CHAPTER ONE

INTRODUCTION

1.1. Background to the Study

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

Though, notwithstanding that the law expressly exempt these oganisationsfrom paying taxes[1]. The proviso to these provisions of the law provided that the profits of these oganisationsare tax exempt so long as they are not derived from a trade or business carried out by them.

Tax as already stated in this work is a compulsory levy on individual or organizations by government as a statutory obligation. Following this definition, it therefore means that these oganisationsand individuals are ordinarily liable to pay taxes, but these oganisationsare exempted from taxation by the express provisions of the law.

Be that as it may, the pertinent questions to answer in this study are, do people (that is, pastors, trustees, officers, salaried church staff, et cetera) who work for these Oganisations, who are paid full emolument, also benefit from tax exemption? Do these Oganisations really engage in charities, to which they were granted exemption status?

[1] Companies Income Tax Act, Cap C 21, LFN 2010, S.23(1), Capital Gains Tax Act, Cap C1, LFN 2010, S.26; personal Income Tax (Amendment), Act 2011, S.19 (1), S.75 & Third Schedule to PITA, Items 12.

There is no gainsayingthe fact that in Nigeria, religious Oganisations as we have now are no longer that of humanitarian *nun of Calcutta* called Mother Teresa, who became famous for humbly ministering to lepers, the homeless and the poor in the slums.[2]

It is worthy of note that most religious Oganisations have gone outside their main calling and now have business interest that are difficult to divorce from their original calling.[3]The law only grants tax freedom to these Oganisations and not their investment where profit is made. Many businesses are now registered and being carried out under the name of the religious Oganisations. Hence, they have become a tax haven for many businesses.

Religious organisation have in fact, transformed into profit earning business enterprises and it is just proper that they are properly assessed for the purpose of taxations under Unrelated Business Income Tax (UBIT)[4]. These Oganisations are involved in various types of commercial activities ranging from operating publishing houses, hotels, factories, radio and television stations, parking lots, newspapers publication, bakeries, restaurants, et cetera The profits derived by these Oganisations from these ventures ought to be made subject to tax.

Again, the free tax status of religion based Oganisations and NGOs enable them to use their tax-free profits to expand operations, while their competitors can expand only with profits remaining after tax. The idea is to impose the same tax on income derived from an unrelated business as is borne by their competitors. It is however not intended

[2]https://www.en.m.wikipedia.org/.../mothertheresa accessed on 26 May 2016

[3]This is the evident in the flamboyant life styles of modern time preachers and also their quest to accumulate more wealth.

[4] "IRS Tax Guide for Churches and Religious Organisations; Benefit and Responsibilities under the Federal Tax Law" available at http://www.irs.gov/pub/irs-pdf/p1828.pdf accessed 3January, 2015.

that the tax imposed on unrelated business income will have any effect on the tax-exempt status of any Oganisations.

Also, the realization by government and tax experts, that despite unreliable and nonexistent figures, many places of worship are making more money than most companies and businesses. The rate of Church and Mosque expansion is astronomical.

Most old warehouses and business places are now being replaced by these religious Oganisations. Record at the Corporate Affairs Commission (CAC) show that registration of these religious Oganisationshave been on the rise in the past 20years[5].

There is also no gainsaying the fact that places of worship put much pressure on the environment as most companies do. Public roads, stadia, recreational centres, car parks, et cetera are traditionally used for religious programmes like crusades, seminars, prayer conferences, rallies, et cetera, with resultant heavy traffic and associated strain on infrastructures. Though, most times, they pay token for the use of such facilities. Even so, the token is not commensurate with the strain on the environment (for instance gridlock).

In fact, it is a common place to Policemen, Civil Defense Corps, et cetera in such gathering to maintaining law and order. Since these Oganisations use community infrastructure such as roads, sidewalks, law enforcement agencies, fire protection, et ceterait is only logical that they pay taxes.

Some have argued that the idea is not realistic, since these Oganisations are tax exempt. The tax freedom granted to these Oganisations are not inclusive of Value Added Tax (VAT)[6]. Thus, these organizations pay VAT on every purchase of goods and supply

[5] D Ayoko "Taxation of Churches and Mosques" www.financialangle.com; accessed on 2nd September. 2014.

[6] Except, where the goods and services are purchased and used for humanitarian projects, only then, they will be exempted from the payment of VAT.

of services utilized by them. Nonetheless, since they pay VAT like all other tax payers, would it not be appropriate for their income to be accessed for tax purposes?

It is against this backdrop that this study focuses on the questions posed earlier, do people (that is,Pastors, Trustees, Officers, Salaried Church staff, et cetera) who work for these organizations who are paid full emolument, also tax exempt? To what extent do these Oganisations engage in charities, to which they were granted tax exemption? Will every income of these Oganisations ordinarily get exempted from taxation? Is it not time the tax exempt status of these Oganisations is reviewed? How far have these tax freedom granted to these Oganisations paid off in improving the welfare of the citizenry? All these and many form the background of this study.

1.2. Statement of problem

The tax exempt status granted to charitable, religious and non-governmental organizations under the law have been on the premise that these organizations engage purely on welfare and charities, that is, they aid the State and Nation in promoting the welfare of the citizenry. The pertinent questions, this study will confront is, to what extent have these oganisations engaged in charities? Is there still any need for these oganisations to enjoy tax freedom under the law? There is no gainsaying that these organizations instead of rendering welfare services or engaging in charities, they plough back their incomes which are tax exempt to business which among others are bakeries, restaurants, hotels, publishing outfits, industries, television and radio stations.

It is obvious that the tax freedom granted to these oganisations have been compromised, instead of focusing on their objects to which they were granted tax

exemptions, they have diversified and engaged in business ventures which are wholly different from their objects to which they were granted tax freedom.

Will it then be proper for these oganisations to continue to enjoy the services (security agents, fire protection, infrastructures and other basic amenities) provided by the government and still will not pay taxes to augment the revenue expended by the government on such services?

It is obvious that instead of promoting welfare, these oganisations, particularly religious organizations engage in the show of affluence (that is, why there is a crave to buy aircraft by most religious leaders). Again, religious oganisations are now seen by Nigerians as "lucrative business venture" that is why many peoplewho tried their hands in various endeavours and failed, opens a place of worship. This is evidenced in the Corporate Affairs Commission's report of the astronomical increase of registered oganisations scattered all over the country.[7] It is worthy of note that full church pastors and their like, salaried church staff/workers, and other full-time staff of these oganisations are not tax exempt, but they do not pay taxes. It is thus, this problem that this study will bring to the fore.

1.3. Purpose of the study

Tax exemptions are accorded basically to charitable, non-governmental and religious oganisations because they provide a benefit to society which the government is unable or unwillingly to provide. The objective of this study is to analyze critically the tax exemptions granted to these oganisations. This study seeks to show that the tax

[7] This information is gathered on a personal interview with one of the directors of the Commission at the Commission's headquarters in Abuja, on 27 September, 2014. Precisely these organisations are registered under part C of CAMA,Cap C20, LFN 2010.

exemptions granted to these oganisations have been compromised, rather than embarking on welfare programmes and charities to which they were granted tax-exempt status, it seem that they utilize their incomes that are tax-free to diversify and establish businesses, which are not taxed.

This study examines the nature of tax exemptions granted to these oganisationsunder the relevant tax regime in Nigeria. It also seeks to review the tax-exempt status granted to these oganisationsover the years, and buttresses why these oganisationsshould start paying taxes like other profit-oriented ventures.

It also analyzes whether the tax-exempt status granted to these organisations were extended to the staff, workers or officers, who are paid full emoluments or who receive donations from donors. The study also advocates the need for the relevant agencies of government, that is, Federal Inland Revenue Service and State Board of Internal Revenue Service to adopt the approaches of other jurisdictions in regulating the affairs and tax treatment of these oganisations.

1.4. Scope of the Study

This study examines the concept of tax exemptions under the relevant tax regime in Nigeria. Itestablishes the position that tax exemptions are granted to charitable, non-governmental and religious oganisations, but criticizes the tax-exempt status granted to these oganisations. It also buttresses the point that staff, workers or officers of these oganisationsdo not pay personal income tax on the premise that their organisations are exempted from tax. The scope of this discourse centres on the need for the tax-exempt status granted to these oganisationsbe reviewed, and the need for these oganisationsto

start paying taxes. The study is organized in eight chapters with clearly designated headings and sub-headings. Chapter one offers a general introduction, conceptual clarifications of key concepts, objectives and functions of taxation, and other preliminary issues.

Chapter two analyzes legal basis for taxation of income and charitable trusts. Chapter three examines the nature of non-governmental and religious oganisations. Chapter four, discusses the tax legislations in Nigeria and their exempt provisions. Chapter five, considers the tax exemptions of charitable, non-governmental and religious oganisations. Chapter six, considers tax exemptions in some selected jurisdictions like United kingdom, United States of America, South Africa, Ghana, Tanzania, Germany. Chapter seven tends to criticize the tax exemptions granted to these oganisationsunder consideration. Chapter eight attempts the conclusion of the study and proffer recommendations to the way forward.

1.5. SignificanceofStudy

The significance of this study reveals the inconsistency or incongruity in the tax-exempt status granted to charitable, non-governmental or religious oganisationsunder the Nigerian tax regime. Flowing from the background of this consistency or incongruity, the research advocates a comprehensive review of the tax-exempt status granted to the said oganisationsunder the extant tax regime. The research has shown the need to review the tax-exempt status granted to these oganisationssince it has become apparent that they thrive on their exempt status and they venture into profit-oriented activities or commercial activities which are not charged or assessed to tax. It has become imperative

that the tax-exempt status must be streamlined, so that distinction can easily be drawn from the activities for which they were exempted and those activities which they are not exempted, hence the latter should be charged to tax while the former should not be charged to tax.

1.6. Research Methodology

The methodology adopted in this work is doctrinal approach using expository, analytical and comparative methods. It is expository and analytical because the work analyzes the present tax regime and their exempting provisions. It undertakes a comparative reference to the position of the law in other jurisdictions. It also attempts a critiquing of the tax exemptions provided under the tax regime.

In carrying out this study, we relied on primary source materials such as relevant statutes, and case laws. Also relied upon are secondary source materials such as textbooks, journal articles, conference papers, encyclopedias, law reviews and newspapers. We also relied extensively on materials from the internet especially for our comparative analysis of what obtains in other jurisdictions.

1.7 Literature Review

Few works are bound in this area of the law, however, these works did not articulate numerous issues raised in this research work. This notwithstanding, there in fact exist some useful works on the relevant issues which discusses the law on the subject and advance opinion actually defensible within the context of the extant tax regime in Nigeria. The objective here is to undertake with a view to identifying crucial viewpoints

having significant bearing on the crux of this research work. The crux of this research work is extensively on the issue of tax exemption granted to charitable, non-governmental and religious oganisationsunder the Nigerian tax regime.

Baker and Langal in their work recognised the Lord Macnaughten's four fold classification of charitable trust; which among others are; relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the society.[8] They addressed trusts as substantially any scheme or effort to better the condition of society or considerably part. For them, the social interest needed to qualify as charitable must be substantial and not trifling or insignificant. They pointed out that charitable trusts are accorded by the law a very favourable tax incentive and also given special privileges in many other ways. According to them, in order to justify a court of equity in validating trust as charitable and thus sanctioning certain social disadvantages (such as freedom from taxation), the court must be convinced that there will be social advantages which will be more than counter-balance the social disadvantages.

They also expressed the view that the court tend to favour charitable trust and will strive to support them and to find a charitable intent wherever possible. The court must also scrutinize the alleged charity and weigh its benefits. It cannot accept without examination the settlor's view that the trust is charitable. For them, the court must also consider the amount of social advantage which will come from it. This research work tends to criticise the favourable tax treatment granted to charitable trusts. This is because these charitable trusts may be avenue for evasion or avoidance of tax.

Martin, also took into consideration Macnaughten's four fold classification of charitable trust and emphasised that the court in determining whether a trust is charitable

[8]PV Baker & P Langal, *Snell's Principles of Equity* (28edn, London: Sweet & Maxwell, 1982)pp.145-170.

or not, that the charitable intent of the settlor is inferred from the nature of the work of the done to whom property is given, as where funds were transferred to a church authority and on investigation, it was found that the gift was to be used for religious purposes, although this was not expressly stated. For him, the motive of the donor is an important factor in determining whether a certain gift is charitable.[9]

The purpose of the settlor of a charitable trust must not be to enrich others, even though he incidentally seeks to confer some public benefits. The limitation in this work is that even where the intention of the settlor is clear, the trustees can divest the trust funds to non-charitable purpose and in turn using the trust as a tax avoidance or evasion device.

Abdulrazaq pointed out that the issue of levying taxes on the income of persons generally, and especially the income of religious institutions has always been greeted with stiff opposition in Nigeria and beyond.[10] For him, this is not unconnected with the fact that the remittance of taxes is not a "favourite past-time" of the average citizen of the State and that tax officials generally do not enjoy the goodwill of the public. He was however quick to note that there is absolutely no justification for physical attacks on tax officials, as such attacks are totally unacceptable in any civilized society and necessarily attract criminal sanctions. He therefore emphasized the need to put sentiments aside and objectively respond to the question of whether or not they are taxable entities in Nigeria; as sentiments notwithstanding, the extant law on the relevant issue must be obeyed.

He also addressed five subsidiary issues in the determination of the relevant issue. Thefirst is the need to determine the legal status of the religious body and the legislative provisions in respect thereof. The second issue is whether the religious body, however

[9]JE Martin, *Modern Equity* (15th en, London, Sweet and Maxwell, 1999)pp.379– 430.
[10]MT Abdulrazaq, "Are religious bodies and their Employees taxable in Nigeria?" available at http://.naijatax.blogspot.com/2013/10/are-religious-bodies-and-their.html?=1 accessed 28 Januray,2016

legally constituted, is carrying on a trading activity. And where it is established that a religious body is carrying on trade, whether it is taxable under CITA, or PITA, on gains and or profits of the trade.[11] Again is the issue of taxation of employees of religious bodies. For him, an employee of religious body in Nigeria is taxable if it is shown that the salary or other compensation is derived from the employment with the religious institution. Also, that the religious institution may be exempted from tax on profits if it "engages in charitable or educational activities of a public character in so far as such profits are not derived from a trade or business carried on by it under CITA.[12] The donations to ecclesiastical bodies are also not taxable under CITA.[13] Though; Abdulrazaq analyzed extensively the taxability of religious bodies and religious employees. He however did not envision the difficulties that may be encountered by Revenue Authority in determining the accessable income of the organizations, and also he did not consider the taxability of non-governmental and charitable Oganisations.

Inko-Tariah categorized non-governmental, charitable and religious oganisationsin Nigeria as non-profit oganisationsprohibited by law from distributing their profits to their members or officers.[14] He expressed the view that an important consideration for the incorporation of non-profit oganisationsis the tax exemption available to such entities. With regard to the tax obligation of non-profit oganisationsin Nigeria, he mirrored Abdulrazaq's view; but added that other tax-related obligations include the fact that they are expected to registered with the Integrated Tax Office (ITO)

[11] Companies Income tax, Cap C21, LFN 2010, section 9 (1)(a) and Personal Income tax (Amendment) Act 2011 section, 3 (1)(a).
[12] *Ibid, section 3 (1)(c).*
[13] *Ibid*,Section 25.
[14] TeingoInko-Tariah, "Tax liabilities of Non-Profits", available at http://www.thescooping.com/ thescoopelegal-tax-liabilities-of-non-profits/(1 september,2014) accessed 28January 2016.

of the Federal Inland Revenue Service (FIRS) and also expressed that in line with the relevant provisions of CITA,[15] non-profit oganisationsare expected to file notice or demand, annual returns with the FIRS. Non-profit oganisationsare also obligated to deduct and remit Pay AS You Earn (PAYE) tax to the appropriate tax authority in accordance with the Personal Income Tax Act (PITA), pay Value Added Tax (VAT) on all goods and services not exempted from VAT in accordance with the Value Added Tax Act and also remit withholding tax where applicable to the relevant tax authority; pay taxes, due on all other activities not covered by any statutory relief, exemption or incentive. He noted the proliferation of non- profit oganisationsin Nigeria, and called for increased supervision of these oganisationsby relevant tax authorities. This, he argued, would constitute an effective check on the abuse of the tax-exemption extended to non-profits. This research work tends to critically analyze the interpretation and application of the tax-exempt status of non-profit oganisationsin relation to their involvement in profit-oriented ventures.

Kofi AntwiApori[16] expressed the view that ecclesiastical taxation is one issue that Nigerian religious organisation and their cleric have argued shouldnever be implemented. He rightly argued that the cleric generally oppose the implementation of any law the object of which is to secure the remittance of tax to the government by religious oganisations. He took a different view and in substance argued that taxes be remitted to the government by religious organisation in Nigeria; as far as allowable under the extant tax regime. For him, religious organisation in Nigeria are registered places of worship

[15] Companies Income Tax Act, section 65-66.

[16]KA Apori,"Towards Ecclesiastical Taxation", Judiciary, Leadership and Governance in Nigeria: Essays in Honour of Honourable Justice OkoliIkpiItam (Calabar, Nigeria: University of Calabar Printing Press, 2014).p.174-182.

whose ecclesiastical activities are founded upon some religious code. They are incorporated with the Corporate Affairs Commission (CAC)[17] as incorporated trustees and enjoy the benefits of corporate personality like other companies but exempted from tax liability, thus should not be chargeable to tax. Even though, this view seems logical, but it failed to address the fact that the tax-exempt status granted to these oganisationsis not unequivocal.

1.8 Organisational Layout

The research is organised in eight chapters. Chapter one is the general introduction by the work. It sets out the statement of the problem; objectives of the study; scope and limitations of the study; literature review, research methodology, and overview of chapters.

Chapter two examines the legal basis for taxation of income and charitable trusts.

Chapter three analyzes the nature of non-governmental and religious oganisations in Nigeria.

Chapter four examines exemption provisions under the Nigerian tax regime.

Chapter five analyzes specifically the tax exemptions of chartable, non-governmental and religious oganisations.

Chapter six considers the nature of tax exemption in some selected jurisdictions like United Kingdom, United State of America, India, South Africa, Australia, Tanzania, Ghana and Germany.

[17] The author appears to have neglected the fact that some religious oganisationsin Nigeria may not be registered with the Corporate Affairs Commission as required under the part C of the Company and Allied Matters Act, LFN 2010 Cap C20.

Chapter seven attempts a critique of the tax exemptions of these organisations under consideration**.**

Chapter eight concludes the work with some recommendations.

1.9 Definition of Terms

It is pertinent to define the key concepts used in this work. The concepts include the following:

(a) Tax

The term "tax" means a charge monetary, usually imposed by the government on persons, entities, transactions, or property to yield public revenue.[18] Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations and enjoyment of the people, and includes duties, imposts and excise.[19] Although a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money.

Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs.[20]The term 'Tax' is also defined as the money or rate of money paid to government by its citizens for governmental service.[21] Similarly, tax has been defined in

[18] BA Garner (ed) *Black's Law Dictionary* (10thedn, USA: Thomson Reuters, 2014)P.1685.
[19]*Ibid*.
[20] TM Cooley, *The Law of Taxation* (4thedn, London: Sweet and Maxwell, 1959) p.61.
[21]*Gilbert Law Summaries, Law Dictionary* (Chicago: Harcourt & Co, 1997) p.326.

United States v Butter[22] as "a tax in the general understanding of the term, and used in the Constitution signifies an exaction for the support of the government"

It is also defined as money that a person pays to the government so that the government can pay for public services. People pay tax according to their income and businesses and also pay tax according to their profits[23]

Again, it is a compulsory contribution to the support of government levied on persons, property, income, commodities, transactions, and so on, now at a fixed rate most proportionate to the amount on which the contribution is levied.[24]

Further, it is also a financial charge or other levy imposed upon a taxpayer (whether an individual or legal entity) by a state or the functional equivalent of a state, such failure to pay is punishable by law.[25] This charge varies with income or profits taxable.

It is also a fee charged (levied) by a government on a product, income, or activity. If tax is levied directly on personal or corporate income, then it is a direct tax. If tax is levied on the price of a good or service, then it is called indirect tax.[26]

It also referred as a compulsory monetary contribution to the state's revenue, assessed and imposed by a government on the activities, enjoyment, expenditure, income, occupation, privilege, property, et cetera of individual and oganisations.[27]

From the foregoing, the term 'tax' is summarized as a pecuniary burden laid upon persons (whether corporate or natural) by astate in order to provide the basic

[22] (1936)2276 US,1961, per Justice Roberts.
[23] S Wehmeier (ed) *Oxford Advanced Learner's Dictionary* (6thedn, Oxford University Press, 2000) p.1227.
[24]IA Ayua, *The Nigerian Tax Law* (Ibadan; Spectrum Law Publishing, 1996) p.3.
[25]www.en.wikipedia.org/wiki/tax,accessed23 Septemberr,2013.
[26] www.investorwoards.com/4879/tax.html,accessed23 September, 2014.
[27]www.businessdictionary.com/.../tax.html, accessed 23 September.2014.

infrastructures (such as roads, water, security, fire protection, hospitals, et cetera) and carter for the welfare of the people. Here, the sum paid as tax is not voluntary, thus, it is as involuntary contribution paid into the state's coffers which is utilized by the government for public services.[28]

(b) Exemption

The term 'exemption' means freedom from a duty, liability, or other requirement; an exception. An amount allowed as deduction from adjusted gross income, used to determine the taxable income.[29]

It also means the process of freeing or state of being free from an obligation or liability imposed on others. It is also defined as the process of exempting a person from paying taxes on a specified amount of income for themselves and their dependents.[30]

It is also a monetary relief from transaction granted to individuals or organizations.[31] Exemption is also a deduction allowed for the tax payer, a spouse and a dependents[32]. It is something that is excluded. It means also to be free from, or not subject to: taxation by regulators or government entities. A tax exempt entity can be excused from a single or multiple taxation laws. Government are often trying to

[28]The collection of tax is performed by a government agency, such as Canada Revenue Service (as in Canada), the Internal Revenue Service(IRS) (in the United States) Her Majesty's Revenue & Customs (HMRC) (in the United Kingdom, Federal Inland Revenue Service (FIRS) (as in federal agency in Nigeria), State Board of Internal Revenue (SBIR) (as in State agencies in Nigeria), etc. When taxes are not fully paid, civil penalties (such as fines or forfeiture) are imposed, but when taxes are not paid (tax invasion) criminal penalties (such as incarceration) may be imposed on the non-paying person.

[29] Garner (ed) op cit. p.692.

[30] www.dictionary.com/exemption/accessed24thSeptember.2014.

[31] en.wikipedia.org/wiki/tax-exemption,accessed24thSeptember.2014.

[32] www.dailyfinance.com/2008/01/17/tax,accessed24thSeptember2014.

encourage investment when exempting taxation.[33] It is also referred to as a part of your income that you do not pay tax on. An official permission not to do something or not pay something they normally have to or pay.[34]

Following the above definitions, exemption is freedom granted to taxpayer (whether natural or artificial persons) by law which excludes them from all forms of taxes. In taxes, there are various tax exemptions and types of income that are exempt from tax. There also certain types of organisation that are exempt from tax[35].

(c). Organisation

The term 'organisation' is defined as a body of persons (such as union or corporation) formed for a common purpose.[36] It also means a group of people who form a business, club, et cetera, together in order to achieve a particular aim.[37]

It is also defined as a social entity that has a collective good and is linked to an external environment[38]. It is a social unit of people that is structured and managed to meet a need or to pursue a collective goal?[39] All oganisations have a management structure that determines relationship between the different activities and the members, and subdivides and assigns roles, responsibilities and authority to embark on different tasks. oganisations are open system; they affect and are affected by their environment.

[33]www.investopedia.com/../tax_exempt.asp accessed 24th September.2014.
[34]Wehmeier(ed),*op.cit,* p.403.
[35] This will form the bulk of our discourse in this study.
[36] Garner, (ed) *op.cit,* p.1133.
[37]Wehmeier (ed) *op. cit,* p.824.
[38] www.en.wikipedia.org/wiki/organization,accessed24thSeptember.2014.
[39]www.businessdictionary.com/definition of organisation, accessed 24th September, 2014.

It is also a systematic arrangement of people to accomplish some specific purpose.[40] Every organisation is composed of three elements, that is, people, goals and system. Each organisation has a distinct purpose. This purpose is expressed as goals generally. Each organisation is composed of people. Every organisation has a systematic structure that defines the limit of each member. Some members are managers and some are operatives.[41]

From the foregoing, the term 'organisation' is an entity where a group of persons is united for common purpose or in some common interests, such as a corporation, an association or a government agency. Basically, there are many types of organisation which among others are; religious organisation, non-governmental organisation, not-for-profit organisation (which includes charitable organisation) friendly societies, co-operative societies, et cetera these shall be discussed in details in this study.

1.10.Objectives and Functions of Taxation

The objectives and functions of taxation are as follows:

i. Raising Revenue

The classical function of the tax system is the raising of the revenue to meet government expenditure.[42] Nothing in this function dictates a particular form of tax. Alternatively the government might commandeer resources, print money, or even borrow it, but taxation is either more efficient or more just than each of these. The government expenditure, which requires to be met, is either the provision of services which the free market cannot

[40]www.allsubjects4you.com/management, accessed 24th September, 2014.
[41]*Ibid*.
[42] MT Abdulrazaq, *Revenue Law and Practice in Nigeria* (2nd edn, Lagos: Malthouse Press, 2010) p.2.

provide such as defence, law and order and parks or the provision of services and education-often called public goods. Indeed, the most important objective of any tax reform in Nigeria today should be to raise more revenue. So tax yield must be made more responsive to changes in money and national income.[43]

ii. RedistributionofWealth

This aspect has two dimensions. The first is the doctrine that taxation should be based on the ability to pay, so that the burden of taxation ought to be heavier for rich men than for the poor, with taxes being raised to pay for social services for the less fortunate. This is achieved by the graduation or progressiveness of the rates at which the taxes are levied. The idea is that, the tax system ought to reduce inequality.[44]

The second dimension sees the present distribution of wealth as being unjust and so attempt to reverse the situation by fixing taxes at confiscatory rates in favour of the poor. High taxes on the income and wealth of the well-to-do can produce either incentive or disincentive effects. Sometimes, a taxpayer's spendable income is reduced through taxation so he is compelled to work harder in order to restore his lost income. Taxes that produce incentive effects therefore increase productivity. On the other hand, a high marginal tax rate can produce the disincentive effect, which makes the workers take to leisure rather than to extra work.It has been shown that the disincentive effect are indications of economic inefficiency and waste.[45]

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[43] IA Ayua, *The Nigerian Tax Law* (Ibadan: Spectrum Law Publishing, 1996) p.2.
[44]Ayua, *Ibid*, p.5.
[45] MN *Umenweke, Tax Law and its Implications for Foreign Investments in Nigeria* (Enugu; Nolix Educational Publications, 2008) 74p.7.

Disincentive effect can take different forms, including emigration to countries of low tax rates, and involvement in 'black economy' activities[46]. Other kinds of distortion likely to be caused by a high marginal tax rate include substitution of one form of business organizations for another. Differences in the tax treatment of the various kinds of businesses may lead to the choice of those favourably treated by the tax system, and a high incidence of tax evasion and tax avoidance.

iii. Management of the Economy

Taxation is an important consideration in the planning of savings and investments. By harmonizing it with development strategy and changing economic structure. The government can use taxation as powerful fiscal weapon to plan and direct the economic structure[47]. The government can use taxation as a powerful fiscal weapon to plan and direct the economy. By doing so, steep booms and deep recessions can be avoided. Taxationcan also be used in shaping the economic growth and development of a country. A tax system can also provide the government with the effective and flexible instruments for the day-today management of the economy. Hence, taxation can be used to achieve specific economic objectives of a nation. For example, capital allowances and the grant of pioneer status to certain industries can be used as a means of stimulating the manufacturing sector by increasing the value added content of domestic output in some key industries in Nigeria.[48]

[46]Ayua*opcit,* p.6.
[47]*Ibid*,p.5.
[48]Umenweke, *opcit,* p.8.

Taxation can also be designed in such a way as to direct private investment in line with national needs and priorities, for instance, though, the use of tax incentive*inter alia,* to attract industries to remote areas of the country.[49]

iv. AffectingBehaviour

The tax system may also be used for much more specific purposes, such as discouraging the use of alcohol or the purchase of cigarettes which are thought to be undesirable on health and social grounds. The tax system thus becomes a legal maid of all work.[50]

1.11.Characteristics of a good tax system

Two hundred years ago,Adam Smith on his 'Wealth of Nation' set out certain 'canons of taxation'. These have been recognizable in the criteria used by the economists judging a tax system. These among others are:

i. Equity

Equity is traditionally divided into two sorts: horizontal equity, which means that those in equal circumstances should pay an equal amount of tax, and vertical equity which means that those in unequal circumstances should pay different amount of tax.[51] The reason why equity is regarded as important is partly an inherent view that it is right and proper and in the same way that equality before the law is right and proper, and partly the view that, if a system is believed to be fair and equal, taxpayers will be more willing to cooperate with

[49]*Ibid.*
[50]Abdulrazaq, *opcit,* p.3.
[51]Abdulrazaq, *opcit,* p.4.

it. However, the statement that equity is important does nothing to help us to determine what circumstances are equal and what unequal.[52]

Equity may be satisfied by a proportional system just as much as by a progressive system of taxation and benefits.

ii. Neutrality

A tax is neutral if it avoids distortions of the market. The tax system is 'neutral' if it does not discriminate between different activities in the economy. The Nigerian tax system has many rules, which break the principle of neutrality; hence, there are many technical rules which make significant tax differences according to which two or more methods are adopted to achieve a given result[53]. The effect is harmful since it encourages the expenditure, which in economic terms is unproductive, and on schemes which may make a trade less efficient.

iii. Certainty

This means first that the scope of the tax should be clear. A tax which every person is bound to pay ought to be certain and not arbitrary. The scope of the tax should be clear, it must also be certain besides increasing the cost of the system. Thetax can and will be enforced with a clear idea of how much revenue will be raised from taxation.

[52] Vertical Equity means graduated or disproportional taxation.

[53] The reconstructing effect of provision of Companies Income Tax (CITA) Cap C21, LFN, 2010, section22.

A tax that is easily 1evaded causes resentment and often a decline in taxpayer morality. It means also that the government will be able to correctly predict how much tax is gathered in and so perhaps the effects of the tax.[54]

iv. Administrative Efficiency

The administrative costs of collecting and managing taxes should not be higher than the revenue to be raised. In other words, there must be an efficient administration of the tax system by trained tax personnel. Only those who regard the duty of the tax system as confiscation of wealth in order to provide employment would be happy with a tax whose administration costs exceed the tax yield. There is the further problems of compliance cost.[55]

1.12.Essentials of a Trust

To create a trust, any requisite formalities for vesting property in the trustees must be complied with and the three certainty must be present: certainty of intention to create a trust, certainty of objects, thereby making the trust administratively workable and capable of being policed by the court. To underpin the binding obligation inherent in the trust concept. The trust must be directly or indirectly for the benefit of persons (individual or corporate) so that some person has *locus standi* to apply to the court to enforce the trust. Unless the trust is for a limited anomalous number of non-charitable purposes relating to

[54]Abdulrazaq, *op cit*, p.5.
[55] MT Abdulrazaq, *Nigerian Tax Offences and Penalties* (Lagos, Batay Law Publications, 1993) p.5.

the maintenance of animals, tombs, et cetera or for charitable purposes, then the Attorney-General enforces the charitable purposes.[56]

A trust cannot be created unless the three certainties are present. Each of these certainties will be considered below. Different considerations apply to each, yet they are inter-related.[57]

Uncertainty in the subject of the gift has a reflex action upon the previous words, and shows doubt that he could not possibly have intended his words of confidence, hope or whatever they may be; his appeal to the conscience of the first taker – to be imperative words.[58]

i. Certainty of Intention

A trustee is under an obligation, but that obligation may be inferred from the nature of the gift, considered as a whole.[59] Technical words are not required. The question is whether, on the proper construction of the words used, the settler or testator has shown an intent to create a trust. A trust may be created without using the word 'trust' and, conversely, the use of the word 'trust' does not conclusively indicate the existence of a trust.[60] A 'precatory' expression of hope or desire, or suggestion or request, is not sufficient. The words in each case must be examined to see whether their intention was to impose a trust upon the donee.

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[56] DHayton, *Cases and Commentary on the Law of Trusts* (9th edn London; Sweet & Maxwell, 1991)p.115.
[57] JE Martin, *Modern Equity* (15th edn, London; Sweet & Maxwell, 1991)p.90.
[58] *Mussourice Bank v Raynor* (1882) 7 APP. Ca.321 at p. 331.
[59] Re Cohen (1973) 1WLR 415.
[60] *Tito v Vwaddell* (No.2) (1977) Ch. 106, *Customs and Excise Commissioner v Richmond Theatre Management Ltd* (1995) S.T.C 257.

The Court of Chancery at one time leaned in favour of constructing expressions of desire as intended to create a binding trust.[61]This was because an executor who had administered an estate was entitled to keep for himself any surplus, which was undisposed of by the will, and was ready to find that he took as trustee in order to prevent this. This approach, then spread beyond executors. In 1930, however, the Executors Act provided that undisposed of residue should be held on trust for the next-of-kin; and from about the middle of the nineteenth century, a stricter construction was placed upon these "precatory words". Where, however, an express trust is construed from precatory words, it is of course, just as much a trust as any other.[62]

A trust will be found from precatory words if on a proper construction of the language such was the intention of the testator. *In Comiskey v Bowring–Hanbury.*[63] The facts to the case were as follows:

> a testator gave to his wife "the whole of my real and personal estate…in full confidence that …at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will… I hereby direct that all my estate and property acquired by her under this will, shall at her death be equally divided among the surviving said nieces".

A majority of the House of Lord held that the testator intended to make a gift to his wife, with a gift over of the whole property at her death to such of her nieces as should survive her, shared according to the wife's will and otherwise equally.

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[61]*Cook v Fountain* (1976) 3 Swan.585.

[62]*In Williams Estate* (1872) 2Ch.12 at P.27, Rigby L.J protested against the use of the term "precatory trust" calling it a "misleading nickname".

[63] (1905) A.C. 84.

Where a form of words has once been held to create a trust, the testator's intention may be held to be such as to reach the same result, at any rate where the words have been used as a precedent, even though the words used, when subjected to the stricter modern construction, might be expected to produce a different result.[64]

Where the words used are held not to create trust, the donee of the property may take overas beneficiary.[65] This must be distinguished from the situation where there is certainty of intention to create a trust, but uncertainty as to the objects or the share they are to take. In such cases, as we shall see, there is a resulting trust.

The question of certainty of intention may also arise where there is no document to construe. The question then is whether the acts or words of the parties indicate an intention to create a trust; as where a man tells his co-habitant that she can share his bank account.[66]or where a mail order company puts money sent by customers into a separate bank account.[67]

Finally, the intention to create a trust must be genuine, and not a sham, as where the settler did not intend the trust to be acted upon, but entered into it for some ulterior motive, such as deceiving creditors or the Galand Revenue. In *Midland Bank Plc v Wyatt.*[68]a declaration of trust was executed by a husband and wife in 1987 (when the husband was contemplating a new business), whereby the family home, their only real asset, was apparently settled on the wife and daughters. The document was kept in a safe

[64]*In Steel's Estate W.T* (1948).
[65]*Lassence v Tierney* (1849) 1 Mac. & Or. 551, *Watson v Halland* (1955) 1 All E.R 290.
[66]*Paul v Constiance* (1977) 1 W.L.R 527, *Swain v The Law Society* (1983) I.A.C 598.
[67]*In KayfordLtd's Estate* (in Liquidation) (1975) 1 W.L.R 279, *R vClowes* (No. 2)(1994) 2 All E.R 316 (items of investment brochure indicated a trust).
[68] (1995) I.F.L.R 696

and the couple continued to act as absolute owners of the property, in particular by mortgaging it. The husband's business failed and the bank obtained a charging order against the house. The husband then revealed the trust document. This was held to be a sham. The inference was that the husband had "kept it up his sleeve for a rainy day" in order to defeat future creditors and had not otherwise intended it to have any effect. This principle does not enquire a finding of fraud, and will apply if the transaction is the result of merely mistaken advice.[69]

ii. CertaintyofSubject-Matter

The subject-matter may be an interest in land; it may be chattels or money; it may be a chose-in-action, such as a covenant,[70] or a debt. Whatever form it takes, it must be specified with reasonable certainty. Testamentary gifts have failed where they concerned "the bulk of my estate",[71] or "such parts of my estate as she shall not have sold,[72] or 'anything that is left,[73] or "the remaining part of what is left[74] or 'all my other houses,[75]that is,those remaining after a choice had been made by another beneficiary who died before choosing. These cases should be contrasted with one the subject-matter of the gift is to be determined in the discretion of a trustee. In *Re Golay's Will Trusts*, a gift directing the executors to allow a beneficiary to 'enjoy one of my fleets during her lifetime and to receive a reasonable income from other properties' was upheld.[76] The

[69] Martin *op cit*, p.92
[70]*Flecher v Simmonds* (1844) 4 Hare 67; post, p.128.
[71]*Palmerv Simmonds* (1854) 2 Drew. 221.
[72]*In Jones Estate* (1898) 1 Ch. 438.
[73]*In the Estate of last* (1958) p. 137.
[74]*Orange v Barnard* (1789) 2 Broc.C 585.
[75]*Boyce v Boyce* (1849 16 Sim. 476.
[76] (1965) I.W.L.R 969.

executors could selects the flat. The word ‘reasonable income’ were not intended to allow the trustees to make a subjective decision; but provided a sufficient objective determinant to enable the court, if necessary, to quantify the amount. The problem, however, is that no objective determination of words such as ‘reasonable’ can be made unless the context is known.

