictated by policy. There are areas in which judicial discretion should be tolerated in the interests of legal development but how far should this be allowed in taxation?

Tax Law is in the main statutory, so that if the law says one thing or omits to provide for a variety of circumstances should the judges be allowed to use their

* Ph.D, Senior Lecturer, Faculty of Law, University of Ilorin, Nigeria. E-mail: adu39asa@gmail.com +2348060848422.

** Ph.D, Lecturer, College of Law, Kwara State University, Malete, Nigeria Email: ahmedisau.elcs@gmail.com, +2347030070078.

discretion to fill in the gap? We attempt to look at the judicial discretion in the interpretation of taxing statutes and to see how far it is acceptable, that even though a taxing statute provides for or omits to provide for certain situations judicial discretion can contrive a solution to any problem which the statute or the omission therein is supposed to provide for.

1.1 General Rules on Interpretation of Statutes:

There are three main general principles of interpretation, namely, the Literal or Plain meaning rule, the Golden rule and the Mischief rule. The **Literal rule** is best summed up in the words of Jervis C.J. in *Abley v Dale*[1]that:

> If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it does lead, in our view of the case, to an absurdity or manifest injustice.

According to this rule, statutes are to be given their 'plain meaning'. Words used in statutes are thus, to be construed in their grammatical sense. If the words are used in relation to a trade or business they are to be given their usual meaning in the trade or business. It is immaterial that hardship would result from literal interpretation, as stated by **Balogun J.** in *Akanro v Lagos Electoral Commission*[2]thus:

> It is necessary that courts of justice should act on general rules without regards to the hardship which in particular cases may result from their application.

Also in *Ifezue v Mbalugha*,[3]Aniagolu JSC held that**:**

> If there is nothing to modify, alter or qualify in the language of a statute, it must be construed in the ordinary and natural meaning of the words and sentences used.

[1](1851)11 QB 378, 391.
[2](1981) NCLR 51, 60.

[3](1984) SCNLR 427, 430.

Lord Reid once said,

> What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act.[4]

However, Lord Blackburn on the other hand said,

> The cases, in which there is real difficulty, are those in which there is a controversy as to what the grammaticaland ordinary sense of the words, used with reference to the subject matter, is.[5]

Therefore, the literal rule should be applied only when the wording of the statute is clear and unambiguous as the court held in *Nabhan v Nabhan*[6]that:

> ... the cardinal rule is to look first at the wordings of the statute which is being construed and if that is found to be unambiguous, it is neither necessary nor permissible to look further.

An extraordinary illustration of the point is *Inland Revenue Commissioners v Henchy*[7]The Income Tax Act, 1952 (U.K.) provided that a person who fails to deliver a correct tax return shall 'forfeit the sum of £20 and treble the tax which he ought to be charged under this Act. The defendant made a return under a particular

[4]*Inland Revenue CommissionersvHinchy* AC [1960] 748,767.

[5]*Caledonian Rail Co. v.North British Rail Co*. [1881] 6 A.C. s 114, 131, 132.

[6](1967) 1 All NLR 47, 54. See also *MajekodunmivMajekodunm*iCCHJ/6/74 809 and s.15 (2) (c),Matrimonial Causes Decree *1970.*

[7]*Inland Revenue Commissioner* (n 4).

heading which was GBP 32.19s 9d less than it should have been. The tax assessable on the amount which he should have declared was GBP14.55 the rest of his tax assessment came to GBP 125.6s 6d, which would have made up a total liability of f139.11s.6d. The Court of Appeal held that the Act meant that he should pay GBP 62.15s, being £20 plus treble the sum of GBP14.5s. The House of Lords, however, held that it meant that he should pay f438 14s 6d, being GBP20 plus trebles the sum of GBP139 11s 6d. Both tribunals were applying the *'plain meaning'*.[8]

The difficulty with this rule of interpretation is that it is not always easy to say whether a word is plain or not.
The golden rule was formulated in *Beck v Smith*.[9] It states that:

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

The golden rule of interpretation is however not without criticisms. The criticism in this regard centers on the fact that resorting to this mode of interpretation has been found to open the door of bias and opinion for judges who under the guise of trying to find the intention of the legislature may pursue their own objectives, opinions, desires and intentions.[10] In such situations, judges are said to be usurping the role of the legislature to pursue their own personal desires on the excuse that the literal meaning of the words would breed absurdity.[11] The golden rule of interpretation is also criticized for being a mere extension of the literal rule which only allows a judge to go for the interpretation that will avoid absurdity.[12]

---

[8]Reginald Walter Michael, *Dias Jurisprudence*, (4[th]edn, Butterworth and Co. Publishers Limited 1976). 227-228.

