



# Re-appraising the Tax Exemptions of Charitable, Non-Governmental and Religious Organisations in Nigeria.

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## ABSTRACT

Tax is a compulsory levy on individual or organisation by the government as a statutory obligation. The classical function of the tax system is the raising of revenue to meet government expenditures. Exempt income is an income liable to be taxed by law but expressly excluded by another provision of the law. Tax exemption refers to a monetary exemption which reduces taxable income. Tax exemptions are granted specifically to specialized companies, religious, charitable, or non-governmental organisations and so on in relation to income derived by them. Basically, these organisations enjoy favourable tax treatments because of their exempt status. Though, tax exemption has been criticized as a subsidy granted by legislative grace to these organisations performing services that the government would have to perform and that such a subsidy relieves the exempt organisation of tax obligations that other tax payers are often obliged to assume. However, be that as it may, the objective of this paper is to critically re-appraise the tax exemptions granted to these organisations and buttress that the tax exemption granted them do not extend to where they derive income from trade or any other business carried out by them.

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## 1. Introduction

There is no doubt that issue of taxation of religious, charitable and non-governmental organisations have generated enough public curiosity and criticism. It has become controversial whether or not these organisations would pay taxes. The taxation issues of these organisations have been very contentious, due to the fact that they enjoy a tax exempt status which have been proven to a burden on patriotic citizens.

Though, notwithstanding that the law expressly exempts these organisations from paying taxes.<sup>1</sup> The proviso to these provisions of the law provided that the profits of these organisations are tax exempt so long as they are not derived from a trade or business carried out by them.

### 2.1 Tax Exemption of Charitable Organisations

Charities may claim exemption from tax on most forms of taxation, with the exception of value added tax, if applied to charitable purposes. Once a body has been accepted as being a charity for tax purposes, it normally retains its charitable status until such time as it ceases to exist either in its original form or altogether.<sup>1</sup>

Registered charities are exempt from income taxation and may issue receipt to tax payers who make donations to them. The income tax system allows tax payers to claim tax credits for charitable donations, within limits, against their income tax liabilities.

To be registered, a charitable must satisfy several criteria,<sup>2</sup> that have to do with the nature of activities it undertakes, the use of its income, and the expenditure of its donations. Basically, there are two types of charities; Charitable Organisation and Charitable Foundation, and slightly, different rules apply to each.<sup>3</sup>

Charitable Organisations are Organisations that devote all their resources to charitable activities (for example, the relief of poverty, the advancement of education or religion or activities intending to the benefit of the community as a whole). They may be corporations, trusts, or other organisations. They are allowed to undertake business activities that are related to their charitable activities.<sup>4</sup>

A charitable organisation may give up to 50 percent of its income (net of capital gains and losses) to other charities. The receiving charity then includes these donations in its own income. Finally, a charitable organisation is obliged to spend in each tax year 80 percent of the receipted donations that it received in the preceding year. Failure to do this may result in a revocation of registration and all of the tax advantages that registration entails.<sup>5</sup>

Charitable foundations are corporation or trusts that are operated solely for charitable purposes – usually, their primary activity is to make donations to other charities. The tax rules that apply to a foundation depend on whether it is a

<sup>2</sup> R.W Boadway & H.M Kitchen, “Canadian Tax Policy” 3<sup>rd</sup> edn, Canadian Tax Paper, No 103, Canadian Tax Foundation; P.190.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>1</sup> *Tax Exemption for Charities* <http://www.gov.uk/government/publications/charities-detailed-guidance-notes> accessed 27 October, 2017.

public or a private foundation. A charitable foundation is public if at least 50 percent of its directors and trustees deal at arm's length, and if no more than 75 percent of its capital was obtained from one individual or group of individuals,<sup>6</sup> otherwise, it is a private foundation.

Public foundation, like charitable organisations are allowed to carry on a related business. They may incur no debt and may not acquire control of any corporation.<sup>7</sup> Unlike charitable organisations, they may disburse as much of their annual income as they wish to other charities. They are however, subject to minimum expenditure requirements. Each year, they must expend the greater of two amounts:

eighty percent of the receipts received in the previous tax year and ninety percent of the current year's income (net of capital gains and losses).<sup>8</sup> They may generally carry forward disbursements in excess of ninety percent of income in a given year as expenditures for the following three years. In computing income, the foundation may take a reserve equal to the current year's income. The reserve must be included in the following year's income.<sup>9</sup>

Private foundations may not carry on a related business, and they are subject to somewhat different disbursement requirements. The capital of a private foundation is divided into qualified investments (those used in the work of the foundation) and unqualified investments (all the rest). In the case of qualified investments, the disbursement quota is ninety percent of the income earned by the investments in the current year. In the case of unqualified investments, the quota is the greater than five percent of the investment market value (evaluated at the beginning of the tax year) and ninety percent of the income from the investments during the tax year.<sup>10</sup>

## 2.2 Tax Treatment of Gifts to Charity

In UK tax law, gifts to charity have been deductible for income tax purpose if they were made in the form of (a) charitable covenants, (b) gift aid and (c) payments under a payroll deduction scheme.

There are deductions in computing trading income of costs incurred in sending employees to work for charities. A taxpayer who makes a gift of an asset to a charity is treated as if the asset were sold for a sum such that no gain, no loss arises on the disposal. The relief exempts a donor from liability to Capital Gains Tax (CGT)<sup>11</sup> on the gain. The rationale for this provision of the statute, is that the donor can never be expected to pay ten percent as CGT on the property donated to charity, since he did not dispose the property on gain. Hence, he is exempted from the payment of capital gain tax. This is far less generous than the United States rules which not only exempt the donor from any liability on the gain but also permit the donor to treat the full market value as a contribution to charity for income tax purposes and so available for deduction against other income.<sup>12</sup> These rules have been criticized to be prone to abuse; for example, Peter gives a car to his church and claims, and gets a deduction of \$10,000; the value of the car; however the church eventually sells the car for only \$3,000.

The basic UK treatment is also applied where a taxpayer sells an asset to a charity and the sale consideration received does not exceed the acquisition cost adjusted for any indexation allowance.<sup>13</sup>

This treatment extends also to settled property. Thus, where property has been held in a non-charitable trust and then, under the terms of the trust, a charity becomes absolutely entitled to that property, there is no charge to CGT. This is achieved by the charge on the deemed disposal specified by section 71<sup>14</sup> being treated as if it were a no gain, no loss disposal.<sup>15</sup>

A relief similar to gift aid applied to companies, including close companies. Companies may also claim exemption from tax on capital gains when making gifts of assets to charity<sup>16</sup>. Again, under the inheritance tax rules, a transfer of value to a charity may be an exempt transfer.<sup>17</sup>

### 2.2.1 Relief Accruing to Charitable Income

Income accruing to charities receives privileged treatment. Here, various types of income are exempt from income tax. These are:

(1) Rents and profits (taxable under schedule A or D) of any land belonging to a hospital,<sup>18</sup> public school<sup>19</sup> or almshouse<sup>20</sup> or vested in trustees for charitable purposes, so far as they applied to charitable purposes only.<sup>21</sup>

(2) Income under schedule D, gains on relevant deep discount securities, yearly interest, annuities or other annual payment or any other income within schedule D, case III and schedule F, if belonging to a charity or which is applicable to charitable purposes only and is so applied. From 6<sup>th</sup> April, 1999 to 5<sup>th</sup> April 2004, a charity is entitled to compensation for loss of the right to reclaim the credit attached to a dividend et cetera. The charity remains not taxable in respect of both qualifying and non-qualifying distributions.

(3) Certain trading income,

(4) Certain lottery winnings,

(5) Offshore income gains,

This list does not exhaust the range of taxable income, so that the charity is chargeable on any income it may receive.<sup>22</sup>

The exemptions are permitted only where the income is actually applied for charitable purposes; this gives the Revenue a policing role. In considering whether money is applied for charitable purposes, the court looks to see how the money has been applied. If it has applied to charitable purposes it does not matter that the charity was obliged to apply it that way, nor probably is it relevant what reason or motive the trustees may have had, nor that they may confer some incidental benefit upon some third person<sup>23</sup>. However, this requirement was not met where a charity established for the public benefit gave all its income to the children of

<sup>13</sup> TCGA, 1992, S.257(2).