In *Re Golay’s Will Trusts,* it was assumed that the criterion was the beneficiary’s previous standard of living.[77] The word ‘reasonable’ in isolation has little meaning. If the testator were to give a ‘reasonable legacy’ to X then no doubt the gift would fail, unless it was clear that the amount was to be fixed by the executors.

Where the subject-matter of the trust is uncertain then no trust is created. There is nothing to form the subject-matter of a resulting trust. If the purported trust has been attached to an absolute gift, then the absolute gift takes effect. It may be, however, that the property itself is certain, but the beneficial share are not. Unless the trustees have a discretion to determine the amounts, then the trust will fail and the property will be held on a resulting trust for the settler.[78] This was the case in *Boyce v Boyce,*[79] where the determination was to be made by a beneficiary who died before choosing. Sometimes, the problem will be solved by the principle that equity is equality[80], or by the court determining what is proper division according to the circumstances.[81]

Certainty of subject matter has been an issue recently not only in relation to express trusts but also in the commercial context of the sale of goods. Where the

[77] *Supra*.
[78] Martin *op cit*, p.93.
[79] (1849) 6 Sim. 476.
[80] *Burrough v Philox* (1840) 5 MYL. & Cr. 72.
[81] *Mcphali v Doulton* (1971) A.C.424.

purchasers have paid for goods but have not taken delivery prior to the seller's insolvency, they may seek to gain priority over general creditors by claiming a trust of their goods in their favour.

Where the goods have not been segregated but form part of a bulk, these claims failed on the ground that there cannot be a trust of unidentified chattels. Thus, in *Re London Wine Co.*, the buyers of wine stored in a warehouse and not segregated from the general stock of similar wine could not establish a trust. It was otherwise where the wine had been segregated for a group of customers (even though not appropriated to each individual customer) as in *Re StapyltonFletceteraher Ltd*.[82] Although the Judge warned that the court 'must be very cautious in devising equitable interests and remedies' which erode the statutory scheme for distribution on insolvency. It cannot do it because of some perceived injustice arising as a consequence only of insolvency.[83]In that case, the legal title had passed to the customers and there was no need to consider the trust argument.

It is worthy of note that uncertainty as to the precise scope of property subjected to a secret trust,[84] a trust arising under mutual wills,[85] or a constructive trust of a family income[86], has not proved fatal to its validity. Insistence on strict rules in these contextcould facilitate fraud or unjust enrichment.

iii. Certainty of Objects

[82] (1994) 1 W.L.R 1181.
[83]*Ibid*, at P.1203, per Paul Baker Q.C.
[84]*Ottaway v Normen* (1977) 2 Ch. 698.
[85]*In Cleaver* (1981) 1 W.L.r. 939.
[86]*Gissing v Gissing* (1971) A.C 886 at 909.

'It is clear law that a trust (other than a charitable trust) must be for ascertainable beneficiaries[87]. In the case of future interests, the beneficiaries must be ascertainable within the period of perpetuity.[88] The test to be applied to determine certainty of objects depends upon the nature of the trust. With a 'fixed' trust, it is, and always has been, that a trust is void unless it is possible to ascertain every beneficiary. With a discretionary trust, the House of Lord decided in *McPhailvDoulton*[89] that the test was; can it be said with certainty that any individual is or is not a member of the class?[90] That is the same test as was established for certainty of objects of a mere power in *Re Gilbenkian's Settlements.*[91] This assimilation of the tests for powers and discretionary trusts destroys what used to be one of the most important reasons for distinguishing between trusts and power.[92]

Nonetheless, where powers are concerned, so long as the trustees consider whether or not to exercise the power and do not go beyond the scope of the power, the courts cannot interfere unless the trustees can be shown to have acted malafide or capriciously, that is,for reasons which are irrational, perverse or irrelevant to any sensible expectation of the settler. It is purely up to the trustees whether or not they exercise the powers position to consider the exercise of the powers, that is,if they can say with certainty of any given person that he is or is not within the scope of the power.[93] Nevertheless, it must be possible to say with certainty whether any given individual is or is not a member of the class, the relaxation of the rule for the entirety of the class does

[87]*Per Lord Denning in Vandervell's Trusts* (No.2) (1974) Ch. 269 at P. 319.
[88]*In Flavel's Estate W.T* (1969) 1 W.L.R 444 at pp 446 – 447.
[89] (1971) A.C 424.
[90]*Per Lord Wilberforce* (1971) A.C. 424 at PP.446 – 447.
[91] (1970) A.C. 508.
[92]*In Gestetner Settlement* (1953) Ch. 672.
[93]*McPhail vDoultonSupra*.

not permit uncertainty as to particular members.[94] If there is such uncertainty, the limitation is void, even though there may be some who fall within any conceivable meaning of the language, example, as to being an "old friend" of the settler; for trustees cannot, by considering only those who are obviously old friend of the settler, narrow the class of persons whom he intends should be included in the simple (and uncertain) phrase "my old friends".[95] Further, if there is a trust for division between all the members of a class (example, in equal shares), it will fail unless all the members of the class are ascertainable with certainty.[96]

iv. Absence of Certainties

The effect of the absence of any certainties may be summarized as follows; the paramount certainty isthat of subject-matter, in the first sense, if there is no certainty as to property to be held upon trust, the entire transaction is nugatory. Next, if that certainty is present, but there is no certainty of words, the person entitled to the trust property holds free from any trust. Finally if both certainties are present but there is uncertainty of objective, there is a resulting trust for the settler, for "once establish that a trust (of definite property) was intended and the legatee cannot take beneficially,[97] the same applies where there is uncertainty of the subject-matter as regard the beneficial, unless one of the beneficiaries can establish a claim to the whole.

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[94] D Hayton, *Cases and Commentary on the Law of Trusts* (London; Sweet & Maxwell, 1991) p.140.
[95] *Whishawv Stephens* (1970) A.C 508.
[96] *Supra* at p.524.
[97] *Briggs v Penny* (1851) Mac. & G. 546 at 557, Per Lord Truro L.C.

1.13.Classification of Trusts

Trusts have been vigorously classified and subdivided. The categories are not exclusive; some trusts could appear in more than one category. The basic division is between private trusts, and public or charitable trusts. Private trusts are divided into express, constructive and resulting trusts and express trusts may be divided into executed and executor and completely and incompletely constituted trusts. These shall be considered as follows:

Private Trusts

A trust is private if it is for the benefit of an individual or class, irrespective of any benefit which may be conferred, thereby on the public at large. A private trust, may be enforced by any of the beneficiaries.[98]

A. Express Trusts

An express trust is one intentionally declared by the creditor of the trust, who is known as the settler, or if the trust is created by will, the testator.[99] A trust is created by a manifestation of an intention to create a trust; though certain formalities are required in the case of life trusts of land and of all testamentary trusts.

i. Executed and Executory Trusts

An executed trust is one in which the testator or settler has marked out in appropriate technical expressions what interests are to be taken by all the beneficiaries. On the other

[98] Martin,*op cit*, p.65.
[99]*Ibid*.

hand, in an executor trust, the execution of some further instrument is required, in order to define the beneficial interests with precision. The property is immediately subject to a valid trust, but it remains executory until the further instrument is dully executed.

The practical significance of distinction is that while the language of executed trusts is governed by strict rules of construction, executory trusts are construed more liberally. Where, in the case of an executed trust, the settler has made use of technical expressions, as to the interpretation.[100] In the case of executor trust, however, equity will attach less importance to the use or omission of technical words, but will seek to discover the settlor's true intention, and order the preparation of a final deed which gives effect to such intention. It is necessary, however, for the court to be able to ascertain, from the language of the instrument, the trust which are intended to be imposed on the property.[101]

ii. Completely and Incompletely Constituted Trusts

There cannot be a trust unless the trust is completely constituted. This classification is therefore irrational; it is dealing, not with two different types of trust, but with a rule for distinguishing what is a trust from something that is void.[102]

A trust is only valid if the title to the property is in the trustee and if the trusts have been validly declared. A declaration that A holds on trust on trust for B is ineffective if the property is not vested in A. The trust becomes constituted and void when the property is vested in A. the form of transfer to A depends on the nature of the property; land, chattel, money, shares in a company, copyrights, patents, debts or other

[100] *In Bostock's Settlement* (1921) 2 Ch. 469.
[101] *In Flavel's Will Estate Trusts* (1966) 1 W.L.R 445 at p.447.
[102] Martin,*op cit*, P.66.

chooses in action, and the appropriate method must of course be used.[103] In the case of trust of land, there must also be written evidence of the declaration of trust. The settler may of course declare himself trustee, and there is then an automatic constitution, because title was in the settler throughout.

Testamentary trusts are always completely constituted for the executors, if not trustees themselves, are under a duty to transfer the trust property to the nominated trustees.[104]

Although, no trust is created unless the trust is completely constituted, there are situations where intended beneficiaries under an incompletely constituted trust may compel the transfer of the property to the trustees. In general, they can do so if given consideration, but not if they are volunteers, for there is yet no trust and "equity will not assist a volunteer".[105]

B. Resulting Trusts

A resulting trust exists where property has been conveyed to another, but the beneficial interest returns, or "results" to the transferor. This may happen in various situations: the simplest one is where the property is conveyed to trustees upon certain trusts which fail or which do not exhaust the beneficial interest. The part undisposed of results to the settler. For example, if there is a gift on trust for A for life and then on trust for X. If X attains the age of 21, but X dies under 21 in A's lifetime, the property will result on A's

[103] *Ibid.*
[104] Martin,*op cit*, p.67.
[105] *Ibid.*

death to the settler. Such a resulting trust has been described as "automatic"[106] meaning that it arises by operation of law, without depending on the intention of the settler. Indeed, it may be what he most wished to avoid, because, for example, it imposes a tax liability upon him[107]. Resulting trusts of this kind are akin to constructive trusts in so far as they appear to arise independently of intention. Indeed, some cases treat the two kinds of trusts as almost synonymous.[108] The better view, however is, that the so called "automatic" resulting trust gives effect to the settlor's presumed intention, as is shown by the fact that the beneficial interest goes to the crown as bona *vacantia* if the settler has expressly or impliedly abandoned it.[109]

C. ConstructiveTrust

While express trusts arise from the act of the parties, constructive trusts arise by operation of law.

Equity says that in certain circumstances the legal owner of property must hold it on trust for others. The absence of the need for formalities in such circumstance is obvious. There is, however, much dispute and uncertainty as to the occasions on which constructive trusts arise, and also as to their nature.[110]

The term has indeed been used in different senses. It can cover the duty of a trustee who has obtained benefits by fraud; the obligation of a transferee from an express trustee, unless he proves he was a bonafide purchaser for value without notice, to hold the

[106] Per Megarry J. in*Vandervell's Estate Trust* (No.2) (1974) Ch. 269 at p.291.
[107]*Vandervell v I.R.C* (1967) 2 A.C 291.
[108] Per Lord Denning M.R in *Hussey v Palmer* (1972) 1 W.L.R 1338; Burns v Burns (1984) 1 F.L.R 263 at p.269.
[109]*W.L.G v ILBC* (1996) A.C 669 at p.708.
[110] Martin,*op cit*, p.68.

transferred property on the trusts previously applicable; the obligation of a trustee who has made a profit however innocently, through his office, to hold such profit for the benefit of his beneficiaries[111], the position of a stranger to the trust who has dishonesty assisted in a breach of trust; the relationship of vendor and purchaser between the contrast and the execution of the conveyance; and other relationships, such as licenses, and claimants to a matrimonial home, where the introduction of a constructive trust was considered to be necessary to enable the court to reach just solution.

2. Public or Charitable Trusts

A trust is public or charitable if the object thereof is to promote the public welfare, even if incidentally. It confers a benefit on an individual or class. These are trusts for certain purposes, which are so beneficial to the community that the Attorney General undertakes responsibility for their enforcement.[112] They are accorded special privileges in terms of non-liability to tax, and in terms of perpetual duration.[113]

[111] *Keech v Standford* (1726) Sel. Cast King 6.i, *Board Man v Philips* (1967) 2 A.C. 46.
[112] PV Baker & P. Langal, *Snell's Principles of Equity*, 28th edn London; Sweet & Maxwell, (1982), p.102.
[113] This shall be discussed in detail in Chapter three of this work.

CHAPTER TWO

AN OVERVIEW OF THE CONCEPTS OF TAXATION AND CHARITABLE TRUSTS

2.1. Concepts of Income, Gains and Profit

1. Income

Income has been defined as money received over a period of time as payment for work,et cetera, or as interest of profit from shares or investment.[114]

Income has also been defined in the personal Income Tax Act to include: "any amount deemed to be income under the Act."[115]

Flowing from the above definition of the word "income" imports that whatever the Act refers to as income automatically becomes income and is treated as one. The word 'income' has further been defined as 'the amount of an individual's consumption outlays plus the increase (or minus the decrease) in his net worth during a particular time period.[116]

Income is also defined as the return in money from one's business, labour or capital invested gain, profits, salary, wages or fees. It is also referred to as the money or other form of payment that one usually receives periodically, from employment, business, investments, royalties, gifts and the like.[117]

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[114]Robinson, *Chambers 21st Century Dictionary* (India: Chambers Harrup Publisher Ltd., 2001) p.684.
[115] Personal Income (Amendment) Act, 2011,section 3 (2)(b).
[116] DM Adeola, Income Tax Law and Administration in Nigeria, (2nd edn. Ife: University of Ife Press, 1986) p.1090.
[117] BA Garner (ed) *Black's Law Dictionary* (10th edn, USA: Thomson Reuters, 2014) p.880.

2. Gain

Gain is an increase in amount, degree, or value.[118] Pecuniary gain means a gain of money or of something having monetary value.It is referred to as excess receipt over expenditure or of sale price over cost. It is also the excess of the amount realized from a sale or other disposition of property over the property's adjusted value[119].In the noun sense of it, the word 'gain' has been defined as 'something gained, example, profit, an increase example, in weight'.

The word gain has further been defined as 'profits, winnings, increment of value, difference between receipt and expenditures, pecuniary gain; difference between the cost and sale price. Appreciation in value or worth of securities or property.[120]Gain is similarly defined as 'to make profitable'.[121]

3. Profit

Profit has been defined as 'money gained from selling something for more than it originally costs; an excess of income over expenses; advantage or benefit'.[122]

Profit is also define by the Black's law Dictionary as, gains from goods, valuable results, useful consequences, gain of an office, excess return over expenditures or excess income over expenditure or the benefits, advantage or pecuniary gain accruing to the owner or occupant of land from its actual use. Thus, the excess of revenues over expenditure in a business transaction.[123]

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[118]Garner *(ed) Black's Law Dictionary,loc cit.* p.792.
[119] *Ibid* p.700.
[120]Hornby *op cit,*p.486
[121]J Earol, *The Dictionary of English Law*: (London, Sweet & Maxwell 1996) vol.1 p. 851
[122]Robinson,*op cit.*1107.
[123]*Ibid,*p. 1404.8.

Profit has similarly been defined as advantage or gain in money or in money's worth.[124]

A thorough examination of the above definitions of 'income', 'profit', and 'gain' will reveal that they all boil down to the same meaning. Income, profit or gain means an increase in worth or spending power. The main reason for examining these concepts is that income tax is tax on income, gain and profit and nothing else.[125] There is a presumption of gain or profit in any transaction, except where the contrary is shown.

2.2. Charge of Income Tax

The scope of the charge to tax is outlined in Personal Income Tax Act.[126]andCompany Income Tax Act.[127]

Tax is payable for each year of assessment upon all income or profits from a source inside or outside Nigeria accruing in, derived from, brought into or received in, in Nigeria.

The Personal Income Tax Act.[128], section 3 provides as follows:

> (1). Subject to the provisions of this Act, tax shall be payable for each year of assessment on the aggregate amounts each of which is the income of every taxable person, for the year, from a source inside or outside Nigeria, "including, without restricting the generality of the foregoing –
> (a) Gain or profit from any trade, business, profession or vocation may have been carried on or exercised.
> (b) any salary, wage, fee, allowance or other gain or profit from employment including compensation, bonuses, premiums, benefits or other prerequisites allowed, given or granted by any person to an employee other than –

[124] *Ibid, vol.2 p.1420.*
[125]MN Umenweke., *Tax Law and its Implications for Foreign Investments in Nigeria* (Enugu, Nolix Educational Publications Nig, 2008) p.93.
[126]Personal Income Tax (Amendment) Act, 2011, section 3.
[127] Company Income Tax Act, Cap C21, LFN 2010, section 9.
[128]Personal Income Tax (Amendment)Act, 2011.

(i) so much of any such sums as may be admitted by the relevant tax authority to represent reimbursement to the employee or expenses incurred by him in the performance of his duties, and from which it is not intended that the employee should make any profit or gain;
(ii) medical or dental expenses incurred by the employee;
(iii) the cost of any passage to or from Nigeria incurred by the employee;
(iv) any sum paid in respect of the maintenance or education of a child if any provision of this Act provides that any sum received by the employee during a year of assessment should be deducted from the personal reliefs to be granted to him for the next following year;
(v) so much of any amount of rent the employee is treated as being in receipt equal to the annual amount deemed to be incurred by the employer under section 4 of this Act;
(vi) so much of any amount of rent the employee is treated as having received under the provisions of section 5 of the Act;
(vii) so much of the amount of rent subsidy or rent allowance paid by the employer, to or on account, for the employee not exceeding N100,000 per annum;
(viii) the amount not exceeding N15,000 per annum paid to an employee as transport allowance;
(ix) meal subsidy or meal allowance, subject to a maximum of N5,000 per annum;
(x) utility allowance of N10,000 per annum;
(xi) entertainment allowance of N6,000 per annum;
(xii) leave grant, subject to a maximum of ten percent of annual basic salary;
(c)gain or profit including any premiums arising from a right granted to any other person for the use or occupation of any property;
(d) dividend, interest or discount;
(e) any pension, charge or annuity;
(f) any profit, gain or other payment not falling within paragraphs (a) to (e) inclusive of this subsection.
(2) for the purpose of this section –
(a) "Allowance" includes any sum paid or payable in respect of expenses and any sum put by an employer at the disposal at any employee and paid away by the employee;
(b) "Income" includes any amount deemed to be income under this Act;
(c) the gain or profit arising from a right granted to any other person for the use or occupation of property under any lease or assignment thereof, being rent paid or expressed to be paid in advance, shall be deemed to accrue to the recipient from day to day over the period for which such rent has been paid;

Provided that where the period exceeds five years, the whole of the rent so paid or expressed to be paid in advance shall be treated as accruing evenly from day to day over the five years commencing on the first day of that said period;

(d) “employment” includes any service rendered by any person in return for any gains or profits.

From the foregoing provisions of Personal Income Act, it is seen that the categories of chargeable income enumerated above are not closed. The combined reading of last phrase clearly attests to the above assertion. Again, what can be gathered from the above provision are that apart from income specifically exempted, all incomesare liable to the income tax while leaving residue of other incomes undetermined and only ascertainable by the tax officials (for instance, taxation of income in the formal sector). This in turn may create obvious problem of assessment and rates of tax, as those sources are not subject to any specification. This also may give room for exploitation, as tax payers may be left at the mercy of the corrupt tax officers who may exploit the situation to extort from the taxpayer.

Similarly, Company Income Tax Act 2010 section9 provides as follows:

(1) Subject to the provision of this Act, the tax shall, for each year of assessment, be payable at the rate specified in section 40(1) of this Act upon the profits of any company accruing in, Nigeria in respect of –

(a) Any trade or business for whatever period of time such trade or business may have been carried on;

(b) Rent or any premium arising from a right granted to any other person for the use or occupation of any property; and where any payment on account of such a rent as is mentioned in this paragraph is made before the expiration of the period to which it relates and is included for the purposes of this paragraph in the profits of a company, then, so much of the payment as relates to any period beginning with the date on which the payment is made shall be treated for these purposes as accruing to the company proportionately from day-to-day over the last mentioned period or over the five years beginning with that date, whichever is the shorter;

(c) Dividends, interest, royalties, discounts charges or annuities;

(d) Any source of annual profit or gain not falling within the preceding categories;

(e) Any amount deemed to be income or profit under a provision of this Act or, with respect to any benefit arising from a pension or provident fund, of the personal Income Tax Act;

(f) Fees, dues and allowances (whichever paid) for services rendered;

(g) Any amount of profits or gains arising from acquisition and disposal of short term money instruments like federal government securities, treasury bills, treasury or saving certificates, debenture certificate or treasury bills, treasury or savings certificates, debenture certificates or treasury bonds.

(2) For the purposes of this section, interest shall be deemed to be derived from Nigeria if –

(a) There is a liability to payment of the interest by a Nigerian company or a company in Nigeria regardless of where or in what form the payment is made; or

(b) The interest accrues to a foreign company or a company in Nigeria regardless of whichever way the interest may have accrued.

A critical look at the provisions of the statutes show that any gain, profit or income arising from employment, profession, vocation, trade, business, rent, pension, dividend, premium, discount, interest, royalties or allowances paid for services rendered shall be chargeable to tax.[129]

The above provisions of Personal Income Tax (Amendment) Act 2011and Company Income Tax Act 2010 embodies the charging clause. Thus, any gain, profit or income not within the said provisions will not be chargeable to tax. It then follows that any gain, profit or income not captured within the express provision of the statutes will not be taxable, for the said provisions determine what are taxable or chargeable to tax with respect to profit, gain or income of persons and companies.[130]

2.3. Sources of Income

The term "source" is not defined by any tax law, but the facts of each case help to determine where the source of an income or deemed income lies.

[129]Personal Income Tax (Amendment) Act 2011 section 3 and Company Income Tax Act 2010 section 9,
[130]*Ibid*

A. Employment

The term "employment" is defined by Personal Income Tax (Amendment) Act 2011section 108 to include any appointment or office, whether public or otherwise, for which remuneration is payable.

The term "employment" is defined bythe Act to include "any service rendered by any person in return for any gains or profits.[131] The term "employment" signifies something in the nature of a "post". Where a person works for more than one employer it is often a difficult question whether there are a number of separate employments or whether the employments are mere vocation.[132]Where the activities of the taxpayer do not consist of obtaining a post and staying in it but consist of a series of engagements treated as carrying on a profession.[133]

In *Fall vHitchin,* it was held that the word "employment" is conterminous with the word "contract of Service" and that income derived by a ballet dancer from a contract with a theatre having the attributes of a contract of service was taxable, notwithstanding the fact the dance carried on a profession as such and entered into the contract in the normal course of carrying on that profession.[134] This decision narrows the scope of *Davies v Braithwaite*to contracts entered upon in the course of carrying on a profession which are contracts for services.[135]

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[131]Personal Income Tax (Amendment) Act 2011 section 3(2)(d)
[132]MT Abdulrazaq, *Revenue Law and Practice in Nigeria,* (2nd edn, Lagos; Malthouse Press Limited, 2010),pp 70-71.
[133]*Davies v Braithwaite* $(1931)_2K_B$ 628.
[134] (1972) 49nT.C 433.
[135] *Supra.*

The two cases are, however, difficult to reconcile since latter cases[136] show that the test for distinguishing a contract of service from a contract for services is whether the *propositus* carries on business on his own account, and *exhypothesi* a person who carries on a profession does so.[137] In some cases, an individual may hold an office or employment and carry on a profession at the same time[138], in such a case, the rules of employment apply to the office or employment. Thus, in *I.R.C v Brander &Cruickshan,*[139] a firm of advocates in Scotland, although not holding themselves out as professional registrars, acted as secretaries and registrars for companies and performed the duties imposed on the holders of such offices by the Companies Act. The registrarship were acquired in the ordinary course of the firm's practice as advocates. It was held that the registrarship were offices and that a payment of €5,000 was accordingly exempt from tax. In practice, and as a matter of convenience receipts from offices held by persons carrying on a profession are often treated as receipts of the profession.[140]

B. Office

There is no statutory definition of the word "office" for income tax purposes. In *Great Western Co v Baker*,Rowlatt J, defined "an Office" to mean a subsisting, permanent, substantive position which exists independently of the person who fills it and, which goes

[136] *Reading Mixed Concrete (South-East) Ltd v Minister of Pensions and National Insurance* (1968)2Q.B497, Market Investigations Ltd v Minister of Social Security (1969)2Q.B173.
[137] Abdulrazaq, op cit p.71.
[138] *Mitchell and Edon v Ross* (1960) Ch. 498.
[139] (1971) 46 T.C 574.
[140] Abdulrazaq, *op cit*p.72.

on and is filled in by successive holders. It is something which is held by tenure and title rather than by contract.[141]

Similarly, in*McMillan v Quest,*[142] Lord Wright construed its meaning "…a position or place to which certain duties are attached, especially those of a more or less public character". It follows that a person who is the beneficial owner of all shares of a private company and who is also its director, holds an office under it.[143] Again, a medical consultant in a private practice, who accepts part-time appointment under National Health Service, holds an office for the purposes of income tax.[144] An accountant who is appointed to be a company's auditor holds an office under it.[145]

C. Profession

Profession is another source of income. The term 'profession' is not defined in any tax law, but the most helpful judicial exposition of its meaning is to be found in the judgment of Scrutton L.Y. in *IRC vMaxse*[146] where he stated that:[147]

> It seems to me as at present advised that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of any manual skill controlled, as in painting and sculpture or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to

[141](1992) 8 TC 231 at 235.
[142] (1948) 24 TC 190 at 202.
[143] *Ibid.*
[144] *Mitchell v Ross* (1962) AC 813.
[145] *Ellis v Lucas* (1966) 2 All ER 935.
[146](1919) IKB 647.
[147] *Ibid* p. 656.

> the three learned professions, the Church, medicine and law. It has now, I think, a wider meaning.

The membership of a professional organization is an indication that an individual is carrying on a profession[148], but it is by no means conclusive.[149]

It is a question of fact whether or not an individual is carrying on a profession, so that the determination of the Appeal Commissioner will not be set aside, unless they have misdirected themselves in law or finding of facts is perverse.[150] The following have been regarded as carrying on a profession; a journalist,[151] and actress,[152] an architecture,[153] an optician,[154] and a headmaster of a school.[155]

The whole essence of determining whether a particular activity amounts to a profession or not, is basically for assessment of such source of income for tax purposes.

D. Vocation

Vocation is also another source of income. The term "vocation" is not defined in any tax law. Nevertheless, it has been judicially interpreted[156] as 'calling', a word of wide significance, meaning the way in which a man passes his life. In that case, it was held that a bookmaker who accepts bets is carrying on an organized vocation.

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[148] *Currie v IRC* (1921) 12 TC 245.
[149] Abdulrazaq, *op cit*p.87.
[150] *Ibid.*
[151] *IRC v Maxse supra.*
[152] *Davies v Braithwaite supra.*
[153] *Durant v IRC* (1921) 12 TC 245 at p.255.
[154] *Carr v IRC* (1944) 2 All ER 163.
[155] *IRC v North and Ingram* (1918) 2KB.705.
[156] Per Denman J. in*Patridge v Mallandine*(1886) 18 Q.B. D 276 at p.278.

Similarly, in *GrahamvArnoto,*[157] it was held that an individual who habitually supplied racing forecasts to Newspapers for reward was chargeable to tax. On the other hand, it will be noted that in *Graham V Green,*[158] an individual was held not to be so chargeable in respect of gains derived from betting. Again, in *Down v Compston,*[159] the winnings of a golf professional on bets on his own matches were held not to be the earnings of a vocation.

A dramatist,[160] a land agent[161] and a Jockey[162] have all been regarded as carrying on a vocation.

E. Trade

Trade is another source of income. Again, there is no statutory interpretation as to what amounts to a trade. The term 'trade' has been judicially stated to ascribe its ordinary dictionary sense, namely "a pecuniary risk, a venture, a speculation, a commercial enterprise.[163]

In *Arbico Ltd v FBIR,*[164] the plaintiff in the dispute, Arbico, had acquired a plot of land, erected a building and sold the property at a profit. 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.

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[157] (1941) 24 TC 157.
[158] (1925) 2KB.37,9TC.309.
[159] (1937) 21 TC 60.
[160] *Billiam v Griffith* (1941) 23 T.C 757.
[161] *Humphery v Peare*(1913) 6 T.C .201.
[162] *Wing v Connell* (1927) I.R. 84.
[163] *Per Scotland L.Y in Smith Barry v Cordy*(1946)28 TC 250 at p.258.
[164] [1996] 2All NLR 303.

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 common everyday meaning. Secondly, that an isolated or one-off transaction can still constitute a 'trade'.

In *I.R.C v Livington*, Lord President Chyde stated:[165]

> I think the test which must be used to determine whether a venture such as we are now considering is or is not, 'in the nature of trade' is whether the operatives involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made.

Similarly, in *Ransom v Higgs*, Lord Wilberforce[166] stated:

> Trade involves, normally, the exchange of goods, or of services, for reward, not of all services, since some qualify as a profession, or employment or vocation, but there must be something, which the trade offers to provide by way of business. Trade moreover, presupposes a customer (to this too, there may exceptions, but such is the norm), or as it may be expressed, trade must be bilateral - you must trade with someone. The mutuality cases are based in part at least upon this principle.

In the opinion of Lord Reid in *Ranson v Higgs,*[167]

> Trade was sometimes used to denote any mercantile operation but it is commonly used to denote operation of a commercial character by which the trader provides to customers for reward of some kind of goods and services.

According to Lord Atkins in *Fry v BurmaCorporationLtd,*[168] trade refers to the various activities of commerce, winning and using of the products of the earth, or multiplying the products of the earth and selling them or manufacturing them and selling them, the

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[165] *(*1927)SC 251 p.256, II TC. 538 p.542.
[166] (1974) 1 WLR 1594 at p. 1611.
[167] *Supra.*
[168](1930) 15 TC 113.

purchase and sale of commodities, or the offering of services for a reward, such as conveyance and the like.This definition may not be useful as it is not all embracing. Other trading activities fall outside the description.[169]

From the foregoing, it is clear that though several judicial attempts to define the word "trade" have been made, no general decision test yet emerged from the decided cases, distinguishing "trade" from the non-trading activity.[170]

Presenting in Nigeria, the yardstick for determining whether a particular activity amounts to trade or not, is by applying the six badges of trade. These include the subject-matter of the transaction, length of the period of ownership, the frequencysimilar transaction by e same person, adaptation of supplementary work and resale, the circumstances responsible for realization and motive.[171]

In analyzing the afore-mentioned source of income, a critical look at Personal Income Tax(Amendment) Act 2011 section 3 provides as follows:

> gain or profit from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised" and "any trade or business for whatever period of time such trade or business may have been carried

While Personal Income Tax(Amendment)Act 2011 section 3 (1)(b) deals with wages, salaries, et cetera, arising from employment.

It is pertinent to note that before any income, gain or profit accruable to a person (whether natural or artificial) can be chargeable to income tax, such income, gain or profit must be that which arises from business, trade, profession, vocation, office,

[169]IA Ayua, *the Nigeria Tax Law*, (Ibadan; Spectrum Law Publishing, 1996) p. 95
[170] *Ibid*, p. 95.
[171]Definition of trade by United Kingdom, Royal Commission on the Taxation of Profits and Income, 1955.

employmentand other minor sources.[172] It then follows that where a person made profit, gain or income which is outside these statutory sources of income, such profit, gain or income cannot be chargeable to income tax in Nigeria.[173]

Other Minor Sources of Income

(a) **Rent or any Premium Arising from Property**

This is rent or any premium arising from a right granted to any other person for the use or occupation of any property,[174] for example, under a lease, tenancy or a right of occupancy.[175]

Rent is the periodical payment by the tenant for the exclusive possession of land.[176]Such payment must be certain or capable being ascertained. Thus, as is usual, it is so much per month or per annum, but it may be fluctuating, provided it is certain or ascertainable.[177] It may be paid in money or in money's worth or in kind. If a payment is in fact a rent, it will be taxed as such no matter how disguised or described.

In*I.R.C v Braillie*,[178] X & Co. took a lease of the coal and other minerals on an estate. In addition to fixed rent, it was bound, while coal was being worked, to furnish free to the less or all coal (not exceeding 200 tons a year) which he might require for the use of his establishment on the estate. It was held that the free coal was rent paid in kind

[172] Which shall be discussed in this Chapter.
[173] The six badges of trade is also very illustrative in determining what amounts to trade. These are the subject-matter of the transaction, length of the period of ownership, the frequency or number of similar transactions by the same person, adaptation or supplementary work and re-sales, the circumstances responsible for realization and motive.
[174]C.I.T.A 2010 s.9(b).
[175] Under the Land Use Act of 1978.
[176]JO Orojo, *Company Tax in Nigeria* (London; Sweet and Maxwell 1979) pp. 24-25.
[177]Abdulrazaq op cit p.184.
[178](1936) 5CC. 438; 21 TC 740.

and therefore assessable to tax. Similarly, in *House and property Investment Co. Ltd v Kneen,*[179] where in addition to fixed rent, a yearly sum equal to the premium for insurance of the premises. It was held that the further sum was property.

As already seen, it is sufficient if the right is for the "use or occupation" of the property. In *Francis Jackson Development Ltd v Stepm,*[180] a person agreed to purchase a house but before completion, he was let into possession as tenant at will and he paid a sum for such "occupation and use". It was held that the payment was rent. However, money paid by a prospective purchaser to meet mortgage outgoings or rates and insurance will not be rent; neither will a payment for a collateral agreement which contains no demise,[181] but where a person occupies and uses a market stall or stand and pays a periodic sum, such sum will be rent and chargeable.[182]

Although, section 9(b), refers to the "use or occupation of any property", what is chargeable is which implies a tenancy.[183]

(b) Dividends, Interest, Discounts, Charges Or Annuities

This has been described as "a reward or consideration or recompenses for the actual or notional use of one person's money by another person".[184] In *Westminister Bank Ltd. v Riches,*[185] Lord Wright explained the general characteristics of interest as follows:

> The essence of interest is that it is a payment which becomes due because the creditor has not had his money at

[179] *(1943) 2 All ER 601.*
[180] *(1943) 2 All ER 601.*
[181] *Duke of Westminister v Store Properties Ltd.* (1844) Ch. 129,131.
[182] Abdulrazaq, *op cit*p.184.
[183] *Companies Income Act, Cap C 21, LFN 2010.*
[184] Abdulrazaq, *loccit*p.186.
[185] (1947) AC 390; 28 TC 353.

> the due date. It may be regarded either as representing the profit he might have made if he had the use of the money, or conversely, the loss suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.

With straightforward cases of lending of money, for example, by a bank, a finance company or professional moneylenders, there is no difficulty in determining whether or not money paid is interest.[186] As the Act,[187] does not define interest, researcher obliged to ascribe to it the ordinary meaning. Interest in the ordinary sense means the extra money that you pay back when you borrow money or that you receive when you invest money.[188]

Sometimes, it is difficult to determine whether a payment is in fact interest or not. For example, in *Lomax v Peter Dixon & Sons Ltd,*[189] a company made a loan to another company secured by notes at a discount of six percent. Interest was agreed and the notes were to be payable any specified times and to bear premium at twenty percent. It was held that the discount and the premium were capital payments and not chargeable interest. Similarly, a loan agreement may provide for the payment of a premium. Such a payment will normally be accretion to capital and, therefore, not interest; but in some cases, it may be in the nature of additional interest.[190] Thus, in *I.R.C v Thomas Welson& Sons Ltd,*[191] the respondent company lent a sum of money to an India company under an agreement which provided that the interest would be paid at three percent per annum and

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[186]Orojo, *op cit,* p.30.
[187]Companies Income Act, Cap C 21, LFN 2010.
[188]AS Hornby, *Oxford Advanced Learner's Dictionary of Current English,*(6th edn, Oxford University Press, 2000) p.625.
[189](1943) 1KB 671; 25 353.
[190]Abdulrazaq, *loccit*p.187.
[191] (1938) SC 816, 22TC 175.

that on repayment of the principal sum or any part thereof, there would also be paid a premium varying with the date of repayment. The full amount of the loan wasultimately repaid to the respondent company, together with the accrued interest and the premiums payable under the agreement. The question was whether the premiums were part of the principal sums repaid and therefore capital payment, or were income. It was held that they were income from the foreign possessions.

Where a loan is granted at a discount and repayable at a premium, both being capital sums, the income derived thereby would be part of the capital sums and therefore, not interest.[192] In determining the true nature ofa discount or premium where it is not determined by the contract, one has to consider the surrounding circumstances and also "the term of the loan, the rate of interest expressly stipulated for, the nature of the capital risk, the extent to which, if at all, the parties expressly took or may reasonably be supposed to have taken the capital risk into account in fixing the terms of the contract.[193]

Discount has been interpreted in England to cover allprofits on security bought at or involving a discount.[194] The discount must however, be an income profit such as discount by a bank, a broker or an issuing house, but not a capital profit such as the discount between the cash and credit price of an article allowed by a seller.[195]

Charges and annuities are sums payable annually or at other regular intervals and either charged on property or secured by covenant. Examples are periodical benevolent contribution secured to a charity,[196] payment of amounts equal to interest and sinking

[192] *Lomax v Peter Dixon & Sons Ltd, supra.*
[193] *Ibid, p. 263.*
[194] *Brown v National President Institution* (1921) 2 AC 222.
[195] *Ibid.*
[196] *IRC v London corporation* (1953) 1 WLR 652(HL).

fund under a contract,[197] and the payment of a percentage of gross receipts from the sale of articles manufactured under secret process.[198]

2.4 Income Receipt

All receipts must be brought into account in computing the gross profit figure, with the following exceptions;

(i) Non-trading receipts

(ii) Capital Receipts

There is always a thin line between what amounts to income receipts and capital receipt. Most times, it is difficult to decide whether a particular sum is an income receipt or capital receipt and this has led to judicial intervention.

In *Mallet v Stavely Coal & Iron Co. Ltd,*[199] Lord Hanworth M.R distinguished fixed and calculating capital:

> I think one has to keep clear in one's mind that in dealing with any business, there are two kinds of capital, one the fixed capital, which is laid out in the fixed plant, whereby the opportunity of making profits or gains is secured, and the other the circulating capital, which is turned over and over in the course of the business which is carried on.