[9] (1836) 150 ER 724-726.

[10] Muhammed TaofeeqAbdulrazaq, *Principles and Practice of Nigerian Tax Planning & Management*, (2[nd]edn.., Stirling-Horden Publishers. Limited 2013) 137.

[11]AM Ekanem'Illuminations on the Attitude of the Court in Interpretation of Tax Legislations in Nigeria-F.B.I.R v I.D.S. Ltd in View,'<https://ssrn.com/abstract=2873618> accessed 10 February 2019.

[12] ibid.

The mischief rule was formulated to provide compass to guide judges on the path of search for the intention of the legislature. The rule requires that the judge should look at the statute to see the intendment of parliament and interpret it to remedy the wrongs in the society that it was meant to correct.[13]The mischiefrule was propounded long ago in 1584 by Lord Edward Coke in the *Heydons's*case.[14] In this case it was stated that:

> For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discussed and considered: 1st, what was the common law before the making of the Act; 2nd, what was the mischief and defect for which the common laws did not provide; 3rd, what remedy hath parliament resolved and appointed to cure the disease of the Commonwealth; and 4th, the true reason of the remedy; that then the office of all the judges is always to make *such* construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privatocommodo*, and to add force and life to the cure and remedy according to the true intend of the makers of the Act *pro bono* public.

This rule contemplates an inquiry into the policy and purpose behind the statute and is applicable only where the meaning of the statutory provision is ambiguous. This rule was applied in *Jammal Steel Structures Ltd. v African Continental Bank*[15]where the court having considered the history of the Federal High Court Decree held that the true object and purposes of the Decree as can be

[13] ibid.
[14]76 ER 638 (1584).
[15](1973) All NLR 208.

gathered from the four corners of it is the more expeditious dispatch of the revenue cases particularly those relating to personal income tax, company tax, custom, excise duties, illegal currency deal, exchange control measures and the like which the State High Courts were supposed to have been too tardy to dispose of especially in recent years.

Therefore, the rule thus sets the pedestal for historical survey of what was before the law to ascertain what the law came to provide that wasn't available before the law came and the courts have held that this can be gleaned from the preamble to the Act itself.[16]In *Emologu v. State*[17], the Supreme Court held as follows:

> Unless I put the legislation…in the proper historical setting…I cannot reach a correct decision in the matter…I feel entitled to call in aid the historical background of the enactment in order to correctly comprehend the true import thereof.

The mischief rule unlike the golden rule does not afford the judge the liberty to bring in alien considerations in his effort to seek out the true intention of the legislator. It only allows the judge to avoid the absurdity that the literal rule may occasion by looking at the state of the law before the statute to find out what was wrong (the mischief) that the present statute came to correct.[18]

There are other general principles which aid the court in its interpretation of statutes. A statute is to be construed in such a manner as not to command doing what is impossible – *Lex non cogitadimpossiblia.*[19] In principle, where a provision is reasonably susceptible of two interpretations and it is found that by one interpretation the provision would be valid and by the other it would be invalid the provision ought to be construed in such a manner as to make it valid. In other words, the statute is to be construed *ut res magisvaleat quam* pereat,[20] that it may rather have effect than be destroyed.

[16]AM Ekanem (n 11).
[17](1988) 2 NWLR (pt. 78) SC.
[18]A.M Ekanem (n 11).
[19]*Commissioner of Police v.Okoli* (1966) NLR1.

[20]*Osho v Phillips* (1972) All N.L.R. 2786; See also *Roe vTranmarr Willies* [1957] 682.