<sup>14</sup> TCGA, 1992.

<sup>15</sup> A qualifying donation is treated as an annuity, as provided under TA 1988, S.339(4).

<sup>16</sup> *Tiley op cit*, p.911.

<sup>17</sup> Though, this position is not applicable in Nigeria.

<sup>18</sup> *Royal Antediluvian Order of Buffaloes v Owen* [1928] 1 KB 446.

<sup>19</sup> *Girls Public Day School Trust Ltd v Ereaut* [1931] AC12.

<sup>20</sup> *Mary Clark Home Trustees v Anderson* [1904] 2 KB 645.

<sup>21</sup> *On application for charitable purposes as was decided in IRC v Helen Slatter Charitable Trust Ltd* [1981] STC471, CA.

<sup>22</sup> *Tiley op cit*, p.912.

<sup>23</sup> *Campbell v IRC* [1966] 45 TC 427,443,444, per Buckley.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, P.191.

<sup>11</sup> TCGA 1992, S. 257.

<sup>12</sup> J. Tiley, *Revenue Law*, (4<sup>th</sup> edn, Oregon, Hart Publishing, 2000) p.911.

employees of a particular firm which was connected with the managers of the charity.<sup>24</sup>

If charity A gives the money to charity B, the money has been applied for charitable purposes.<sup>25</sup> At one time this entitled A to claim any exemptions or repayments whether or not B used it properly, and even though A and B were under common control; this position is no longer tenable as it has been restricted.

### 2.2.2 Trade Income - Limited Exemption

If a charity carries on a trade, it will be exempt from tax on the profit of that trade only if:

(a) The profits are applied solely for the purposes of the charity.

(b) Either (i) the trade is exercised in the course of the actual carrying out of a primary purpose of the charity or (ii) the work in connection with the trade is mainly carried out by beneficiaries of the charity.<sup>26</sup>

Requirement (b) (i) above is that. Thus, if a charity runs a law surgeon and one of its objects is the provision of the trade is exercised in the course of the actual carrying out of a primary purpose of the charity lectures and general education, the profits of conferences for solicitors escape tax. Similarly, if a school or college carries on the trade of education and charge fees, the trade is exercised in the course of actual carrying out of a primary purpose of the charity.

Requirements (b)(ii) above contemplates “the basket factory of a blind asylum, the blind inmates being the beneficiaries by whose work the trade of manufacturing baskets for sale is mainly carried on”.<sup>27</sup>

However, it has been extended to a charitable association which organized a competitive music festival, the competitors being treated as the beneficiaries.<sup>28</sup> More obviously, the profits of a school run by nuns have been held exempt, the nuns, and not just the pupils being regarded as beneficiaries.<sup>29</sup> However, it does not follow that ordinary school teachers are beneficiaries.<sup>30</sup> Thus, the same rule does not extend to teachers in the ordinary school.

It will be seen that commercially oriented trading, such as the sale of Christmas cards or the organisation of the sales of gifts, given rise to taxable, not exempt, profits such sales not being integral parts of the charity’s purposes<sup>31</sup>. However, by concession, profits from bazaars or jumble sales run by voluntary organisations are not generally charged to tax.<sup>32</sup> A result similar to complete exemption of trading income from income tax can be achieved by letting the trade be carried on by a company whose shares are held by the charity equal to its profits: such payments are charges on income and so, in effect, deductible.

Where a charity incurs expense and so a loss on its charitable but non-trading activities, it cannot set that loss off against its profits from a taxable trade<sup>33</sup>. However, if a charity carries on two trades, one exempt, on which it makes a loss, and the other taxable, on which he makes profit, the loss may be received<sup>34</sup>. This view seems doubtful but has not been tested in the courts.<sup>35</sup> On the other hand, it is perfectly permissible for a loss on a taxable trade be set off against the profit of another taxable trade.

### 2.2.3 Capital Gains Realized by a Charity

A gain made by a charity is not a chargeable gain “if it accrues to a charity and is applicable and applied for charitable purposes.”<sup>36</sup> Thus, where a charity sells an asset for cash and applies the proceeds to its charitable endeavours, no charge to tax arises.<sup>37</sup>

In determining the capital gains of charity for the purpose of its tax treatment the following problems may be encountered;

#### (a) Gifts

Technical problems arise if no actual consideration is received by the charity, since there is nothing to be “applied”. Thus, if a charity, in the course of carrying out charitable work, gives an asset to a beneficiary, any chargeable gain arising may be assessable on the charity. The revenue is likely to adopt a generous approach where the gift of the asset was clearly made in the pursuance of the charity’s object.<sup>38</sup>

#### (b) Deemed disposal

Similar problems arise on a deemed proposal since, again, there is no actual consideration and no gain is “applied for charitable purposes”. In such cases, the charity is subject to CGT on the gain that arises. Suppose that charity A owns a freehold which it lets for a commercial rent to B, another charity. In order to help B, A reduces the rent from a commercial to a peppercorn rent.<sup>39</sup> The charity exempt is not available on this deemed disposal.

#### (c) Transaction under TCGA, Section 171

If C, a charity, setup S, a wholly owned subsidiary, and passes asset to S, TCGA, 1992, Section 171 should operate to treat the transfer as at no gain, no loss. However, this is specified in statute as applying only where one company is a subsidiary of another and it is not clear whether S can be a subsidiary of C since a charity does not have an equitable interest in its assets such as; instead, it holds those assets on trust for the ultimate beneficiaries<sup>40</sup>. If S cannot be a subsidiary, Section 171 cannot apply to defer the charge. Moreover, the gain cannot be exempted, since the gain cannot

<sup>24</sup> *IRC v Educational Grants Association* [1967] 2All ER 893.

<sup>25</sup> *IRC v Helen Slatter Charitable Trust* [1981]STC 471.

<sup>26</sup> *Tiley op cit*, p.913.

<sup>27</sup> *IRC v Glasgow Musical Festival Association* [1926] II TC 154, 163, Per Lord Clyde.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Brighton Convent of the Blessed Sacrament v IRC* [1933] 8 TC 76.

<sup>30</sup> *Brighton College v Marriot* [1926] AC 192, 203 [1926] 10 TC 213,234, Per Lord Buckmaster.

<sup>31</sup> *Tiley op.cit*, p.914

<sup>32</sup> *As annual payments; see R. v IT special Comrs, ex parte Shaftesbury Home and Arethusa Training Ship*[1923]IKB 393, [1923] 8TC 367; *distinguishing Trust of Psalms and Hymns v Whitwell* [1890]TC 7.

<sup>33</sup> *Religious tract and Book Society of Scotland v Forbes* [1896] 3 TC 415.

<sup>34</sup> Under TA 1988, section 380.

<sup>35</sup> *Tiley op cit*. p. 914.

<sup>36</sup> TCGA 1992, S.250(1); there is no requirement that the gain be applied for charitable purposes only.

<sup>37</sup> The exemption is also available where the charity retains the proceeds in its general fund *IRC v Helen Slatter Charitable Trust* [1981]STC 471,CA.

<sup>38</sup> *Tiley op cit*, p.915.

<sup>39</sup> Peppercorn rent means a small or insignificant amount, a nominal consideration used to satisfy the requirements for the creation of a legal contract.