It is not always easy, however, to determine whether an asset belongs to one category or the other, and little or no assistance can be obtained by examining the nature of the asset itself.[200] This difficulty is referred to by Romer L.J in *Golden Horse Shoe (New) Ltd v Thurgood:*[201]

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[197]*Surbition U.D.C v Callender Cable and Construction Co.Ltd.* (1910) 74 JP 88.
[198]*Delage v Nugget polish Co. Ltd* [1905] 92 L.T. 682.
[199] *(*1928) 2 KB 405 at p. 413.
[200]Abdulrazaq, *op cit,* p.123.
[201] (1934) 1KB 584 at p.563.

> Land may in certain circumstances be circulating capital. A Chattel or chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed. The land upon which a manufacturer carries on his business is part of his fixed capital. The land with which a dealer in real estate carries on his business is part of his circulating capital. The machinery with which a manufacturer makes the articles that he sells is part of his fixed capital. The machinery that a dealer in machinery buys and sells is part of his circulating capital, as is the coal that a coal merchant buys and sells in the course of his trade.

Again, the character of an asset may change in the course of business; thus, land originally acquired, as an investment may later become part of the owner's circulating capital or stock-in-trade. Indeed, the value of the distinction between fixed and circulating as a criterion for determining the nature of a receipt may be questioned; but it is thought that the distinction has some value if it is recognized that the character or the asset is but one of a number of factors which are material. Where a receipt comes from the sale of ordinary trading stock or from rendering of services, it will be brought into the computation of the annual profit or gain for tax purposes.[202]

A sum realized on the sum of a fixed asset may be trading receipt. If, for example, the asset is sold on terms which secure to the vendor a right to future commission on sales by the purchaser, the commission thus received is a trading receipt of the vendor.[203]The question in such cases is whether there is a sale of an asset providing for the payment of capital sums by installments on a sale coupled with collateral bargain for sharing of commission.[204]

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[202]Abdulrazaq, *op cit,* p.124.
[203] *Orchard Wine & Spirit Co. v Loynes*(1952) 33 TC 97.
[204]*Lamport&Holtline Ltd v Langwell*(1958) 38 TC 193 (CA).

A sum received by a trader for undertaking not to carry on some trading activity may not be a receipt of the trade. Thus, in *Higgs v Olivier,*[205] following the production of the film, Henry Vand to assist in its promotion, Sir Laurence Oliver entered into a covenant under which he received €15,000 in consideration of an undertaking by him to appear in no other film for any company other than the covenantee company for a period of 18 months. It was held that the sum was not taxable. It did not come to the recipient as income of his vocation; it came to him for refraining from carrying on one facet of his vocation, same "that part of it which showed him as an actor on the celluloid stage". Where, however, atrader agrees to some restriction on his trading activities as part of an arrangement to obtain supplies of raw material, the sum receivable by him are trading receipts.[206]

Thus, in *Thompson v Magnessium Electron Ltd,*[207] the respondent company entered into two agreements with I.C.I;

(a) An agreement for the purchase of Chlorine at a stated price per ton; and

(b) An agreement not to manufacture Chlorine or caustic soda (165 by-product), in consideration of a payment of YX for each ton of caustic soda which the respondent company would have produced if it had manufactured its own chlorine, for which latter purpose it was to be treated as having produced an agreed number of tons for each ton of chlorine purchased from I.C.I. it was held that the two agreement should be read together as an arrangement for the supply of chlorine and that the sum received under agreement (a) as stated above were taxable.

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[205](1952) Ch.311; 33TC 136.
[206]Abdulrazaq, *op cit,* p125.
[207] (1944) 26 TC 1 (CA).

In *I.R.C v Biggar,*[208] a grant paid under the EEC Diary Herd Conversion Scheme to a farmer who agreed to switch from dairy farming to raising cattle for beef was held to be a receipt of the trade of farming.

In determining whether a particular sum amounts to an income receipt or capital receipt, which will be, chargeable to tax, it is pertinent to consider the intent of the transaction and not the subject matter of the transaction. Some of these situations are considered as follows:

1. **Sale of know-how or industrial information**. The question here is, where company has received money or money's worth for the sale of a technical know-how or industrial information, will the sum so received be categorized as trading income, which is liable to be taxed, or capital receipt which is not liable to be taxed?[209] The subject matter raises in an acute form, the distinction between income and capital receipts and the cases on the matter do not really and properly classify the issue.[210] The underlying question in the line of cases discussed here seems to be "whether the know-how has been used by the seller for the purposes of the trade and does he continue to carry on the trade after selling the know-how?[211] If the answer is yes, the consideration received will be treated as a trading receipt. But where the sale strikes at the root of the business or the trader effectively gives up his business in an area, and receives payment for the same, that payment is a capital receipt or capital realization and not subjected to income tax.[212]

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[208] (1982) STC 677 (CS) 125.
[209] SW Mayson, *Revenue Law* (1988-99 edns, USA, Blackstone Press Ltd, 1988-1999) p. 82.
[210] *Ibid, p.83.*
[211] Umenweke, *op cit,* p.105.
[212] *Ibid.*

In *Moriaty v Evans Medical Supplies,*[213] the company dealt in medical supplies. In exchange for a promise by the Burmanese Government not to disclose its secret as to the production of medical equipment for the sum of $100,000. The House of Lord held this sum to be non-taxable capital, the sale of which had the effect of commencing serious competition with the company and consequent reduction in the sales of the company.

This could be contrasted with the case of *Rolls Royce Ltd v Jeffrey.*[214] Here, Rolls Royce Company adopted the measure of licensing other companies to produce Rolls Royce engines upon payment of what was called "capital sums". The House of Lords held these sums to be taxable trading receipts. The court further held that the company was not disposing of a capital asset, but was exploiting its know-how.

From the above analyzed cases, the Court in *Moriaty v Evans Medical Supplies* was right in holding the sum received as non-taxable capital since the sale strikes at the root of the business. In the opinion of the researcher, the Court in *Rolls Roy Co. Ltd's* case was also right in holding the sums received as being taxable as receipt, since the company continued with the trade and merely license their know-how on the payment of certain sum to other companies.

2. Compensation Cases

The problem now to be considered arises where a trader is deprived of some profitable asset and receives compensation by way of damages or otherwise for the loss suffered or anticipated. It should be borne in mind that the cases discussed below preceded the

[213] (1957) 3 All ER 718.
[214] (1962) 1 All ER 801.

introduction of the tax on capital gains.[215] It is our humble view that the courts will hold otherwise in these cases, if they were brought before it now.

(a) **Compensation for Sterilization of Assets**

Under this head, the *locus classicus* is*GlenboigUnion Fire Clay Co. Ltd v I.R.C,*[216] the facts were as follows; the appellants manufactured fire clay goods and sold raw fire clay. They were lessees of Fire Clay fields in the neighborhood of Caledonian Railway and a dispute arose with the railway company as to their right to work the fireclay under railway. Actions by the railway company to restrict the appellants were restrained from working the fields (but incurred expense in keeping them open). When the House of Lords decided against the railway company, that company exercised its statutory powers to require part of the fireclay to be left unworked on payment of compensation. The Court held that the amount received for compensation was a capital receipt, not subject to tax.

Lord Wrenbury stated the principle as follows:

> Was that compensation profit? The answer may be supplied, I think, by the answer to the following question; is a sum profit which is paid to an owner of property on the term that he shall not use his property so as to make profit? The answer must be in the negative. The whole point is that he is not to make a profit and is paid for abstaining from seeking to make a profit… it was the price paid for sterilizing the asset from which otherwise profit might have been obtained.

[215]Abdulrazaq, *op cit*p.126.
[216](1921) 12 TC 427 (H.L).

It must not be supposed, however, that all payments for sterilization of assets are capital receipts.[217] In *Glenboig* case, the asset of which the appellants were deprived was a capital asset (that is,fixed capital), moreover, sterilization was complete. If the appellants had been dealers in fireclay beds (which would then be circulating capital or stock-in-trade), or if the asset had been only partially sterilized, or sterilized in the year of its effect life, the payment might be regarded as of an income nature. The real test, it seems, is whether the thing in respect of which the tax payer has recovered compensation is the depreciation of one of the capital assets of his trading enterprise or a mere restriction of his trading properties.[218]

The Glenboig's case should be contrasted with *Burmah Steamship Co. Ltd v I.R.C,*[219] which facts relate to repairers of a vessel exceeding the time stipulated by contract for the completion of an overhaul damages and consequently were paid in compromise of a claim for loss of profit. The payment was held to be a trading receipt.

The character of a payment for sterilization of assets is not determined by the manner in which the compensation payment is calculated.[220] In the *Glenboig's* case, for example, the compensation was estimated on the basis of the profits lost to the appellants; yet the payment was held to be a capital receipt.

(b) Compensation for cancellation of business contracts

[217]Abdulrazaq, *op cit,* p.126.
[218] *Ibid.*
[219](1931) 16 TC 671).
[220]Abdulrazaq, *op cit,* p.126.

In *Van den Berghs Ltd v Clark*[221], an English company manufacturing Margarine and other butter substitutes had a Dutch company as its principal trade rival. In 1908 and 1013 certain "pooling agreement" was entered into between the companies under which each company retained its separate identity but agreed to conduct business on certain agreed lines to the mutual advantage of both companies. After some years these agreements became unworkable and it was agreed that they should be rescinded and that the Dutch company should pay the English company €450,000 "as damages". It was held that this was a capital receipt. Lord Macmillan was of the following opinion:

> The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products, or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary the cancelled agreements related to the whole structure of the appellant's profit-making apparatus. They regulated the appellant's activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure or money received for the cancellation of so fundamental an organization of a trader's activities can be regarded as an income disbursement or an income receipt… it is not the largeness of the sum that is important but the nature of the asset that was surrendered.

This passage is the foundation of the distinction, often made between payments for the cancellation of ordinary trading contracts and payments for the cancellation of

[221] (1935) 19 TC 390

contracts affecting the structure of the taxpayer's profit making apparatus (which are not).[222]

In contrast to the decision in the *VandenBerghs'* case is *kelsall Parsons & Co v IRC,*[223] the appellants were manufacturers' agents; that is, they had contracts with a number of manufacturers whose products they sold on a commission basis. They had sold Ellison products for some time under agency contracts which had occasionally been varied, and the agreement in force in 1934 was due to expire on September 30, 1935. In May 1934, however, Ellisons requested that agency agreement should be terminated and, in due course, €1,500 was paid as compensation for the premature determination. This amount was held to be taxable receipt.

The *kelsall* Parsons' case can be distinguished from the *Van den Berghs'* case in the following respects:

(a) In the *Kelsall* Parsons case, the tax payer was a manufacturers' agent, so the acquisition and loss of an agency was a normal incident of the business.

Lord Normand expressed the following opinion:[224]

> "The agency agreement… so far from being fixed framework, are rather to be regarded as temporary and variable elements of the profit making enterprise"

(b) In the *KelsallParsons'* case, the abandoned agreement had only one year to run (a factor to which importance was attached) and the compensation was "really a *surrogatum* for one year's profits". In the *van den Berghs'* case however, the cancelled agreements had 13 years to run.[225]

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[222] Abdulrazaq, *op cit,* p.128.
[223] (1938) 21 TC 608.
[224] *Ibid.*
[225] Abdulrazaq, *op cit,* p.128.

(3) Unclaimed balanced and released debts

In *Morley v Tattersall,*[226] a firm of blood stock auctioneers received sums from sales for which they were liable to account to the vendors, their clients. These sums were not trade receipts; they were the clients' money. Substantial sums were never collected by the clients and remained in the firm's hands as "unclaimed balances", and, in due course, when such balances seemed unlikely ever to be claimed, they were transferred to the credit of the individual partners. It was held that these sums were not trading receipts of the firm. Sir WilfridGreene M.R expressed the following view:

> I invited Mr Hills to point to any authority which in any way supported the proposition that a receipt which at the time of its receipt was not a trading receipt, not, be it observed, as at the date of receipt, but as at the date of the subsequent operation. It seems to me, with all respect to that argument, that it is based on a complete misapprehension of what is meant by a trading receipt in income tax law… it seems to me that the quality and nature of a receipt for income tax purposes is fixed once and for all when it is received.[227]

The above case was distinguished from Jary's the *Jewellers Ltd v V.I.R.C,*[228] where a company of pawn brokers had unclaimed balances representing the proceeds of sale of unredeemed pledges. Some of these balances became the property of the pawnbroker after a period of time by virtue of the pawn brokers Act 1872, and these were held to have become trade receipts when they became the pawn broker's property. The statute had changed the character of the balances. Other unclaimed balances were outside the

[226] (1938) 22 TC 51 (CA).
[227] *Ibid.*
[228](19470 29 TC 274.

pawnbrokers Act, but they became statute barred after six years under the statutes of limitation. Atkinson J. decided that these also became trade receipts of the pawnbroker.

Furthermore, in *Elson v Price Tailor Ltd*,[229], the defendant tailors took "deposit" from customers who ordered garments. Where the garment were not collected, the deposits were eventually transferred to an "Unclaimed Deposit Account" and would ordinarily be returned to dissatisfied customers. It was held;

(a) That the payments were true deposits and were therefore strictly irrecoverable by the customers;

(b) That they were trading receipts because they were paid to the defendant company subject to the consequence that they would used in the company's business, and they were receipts of the yearwhen payments were made.

Morley v Tattersall and Jay's the *Jewellers Ltd v I.R.C*[230] were distinguished because in those cases the balance in the trader's hands were originally their clients' property and were not receipts of the trade[231]

Having examined the principles governing an income, receipt, and drawing a distinction between an income receipt from a capital receipt, it is pertinent to examine the specific provisions of the charging clause of Personal Income Tax (Amendment) Act[232] and Companies Income Tax Act[233]earlier mentioned in this chapter.

2.5. Liability to Pay Taxes

[229](1962) 40 TC 671.
[230] *Supra.*
[231]Abdulrazaq, *op cit,* p.130.
[232]Personal Income Tax (Amendment) Act 2011.
[233] Cap C21, LFN 2010.

Company Income Tax Act 2010 and Personal Income Tax (Amendment) Act 2011respectively, levied taxes upon profits of any company "accruing in, derived from, brought into or received in Nigeria" and "from a source inside or outside Nigeria".[234]

The precise construction of phrases, "accruing in, derived from, brought into or received in Nigeria" has caused many problems in the past.[235]

In constructing the expressions used by this charging provisions, repeated use will be made of cases from other commonwealth jurisdictions.[236] This has been the practice of both the body of Appeal Commissioners (now, Tax Appeal Tribunal) and Supervisor Courts in Nigeria when construing this provision.[237] This is because charging provisions in the tax statutes of many commonwealth countries have similar provision. Thus, for example, section 51 of the New Zealand Land and Income tax Assessment Act 1900, section 51 charges to tax among others "all profit derived from and/or received in New Zealand"

Section 5 of the Trinidad and Tobago Income Ordinance 1940, section 5, charges any income "accruing in, derived from or received in the colony" and so forth.What do the operating words "accruing in, derived from, brought into or received in" as used in section 9 of Company Income Tax Act 2010, mean and what have the courts interpreted them to mean?[238]

[234] Section 9 and section 3
[235] JM Elegido, 'Income Taxable in Nigeria' (1990) No1. The British Tax Review, 36.
[236]Umenweke, *op cit*p.121.
[237] *Quebec Iron and Titanium Corporation v FBIR* (unreported suit no App/COANM/214/1974) *Reiss &Co .(Nig) Ltd v FBIR* (1977) FRCR 251.
[238]Umenweke, *op cit*p.123.

Accruingin: The word "accrue" means to come in addition as a product, result or development, to be added as interest, to collect.[239]The word 'in" is used to express the position of someone or something with regard to what encloses, surrounds or includes them or it, within.[240]There are some dicta that make the expression "accrued in" equivalent to "derived from" and therefore deprive it of any significance in the statute.[241]

These dicta stem from the observation made in *C.T. v Kirk,*[242] wherein it was stated that the court attached no special meaning to the word "derived", which it treated as synonymous with "arising" or "accruing".

This has been followed in Nigeria, Obiter, in *Offshore International S.A v F.B.I.R.*[243] This construction however, does not seem to be correct in the case of the Nigeria statutes[244]. Nonetheless, in Nigeria, the word "accruing in" is intended to cover gains or profits arising in Nigeria, while "derived from" charges to tax gains or profit that their source in Nigeria, even if they become due and payable elsewhere.[245] The court in *Tollfic Simon Karan v C.I.I,*[246] observed that while the expression "accruing in" imported a clear territorial limitation to the Cold Coast, this was not the case with "derived from" it then follows that the two expressions cannot be equivalent.[247]

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[239]Robinson, *op cit,* p.9.
[240] *Ibid,* p.680.
[241]Companies Income Tax Act, Cap C21, LFN 2010.
[242] (1900) A.C 588, p.592 (Privy Council on Appeal from New South Wales). Also, *C.T.v Lowell & Christmas* (1908) AC 46 (Privy Council on Appeal from New Zealand.
[243]Unreported, suit No. FRCL/L/36/75 judgment declared on June 7, 1976 by Federal Revenue Court, Lagos.
[244]Umenweke, *op cit*p.123.
[245] *In John Robert Potter's Estate* (1934) II NLR, 114.
[246](1948)12 WACA 331.
[247]Umenweke,*Loccit,* p. 125.

The expression "accruing in" as used in many tax enactments of commonwealth countries, has always been construed as meaning "becoming due and payable.[248] From the foregoing, it can be said that the word "accruing in" charges to tax gains or profits that have their source in Nigeria.

Derived from

In the ordinary sense, the expression, "derived from" means to get something from something.[249] It also means to come or develop from something.[250]

This appears to be more important expression in the charging provisions of C.I.T.A 2010,[251] considering the fact that it sought to charge to tax every profit or gains, which are derived from Nigeria whether by Nigerians or foreigners, so long as such profit or gains emanated from Nigeria. There is a plethora of cases on this point to the effect that the source of an income and the place from which the income is derived are the same.[252] Some scholars on the subject have reached the same conclusion.[253] This is an

[248] *A Colquhoun v Brook* 2TC 490 (CA).
[249] Hornby, *op cit*, p.314.
[250] *Ibid.*
[251] Companies Income Tax Act, Cap C21, LFN 2010.
[252] *C.I.T v P.Co Ltd.* IEATC 131,162, *C.I.R. v PhillipasGloellaMpenFabrieken*(1955) NZLR 868, 876-*877, ESSO Standard Eastern Inc v Income Tax* (1971) EA 127, 144, *ZIM properties Ltd v Proctor* (*1985) 5 TC 90,106.*
[253] AAbdulahi, "Nigeria; What Tax Philosophy"?(1976)7, Nigerian Journal of Contemporary Law, 20. CA Fagbemi,"Taxation and the Acquisition of Technology in Nigeria" Proceedings of National Seminar on Tax Law and Tax Administration in Nigeria, (1984) Lagos.

important proposition because there are many useful decisions on how to determine the source of a given income.[254]

The courts have developed three main guidelines in order to identify the source from which a certain income derives. The first and most important is that source is not a legal concept but rather "something which a practical man would regard as a real source of income… the assessment of the actual source of a given income is a practical, hard matter of fact".[255]

An important consequence of this was pointed out by Rick J, in *Esso Standard Eastern Inc. v Income Tax*[256] when he stated that:

> Source or determination of a sum of money assessed being a question of fact, the conclusion of a set of facts, for instance remuneration of directors, cannot be accepted as binding on other facts, for instance salaries, income derived from business and as have, interest on a loan.[257]

A second guideline that has attracted the approval of the courts of many jurisdictions was well expressed by Walt Mayer C. J., in *C.I.R v Lever Brothers and Unilever Ltd,*[258] summing up the effect of several decisions of the privy Council in Appeals from Africa, he concluded as follows:

> The inference, I think, which should be drawn from those decisions is that the source of receipt, received as income, is not the quarter where they came, but the originating cause is the work which the tax payer does to earn them, the *quid pro quo* he gives, in return for which he receives them. The work which he does may be business which he carries on, or an enterprise which he undertakes, or an activity in which he engages and it may take the form of

[254]Umenweke, *op cit*p.126.
[255]Per Isaacs J. in *Nathan v* FCT (1918) 25 CLR. 183, 189-190.
[256](1971) EA 127, 133 (Kenya).
[257] *Ibid.*
[258](1946) SATA 441 (South Africa).

> personal exertion, mental or physical, or it may take the form of employment of capital either by using it to earn income or by letting its use to someone else. Often the work is some combination of these.[259]

A third main guideline that has often been following by the court in identifying the source of derivation of a given income is that income can be derived from more than one source[260]. This is the main difference between system based on source or derivation concepts and the United Kingdom system of taxing every trade that has been carried on wholly or partly in the United Kingdom.[261]

In applying this general guideline, especially in the case of income from business, the court[262] have often distinguished between income that is substantially derived from one operation or transaction – usually a contract even though some auxiliary operations may be carried out besides the main one, and income that is derived from a complex of operations, none of which can be identified as being of decisively greater importance than the others. In the first case, a typical example would be that of an export merchant whose profit derives from entering into contracts of sale, such profit has usually been held to be derived from the place where the contract is made[263]. This has also been held not to be decisive[264]. In the opinion of Dixon J.:

> The place where one operation is performed cannot be fastened upon as the locality from which the whole income is derived…a sale is only one stage of s series of operations which together result in the income, and to regard it as the

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[259] *Ibid,* p.449.
[260] *Liquidator, Rhodesia Metals Ltd v C.T* (1940) AC, 755.
[261] Elegido, *op cit,* p.40 .
[262] *Grainger & Son v Gough* (1896) AC 325 (UK)*Sulley v A.G (*1860*)* 2tc 149 (UK); *Lowell & Christmas v C.T* (1908) AC 46 (Privy Council on Appeal from New Zealand*) C.T v British Australia Ltd* (1921) CLR 225.
[263] Elegido, *op cit,* p.41.
[264] *Dickson v C.*T (NSW)(1925) 30 CLR 500-501 *(New South Wales).*

> direct source of the income, is to leave out of sight the initial and other stages of these operations.[265]

In case where it is found that income derives from more than one source, the courts have often held that solution is to apportion the income and tax that portion of it that is derived from the jurisdiction.[266]This is the solution adopted by P.I.T.A and C.I.T.A for such incomes, profits or gains.

P.I.T.A 2011 section 6 provides as follows:

> Where an individual, an executor, or a trustee, outside Nigeria, carries on a trade or business of which only part of the operations are carried out in Nigeria, the gains or profits of the trade or business shall be deemed to be derived from Nigeria to the extent to which such gains or profits are not attributable to that part of the operations carried on outside Nigeria.

Similarly, C.I.T.A 2010 section 3(2)(a) also provides as follows:

> The profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from Nigeria – If that company has a fixed base of business in Nigeria to the extent that the profit is attributable to the fixed base.

From the foregoing, following the apportionment principle, profits or gains from business or trade carried out by as individual or company outside Nigeria, shall be chargeable to tax in Nigeria, if such gains or profits shall be attributed to the part of the of the operations carried out in Nigeria. Thus, if the gains or profits cannot be attributed to that part of operations carried out in Nigeria or the fixed base in Nigeria, then it will not be subject to tax.

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[265] *Ibid.*

[266] *C.T v Kanuri Timber Co.* (1904)24 NZLR 18 (New Zealand) *Mount Morgan Gold Mining Vo. v C.I.T.* (1923) 33 CLR 76 (Queensland*);* S.T.C (N.S.W) v Hills Dom Walts *Ltd*(1936) 57 CIR 36*; CIT v Union* Tile Exporters, 71 ITR. 453 (India).

Brought into or Received in

Under the Companies Income Tax Act, the expressions "brought into or received in" are entirely superfluous and of no effect.[267] For the Act [268] provides expressly under section13(1) that "the profits of a Nigerian company shall be deemed to accrue in Nigeria wherever they have arisen and whether or not they have brought into or received in Nigeria".

It then follows that liability to pay will arise when profits are accruable in Nigeria whether or not they were "brought into or received in" Nigeria.

In the leading case of *Thomson v Moyse*,[269] a case where the House of Lords reviewed and modified the law on this topic, declaring a number of ideas prevalent until then to have been erroneous.[270] The facts of the case were that Mr. Moyse resided in England but was domiciled in the USA. He was credited to an income in the USA of $17,000 per year, which was credited to his New York Bank Account. Under English law at the time that income would only be taxable in the United Kingdom, if it was "received" in the United Kingdom. Mr. Moyse sold cheques drawn in dollars on his American account to British banks on several occasions. MrMoyse's Counsel stressed that the cheques were not deposited with the British banks for them to collect the American dollars on his behalf, but that Mr Moyse had sold the cheques to British banks, and therefore, he had not received (or had not had the banks received on his behalf) his money from the USA. The argument found favour with the commissioners, the High Court and the Court of Appeal that felt bound by some previous decision, but was

[267]MN Umenweke, *op cit*, p.140.
[268] Company Income Tax Act, Cap C21, LFN 2010.
[269] (1980) 39TC 291.
[270]Umenweke, *op cit*, p.141.

dismissed unanimously in the House of Lords. The Lords refused to draw any fine distinctions and held that the money had been substantially received from the USA.

In the opinion of Lord Denning,[271] tax is only to be computed on the sums received in England. These sums must be directly referable to Mr. Moyse's New York income, or be deductible from it or be traceable to it so that in the end his New York income is seen to be the provider of the sums received in England.

He buttressed further that:

> If Mr. Moyse receives the sums out of that income in England himself, he must of course pay tax on those sums. But he need not receive them himself. It is sufficient if the sums are received in England by some third person by his authority. Thus, if Mr. Moyse instead of receiving the money himself, tells his New York banker to send a remittance to his butcher, or baker… in England, he is chargeable with tax on it…no matter by whom it is received so long as it is received by his authority…nor is it necessary that Mr Moyse or the third party should receive the sum in coins or dollars note or treasury notes. It is sufficient if he or the third party receives the sums in England in any of the other forms of money recognized by commercial men such as bills of exchange, cheques, promissory notes or cash at bank.

From the whole analysis, it is our view that operating words; "from any source inside or outside Nigeria" as used in P.I.T.A 2011 section 3, has more embracing effect than the combination of words "accruing in, derived from, brought into and received in" as used in C.I.T.A 2010 section 9.

[271] *Thomson v Moyse supra*

2.6. Nature of Charitable Trusts

Equity has also long enforced trusts for the benefit of large and changing groups of people, or to carry out certain purposes which are beneficial to the community at large. These trusts are known as public or charitable trusts, or more shortly "Charities".[272]

A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of person either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or erecting and maintaining public building or works, or otherwise lessening the burden of government.[273] Charitable trust includes everything that is within the letter and spirit of the Statute of Elizabeth in 1601, considering such spirit to be broad enough to include whatever will promote, in a legitimate way, the comfort, happiness, and improvementofan indefinite number of persons.[274]

The word 'charity' as used in law, has a broader meaning and includes substantially any scheme or effort to better the condition of society or considerable part thereof[275]. It has been well said that any gift not inconsistent with existing laws, which is promotive of science or trends to the education, enlightening, benefit, or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience, is a charity.[276]

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[272]PV Baker & P Langal, *Snell's Principles of Equity* [28 edn, London: Sweet & Maxwell, 1982] P. 145.
[273]Per Gray, J. in *Jackson v Philips,* 14 Allen, Mass., 539,556.
[274] *Harrington v Pier,* 105 wis 485, 520; 82 N.W 345.
[275]GT Borgert, *Trusts* (6th edn, St. Paul Minnessota;West Publishing Co. 1987) p. 202.
[276] *Ibid.*

Private trusts have been shown to have as their objectives the furnishing of financial benefits to human beings or corporations. This is true of charitable trusts. In such trusts, the purpose is to bring social benefits to some portion of the public. While money may be paid out by the trustee to or for various persons, the purpose is not to enrich them financially but rather is to advance the public interest in a spiritual, mental, or physical manner.[277] For example, if the trust is to relieve poverty and cash in paid out by the trustee to B, a poor man selected by the trustee, the trust is charitable, because the life of suffering and want is of social benefit, and the fact that B may receive cash or goods in course of administration of the trust is not because the settlor wished to forward the cause of the relief of the impoverished, in which the state is interested. B in this regard is not a beneficiary of such a trust, the society is the beneficiary.[278] B is merely the instrumentality through which the public interest is promoted. While human being who are to obtain advantages from charitable trusts may be referred to as beneficiaries, the real beneficiary is the public and the human beings involved are merely the instrumentalities from whom the benefits flow.[279]

The social interest needed to qualify a trust as technically charitable must be substantial and not trifling or insignificant.[280] Charitable trusts accorded by the law a very favourable situation as to taxation and given special privileges in many other ways. In order to justify a court of equity in validating trust as charitable and thus sanctioning

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[277] *Ibid, P.203.*

[278] *In Petroleum Research Fund's Estate* [1958], 15 misc.2d 23,507; Mckee's Estate [1954], 378 Pa.607, "The beneficiary of charitable trusts in the general public to whom the social and economic advantages accrue".

[279] *In Freshour's Estate* [1959] 185 Kan. 434,345.

[280] *Johnson v De Pauw University,* 116.Ky. 671,76 SW.857,25 Ky.law Rep.950; *KentvDunham*.142 Mass.016,7NE 730,Boston,201/Mass.320,87 N.E.602.

certain social disadvantages (such as freedom from taxation), the court must be convinced that there will be social advantages which will more than counterbalance the social disadvantages. A trust to aid one boy or girl to secure an education will fail as a charity because of lack of substantial amount of public benefit.[281] The size of the class through whom the community advantages are flow may be determinative.[282] Or a trust may be deemed to provide some social advantages but also disadvantages to the public which more than offset the community gains, as in the case of a trust to propagandize against vivisection.[283]

The court tend to favour charitable trust and will strive to support them and to find a charitable intent wherever possible.[284] The court must also scrutinize the alleged charity and weigh its benefits. It cannot accept without examination the settlor's view that the trust is charitable.[285] It must consider the amount of social advantage which will come from it. In these days of search for sources of tax revenue and consequent efforts to evade or avoid taxation, the court are careful to make sure that a doubtful trust which is alleged to be charitable is not a mere tax avoidance device.

In some cases, the charitable intent of the settlor is inferred from the nature of the work of the done to whom property is given, as where funds are transferred to a church

[281] *Estate of Huebner*,[1932] 127 Cal.App.244.
[282] As to trust to aid relatives of the settler or employees of a named Corporation.
[283] *National Anti-vivisection Society v .I.R C* [1947] 2 All ER 217.
[284] *Board of Directors of City Trust of City of Philadelphia v Maloney* [1944] 78 US.App. D.C 371, 141F. 2d 275.
[285] *Hardage v Hardage*[1954],211 Ga.80., where a trust to aid dependants of blood relatives of settler, was held as class too narrow.

authority and on implication is found that the gift is to be used for religious purposes, although this is not expressly stated.[286]

The motive of the donor is not an important factor in determining whether a certain gift is charitable.[287] The effect of administration of the gift is the vital matter. The settlor may have had as his principal purpose. The glorification of himself or his family or the satisfaction of his varsity in making a gift for the operation of a hospital, but if the relief of disease and suffering is to be brought about by the gift the trust is charitable, then the motives of the settlor Are trusted as minor and immaterial.[288]

The purpose of the settlor of a charitable trust must not be to enrich others, even though he incidentally seeks to confer some public benefits.[289] "It is not charity to aid a business enterprise", as a distinguished judge stated.[290] A trust to aid a private hospital and thus benefit its stockholders is not charitable, although the operation of such an institution will undoubtedly help the sick and suffering,[291] and the same would be true of a trust to avoid advance the interests of a private school run by a stock corporation or to aid a bank or insurance company.[292] The settlor in his instrument must exclude the notion

[286]In Norman [1947] 1 Ch 349 [to Editors of Missionary Society to be used as they fit]; In Flinn [1948] 1 Ch 241 [to Archbishop to be used in his discretion].
[287] *In Coleman's Estate,* 167 Cal.212,138 p. 992, Ann.Cas 1915c.682;*Hagin v International Trust Co.,* 69 colo.135,169 p.138,LRA 1918B,710.
[288] *In Smith's Estate,*181 pa.109,37 A.114.
[289] *In Leverhulme's Estate* [1943]2 All ER 143; *Sussex Trust Co. v Beebe Hospital of Sussex County* [1940]25 Del. Ch 172,15 A 2d246.
[290]Cardozo, Jin*Butterwork v keeler,*219 NY 446,449,114 NE.803.
[291] *Stratton v Physio-Medical College,* [149] Mass.505,21 NE 874.
[292]GT Bogert, *op cit,*p.205.

that he intends to aid a moneymaking business,[293]though, this can be done inferentially, as where he makes no provision for the disposition of profits.[294]

However, a trust otherwise charitable is not rendered no-charitable because it is to charge fees, provided such income goes to aid in the operation of the charity and is not paid out as profits to stockholders or others in a similar position.[295]

A charitable trust is not confined to alms giving. It includes relief of the poor, but also connotes the social advancement of rich and poor in education, religion, culture, and civilization. A charitable trust is not confined to mere alms-giving, or the relief of poverty and distress, but has a wider signification, which embraces the importance and promotion of the happiness of man.[296]

If a gift is made to a charitable corporation for any or all its purposes, with the intent that full title shall rest in the corporation, subject only to the duty of the corporation to use the gift within the purposes charter, no trust is created.[297] It is sometimes difficult to determine whether the intent of a donor to a charitable corporation was to have the corporation act as trustee or to have it own the property outright.[298]

Having considered the nature of charitable trusts, it is pertinent to consider the advantages of charitable trusts over non-charitable trust.

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[293] *Matter of Shattuck's Estate Will,*193 NY 446 86 NE 455.
[294] *Mitchell v Reeves,* [1938] 123 Conn.549,196 A.
[295] *Park v North Western University,* 218 111.381, 75 NE 991,2 LRA, NS 556; Harter v Johnson, [1922]122 Sc 96, 115 SE 217.
[296] *New England Sanitation v Inhabitants of Stoneham,* 205 Mass. 335, 342, 91 NE 385.
[297]*Braddley v Hill* [1935]141 Kan. 602,42 p.2d 580; *Creek Orthodox Community v Malicourtis*[1929]267 Mass. 472,166 NE 863*; In Hart's Estate* [1923] 205 App Div. 703, 200 NYS 63.
[298]*Zabel v Stewart*,[1941]153 Kan. 272,109 p.2d 177.

2.7 Advantages of Charitable Trusts Over Non-Charitable Trusts

Charitable trusts are accorded a number of concessions over other trusts in terms of enforcement, perpetuity, certainty and taxation.[299] To earn these concessions, especially in relation to the growing significance of relief from taxation, a trust must be of a public nature; of benefit, to the public, and not merely private individuals. These concessions shall be considered *seriatim*.

A. **Charitable trusts are purpose trusts.**

This means that charitable trust need no human beneficiaries to enforce them, as there is in the case of non-charitable purpose trusts.[300] Individuals who may benefit from a charitable trust have no *locus standi* to enforce them. Charitable trusts are public trusts, and are enforced by the Attorney-General or the public trustee,[301] and this must not be mere power to apply to charitable on behalf of the state. There must of course be an obligation upon the trustees; a mere power to apply to charitable purposes cannot be a trust.[302]

B. Charitable Objects need not be Certain

There is no requirement, as with other trusts, that the objects of the trust must be certain. Thus, a trust for "charitable purpose" will be valid. There must of course, be no doubt

[299] *Per Lord Cross in Dingle v Turner* [1972] AC 601,624.
[300] JE Martin; *Modern Equity* [15th edn, London;Sweet & Maxwell, 1997] p. 379.
[301] Trustee and Equity law of Enugu State, Cap 153, Vol.vi, Revised Laws of Enugu State of Nigeria, 2004, s.107[2].
[302] *In Cohen's Estate* [1973]1 WLR 415, where a gift to trustees to apply "the whole or any part" of the fund "in such manner and at such time or times as my trustees shall in their absolute and uncontrolled discretion.

that objects of the trust are exclusively charitable, and the purpose expressed must not be so vague and uncertain that the court could not control the application of the assets.[303] The relaxation of the certainty rule is only in respect of the particular form of charitable purpose intended.[304]

Where no trust has been created, but only a general intention expressed that the property should go to charity, the court has no jurisdiction. In such situations in United Kingdom, the crown disposes of the gifts by sign manual.[305] But the crown acts on principles very similar to these by which the court is governed.[306] A settlor or testator may simply direct the property to be applied for charitable purposes, or for such charitable purposes as trustees or executors may select.[307]and he may authorize the trustees to alter the trust if necessary.[308] Where requisite, the specific objects will be supplied by means of a scheme[309] that is an order made by the court or one of the public bodies.