Provisions being interpreted should not be read in isolation.[21] Words are to be construed in their context and any section, part of which is being interpreted must be read as a whole. There are also presumptions of interpretation. One of the presumptive principles is the *ejusdem generis* rule. According to the principle, where particular words of the same class are followed by general words, the general words must be construed to be similar in meaning to the particular words. Can these general principles be applied in the interpretation of taxing statutes?

2.0 RULES ON INTERPRETATION OF TAXING STATUTES

The law of taxation is wholly the creature of statute; that is to say, there is no common law of taxation, no principles of law which are applicable other than those principles which are found in the Taxing Acts themselves according to their true meaning and effect. In any tax case, it is consequently necessary for the court to determine the rule, meaning and effect of the particular statutory provision which is in question. The approach of the courts to the interpretation of Taxing Acts has been fairly evasive throughout the years, but it is generally recognized that Taxing Acts are a rather special type of statute, demanding a predictable and hence strict form of interpretation. Certain general principles, characteristic to this approach, have been formulated by the English courts. These general principles provide relevant guidelines for the Nigerian courts, not for the purposes of slavish limitation, but because it is common place and sensible to learn from another's experience. The principles thus formulated are:[22]

a) A tax must be expressly imposed upon the subject by the clear words of the statute[23]
b) The words of the Act must be given their natural meaning.[24]
c) Where the meaning of a statutory provision is ambiguous the taxpayer must be given the benefit of the doubt.[25]
d) There is no equity in taxation.[26]

[21]*Council of the University of Ibadan v Adamolekun* (1967) 1 NLR.213.

[22]AJEasson.Cases and Materials in Revenue Law, 3.

[23]*Coltness Iron Company v Black App* [1881]Cas. 315.

[24]*Pryce v Monmouthshire Canal v Railway Company* (1974) *4 App. Cass.197.*

[25]*Adamson v Attorney-General [1938].C. 257*

[26]*Cape Brandy Syndicate v Inland Revenue Commissioners*[1921] 1K.B.64. See also *Federal Board of InlandRevenue v. Omotosho* (1973) N. Comm. L.R. 369.

e) Where the meaning of the statute is clearly expressed, the court will not have regard to any contrary intention or belief of Parliament.[27]

f) Where the meaning of the statute is not clear, it should, if possible, be construed so as to carry out the expressed or presumed intention of Parliament.[28]

g) Ambiguity may be resolved by subsequent legislation.[29]

h) In applying the appropriate statutory provision to a given set of facts, the court will not go behind the form of the transaction or document concerned and have regard to the substance unless the form is a "mere sham".[30]

There are apparent contradictions in these rules of statutory interpretations which indicate that there is a lack of consistency on the part of the courts with regard to interpreting taxing statutes particularly in the area of tax planning or avoidance. This lack of consistency is more noticeable in the court's attempt to stifle any transaction which it 'feels' has a tax avoidance motive. That is, the court has continuously in its efforts to stop tax avoidance unable to lay down any predictable approach to such cases. Thus, the courts have failed to realize that tax statutes are special and that they have no discretion other than to decide whether a particular transaction falls within or without a taxing provision. They possess no discretion to look into the motive of tax planning.

2.1 Tax Planning[31]

The various cases in the area of tax planning illustrate this inconsistent interpretation approach of the courts in Nigeria; judicial decisions squarely on the issue of tax avoidance or the construction of statutory provisions against tax avoidance are the exception rather than the rule. This is rather unfortunate, in view of the fact that it is a notorious fact that the incidence of tax avoidance, just like its twin factor, tax evasion, is rampant in Nigeria. Based on a critical review of some of the tax cases, the general trend which can be easily discerned is a conscious judicial

[27]*Inland Revenue Commissioners vAyshire Employers Mutual Insurance Association Ltd* (1946) 1 All E.R.637.

[28]*Astor vPerry*[1935]A.C 398. See also *Luke v. IRC*[1956]A.C 557; *Brown v. National Provident Institution* [1921] 2 A.C.222.

[29]*Ormond Investment v Betts* A.C [1928] 143.

[30]*Inland Revenue Commissioners v Duke of Westminster* [1936] A.C. 1. See also *Marina Nominees Ltd. vFederal Board of Inland Revenue*, FCA/L/20/83.