<sup>40</sup> *Von Ernest v IRC* [1980]STC 111.

be said to have been “applied for charitable purposes” as there is no consideration.<sup>41</sup>

### 2.3 Restriction of Exemption; Qualifying and Non-Qualifying Expenditure

The tax available to a charity may be restricted.<sup>42</sup> In general, the restrictions apply only if, in the chargeable period concerned, the charity has “relevant income and gains” of €10,000 or more.<sup>43</sup> The phrase, “relevant income and gains” means (a) income which would be taxable but for the exemptions provided under the Act<sup>44</sup> (b) income which is taxable regardless of Section 505(1), (c) gains which would be taxable but for TCGA 1992, Section 256, and (d) gains which would be chargeable anyways<sup>45</sup>. The exemptions are therefore lost if, in any chargeable period of the charity, (i) its relevant income and gains are €10,000 (ten thousand pounds) or more, (ii) its relevant income and gains exceed the amount of its qualifying expenditure and (iii) it incurs, or is treated as incurring, non-qualifying expenditure<sup>46</sup>. To avoid the restriction, therefore, the charity must keep its total income or gains below €10,000 (ten thousand pounds) or make sure that it incurs no non-qualifying expenditure. An alternative way of avoiding this restriction is to incur the non-qualifying expenditure in the period before that in which the income arises, borrowing if necessary.<sup>47</sup>

Nonetheless, the provision may be applied to charities with relevant income and gains below €10,000; however, if it appears to the Board that two or more charities are acting in concert, with the avoidance of tax (whether by charities or by another person) as one of their main aims, the Board must serve notice in writing on the charities which have the right to appeal against its decision.<sup>48</sup>

The rule applicable here is that the income tax and CGT exemption to which the charity is entitled are restricted if any expenditure by the charity during the chargeable period is incurred otherwise than for exclusively charitable purpose; such expenditure is referred to as a “non-qualifying expenditure”, while “qualifying expenditure” is expenditure incurred for charitable purpose only. A payment made to a body outside the UK is treated as non-qualifying expenditure unless the charity has taken such steps as are reasonable in the circumstances to ensure that the payment will be used for charitable purposes only.

Again, loans and investments are treated as non-qualifying expenditure unless they fall within the categories of qualifying loans and qualifying investments set out<sup>49</sup>. Loans qualifying for exemption if

- (a) Made to another charity for charitable purposes only,
- (b) Made to a beneficiary of the charity in the course of its charitable activities or

(c) Is money placed in a current account with a bank (unless this form part of an arrangement under which the bank makes a loan to another person).<sup>50</sup>

Qualifying investments are also elaborately defined.<sup>51</sup> The Revenue may designate any loan or investment as “qualifying investment” where, on a claim being made, the revenue is satisfied that the loan or investment is made for the benefit of the charity and not for the avoidance of tax.<sup>52</sup>

A further rule ensures that if a non-qualifying investment is made and realized, or loan is made and repaid, during the same chargeable period, reinvestment of the proceeds during that chargeable period is left out of account when calculating the amount of “non-qualifying expenditure” incurred by the charity.<sup>53</sup>

Consequently, tax relief under both TA 1988, S.505 and TCGA 1992, Section 256 is withheld from the amount by which a charity’s “relevant income and gains” exceeds its “qualifying expenditure” to extent that this amount does not exceed the “non-qualifying expenditure” incurred by the charity in that chargeable period.<sup>54</sup> The charity may specify the items of relevant income and gains, which are to be treated as attributable to the non-exempt amount,<sup>55</sup> a matter of great importance now that tax credits on dividends cannot be recovered in full. If the charity’s total expenditure in a chargeable period exceeds its relevant income and gains, so that part may be attributed to earlier chargeable period.<sup>56</sup> Where, there is non-qualifying expenditure, revenue practice is first to restrict the CGT exemption for any excess.<sup>57</sup>

Thus, if charity A has income of N300,000 and spend N250,000 on non-qualifying purposes and N50,000 on qualifying purposes, it will not be entitled to exemption of three-quarters of its income. The same result will follow if it simply spends N250,000 on non-qualifying purposes and does not spend the other N50,000 at all.

Similarly, if charity B has income of N500,000 and in a year 2 spends N500,000 on qualifying expenditure and N500,000 on non-qualifying expenditure, it will be exemption on its income in full. However, the non-qualifying expenditure may then related back to year 1 and undo any claims for exemptions for that year.<sup>58</sup>

Finally, there is a deemed disposal of property when it ceases to be held on charitable trust and the gain arising on that deemed disposal is chargeable.<sup>59</sup> There is, therefore, no immunity for realized capital gain built up behind the screen of charity.<sup>60</sup>

<sup>50</sup> *Ibid*, sch.20, pt II.

<sup>51</sup> *Ibid*, sch.20, pt I.

<sup>52</sup> *Ibid*, sch.20, para. 9.

<sup>53</sup> *Ibid*, S.506 (5).

<sup>54</sup> *Ibid*, S.505 (3).

<sup>55</sup> *Ibid*., S. 505(7).

<sup>56</sup> *Ibid*., S. 506(6).

<sup>57</sup> Some support for this practice is given in TA 1988, S. 505(3).

<sup>58</sup> TA 1988, S. 506(6).

<sup>59</sup> TCGA 1992, S. 256(2).

<sup>60</sup> One view, a temporary charitable trust is not really a qualifying charity at all; this is the view expressed in Whitman, Capital Gains Tax (4<sup>th</sup> ed., London Sweet & Maxwell,1990)p.27. There is no concession for a temporary loss of charitable status due to the reverter of a site such as a school and reversioner cannot be found.

<sup>41</sup> TCGA,1992,S.256.

<sup>42</sup> TA 1988, SS. 506 & 507. The purpose is to prevent schemes such as those behind *IRC v Helen Slatter Charitable Trust Ltd* (Supra).

<sup>43</sup> TA 1988, S. 505 (3)(a).

<sup>44</sup> *Ibid*, S.505.

<sup>45</sup> *Ibid*, S. 505(5).

<sup>46</sup> *Ibid*, S. 505(3), applied by TCGA 1992, S.256(1).

<sup>47</sup> *Tiley op cit*, P.916.

<sup>48</sup> TA 1988, S. 505(7).

<sup>49</sup> *Ibid*, S.506.

### 3.1 Tax Exemption of Non-Governmental Organisations

A non-governmental organisation (NGO) is an association of persons registered under section 590 of Companies and Allied Matters Act (CAMA).<sup>61</sup> Upon registration of the association, the body corporate may contract in the same form and manner as an individual.<sup>62</sup>

NGOs include organisations, institutions and companies engaged in benevolent, social, educational or scientific activities of a public character. Many countries, including Nigeria have recognized the significant role being played by these organisations in building a strong, caring and well-functioning society as well as in contributing to its welfare and economic growth. In recognition of this, government grants tax incentives to such organisations in exemption of their profits (other than those derived from trade or business carried out by them) from income tax and zero rate of Value Added Tax (VAT) for their humanitarian services.<sup>63</sup> Thus, the role of tax authority is to ensure that these tax incentives or benefits are appropriately

enjoyed and not abused and that the obligations associated with the tax benefits are complied with by the NGOs. The guidelines are basically to check possible abuse and ensure standardization.<sup>64</sup>

In South Africa for example, Not for Profit organisations (NPO) play a significant role in society as they take a shared responsibility with government for the social and development needs of the country.<sup>65</sup> Preferential tax treatment is designed to assist non-profit organisations by augmenting their financial resources.

The preferential tax treatment for not for profit organisations is however not automatic and organisations that meet the requirements set out in the Income Tax Act, 1962 must apply for this exemption.<sup>66</sup> If the exemption application has been approved by SARS (South African Revenue Service), the organisation is registered as a Public Benefit Organisation (PBO) and allocated a unique PBO reference number.

It is important to note that an organization that has a non-profit motive or is registered as a Non-Profit Organisation (NPO) does not automatically qualify for preferential tax treatment. An organisation will only enjoy preferential tax treatment after it has applied for and been granted approval as a Public Benefit Organisation (PBO) by the Tax Exemption Unit (TEU).<sup>67</sup>

The conditions and requirements for an organisation to be approved as a PBO are contained in the Act,<sup>68</sup> while the rules governing the preferential tax treatment of PBO are contained in the Act.<sup>69</sup> The Act<sup>70</sup> provides for the exemption from normal tax of certain receipts and accruals of approved

PBOs. Certain receipt and accruals from trading or business activities will nevertheless be taxable.

Approved PBOs have the privileged and responsibility of spending public funds, which they derive from donations and grant, in the public interest on a tax-free basis. The donations or grants may be received from the general public or direct or indirectly from the State.<sup>71</sup> It is therefore important to ensure that tax exempt organisations use their funds responsibly and solely for their Stated objectives, without any personal gain being enjoyed by any person including the founders and the fiduciaries.