C. Charitable Trusts May be Perpetual

Statements have often been made by judges to the effect that the rule against perpetuities does not apply to charities.[310] That is not the position. With the exception of the rule in

[303]*Koeppler's Estate Will trusts*[1986] Ch. 423, where the formation of an informed international public opinion and the promotion of greater cooperation in Europe and the West were held too vague and uncertain to be charitable in themselves, but these aims did not destroy the charitable nature of the gift, which was to further the work of an educational project.
[304]*Moggride v Thackwell*[1972] 1 Ves. Jr 464.
[305] *Smith's Estate* [1932] 1Ch 531*; Re Benneth*[1960] Ch 18; *Re Hetherington*[1960] Ch. 1.
[306]Martin,*op cit, p.379.*
[307] *Willis, Shaw v Willis* [1921] 1 Ch. 44.
[308] *In Beesty's Estate W.T* [1966] Ch 222.
[309] *In Pyne's Estate* [1903]1 Ch. 83.
[310] *Goodman v Mayor of Saltash[1882] 7 App. Cas 633, 642.*

Christ's Hospital v Grainger,[311] the rule governs the remoteness of vesting in the case of gifts to charities in the same way that it governs remoteness in the case of other gifts (non-charitable).[312]

Charitable trusts, however, may be perpetual. Indeed, the purpose of many charitable trusts could be said never to be capable of final achievement.[313] Many charitable trusts have existed for centuries. If a perpetual gift of income only is made to a charity, the charity cannot claim the capital, as an individual could do in such circumstances.[314] But where property is given absolutely to a charity with a direction to accumulate the income for a period of time, a charity may terminate the accumulation, and the principal forthwith.[315]

The charity to the rule regulating remoteness of vesting is that a gift over from one charity to another charity is not subject to the rule.[316] The gift over to the second charity is valid even if it takes effect outside the perpetuity period.[317]

The reason for the exception is that "there is no more perpetuity created by giving to two charities rather than by giving to one".[318]

If the reason for upholding a gift to a charity for an indefinite period is that a charity in its nature is not obnoxious to the rule against perpetuities, I fail to see why the same reason should not apply to a gift over from any one charity to another charity.[319]

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[311] *[1949] 1Mac & G460; In Tyler's Estate* [1891] AC 262,266.
[312] *Wightwick's W.T.*[1950] Ch.547; *Green's Estate W.T*[1985] 3 All ER 455.
[313] *Re Delius*[1957] Ch 299.
[314] *In Levy's Estate* [1960] Ch. 346.
[315] *Wharton v Master Man* [1895]AC 186; *In Knapp's Estate* [1929], Ch 341.
[316] A gift from non-charity to a charity is caught*; Re Bowen* [1893] 2Ch.291. so also a gift from charity to a non-charity. *In Bowen's Estate supra; In Peel's Estate Release* [1921]2ch.218*, In Engels's Estate* [1943] 1 All ER 506.
[317] *Christ's Hospital v Grainger supra.*
[318] *Per Shadwell in Christ's Hospital supra.*

The above explanation looks to the vesting for charitable purposes, rather than vesting in one specific charity[320]. Once vested in charity, then subject to express provision to the contrary, a trust will continue, even if the purpose becomes impossible of fulfillment; the property will be applied Cy pres.[321]

All that is done by the provision for vesting in another charity is to make expressly the selection of the charity to be benefitted when the first gift terminates.

Thus, the rule as advocated in Christ's Hospital[322] and *Royal College of Surgeons v National Provincial Bank*[323]seems logical and also reasonable, since the gift from one charity over to another charity will take effect even outside the perpetuity period. The gift to another charity take effect upon the happening of some event related to the carrying out of the purposes of the charity.

D. Fiscal Advantages/Benefit

Charities enjoy fiscal advantages/benefits unlike other trusts. Charities are exempt from income tax, provided that the income is applied for charitable purposes only.[324]. They may recover from the Revenue office income tax paid or credited prior to the payment of interest or dividend. Alternatively, donors who are employees may utilize the payroll

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[319] *Per Lord Morton of Henryton in Royal College of Surgeons v National Provincial Bank Ltd* [1952] AC .631,p.650.
[320]Martin, *op cit, p.380.*
[321] *Ibid.*
[322] *Supra.*
[323] *Supra.*
[324] *I.R.C v Educational Grants Association Ltd.* [1967]ch. 993; *I.R.C v Helen Slatter Charitable Trust Ltd* [1982]Ch. 49.

deduction scheme,[325] that is donors who also are employees may use the payroll deduction scheme to deduct from their emoluments whatever sum they have donated to charity, and such sum in form donations will be completely exempted from taxation. Though, in Nigeria, this is not applicable, because payroll deduction scheme is not in use, thus, whatever donors who are employees give or donate to charity, will not be deducted from their emoluments, hence, not exempted from tax. Further, no income tax is chargeable in respect of profits of any trade carried on by the charity, if the profits are applied solely to the purposes of the charity and either the trade is exercised in the course of the actual carrying out a primary purpose of the charity, or the work in connection with the trade is mainly carried out by beneficiaries of the charity.[326]

Again, the profits must be applied solely to the purposes of the charity. Similarly, charitable corporations/companies are exempt from paying corporation tax in the United Kingdom, U.S.A,[327]et cetera,, while in Nigeria, such companies are exempt from companies' income tax.[328]

Gifts of any amount in favour of charity are exempt from inheritance tax if made by way of payment from a discretionary trust or by way of gift by an individual during his lifetime or on death.[329] Transfers from a charitable trust are exempt from inheritance tax[330]. Though, this not applicable in Nigeria, since there is no form of tax as inheritance tax in Nigeria.

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[325] *I.C.T.A 1988,* s.202.
[326] *Ibid,* s.505[1].
[327] *Ibid,* s.505[1] & 506[1].
[328] *C.I.T.A 2010,*s.23[1][c].
[329] *Inheritance tax* 1984,s.76.
[330] *Ibid,*s.58[1][a]; Capital Gains Act, Cap. C1 LFN 2010; s.26[1][a].

No capital gains tax arises where a gain accrues to a charity and the gain is applicable and is applied for charitable purposes.[331] Nor, will a donor be under any such liability in respect of a disposal to charity. Charities are also exempt from stamp duty on conveyance and other documents executed by/for them.

Charities, however, do not enjoy exemption on Value Added Tax(VAT). This means they pay VAT on goods and services purchase by them. The rationale behind this, is that the nature of VAT exempts only some classes of goods and services and not persons (whether natural or artificial). Thus, if the goods or services purchased by the charities are not among the exempted ones, they are chargeable to VAT on the purchase of such goods or services.[332]

2.8. Essential Requirements of Charitable Trusts

It is trite law that a charitable trust must satisfy three essential requirements in order to be valid. These essential requirements shall be considered *seriatim*.

2.8.1. Charitable Nature

Before the Statute of Charitable Uses Act 1601, the Court of Chancery exercised jurisdiction in matters relating to charity, but notions of what was a charity were imprecise. The preamble to that Statute contained a list of charitable objects which the courts used as an "index or chart" for the decision of particular cases, with the result that,

[331] Stamp Duty Act, Cap S8 LFN 2010,s.63[1] proviso.
[332]Value Added Tax, Cap V, LFN 2010,s.3& First Schedule, Part 1 and Part 2.

in addition to the objects enumerated in the preamble, other objects analogous to them or within the spirit and intendment of the preamble came to be regarded as charitable.[333]

The 1601 Statue was enacted as part of a comprehensive poor law code and provided for commissioners to be appointed to investigate misappropriations of charity property. Its preamble commenced, "whereas lands, chattels, money have been given by sundry well disposed persons; some for the relief of aged; important and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock, or maintenance for houses of correction; the marriage of poor maids; the support aid and help of young tradesmen, handicraftsmen and persons decayed; the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes; which lands, chattels and money have not been displayed according to the charitable intent of the givers by the reasons of frauds, breaches of trust and negligence.[334]

The Statute of Charitable Uses 1601 was repealed by the Mortmain and Charitable Uses Act 1888, but section 13(2) of the latter Act expressly preserved the preamble to the former Statute, and on the basis of its continued existence *Lord McNaughten in Commissioners of Income Tax v Pemsel,*[335] enunciated his famous fourfold classification of charity: "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts

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[333]D Hayton, *Cases and Commentary on the Law of Trust* [9th edn, London; Sweet & Maxwell,1991] p. *279.* Also, *Scottish Burial Reform & Cremation Society Ltd v Glasgow Corporation* [1968] AC 138.
[334]List of charitable objects as set out in the preamble to Statute of Charitable Uses Act 1601.
[335][1891] AC 531,583.

for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads".

The Mortmain and Charitable Uses Act 1888, and with it the preamble to the Statute of charitable 1601, were repealed by section 38(1) of the Charities Act 1960, section 38 (4) of the same Act went to provide:

> Any reference in any enactment or document to charity within the meaning, purview and interpretation shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales

From the foregoing, notwithstanding the numerous repeal of the previous enactments, the preamble to the Statute of Charitable Uses 1601 is preserved, and this has been expressed bylaw McNaughten's fourfold classification. Lord McNaughton's fourfold classification has been adopted even in Nigeria as determinants in deciding what amounts to charitable nature. These fourfold classification as enumerated by Lord McNaughten shall be discussed *seriatim*.

A. TheRelief of Poverty

There is no legal definition of poverty. Its meaning can only be understood by examining the cases on the object. "it is quite clearly established", said Sir Raymond Evershed M.R, "that poverty does not mean destitution;… it may not unfairly be paraphrased as meaning persons who have to 'go short' in the ordinary acceptance of that term…".[336] It is thus a matter of degree. Most of the cases come from a time before welfare payments were available from public funds.[337] Such payments are intended to relieve poverty and hardship, and it could be argued that eligibility for such payments should be the test of

[336] *Re Coulthurst*[1951] Ch. 661,665-666.
[337] Martin,*op cit*, p.386.

poverty. But, if there were so, charity in this area would duplicate the work of a good welfare programme.[338] This particular head of charitable nature has been illustrated in the following ways; gifts for the benefit of the poor are clearly charitable.[339] Also "needy"[340] persons or "indigent"[341] persons have been classified as poor persons.

Often a group of poor is confined to a particular location,[342] or religion,[343] or to a group which is assured to be in need of help,[344] or victims of a disaster.[345] Persons of "persons of limited means"[346] are included in the list of poor, and trusts for distressed gentlewomen and distressed gentlefolk.[347] On the other hand, a gift, which persons who are not in need will benefit, is to be excluded. Thus, gifts to employees of a company are not charitable[348], unless the qualification of poverty is clearly imposed.[349]

In Re Sanders' *Will Trusts*,[350] a gift for the provision of housing for the working classes was not charitable. Similarly, in *Re Gwyon*,[351] a fund providing for a gift of clothing to boys in Farnham and district failed on the ground that the conditions for qualification, precise though they were in many ways, failed to exclude the affluent children.

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[338] *Ibid.*
[339] *Re Darling* [1896] 1 Ch.56, where a gift to the poor and a service of God was upheld as charitable.
[340] *Re Scarisbrick*[1951]Ch.622.
[341] *Weir v Crum – Brown*[1908] AC 162.
[342] *Re Lucas*[1922] 2Ch.52, where a gift to oldest respectable inhabitants in Gunville was upheld as charitable.
[343] *Re Wall* [1889] 52ChD 570.
[344] *AG v Ironmongers Co*.[1834]2My & 526, *Re Coulthurstsupra*where a gift to the widows and orphaned children of employees was held as charitable.
[345]Typically in Nigeria, relieves and gifts were given to victims of flood disaster.
[346] *Re Gardom*[1994] 1Ch. 664; *Re de Carteret*[1933] Ch.103.
[347] *Mary Clark Home Trustees v Anderson* [1904] 2KB745.
[348] *Re Drummond*[1914] 2Ch.90.
[349] *Dingle v Turner* [1973] AC 601.
[350][1954] Ch 265.
[351][1930]1 Ch.255.

There is no need for the trust to be an endowment. A trust may be charitable although the trustees may distribute the capital.[352] A trust was upheld in *Re Sacrisbrick,*[353] "for such relations of my…son and daughters as in the opinion of the survivor of my… son and daughters shall be in needy circumstances… as the survivor… shall by deed or will appoint". This was a trust for "poor relations" and there is no requirement of public benefit in poverty cases. But, there can be no charitable trust, even in the poverty category, where the persons to be benefitted are specified individuals have no qualification or suffer no deprivation as to benefit under this head.

From the forgoing, for trust for relief of poverty to be valid as being charitable, the trust would have been for persons who have suffered deprivation or individuals who qualified for welfare schemes, irrespective of their nexus or connection with the donor, settler, et cetera. Thus, trust for relief of poverty created on behalf of poor relations or named persons who has connection with the donor will be charitable.

B. The Advancement of Education

This second classification has its origin in the phrases in the preamble to Statute of Charitable Uses 1601, which speaks of "maintenance of schools of learning, free schools and scholars in Universities" and "the education and preferment of orphans". The endowments, some of course very ancient, of many schools, colleges and universities are based on this provision.

[352]Martin, *op cit*, p.387.
[353][1951] Ch. 622; Re Cohen [1973] 1 WLR 415.

The following trusts have been held charitable under this classification; Education in business management,[354] and the art of government,[355] the production of a dictionary,[356] the support of London 200 logical society,[357] the establishment and maintenance of museums,[358] the support of learned, literary, scientific and cultural societies,[359] a search for the Shakespeare Manuscript,[360] choral singing in London,[361] the promotion of Delius,[362] classical drama and acting,[363] the publication of the law Reports,[364] the founding of lectureships and professorships,[365] the study and dissemination of ethical principles and cultivation of a rational religious sentiment,[366] and even a "sort of finishing school for Irish people" where "self control, oratory, deportment and the art of personal contact" were to be taught.[367] Educational purposes include matters ancillary to the main purposes, such as the payment of teachers and administrative staff.[368]

Education requires something more than the mere accumulation of knowledge. There must be some sharing, or teaching or dissemination, some way of showing that the public will benefit. There is no difficulty in the case of research which is likely to

[354] *Re Koettgen's W.T*[1954]Ch. 252.
[355] *Re McDougall* [1957] 1 WLR 81, but not for the promotion of political causes.
[356]*Re Stanford [1924] 1 Ch 73.*
[357]*Re Lopes* [1931] 2 Ch.130.
[358] *British Museum Trustees v White*[1826] 2 Sn&St 594.
[359] *Royal College of Surgeons v National Provincial Bank Ltd* [1952] AC 361.
[360] *Re Hopkins'* W.T [1965] Ch 669.
[361] *Royal Choral Society v I.R.C* [1943] 2 All ER 101.
[362] *Re Delius* [1957] Ch. 299.
[363] *Re Shakespeare Memorial Trust* [1923] 2Ch.398.
[364] *Incorporated Council of Law Reporting for England & Wales v Att. Gen* [1972]Ch.73.
[365] *Att. Gen, Margaret &Regius Professors in Cambridge* [1682]1 Vern 55.
[366] *Re South Place Ethical Society* [1980]1WLR 1565.
[367] *Re Shaw's W.T* [1952] Ch. 163.
[368] *Case of Christ's College, Cambridge* [1757] 1 Win BI.90.

produce material benefit to the community, such as medical or scientific research.[369] Such purposes would in any case come under the fourth head. But, on literary, cultural and scholarly subjects, the matter is less obvious.[370] According to Wilberforce J. in Re Hopkins:[371]

> the word 'education' must be used in a wide sense, certainly extending beyond teaching, and that the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover – education in this last context extending to the formation of literary taste and appreciation

In *Re Hopkins,*[372] there was a testamentary gift to the Francis Bacon Society "to be earmarked and applied towards finding the Bacon-Shakespeare Manuscripts". A search or research for the original manuscripts of England's greatest dramatist (wherever he was) would be well within the law's conception of charitable purposes. The discovery would be of the highest value to history and to literature.[373] The gift was held to be a valid charitable trust under this head and the fourth head.[374]

In contrast, the court in *Re Shaw*[375] decided otherwise. In Re Shaw; George Bernard Shaw, by his will, directed that his residuary estate should be devoted to researching the advantages to be gained by a new proposed British alphabet of 40 letters; in which each letter would indicate a single sound; and to translate his play "Androcles and the Lion" into new alphabet. Harman J. held that the gift was not charitable "if the

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[369] *Royal College of Surgeons v National Provincial Bank Ltd supra.*
[370] Martin, *op cit*, p.389.
[371] [1965]Ch.669,680.
[372] *Supra.*
[373] *Ibid*, p.679.
[374] Other purposes beneficial to the community.
[375] [1957] 1 WLR 729.

object be merely the increase of knowledge that is not in itself a charitable object unless it be combined with teaching or education.[376]

This is thought to be too narrow a view of education whether the trust in this case would be held charitable under Wilberforce J.'s test depends on the usefulness of the research, and that is a matter of individual judgment. Not every type of knowledge, whether researched, disseminated or taught is capable of being education.[377] Not schools for prostitute or pickpocket,[378] nor the training of spiritualistic medium[379] will not qualify under this classification.

C. The Advancement of Religion

This category of charitable trusts has its origin in the preamble to the 1601 Statute which speaks of "the repairs of Churches" but the court soon held that the equity of the Statute extending for trusts advancing orthodox religion.[380] With increasing religious toleration, "the present position is that any religious body is entitled to charitable status so long as it's tenets are not morally subversive and its purposes are directed to the benefit of the public.

What then is religion? In *Bowman v Secular Society,*[381] Lord Parker of Waddington suggested that any form of monotheistic theism will be recognized as a religion, but the restriction to monotheism is probably now outmoded.[382] Religion

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[376] *Ibid,* p.104.
[377] Martin, *op cit*p.390.
[378] Per Harman J.in *Re Shaw supra.*
[379] *Re Hummeltenberg*[1923]1 Ch. 237.
[380] *Re Banfield*[1968] 1WLR 846*; Straus v Coldsmid*[1837] 8 sim. 614*; Veville Estate Ltd v Madden* [1962] Ch. 832.
[381] [1917]AC 407.
[382] Martin, *op cit*p.395.

requires a spiritual belief. It may include, but is greater than, morality, or a recommended way of life. In *Re South Place Ethical Society,*[383] one question was whether the society's objects, which were the "study and dissemination of ethical principles and cultivation of a rational religious sentiment", were charitable under this heading. Dillon J. held that they were not. "Religion according to him is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same, and are not made the same by sincere enquiry into the question; what is God?"[384] Similarly, the object of the body such as the Freemason, whose rules demand the highest personal, social and domestic standards, do not constitute a religion, even though they insist upon a belief in a divine spirit.[385] In any event, to be charitable, a trust must be for the advancement of religion; and this means "the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which this rests, and the observances that serve to promote and manifest it – not merely a foundation or cause to which it can be related".[386]

The advent of religion toleration in the seventeenth century permitted the recognition of Christian sect other than the established church, and it seems now that no distinction is drawn between them.[387] Thus, trusts for Roman Catholics,[388] Quakers,[389]Baptist[390], Methodist, and the Exclusive Brethren[391] have been held. So also small groups, promoting minority religions.

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[383][1980]1 WLR 1565.
[384] *Ibid*, p.1571.
[385] *United Grand Lodge of Ancient Free & Accepted Mason of England and Wales v Holborn B.C* [1957] 1 WLR 1080.
[386] *Ibid.*
[387] *Dunn v Bryne*[1912] AC 407*; Re Flynn* [1948] Ch.24.
[388] *Dunn v Brynesupra*.
[389] *Re Manser*[1905]1 Ch.68.

In *Thornton v Howe*,[392]Romilly M.R went so far as to held as charitable a trust for the publication of the sacred writings of Joanna South Cott, who claimed that she was with child by the Holy Ghost and would give birth to a new messiah. In *Re Watson*[393], Plowman J. upheld a trust for the continuation of the work of God… "In propagating the truth as given in the Holy Bible" by financing the continued publication of the books and tracts of one Hobbs who, with the testator, has the leading member of a very small group of undenominational Christians. Expert evidence regarded the intrinsic value of the work as nil; but it confirmed the genuineness of the belief of the adherents of that small group.

Cases like these raise the question of the limits of such trusts. This is an area where crankish views can be held with the greatest fervor and good faith. Should any belief, however outlandish, shared perhaps by only a handful of friends, be entitled to the perpetual and fiscal privileges given to charities? Or, should such religion be required to show some relation to orthodox religious thought? This is not a question of public benefit, as "where the purposes in question is of a religious nature… the court assumes a public benefit unless the contrary is shown.[394] It seems, therefore, that, if a movement can establish that its tenets are within the scope of the Christian religion, it is no objection that those tenets are theologically unsound, or that the number of followers is minimal. Minority groups are well looked after. But doctrines adverse to the very foundation of all religion"[395] cannot be charitable.

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[390] *Re Strickland's W.T* [1936] 3 All ER 1627.

[391] *Holmes v Att. Gen.,* The Times, February 12,1981. But their place of worship did not qualify for rating exemption in *Broxtowe Borough Council v Birch*[1983] 1 WLR 314.

[392][1862] 31 Beav.14. As this gift was to take effect out of land, it was void as infringing the Statutes of Mortmain, now repealed.

[393] [1973] 1 WLR 1472. Also, *Funnell v Stewart* [1996] 1 WLR282 [faith healing upheld]

[394]Per Plowman J. p.1482.

[395]Per Romilly MR in *Thornton v Howe* [1862] 31 Beav.141,p.20.

A trust to aid religion without specifying what religion or how the aid is to be furnished, is a valid charity, although admittedly giving great latitude to the trustee,[396] and the same is true where the trustee is expressly given discretion to select methods or objects.[397]

The burden is on the court to decide whether the institutions, ideas, and practices which the settlor has sought to make the basis of a charitable trust are religious.[398] The courts have not bound themselves by any clear-cut definition of religion. In several constitutional and tax cases courts have expressed the view that belief in a divinity is essential to a religion,[399] and it may be argued that in addition to a system of ethics or morals this element is a prerequisite, but this view has not received judicial sanction.[400] It seems clear that the settlor cannot create or adopt a set of practices and theories and describe them as his religion, and thus bind the courts to approve a trust for their advancement as charitable. Examples, might exist where nudism and sun worshiping, or opposition to the slaughter of animals and consequent vegetarianism, where merely the hobbies of the settler.[401]

Gift to the numerous denominations and sects of protestants Christianity have been held charitable,[402] as have donations in aid of the Roman Catholic[403] and the Jewish

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[396] *Thompson's Estate*[1925] 282 Pa.30, 127 A.446.
[397] In*Geppert's Estate,* [1953] 75 SD.96,59 NW 2d.727.
[398] *In Hummeltenberg'sEstate* ,[1923] 1 Ch. 237, the court held that the training of spiritualistic medium not charitable. Also, *Glover v Baker*, 76 NH.393,420,83A.916, where the court said, "Mrs Eddy had the constitutional right to entertain such opinions as she chose, and to make a religion of them, and to teach them to all others;… whether her opinions are theologically true, the courts are not competent to decide".
[399] *Davis v Beason*[1890] 133 US.333,10*S.Ct.* 299,33 L.E.D 637*; Berman v United States* [1946]156 F.2d *377; Washington Ethical Society v District of Columbia,*84 Wash.LR 1072; *Fellowship of Humanity v Alameda,* [1957]153 Cal.App.2d673.
[400] Bogert, *op cit*,p.219.
[401] *Ibid.*
[402] *Gass v White,*2 Dana,KY170,26 Am.Dec.446.

religion.[404] Trusts for the support of a religious order or community[405] such as monastery or a Covent are plainly within this head, though if instead of engaging in good works (example, among the sick and the poor) the order has as it object merely sanctification by prayer and pious contemplation, it will lack the necessary element of demonstrable public benefit and so not be charitable.[406] A gift to establish "a Catholic daily newspaper", has been held not to be charitable, for at best it is no more than partly conducive to religion.[407] The saying of masses for the dead,[408] the improvement of musical services in a church,[409] and a gift simply "for God's work"[410] have also been charitable. It is seen from the foregoing that in order that a trust for religion to be held charitable, such trust must involve the bringing of religious benefits to the public or some class of it, and must not be merely a case of private religious exercises and devotions, open to some sect; clergy, monks, nuns or others of similar position.

D. Other Purposes Beneficial to the Community

This classification of charitable trusts has its origin in the remaining charitable purposes enumerated in the preamble to the Statute of Charitable Uses 1601, and like the other heads, it includes purposes within the spirit and intendment of the preamble.

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[403] *Mannix v Pursell*, 46 Ohio St. 102,19 N.E 572.
[404] *Glasser v Congregation Kehillath Israel* [1928] 263 Mass.
[405] *Re Banfield*[1968]n1WLR 846.
[406] *Gilmour v Coats* [1949] ac 426.
[407] *Roman Catholic Archbishop of Melbourne v Lawlor*[1934] 51CLR.1.
[408] *Re Obabunmi Pedro* [1961] LLR 127; *Re Caus*[1934] Ch.162.
[409] *Re Royce* [1940]Ch.162.
[410] *Re Baker's W.T* [1948]64 TLR 273.

In the words of Sir Romilly; "this is the residual head of charity; the most difficult.[411] The earlier three heads are in their nature charitable. There is no need in those cases to prove that the relief of poverty, or the advancement of education or religion is beneficial. The public element there, as we will see, concerns the extent to which those benefits are made available to the public or a section of the public as opposed to a group of individuals. With this fourth head, however, it must be shown that the selected purposes are beneficial; beneficial, that is in the way, which the law regards as charitable. But "not every object of the public general utility must necessarily be a charity".[412] The purpose need not be *ejusdem generis* with those listed in the preamble, but must be charitable in the same sense.[413] When new purposes arise; it is not sufficient to show that the purpose is beneficial. It must shown to be beneficial within the spirit and intendment of the preamble, or by analogy within the principles established by the cases.[414] In *Williams' Trustees v I.R.C,*[415] a trust for promoting the interest of the Welsh Community in London failed, on the ground that the objects of the trust, though beneficial to the community, were not beneficial in the way, which the law regards as charitable.

Similarly, trusts for international cooperation have usually failed, either on the ground that their purposes are not within the spirit and intendment of the Statute,[416] or because they are political.[417] On the other hand, in *Scottish Burial Reform and Cremation*

[411] *Morice v The Bishop of Durham*[1805] 10Ves.522,531.
[412] *Per Lindley L J in Re Macduff* [1896] 2Ch. 451,456 .
[413] *Re Strakosch*[1949] Ch 529.
[414] *William, Trustees v I.R.C* [1947]AC 447,455, also *Brisbane C.C. v Att. Gen. for Queensland* [1979] AC 411,422.
[415] *Supra.*
[416] *Re Strakosch supra.*
[417] *McGovern v Att-Gen*.[1982] Ch.321.

Society v Glasgow Corporation,[418] a non-profit making cremation society was held charitable by analogy with cases holding burial grounds to be so, though neither facility receives specific mention in the preamble.

The question whether a purpose is beneficial to the community is one that the court must decide in the light of all the evidence available. What the donor thought, or what other people think is not the issue. In a sense, the test is objective.

In *National Anti-Vivisection Society v Inland Revenue Commissioners,*[419] the question for determination was whether the society was entitled to relief from income tax on the ground that its object, which was the total suppression if vivisection, was charitable. The protection of animals from cruelty is a charitable purpose. Vivisection, on the other hand, is a necessary part of medical research and as such, is itself beneficial to the community. The question, as Lord Simonds said,

> "Is whether the court, for the purposes of determining whether the object of the society is charitable may disregard the finding of the fact that any assumed public benefit in the direction of the advancement of morals and education was far outweighed by the detriment to medical science and research and consequently to the public health which would result if the society succeeded in achieving its object, and that on balance, the object of the society, so far from being for the public benefit, was gravely injurious thereto. The society says that the court must disregard this fact, arguing that evidence of disadvantages or evils which would or might result from the stopping of vivisection is irrelevant and inadmissible.[420] The court undertook to make the value judgment, "weighing conflicting moral and material utilities".

On balance, on the evidence available to it, the suppression of vivisection was not beneficial to the public, and the claim failed.

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[418] [1968]AC138.
[419][1948] AC31.
[420] *Ibid,*pp60-61.

Under this fourth classification of charitable trust, the following have been held to be charitable; the relief of the aged,[421] or sick,[422] or disabled,[423] providing public works and public amenities,[424] protecting human life, the environment and property,[425] providing for social rehabilitation and welfare,[426] protecting or benefitting animals, so long as this benefits, or promotes the moral improvement of the community[427] by promoting patriotic purposes.[428]

2.8.2. Public Benefit

This is the second requirement a charitable trust must satisfy before it can be valid.

A gift can only be charitable, if it is for the public benefit. It is trite that a trust will not be charitable unless it promotes a public benefit. If its object is to benefit certain private individuals and not the public at large, it will not be charitable. An example where this requirement was lacking is the Nigerian case of *Iyanda v Ajike,*[429][430] there a testator by his will appointed trustees and provided that they should let one of his houses and use the rents and profits for the maintenance of a family prayer – room in another of the testator's houses. This prayer –room was described as a "private Mosque". It was held

[421] *Re Dunlop* [1984].
[422] *Re Resch's W.T* [1969]1AC 514.
[423] *Re Lewis* [1955]Ch 104.
[424] *Att. Gen v Shrewsbury Corp.* [1843] 6 Beav 220*; Re Morgan*[1955]1WLR738.
[425] *Re Wokingham Fire Brigade Trusts*[1951]Ch 373.
[426] *Bahamas v Royal Trust Co.* [1986]1 WLR 1001 (P.C).
[427]A gift "for patriotic purposes" is not necessarily charitable and so void. But some particular patriotic purposes are charitable; trusts for helping the defence of the realm.
[428] *Re Wedgwood* [1915] 1 Ch 113,122; "A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and thus to stimulate humane aid generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality and thus elevate the human race".
[429] *Re Strathedan*[1895] 3Ch. 265; *Re Corbyn*[1941]Ch 400.
[430] [1948]19 NLR 11.

that, since there was no suggestion that members of the public were to be admitted to the mosque, the trust lacked the essential element of public benefit, and was therefore not charitable.

Baker S.P.J, said, "Religious purposes are charitable only when religious services tend directly or indirectly towards the instruction and edification of the public".[431]

From the foregoing, it is seen that every charitable gift, with the exemption of relief of poverty must satisfy the requirement of public benefit before it will be regarded as a charitable trust.

Application of Public Benefit Test to Lord McNaughten's Four-fold Classification of Charitable Nature.

A. Application of Public Benefit Test to the First classification (Trust for the relief of poverty)

The requirement of public benefit has been reduced in the field of poverty, almost to vanishing point. Under this classification, the public benefit requirement is relaxed to the extent that a gift made to poor relations or needy persons are held charitable. In this regard, notwithstanding that there exist a personal nexus between the donor and beneficiary, the gift will still be valid as a charitable trust.

In *Dingle v Turner*,[432] a testator provided a fund upon trust "to apply the income thereof in paying pensions to poor employees of E. Dingle and Co Ltd who are of the age of 60years at least or who being of the age of 45 years at least are incapacitated from mental infirmity". At the date of the testator's death, the company employed over 600

[431] *Ibid*, p.15.
[432][1972] AC 601].

persons, and there was a substantial number of ex-employees. The House of Lord upheld the gift a charitable trust.

B. Application of Public Benefit Test to the Second classification (Trust for the Advancement of Education)

Unlike trust for relief of poverty, for trust for the advancement of education to be charitable, it must be for the benefit of the community or an appreciably important class of the community. That is, it must confer some benefit to the public or a section of the public.

It is pertinent to note that, under this head of charitable nature, there must not exist a personal nexus between the donor and the beneficiary. That is a person who is to benefit from the trust must not have a personal connection with the donor.

It is trite that not every member of the public can benefit from every charitable trust, and it becomes necessary to determine what is a section of the public for these purposes.[433] Again, this will vary with the different categories (heads).[434] A trust for the advancement of education is charitable if it is for education of the public or of a section of the public, which is not selected on the basis of a personal nexus or connection, either with the donor or between themselves. Thus, a trust for the education of named persons,[435] or of children of employees of a company[436] or of members of a club is not charitable.

[433] Martin, *op.cit*,p.414.
[434] *Ibid* .
[435] *Re Compton* [1945] Ch.123.
[436] *Oppenheim v Tobacco Securities Trust Ltd* [1951] AC 297.

In *Oppenheim v Tobacco Securities Trust Co*.,[437] income was to be applied in "providing for… the education of children of employees or former employees of the British-America Tabacco Company Ltd… or any of its subsidiary or allied companies in such manner… as the acting trustees shall in their absolute discretion… think fit" and there was power also to apply capital. The number of employees of the company and the subsidiary and allied companies exceeded 100,000. The House of Lords (Lord McDermott dissenting) following Re Compton,[438] held that there was a personal nexus between the members of the class of beneficiaries and they did not constitute a section of the public. The trust failed.

In the leading majority judgment, Lord Simonds said that to constitute a section of the community for these purposes, the possible beneficiaries must not be numerically negligible. Secondly, that the quality which distinguishes them from members of the community… must be a quality which does not depend on their relationship to a single *propositus* or to several *propositi*, they are neither the community nor a section of the community for charitable purposes.[439] Nonetheless, these educational trusts for employees are attempts to use charity's fiscal privileges for the benefit of the company by providing a tax-free fringe benefit for the employees.[440] Such trusts should fail, not on the ground that employees, however numerous, can never constitute a class of the

[437] *Supra.*
[438] [1945]Ch. 123.
[439] *Oppenheim's case supra,* p.306.
[440] "it is an admirable thing that the children of employees should have higher education, but I do not see why that should be at the expense of the taxpayer"per Harman L.J.in *I.R.C v Educational Grants Association Ltd* [1967] Ch. 993 at p.1013.

public, but because the purpose of the trust being a company purpose, is not charitable.[441]

It was worthy of note, that a donor cannot effectively obtain benefits for a group of private individuals, by setting up a charitable trust in favour of the public and relying on the trustees to make grants in favour of a narrow group. In *I.R.C v Educational Grants Association Ltd,*[442] the dependant was an association established for the advancement of education in general terms and was a charitable corporation. It was financially supported by payments under a deed of covenant by the Metal Box Co. Ltd, and by senior executives of the company. The association claimed the repayment of tax due in respect of payment under the covenant. Between 76 percent and 85 percent of the income of the relevant year had been paid towards the education of children of persons connected with Metal Box Co. Ltd, and Court of Appeal held that the tax was not recoverable, because the money had not been applied for charitable purposes only.

C. Application of Public Benefit Test to the Third Classification (Trusts for the Advancement of Religion)

The principle of public benefit in religious trusts is very similar to that of education. The advancement of religion among the public or a section of the public is charitable, and there is no room for atheists that it is not beneficial.[443] The section of the public may be a sect, whether of the Christian Religion, such as the Roman Catholic[444] or the Methodist

[441] *Dingle v Turner supra.*
[442] *Supra.*
[443] Martin*op cit*, p.417.
[444] *Dunne v Bryne*[1912] AC 407*; Re Flinn*[1948] Ch. 241.

Church[445] or of a non-Christian religion, such as Jewish.[446] It is seen that the law is especially generous in favour of bonafide religions, even though they have minimal following.[447] Similarly, a gift to a church will be charitable even if the congregation is small. A trust is charitable if it makes available a religious activity to the public if they should wish to take advantage of it. It may be that a sufficient benefit to the public is shown by having amongst it persons who have enjoyed the benefit of religious experience. But an enclosed, cloistered, monastic activity is excluded.[448]

In *Gilmour v Coats,*[449] a gift of £500 was made to a Carmelite priory "if the purposes of the priory are charitable". The priory consisted of a community of cloistered nuns, about 20 in number, who devoted their lives to prayer, contemplation and self-sanctification, and engaged in no external work. The House of Lords held that the purposes were not charitable because they lacked the necessary public benefit. This could not be found in the benefits conferred upon the public by the prayers and intercessions of nuns according to the doctrine of the Roman Catholic Church. Such benefit was "manifestly not susceptible of proof"[450] in a court of law, and the doctrine belief of the Roman Catholic Church[451]; nor in the edification of a section of the public by the example of the spiritual life followed by the nuns, for that was too vague and intangible

[445] *I.R.C v Baddeley*[1955] AC 572.
[446]*Veville Estate Ltd v Madden* [1962] Ch 832.
[447] *Re Watson* [1973] 1WLR 1472.
[448]Martin, *op cit,* p.417.
[449] *[1949] AC 426.*
[450]*Ibid*p.446.
[451] *The Irish Court takes a different view and accept the doctrine of the church in O'Hanlon v Logue*[1906] IR 247.

to constitute a proper test;[452]; nor by the availability of the religious life being open to all women of the Roman Catholic faith.

Similarly, the same principle was established by Baker S.P.J in Iyanda v Ajike,[453] where a testator by his will appointed trustees and provided that they should let one of his houses and use the rents and profits for the maintenance of the family prayer-room in another of the testator's houses. This prayer-room was described as a "private Mosque". It was held that, since there was no suggestion that members of the public were to be admitted to the mosque, the trust lacked the essential element of public benefit, and was therefore not charitable. Baker S.P.J was of the view that "religious purposes are charitable only when religious services tend directly or indirectly towards the instruction and edification of the public".

Also, gift for saying masses for the repose of the souls of the dead have also been held charitable[454], and as such deemed to have passed the public benefit test.

D. Application of Public Benefit Test to the Fourth Classification (Other Purposes Beneficial to the Community)

In most of the situations which have been considered under this head, the trust is for the benefit of all the public. This is so with the gift which improve the efficiency of the fighting forces, or the police or medical research, or public parks and sea walls, or law reporting. It does not matter that it is only a limited number of people who will take advantage of the benefit provided.[455] "A bridge which is available for all the public may

[452] *Gilmour v Coats supra.*.
[453] *Supra.*
[454] *Re Obabunmi Pedro* [1961] LLR 127; *Re Caus*[1934] Ch162; *Re Hetherington (deceased)* [1990]Ch 1.
[455]Martin, *op cit*, p.419.

undoubtedly be a charity and it is indifferent how many people use it. But confine its use to a selected number of persons, however, numerous and important; it is then clearly not a charity. It is not of general public utility: for it does not serve the public purpose which its nature qualifies it to serve.[456]

The problem arises where the purposes are restricted to a group of persons. It is seen that trusts for the relief of the aged and the sick are charitable. Not everyone is aged or sick.[457] But if the benefit are generally available, there is some benefit, albeit indirect, to the public generally.[458] Clearly, a trust under the fourth classification cannot be charitable if it is confined to persons bound together by a personal nexus[459]. The inhabitants of a geographical area are a section of the public in this context. But there are *dicta* in Williams v I.R.C[188] and in *I.R.C v Baddeley,*[460] which suggest that trusts under this fourth head, even if otherwise charitable, are subject to a stricter rule than trusts under the other three heads in relation to the selection of persons who are to benefit.[461]

In *Williams v I.R.C,*[462] Lord Simonds suggested that, even if the trust would otherwise have been charitable, the "Welsh people in London", to whom the benefit was confined, would not have constituted a section of the public.