[31]This is used interchangeably with tax avoidance as they both substantially mean the same thing.

side tracking on technical grounds, of the issue of tax avoidance or an in-depth judicial construction and analysis of the statutory provision against tax avoidance.[32]

Therefore, in order to assess how the Nigerian courts interpret a taxing statute it is to the English courts we have to turn as a guide. The ideal no doubt, is for a country to have its own 'homegrown' legal system, but the organic development of any such system is a slow and gradual process, and until when a society chooses or is forced by circumstances to undergo a radical change, it is most unlikely that its domestic law will be able to adapt itself rapidly enough to fit the altered situation. One solution to this problem is for the society to take over and apply for its purposes the legal system of another country which has already developed to the stage which it is itself hurrying.[33]

No better starting point can be afforded than the principle enunciated in *Inland Revenue Commissioners v Duke of Westminster*[34] by Lord Tomlin to the effect that:

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

Also, in the US's case of ***Cape Brandy v IRC***[35], the court held as follows:

[32] Margaret TOkorodudu, 'Measures Against Tax Evasion and Avoidance: Some Equity Question & Suggested Reforms' (1985) Being text of a paper presented at the 15th Annual Senior Staff Conference of the Federal Inland Revenue Department 34.

[33] Andrew Edward Wilson Park, *Sources of Nigerian Law* (Sweet & Maxwell 1963)15-16.

[34][1936] AC 1.

> In a taxing Act, clear words are necessary to tax the subject. But it is often endeavoured to give to this maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment, there is no equity about tax, you read nothing in; you imply nothing, but you look fairly at what I said and at what is said clearly and that is tax.

What the principle is really saying is that a taxpayer is to be taxed by reference to what he has actually done, and not by reference to what he might more naturally have done but did not do, to achieve the same result. This, it is respectfully submitted, should be the approach of the courts in deciding cases of tax planning, however, recent decisions of the courts have tended to depart from this principle to adopt the role of an unsolicited tax intelligence agency for the Revenue. To perform this role the courts have coined various terminologies like "no commercial purpose", "fiscal nullity" and "no appreciable effect" to nullify certain taxing transactions which they feel have a tax avoidance motive.

The modern developments started from the case of *Floor v Davis*[36]through *Inland Revenue Commissioners v Plummer*,[37]*Inland Revenue Commissioners v Ramsay,*[38]*Eilbeck v Rawling,*[39] *Inland Revenue Commissioners v Brumah Oil Co. Ltd.*[40] *and Marina Nominees Ltd.v Federal Board of Inland Revenue*[41] where the

[35]12 Tax Cases 358 [1921].
[36](1972) All ER 677, H.L.

[37](1979)3 All ER 865, H.L

[38](1981) 1 All ER 865, H.L.

[39]ibid.

[40](1982) STC 39.

English courts, and the Nigerian court in *Marina Nominees*, seem to take the position that they were not precluded by the principle in the *Duke of Westminster* case from interpreting otherwise especially as an essential feature of all the transactions in these cases:

> .... was that, when they were completely carried out, they did not result in any actual loss to the tax payer. The apparently magic result of creating a tax loss that would not be a real loss was to be brought about by arranging that the scheme included loss which was allowable for tax purposes and matching again which was not chargeable.[42]

What the courts failed to realize in these cases is that a lot of the transactions involved were:

> .....capable of explanation by reference to ordinary business or family dealing, without necessarily being labeled as a means to avoid tax ...[43]

And that:

> ….a transaction for the purposes of income tax must be looked at from a commercial point of view. In dealing with commercial men in income tax matters, we must try and understand what is the real commercial result of a particular action taken by a commercial man ....[44]

---

[41]FCA/L/20/83.

[42]*Aberdeen Construction Group Ltd. v IRC* [1978] A.C. 855.

[43]*Newtown v Commissioner of Taxation of the Commonwealth Australia, Privy Council* [1958] AC.

450 Per Lord Denning.

[44]*C.I.T.E.P.T. Bompay v Sir HomiMehataI.L.R.*[1956]Hom.154 at 156.