Approved PBOs must continue to comply with the Act and related legislation throughout their existence. This includes the submission of annual income tax returns on an IT 12E 1 form. The income tax return enables the commissioner to assess whether the approved PBO is operating within the prescribed limits of the relevant approval granted and to determine whether the partial taxation principles must be applied to receipts and accruals derived from a trading activity or business undertaking which does not qualify for exemption.<sup>72</sup>

#### 3.1.1 Tax Deductible Donations (Section 18 (a) receipts)

The South African Government has recognized that certain organisations are dependent upon the generosity of the public and encourage that generosity, has provided a tax deduction for certain donations made by taxpayers.<sup>73</sup>

The eligibility to issue tax deductible receipts is dependent on section 18A approval granted by the TEU, and is restricted to specific approved organisations which use the donations to fund specific approved public benefit activities.

A taxpayer making a bona-fide donation in cash or property in kind to a section 18A- approved organisation, is entitled to a deduction from taxable income if the donation is supported by necessary section 18A receipt issued by the organisation or, in certain circumstances, by an employees' tax certificate reflecting donations made by the employee. The amount of donations which may qualify for a tax deduction is limited.<sup>74</sup>

Similarly in Nigeria, the Federal Inland Revenue Service (FIRS) published an information circular regarding the guidelines on the tax exemption status of Non-Governmental Organisations (NGOs).<sup>75</sup>

It has been stated earlier, that Companies Income Tax Act, provides that the profit of any statutory, charitable, ecclesiastical, educational or other similar associations are exempted from companies income tax obligation provided such profits are not derived from any trade or business carried on by such organisation or association.<sup>76</sup>

By virtue of provision of CITA and PITA, profits of any company/institution engaged in ecclesiastical, charitable, benevolent or educational activities of a public character are exempt from income tax provided such profits are not derived from a trade or business carried on by the company.<sup>77</sup> Thus, where NGO engages in any trade or business, the profit derived therefrom will be subjected to income tax as provided

<sup>61</sup> Cap C20 LFN, 2004.

<sup>62</sup> Companies and Allied Matters Act (CAMA) S.605, Cap C20 LFN 2004.

<sup>63</sup> <http://thenationonline.ng.net/guideline-on-tax-exemption-for-ngos> accessed on 30th November, 2017.

<sup>64</sup> *Ibid.*

<sup>65</sup> <http://www.sars.gov.za/clientsegments/business/teo/pages> accessed on 30th November, 2017.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Income Act 1961, section 30.

<sup>69</sup> *Ibid.*, Section 10(1) (CN).

<sup>70</sup> *Ibid.*

<sup>71</sup> <http://www.sars.gov.za>, *op cit.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> FIRS Circular No. 2010/PC- TI. 2.2.3. 1028.

<sup>76</sup> Cap C21, LFN 2004, section 23(1).

<sup>77</sup> CITA, section 23(c) and PITA, section 19, paragraph 13, third schedule.

for in the Act.<sup>78</sup> Also, where the NGO invests its assets in any institution, the income derived from such investment shall be subjected to tax. It should be noted that Capital Gains Tax (CGT) shall arise where assets are disposed of by the NGOs for a gain.<sup>79</sup>

Since the liability to payment of tax by the NGOs is hampered on derivation of profits from trade. The cardinal question will then be; what constitute a trade?

In *Arbico Ltd v FBIR*, the plaintiff in the dispute, Arbico, had acquired a plot of land, erected a building and sold the property at a profit.<sup>80</sup> The company was subsequently assessed for tax on the proceeds of the sale of the property. The company objected to the assessment on the basis that the transaction was a one-off and did not constitute 'trade'. The case was ultimately settled in the Supreme Court.

In the judgment, the court laid down two important axioms; firstly, that the word 'trade' should be interpreted in its widest sense in accordance with its commoneveryday meaning. Secondly, that an isolated or one-off transaction can still constitute a 'trade'.

Decided case in other jurisdiction on what constitute trade or business are as follows;

In the case of *Marlin v Lowry*, a person without previous knowledge of linen trade bought a surplus stock of aeroplane linen from government which he sold to the public in small lots.<sup>81</sup> He engage employees for the re-packaging and embark on 'sales' promotion through extensive adverts and campaigns. It was held that he was engaged in trading activities.

Similarly, in *Murray v IRC*,<sup>82</sup> where a timber merchant who bought standing timbers in two plantations and could not cut them due to labour cost, sold the rights to cut the timbers to meet his indebtedness. He was to tax on the profit from the transaction. He contended that sale was a capital transaction since it was not in normal course of his business, but it was held that the transaction was part of his normal trading as a timber merchant.

Again, in *Burge v Payne*<sup>83</sup>, a club a proprietor providing facilities for bar, dancing, cabaret, fruit machines and gambling, appealed against the inclusion of his winnings in his assessment. The appeal was dismissed on the ground that winnings formed part of his regular income from the trade of running the club.

From the foregoing, it is seen that whenever a taxable person whether natural or artificial, engages in a transaction whether isolated or one-off and derives income from the said transaction, such income shall be subjected to tax. Similarly, if an NGO transaction or activities, such profits or income derive from the transaction or activities shall be subjected to the payment of tax. Thus, the supposedly exempted NGO, becomes liable to payment of tax, by virtue of such income.

### 3.2 Tax Reliefs Available to NGOs

In addition to the income tax exemption granted to NGOs as noted above, section 25 (3) of CITA provides that any company making donations to such an organisation listed under the 5<sup>th</sup> schedule to CITA shall enjoy tax deductible donations to made and must not be of capital nature. Goods

purchased for use in humanitarian donor funded projects are zero rated under the Value Added Tax Act.<sup>84</sup>

### 3.3 Registration with Federal Inland Revenue Service (FIRS) by NGOs

All NGOs are expected to register with the nearest Integrated Office (ITO) of FIRS with the following documents:

- (i) A copy of registration certificate issued by Corporate Affairs Commission (CAC);
- (ii) Certified copy of memorandum or constitution, rules and regulations governing the NGO;
- (iii) List and profiles of the Trustees/Board members nominated; one of the trustees/Board members must be a serving government official from relevant MDA responsible for the activity of the NGO;
- (iv) Copy of the current tax clearance certificate (TCC) of each of the trustees and Board members.
- (v) From the foregoing, it therefore follows that the NGOs must present all the necessary documents at the (ITO) Integrated Tax Office of the FIRS before the relevant NGO will be registered by the authority.

### 3.4 Filing of Return by NGOs

In line with section 55 of CITA,<sup>85</sup> it is mandatory for every NGOs to file a tax return every year and such return shall contain:

- (i) The audited accounts, tax and capital allowances computation and a true and correct Statement in writing containing the amount of its profits from each and every source computed in accordance with the provision of CITA;
- (ii) Such particulars as may be such form or return be required for the purpose of the Act and any rules made with respect to such profits, allowances, reliefs, deductions or otherwise as may be material by virtue of the CITA; and
- (iii) A declaration to be signed by a director or secretary of the organisation that the information contained in the return is true and correct<sup>86</sup>.

From the foregoing, it is seen that notwithstanding that NGO's income are exempted from payment of tax, except if the emanated from trade-related activities or transactions, there are still mandated under the law to file their annual returns like other, companies.

### 3.5 Responsibilities of the Tax Office

The FIRS in regulation of the activities or affairs of the NGOs, the FIRS is mandated with the following responsibilities:

- (a) Clarification of Tax Status: An NGO seeking clarification on its tax exemption status shall direct such enquiries to the Integrated Tax Office (ITO) where it was registered and the NGO Desk in the relevant ITO shall process the enquiry and respond to it.
- (b) Application for Tax Clearance Certificate (TCC): An NGO shall direct its application for tax clearance certificate (TCC) to the Integrated Tax Office (ITO) where it was registered and file its tax returns. The relevant ITO shall process the application and issue TCC if the NGO if found qualified and if unqualified be given reason in writing two weeks of the application.
- (c) Monitoring: The relevant ITO shall monitor the activities of NGOs within its jurisdiction regularly to ensure

<sup>78</sup> FIRS Circular, *op cit*.

<sup>79</sup> *Ibid*.