From the foregoing, it is seen that all the classifications of charitable nature of a trust, with the exception of the relief of poverty, must satisfy the public benefit requirement before they can be regarded as charitable. The reason being, that taxpayers

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[456]Per Lord Simondsin *I.R.C v Baddeley*[1955] AC 572 p.592.
[457]Martin, *op cit*, p.420.
[458] *Re Dunlop (deceased)* [1984] 19 Northern Ireland judgments Bulletin; [1987] Conv.114 (N.Dawson), where a home for "Old Presbyterian Persons" was held charitable.
[459] [1947] AC 447.
[460] *Supra.*
[461]Martin, *op cit*, p.420.
[462] *Supra.*

ordinarily will like to arrange their affairs or activities to benefit a specified class of people under the guise of charitable trust to avoid tax or enjoy tax-free fringe benefits.

2.8.3. Exclusively Charitable

It is also pertinent for a valid charitable trust to satisfy this third requirement: exclusively charitable. That is, a valid charitable trust must be exclusively for charitable purposes and no other. Charitable trusts are often framed in a general manner, or as a list of a number of specific purposes, so that the gift authorizes the application of the trusts funds for many different purposes. In such cases, the gift does not create a valid charitable trust unless every object or purpose is wholly charitable.[463] For instance, if a settlor or testator gives property to be used for such "charitable or deserving",[464] "charitable or philanthropic",[465] "charitable or patriotic"[466] or "charitable or other"[467]objectsor "worthy causes"[468] as his executor may select, the gift cannot be charitable. This is because not every deserving, philanthropic, benevolent, public, patriotic, worthy or other object is charitable, and it would therefore be open to the executor, without committing any breach of his duty, to apply the whole of the property to a non-charitable object. The trusts cannot in such cases be said to be charitable, or, at any rate, exclusively charitable; and there is no escape from this draftsman's trap in a will by asking the court to omit the "or" from probate.[469] A gift to organisations having "in the opinion of my trustees" charitable

[463] *Morice v Bishop of Durham* [1805]10 Ves. 522.
[464] *Re Sutton* [1885] 28 ChD 464.
[465] *Re Eades*[1920] 2Ch 353.
[466] *Att-Gen. for New Zealand v Brown* [1917] AC 393; *Re Diplock*[1948]Ch465.
[467] *Blair v Duncan* [1902] AC 37; *Re Davis, Thomas v Davis*[1923] 1ch225.
[468] *Att-Gen. v National Provincial and Union Bank of England Ltd*[1924] AC 262.
[469] *Re Horrocks*[1939]p.198.

objects is similarly not charitable, for not only may the trustees be mistaken but also the objects of the organization could be non-charitable as well as charitable.[470]

Where, however, a gift is for certain "educational or charitable or religious purposes", it is valid, for each of these heads is exclusively charitable.

In *Blair v Duncan,*[471] the words were "such charitable or public purposes as my trustee thinks proper"; in *Houston v Burns*[472] "public, benevolent, or charitable purposes"; in *ChichesterDiocesan Fund and Board of Finance v Simpson*[473] "charitable or benevolent" in each of these cases, the gift was held not to be charitable, in that the words were wide enough to justify the trustees in disposing of the fund, or an unascertainable part of it to non-charitable objects.

In Re Macduff, a bequest of money "for some one or more purposes, charitable, philanthropic or – "was held to be bad, not by reason of the blank, but because there may be philanthropic purposes that are not charitable.[474]

In contrast, the court in Re *Bennett*[475] held the following words "for the benefit of the schools, and charitable institutions, and poor, and other objects of charity or any other public objects", also, in addition of the words "other" entitled him to apply the *ejusdemgeneris* rule of interpretation and dispensed him from the necessity of reading the word "or" disjunctively; the gift was, therefore, upheld as a charitable gift of the whole.

Where the objects were described as "charitable and deserving" or as "charitable and benevolent" will sometimes be construed simply as charitable objects, the added

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[470] *Re Wootton*[1968] 1WLR.
[471] [1902] AC 37.
[472] [1918]AC 337.
[473] [1944]AC 341.
[474] [1896]2Ch 451.
[475] [1920] 1Ch 305.

words being treated as merely restrictive of the class of charities to which the property can be devoted.[476] In the opinion of *LordDarvey in Blair v Duncan*,[477] if the words had been "charitable and public" effect might be given to them, because they could be construed to mean charitable purposes of a public character.

In contrast, the court in *Attorney General of Bahamas v Royal Trust Co*., held, a gift for the "education and welfare" of Bahamian children and young people as void on a disjunctive construction. To construe the words conjunctively would result in a single purpose of educational welfare, but the word "welfare" was regarded as too wide to permit such construction. The addition of the third word, "without any conjunction, copulative or disjunctive[478], was in *Williams v Kershaw*[479], held fatal to a gift to "benevolent, charitable and religious purposes, and in Re *Eades*,[480]*Sargent* J. refused to uphold a gift for "such religious, charitable and philanthropic objects" as three named persons should jointly appoint.

In *AttorneyGeneral v National Provincial and Union Bank of England*,[481] there was a gift of part of the residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire" as the trustees should select. The House of Lords interpreted this as a gift for any or all of four categories, two of which might not be charitable, and so held the whole gift void.

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[476] *Re Sutton supra.*
[477] *Supra.*
[478]Per Pearson J. in *Re Sutton supra.*
[479][1835] 5CI &F.IIIn.
[480] [1920]2Ch353.
[481] [1924]AC262.

From the foregoing, it is seen that the word "or" *primafacie* causes the words to be read disjunctively; while the word "and" *primafacie* causes the words to be read conjunctively.

Furthermore, where the language permits funds to be applied partly for charitable and partly for non-charitable purposes, the court will, in some cases, apply a doctrine of severance, separating the charitable from the non-charitable, and allow the former to stand although the latter may fail. In *Salusbury v Denton*[482], a testator bequeathed a fund to his widow to be applied by her in her will, in part towards the foundation of a charity school, and as to the rest towards the benefit of the testator's relatives. The widow died without making any apportionment, but it was held relying on the maxim "Equality is Equity", that the court would divide the fund into two halves.

There are some exceptions to the rule that a trust cannot be charitable unless its purposes are exclusively charitable. The exceptions include the following: incidental purposes, apportionment and validation by statutes.

1. Incidental Purposes

Here, if the main purpose of a corporation or trust is charitable and the only elements in its constitution and operations, which are non-charitable, are merely incidental to the effective promotion of that main purpose, the corporation and trust are established for charitable purposes only; but there is this difference between them: the corporation remains validly constituted, but the trust is void.[483] As Slade J. states,[484] "The distinction

[482][1857] 3 K&J 5 29.
[483] *Oxford Group v I.R.C* [1949] WN 343*; Chichester Diocesan Fund and Board of Finance Incorporated v Simpson supra.*
[484] *McGovern v Att.-Gen* [1981] 3 All ER 493,150.

is between (a) those non-charitable activities authorized by the trust instrument which are merely incidental or subsidiary to a charitable purpose and (b) those non-charitable activities so authorized which themselves form part of the trust purpose. In the latter but not the former case the reference to non-charitable activities will deprive the trust of its charitable status".[485]

Thus, a gift will still be charitable notwithstanding that the achievement of the objects which are charitable incidentally promotes other objects which are not. Thus, in *Re Coxen,*[486] the testator entrusted to the court of Aldermen of the City of London the management of a large fund for the benefit of orthopedic hospitals and directed that an annual sum not exceeding €100 out of the fund should be applied for a dinner for the court upon their meeting for the business of the trust. Jenkins J. held that both this direction and also provisions for the payment of certain fees to the trustees were valid as conducing to the attainment of the charitable purposes.[487]

ii. Apportionment

Where a trustees is directed to apportion between charitable and non-charitable objects, the trust is always good as to the charitable objects. The trust will be valid in *intoto* if the non-charitable objects are certain and valid,[488] and in the absence of apportionment by the trustee, the court will divide the fund equally between both classes of objects in accordance with the maxim that "equality is equity".[489] If the non-charitable objects are

[485]Hayton, *op cit,* p. 362.
[486] [1948] Ch747.
[487] *Aldous v Southwork London Borough Council*[1968]1 WLR 1671.
[488] *Re Douglas* [1887] 35 ChD 472.
[489]*Salusbury v Denton supra.*

uncertain, the trust will be good as to the charitable objects only,[490] so long as defined sufficiently enough to reveal a general charitable intention.[491]

If there is no direction to apportion, and if the trust is partly for a non-charitable purpose, some cases decide that where the court is satisfied that an inquiry is practicable as to the portion required for the non-charitable purposes, it will direct such an inquiry and uphold the charitable part of the gift.[492] If, on the other hand, such an inquiry is impracticable, it will divide the fund into equal shares, the share applicable to non-charitable purposes falling into residue.[493] Other cases, however, have held that the whole of the gift goes to charity, independently of the question whether which would otherwise have been required for the non-charitable purpose is ascertainable.[494]

iii. Validation by Statute

The validation by Statute as enshrined in the Charitable Trusts (Validation) Act 1954, the effect of the Act may be summarized as follows: where consistently with the terms of a trust which took effect before December 16,1952, the trust property could be used exclusively for charitable purposes, but could, nevertheless, be used for purposes which are not charitable, then effectively from July 30, 1954, the trust is deemed to have had effect as if all the declared objects in so far only as they are charitable.[495] The provision of such trusts are called "imperfect trust provision" and the Act applied to dispositions of property held under such trusts, where apart from the Act, the disposition

[490] *Re Clarke* [1923]2Ch407.
[491]Hayton, *op cit*p.362.
[492] *Re Rigley*[1867] 36 L.J Ch147.
[493] *Adman v Cole* [1843] 6 Beav.353.
[494] *Fisk v Att.-Gen*.[1867] LR 4 Eq.521*; Hunter Bullock* [1872] LR 14 Eq 585; *Dawson v Rogerson*[1901]Ch715; *Re Porter*[1925]Ch746.
[495]Charitable Trusts (Validation) Act, 1954, s.1.

would be invalid, but would be valid if the objects were exclusively charitable. But the Act does not apply if before December 16, 1952, the property has been disposed of in favour of persons entitled by reason of the invalidity of the trust.

From the foregoing, it is seen that if the terms of a trust coming into operation before December 16, 1952, are such that the property could be applied exclusively for charitable purposes but could also be applied for non-charitable purposes (called in the Act, an "imperfect trust provision") then as from July 30, 1954, the terms shall be treated as if they permitted application for charitable purposes only. It is also seen that the Act does not apply to assist assets already distributed.[496]

The simple case covered by this provision would be gift, prior to December 16, 1952, for "charitable or benevolent purposes". It would also cover "worthy causes", but not a case involving the mere possibility of charitable benefit.[497]

2.9 Application of Cy-près Doctrine

Where a private trust is initially ineffective or subsequently fails, there arises a resulting trust for the settlor or his estate if he is dead. If a charitable trust is initially impracticable or impossible or subsequently becomes so, the trust will not fail, and the court will apply the property Cy-près, that is, apply it to some other charitable purposes "as nearly as possible" resembling the original trusts or original purposes.[498] This will be achieved by means of a scheme formulated by the charity commissioners or the court.[499]

The Cy-près Doctrine Prior to 1960

[496] Charitable Trusts (Validation) Act 1954, s.2.
[497] *Re Mead's Trust Deed* [1961] 1WLR 1244.
[498] Parker, et al, *op cit*, p.163.
[499] *Biscoe v Jackson* [1887] 35 Ch.D 460.

The Cy-près jurisdiction was very narrow until reforms of the Charities Act, 1960, and was available only where it was "impossible" or impracticable to carry the purposes of the trust[500]. Thus, trusts for the distribution of loaves of bread to the poor or of stockings for poor maidservants continued until modern times. Their performance was cumbersome, uneconomical, inconvenient, but not impossible nor impracticable. But, it had at least, by the turn of the nineteenth century, become impracticable to apply money for the advancement and propagation of the Christian religion among the infidels of Virginia,[501] or for the redemption of British slaves in Turkey or Barbary.[502] again, the objects of the trust may cease to be charitable,[503] or the property may be (or become) more than is needed to carry out the selected objects;[504] and a Cy-prèsapplicationisnotexcluded merely because the property consists of surplus income which has been directed to be accumulated beyond the statutory limits[505].

"Impossible" was generously construed, and extended to cases where the consequences of carryout the trust would be highly undesirable, so that the court was able to remove a "colour bar" from a hostel for British Overseas Students when the charity's main object was to promote community of interest in the empire.[506] However, there were many difficulties in the application of these principles.[507] In particular, they did not permit property to be applied Cy-près where there was no impossibility, even if the objects would be far more beneficial; in order to encourage charitable gifts, it was held

[500] *Re Weir Hospital* [1910] 2Ch. 124.
[501] *Att.-Gen. v City of London* [1790] 3 Bro. C.C 121.
[502] *Ironmongers Co. v Att.-Gen* [1844] 10 CI&F 908.
[503] *National Anti-vivisection Society v I.R.C* [1948] AC 31,74.
[504] *Re Campden Charities* [1881] 18 ChD 310*; Re Robertson* [1930] 2Ch 71.
[505] *Re Monk*[1927] 2Ch197; *Re Bradwell*[1952] Ch 575.
[506] *Re Dominion Students' Hall Trust* [1947] Ch 183.
[507] Parker, et al, *op cit,* p.164.

important to disregard the donor's wishes only in cases of necessity.[508] The Charities Act 1960 has accordingly now relaxed the requirement of impossibility.

The Cy-près Doctrine After 1960

The United Kingdom's Charities Act 1960[509], makes it unnecessary to decide whether or not there is impossibility in the old sense.

Charities Act, 1960, section 13 provides as follows:

(1) Section 13(1) subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied Cy-près shall be as follows:

(a) where the original purposes, in whole or in part-

(i) have been as far as may be fulfilled; or

(ii) cannot be carried out, or not according to the direction given and to the spirit of the gift; or

(b) where the original purposes provide a use for part only of the property available by virtue of the gift; or

(c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or

(d) where the original purposes were laid down by reference to an area which then was but has since ceased to be unit for some other purpose; or by reference to a

[508] *Re Weir Hospital supra.*
[509] s.13(1).

class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or

(e) where the original purpose, in whole or in part, have since they were laid down,-

(i) been adequately provided for by other means; or

(ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or

(iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.

(2) Subsection (1) shall not affect the conditions, which must be satisfied in order that property given for charitable purposes may be applied Cy-près, except in so far as those conditions require a failure of the original purposes.

A critical look at the foregoing provision specify the circumstances in which the original purposes of charitable gift can be modify to allow the property or part of it to be applied Cy-près. Prior to Charities Act of 1960, a charitable trust has applied Cy-près on the grounds of impossibility or impracticability. But, after 1960, it has now been extended to where there is no impossibility. Thus, Charitable trust can now be applied Cy-près on other grounds as stated in section 13(1) of the Act other than impossibility or impracticability.

CHAPTER THREE

NON-GOVERNMENTAL AND RELIGIOUS ORGANISATIONS IN NIGERIA

3.1 The Nature of Non-Governmental Organisations (NGO)

Non-Governmental Organization is a legally constituted organization created by natural or legal persons that operates independently from any government. The term originated from the United Nations (UN), and normally used to refer to organisations that do not form part of the government and are not conventional for profit business.

A non-governmental organization is generally considered to be any non-state, non-profit, voluntary organization. As a non-state entity, an NGO is generally independent from government influence, it is not part of or controlled by government or an interdenominational agency[510]. As such an NGO either not established by government or intergovernmental agreement, or; if established in such manner, is now independent of such influence. As a non-profit organization, an NGO is not operated for the primary purpose of carrying on trade business, although profits may be generated for the mission of the organization.[1]Other words, regard as non-profit distributing, in that any surplus that is generated is to be used solely to help the organization fulfill its mission and objectives, with no part of the net earnings of the NGO to be distributed to the benefit of the directors, officers, members, or employees of the NGO, or any private person, other reasonable compensation for services rendered.

As a voluntary organization, an NGO is not required to exist by law, but is formed initiative resulting from voluntary actions of individuals.[511] In effect, NGOs are

[510] www.ngo.handbook.org accessed 20/01/2015.
[511] *Ibid.*

organisations that are not part of the government sector no part of the business sector. For such reasons, they are sometimes referred to being part of the "third sector" in the society.

An NGO is also viewed as a non-profit making voluntary, service-oriented/development oriented organization, either for the benefit of members)a grassroots organization) or of other members of the population (an agency)[512]. Thus, it is an organization of private individuals who believe in certain basic social principles and who structure their activities to bring about development to communities that they are servicing.

3.2 Types of NGOs

The term NGOs have been sought to categorize into different types. Some typologies distinguish them according to the focus of their work; for instance, whether it is primary service or welfare oriented or whether it is more concerned with providing education and development activities to enhance the ability of the poorest groups to secure resources. Such organisations are also classified according to the level at which they operate, whether they collaborate with self-help organisations (i.e. community based organization), whether they are federations of such organisations or whether they are themselves a self-help organization. They can also be classified according to the approach they undertake, whether they operate projects directly or focus on tasks such as advocacy and networking[513]. These shall be discussed seriatim.

[512] Samuel Uwhejevwe, "Role of Non-Governmental Organisation" available at http://www.Nigeria villagesquare.com, accessed 20/01/2014.
[513] *Ibid.*

A. NGO Types by Orientation

i. Charitable Orientation often involves a top-down paternalistic effort with little participation by the "beneficiaries". It includes NGOs with activities directed towards meeting the needs of the poor; distribution of food, clothing or medicine; provision of hosing, transport, schools, et cetera. Such NGOs may also undertake relief activities during a natural or man-made disaster.

ii. Service Orientation; includes NGOs with activities such as the provision of health, family planning or education services in which the program is designed by the NGO and people are expected to participate in its implementation and in the receiving the services.

iii. Participatory Orientation; is characterized by self-help projects where local people are involves particularly in the implementation of a project by contributing cash, tools, land, materials, labor, et cetera. In the classical community development project, participation begins with the need definition and continues into the planning and implementation stages. Cooperatives often have a participatory orientation.[514]

iv. Empowering Orientation; is where the aim is to help poor people develop a clearer understanding of the social, political and economic factors affecting their lives, and to strengthen their awareness of their own potential power to control their lives. Sometimes, these groups develop spontaneously around a problem or an issue, at other times outside

[514] *Ibid.*

workers from NGOs plays a facilitating role in their development. In any case, there is a maximum involvement of the people with NGOs acting as facilitators.[515]

B. NGO Types by Level of Operation

i. Community-based Organisations (CBOs) arise out of people's own initiatives. These can include sports clubs, women's organisations, neighbourhoodorganisations, religious or educational organisations. There are a large variety of these, some supported by NGOs, National or International Agencies, and others independent of outside help. Some are devoted to rising the consciousness of the urban poor or helping them to understand their rights in gaining access to needed services while others in providing such services.[516]

ii. Citywide Organisations; include organisations such as chambers of commerce and industry, coalition of business, ethnic or educational groups and associations of community organisations. Some exist for other purposes, and become involved in helping the poor as one of many activities, while other are created for the specific purpose of helping the poor.[517]

iii. National NGOs include organization such as Red Cross, professional organisationset cetera. Some of these have state and city branches and assist local NGOs.

[515] *Ibid.*
[516] *Ibid.*
[517] *Ibid.*

iv. International NGOs range from secular agencies such as ReddaBarna and Save the Children Organisations, Oxfam, CARE, Ford and Rockefeller Foundations religiously motivated groups. Their activities vary from mainly funding local NGOs, institutions and projects, to implementing the project themselves.

3.3. Objectives of Non-Governmental Organization

A major objective of many non-governmental organisations (NGOs) is welfare work in relation to poverty and disease or in respect to social groups such as the elderly or children[518]. Some other types of NGOs help groups of people to unite at a grass-roots level and find their voice in local and national government. The groups that NGOs aim to help may have an economic focus, such as producer groups, or they marginalized for other reasons, as with women's groups or ethnic groups. Some NGOs aim to help small businesses in particular geographic areas and concentrate on particular functions such as providing training or microfinance. NGOs also are formed to help scientific research in areas such as improved agricultural methods or the elimination of certain infectious diseases.[519]

Objectives of NGOs may include assisting producer groups to come together as pressure groups and find ways to influence policy on matter that concern them. An NGO can make these groups aware of their rights and educate them on ways to demand greater political participation. An example is the work of NGOs involved in fair trade issues.

[518] www.wisegreek.com/what-are-the-objectives-of-ngos-html, accessed 11 January, 2015
[10] *Ibid.*

These may help producer groups to negotiate improved terms for selling their produce and may campaign on an international level for fairer world trade[520].

Objectives of NGOs concerned with the empowerment of women may include activities on a political or economic level. Such an NGO might be concerned with issues concerning the education and health of women and would help women's groups to use their united strength to stand up for their rights in the political arena. Some NGOs also are concerned with helping women in business[521].

Some objectives of NGOs involves assisting small businesses in gaining access to credit and finding markets for their produce. These NGOs may, for example, provide microfinance, including loans to small business and savings and insurance products for low-income household. Such NGOs may support economic development by helping households to use any money they earn to accumulate assets and insure themselves against adverse situations[522].

Other objectives of NGOs include promoting the use of appropriate technology and assisting research and development into new technology. This type of NGO also may concentrate on problems in agriculture such as crop disease or harmful insects. NGOs also may research improved agricultural equipment that is appropriate for a region's particular agricultural conditions.[523]

Other types of NGOs may help research disease and look for affordable cures for serious illness. These may include NGOs that mainly are concerned with the welfare of

[11] *Ibid.*
[12] *Ibid*.
[13] *Ibid.*
[523] *Ibid.*

children and want to stop children from falling victim to preventable disease.[524]These NGOs also may assist with research into cheaper vaccines and ensure that children are immunized.[525]

3.4 Nature of Religious Organisations

Religiousorganisations include, but not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational, ecumenical, mission organisations, faith-based social agencies and other entities whose principal purpose is the study, practice, or advancement of religious.

Religious organisations play an active role in shaping beliefs; may invest time and effort in advocating certain kinds of messages while censoring others.[526] It is assumed that an individual's affiliation with a religious organization endows him with religious beliefs.Religion in Nigeria plays a major role in the life of the people, to some, it is their candle light, to gives them insight, wisdom, knowledge and faith is increased through the study of scripture, books and prayers.

The world is filled with many different faiths. Religion is a source of strength to many people, especially during tough times. Religion can also be the source of friction between people of different faiths. Regardless of the actual beliefs of the religion in question, organized religions all have associated organisations to help them advance their goals.

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[15] *Ibid*
[16] *Ibid*
[17] One example of censorship is the index Librorumprohibitorum ("list of prohibited Books") (from1529 to 1966 which listed publications prohibited by the Roman Catholic Church. Also, "Pro & Con Arguments: should Churches (defined as Churches, Mosques, Temples, Synagogues, etc) Remain Tax Exempt?", available athttps://www.chuurchesandtaxes.procon.org,accessed 20 January, 2015.

3.5 Types of Religious Organisations

Many types of religious organisations exist in modern societies. All religious organisations involve communities of believers. Religions organize themselves – institutions, practitioners, and structures- in variety of fashions. These among others include;

(a). Church; The Ecclesia and Denomination

The Church is a large, bureaucratically organized religious organization that is closely integrated into the larger society[527]. Two types of Church organisations exist. The first is the ecclesia, a large, bureaucratic religious organization that is formal part of the State and has most or all of a State's citizens as its members. As such, the ecclesia is the national or State religion. People ordinarily do not join an ecclesia; instead they automatically become members when they are born. A few ecclesia exist in the world today including, the Catholic Church in Spain, the Lutheran Church in Sweden, the Anglican Church in England[528] and Islamic Communities (E.g. Ahmmadu-yya Moslem Community in the United Kingdom)

As should be clear, in an ecclesiastic society, there may be little separation of church and State, because the ecclesia and the State are intertwined. In some ecclesiastic societies, such as those in the Middle East, religious leaders rule the State or have much influence over it, which in others, such as Sweden and England, the have little or no influence. In general, the close ties that ecclesiae have to the State

[527] *Ibid.*
[528] *Ibid.*

help ensure they will support State policies and practices. For this reason, ecclesiae often help the State solidify its control over the populace.[529]

The second type of Church organization is the denomination, a large, bureaucratic religious organization that is closely integrated into the larger society but is not a formal part of the State. In modern pluralistic nations, several denominations coexist. Most people are members of a specific denomination because their parents were members. They are born into a denomination and generally consider themselves members of it in rest of their lives, whether or not they actively practice their faith, unless they convert to another denomination or abandon religion altogether.[530]

The Mega Church

A relatively recent development in religious organization is the rise of the so called Mega Church, a church at which more than 2,000 people worship every weekend (or Sunday in particular) on the average. Several dozen have at least 10,000 worshipers[531], the largest US Mega Church in Houston has more than 35,000 worshipers and is nicknamed a "Giga Church". There are more than 1,300 Mega Churches in the United States, a steep increase from the 50 that existed in 1970, and their total membership exceeds 4million. Also, in Nigeria, from late 1990 till date, there has been rise of mega churches ranging from Living faith Church (aka Winners Chapel) which has more than 50,000 worshipers in a single service, Redeemed

[529]*Ibid*.
[530]*Ibid.*
[531]RJ Priest, et al, *Religion Matters; What Sociology Teaches Us About Religion In Our World,* (Upper Saddle River, NY: Prentice Hall, 2011.

Christian Church of God, DunamisInternational, Christ Embassy, Chosen Church of God, et cetera. These mega churches also have strong television and radio ministries.

Compared to traditional, smaller churches, mega churches are more concerned with meeting their member's practical needs in addition to helping achieve religious fulfillment. Some even conduct market survey to determine these needs and how best to address them. As might be expected, their buildings are huge by any standard, and they often feature book stories, food courts, sports, and recreation facilities. They also provide day care, psychological counseling and youth outreach programs. Their services often feature electronic music and light shows.

Although, mega churches are popular, they have been criticized for being so big that members are unable to develop the close bonds with each other and with members of the clergy characteristic of smaller houses of worship. Their supporters say that mega churches involve many people in religion who would otherwise not be involved.[532]

Sect

A sect is a relatively small religious organization that is not closely integrated into the larger society and that often conflicts with at least some of its norms and values. The Amish, who live in Pennsylvania, Ohio, and many other States are perhaps the most well-known example of a sect in the United States today[533]. In Nigeria, we have classical example of the Jehovah Witness, Grail Centre, Eckankar, et cetera.

[532] *Ibid.*
[533] *Ibid.*

A sect is a relatively small religious organization that is not closely integrated into the larger society and that often conflicts with at least some of its norms and values. Typically, a sect has broken away from a larger denomination in an effort to restore what members of the sect regard as the original views of the denomination. Because sects are relatively small, they usually lack the bureaucracy of denominations and ecclesiae and often also lack clergy who have received official training.[534]

Their worship services can be intensely emotional experiences, often more so than those typical of many denominations, where worshipers tends to be more formal and restrained. Members of many sects typically proselytize and try to recruit new members into the sect.[535] If a sect succeeds in attracting many new members, it gradually grows, becomes more bureaucratic, and ironically, eventually evolves into a denomination. Many of today's protestant denominations began as sect, as did the Mennonites, Quakers, and other groups. The Amish in the United States are perhaps the most well known example of a current sect.[536]

Cult

A cult is a small religious organization that is at great odds with the norms and values of the larger society. Cults are similar to sects but differ in at least three respects. First, they generally have not broken away from a larger denomination and instead originate outside the mainstream religious tradition. secondly, they are often secretive and do not proselytize as much. Thirdly, they are at least somewhat more likely than

[534] *Ibid.*
[535] *Ibid.*
[536] *Ibid.*

sect to rely on charismatic leadership based on the extraordinary qualities of the cult's leader.[537]

Although, the term cult today raises negative images of crazy, violent, small groups of people, it is important to keep in mind that major world religious including Christianity, Judaism and denominations such as the Mormons began as cults. Research challenges several popular beliefs about cults, including the idea that they brainwash people into joining them and that their members are mentally ill[538]. In study of the unification church (Moonies) it was found that there was no more signs of mental illness among people who joined the Moonies than those who did not.[539] It was also found there was no evidence that people who joined them had been brainwashed into doing so.[540]

Another image of cults is that they are violent. In fact, most are not violent. However, some cults have committed violence in the recent pass. In 1995, the AumShinrikyo(Supreme Truth) cult in Japan killed 10 people and injured thousands more when it released bombs of deadly nerve gas in several Tokyo subway lines[541]. Two years earlier, the branch Davidian Cult engaged in an armed standoff with federal agents in Waco and Texas when the agents attacked its compound, a fire broke out and killed 80 members of the cult, including 19 children; the origin of the fire remains unknown.[542]

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[537]*Ibid.*
[538]E Barker, *The making of a Moonie: Choice or brainwash* (New York; Oxford University Press, 1984".
[539]*Ibid*.
[540]*Ibid.*
[541]*Ibid.*
[542]SStrasser et al,"A Cloud of Terror and Suspicion"*Newsweek*, April 3, 1995, pp36-41.

The term cult is sometimes used interchangeably with the term New Religious Movement(NRM). In its pejorative use, these groups are often disparage as being secretive, highly controlling of members' lives, and dominated by a single, charismatic leader.[543]

3.6 Objectives of Religious Organization

Religion is a cultural universal because it fulfills several basic functions within human societies. It is a basic requirement of group life. In sociological terms, these include both manifest (open and Stated) functions of religion are included defining the spiritual world and giving meaning to the divine.

Religion provides an explanation for events that seen difficult to understand. By contrast, latent functions or religions are unintended, covert, or hidden. Functionalists suggest that religion is a requirement for society and individual both because it serves both manifest and latent objectives.[544]

These include among others;

(a) Religion as an integrative force;

The primary objective of religion has been to preserve and solidify society. It functions to reinforce the collective unity or social solidarity of a group sharing the same religion or religious interpretation of the meaning of life unites people in a cohesive and building moral order.

[543]JD Tabor, et al, *Willy Waco? Cults and the Battle for Religious Freedom in Africa*(Berkely; University of California Press, 1995).
[544]www.yourarticlelibrary.com/sociology/religious-institutions/religionaccessed 4th January, 2016.

The social cohesiveness is developed through rituals such as reciting prayer in the honour of God, institutions of worship (church, temple, mosque, et cetera) performing naming, and multitudes of observances and ceremonies practiced by different groups.[545]The unifying ritual of different faiths are also observed by individuals on the most significant occasions such as birth, marriage and death. This integrative objective of religion was particularly apparent in traditional, pre-industrial societies. Although, the integrative impact of religion has been emphasized here, it should be noted that religion is not the only integrative force – the feelings of nationalism or patriotism may also serve the same end. In contemporary industrial societies, people are also bond by patterns of consumption, way of life, laws and other forces.[546]

(b) Creating a Moral Community

Religion provides a system of beliefs around which people may gather to belong to something greater than themselves in order to have their personal beliefs reinforced by the group and its rituals. Those who share a common ideology develop a collective identity and a sense of fellowship.[547]

Members of moral community also share a common life. This moral community gives rise to social community through the symbolism of the sacred that

[545]*Ibid.*
[546]*Ibid.*
[547]*Ibid.*

supports the more ordinary aspects of social life. Religion then legitimizes society. It provides sacred sanction for the social order and its basic values and meanings.[548]

(c) Religion as Social Control:

Religion usually acts a powerful aid in social control, enforcing what men should not do. Among primitive people, the sanctions and dictates of religion were more binding than any of the other controls exercised by the group; and in modern societies such influence is still great. Religion has its own supernatural prescriptions that are at the same time codes of behavior for the here and now.[549]

Religious beliefs can influence the conduct of those who believes in them. It helps people "in line" through folkways and mores. It provides a foundation for mores of society. Religious sanctions are sought for certain desirable patterns of behavior to persist in society in the form of mores. Thus, many taboos in various cultures have religious sanctions, e.g. the taboo against eating of pork in Jewish and Muslims and Beef in Hindus.[550]

(d) Religion as a source of Emotional Support;

Religion is a sense of comfort and solace to the individuals during times of personal and social crises such as death of loved ones, serious injury or other challenges. This is especially true when something tragedy happens. It gives them emotional support and provides consolation, reconciliation and moral strength during trials and defeats, personal losses and unjust treatments. Man can face the crises and vicissitudes of life

[548] *Ibid.*
[549] www.ling.gu.se/-lager/oz/test.txt. accessed on 4th January, 2016.
[550] www.yourarticlelibrary.com/sociology.religious-institutions/religion. accessed on 4 January, 2016.

with strength and fortitude. The concepts of Karma and transmigration among Hindus and Jesus Christ as a Son of God and prayer among Christians seek to provide such fortitude and strength. It has been said that people need emotional support in the face of uncertainty; consolation when confronted with disappointments and anxiety. It is often said that visiting places of worship and holy premises serves as outlets for releasing tension and stress. Religion offers consolation to oppressed people also by giving them hope that they can achieve salvation and eternal happiness in the afterlife. Religion enhances the "God will provide attitude".[551]

(e) Religion Serves a Means to Provide Answers to Ultimate Questions;

Some of the ultimate questions which religion provides answer to include "Why are we here on earth?""Is there a supreme being?" What happens after death?" All religions have certain notions and beliefs that provide answers to the above questions. These beliefs are based on the faith that life has a purpose, and there is someone or something that controls the universe. It defines the spiritual world and gives meaning to divine. Due to its beliefs concerning people's relationship to a beyond, religion provides an explanation for events that seem difficult to understand.[552]

(f) Provide Rites of Passage;

[551] *Ibid.*
[552] *Ibid.*

Religion helps us in performing ceremonies and rituals related to rites of passage (birth, death, marriage and other momentous events) which gives meaning and a social significance to life.

(g) Religion as a Source of Identity;

Religion gives individuals a sense of identity – a profound and positive self-identity. It enables them to cope effectively with the many doubts and indignation of everyday life. Religion may suggest people that they are not worthless or meaningless creatures and thus helps them alleviating the frustrating experiences of life, which sometimes force a person to commit suicide.[553]

In industrial societies, religion helps to integrate newcomers by providing a source of identity. For example, Bangladeshi immigrants in India, after setting in their new social environment, came to be identified as Indian Muslims. In a rapidly changing world, religious faith often provides an important sense of belonging.[554]

(h) Religion Promotes Social Solidarity;

Religion gives rise to the spirit of brotherhood. Religion has been said to strengthen social solidarity. It has the supremely integration and verifying force in human society. It is true that common belief, common sentiment, common worship,

[553] *Ibid.*
[554] *Ibid.*

participation in common rituals et cetera. are the significant cementing factors, which strengthen unity and solidarity.[555]

(i) Religion Promotes Welfare

Religion teaches the people to serve the masses and promote their welfare. It gives message that "the service to humanity is service to God". For this reason, people spend money to feed poor and needy.[556]

Some religions like Hinduism, Islam, Christianity, et cetera, put emphasis on almsgiving to the poor and beggars. It develops the philanthropic attitude of the people and thereby injects the idea of mutual help and cooperation. With the influence of religious beliefs, different religious organisations engage themselves in various welfare activities.

(j) Religion Influences Political System;

Religion has played a significant role in political system in the ancient and modern society. Even in the modern times, religion directly and indirectly influences political activities in many countries.[557] During ancient and Medieval period, the monarch were seen as a representatives of the god or ruling the society min the name of God.[558]

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[555] www.preservearticles.com/201104296054/10most-important-functions-of-religion.htmlaccessed 5th January 2016.

[556] *Ibid.*

[557] As we have seen in Nigeria, Northerners will be minded to vote a fellow Moslem into governance irrespective of incredibility of the candidate.

[558] Thepolitical system of countries like Pakistan, Italy, Germany, England, India, Bangladeshi are influenced by their religion.

CHAPTER FOUR

EXEMPTION PROVISIONSUNDER THE NIGERIAN TAX REGIME

The phrase tax exemption is not defined the personal income Tax Act[559], the Companies Income Tax Act[560] or any other tax legislation. But in *Northern Nigeria Investment Ltd v FBIR,*[561] the court, Per Belgore J. defined the expression "exempt income" as follows; "exempt income is income primarily subject to tax but exempt under another provision of the law. The true position is not that exempt is not subject to tax.[562]In other words, exempt income is income subject to tax under a particular provision of the law, but only taken out of the taxing law by the relevant exempting provision.[563]

Exempt income is therefore, income liable to be taxed by law, but expressly excluded by another provision of the law. In *Australian Mutual Provident Society v IRC,*[564] it was stated that the word "exempted from taxation" in section 86 of the Act, did not cover income which was not withinthe reach of the New Zealand tax laws.

Having stated the meaning of exempt income, the various tax law in Nigeria and their exemption provisions shall now be considered.

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[559]Personal Income Tax (Amendment) Act, 2011.
[560] Cap C21 LFN 2010.
[561] [1976] FRCR 93.
[562]*Ibid, p.95.*
[563]I. A. Ayua*, Nigeria Tax Law,* (Ibadan; Spectrum Law Publishing, 1996) pp.72-73.
[564]*[1962] A.C. 135.*

4.1 Capital Gains Tax Act

Under Capital Gains Tax Act,[565] the Act expressly stated the organizations, institutions et cetera, whose gain are exempted from tax.

Section 26 of the Act,[566] provides as follows:

(1) Subject to subsection 2 of this section, a gain shall not be chargeable if it accrues to

(a) An ecclesiastical, charitable or educational institution of a public character;

(b) Any statutory or registered friendly society;

(c) Any cooperative society registered under the cooperative societies law of any State; or

(d) Any trade union registered under the trade unions Act,

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 the institution or society and the gain is applied purely for the purpose of the institution or society, as the case may be.

From the foregoing, it can be deduced that gains accruing to ecclesiastical bodies, charitable organizations, educational institutions of a public character, statutory or friendly society, cooperative societies and trade unions shall be tax exempt so long such gains are not derived from disposal of any assets acquired in connection with

[565] Cap C1, LFN 2010.
[566] *Ibid.*

trade or business carried on by the afore-mentioned and the such gain must be applied solely for the purpose of the aforementioned.