This thinking seemed to govern the decisions of the Nigerian courts in *Nasr v. Federal Board of Inland Revenue*[45] *and Reiss & Company (Nigeria) Ltd. v. Federal Board of Inland Revenue*[46]where the suggestion that certain transactions were carried out with a tax avoidance motive were rejected on the grounds that no evidence was called which could have justified such finding.

The guiding rule which the courts considered in *Furniss v. Dawson and Coates v. Arndale Properties Ltd.* in rejecting the *Ramday and Burmah Oil Co. Ltd*. cases was that, although the principles enunciated in them represented a radical change in the approach of the courts to artificial schemes designed to avoid tax. The House of Lords had not gone so far as to over-rule its earlier decision in the *Duke of Westminster* case – namely that in ascertaining the fiscal effect of a transaction the court had to have regard to the substance of the transaction and the position which resulted from the legal rights and obligations of the parties ascertained from ordinary legal principles. The court could not disregard the transaction which a taxpayer had actually entered into and the rights and obligations which flowed from it and substitute for it, some more straight forward transaction on the ground that the more straightforward transaction would have achieved a similar economic or business and was the transaction which the taxpayer would have entered into if he had not set out to reduce the incidence of tax.

Despite these reasons the courts, again, seem to take a contradictory interpretative stance in the Nigerian case of Marina Nominees and the House of Lords decision in *Furniss v. Dawson.*[47] *In Marina Nominees Ltd.*, the company which was the company secretariat arm of **Peat, Marwich**, **Ani Ogunde**Chartered Accountants sought to disclaim liability for tax on the grounds that all its workers belonged to its parent company, **Peat, Marwick, Ani Ogunde**said since its parent company had paid tax, then that payment should be imputed to them. The argument advanced and the scheme in this case looked rather curious, simplistic and seemed to suggest a total lack of the basic knowledge of company Law and Income Tax Law on the part of the planners. The Planners seemed to be encouraged by the decision in *Reiss & Co (Nigeria) Ltd v Federal Board of Inland Revenu e*where the Nigerian company was engaged in the business of agency services and introducing customers in Nigeria to the Dutch Company, Reiss & Co. (Amsterdam). The Federal Board of Inland Revenue had assessed the Nigeria Subsidiary, Reiss & Co. (Nigeria) Ltd., for tax in respect of all the profits made by its Dutch principals, Reiss & Co. (Amsterdam) on all businesses introduced by the Nigerian subsidiary.

[45](1964) N. Comm. L.R.93 SCN.

[46]Suit No. FRC/L/1A/76 of 15July 1977.
[47][1984] AC 526.

The Federal High Court disallowed the impugning of the separate legal entity of **Reiss & Co. Nigeria Ltd**. and **Reiss & Co**. (Amsterdam) respectively, on the forcible authority of *Salomon v Salomon*[48] in spite of the suggestive element of tax sheltering motive emerging from the facts.[49]

The proper approach the planners in Marina Nominees should have taken was either to pay all the income of **Marina Nominees** to **Peat Marwick** as remuneration for work done so that **Peat Marwick** would then pay the tax due with all allowances they may be entitled to claim as Marina Nominees would not have any income on which tax may be levied or claim all possible losses incurred by **Pea**t **Marwick** under Group relief equivalent to the tax that may be levied on them. In view of the simplistic tax planning scheme canvassed, the court wasted no time in dismissing Marina Nominees' contention. The decision of the House of Lords in *Furniss v Dawon* in which a roll-over given by statute to a disposal by way of an exchange of shares for shares was, denied on the ground that the share exchange had been arranged purely for the tax-avoiding purposes. The principle is relatively easy to apply, for what is required is a pre-ordained series of transaction one or more of which have been inserted for no commercial purpose other than the avoidance of liability to tax, one then disregards the transaction or transactions which have been inserted for that purpose. Having excised those transactions, one looks at the end result and applies tax law accordingly.[50]

Hence, one may ask the question; what is the principle behind the decisions reached in these cases? Could it have been the need to carry out the *"*intention of the Parliament*"* to settle tax planning cases? A glimpse into the principle is proved by the approach of Lord Diplock (dissenting) in *Inland Revenue Commissioners v Plummer*,[51] that;

> *(*The question is) can Parliament really have intended to tax this particular transaction by the wide words the draftsman has used? If the only sensible answer to that question is 'No' the words of the Act should be understood as inapplicable to the

[48][18897] AC 22.