<sup>80</sup> [1996] 2All NLR 303.

<sup>81</sup> [1955] 3All ER 48; IITC 297.

<sup>82</sup> [1951] 32 TC 238.

<sup>83</sup> [1969] 1 All ER 467.

<sup>84</sup> Cap VI LFN 2004.

<sup>85</sup> Cap C21 LFN, 2004.

<sup>86</sup> FIRS Circular, *op cit*.

compliance with provisions of the tax laws. Monitoring shall be through NGO desk setup for that purpose.<sup>87</sup>

Notwithstanding their above mentioned responsibilities of the FIRS, the NGOs are expected to fulfill their statutory obligations, which among others are;

- (i) Maintain accurate record of employees;
- (ii) Maintain proper books of accounts;
- (iii) Deduct Pay As You Earn (PAYE) from employees' salary and remit same to the appropriate tax authority;
- (iv) Pay Value Added Tax (VAT) on goods and services consumed except those purchased exclusively for its humanitarian projects or activities;
- (v) Deduct Withholding Tax (WHT) on payments made to its contractors/suppliers and remit same to appropriate tax authority in accordance with the laws; such remittance is to be accompanied with schedule of deduction; and
- (vi) Pay tax as when due on non-exempt activities failure to comply with the above requirements will attract appropriate penalty under the law<sup>88</sup>.

It is to be emphasized that the fact on NGO is exempted from payment of income tax does not remove the obligation to file returns regularly. It is also to be emphasized that profits derived from business or trading activities are liable to tax<sup>89</sup>. It is expected that all NGOs will abide with the aforementioned regulations in order to continue to enjoy tax incentives granted by the Government in furtherance of their charitable activities.

#### 4.1 Tax Exemption of Religious Organisations

As already stated, religious organisations in Nigeria are generally exempt from the payment of income tax to the governments. Companies Income Act 2004, section 23(1) (c) provides that:

There shall be exempt from income tax the profits of any company engaged in ecclesiastical, charitable or educational activities of a public character in so far as such profits are not derived from trade or business carried on by such company.

The CITA also allows deduction for the purpose of tax assessment in respect of specific donations advanced to religious organisation by any company in Nigeria.

Furthermore, income of a religious organisations are also exempted from personal income tax. Personal Income Tax, 2011, section 19(1) and third schedule, para. i provides as follows:

There shall be exempt from all that income specified in the third schedule to this Act, the income of any ecclesiastical, charitable or educational institution of a public character in so far as such income is not derived from a trade or business carried on by such institution.

Further to the above, religious organisations are also exempted from the payment of capital gain tax under Capital Gains Tax Act.<sup>90</sup> Capital Gains Act, provides that a gain is not chargeable to tax if it accrues to an ecclesiastical, charitable or educational institution of a public character; in so far as the gain is not derived from any disposal of any assets acquired in connection with any trade or business carried on by institution and the gain applied purely for the

purpose of the institution.<sup>91</sup> Also, organisation such as religious bodies enjoy tax exemption on value added tax on the procurement of vatable goods which are used or to be used for purely humanitarian purposes.<sup>92</sup>

From the foregoing, it is seen that religious organisations in Nigeria are exempted from the payment of tax or any liability to tax; in so far as they are of public character and do not engage in business or trade related activities. Thus, the liability to tax religious organisations will accrue when they engage solely in commercial activities, be it trade<sup>93</sup> or business, aside that, they retain their tax exempt status.

In *Walz v Tax Commission of the City of New York*,<sup>94</sup> in this case, the plaintiff- Walz was an owner of real estate in Richmond County, New York. He sued the tax commission to challenge the property tax exemption for church-owned buildings used exclusively for worship. Walz contended that this property tax exemption indirectly placed taxpayers in the position of contributing to the churches. For him, churches do not pay the taxes, everyone else has to pay extra to make up the difference, even if they do not belong to that church. He also contended that churches are also beneficiaries of government services; fire protection, police protection, et cetera, without actually paying for any of it. Since these services are at least in part funded to indirectly make contributions to religious institutions in violation of the establishment clause. Again, religious institutions are obviously relieved of a common expenditure because of their exemptions, and this allows them to spend more money on religious purposes. That part of the money spent on religious purposes should have been spent on payment of taxes to support government.

The court with the majority opinion written by Chief Justice Burger upheld the tax exemption for churches by a vote of eight against one (8-1). The court used three basic arguments to justify the exemptions.

The first argument was what is often called the "charitable class argument" religious properties are placed in a larger class of "eleemosynary institutions." Thus, the tax exempt status granted to all houses of worship is the same privilege given to other non-profit organisations (hospitals, libraries, playground, et cetera). This meant that churches were not singled out for special treatment. In the words of the court;

New York...has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its moral or mental improvement, should not be inhibited in their activities by property taxation or the hazard of loss of these properties for non-payment of taxes.<sup>95</sup>

The third argument was the issue of "excessive entanglement"; the establishment clause is supposed to minimize the interaction between church and State (this argument became the "third prong" in the Lemon test). However, if the government were to collect property taxes from churches, then the level of interaction could be raised to

<sup>91</sup> *Ibid*, section 26 (1)(a) .

<sup>92</sup> FIRS circular No. 2010 *op cit*.

<sup>93</sup> What amounts to trade for the purposes of tax liability has been fully discussed in chapter 7.2 of this work.

<sup>94</sup> [1970]

<http://atheism.about.com/library/decisions/tax/bldecwalztaxation.htm>. accessed on 22nd December, 2017.

<sup>95</sup> *Ibid*.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*.

<sup>90</sup> Cap C1, LFN 2004, .

an unacceptable level. Either course, taxation of churches or exemption, occasions some degree of involvement with religious elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures and the direct confrontations and conflicts that follows in the train of those legal processes... granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.<sup>96</sup>

Part of this argument involved emphasizing the difference between direct monetary subsidies and the indirect economic benefit of tax exemptions.<sup>97</sup>

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church supports the State. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the State or put employees on the public payroll.<sup>98</sup>

This constitutes a sort of contradiction for Justice Burger; on one hand, he argues that the tax exemptions do not benefit religion, but then he states that tax exemptions exist for organisations which benefit the community; in other words, to help advance the organisation's missions.

Justice Brennan, in a concurring opinion, explained the purpose of tax exemption thus;

Government has two basic secular purposes for granting real property tax exemptions to organisations to religious organisations. First, these organisations are exempted because they, among a range of other private, nonprofit organisations, contribute to the wellbeing of the community in a variety of non-religious ways and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community... second, government grants exemptions to religious organisations because they uniquely contribute to the pluralism of American Society by their religious activities. Government, may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association view point, and enterprise essential to a rigorous, pluralistic society.

In a dissenting opinion, Justice Douglas argued that there was a difference between tax exemptions for secular charities because the latter perform functions which the government is also constitutionally permitted to perform; the former, however, do many things which would be unconstitutional for the government. Churches exist for religious purposes and tax exemption amount to an indirect subsidy, which does not differ in any relevant aspect from direct subsidies;

The financial support rendered here is to the church, the place of worship. A tax exemption is a subsidy. Is my brother Burger<sup>99</sup> correct in saying that we would hold that State or federal grants churches, say, to

construct the edifies itself would be unconstitutional?

What is the difference between that kind of subsidy and the present subsidy?<sup>100</sup>

In analyzing the above decision of the court in the instant case, the court accept the premise that religious institutions are beneficial to society and thus, eligible for the same benefits offered to other such organisations. The effect herein is to promote the notion that churches used primarily for religious worship are "charitable institutions" serving the greater public in the same way that hospital, libraries libraries and museums do.<sup>101</sup> Once again, the court allowed the government to give special privileges to religion without it being construed as "establishing, sponsoring, or supporting religion."<sup>102</sup> Similarly, in *First Unitarian Church of Los Angeles v County of Los Angeles*<sup>103</sup>, the question for determination was whether tax exemptions for religious organisations can be premised on an oath of adherence to some particular political ideas. In this case, the First Unitarian Church of Los Angeles applied for a property tax exemption as provided for by the California Constitution, but the application included an oath that they did not advocate the overthrow of the government of the United States and of the State of California by force of violence or other unlawful means nor advocate the support of a foreign government against the United States in the event of hostilities. The Unitarian Church crossed out that provision from the application form and their request for property tax exemption was denied. The Unitarian Church sued to recover taxes paid under protest and for a declaratory relief. They contended that the requirement that they subscribe to the oath in order to receive property tax exemption be dropped. The superior Court affirmed that this provision in the application was valid and the California Supreme Court agreed, but this decision was reversed on appeal to the United States Supreme Court. The Court among other held that;

It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech... it is settled that speech can be effectively limited by the exercise of the taxing power. To deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty", its denial may not infringe speech.<sup>104</sup>

In a concurring opinion by Justice Douglas and Black, it was noted that;

The principles, moral and religious, of the first Unitarian church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the State to compel acceptance by it or any other church of this or any other oath of

<sup>100</sup> Walz case *supra*.