Thus, it follows that if any of the bodies mentioned under the Act,[567] disposes of its asset and applied the proceeds not for purpose of the bodies as mentioned, such gain will no longer be exempted, but must be chargeable to capital gains tax.

Again, under the Act,[568]provides as follows;

(2). If any property to which subsection (1) of this section relates which is held on trust ceases to be subject to such trust –

(a) the trustees shall be treated as if they had disposed of, immediately reacquired, the property for consideration equal to its market value, any gain on the disposal being treated as not accruing to the institution or society; and

(b) if and so far any of that property represents, directly or indirectly, the consideration for the disposal of assets by the trustees, any gain, accruing on that disposal shall be treated as not having accrued to such institution or society,and, notwithstanding anything in this Act limiting the time for making assessments, any assessment to capital gains tax chargeable by virtue of paragraph (b) of this subsection may be made at any time not more than three years after the end of the year of assessment in which the property ceases to be subject to such trusts.

From the foregoing, when a property that is held on trust ceases to be subject to such trust, the trustees shall be treated as if they had disposed of and immediately

[567]section 26 (1), *Ibid*

[568]Section 26 (2), *ibid*

reacquired the property, and any gain in relation to such property shall be chargeable to capital gain tax.

Again, the Act,[569] exempts from capital gains any gain accruing from statutory bodies in Nigeria.

A cursory look at section 27(1) of the Act depict an exemption from capital gains tax any gain accruing to any local government council. That is to say, any gain accruing to local government council shall be exempt from the payment of capital gains tax.

It is also provided under section 27(2) of the Act as follows:

(2) Gains accruing to any of the bodies mentioned in this subsection shall be exempt from capital gains tax, that is to say –

(a) Gains accruing to any company, being a purchasing authority established by or under any law in Nigeria, empowered to acquire any commodity in Nigeria for export from Nigeria; or

(b) Gains accruing to any corporation established by or under any law for the purpose of fostering the economic development of any part of Nigeria in so far as the gains are not derived from the disposal of any assets acquired by the corporation in connection with trade or business carried on by it or from the disposal of any share or other interest possessed by the corporation in a trade or business carried on by some other person or authority.

It is seen from the above section, that companies or corporation founded by any enabling law in Nigeria shall enjoy exemption on any gains accruing to them, so far

[569]section 27,*Ibid.*

as the gains are not derived from the disposal of any assets acquired by the corporation in connection with any trade or business carried on by it or disposal of any share or interest possessed by the corporation in a trade or business carried by another authority or any gains accruing to any company whose business is acquiring any commodity in Nigeria for export from Nigeria.

Further, gains shall not be chargeable from any disposal of investment held by a person as part of any superannuation fund, but where part only of that fund is approved under the Personal Income Tax Act,[570] the gain shall be exempt from being a chargeable gain to the same extent only as income derived from the assets would be exempt under that section.[571]The same applies to gains accruing to a person from disposal of investment held by him as part of any national provident fund or other retirement benefits schemes established under the provisions of any Act or enactment for employees throughout Nigeria.[572]

It is also provided for under the Act that gain accruing to any person from the disposal of a decoration, awarded for valour or gallant conduct which he acquires otherwise than for consideration in money or money's worth shall not be a chargeable gain.[573]Gains accruing to a person from a disposal by him of Nigerian government securities, stocks and shares shall not be chargeable gains.[574]

[570]Personal Income Tax (Amendment) Act, 2011, section20
[571]CGTA, Cap C, LFN 2010,Section 28
[572]Section28(2), *ibid.*
[573]Section 29*Ibid.*
[574]Section 30 *Ibid.*

Notwithstanding, that exemption have been granted to the aforementioned bodies under the Act, the exemption may be lost in respect of gains arising from trading activities or not applied purely for the purposes of the institution.

4.2. Companies Income Tax Act

Companies income tax is a tax on all limited liability companies in Nigeria except companies engaged in petroleum operations.

Under section 23(1) of CITA[575], the following profits are exempted from tax:

(a) The profit of a company being a statutory or registered friendly society, provided such profits are not derived from trade or business carried on by such society;

(b) The profits of any company being a cooperative society registered under any enactment or law relating to cooperative societies not being from any trade or business carried on by the company;

(c) The profits of any company engaged in any ecclesiastical, charitable or educational activities of a public character, provided such profits are not derived from trade or business carried on by such a company;

(d) The profits of any company formed for the purpose of promoting sporting activities, provided such profits are fully applied for such purposes;

(e) Profits of a trade union registered under the Trade Union Act 1973, provided such profits are not derived from a trade or business carried on by such trade union;

[575] *Cap C21, LFN 2010.*

(f) Dividend distributed by unit trust;

(g) The profits of anybody corporate established by or under any local government law or edict in force in any State in Nigeria;

(h) The profits of any body corporate being a purchasing authority established by an enactment and empowered to acquire any commodity for export from Nigeria from the purchase and sale (whether for the purposes of export or otherwise of that commodity);

(i) The profits of any company or any corporation established by the law of a State for the purpose of fostering the economic development of that State, not being profits derived from any trade or business carried on by that corporation or from any share or other interest possessed by that corporation in a trade or business in Nigeria carried on by some other person or authority;

(j) Any profits of a company other than a Nigerian company which, but for this paragraph, would be chargeable to tax by reason solely of their being brought into or receive in Nigeria;

(k) Dividend, interest, rent, or royalty derived by a company from a country outside Nigeria and brought into Nigeria through government approved channels. For the purpose of this subsection, "Government approved channels", means the Central Bank of Nigeria, any bank or other corporate body appointed by the Minister as authorized dealer under the Foreign Exchange (Monitoring and Miscellaneous provisions) Act or any enactment replacing that Act;

(l) The interest on deposit accounts of a foreign non-resident company; provided that the deposit into the account are transferred wholly of foreign currencies to Nigeria on or after 1 January 1990 through government approved channels;

(m) The interest on foreign currency domiciliary account in Nigeria accruing on or after 1 January 1990;

(n) Nothing in this section shall be construed to exempt from deduction at source, the tax which a company making payments is to deduct under sections 78,79 or 80 of this Act, such that the provision of sections 78,79 or 80 of this Act, shall apply to a dividend, interest, rent or royalty which is a part of the profits or income referred to in subsection (1)(a) to (f) and (h) to (i) of this section;

(o) Dividend received from small companies in the manufacturing sector in the first five years of their operation;

(p) Dividend received from investments in wholly export-oriented businesses;

(q) The profits of any Nigerian company in respect of goods exported from Nigeria, provided that the proceeds from such export are repatriated to Nigeria and used exclusively for the purchase of raw materials, plant, equipment and spare parts;

(r) The profits of a company whose supplies are exclusively inputs to the manufacturing of products for export, provided that the exporter shall give a certificate of purchase of the inputs of the exportable goods to the seller of the supplies;

(s) The profit of a company established within an export processing or free trade zone; provided that 100 percent production of such company is for export otherwise tax shall accrue proportionately on the profits of the company.

It is worthy of note that under the Act,[576](as mentioned above), to ensure exemption, careful drafting of the memorandum of association of the company will be needed. Thus, the objects of the company should be drawn as to restrict the company to objects, which are within the exemption. In most cases, this will involve prohibiting trading.[577]

Again, it should be that paragraph (c) of the above section applies only where the activity, be it ecclesiastical, charitable or education, is of a public character, although on the other hand it is not merely limited to charitable activities but could apply to a non-charitable education activity provided it was of a sufficiently public character. Paragraph (d) which relates to companies formed for the purposes of promoting sporting activities is quite separate and apparently it is not necessary to show either a charitable or a public element and moreover all profits are exempt (even though derived from a trade or business) provided they are wholly expendable for the sporting purposes for which the company was formed.[578] It is observed that the exemption of profits on sporting activities should also be reviewed. Although, some sports are not well established in Nigeria and attempt to tax their earnings may hinder the development of such sports, however, football has become a big business in Nigeria and earnings from gate-takings, television rights and other sources has

[576]CITA section 23, *Ibid*
[577]MT Abdulrazaq; *Revenue Law and Practice in Nigeria* (Lagos, Malthouse Press Ltd,2010)P.193.
[578]*Ibid.*

increased considerably.[579] Thus, it would be necessary to remove earnings from football from tax exemption.

It is also opined that the earnings of some trade union should be taxed. This is because some trade union have large membership and raise a lot of money from registration, and some other forms of contribution from members for certain objectives which they never achieve. Some trade union do not even have any identifiable objectives or known programmes for welfarism, yet they raise millions of naira yearly from members.[580]

The National Union of Road Transport Workers (NURTW) is one of such trade unions that make a lot of money from members and motorists and yet have no identifiable corresponding duty, other than enriching themselves by such earnings. Thus, it would be necessary for the earnings of such trade unions like the NURTW should be removed from tax exemption. The researcher will refrain from raising issues that bothers on exemption of ecclesiastical bodies, charitable organizations et cetera, here, since these will form the bulk of our discourse in the next succeeding chapters.

4.3. Petroleum Profits Tax Act

Nigeria has exclusive rights to all mineral resources reposed under its territory including mineral oil. Nigeria thus grants licenses to oil producing companies to prospect, drill and mine crude oil. In Nigeria, the Federal Government acting

[579] J AAchorAgbonika; *Problems of Personal Income Tax in Nigeria* (Ibadan, Ababa Press Ltd, 2012) p. 102.
[580] *Ibid*, p.103.

through the Nigeria National Petroleum Corporation (NNPC), in joint venture with the major oil producing companies in exploration and production of oil. The federal government owns 59% in the ventures, while the operators own 41%. The federal government's share is managed by the NNPC which sells the crude oil and pays the proceeds gross into the federal account.[581]

It is therefore, noteworthy that it is the profits of operators (the oil producing companies) who are in partnership with the Federal Government that is chargeable to petroleum profit tax. The Federal Government's share is not taxed.

In the oil or petroleum industry, there are two types of companies involved in the chain of activities; these are:

(a) Upstream; the crude oil producing companies operate upstream.

(b) Downstream; these involve petroleum marketing companies and petroleum oil servicing companies. It is only the profits of oil producing companies that are chargeable to tax under the Petroleum Profit Tax Act,[582] while the other category are charged under the Companies Income Tax Act,[583]

Unlike other tax legislations, petroleum profit tax did not provide for any exemption provisions. It makes provision for allowable deductions only, these allowable deductions are all expenses, which are "wholly", "exclusively", "necessary" and "reasonably" incurred whether within or outside Nigeria, for the purposes of these operations during that period. Such outgoings and expenses among others include:

[581] *Ibid,* p.119.

[582] Cap P13, LFN 2010,

[583] Cap C21,LFN 2010.

(1) Rent (other than rents included in the definition of royalties and non-productive rents incurred by the company in respect of land and building occupied for its petroleum operations or compensation incurred under an oil prospecting license or an oil mining lease for disturbance such as compensation paid in respect of damage to crops, houses and interferences with right of way.

(2) All royalties the liability for which was incurred by the company in respectof crude oil exported from Nigeria or of casing petroleum spirit so exported after injection into crude oil;

(3) Interest upon money borrowed (that is loans) where the board is satisfied that the interest was payable on capital employed in carrying on the company's petroleum operations;

(4) Expenses incurred for the repair of premises, plant, machinery or fixture employed for the purposes of carrying on petroleum operation or for the renewal, repair or articles so employed;

(5) Bad or doubtful debts proved to have been doubtful ,during the period; et cetera,

All these are deducted from the profits of company engaged in petroleum operations before other profit are assessed.

4.4. Value Added Tax Act

Value Added Tax (VAT) is a merger of two concepts to wit; "value added" and "tax" for the purpose of clarity; each of these needs further elaboration.

The phrase "value added" has been described as "the increase in the value of goods or services in the process of their production or delivery". It has also been described as the amount of value a firm contributes to goods or service by applying its factors of production namely – land, labor, capital and entrepreneurial ability[584]. Value can be added to a product by:

(a) Altering its form (improving it);

(b) Removing it to an area of higher need (transportation);

(c) By passage of time (storage).

It is calculated by deducting from the value of goods or services the cost of the input of the other goods or services that were used in the process of the production of the goods or in the delivery of the services. It is the tax levied on this additional value of goods or that is couched "Value Added Tax"

VAT has the following characteristics:

(1) It is an expenditure or consumption tax.

(2) It is an indirect tax since the taxpayer does not pay a distinct tax but pays as the cost of the goods or service.

(3) It is a multi-stage tax.

(4) The incidence of VAT is on the final consumers

Unlike other taxes, VAT makes provision for goods and services to be exempted from VAT. Thus, no person whether artificial or natural is exempted from the payment of tax, hence only some classified goods and services are expressly prohibited as not vatable or taxable.

[584]AchorAgbonika, *op cit*, p.133.

Exempted goods from VAT include[585]:

(a) All medical and Pharmaceutical products

(b) Basic food items;

(c) Books and educational materials;

(d) Newspapers and magazines;

(e) Commercial vehicles and commercial vehicle .spare parts;

(f) Baby products;

(g) Fertilizer, agricultural and veterinary medicine, farming machinery and farming transportation equipment;

(h) All exports;

(i) Plant and machinery imported for use in the export processing zone;

(j) Plant and machinery purchased for utilization of gas in downstream petroleum operations;

(k) Tractors, ploughs and agricultural equipment and implements purchased for agricultural.

While exempted services include:

(a) Medical services;

(b) Service rendered by community bank, people's bank and mortgage institutions;

(c) Plays and performances conducted by educational institutional as Part of learning;

(d) All exported services;

[585]Schedule 1 to the VAT Act (part 1), Cap VI LFN 2010.

From the foregoing, it is observed that notwithstanding that organizations, companies, institutions et cetera, are exempted from the payment of some taxes, but under the VAT Act, only some certain goods and services enjoy such exemptions, though, but non-governmental, charitable or religious organizations enjoy exemptions on VAT when the procures goods for humanitarian purposes.

4.5. Personal Income Tax Act

Personal income tax is regulated by the Personal Income Tax Act of 1993 as adopted by Laws of the Federation of Nigeria.[586] The Act identifies taxable persons chargeable incomes determines accessible income and tax that income. The Act also determines the residence of the taxpayer for the purpose of payment and or collection of personal income tax.

All the indices identified above shall be discussed collectively, since one cannot assess a tax when he does not know the taxable person, nor would he assess when he does not know the income that is assessable. Since residence is pivotal to assessment and collection of income tax, its discussion will also be inevitable

Taxable Persons

Section 2 of PITA[587] identifies the persons chargeable to personal income tax. These could be categorized into three;

First category;

[586](LFN) 2010,Cap P.8
[587]LFN 2010, Cap p8

(a) Any individual or body of individuals such as communities, families.

(b) Any corporation sole; and

(c) Executors of estates of a deceased person

Second category;

Trustee of any settlement or trusts

Third category;

(a) Persons employed in the Nigeria Army, Navy, Air force and the Nigeria police other than in a Civilian capacity;

(b) Officers of the Nigerian Foreign Service

(c) Every resident of the Federal Capital Territory Abuja; and

(d) A person resident outside Nigeria who desire income or profit from Nigeria.

Note that the Act also identifies itinerant workers and families as taxable persons under subsection (3) and (5) respectively. This particular category, including the first and second categories are assessed by relevant StateBoard of Internal Revenue, while the third category is assessed exclusively by Federal Inland Revenue Service.

Assessment / Chargeable Income

Personal Income Tax Act, section 3, provides that Personal Income tax is charged on the income of every taxable person for the year from a source inside or outside Nigeria in respect of but not restricted to the following:

(a) The gains or profits from any trade, business, profession or vocation for whatsoever period of time such may have been carried out;

(b) Any salary, wages, fees, allowances or other gains or profits from a employment including gratuities, compensations, bonuses, premiums, benefits or other prerequisites allowed, given or granted by any person to an employee;

(c) Gain or profit including any premiums arising from a right granted to any other person for the use or occupation of any property;

(d) Dividends, interest or discount;

(e) Any pension, charge or annuity;

(f) Any profit, gain or other payment not falling within paragraphs a-e inclusive of this subsection.

It is worthy of note that these categories of chargeable income enumerated above are not closed. The combined reading of the last phrase of the session,[588]clearly attest to the above assertion.[589]

Exempted Income

Section 19(1) of PITA[590] provides that too many as follows: there shall be exempt from the tax all that income specified in the Third Schedule to this Act. Thus, incomes exempted from taxation of personal income tax are those enumerated under the third schedule to the Act.

(a) The emoluments payable from United Kingdom funds to members of visiting or other forces and to persons in the permanent service of the

[588]section 3 (1) and paragraph (f) of subsection1, *Ibid.*

[589]AchorAgbonika*, op.cit,* p. 60.

[590]Personal Income Tax (Amendment) Act 2011

United Kingdom Government and the emoluments payable to members of any civilian component and the income of any authorized service organizations, accompanying the visiting forces. Though, this exemption shall not apply to any individual who is a citizen of Nigeria or who resides in Nigeria.

(b) All consular fees received on behalf of foreign State or by a consular officer or employee of the State of his own account, all income of such officer or employee, other than income in respect of any trade, business, profession or vocation carried on by an officer or employee or in respect of any other employment exercised by him with Nigeria. though, this exemption shall not apply where the employee is engaged on domestic duties or where the officer or employee resides in Nigeria and is not also a national of the foreign State.

(c) Interest accruing to a person who is not resident in Nigeria is also exempted from taxable on the fulfillment of certain conditions;

(d) Interest on any loan granted by a bank on or after 1 January, 1997, to a person engaged in agricultural trade or business or the fabrication of any local and machinery or as working capital for any cottage industry established by the person under the Family Economic Advancement Programme as far as the moratorium is not less than eighteen months and the rate of interest on the loan is not more than the base lending rate at the time the loan was granted;

(e) The income of a national of the United States of America from employment by the International Cooperation Administration;

(f) The income of an individual from employment by the Ohio University of Athens, Ohio, as agent for the International Cooperation Administration, in connection with any scheme for the training of teachers in Nigeria;

(g) An income in respect of which tax is remitted or exempted under the provisions of the Diplomatic Immunities and privileges Act or of any enactment, order or notice continued in force or effected by that Act.

(h) The income of a local government or government institution;

(i) 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;

(j) Wound and disability pensions granted to members of the armed forces or any recognized national defence organization or to persons injured as a result of enemy action;

(k) Pensionthe income granted to a person under the provisions of the pensions Act relating to widows and orphans;

(l) The income of a trade union registered under the Trade Union Act, in so far as is not derived from a trade or business carried on by that trade union;

(m) Gratuities payable to a public officer by the government of the federation or a State in respect of services rendered by him under a

contract of service with that government and described as gratuities either in the contract or some other document issued by or on behalf of government in connection with such contract;

(n) Gratuities payable to an employee in the private sector in respect of service rendered by him under a contract of service with his employer and described as gratuities either in the contract or some other document issued by or on behalf of the employer in connection with such contractor are also exempted subject to certain conditions;

(o) The income of a statutory or registered friendly society in so far as such income is not derived from a trade or business carried on by such society;

(p) The income of a cooperative society registered under the Nigerian Cooperative Societies Act, not being income from any trade or business carried on by the society other than the cooperative activities solely carried out for and with its members or from any share or other interest possessed by that society in a trade or business in Nigeria or elsewhere carried on by some other person or authority;

(q) Any compensation for loss of employment.

From the foregoing, it is seen that only the aforementioned incomes, are exempted under the Personal Income Act.

Again, formerly, the official emoluments of the President, Vice President, Governors and Deputy Governors were fully exempted from income tax. But now, the official emoluments of the President, Vice President, Governors and Deputy

Governors are no longer tax exempt. This implies that the income of these officials (including allowances and benefits) are now fully taxable. Thus, if this law is properly implemented in line with the law as applicable to other individuals, the President, Vice President, Governors and Deputy Governors could technically become bankrupt as their personal income tax liabilities will likely exceed the cash component of their emoluments.[591]

4.6. Stamp Duties Act

Stamp duty is one of the oldest taxes. It was originally introduced in 1694[592] in England. Stamp duties are taxes on documents and not on persons. Stamp Duties Ordinance No. 5 1939 is the extant law on stamp duties, now encapsulated in the Laws of Federation.[593]

Stamp duties as form of taxation are relatively cheap to administer and collect. Stamp duty is payable *ad valorem* or fixed duty. *Advalorem* duties are duties whose sum increases with an increase in the value of the document evidencing the transaction. E.g. a company's share capital is subject to *ad valorem* duty of one naira for every 200 naira.[594] Fixed duties are flat and do not change irrespective of the value of the transaction. E.g duty on admission as a barrister or notary public is fixed[595].

[591] Personal Income Tax Act, 1993, Cap P8, LFN 2004 (now Amended by Personal Income Tax (Amendment) Act 2011).
[592] Stamp duty Act, 1694
[593] Cap S8 LFN 2010
[594] Section 100(2)
[595] Schedule to the Act

Charge of duty payable upon instruments are contained in the schedule to the Act.[596] These are arranged in alphabetical order as different heads of charge.

Exempted Duties

The regulations contained in the part II of the Act, specify exemptions to stamping as regards specific instruments. In addition to those specific exemptions, the schedule further contains exemptions of a general nature to stamp duties. These include:

(a) Transfers of share in the government or legislative stocks or funds Nigeria;

(b) Instruments for the sale, transfer or other disposition of any ship or vessel or part thereof;

(c) All instruments on which the duty would be payable by government.

(d) All instruments on which the duty would be payable locally by government in Nigeria or any of the departments thereof;

(e) Agreements made with the Nigerian Railway Corporation relating to the receipt and carriage of passengers, goods or animals;

(f) Indemnity bonds given to the Nigerian Railway Corporation by Consignees (when the railway receipt is not produced) in respect of the delivery of consignments of fresh fish, fruit and vegetables, and other perishable articles. That is delivery of consignments of perishable nature;

(g) Bond given by a public officer for the execution of his duties;

[596]Section 3,Stamp Duties Act, Cap S8 LFN 2010

(h) Instruments on which the payment of the duty would be payable by a consular officer in his official duties where the foreign government he represents grants a similar exemption to Nigerian consular officers;

(i) Instruments relating to the alienation of land or interest approved by local authorities of the southern States of Nigeria in accordance with rules made by them under local government laws;

(j) Instruments regarding which the government of the federation is competent to make laws executed by any cooperative society registered under any Act or law or by any officer or member of such a society relating to the business of such society;

(k) All document relating to the transfer of stocks and shares.

Again, the following receipt are exempted from stamp duties:

(a) Receipt given by a person or his representative on account of any salary, pay or wages or any other like payment made for the benefit of an employee or holder of an office in respect of his employment or an account of money paid in respect of any pension, superannuation allowance, compassionate allowance or other like allowance;

(b) Receipt endorsed or contained in any instrument liable to stamp duty and dully stamped, acknowledging the receipt of the consideration money expressed in the instrument or other interest thereby secured.

(c) Acknowledgment by a banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment;

(d) Receipt given for money deposited or withdrawn from a bank.

(e) Receipt given by the payee of a money order;

(f) Receipt given upon the payment of any government duties or taxes or money for the use of the government;

(g) The duplicate of any receipt required to be given in duplicate, the original receipt being dully stamped;

(h) Receipt given by an officer of a public department of the government of Nigeria or a State for money paid by way of imprest, advance or adjustment of account, where he derives no personal benefit therefrom, or for the refund of out of pocket expenses due from government;

(i) Receipt given for drawback or bounty upon the exportation of any goods or merchandize;

(j) Receipt given for the return of any duties of customs upon certificates of over-entry or upon re-importation certificates;

(k) Receipt given for the refund of any sums deposited with the treasury under the provisions of the Minerals Act;

(l) Receipt given for the return of monies over collected by government.

(m) Receipt given by an accused person for money or other property taken from him on his arrest;

(n) Receipt given by a prisoner on discharge, having being held placed on deposit in the treasury or otherwise retained during the term of his imprisonment;

(o) Receipt given for money given or subscribed to the Nigeria Red Cross Society.

In addition to the aforementioned exempted duties, it is provided under section 63(1) of the Act[597] that:

> Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale; provided that this section shall not apply to a conveyance or transfer operating as a voluntary disposition of property to a body of persons incorporated by a special Act, if that body is by its Act precluded from dividing any profit among its members and the property conveyed is to be held for the purpose of an open space or for the purposes of its preservation for the benefit of Nigeria.

From the foregoing provision, stamp duties shall not be payable on a conveyance or transfer of a voluntary disposition of property to incorporated bodies formed by an enabling Act, so far as such incorporated bodies do not share profits among its members and such property conveyed must be held as open space or must be for the benefit of Nigeria, that is, its utilization must be for public benefit. A classical example of this, is property held under charitable trust like parks.

[597]Stamp duties Act, Cap S8 LFN 2010.

CHAPTER FIVE

TAX EXEMPTIONS

5.1 Tax Exemption of Charitable Organisation

Charities may claim exemption from tax on most forms of taxation, with the exception of value added tax, if there are applied to charitable purposes.[598] 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.[599]

Registered charities are exempt from income taxation and may issue receipt to tax payers who make donations to them.[600] 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,[601] 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 Organization and Charitable Foundation, and slightly, different rules apply to each.[602]

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

[598] As already discussed in chapter 6 of this research work.

[599] *Tax Exemption for Charities* http:/www.gov.uk/government/publications/charities-detailed guidance-notes accessed 27 October,2015.

[600] As already discussed in chapter 3 of this research work.

[601] R.W Boadway& H.M Kitchen, *"Canadian Tax Policy"* 3rd edn, Canadian Tax Paper, No 103, Canadian Tax Foundation; P.190.

[602] *Ibid*.

may be corporations, trusts, or other organisations. They are allowed to undertake business activities that are related to their charitable activities.[603]

A charitable organization 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 organization 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.[604].

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 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,[605] 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.[606] 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:

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[603] *Ibid.*
[604] *Ibid.*
[605] *Ibid.*
[606] *Ibid.*

eighty percent of the receipted donations received in the previous tax year and ninety percent of the current year's income (net of capital gains and losses).[607] 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 include in the following year's income.[608]

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 of 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.[609]

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

[607] *Ibid*.
[608] *Ibid*.
[609] *Ibid*, P.191.

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)[610] on the gain. The rational 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.[611]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.[612]

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 entitledto that property, there is no charge to CGT. This is achieved by the

[610] TCGA 1992, S. 257.

[611] J. Tiley, *Revenue Law,* (4th edn, Oregon, Hart Publishing, 2000)p.911.

[612] TCGA, 1992, S.257(2).

charge on the deemed disposal specified by section 71[613] being treated as if it were a no gain, no loss disposal.[614]

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[615]. Again, under the inheritance tax rules, a transfer of value to a charity may be an exempt transfer.[616]

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,[617] public school[618] or almshouse[619] or vested in trustees for charitable purposes, so far as they applied to charitable purposes only.[620]

(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 6th April, 1999 to 5th April 2004, a charity is entitled to compensation for loss of the right to

[613] TCGA, 1992.
[614] A qualifying donation is treated as an annuity, as provided under TA 1988, S.339(4).
[615] Tiley*op cit*, p.911.
[616] Though, this position is not applicable in Nigeria .
[617] *Royal Antediluvian Order of Buffaloes v Owen*[1928] IKB 446.
[618] *Girls Public Day School Trust Ltd v Ereaut*[1931] AC12.
[619] *Mary Clark Home Trustees v Anderson* [1904] 2KB 645.
[620] *On application for charitable purposes as was decided in IRC v Helen Slatter Charitable Trust Ltd*[1981]STC471, CA.

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.[621]

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[622]. However, this requirement was not met where a charity established for the public benefit gave all its income to the children of employees of a particular firm which was connected with the managers of the charity.[623]

If charity A gives the money to charity B, the money has been applied for charitable purposes.[624] 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.

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[621] Tiley *opcit,* p.912.

[622] *Campbell v IRC* [1966] 45 TC 427,443,444, per Buckley.

[623] *IRC v Educational Grants Association* [1967] 2All ER 893.

[624] *IRC v Helen Slatter Charitable Trust* [1981]STC 471.

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.[625]

Requirement (b)(i) above is that the trade is exercised in the course of the actual carrying out of a primary purpose of the charity. Thus, if a charity runs a law surgeon and one of its objects is the provision of 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".[626]

However, it has been extended to a charitable association which organized a competitive music festival, the competitors being treated as the beneficiaries.[627] More obviously, the profits of a school run by nuns have been held exempt, the nuns, and

[625]Tiley*op cit*, p.913.
[626]*IRC v Glasgow Musical Festival Association* [1926] II TC 154, 163, Per Lord Clyde.
[627]*Ibid*.

not just the pupils being regarded as beneficiaries.[628] However, it does not follow that ordinary school teachers are beneficiaries.[629] 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 organization of the sales of gifts, given rise to taxable, not exempt, profits such sales not being integral parts of the charity's purposes[630]. However, by concession, profits from bazaars or jumble sales run by voluntary organisations are not generally charged to tax.[631] 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[632]. 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[633] This view seems doubtful but has not been tested in the courts.[634] 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.

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[628]*Brighton Convent of the Blessed Sacrament v IRC*[1933] 8 TC 76.

[629]*Brighton College v Marriot*[1926] AC 192, 203 [1926] 10 TC 213,234, Per Lord Buckmaster.

[630]Tiley*op.cit,* p.914

[631]*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.

[632]*Religious tract and Book Society of Scotland v Forbes* [1896] 3 TC 415.

[633] Under TA 1988, section 380.

[634]Tiley*op cit*. p. 914.

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."[635] Thus, where a charity sells an asset for cash and applies the proceeds to its charitable endeavours, no charge to tax arises.[636]

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.[637]

(c) 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,

[635] TCGA 1992, S.250(1); there is no requirement that the gain be applied for charitable purposes only.
[636] 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.
[637] Tiley*op cit*, p.915.

A reduces the rent from a commercial to a peppercorn rent.[638] The charity exempt is not available on this deemed disposal.

(d) 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[639]. If S cannot be a subsidiary, Section 171 cannot apply to defer the charge. Moreover, the gain cannot be exempted, since the gain cannot be said to have been "applied for charitable purposes" as there is no consideration.[640]

Restriction of Exemption; Qualifying and Non-Qualifying Expenditure

The tax available to a charity may be restricted.[641] In general, the restrictions apply only if, in the chargeable period concerned, the charity has "relevant income and gains" of €10,000 or more.[642] The phrase, "relevant income and gains" means (a) income which would be taxable but for the exemptions provided under the Act[643] (b)

[638]Peppercorn rent means a small or insignificant amount, a nominal consideration used to satisfy the requirements for the creation of a legal contract.
[639]*Von Ernest v IRC* [1980]STC 111.
[640] TCGA,1992,S.256.
[641] TA 1988, SS. 506 & 507. The purpose is to prevent schemes such as those behind *IRC v Helen Slatter Charitable Trust Ltd* (Supra).
[642]*TA 1988, S. 505* (3)(a).
[643]*Ibid*, S.505.

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[644]. 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[645]. 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.[646]

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.[647]

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 people is incurred otherwise than for exclusively charitable purpose; such expenditure is referred to as a "non-qualifying expenditure", while "qualifying

[644] *Ibid*, S. 505(5).
[645] *Ibid*, S. 505(3), applied by TCGA 1992, S.256(1).
[646] Tiley *opcit*, P.916.
[647] TA 1988, S. 505(7).

expenditure" is expenditure incurred for charitable purpose only.[648] 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.[649]

Again, loans and investments are treated as non-qualifying expenditure unless they fall within the categories of qualifying loans and qualifying investments set out[650]. 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 anarrangement under which the bank makes a loan to another person).[651]

Qualifying investments are also elaborately defined.[652] 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.[653]

A further rule ensures that if a non-qualify investment is made and realized, or loan is made and repaid, during the same chargeable period, reinvestment of the

[648] As already discussed earlier in this Chapter.
[649] TA 1988, S. 506(1).
[650] *Ibid*, S.506.
[651] *Ibid*, sch.20, pt II.
[652] *Ibid*, sch.20, pt I.
[653] *Ibid*, sch.20, para. 9.

proceeds during that chargeable period is left out of account when calculating the amount of "non-qualifying expenditure" incurred by the charity.[654]

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.[655] The charity may specify the items of relevant income and gains, which are to be treated as attributable to the non-exempt amount,[656] a matter of great importance now that tax credits on dividends cannot be recovered in full. If the charity's total expenditure ina chargeable period exceeds its relevant income and gains, so that part may be attributed to earlier chargeable period.[657] Where, there is non-qualifying expenditure, revenue practice is first to restrict the CGT exemption for any excess.[658]

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 save 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

[654] *Ibid*, S.506 (5).
[655] *Ibid*, S.505 (3).
[656] *Ibid*., S. 505(7).
[657] *Ibid*., S. 506(6).
[658] Some support for this practice is given in TA 1988, S. 505(3).

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.[659]

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.[660]There is, therefore, no immunity for realized capital gain built up behind the screen of charity.[661]

5.2. Tax Exemption of Non-Governmental Organisations

A non-governmental organization (NGO) is an association of persons registered under section 590 of Companies and Allied Matters Act(CAMA).[662] Upon registration of the association, the body corporate may contract in the same form and manner as an individual.[663]

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

[659] TA 1988, S. 506(6).

[660] TCGA 1992, S. 256(2).

[661] One view, a temporary charitable trust is not really a qualifying charity at all; this is the view expressed in Whitman, Capital Gains Tax(4th 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.

[662] Cap C20 LFN, 2010.

[663] Companies and Allied Matters Act(CAMA) S.605, Cap C20 LFN 2010.

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.[664] 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.[665]

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.[666] 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.[667] If the exemption application has been approved by SARS (South African Revenue Service), the organization is registered as a Public Benefit Organization (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 Organization (NPO) does not automatically qualify for preferential tax treatment. An organization will only enjoy preferential tax treatment

[664] http://thenationonline.ng.net/guildeline-on-tax-exemption-for-ngos accessed on 30th November, 2015.
[665] *Ibid*.
[666] http://www.sars.gov.za/clientsegments/business/teo/pages accessed on 30th November, 2015.
[667] *Ibid*.

after it has applied for and been granted approval as a Public Benefit Organization (PBO) by the Tax Exemption Unit (TEU).[668]

The conditions and requirements for an organization to be approved as a PBO are contained in the Act,[669] while the rules governing the preferential tax treatment of PBO are contained in the Act.[670]The Act[671]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.[672] 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

[668] *Ibid*.
[669] Income Act 1961, section 30.
[670] *Ibid,* Section 10(1) (CN).
[671] *Ibid.*
[672] http://www.sars.gov.za, *op cit*.

applied to receipts and accruals derived from a trading activity or business undertaking which does not qualify for exemption.[673]

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.[674]

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 organization, is entitled to a deduction from taxable income if the donation is supported by necessary section 18A receipt issued by the organization 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.[675]

Similarly in Nigeria, the Federal Inland Revenue Service (FIRS) published an information circular regarding the guidelines on the tax exemption status of Non-Governmental Organization (NGOs).[676]

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[673] *Ibid*.
[674] *Ibid*.
[675] *Ibid*.
[676] FIRS Circular No. 2010/PC- TI. 2.2.3. 1028.

It has been stated earlier,[677] 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 organization or association.[678]

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.[679] Thus, where NGO engages in any trade or business, the profit derived therefrom will be subjected to income tax as provided for in the Act.[680] 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.[681]

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.[682] The company was subsequently assessed for tax on the proceeds of the sale of the property. The

[677] Chapter 4 of this research work
[678] Cap C21, LFN 2010, section 23(1).
[679] CITA, section 23(c) and PITA, section 19, paragraph 13, third schedule.
[680] FIRS Circular, *op cit*.
[681] *Ibid*.
[682] [1996] 2All NLR 303.

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 common everyday 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.[683] 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,*[684] 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.

[683] [1955] 3All ER 48; IITC 297.
[684] [1951] 32 TC 238.

Again, in *Burge v Payne*[685], 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.

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 organization listed under the 5th 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.[686]

Registration with FIRS by NGOs

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

[685] [1969] 1 All ER 467.
[686] Cap VI LFN 2010.

(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.

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.

Filing of Return by NGOs

In line with section 55 of CITA,[687] 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 by such form or return be required for the purpose of the Act and any rules made with respect to such profits, allowances,

[687] Cap C21 LFN, 2010.

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 organization that the information contained in the return is true and correct[688].

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.

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.

[688] FIRS Circular, *op cit*.

(c) Monitoring: The relevant ITO shall monitor the activities of NGOs within its jurisdiction regularly to ensure compliance with provisions of the tax laws. Monitoring shall be through NGO desk setup for that purpose.[689]

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[690].

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[691]. It is expected that all NGOs will abide with the aforementioned regulations in order to

[689] *Ibid*.
[690] *Ibid*.
[691] *Ibid*.

continue to enjoy tax incentives granted by the Government in furtherance of their charitable activities.

5.3. Tax Exemption of Religious Organization

As already stated, religious organisations in Nigeria are generally exempt from the payment of income tax to the governments. Companies Income Act 2010, 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[692] assessment in respect of specific donations advanced to religious organisation by any company in Nigeria.

As already discussed[693], 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.

[692] Has been fully discussed in Chapter 6 of this research work.
[693] In chapter 6 of this work.

Further to the above, religious organisations are also exempted from the payment of capital gain tax under Capital Gains Tax Act.[694] 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.[695] Also, organization 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.[696]

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[697] or business, aside that, they retain their tax exempt status.

In *Walz v Tax Commission of the City of New York*,[698] 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

[694] Cap C1,LFN 2010, .
[695] *Ibid,* section 26 (1)(a) .
[696] FIRS circular No. 2010 *op cit*.
[697] What amounts to trade for the purposes of tax liability has been fully discussed in chapter 7.2 of this work.
[698] [1970] http://atheism.about.com/library/decisions/tax/bldecwalztaxation.htm. accessed on 22nd December, 2015.