[49]Margaret.T. Okorodudu*(n* 33) 40.
[50] *C.N. Beattie, Furnissv.Dawson. British Tax Review* [1984] 109.

[51][1980] AC 896, 924.

> transaction. That question, when asked about a transaction which only falls within the literal meaning of the words used in the section but has no further object than to enable the settlor to avoid a liability to tax on his income which he would otherwise be obliged to pay, so far from inviting the answer 'No' invites the answer: 'whatever kind of transaction Parliament may have intended to exclude it cannot have been this one.

This intention of the Parliament or Legislature that the judges have always sought to carry out, what exactly is it? Is it really the intention of the Parliament? Does this not contradict the rule that tax must be expressly imposed upon the subject by the clear words of the statute? Are the judges not acting according to private opinion? Should one not agree with the Supreme Court in *Animashaun v Osuma*[52]that,

> .... The function of the courts is to ascertain what the parties meant by the words which they have used…

The real problem in these matters is enunciated in the statement of Learned Hand J. in *C libertv Commissioner of Internal Revenue*[53] that:

> It is a corollary of the universally accepted canon of interpretation that the literal meaning of the words of a statute is seldom if ever, the conclusive measure of its scope. Except in rare instances statutes are written in general terms and do not undertake to specify, all occasions they are meant to cover; and their 'interpretation' demands the projection of their expressed purpose,

[52](1972) All NLR (pt 1) 363.

[53]248f 2nd, 399, 411 (1957).

> upon occasions, not present in the minds of those who enacted them...

That is, since statutes are written in general terms and do not undertake to specify all occasion they are meant to cover, if an occasion which they do not cover arises what is the court supposed to do?

> The one point at which the judges get struck is when there is a gap. The words are clear enough. The meaning of them is clear enough. But they do not cover the matter in hand. Something has taken which the draftsman has not foreseen. Nor have the members of Parliament. So they have not provided for it. Or else, by some mistake, they have overlooked something, or not provided for it. There is a gap. Can it be filled by the judges?[54]

2.2 Filling in the Gaps

As early as 1946 the House of Lords held emphatically that the judges could not fill the gap. Lord Simonds said in *Inland Commissioners v Ayrshire Employers Mutual Insurance Association*[55] that:

> The section (under discussion) is clearly a remedial section. It is at least clear what the gap which is intended to be filled is and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed.

[54]Rt H. Lord Denning.The Closing Chapter,.98-99.

[55](1946) 1 All ER 637, 641.

Lord Denning does not agree with the above view and he says:

> Beyond doubt the task of the lawyer – and of the judge – is to find out the intention of Parliament. In doing this, you must, of course, start with the words used in the statute: but not end with them – as some people seem to think. You must discover the meaning of the words …

Further on he says:

> At one time the judges used to limit themselves to the bare reading of the statute itself – to go simply by the words, giving them their grammatical meaning, and that was all. That view was prevalent in the 19th century and still has some supporters today. But is wrong in principle…[56]

This view cannot be right to the interpretation of a taxing statute since legislative intention can only be discovered from the statute itself and the rules are clear – a tax must be expressly imposed upon the subject by the clear words of the Act which must be given their natural meaning.

The modern trend is to introduce a new approach to the traditional rule of statutory interpretation; and the chief protagonist of this new approach which is hereinafter referred to as the *"purposive* construction" is no other than the erudite Lord Denning.[57] The first case in which there was an opportunity to advocate this new approach to the statutory interpretation was *Seaford Court Estate Ltd. v Asher***.**[58]In his own judgment when the matter was considered by the Court of Appeal, Denning L.J. (as he then was) held, *inter alia,* thus:

[56] Lord Denning, *The Discipline of Law*(Butterworths 1979) 9- 10.

[57]*Awolowo v Shagari.* Suit No. SET/1/1979 per Kazeem.JCA.

[58][1949] KB 481.

> …It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply hold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and to the intention of the legislature….