<sup>101</sup> Umenweke, *op cit*, p.440.

<sup>102</sup> *Ibid*.

<sup>103</sup> [1958]

<http://atheism.about.com/library/decisions/tax/bldec-firstunitarian>, accessed 22<sup>nd</sup> December, 2017.

<sup>104</sup> Per Justice Brennan in *supra*.

<sup>96</sup> *Ibid*.

<sup>97</sup> Umenweke, *op cit*, p.437.

<sup>98</sup> *Ibid*.

<sup>99</sup> Justice Burger delivered the lead judgment.

coerced affirmation as to church doctrine, advantage or beliefs.

As a consequence, requiring the leaders of this church to take the oath main question would entail a violation of the Free Exercise Clause of the First Amendment. It has been established in numerous previous cases that the government cannot force citizens to take oaths to which they object, and this includes conditioning general government benefits on such oaths.

From the foregoing, the Supreme Court established that providing tax exemptions for religious organisations could not be conditioned on those organisations adhering to any sort of political orthodoxy. Even the most extreme political views must be tolerated in a church, which applied for tax exemptions because the government cannot ask the officers or religious leaders of a church to take any pledges or oaths as to what they will or will not believe, say or advocate.<sup>105</sup>

Also, in *United States v Christian Echoes National Ministry*<sup>106</sup>, Christian Echoes Ministry, was formed in 1951 by Dr. Billy James Hargis and it received tax exemption status in 1953. Its theology was fundamentalist in nature and its politics was focused on opposition to communism, socialism, liberalism all believed to be enemies of Christianity.

The IRS denied their tax exempt status in 1964, on the ground that the group did not operate “exclusively for religious purposes” that it had “substantial activity aimed at influencing legislation”, and that it had “intervened in political campaigns on behalf of candidates for public office”. Because by virtue of 501 (c)(3) religious tax exemption are conditioned upon a group remaining religious and refraining from political advocacy, the IRS determined that Christian Echoes National Ministry had violated its tax exemption requirements.

Christian Echoes National Ministry appealed this decision and an Oklahoma District Court ruled in favour of them, finding that IRS has acted improperly. The IRS appealed directly to the Supreme Court. The Supreme Court let the District Court’s decision stand, finding that the IRS did not have the right to appeal directly to the Supreme Court in a case where a lower court simply ruled on a narrowing of how a statute should be interpreted rather than overturning a statute entirely. This meant that the Supreme Court did not rule on the substance of the case and whether the District Court’s opinion was sound or not. So, the IRS appealed to the Tenth Circuit Court.

The Tenth Circuit Court, held among others that the political activity of the Christian Echoes National Ministry was pervasive. It encouraged people to write to their representatives in support of particular political causes, it worked on behalf of constitutional amendments to bring organized prayer back to public schools, it ought to have things like communism and socialized medicine outlawed, and it even endorsed Barry Goldwater for president in 1964. Because of this, the court agreed with the decision of the IRS to revoke the group’s tax-exempt status. The court expressed the following view:

Tax exemptions are matter of legislative grace and tax payers have the burden of establishing their entitlement to exemptions. The initiation in section

501(c)(3) stem from the congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized.

Following from the above, three key points are to be noted, firstly, tax exemptions are matter of “legislative grace”, this means that no one is necessarily entitled by the constitution to tax exemption. Thus, it is a privilege that must be earned on merits. If a government does not want to allow tax exemptions, it does not have to. Secondly, it is up to tax payers to establish that they are entitled to get any exemptions which the government allows – if they fail to meet that burden, the exemptions can be denied.

Finally, charitable and religious organisations which receive section 501(c)(3) tax exemption have a clear and simple choice to make: they can engage in religious activities and retain their exemption or they can engage in political activity and lose it, but they cannot engage in political activity and retain their exemption; thus,

A religious organisation that engages in substantial activity aimed at influencing legislation is disqualified from tax exemption, whatever the motivation... the free exercise clause of the first amendment is restrained only to the extent of denying tax exempt status and the only in keeping with an overwhelming and compelling government interest; that of guaranteeing that wall separating church and State remain high and firm... the taxpayer may engage in all such activities without restraint, subject however, to withholding the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption.<sup>107</sup>

The Supreme Court refused to hear an appeal of this case, letting the decision to stand.

From the foregoing, the decision serve to emphasize the importance of IRS rules which prevent religious organisations (or any other charitable, non-profit groups) from benefitting from tax exempt status while working to influence politics. Churches have to choose; politics or religion, and then accept the consequences of what will happen to their tax-exempt status if they choose the former. They are not automatically entitled to their tax exemptions, so they have to adhere to the regulations set forth by the government.

Similarly, in *Gibbons v District of Columbia*,<sup>108</sup> here, the question for determination by the court was whether property owned by religious organisations be exempted from property tax, even if the property is used for commercial rather than religious purposes. The Supreme Court held that congress is free to set the standards for tax exemptions and refuse to grant such exemptions to commercial property owned by the church.<sup>109</sup>

Also, in *Jimmy Swaggart Ministries v Board of Equalization of California*,<sup>110</sup> here, the question for determination by the court, was whether sales tax was payable on religious materials sold by religious organisations. In this case, the California law required that a sales tax of 6

<sup>107</sup> *Ibid.*

<sup>108</sup> [1886] [atheism.about/library/decision/tax/bldec-gibbonsdc.htm](http://atheism.about/library/decision/tax/bldec-gibbonsdc.htm) accessed 26<sup>th</sup> December, 2017.

<sup>109</sup> *Ibid.*

<sup>110</sup> [1990] [atheism.about/library/decision/tax/bldec-swaggartcalifornia.htm](http://atheism.about/library/decision/tax/bldec-swaggartcalifornia.htm) accessed on 26<sup>th</sup> December, 2017.

<sup>105</sup> Umenweke, *op cit*, pp. 434 – 435.

<sup>106</sup> [1972] <http://atheism.about.com/library/decsions/taxbldec-uschristianechoes.htm> accessed December, 2017.

percent be collected on all tangible property purchased within the State as well as a 6 percent used-tax on property purchased outside the State. There was no provision for an exemption when the property was religious in nature or sold by a religious organisation. Over an extended period of time (1974 - 1981), Jimmy Swaggart Ministries sold a variety of religious materials during “evangelistic crusade” in California and sold similar materials by mail to California residents (included in these materials were; “Bibles, Bible study manual, printed sermons and collection of sermons, audio cassettes tapes of sermons, religious books and pamphlets, and religious music in the form of songbooks, tapes, and records”).

An auditor discovered that taxes were not paid on these purchases, so the State Board of Equalization informed the organisation that it must “register as a seller” and pay back taxes (\$118,294.54, plus \$65,043.55 in interest). This was done but the organisation also filed an appeal asking for a refund, arguing that under the first amendment there should be no taxation whatsoever on religious materials.

The Supreme Court held in a unanimous decision that the free exercise clause does not require that religious organisations and religious purchases or sales be completely exempt from taxation. Although, it is true that licensing taxes on the distribution of religious materials had been held unconstitutional in *Murdock v Pennsylvania and Follett v McCormick*, the same did not hold here. On the contrary, the Supreme Court specifically stated that a “generally applicable income or property tax” like that in this case was perfectly acceptable if also applied to the sale of religious material.