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.[699]

[699] *Ibid*.

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 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.[700]

Part of this argument involved emphasizing the difference between direct monetary subsidies and the indirect economic benefit of tax exemptions.[701]

> 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.[702]

This constitutes a sort of contradiction for Justice Burger; on one hand, he argues that the tax exemptions do not benefits religion, but then he states that tax

[700] *Ibid*.
[701] Umenweke, *op cit*, p.437.
[702] *Ibid*.

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, non-profit 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[703] 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?[704]

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 and museums do.[705] Once again, the court allowed the government to give special privileges to religion without it being construed as "establishing, sponsoring, or supporting religion.[706]

Similarly, in *First Unitarian Church of Los Angeles v County of Los Angeles*[707], 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

[703] Justice Burger delivered the lead judgment.
[704] Walz case *supra*.
[705] Umenweke, *opcit,* p.440.
[706] *Ibid*.
[707] [1958] http://atheism.about.com/library/decisions/tax/bldec-firstunitarian, accessed 22nd December, 2015.

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, kin 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.[708]

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 coerced affirmation as to church doctrine, advantage or beliefs.

[708] Per Justice Brennan in *supra*.

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.[709]

Also, in *United States v Christian Echoes National Ministry*[710], 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

[709]Umenweke, *op cit*, pp. 434 – 435.

[710] [1972] http://atheism.about.com/library/decsions/taxbldec-uschristianechoes.htm accessed December, 2015.

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 organization 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.[711]

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

[711] *Ibid*.

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,*[712] 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.[713]

Also, in *JimmySwaggart Ministries v Board of Equalization of California,*[714] 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 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 organization. Over an extended period of time (1974 -

[712] [1886] atheism.about/library/decision/tax/bldec-gibbonsdc.htm accessed 26th December, 2015.
[713] *Ibid*.
[714] [1990] atheism.about/library/decision/tax/bldec-swaggartcalifornia.htm accessed on 26th December, 2015.

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 organization 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 organization 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.[715]
>
> 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

[715] *Ibid*.

> there is a sale or a use, a question which involves only a secular determination.[716]

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*[717], 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*[718]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".

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[716]*Ibid*.

[717]Skepticism.org/timeline/april-history/5443-hallervpennysylvania-court-rules-tax-exemptions-must-be-available-for-all-religious-literature accessed on 26th December, 2015.

[718] [1989] http:/atheism.about.com/library/decisions/tax/bldec-texas-bullock.htm, accessed 27th December, 2015.

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 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 *interalia*:

> 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.[719]

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

[719] *Ibid*.

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.*[720]Thecourt 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.[721]

[720]*Supra*.

[721]*Texas Monthly Inc. v Bullock* supra.

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 unsupportable assertion" that government is not permitted to "convey a message of endorsement of religion"[722].

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.[723]

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

[722] *Ibid*.
[723] *Ibid*.

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 rules unconstitutional in *Murdock and Follett* cases.[724].

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 organization 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[725], 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 organization". Thus, only an organization that meets the statutory criteria of public benefit organization

[724] *Ibid*.

[725] 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.

and which has, in addition, been approved by the commissioner will have tax exempt status.[726]

The revised tax system creates a new category of "public benefit Organisations" (PBOs), eligible to claim exemption from tax[727]. To qualify as a PBO, an organization 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 organization has been established and which meets the requirement of section 30 of the income tax Act;

(e) Register as a non-profit Organization (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.

[726] This new tax regime has taken effect from 15th July 2001.http:/www.saica.co.za/integritax/2005/1258-public-benefit-organization-tax-exemptstatus.htm, accessed 28th December,2015.

[727] Income Tax Law Amendment Act 2001, section 10 (1)(CN) & 30.

Many PBOs, including most churches, are voluntary associations – a group of three or more people working together to achieve a common non-profit objective.Voluntaryassociation 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.

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.[728]

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.[729]

Public Character Test;

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

It is pertinent to note that for these organization[730] to be recognized as PBO, the organization must first be registered as a Non-Profit Organization (NPO) in terms of the Non-Profit Organization Act, 1997. However, the Commissioner of Revenue may waive this requirement if an organization can show "good cause" why it should

[728] www.sacc-it.org.za/taxbook2.html accessed on 28th December,2015.
[729] *Ibid*.
[730] Be it religious, charitable or non-governmental organization.

not have to register.[731]NPO registration is fairly simple; an organization is required to do two things:

- File an acceptable founding document or constitution of the organization 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 organization with a certificate of registration and a registration number. An NPO remains registered, until it is deregistered. Deregistration may be voluntary (due to the organization's request or its dissolution) or involuntary (due to the organization'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 organization's financial year;
- Prepare an annual narrative report of the organization's activities,[732]et cetera,.

[731]www.sacc-it.org.za/taxbook2.htmlaccessed on 29th December,2015.
[732]*Ibid*.

Again, there is a prohibition on excessive compensation an organization 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"[733]. 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 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 organization's purpose and that does not compete unfairly with non-exempt traders;
- Income from occasional trading conducted primarily using uncompensated, voluntary assistance; and

[733] Income Tax Laws Amendment Act, 2002 "The Amendment Act".

- Income from any other type of business activity explicitly approved and gazetted by the Minister of Finance.[734]

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 organization.[735] 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.[736]

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.

[734] www.sacc-it.org.za,*op cit.*

[735] SKlingehofer et al, "Global Perspective on Not-for profit law" (ICNL) 1996 available at www.icnl.org. accessed 29th December,2015.

[736] www.icnl.org/research/journal/vol3iss1/art-4.htmaccessed 29th December, 2015.

CHAPTER SIX

TAX EXEMPTION IN SOME SELECTED JURISDICTIONS

6.1. United Kingdom (UK)

Taxation in the United Kingdom will involve payments to a minimum of two different levels of government; the Central government (Her Majesty's Revenue and Custom) and local government.[737] Central government revenues emanate primarilyfrom Income tax, National Insurance contributions, Value Added Tax, Corporation and Fuel duty. Local government revenues emanate from grants from central government funds; business rates in England and Wales, Council tax and increasingly from fees and charges such as those from on-street parking.[738]

Tax exemption[739] refers to a monetary exemption which reduces taxable income. Tax exempt status can provide complete relief from taxes, reduced rates or tax on only a portion of items.[740]

Religious organisations and other not for profit organisations in the United Kingdom belong to a domain of entities known as "Charities", which enjoy tax exemptions in the UK. Charity law within the UK varies between England and Wales, Scotland and Northern Ireland; but the fundamental principles are the same.[741] Most organisations that are charities are required to be registered with the appropriate authority

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[737] http:/en.wikipedia.org/wiki/taxation in the United Kingdomaccessed 13th January, 2016.
[738] *Ibid.*
[739] Though, the term has been broadly discussed under clarification of concepts.
[740] http://en.wikipedia.org/wiki/tax-exemptionaccessed on 13 January, 2016.
[741] "Charitableorganisation",Wikipedia, the free encyclopedia, available at http:// en.wikipedia.org/wiki/charitable organisation.html, accessed 13 January,2016.

for their jurisdiction,[742]but significant exception apply so that many organisations are bonafide charities but do not appear on the public register. The registers are maintained by the Charity Commission for England and Wales. The organization that intend to apply must meet the specific legal requirements summarized below, and the filling requirements. They are also subject to inspection or other forms of review.

By virtue of Chargeable Gains Act 1992, Charitable Trusts such as trusts for the advancement of religion, are exempt from capital gains tax on the disposal of assets, provided they are devoted to charitable purposes only. Also, under UK Corporation Tax Act, 2010, section 478, Charitable companies – such as those setup for the advancement of religion are generally exempt from the payment of corporate income tax on their profits, provided the profits are applied to the purposes of the charitable company only.[743]Exemption from income tax also exists in favour of charitable trusts setup, *interalia* for the advancement of religion, in respect of profits derived from a charitable trade carried on by the charitable trust.[744]

Religious bodies qualifying as charities also enjoy statutory exemption from value added tax in respect of certain goods purchased by, or donated to them, for charitable purposes.[745]

All the same, to enjoy any of the available tax reliefs in the UK, the religious organisations and other not for profit organisations must be recognized by HM Revenue and Customs (HMRC),[746] which implies that the religious organisations must be

[742]Though, for the purpose of this discourse, UK jurisdiction of England and Wales shall be the scope

[743] Purpose which include for the advancement of religion

[744] UK Income Tax Act 2007, sections 524 and 525 (hereinafter, the ITA) ITA is available athttp://www.legislation.gov.uk/ukpga/2007/3/pdfs/ukpga_2007003en.pdfaccessed 13 January, 2016

[745] UK Value Added Tax Act 1994, S.30 and Group 15 of part II of the Eight Schedule

(i) based in the UK, European Union (EU), Iceland, Liechtenstein or Norway;

(ii) established for religious purposes only;

(iii) registered with the Charity Commission of England and Wales or other regulator, where applicable;

(iv) run by fit and proper persons; and

(v) apply for and obtain recognition of tax exemption from the HMRC.[747]

Religious organization recognized as tax exempt by the HMRC do not pay tax on certain types of income and gains, provided it applied the income or gain to the exclusive advancement of its religious purpose. This is known as "charitable expenditure".This includes tax on donations, profits from trading, rental or investment income, profits realized from the sale or disposal of an asset or upon the purchase of property.[748]

However, it is not all the income and gains of recognized religious organization in the UK that are tax exempt. Religious organisations recognized as tax exempt by the HMRC are still required to pay tax on:

(a) dividends from UK companies;

(b) profits from developing land or property; and

(c) purposes of goods and services (but there are special VAT rules for religious organisations).

Religious organisations also pay business rates on non-domestic buildings, but they get an 80% discount. Also, a religious organization recognized as tax exempt by the HMRC must pay tax on part of its income not applied to the advancement of its religious

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[746] "Charities and Tax-Gov.UK." available at http://www.gov.uk/charities-and-tax/tax-reldiefsaccessed 13 January, 2016.

[747] *Ibid.*

[748]

purpose. Such taxable part of the income of a religious organization is known as "non-charitable expenditure".

Some ministers are exempted[749] from liability on certain types of income connected with their occupation of property. Those qualifying are ministers who:

(a) are provided with a residence from which they are expected to perform their duties; and

(b) hold a full-time office as a minister.

This special treatment only applies where some legal interest in the residence belongs to either a charity or an ecclesiastical corporation. So, for example, premises belonging to a Diocesan Board of Finance, a Cathedral Chapter, a body of trustees acting for a denomination or for a local congregation, and a parochial church council, are all covered. It also covers parsonage houses vested in incumbents of benefices in the Church of England.[750]

There are also examples of properties that do not meet the requirements for exemption.These include:

(a) premises privately leased by the Minister from a charity

(b) premises in ,which the minister lives rent-free but which are not his or her official residence (for example a cottage provided by the congregation)

(c) premises occupied by a minister holding an appointment that could be filled by a layman (for example a school teacher).

[749]ITEPA 2003, section 290 and Extra-Statutory Concession A61, available atwww.hmrc.gov.uk/mannuals/eimmanul/EIM60007.htmaccessed 13 January, 2016.
[750]*Mitchell v Child* 24TC 511.

Again, earnings of some specified persons are exempted from liability to income tax. These include:

(a) employee in lower-paid employment,

(b) a director in lower-paid employment and has no material interest in the company who is either a full-time working director or the company is non-profit making or is established for charitable purposes only.[751]

It is worthy of note that the mere fact the company does not make a profit does not mean that it is non-profit making for the purpose of this test. Such a company must not carry on a trade and its function must not consist wholly or mainly in the holding of investments or other property.

Further, charities may claim exemption from tax on most forms of income and capital gains, if they are applied to charitable purposes.[752] These exemptions relate to all charitable tax exemptions and are subject to the condition that income is applied to charitable purposes. These exemptions among others including the following;

(a) Income from Land: The profits of a property business carried on by a charitable company are chargeable to tax under Corporation Tax Act 2010. If a charity is buying and selling land or property this may be treated as non-primary purpose of trading, the profits of such a trade will be chargeable to tax. But if the profits are ploughed back to charitable cause, then such profits will be exempted from tax. These exemptions applied to income from property businesses both in

[751] "EIM20007", *Ibid.*

[752] Main statutory exemptions from tax for the income of a charity are contained for in Corporation Tax Act 2010 (CTA) sections 466 to 493 for charitable companies, income Tax Act 2007 (ITA) sections 521 to 536 for charitable trusts.

the UK and overseas. The exemptions do not apply to profits from buying and selling land or profits arising from the development of land.

(b) Interest and other annual payments: CTA 2010, sections 475 – 476 and 486 – 488 provide for An exemption to charitable companies and charitable trust respectively in respect of:

i. all interest, Gift Aid donations and other annual payments.

ii. any non-UK equivalent of such income which would otherwise fall to be assessed as foreign income.[753]

It is worthy of note that any payment from one charity to another charity is taxable income in the hands of the receipt charity.[754]However, it is exempt from tax if it's applied for charitable purposes only. Exemption is provided for tax in respect of dividends and other distributions received by charitable companies and charitable trusts respectively from companies not resident in the UK.

(c) TradingIncome

A charity is exempt from tax on the profits of any trade carried on in the UK or elsewhere provided its income is applied solely to charitable purposes and which is either;

i. exercised in the course of actual carrying out of a primary purpose of the charity.[755]

ii. mainly carried out by beneficiaries of the charity.[756]

iii. a non-primary purpose trade the turnover of which falls below certain limits.[757]

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[753]http://www.gov.uk/government/publications/charities-detailed-guidance-notes/annex-i-tax-exemptions-for-charities; accessed 16 February, 2016.

[754]ITA 2007, S.523 (trusts) and CTA 2010, S.474.

[755]CTA 2010,S.478 for charitable companies and ITA 2007, S.524 for charitable trusts.

[756] CTA 2010,S.478, ITA 2007, S.524.

iv. the profits arise from certain lotteries.

Here, primary purpose trading implies trading exercised in the course of carrying out a primary purpose of the charity such as religious charity selling bibles, a charitable school charging pupils, or a charitable clinic charging patients or selling medicines

(d) Capital Gains Tax

The TCGA 1992, provides an exemption from tax on capital gains provided the gains are applied for charitable purposes.[758]

(e) Fund Raising Events

Profits arising from fund raising events organized by charities are exempted from tax[759].

It is worthy of note that where a religious institution has made income or gain which does not qualify to tax relief,it must complete a tax return. The religious organization is required to complete Company Tax Return, if it is a limited company or an incorporated association. Where the religious institution is a trust, it s required to complete a Trust and Estate Self-Assessment Tax Return. A religious organization may have to pay a penalty if its tax return is completed late or if it fails to complete one as at when due.

However, where the religious or Not for Profit Organization has not made any taxable income or gain, it is only required to complete a tax return where the HMRC so requests where the income of the organization is over €10, 000, it must submit an annual return to the Charity Commission of England and Wales. This annual return is different

[757]CTA 2010,S.480, ITA 2007, S.526; CTA 2010,S.483 for charitable companies and ITA 2007, S.529 for charitable trusts.

[758]section 256

[759]http://www.ato.gov.au/non-profit/getting-started/in-detail/types_of_charities/religious-institutions-access-to-tax-concession/?page21/what is a religious institution accessed 15 January, 2016.

from the charity return that the organization is required to send to the HMRC where applicable.

6.2. United States of America (USA)

In USA, charitable, non-profit and religious organisations are colloquially known as 501 (c) organisations.[760] The United States Internal Revenue Code, provides that 29 types of non-profit organisations are exempt from some federal Income taxes.[761]

The most common type of tax-exempt nonprofit Organization falls under category 501 (c)(3), where a nonprofit organization is exempt from federal income tax if its activities have the following purposes: charitable, religious, educational, scientific, literary, testing for public safety, fostering amateur sports competition, or preventing cruelty to children or animals.[762]

Section 501 (c)(3) Requirements

IRS Code, section.501(c)(3)of the exempts non-profit entities, like church and other religious institutions from taxes and IRS code, S.170 (c) 2(B) allows for individuals who donate monies to those entities to deduct their contributions from individual tax returns.

IRC 2006, S.501(c)(3) provides as follows:

> Corporations and any community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur

[760] http://en.wikipedia.org/wiki/501(c)-organiztaion, accessed 17 January, 2016

[761] Section 501 (c) and sections 503 to 505 set out the requirementsfor the attaining such exemptions.

[762] *Ibid.*

> sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda or otherwise attempting, to influence legislation (except as otherwise provided in sub-section (h) and which does not participate in or intervene in (including the publishing or distributing of Statements) any political campaign on behalf of (or in opposition to) any candidate for public office.

While, IRC 2006, Section 170 (a)(i) and Section 170 (c)(2)B provides that:

> It(there) shall be allowed as deduction any charitable contribution (as defined in subsection c) payment of which is made within the taxable year… allows for an individual to deduct a charitable contribution made to a church or religious non-profit organization.

The Federal Government confers tax exempt status on non-profit organisations and the IRS Code's definition of a non-profit includes religious organisations.[763] This status provides two distinct tax benefits; (a) S.501(c)(3) organisations themselves do not pay taxes; (b) people (donors) who donate to those organisations may deduct the value of those donations on their individual tax returns[764]. For Churches, Congress provided an additional benefit; churches automatically qualify for tax exempt status under section.501(c)(3)[765]. Hence, churches that meet the requirements of IRC are automatically considered tax exempt and are not required to apply for and obtain recognition for tax-exempt status from the IRC.[766]

[763]IRC, Section 501(c)(3)

[764]IRS Code limits the amount of these deductions to no more than fifty percent of the person's total income, if the contribution goes to a church, IRC 2006, S.170 (b)(1)(A).

[765]*Branch Ministries v Rossolti*(Branch Ministries) (2000) 211F: 3d, 137,139.

[766]section 501(c)(3)

Although, there is no requirement to do so, many churches seek recognition of tax-exempt status from the IRS because this recognition assures church leaders, members and contributors that church is recognized as exempt and qualifies for related tax benefits. For example, contributors to church recognized as tax exempt would know that their contributions generally are tax deductible.[767]

On the other hand, religious organisations, unlike churches, that wish to be tax exempt generally must apply to the IRS for tax-exempt status unless their gross receipts do not normally exceed $5,000 annually.[768]

Factors that jeopardize tax-exempt status of all IRC organisations,[769] including churches and religious organisations must adhere to certain rules, these among others include:

(a) Their net earnings may not inure to any private shareholder or individual;

(b) They must not provide a substantial benefit to private interests;

(c) They must not participate in or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office;

(d) The organization's purposes and activities may not be illegal or violate fundamental public policy; and

(e) They must not devote a substantial part of their activities to attempting to influence legislation.[770]

Some of these factors shall be discussed in *seriatim*.

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[767] *Ibid.*
[768] *Ibid.*
[769] section 501(c)(3)
[770] *Ibid.*

Prohibition on Investment and Private Benefit

(a) Inurement to Insiders

Churches and religious organisations, like all exempt organisations under IRC section 501(c)(3), are prohibited from engaging in activities that result in inurement of the church's or organization's income or assets to insiders (such as persons having a personal and private interest in the activities of the organization). Insiders could include the Minister, Church Board members, Officers, and in certain circumstances, employees. Examples of prohibited inurement include they payment of dividends, the payment of unreasonable,compensation to insiders and transferring property to insiders for less than fair market value.[771] The prohibition against inurement to insiders is absolute; therefore, any amount of inurement is, potentially, grounds for loss of tax-exempt status. In addition, the insider involved may be subjected to excise tax. It is worthy of note that prohibited inurement does not include reasonable payments for services rendered, payments that further tax-exempt purposes or payment made for the fair market value of real or personal property.[772]

(b) Private Benefit

An IRC section 501(c)(3) organization's activities must be directed exclusively towards charitable, educational, religious or other exempt purposes. The organization's activities may not serve the private interests of any individual or organization. Rather, beneficiaries of an organization's activities must be recognized objects of charity (such as the poor or the distressed) or the community at large (for example, through the conduct of religious

[771] *Ibid.*
[772] *Ibid.*

services or the promotion of religious private benefit is different from inurement to insiders. Private benefit may occur even if the persons that benefitted are not insiders. Also, private benefit must be substantial to jeopardize tax-exempt status.[773]

Restriction on Lobbying Activity

In general, no organization, including a church, may qualify for IRC section 501(c)(3) status if a substantial part of its activities attempt to influence legislation (commonly known as lobbying). An IRC section 501(c)(3) organization may engage in some sort of insubstantial lobby, but substantial lobbying activity risks loss of tax-exempt status.

A church or religious organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting or opposing legislations, or if the organization advocates the adaptation or rejection of legislation.[774]

Churches and religious organisations may, however, involve themselves in issues of public policy without the activity being considered as lobbying. For example, churches may conduct educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.[775]

Prohibition on Political Campaign Activity

[773] *Ibid.*
[774] *Ibid.*
[775] *Ibid.*

Under the Internal Revenue Code, all IRC section 501(c)(3) organisations, including churches and religious organization, are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaigns funds or public Statements of position(verbalorwritten) made by or on behalf of the organization in favour of (or in opposition to) any candidate for public office clearly violate the prohibition may result in denial or revocation of tax-exempt status and the imposition of excise tax.[776]

Certain activities or expenditures may not be prohibited depending on the facts and circumstances. For example, certain voter education activities (including the presentation of public forums and the publication of voter education guides) conducted in a non-partisan manner do not constitute prohibited political campaign activity. In addition, other activities intended to encourage people to participate in the educational process, such as voter registration and get-out-the-vote drives, would not constitute prohibited political campaign activity if conducted in a non-partisan manner.[777] On the other hand, voter education or registration activities with evidence of bias that (a) would favour one candidate over another; (b) oppose a candidate in some manner; or (c) have the effect of favouring a candidate over group of candidates, will constitute prohibited participation or intervention.[778]

It is worthy of note that individual activity by religious leaders does not jeopardize the tax-exempt status of the organization. Thus, political campaign activity

[776] *Ibid.*
[777] *Ibid.*
[778] *Ibid* .

prohibition is not intended to restrict free expression on political matters by leaders of churches or religious organisations speaking for themselves, as individuals. Nor are leaders prohibited from speaking about important issues of public policy. However, for their organization to remain tax exempt under IRC section 501(c)(3), religious leaders cannot make partisan comments in official publications or at official church functions. To avoid potential attribution of their comments outside of church functions and publications, religious leaders who speak or write in their individual capacity are encouraged to clearly indicate that their comments are personal and not intended to represent the views of the organization.[779]

Unrelated Business Income Tax (UBIT)

Net Income subject to the UBIT

Churches and religious organisations, like other tax exempt organisations, may engage in income-producing activities arenot a substantial part of the organization's activities[780]. However, the net income from these activities will be subject to the UBIT if the following three conditions are met:

(a) The activity constitutes a trade or business ,

(b) The trade or business is regularly carried on, and

(c) The trade or business is not substantially related to organization's exempt purpose.[781]

[779] *Ibid.*

[780] *Ibid.*

[781] The fact that the organization uses the income to further its charitable or religious purposes does not make the activity substantially related to its exempt purposes.

Exception to UBIT

Even if an activity meets the above criteria, the income may not be subject to tax if it meets one of the following exceptions:

(a) Substantially all the work in operating the trade or business is performed by volunteers;

(b) The activity is conducted by the organization primarily for the convenience of its members; or

(c) The trade or business involves the selling of substantially all of which was donated.

In general, rents from real property, royalties, capital gains, and interest and dividends are not subject to the unrelated business income tax unless financed with borrowed money.

Examples Of Unrelated Trade Or Business Activities

Unrelated trade or business activities vary depending on types of activities. Such activities include advertising, gaming, sale of merchandize and publications and rental income.

(i) Advertising

Many tax-exempt organisations sell advertising in their publications or other forms of public communication. Generally, income from the sale of advertising is unrelated trade or business income. This may include the sale of advertising space in weekly bulletins, magazines or journals, or on church or religious organization websites.[782]

(ii) Gaming

[782] *Ibid.*

Most forms of gaming, if regularly carried on, may consider the conduct of unrelated trade or business. This can include the sale of pull-tabs and raffles. Income derived from bingo games may be eligible for a special tax exception (inaddition to the exception regarding uncompensated volunteer labor), if (a) the bingo game is the additional type of bingo (as opposed to instant bingo, a variation of pull tabs) (b) the conduct of the bingo game is not an activity carried out by for profit organisations in the local area and (c) the operation of the bingo game does not violate any State or Local law.[783]

(iii) Sale of merchandise and publications.

The sale of merchandise and publications (including the actual publication of materials) can be considered the conduct of unrelated trade or business if the items involved purposes of the organisations.[784]

(iv) Rental Income

Generally, income derived from the rental of real property and incidental personal property is excluded from unrelated business income. However, there are certain situations in which rental income may be unrelated business taxable income;

a) If a church rents out property on which there is debt outstanding (for example, a mortgage note), the rental income may constitute in related debt financed income subject to UBIT. (However, if a church or convention or association of churches a acquires debt-financed land and intends to use it for exempt purposes within 15 years

[783] *Ibid.*
[784] *Ibid.*

of time of acquisition, then income from the rental of the land may not constitute unrelated business income)[785].

b) If personal services are rendered in connection with the rental, then the income may by unrelated business taxable income.

c) Parking Lots

If a church owns a parking lot that is used by church members and visitors while attending church services, any parking fee paid to the church would not be subject to UBIT. However, if a church operates a parking lot that is used by members of the general public, parking fees would be taxable, as this activity would not be substantially related to the church's example purpose, and parking fees are not treated as rent from real property. If the church enters into a lease with a third party who operates the church's parking lot and pays rent to the church, these payments would not be subject to tax as they would constitute rent from real property.[786]

Also worthy of discourse here, is the employment tax of church of religious organization ministers and staff.

Employment Tax of Religious Organisations

Generally, churches and religious organisations in the USA are required to withhold report and pay income and Federal Insurance Contribution Act (FICA) taxes for their employees. Employment tax includes income tax withheld and paid on behalf after employee. Substantial penalties may be imposed against a church or religious

[785] *Ibid*
[786] *Ibid*

organization that fails to withhold and pay the proper employment tax. Whether a church or religious organization that fails to withhold and pay employment tax depends upon whether the church's workers are employees. Determination of worker status is important. Several facts determine whether a worker is an employee.[787]For employment tax purposes, no distinction is made between classes of employees. Once there is an employer-employee relationship between the religious body and its worker (s).It makes no difference how it is labeled.

An officer of a religious institution is generally an employee thereof; however, an officer who performs no services or only major service, and neither receives nor is entitled to receive any pay, is not considered an employee. An independent contractor is not considered employee of a religious body.To determine whether an individual is an employee or an independent contractor, the relationship of the worker and the religious body must be examined. Here, all information that provides evidence of the degree of control and the degree of independence must be considered.[788]Facts that provide evidence of the degree of control and independence fall into three categories; behavioral control[789];

financial control;[790] and the type of relationship of the parties.[791]

[787]IRS Tax Guide for churches and religious organization: Benefits and Responsibilities under the Federal Tax Law"availableathttp://www.irs.gov/pub/irs-pdf/p/828.pdfaccessed 21 January, 2016.

[788]*Ibid.*

[789]Facts that show whether the religious body has the right to direct and control how the relevant worker does the relevant task include the type and degree of (a)instructions that the religious institution gives to the worker; and (b) training that the religious body gives to the worker.

[790]Facts that shows whether the religious body has right to control the business aspects of the worker's job include; (a)the extent to which the worker has unreimbursed expenses in connection with the services afforded the religious body; (b) the extent to the worker's investment in the tools or facilities used in

Generally, the religious institution is expected to invite the IRI to determine whether its workers are employee or not[792].Facts that will show whether the religious body has the right to direct and control how the relevant worker does the relevant task including the type and degree of; (a) instructions that the religious institution gives to the worker; (b) and training that the religious body gives to the worker. Again facts that will show whether the religious body has the right to control the business aspects of the workers job include:

a. The extent to which the works has unreimbursed expenses in connection with the service afford the religious body; (b) the extent of the worker's investment in the tools or facilities used in performing the services; (c) the extent to which the worker makes has for services available to the relevant market; and (d) how the religious body pays the worker his services. An employee is generally guaranteed a regular wage amount for an hourly, weekly or other period of time. This usually indicates that the worker is an employee.

Facts that will show the parties type of relationship include; (a) written contracts describing the relationship the parties intend to create; (b) whether or not the religious body provides the worker with employee types of benefits, such as insurance, a pension

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performing the services; (c) the extent to which the worker makes her services available to the relevant market; (d) the extent to which the worker can realize a profit or a loss; and (e) how the religious body pays the worker his services. An employee is generally guaranteed a regular wage amount for an hourly, weekly or other period of time. This usually indicates that the worker is an employee.

[791] Facts that show the parties' type of relationship include; (a) written contracts describing the relationship the parties intend to create; (b) whether or not the religious body provides the worker with employee-type of benefits, such as insurance, a pension plan, vacation pay r sick pay; (c) the permanency of the relationship; and (d) the extent to which services performed by the worker are a key aspect of the regular business of the company.

[792] *"Employer's supplemental Tax Guide",* IRS publication 15 – A supplement to publication 15 (circular *E),* employer 's Tax Guide[for use in 2015]available at http://www.irs.gov/pub/irs-pdf/p15a.pdfaccessed 21 January, 2016; www.karmayog.org/startanngo/startanngo_10669.htmaccessed 25 January, 2016.

plan, vacation pay or sick pay; (c) the permanency of the relationship; and (d) the extent which services performed by the worker are a key aspect of the regular business of the company.

6.3India

The Income Tax Act, 1961, which applies to as a whole, governs tax exemption of not-for- profit entitles. organisations may qualify for tax-exempt status if the following conditions are met:

a. The organization must be organized for religious or charitable purposes;
b. The organization must spend 85% of its income in any financial year (April 1st to March 31st) on the objects of the organization. The organization has until 12 months following the end of the financial year to comply with this requirement.[793] Surplus income may be accumulated for specific projects for a period ranging from 1 to 5 years. The funds of the organization must be deposited as specified in section 11 (5) of the Income Tax Act; which provides expressly that:

No part of the income or property of the organization may be used or applied directly or indirectly for the benefit of the founder, trustee, relative of the founder or trustee or a person who has contributed in excess of RS.50,000 to the organization in a financial year.

The organization must timely file its annual income return; and the income must be applied or accumulated in India[794]. However, trust income may be applied outside

[793] *Ibid.*
[794] *Ibid.*

India to promote international causes in which India has an interest, without being subject to income tax.

Further, the Income Tax Act 1961, as a federal legislation affects all NGOs (trust, society or section 25 company) uniformly throughout India.[795] It treats all of them equally in terms of exempting their income and in granting a certificate under section 80G whereby donors to the NGOs may claim to tax rebate against donations made.

The following tax issues in India shall be examined seriatim; Corpus fund or Capital Receipt.

Corpus donations are capital contributions and should be ignored when computing the total income of the organization. They should be held as corpus or capital of the trust and should not be spent like any other income (although, any interest or dividend derived from the investment of such donations may be used on the objects or operation of the NGO.[796] The accounts of the organization should reflect this position clearly.

The direction for the donation-whatever the amount to be applied to the corpus of the organization can be given only by the donor. Such a direction should be given in writing. Though, under the proposed new bill, a cash contribution received,that is, other than kind or by crossed cheque bank draft towards the corpus of the NGO will be deemed to be a contribution otherwise than towards the corpus of the trust, regardless of the donor's intended use of the donation. Income received through cash collection boxes at temples, churches, hospitals or schools will be treated as 'income' (and no as 'capital receipt'), regardless of any indication put on or near the collection boxes than

[795]"Tax issues in India" available at www.siteresources.worldbank.org/ INTPENR/Resources/ taxissuesinindia.pdfaccessed on 25 January, 2016.
[796]*Ibid.*

contributions are towards the corpus. Therefore, 60 percent of the amount will have to be used for charitable purposes).

If the NGO accepts membership fees, all life membership subscription and entrance fees beings a collection from members and in the nature of capital receipts and not for any specific service may be taken as capital, and therefore not treated as income for the purpose o computing total income. People paying such membership fees and subscriptions, however, cannot deem them to be a donation and claim in rebate under section 80G.[797]

BusinessIncome

Under the Income Tax Act, 1961, section 11 (4A) (as amended with effect from 1 April 1992), if the income from business is incidental to the attainment of the NGOs objects and separate books of accounts are maintained by the organization in respect of such business, the profit is not considered for taxation. For example, the profit from the sale of goods produced by the beneficiaries during their training is fully exempt from tax.[798]

Income from a business undertaking that is itself held on trust for charitable purpose is also exempt.

Furthermore, an activity resulting in profit need always be treated as business. For example, hiring out halls whether for private or public functions) or rent houses (ie subsidized accommodation for pilgrims, or sanatoria or convalescent homes) by NGOS is not regarded as business.[799]

[797] *Ibid.*
[798] *Ibid.*
[799] *Ibid.*

CapitalGains

If an NGO sells its capital asset, capital gain arising on such sale is not liable to tax if the net sale proceeds are invested in the purchase of a new capital assets. Such reinvestment should, as far as possible, be made during the same accounting year.[800]

Disqualificationfromexemption

All private religious trusts and NGOs created after particular religious community or caste are not eligible for tax exemption (sections 11 and 12 of the Income tax Act). However, an NGO for the benefit of scheduled castes, backward classes, schedule tribes, women or children is not considered an organization for a particular religious community or caste and therefore its income is exempt. This is based on separation of charitable organization and religious organisations.[801]

Special Exemption for Certain Institutions

The income of certain NGOs engaged in activities pertaining to scientific research, education, charitable hospitals, et cetera,, is exempt from payment of tax by various provisions contained in a group of clauses of section 10 of the Income Tax Act.[802]

organisations exempt under the clauses of section 10 enjoy various benefits. For example, a charitable hospital or medical institution approved under section 10 need not

[800] *Ibid.*
[801] *Ibid.*
[802] *Ibid.*

use 75 percent of its income during the financial year on the objects of the organization. The special exemption provides much more operational freedom.[803]

Tax Rebate For Donors

The Exemption under section 80G

Section 80G Require donors; whether individuals, association, companies et cetera, are entitled to a deduction (in computing their total income) if they make a donation to an NGO enjoying exemption under section 80G of the Income Tax Act. The amount donated should not, however, exceed to percent of the donor's gross total income after subtracting allowable deductions (other than the deduction under section 80G) for the purpose of tax rebate. Even if the donation is in excess of 10 percent of the donor's gross total income, only the 10 percent can be considered for deduction under this section.[804]

Donations made to various funds setup by the Federal or the State government (eg the National Defence Fund, the Jawaharlal) Nchru Memorial Fund, the Prime Minister's Drought Relief Fund, the National Foundation for Communal Harmony) qualify for 100 percent tax debate (that is, the whole of the amount donations is allowable as a deduction). However, donations made to non-government NGOs exempt under section 80G (5) of the Income Tax Act qualify for only 50 percent tax rebate.[805]

Places of worship such as temples, mosques, gurudwavas, churches or other places notified by the federal government to be of historic, archaeological or artistic importance or to be a place of public worship of renowned throughout any State or States

[803] *Ibid.*
[804] *Ibid.*
[805] *Ibid.*

may also apply for, and secure, exemption under section 80g (2) (ii) (b) of the Income Tax Act for renovation or repair. Donors contributing towards the repair or renovation of such a place of worship would be entitled to a 50 percent tax rebate when computing their income for tax purposes.[806]

Donations in kind (such as computers, medical equipment, vehicles, et cetera,) are not eligible for deduction under section 80G. The donation must be of money.[807]

In order to qualify for exemption under section 80G, the NGO must be a wholly charitable (not religious), recognized, tax exempt institution and should not be for, the benefit of any particular religious community or caste.[808]

NGO exclusively for the benefit of any particular religious community or caste may, however, create a separate women and children fund. Donations given to this fund qualify the deduction under section 80G, even though, the organization as a whole may be for the exclusive benefit of only a particular religious community or caste. However, a separate account must be maintained of the funds received and disburse for the welfare of women and children[809].

It is worthy of note that receipt issued to donors by NGOs should bear the number and date of the 80G certificate and period for which the certificate is valid.[810]

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[806] *Ibid.*
[807] *Ibid.*
[808] *Ibid.*
[809] *Ibid.*
[810] *Ibid.*

Exemption Under Income Tax, Section 35 AC

Section 35AC was inserted in the Income Tax Act 1991 and came in to force on April 1992. Contribution (s) made to a project or scheme notified as an eligible project or scheme for the purpose of the Income Tax Act, entitled the donor (individual, institution or company) to a 100 percent deduction of the amount of the contribution.[811]

Unlike, the certificate granted under section 80G whereby a donation made to a qualifying organization entitles the donor to a 50 percent deduction, the certificate under section 35AC is not given to any organization as a whole, but only to an eligible and approved project of an organization.[812]

Eligible projects and schemes for exemption under section 35AC include or more of the following:

i. Construction and maintenance of drinking water projects in rural areas and in urban slums, including installation of pump sets, digging of wells, tuber-wells and laying of pipes for the supply of drinking water.
ii. Construction of dwelling units for the economically weaker sections of society.
iii. Construction of school buildings, primarily for children belonging to the economically weaker sections of society
iv. Establishment and running of non-convention and renewable source of energy systems.
v. Construction and maintenance of bridges, public highways and other roads.
vi. Pollution-control projects, et cetera,.

[811]section 35AC,*Ibid.*
[812]*Ibid.*

Section 35 (ii) and (iii) Requirement

A deduction of 100 percent is allowed the donors for contribution (s) made to organization; such as a scientific research institute or a university, college or other institution approved under section 35 (i) (ii) specifically for scientific research, and other section 35 (i) (ii) specifically for research in social science or statistical research[813].

An organization approved under section2 35 (i) (ii) or 35 (i) (iii) must maintain a separate account of the money received by it for scientific research or for research is social science or statistical research[814]. It is obvious that this mandatory requirement by the revenue authority is to check against diversion of the money solely contributed for scientific research and others in to other uses.