The purposive approach also known as 'the doctrine of disregard' 'the principle of fiscal nullity' and 'a judge-made anti-avoidance weapon',[59]overlaps with the mischief rule, which itself dates to the 16th century when judges viewed legislation as a means of meeting the deficiencies of the common law as formulated in the *Heydon's case*.[60]The purposive mode of interpretation proceeds from the premise that in enacting tax legislation 'the legislature must have had some rational purpose in mind'.[61]It therefore directs the judge to ascertain the true purpose or purposes of the legislature and to interpret the words of the statute in accordance with that purpose[62] which may or may not require the words of the provision in question to be read strictly.[63]

The purposive approach enables judges to modify or even 'reframe' the language of legislation to accord with the intention or purpose of the legislation

[59]AHalkyard, 'Not a Weapon of Mass Destruction: Can the Ramsay Approach Apply to the Inland RevenueOrdinance in Hong Kong*?'*(2005) 9 (3) Asia-Pacific Journal of Taxation 68.

[60] (1584) 76 ER 638 (1). The Mischief rules are as follows: (1) what was the common law before the Act was passed (2) what mischief was the Act designed to remedy (3) what remedy was provided for in the Act; (4) the reason for the remedy.

[61] Per Lord Oliver in *Commissioners v Sir John Aird's Settlement [1984] Ch. 382, 382.*

[62] *Hart v Pepper* (1993] AC. 93,*Agbaje v Fashola* (2008) 2 NWLR 908.

[63] M Zander, *The Law-Making Process*, (Sweet & Maxwell London 1980) 62.

even to the extent of 'doing some violence to the words' of the statute.[64] It is permissible for a judge to have regard to extrinsic material as an aid in the construction of statutory provision where such material throws light on the real intention of Parliament.

What the legislature has not written, the court must write. This proposition which re-states in a new form the view expressed by the lord justice in the earlier case of *Seaford Court Estates. Ltd v Asher*(to which the lord justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislature's function under the disguise of interpretation, and it is less justifiable when it is guess work with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is discoverd, the remedy lies in an amending Act.

It is thus clear from the exposition of the rules of statutory interpretation, that in the construction of words of a taxing statute, the liberal interpretation should be adhered to instead of the new approach.

Even in Nigeria, the Supreme Court has held in *Okumagba v Egbe*[65]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. As Lord Bacon said in his essay on judicature, the office of a judge is *jurisdicere*, not *juris dare*, to state the law, and not to give law….

This of course will result in a situation in which the judges will:

> ....pull the language of Parliament to pieces and make nuisance of it….[66]

in order to avoid opening up a tax legislation to: "destructive analysis"[67]

[64]DA Obadina,'Fighting Aggressive Tax Avoidance in Nigeria: An Agenda for Reform' <https://www.academia.edu/10805766/Tackling_Aggressive_Tax_Avoidance_in_Nigeria_an_agenda_for_reform> accessed 17 February 2019.

[65](1965)1 All NLR 62.

[66]*Magor and St Mellons Rural District Council v Newport Corporation* (1951) 1.All E.R.1018.

[67]Ibid. See further the following Nigerian cases.*Alh. Ibrahim Ahmadu& 1 Or. vThe Governor of Kogi State*. (1960-2010) 1 NTLR 244, *7UP Bottling Co. PLC v L.S.I.R.B.* Suit No.CA/L/83/98; (2000) 3

3.0 CONCLUSION AND RECOMMENDATIONS

It is strongly recommended that Nigeria should devise means of efficient and effective drafting of tax statutes and legislations to avoid many of the pitfalls associated with court's interpretation of taxing statutes generally. The country must take a cue from the arrangement of the judicial system in England and ensure that those who eventually get appointed to judicial offices are made to sit on cases in which they have specialization and experience, so that, in the case of taxation, those who get appointed to the Federal High Court and Tax Appeal Tribunal to sit on tax cases are people with proven experience and specialization in tax matters. The country must also devise its own home grown sustainable and sufficient judicial precedents on issue of taxation generally and the interpretation of taxing legislation in particular. Lastly, efforts must be made from time to time to amend all legislations dealing with tax and taxation whenever gaps are detected in these instruments.

NWLR (Pt. 650) 565, at 590-592 and *Ansaldo Nigeria Limited v National Provident Fund Management Board*, (1960-2010) 1 NTLR 476.