Payment of such a generally tax was found not to be an undue burden on anyone’s right to freely exercise their religion, it was found not to be an example of the State singling out a specific religion or religious group or discriminatory treatment, and it was not found to constitute any form of “prior restraint” against religious speech. According to the Court;

There is no evidence in this case that collection and payment of the tax violates appellant’s sincere religious beliefs. California’s nondiscriminatory Sales and Use Tax Law requires only that appellant collect the tax from its California purchasers and remit the tax money to the State. The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant’s wares (caused by the marginally higher price) and from the costs associated with administering the tax.<sup>111</sup>

As the court made clear... to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant... though we do not doubt the economic cost to appellant of complying with a generally applicable sales and use tax, such a tax is no different from other generally applicable laws and regulations – such as health and safety regulations – to which the appellant must adhere.

The Court went further to state that:

it was also found that the existence of this tax did not violate the Establishment clause of the First Amendment because such taxation stems from a

religious purposes and does not create any “excessive” governmental entanglement with religion...it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and non-discriminatory on questions of religious belief... Collection and payment of the tax will of course require some contact between appellant and the State, but we have held that generally applicable administrative and recordkeeping regulations may be imposed on religious organization without running afoul of the establishment clause. Most significantly, the imposition of the sale and use tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive. From the State’s point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question which involves only a secular determination.<sup>112</sup>

Flowing from the above analyzed case, the Supreme Court made it clear that the “Free Exercise Clause” accordingly does not require the State to grant appellant an exemption from its generally applicable Sales and Use Tax”. In other words, there is no constitutional protection for tax exemptions for religious organisations. If government provides tax exemptions to other non-profit groups, they cannot deny the same exemptions to some groups based solely on the existence of religious affiliation. However, governments are not required to provide tax exemptions generally or special tax exemptions available only to religious organisations.

Again, in *Haller v Pennsylvania*<sup>113</sup>, the Pennsylvania Supreme Court held that tax exemptions offered only to certain types of religious literature and not to other types of religious literature or any non-religious literature is unconstitutional.

Further, in *Texas Monthly Inc. v Bullock*<sup>114</sup> between 1984 and 1987, Texas had a statute exempting from sale tax: “periodicals... published or distributed...by a religious faith...constituting wholly of writings promulgating the teachings of the faith and books... constituting wholly of writing sacred to a religious faith”.

The law was challenged by the secular publisher of “Texas monthly”, who was not exempt from the tax. The publisher claimed that the statute violated the establishment clause by promoting religious publications.

The court per Justice Brennan, delivering the lead judgment, held that exempting religious groups, made it different from tax exemptions which are offered to a broad range of groups. Charitable and non-profit organisations are examples of the broad range of groups. By restricting the tax exemption to religious groups, Texas makes each taxpayer a donor to those religions. Incidental and indirect benefits to

<sup>112</sup> *Ibid.*

<sup>113</sup> [Skepticism.org/timeline/april-history/5443-hallervpennsylvania-court-rules-tax-exemptions-must-be-available-for-all-religious-literature](http://Skepticism.org/timeline/april-history/5443-hallervpennsylvania-court-rules-tax-exemptions-must-be-available-for-all-religious-literature) accessed on 26<sup>th</sup> December, 2017.

<sup>114</sup> [1989] <http://atheism.about.com/library/decisions/tax/bldec-texas-bullock.htm>, accessed 27<sup>th</sup> December, 2017.

<sup>111</sup> *Ibid.*

religions and religious organisations is one thing and is acceptable, but the singling out of religions and religious organisations for special treatment is quite another; and is unacceptable.

The court held *inter alia*:

It is difficult to view Texas' narrow exemption as anything but State sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors.<sup>115</sup>

To be permissible, the exemption had to be offered to all groups (religious or not) who met the goals that the State was attempting to foster. As it stood, the law lacked a secular objective. The court decided that Texas had failed to show that payment of sales tax would infringe on their freedom to practice their religion.

While Texas is correct in pointing out that compliance with government regulations by religious organisations and the monitoring of their compliance by government agencies would itself enmesh the operations of church and State to some degree. It is seen that such compliance would generally not impede the evangelical activities of religious groups and that the "routine and factual inquires" commonly associated with the enforcement of tax laws bear no resemblance to the kind of government surveillance the court has previously held to an intolerable risk of government entanglement with religion.

The State of Texas had tried to argue that exempting religious publications from the tax was required of them because of the earlier court decision in *Murdock v Pennsylvania*.<sup>116</sup> The court held that a city could not impose a flat tax on a religious activity for the privilege of engaging in that activity.

The court rejected this argument, pointing out that while the government is not permitted to tax a minister for the privilege of preaching, it may indeed, tax her income just as it taxes the income of people in other secular professions – as long as it is part of a general taxation programme applicable equally to all people.

In the concurring opinion of Justice Blackburn and O'Connor, they argued that:

By confirming the tax exemption exclusively to the sale of religious publications. Texas engaged in preferential support for the communication of religious messages. Although, some forms of accommodating religion are constitutionally permissible, ...the one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the establishment clause is all about and hence is constitutionally intolerable.<sup>117</sup>

In a characteristically vitriolic dissent, Justice Scalia, Kennedy and Chief Justice Rehnquist Stated that above opinion were a "judicial demolition project" based upon the "bold but unsupported assertion" that government is not permitted to "convey a message of endorsement of religion"<sup>118</sup>.

For Justice Scalia, Rehnquist and Kennedy, government endorsement of religion and religious messages is not a problem – and if the government chooses to do so by

providing religious organisations and religious materials with a special tax exemption, that it is not a problem, either. According to Scalia;

I dissent because I find no basis in the text of the Constitution, the decisions of this court, or the traditions of our people for disappointing this longstanding and widespread practice.<sup>119</sup>

From the foregoing, it is seen that the Court required law to be broad enough to apply to all organisations that offer similar benefits as religious groups. A State could exempt the sale of all books and subscriptions to magazines, including those with religious content, from sales tax. Or it could tax the sale of all books and subscriptions to magazines, including those with religious books and magazines for special treatment.

Perhaps, more significantly, the Supreme Court here ruled that the mere existence of a tax, which is applied to religious groups or religious materials (in other words, the mere absence of a tax exemption) does not burden religious groups and is not, by itself, sufficient to violate either the free-exercise or the Establishment Clause of the First Amendment. What this means is that the existence of tax exemptions is not necessarily guaranteed by the Constitution.

The court specifically distinguished between this Sales tax and occupational tax that was ruled unconstitutional in *Murdock and Follett* cases.<sup>120</sup>

Nevertheless, the position in South Africa is quite similar to that of Nigeria. South Africa government has offered tax concessions to religious organisations and those. The South Africa's income legislation known as the Income Tax Act, 1962, section 10(1)(f) exempted religious, charitable and educational institutions of a public character from paying income tax.

To claim the income tax exemption, a religious organisation will have to write to the Receiver of Revenue, providing evidence of its eligibility. The Receiver of Revenue would then supply a letter or certificate acknowledging the exemption. Religious institutions that secured income tax exemption in this way were automatically eligible for the other tax exemptions.

Following the Ninth Report of the Katz Commission<sup>121</sup>, the tax exemption provisions of the Act were considerably tightened. In particular, there is now no automatic exemption for churches, charities, schools, et cetera, there has been introduced and narrowly defined the concept of a "public benefit organisation". Thus, only an organisation that meets the statutory criteria of public benefit organisation and which has, in addition, been approved by the commissioner will have tax exempt status.<sup>122</sup>

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> The Commission chaired by Michael Katz, published nine reports and the ninth report dealt extensively with matters affecting non-profit organisations. These recommendations as proposed by Katz were incorporated into a taxation laws amendment Act, passed by parliament in June 2000. Further amendments were enacted in June 2002.

<sup>122</sup> This new tax regime has taken effect from 15<sup>th</sup> July 2001. <http://www.saica.co.za/integritax/2005/1258-public-benefit-organisation-tax-exemptstatus.htm>, accessed 28<sup>th</sup> December, 2017.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Supra.*

<sup>117</sup> *Texas Monthly Inc. v Bullock supra.*

<sup>118</sup> *Ibid.*

The revised tax system creates a new category of “public benefit Organisations” (PBOs), eligible to claim exemption from tax<sup>123</sup>. To qualify as a PBO, an organisation must:

- (a) Be a trust, an association or a section 21 company,
- (b) Pursue only approved public benefit activities on a non-profit basis and primarily within South Africa;
- (c) Be of a public character;
- (d) Submit to the commissioner of Revenue; a copy of the Will, constitution or other written instrument under which the organisation has been established and which meets the requirement of section 30 of the income tax Act;
- (e) Register as a non-profit Organisation (NPO) in terms of the non-profit organisations Act, 1997 (unless the commissioner waives this requirement);
- (f) Comply with any reporting requirements set by the commissioner of Revenue;
- (g) Refrain from paying “excessive” remuneration to any employee, office bearer or member; and
- (h) Stay within limitations on business activities.

Many PBOs, including most churches, are voluntary associations – a group of three or more people working together to achieve a common non-profit objective. Voluntary associations are usually administered by an executive committee appointed or elected in terms of their constitution. A voluntary association is governed by the common law and can be an independent legal entity if its constitution explicitly provides for this.

#### 4.2 Public Benefit Activities

The law also requires the Minister of Finance to develop a list of activities “of a philanthropic or benevolent nature”. Following extensive consultation, a revised list was incorporated into the Income Tax Act of 2002. This includes the following activities under the various headings:

- Welfare and Humanitarian
- Health Care
- Land and Housing
- Education and Development
- Religion, Belief or Philosophy
- Culture
- Conservation, Environment and Animal welfare
- Research and Consumer Right
- Sport
- Providing of funds, Assets or Other Resources
- General

The Minister of Finance may add new items to the list of public benefit activities from time to time, as need arises.<sup>124</sup>

In general, a PBO must carry out at least 85 percent of its activities – measured either in terms of time or money expended within South Africa. However, the Minister of Finance may waive this requirement on request.<sup>125</sup>

#### 4.3 Public Character Test

An organisation must be of a “public Character” in order to qualify as a PBO. This means that it must meet at least one of the following tests:

- Each activity of the organisation must be for the benefit of or widely accessible to the general public or some sector thereof (other than small and exclusive groups); or

- Each activity of the organisation must be for the benefit of or readily accessible to the poor and needy; or
- At least eight-five percent of the organisation’s funding must come from some combination of donations, grants from an organ of State or grants from a Foreign State or International Organisation.

It is pertinent to note that for these organisation<sup>126</sup> to be recognized as PBO, the organisation must first be registered as a Non-Profit Organisation (NPO) in terms of the Non-Profit Organisation Act, 1997. However, the Commissioner of Revenue may waive this requirement if an organisation can show “good cause” why it should not have to register.<sup>127</sup> NPO registration is fairly simple; an organisation is required to do two things:

- File an acceptable founding document or constitution of the organisation with the NPO Directorate of the Department of Social Development; and
- Satisfying the NPO Directorate’s reporting requirements.

Upon registration, the NPO Directorate must supply the organisation with a certificate of registration and a registration number. An NPO remains registered, until it is deregistered. Deregistration may be voluntary (due to the organisation’s request or its dissolution) or involuntary (due to the organisation’s failure to comply with the terms of its constitution or the reporting requirements).

Once registered, an NPO must record and report certain types of information to show that it is operating in a manner consistent with its non-profit status.

This information among others include;

- Indicate its registered status and registration number on all its documents;
- Keep accounting records of its income, expenditure, assets and liabilities and retain these receipt and other supporting documentation, for five years;
- Draw up a balance sheet and a Statement of income and expenditure within six months of the end of the organisation’s financial year;
- Prepare an annual narrative report of the organisation’s activities,<sup>128</sup> et cetera,.

Again, there is a prohibition on excessive compensation an organisation may not be tax-exempt if it pays any person excessive compensation, including its own employee, office bearer, or member. The amended Income Tax Act does not define “excessive” except to say that it must be assessed “having regard to what is generally considered reasonable in the sector and relation to the service rendered”<sup>129</sup>. This provision is primarily intended to prevent people from abusing the tax concessions offered to PBOs. This restriction is unlikely to become an obstacle to the recognition of the exempt status of legitimate PBOs.

There is also a limitation on trading like we have in Nigeria, but in South Africa, the position is a bit modified. South Africa Revenue Service (SARS) recognizing the difficult financial situations in which most non-profit organisations find themselves, the law now allows organisations to earn income from a wider variety of business

<sup>126</sup>Be it religious, charitable or non-governmental organisation.

<sup>127</sup>[www.sacc-it.org.za/taxbook2.html](http://www.sacc-it.org.za/taxbook2.html) accessed on 29th December, 2017.

<sup>128</sup> *Ibid.*

<sup>129</sup>Income Tax Laws Amendment Act, 2002 “The Amendment Act”.

<sup>123</sup>Income Tax Law Amendment Act 2001, section 10 (1)(CN) & 30.

<sup>124</sup>[www.sacc-it.org.za/taxbook2.html](http://www.sacc-it.org.za/taxbook2.html) accessed on 28th December, 2017.

<sup>125</sup> *Ibid.*

and commercial activities without jeopardizing their tax-exempt status. The following types of business income are permitted:

- Income totaling less than R25,000 per annum or 15percent of gross annual receipts, whichever is greater;
- Income from trading that is directing related to the organisation's purpose and that does not compete unfairly with non-exempt traders;
- Income from occasional trading conducted primarily using uncompensated, voluntary assistance; and
- Income from any other type of business activity explicitly approved and gazetted by the Minister of Finance.<sup>130</sup>

In the context of the funding crisis, the self-financing capacity of the non-profit sector is of critical importance to its long-term viability. The taxation of the business/trading activities of PBOs plays a crucial role in the development of financial sustainability. The extent to which PBOs are taxed on their income from economic activities in many cases makes the difference between closure and continued existence of the organisation.<sup>131</sup> Therefore, whilst the new formulation of trading rules may not be ideal, they due to the extent that trading income is exempted from tax, encourage a move among PBOs towards financial sustainability; something which under the old law was impossible for most PBOs to achieve.<sup>132</sup>

From the foregoing, it is seen that in South Africa, PBOs are now permitted to carry on business or trading activities on a tax free basis with certain specific parameters, but will be

taxed on the receipts and accrual derived from any business undertaking or trading activity that falls outside the parameters of these permissible trading rules, after deducting the basic exemption.

#### **Conclusion**

It has been observed that notwithstanding the tax exempt status granted to charitable, non-governmental and religious organisations, the exemption is not absolute. As enshrined under the Nigerian tax regime, the tax exemption granted to these organisations pertains only to income derived in the course of carrying out ordinary purpose for which they are established. Once it is seen that they have realized income from profit-oriented venture or commercial activity, such income will be chargeable to tax and as such, their liability to the payment of tax will arise.

Nevertheless, contrary to the general assumption, the tax-exempt status enjoyed by not-for-profit organisations in Nigeria as already observed is not absolute; it is indeed predicated upon number of qualifications. These qualifications among others are; (a) The organisation must be of a public character, that is its activities must confer some benefit to the public or section of the public - that is public benefit, within the legal meaning of the term. (b) The organisation must not derive its profits from a trade or business, that is, it must not derive its income from any activity of a commercial nature or profit oriented venture. (c) The organisation must apply its profits or gains purely or solely to its charitable purposes or objects, that is income or assets may not inure to the private benefit of any person connected to them or any person having an interest in the organisation. These qualifications must be satisfied before the organisation will be granted the tax exempt status.

<sup>130</sup> [www.sacc-it.org.za](http://www.sacc-it.org.za), *op cit*.

<sup>131</sup> S Klingehofer et al, "Global Perspective on Not-for profit law" (ICNL) 1996 available at [www.icnl.org](http://www.icnl.org). accessed 29<sup>th</sup> December, 2017.

<sup>132</sup> [www.icnl.org/research/journal/vol3iss1/art-4.htm](http://www.icnl.org/research/journal/vol3iss1/art-4.htm) accessed 29<sup>th</sup> December, 2017.