6.4 Australia

Not–For-Profit (NFP) organization which includes charities, religious and non-governmental organisationset cetera, perform a valuable role in Australian society. They are eligible for a range of tax concessions and receive direct government funding in support of their philanthropic and community based activities. The tax concessions for the NFP sector are complex and applied unevenly.[815]

Under the Income Tax Assessment Act, 1997, a not for profit organization must pay tax on any "taxable income" unless it qualifies for an exemption. For example, a charity must be registered with the Australian Charities and Not-For Profits Commission (ACNC) to apply for charity concessions from the Australian Tax Office (ATO).

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[813] *Ibid.*

[814] *Ibid.*

[815] "Australian Charities and Not-for-profit Commission's guideline"available at http://www.acnc.gov.au/ACNC/FTs/Fact_Cncavial.aspxaccessed 26 January, 2016.

The ACNC register organisations as charities for common wealth purposes while the ATO remains responsible for administering tax law, including decision on the organization's eligibility for tax concessions.[816]

Australia applies a range of tax concessions to different types of NFP organisations. These concessions includes; Income tax exemptions; a higher GST (Goods and Services Tax) registration threshold; the ability to make supplies GST free in certain circumstances; GST input credits; capped exemptions form (or rebates of) Fringe Benefits Tax (FBT); and the ability to receive tax deductible gifts (DGR).[817] These tax concessions shall be discussed seriation.

Fringe Benefits Tax

The FBT concessions provided to the NPF sector can provide NFP organisations with a cost advantages for the recruitment and retention of staff. The concessions are capped to prevent over-use and limit the impact on competitive neutrality. This is particularly significant concessions for hospital, given that the health industry and competes directly with the private sector for qualified staff. Some ineligible charitable and community organisations have criticized the concessions on the ground that they have led to staff losses (through the inability to match market salaries for qualified staff) and resulted in a greater proportion of their funds being directed into salaries.[818]

Similar issues in respect of competitive neutrality arise in relation to the treatment of rebateable employers, which are eligible for a rebate of 48 percent of the amount of

[816] *Ibid.*

[817] www.taxreview.treasury.gov.au/consultationpaper.aspx?doc=html /publications/papers/ consultation _paper/section7.htm accessed 26 January, 2016.

[818] *Ibid.*

FBT that would otherwise be payable[819]. The rebate applies up to $30,000 percent employee and reflects the fact that these employers do not benefit from the tax deductibility of FBT cost.

The FBT concessions provided to NFP organisations may result in a greater proportion of income being provided to employees as fringe benefits, rather than a cash.

Good and Service Tax

Certain NFP organisations are able to treat some or all their separately identifiable branches as separate GST entitles. As a consequence, one or more sub-entitles may fall below the $150,000 GST registration threshold for NFP organisations, when the complete entitle would exceed the registration threshold. This is intended to reduce the compliance costs of NFP organisations and may result in a reduced GST liability for some NFP organisations.[820]

The GST concessions for charitable organisations would not be expected to impact on competition neutrality. Unlike income tax exemptions, the activities of charitable organisations are taxable under the GST legislation, unless an explicit concession applies. Since, the commercial activities of charitable organisations would not be expected to qualify for these GST concessions, this is unlikely to lead to competitive neutrality concerns[821].

It is worthy of note, Goods and Services Tax (GST) is a tax on transactions. Where goods and services are sold, the amount received for the sale may be subject to

[819] *Ibid.*
[820] *Ibid.*
[821] *Ibid.*

GST. Similarly, where goods and services are purchases, the purchase may be able to claim a GST for the GST included in the amount paid.[822]

Deductible Gift Receipt (DGR) status as well as applying for the tax concessions listed above, NFP can apply for deductible gift receipt (DGR) status.[823] The benefit of being a deductible gift receipt is that donations made to the organization may be tax deductible. If a donation is tax deductible, donors can deduct the amount of their donation from their taxable income when they lodge their tax return.[824]

Deductions are provided as a mechanism for distributing government funds to charitable organisations, on the assumption that they will increase the size of charitable donations. However, the degree to which this is the case is unclear.

Broadly, deductible gift receipt (DGR) status is extended to those organisations whose activities provide a benefit to the public or a significant group within the public. The general DGR categories include public benevolent institutions, public universities, public hospital, approved research institutes, arts and cultural organisations, environmental organisations, school building and overseas and funds.

The general categories restrict DGR status to closely targeted set of organisations. While these categories have been created to reflect community demand and government priorities for the sector, some submissions indicate that they should be redefined as community activities and priorities change.[825]

Mutual Receipts

[822] Australia Charities and Not-For-Profit Organization*, op. cit.*
[823] *Ibid.*
[824] *Ibid.*
[825] *Ibid.*

The receipt that NFP member-based organisations (for example, licensed clubs) collect from dealing with their members are generally treated as non-assessable income. These entities are subject to income tax on profit from transactions with non-members and on transaction with their members.[826] Membership organization not prescribed as income tax exempt may utilize the mutualityprinciple. Under the mutuality principle, where a group of individuals join together to contribute to common fund, created and controlled by all of them for a common purpose, any surplus created in the fund from the individual contributions is not considered to be income.

Income Tax Exemption fortaxpurposes

A range of NFP organisations are eligible for income tax exempt status, such as employee or employer associations and club established to encourage animal racing, sport, art, literature or music. Although, an income tax exemption does not pose as many concerns regarding competitive advantage and any retained earning must ultimately be used to further their purposes, there appears to be no clear rationale underlying this exemption.[827]

Religious organization in Australia on the other hand, enjoy expanded tax exempt benefit.[828] This has precipitated quantum of criticism on the Australia Government's status on the point.[829] Though, they enjoy other concessions along with not-for-organisations.

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[826] *Ibid.*

[827] "Note-for-profit-sector" available at www.better.gov.au/files/2015/03/07_Not-for-profits.pdfaccessed 26th January, 2016.

[828] "Tax Exemptions For Religious Bodies" available at www.aph.gov.au/media/wopapub/.../ Religion/ relchap11_pdf.ashx. accessed 26th January, 2016.

[829] *Ibid.*

Before July, 2000, a body was a 'religious institution' if it instituted for religious purposes, so that; its objects and activities reflect its character as a body instituted for the promotion of some religious object, and the beliefs and practices of the members constituted a religious[830]. The two most important factors for determining whether a particular set of belief and practices that constituted a religious are; belief in a supernatural being, thing or principle, and acceptance of canons of conduct that gave effect to that belief, but that did not offend against the ordinary laws.

The position above was however modified after July 1, 2000.[831] Information provided by the Australian Tax Office (ATO) about the new taxation arrangements that include the GST applying after 1 July, 2000 to religious bodies, began by defining a 'charity' for tax purposes.[832] Thus, while most supplies of goods and services by businesses will be subject to the Goods and Services Tax, some supplies made by charitable institutions, trustees of charitable funds and gift-deductible entities will be free of it.

The ATO booklet also provided information on the status of various activities that could be relevant to religious bodies after the introduction of the GST; including provision of accommodation; donated second-hand goods, receipt of donations, grants and sponsorships, raising of funds, and flexibility for units (branches) within the NFP organization for GST purposes.[833]

6.5. South Africa

[830] *Ibid.*
[831] This is the effect of the Australian Taxation Office (ATO) ruling issued I 1992 on the subject under focus.
[832] *Ibid.*
[833] *Ibid.*

Non Profit organisations play a significant role in society as they tax a shared responsibility with government for the social and development needs of the country. Preferential tax treatment is designed to assist non-profit organization by augmenting their financial resources.[834]

The preferential tax treatment for not for profit organisations that meet the requirements set out in the Income Tax Act, 1962, must apply for this exemption.[835] If the exemption application has been approved by South African Revenue Service (SARS), the organisations is registered as a Public Benefit Organization (PBO) and allocated a unique PBO reference number.[836]

It is worthy of note that an organization that has a non-profit motive or is registered as a non-profit organization (NPO)[837] or Non-Profit Company (NPC) does not automatically qualify for preferential tax treatment. An organization will only enjoy preferential tax treatment after it has applied for and been granted approval as a Public Benefit organization(PBO) by the Tax Exemption Unit (TEU).[838]

Approved PBOs have the privilege and responsibility of spending public funds in the public interest on a tax free basis which they derive from donors including the general public and directly or indirectly from the State. It is therefore important to ensure that exempt organisations utilize their funds responsibly and solely for their Stated objective,

[834]"Tax Exempt Organisations" available atwww.sars.gov.za/clientsegments/businesses/TEO/ pages/ default.aspxaccessed on 27 January, 2016.
[835]*Ibid.*
[836]*Ibid* .
[837]All non-profit Organisations in South Africa are governed by the Non-Profit Organization Act, 2001.
[838]"Tax Exemption Organisations*", op .cit.*

without any personal gain being enjoyed by any person including the founders and the fiduciaries.[839]

It is worthy of note that PBOs are now permitted to carry on businesses or trading activities on a tax-free basis within certain parameters, but will be taxed on the receipt and accruals derived from any business undertaking or trading activity that falls outside the parameters of these permissible trading rules, after deducting the basic exemption. There are three categories of permissible trading activities where there is no limit to the amount of receipts and accruals which are exempt from normal tax. Each category has its own condition and requirements and each rule is applied separately.[840] The fourth rule is the basic exemption[841] rule which is applied to the commercial trading activities which do not qualify in terms of the other three exclusion rules. Where a PBO carries on more than one commercial trading activity the basic exemption rule is applied collectively to the total receipt derived from all such other trading activities.

However, there are categories of trading activities not subject to tax. These among others include:

(a) Integral and directly related trade as provided under Income Tax Act 1962, section 10(1)(CN)(ii)(aa);

(b) Occasional trade as provide under Income Tax Act 1962, section 10(1)(CN)(ii)(bb);

(c) Ministerial approval as provided under Income Tax Act 1962, section 10(1)(CN)(ii)(cc).

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[839] *Ibid*

[840] *Ibid*.

[841] Basic exemption is the threshold determined by calculating the amount of receipts and accruals derived from business or trading activities not otherwise excluded which is exempt from income tax.

Under the first head, the undertaking or activity is integral and directly related to the sole or principal object of the PBO as contemplated under the Act, also is carried out or conducted on a basis substantially the whole of which is directly towards the recovery of cost and does not result in unfair competition in relation to taxable entities. It is worthy of note that all these requirements must be complied with, before the PBO can enjoy a tax-free trading activity.[842]

Again, under the second head, the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation. That is, to qualify under this item, the trading activity must take place on an occasional or infrequent basis, and be undertaken substantially with assistance on a voluntary basis with compensation, other than the bonafide reimbursement of reasonable and necessary out of pocket expenditure.[843]

Whilst, under that third head, the undertaking or activity is approved by the minister by notice in the Gazette having regard to the scope and benevolent nature of the undertaking or activity; the direct connection and interrelationship of the undertaking or activity with the sole purpose of the PBO; the profitability of the undertaking or activity; and the level of economic distortion that will be caused by the tax exempt status of the PBO carrying out the undertaking or activity.[844]

Finally, the basic exemption provision as provided under section 10(1)(CN)(ii)(dd);[845] other than an undertaking or activity in respect of which item (aa)

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[842]"Tax Exemption Guide for Public Benefit Organization in South Africa" available at www.igazi.org.za/system/resources/.../SARS Tax pdfaccessed 26 January, 2016

[843]*Ibid*

[844]*Ibid*

[845]Income Tax Act, 1962

(bb) or (cc) applies and do not exceed the greater of (i) 5% of the total receipt and accruals of that public benefit organization during the relevant year of assessment; or (ii) R100,000 flowing from the above where a PBO carries on trading activities which do not fall within the ambit of the exemption set out in item (aa) (bb) or (cc) of section 10(1)(CN)(ii), the PBO will be taxable on the taxable income derived from all such other business or trading activities. Thus, the greater of 5% of the total receipt and accruals of the organization or R100,000 will not be subject to tax.

Exemption from other Taxes and Duties Granted to PBOs.

In addition to being exempt from the payment of income tax, PBOs will also enjoy the benefit exempt from a number of other taxes and duties. The exemptions are subject to the approval of the organization as a PBO in terms of section 30.[846]

These among other include:

(i) **Donations Tax**

Donations tax is payable at rate of 20% on the value of any gratuitous disposal of property by one person, to another, including the disposal of property less than its market value. Donation Tax is payable by the donor, but if the donor fails to pay the tax timeously, the donor and the done shall be jointly and severally liable for the tax.[847]

A specific exemption is granted for donations made by to any PBO and any organisations exempt from income tax in terms of section 10(1)(CO), (d) and (e) of the

[846]Income Tax Act, 1962, S.30, defined the term PBO and the Criteria for approval of the said PBOs by the commissioner.

[847] "Tax Exemption Guide for Public Benefit Organization in South Africa, *op .cit.*

Act. Also, natural persons are exempted from donations tax on the first Rs100,000 of property donated during any year of assessment.[848]

(ii) **Estate Duty**

Estate duty is levied at a rate of 20% on the net estate of a deceased person. Any property bequeathed to a PBO is excluded from value of the estate and therefore not subject to estate duty[849]. Thus, property bequeathed to approved PBO are exempted from estate duty in line with provisions of estate duty Act No. 45 of 1953 section 4(h)(1).

(iii) **TransferDuty**

Transfer duty is levied on a sliding scale on the value of fixed property acquired by any person. The rates vary from 0% to 8% in the case of natural persons. Legal persons and trusts pay transfer duty at the rate of 8%. A PBO, exempt from income tax in terms of section 10(1)(CN) of the Act, as well as an institution, board or body exempted from income tax under section 10(1)(CA)(1) of the Act, and which has its sole or principal object carrying on any PBA is exempt from the payment of transfer duty on property acquired, provided the whole or substantially the whole of the property will be used for the purpose of carrying on one or more approved PBA. The transfer duty exemption is granted per transaction and will be considered upon receipt of the letter issued by the commissioner approving the exemption from income tax.[850]

Further, where property is transferred by an exempt PBO to any other entity which is controlled by the PBO, no transfer duty is payable.[851]

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[848]Income Tax Act 1962, section listed organization exempted from the payment of income tax.
[849]*Ibid.*
[850]*Ibid.*
[851]Transfer Duty Act, 1949, section 9(1A).

(iv) **Stamp Duty**

Stamp duty is levied on instruments such as leases of immovable property and the transfer and cancellation of marketable securities at different rates. PBOs are exempt from the payment of stamp duties only if the duty is legally payable and borne by the PBO.[852]

(v) **Uncertificated Securities Tax (UST)**

UST is payable in respect of change in beneficial ownership in any listed securities, at the rate of0.25% on the taxable amount of such securities. Interest-bearing securities are exempt.

A PBO which is exempt from stamp duty will also be exempt from UST in respect of change in beneficial ownership in securities, provided the change was not as a result of a purchase as contemplated under the UST Act.[853]

(vi) **Skills Development Levy (SDL)**

A compulsory levy to fund education and training is levied based broadly on 1% of the payroll of employers. An approved PBO is exempt from the payment of the skills development levy if it solely carries on an approved PBA as contemplated in paragraphs 1,2(a), (b),(c), (d) and 5 of part 1 the ninth schedule to the Act or if it is a PBO that provides fund solely to such PBO which carries on these PBA.[854]

(vii) **Capital Gains Tax (CGT)**

[852] "Tax Exemption Guide for public Benefit Organization in South Africa" *op.cit.* Also Stamp Duties Act,No.77 of 1968.

[853] UST Act, No.31 of 1998.

[854] Skills Development Levy Act,No.9 of 1999.

Any taxable capital gain made on the disposal of an asset by a person is included in the taxable income of that person. Approved PBOs are also be exempted from the payment of capital gain tax when disposing of an asset. This exemption is not automatic. The disposal asset should not have been used to carry on business activities, unless specifically allowed under the Income Tax Act.[855]

(viii) **Donor Deductible Contributions**

The Income Tax Act,1962, section 18A allows tax payers to made deduction from their taxable income when they make donations to certain organisations, including PBOs. Thus, any donation made by tax payers to such organisations will be deductible when assessing the taxpayer's chargeable income.

6.6 Ghana

The information released from the Ghana Revenue Authority suggests that religious and other not for profit organisations enjoy similar tax exemption as they do in Nigeria.[856] Generally, there are three source of income, which are assessable to tax. These are – income from a business, income from an employment and income from investment.[857] With respect to income from a business, tax is payable on the chargeable income after making allowance for deductible expenses under Internal Revenue Act 2000 (Act 592), Chapter 1, Part III, Division III. However, the Internal Revenue Act, 2000 (Act592) under section 10 (Part II, Division III) provides for incomes that are exempt from tax.

[855] In terms of Eight Schedule.

[856] Available at www.gra.gov.gh/docs/info/educat_inst.pdf accessed 27 January,2016.

[857] Act 592, sect 10(1d).

Included in the list of the incomes exempt from tax is "Income accruing to or derived by an exempt organization other than income from any business.

The "exempt Organization" has been defined among others to mean "a person:

(a) Who or that is and functions as religious, charitable or educational institution of a public character;

(b) Who or that has been issued with a ruling by the commissioner–general currently in force, stating that it is an exempt organization; and

(c) None of whose income or assets confer, a private benefit, other than in pursuit of the organization's function referred to in paragraph (a).[858]

In effect, an "exempt organization" which undertakes an activity of a business nature and derives income as a result, will be subject to tax on the income from thatbusiness. Thus, the "exemption outlined under Act 592, section 10(1d) does not confer total tax exemption on all categories of income even for an institution or organization which qualifies as an "exempt organization".

Nonetheless, the Internal Revenue Act was amended in 2013,[859] the same redefines the meaning of "exempt organization" to clarify the status of educational institutions. Under section 6 of Act 859, "exempt organization" includes a person that functions as:

(i) A religious or charitable institution of a public character

(ii) A State-owned or State-sponsored educational institution

[858]Act 592, section 94.

[859]Internal Revenue (Amendment)Act, 2013 (Act 859), section 6.

From the foregoing, it is seen that Ghana provides exemptions to corporate income taxes for non-profit. The Internal Revenue Act exempts income earned from "religious, charitable and educational institutions" of a public character.

However, it is to be noted the VAT act did not grant explicit exemption to non-profit organisations from the payment of VAT. Though, the VAT Act exempts a wide variety of goods and services, most notably for agriculture, commerce and transportation.[860] But the Act does not explicitly mention charity as being exempt from the payment of VAT.[861]

6.7 Tanzania

In Tanzania, tax exemptions are granted for a variety of reasons,[862] one of which is where activities of certain organization do not earn them a profit but have a direct benefit to society which the government may not be able to otherwise procure. This basis is used to grant exemptions to charities including religious organisations.[863] However, available statistics[864] shows that purchases made duty free and import related exemptions granted to religious organisationsare at the bottom of the list of beneficiaries of tax exemptions in Tanzania.[865]

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[860] Value Added Tax Act of 1998.

[861] *Ibid.*

[862] A list of tax exemption can be found on the Ministry of Finance website for Tanzania videhttp://www.mof.go.tzaccessed 27 January, 2016.

[863] "Tanzania Tax Exemptions" available at www.uwazi.org/uploads/files/tanzania%20taxexemptionspdfaccessed 27 January, 2016.

[864] *Ibid.*

[865] It thus appear that most tax incentives are enjoyed by foreign and local investors; this can be seen inhttp://www.tra.go.tz/index.php/tax-incentiveaccessed 27 January, 2016.

An organization is charitable organization (charity), if it meets the following conditions:

(i) It is a public organization which is resident in Tanzania.

(ii) It's main functions are: (a) relief of poverty (b)relief of distress of public (c) advancement of education (d) provision of general public health, education, water or road construction or maintenance; and

(iii) approved by TRA (Tanzania Revenue Authority).[866]

When a charity conducts the activities mention in (b) above, it is said to conduct charitable business. If it conducts other activities apart from those mentioned above, then these activities shall be treated separately from the charitable business.[867]

Any charitable/religious organization must file a return with the TRA, even if it is not liable to pay any tax.

It is worthy of note that charitable organisations in Tanzania are expected to include income from all gifts and donations received by the organization when calculating assessable income.[868] Though, the charity can deduct amounts spent on the organization's charitable functions. In addition to amounts actually spent, charities can apply to the TRA to also deduct the amounts saved for a particular charitable project.[869]There is also a special deduction of 25% of the organization's business and investment income.[870]

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[866]"Taxation of Charities" available at www.taxation-tz.com/taxation-of-charitiesaccessed 28 January, 2016

[867]*Ibid*

[868]Income Tax Act 2006, Cap 332, section 64 available at www.mof.go.tz./mofdoes/revenue/incometax1.pdf accessed 28 January, 2016

[869]*Ibid,* S. 64(3)

[870]*Ibid* S.64 (2)(iii*)*

Again, it is worthy of mention that religious institutions as well as charitable organization are exempted from payment of Skill development levy. Religious institutions whose employee are solely employed to administer places of worship or give religious instructions or generally administer religion. But all the entities (persons) are required to pay corporation tax. Thus, non-governmental association, charitable organisations, et cetera, are expected to pay corporation tax.

6.8. Germany

Taxes in Germany, as it is a Federal Republic are levied by the Federal Government, the States as well as the Municipalities. Many direct and indirect taxes exist in Germany; income tax and VAT are the most significant.[871]

So even if Germany is a federal State, 95% of all taxes are imposed on a federal level. The income of these taxes is allocated by the federation and the States as follows:[872]The federation receives exclusively the revenue of; custom, taxes on alcopops, cars, distilled beverages, coffee, mineral oil products, sparkling wine, electricity, tobacco, and insurance. Supplement on income taxes so-called solidarity surcharge.The State receive exclusively the revenue of; inheritance tax, real property transfer tax, taxes on beer and gambling,fire protection tax.The municipalities and/or districts receive exclusively the revenue of; real property tax, taxes on other beverages, dogs and inns.

Most of the revenue is earned by income tax and VAT. The revenue of these taxes are distributed between the federation and the States by quota. The municipalities receive

[871]Taxation in Germany, available at https://en.wikipedia.org/wiki/taxation_in_germany.
[872]*Ibid.*

a part of the income of the States. In addition, there is a compensation between rich and poor States.

Also, worthy of note is the church tax[873]. A church tax is imposed on members of some religious congregations in Germany. Here, on the basis of tax regulations passed by the religious communities and within the limit set by State laws, communities may either:

i. Require the taxation authorities of the State to collect the fees from the members on the basis of income tax assessment (then, the authorities withhold a collection fee), or

ii. Choose to collect the church tax themselves.

In the first case, membership in the religious community is stored in a database at the Federal Tax Office which employers receive excerpts of for the purpose of withholding tax on paid income. If an employee's data indicate membership in a tax-collecting religious community, the employer must withhold church tax prepayments from their income in addition to other tax prepayments.

In connection with the final annual income tax assessment, the State revenue authorities also finally assess the church tax owed. In the case of self-employed persons or of unemployed tax payers, State revenue authorities collect prepayments on the church tax together with prepayments on the income tax.[874]

If however, religious communities choose to collect church tax themselves, they may demand that the tax authorities reveal taxation data of their members to calculate the contributions and prepayments owed. In particular, some smaller communities (e.g the

[873]"Church Tax in Germany", available at https://en.wikipedia.org/wiki/church_tax accessed 24 February, 2016.
[874]*Ibid.*

Jewish community of Berlin) chose to collect taxes themselves to save collection fees the government would charge otherwise.[875]

Collection of church tax may be used to cover any church-related expenses such as funding institutions and foundations or paying ministers.

The church tax is only paid by members of the respective church people who are not members of a church tax collecting denomination do not have to pay it. Members of a religious community under public law may formally declare their wish to leave the community to State (not religions) authorities. With such declaration, the obligation, to pay church taxes ends. Some communities refuse to administer marriages and burials of (former) members who had declared to leave it.[876]

Upon application, public purpose entities may be granted a tax-exempt status, exempting them from German corporate income tax and trade tax. Such tax-exempt status may also result in a VAT-exemption or reduced VAT rate for services provided by such entity, depending, however, on the specific type of service rendered.[877]

Otherwise, if tax-exemption is not granted, entities would be subject to a tax burden of roughly 30% on their taxable income. The same tax burden applies in general, if tax-exempt status is granted to the extent that the tax-exempted entity receives income in its taxable "business sphere" income category.

Recently, the German nonprofit tax law regulations have been loosened to cover cross-border activities.[878]

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[875] *Ibid.*

[876] *Ibid.*

[877] "Germany; Non-profit Tax Aspects", available at www.twobirds.com/en/news/articles/2014/global/tax/oct-14/germany-and-tax-exemption-rules-for-non-profit-entities,accessed 25 March, 2016.

[878] *Ibid.*

The legal options for operating a non-profit organization in Germany comprise of entities potentially in the scope of German corporate income taxation. Hence, tax-transparent partnership are excluded. Company (specifically, foundation (Stiftung) and registered association (eingetragenerverein, "e.v").[879]

Resident or non-resident entities from other EU Jurisdictions may also benefit from such tax privileges, provided they meet the requirements stipulated by German tax laws. This new option is due to case from the European Court of Justice.[880]

Entities may be granted a tax-exempt status in advance if they pass a review of their founding documents in a specific procedure. One of the benefits of such advance exemption is that entities may start to collect tax-deductible donations. Nonetheless, they remain subject to full audits by tax inspectors.

Even if an entity is recognized as being tax-exempt by the tax authorities that entity may still be taxable with sources of income received.

It is worthy of note that an organization must have a formal status, example, registered or unregistered association, foundation, or limited liability company and fulfill other requirements before it can be considered as charity.

6.9. Evaluation

Having examined the tax exemption as enjoyed by these organisations in these selected jurisdictions, it is pertinent that we evaluate the positions there as against what we have in Nigeria.

[879] *Ibid.*
[880] *Ibid.*

In United Kingdom, all not-for-profitorganisations are regarded as charities. These organisations are required to be registered with the CharityCommission, then, they will be granted exemption. Though, not all the income and gains of these organisations are tax-exempt, some income and gains of exempted organisations by HMRC, are still required to pay tax on (a) dividends from UK companies, (b) profits from developing land or property and (c) purchases of goods and services. But, in Nigeria there is no established Charity Commission, as that is the case, there is no requirement for registration of these organisations. In Nigeria though, these organisations are not regarded exclusively as charities, except where the objects of the organization indicate so. The same embargo on trading and business that applies in Nigeria, also applies in the United Kingdom, except that of UK is subject to certain qualifications.

Similarly, United States of America, by Internal Revenue Code, section 501 (c) provided that these organisations are exempted from all federal income taxes. Notwithstanding, the absolute exemption granted to these organisations, some factors may jeopardize their tax exempt status. These are, inurement to any private person, benefit to private interests, participation in political campaign activities, purposes and activities of these organisations must not be illegal or violate fundamental policy, et cetera. But, in Nigeria, the only factor that may jeopardize tax exempt status is where they embarked in trade or business related activities.

Further, Indian government do not grant tax exemption as of right. Tax exemption here is not automatic: Certain conditions must be met before these organisations are granted this exemption. These conditions are: that organization must be organized for religious or charitable purposes, the organization must spend 85% of its income in any

financial year on the objects of the organization. This is not applicable in Nigeria. There is no such conditions, what is important is that the organization be established for charitable, ecclesiastical and educational purposes. As such, tax exemption in Nigeria is automatic.

Also, in India, there is tax rebate for all donors. Unlike Nigeria, where only corporate donor's contributions are made deductible under CITA.

For Australia, not-for-profit organisations qualify for exemption, if they register with the Australian Charities and Not-for-profits Commission (ACNC) and apply for charity concessions from the Australian Tax Office (ATO). There is no such requirements in the Nigerian tax regime. Though, the Australian religious organisations enjoy expanded tax exempt benefits, unlike the religious organisations in Nigeria.

South African tax regime is more improved and organized that our indigenous taxregime. In South Africa, the preferential tax treatments for not-for-profit organisations are not automatic. These organisations must apply for the exemption and if the application for exemption is approved by South Africa Revenue Service (SARS), then the organization is registered as Public Benefit organization (PBO) and allocated a unique PBO reference number by the Tax Exemption Unit (TEU). But, Nigeria tax regime did not make provision for registration with FIRS (Federal Inland Revenue Service) by these organisations. No need for approval or reference number from the tax authority.

Again, South Africa PBO are now permitted to carry on business or trading activity on a tax-free basis within certain parameter. Though, in Nigeria, there is no such leverage.

The information released from the Ghana Revenue Authority suggests that religious and other non-profit organisations enjoy similar tax exemption as they do here in Nigeria. the only improvement in Ghanaian tax regime is that the qualified educational establishment that will be exempted, that is only State owned or State sponsored educational establishments are exempted. Thus, privately owned education establishments are not exempted, as such educational institutions operated by private persons are liable to pay tax.

It was observed in Tanzania similar tax exemption regime exists as in Nigeria. But in Tanzania, employees of these organisations who are employed solely for the purpose or in the attainment of the objects of the employment are exempted from the payment of Skill development levy. Though, the organisations are still liable to pay corporation tax. Whilst in Nigeria, these corporations are totally exempted from the payment of company income tax.

Finally in Germany, very remarkable is the church tax. Every member of religious congregation is expected to pay church tax, thus, members of non-religious congregation are exempted totally from payment of church tax. Though, recently, most members of religious organisations have deregistered as members of the said religious organisations to avoid payment of church tax.

Recently in Germany, the Catholic Church got a court ruling to the effect that deregistered Catholic faithful will be deprived the privilege of partaking in the Sacraments of Holy Communion, confession, Baptism and even burial rites. The said church tax is used to cover any church related expenses such as funding institutions and

foundations or paying ministers. Though, not-for-profit entities are also exempted from corporation tax and trade tax, church tax is alien to Nigerian tax regime.

CHAPTER SEVEN

CRITIQUE OF THE TAX EXEMPTIONS OF CHARITABLE, NON-GOVERNMENTAL AND RELIGIOUS ORGANISATIONS.

Any discussion of the appropriate tax treatment of nonprofitorganisations will inevitably confront the conundrum of churches and other charities.

As a threshold matter, to question the non-profit tax exemption is to question the value of nonprofit themselves. Vital independent nonprofit organisations are crucial to the society.[881] The benefits of charities which ranges from promotion of altruism and volunteerism, collective action free from private profit motive to pluralistic approach to problems have been celebrated. At the same time, Lawrence Stone[882] emphasized the "responsibility on the part of government not to provide tax and other financial benefits that might create an imbalance between government needs for tax revenues and the benefits provided the exempt sector". At this juncture, it is pertinent to analyze the different theories of tax exemption, since that will depend on whether the nation views exemption as a mechanism for delivering a particular subsidy or, instead, as part of the organic structure of the tax scheme.

Theories of Tax Exemption

(1) Base-Defining Theory

[881] *E Brody, Legal Theories of Tax Exemption: A Sovereignty Perspective,* available athttps://books.google.com.ng/books?id accessed 29 January, 2016

[882] *L Stone,* "Federal Tax Support Charities and other Exempt Organisations: The need for a National Policy" University of Southern California Tax Institute, 1968, 27.

The base-defining theory holds that charitable activity does not even rise to the level of taxable activity. For example, the Connecticut Supreme Court's 1899 description of the "non-taxation of the public buildings". The seats of government, State or municipal, highways, parks, churches, public school-houses, colleges, have never been within the range of taxation; they cannot be exceptions from a rule in which they were not included".[883]

Charitable activity enjoyed favourable treatment under a variety of tax regimes. Attempts have been made to cast each exemption in terms that define the tax base. It has been asserted that "income" of charities cannot be measured in profit-seeking terms. Similarly, a legal scholar[884] argued that the charitable-contribution deduction is necessary to properly measure the donor's ability to pay income tax. Another legal scholar[885] made similar argument with regard to the State tax.

Nevertheless, some debate remains over which tax-favoured rules for charity constitutes subsidies rather than being part of the properly measured tax base.[886] A tax-base defining theory encounters some difficulties describing property-tax exemption for charities.

By definition, charities that own property have property in their base. If charities are to be exempt because they do not engage in business activities, then how does the base-defining theory account for the fact that householders/ houseowners form backbone of any property-tax scheme? If, instead, charities are to be exempt because their property

[883] *Connecticut's Supreme Court's decision in Yale University v Town of New Haven* [1899] 42A.87,91.
[884] William Andrew; "Personal Deductions in an Ideal Income Tax" *Harvard Law Review* 86:309.
[885] John Simon, *The Tax Treatment of Nonprofit organisations: A Review of Federal and State Policies", In the Nonprofit sector:* A Research Handbook (New Haven: Yale University Press) p.67.
[886] Brody, *op cit*p.168.

does not benefit from local expenditures funded by the property tax (such as schools), then why should business owners pay property tax? And since certain services – such as police, fire, and trash collection – directly benefit all property owners, even those opposed to subjecting churches to general municipal tax have no objection to churches having to pay their own way. "They do not need or ask for specialfavours like free water or electricity for which others have to pay".[887]

An alternative argument that imports income-tax notion can support the base theory. A scholar suggested that the property tax operates as a complement to the federal personal income tax, which fails to tax the imputed rental value of owner-occupied housing; no such complement would be needed for charities, because they owe no federal income tax.[888] More generally, the property tax, like all tax, is borne by individuals; a property tax imposed on charities would be borne by their beneficiaries, donors, and employees,[889] or even their operators.

(ii) **The "Subsidy" or Tax Expenditure" Theory**

A rather common view of religious or charitable tax exemption is that it is a means of subsidizing particular charitable services that these organisations provide.[890] It would thus appear that those who argue in favour of not-for-profit tax exemption on the grounds

[887]DM Kelly, "A New meaning for Tax Exemption"?*Journal of Church and State,* Vol.25. No.3 (Autumn, 1983) p.p 415 – 426 available at https://www.jstar.org/stable23916569, accessed 29 January, 2016.

[888]TCHeller, "Is the Charitable Exemption from property taxation as Easy case"General concerns about legal Economics and Jurisprudence".*Journal of Church and State,* vol. 25. N0.3 (autum, 1983) p.391-414 available at https://www.jstor.org/stable23916569, accessed 29 January, 2016

[889]*Yale University v City New Haven,* [1899] 92 conn.42A.87,92.

[890]Henry Hansmann,"The Rationale for Exempting Nonprofit Organisations from Corporate Income Taxation"*The Yale Law Journal,* Vol. 91 No.1(Nov. 1981), pp.54-100, available athttp://www.ystor.org/stable/795849,accessed 29 January, 2016.

that these organisations provide services that would otherwise fall to government expense presumably subscribe to such a view.[891] This view is premised on a rationale of *quidproquo*: that most of the services supplied by these organisations, if diminished in scale by taxation, would have to be replaced at government expense. In other words, not-for-profit organisations relieve government's burden and therefore should be tax exempt as a subsidy granted by the government in reciprocity. For through tax exemptions, government supports the work of not-for-profit organisations and receive a direct benefit.

Commenting on this theory, a seasoned Jurist noted thus:

> One understanding of tax exemption is that it is, in effect, a subsidy granted by legislative grace to those Organisations performing services that the government would otherwise have to perform, and that such a subsidy relieves the exempt organization of tax obligations that other taxpayers are often obliged to assume. This view is clearly expressed in such lower court decisions in Christian Echoes National Ministry v U.S (470f.2d.849, 10th Circuit, 1972), and has been referred to as the *quid pro quo* or "tax expenditure" theory[892].

Thus, the "subsidy" theory suffers a very prominent weakness,[893] calling charitable tax exemption a subsidy makes it very difficult to account for the exemption of religious

[891] *Ibid.*

[892] The US Supreme Court, per Chief Justice Williams H. Rehnquist, in Regan v Taxation with representation, 461 U.S.540 (1983), substantially endorsed the quid pro quo or "subsidy" theory of tax exemption, when it observed thus; "both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system congress has enacted this kind of subsidy to nonprofit civil welfare Organisations generally…".

[893] "Reasons for tax-exemption; why are nonprofit Organisations Tax Exempt" available athtpp:// www.nonprofitmsine.org/about-no-profit-faqs/reasons-for-tax-exemption/ accessed 29 January,2016.

institutions, a large and historically central component of the charitable world, without running afoul of section 10 of the 1999 constitution.[894]

Accordingly, the U.S Supreme Court has, in refusing to access the social services rendered by churches as the basis of their exemption from tax, rejecting the *quid pro quo* rationale of both the "Subsidy" and "Social Benefit" theories of religious tax exemption on the grounds that it violates the principle of separation of church and State as established in the U.S. Constitution.[895]

An obvious merit of this theory is that it provides some theoretical justification for the existing tenor of the exempting statutes, which tends to extend the exemption to only non-profit organisations which are of a public character.[896] However, the validity of this theory may be quickly assailed on the grounds that religious institutions primarily serve a religious purpose that does not directly aid the government; as such, their tax-exempt status is unjustified ona rationale of *quid pro quo.*[897]

The argument here is that tax exemptions to secular non-profit like hospitals and homeless shelters are justified because such organisations provide public services that would otherwise fall to the government expenses. Religious institutions, however, while

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[894]*Ibid.* Also Constitution of the Federal Republic of Nigeria 1999 (as amended), section 10, provides that the government of the federation or of a State shall not adopt any religion as a State religion. If the State is by thisConstitutional provision prevented from propagating religion, then how does the propagation of religion benefit the State to warrant a subsidy by way of exemption from taxes in lieu thereof?

[895] Rob Atkinson,"Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis and Synthesis", 27 *Stetson Law Review* 395 [vol. xxvii] available athttps://www.stetson.edu/law.lawreview/media/theories-of-the-federal-income-tax-exemption-for-charities-thesis-antithesisandsynthesis-27-2.pdf,accessed 29 January 2016.

[896]DM Kelly,"A New Meaning for Tax Exemption?",*Journal of Church and State,* Vol. 25 No.3 (Autumn,1983) pp.415-426, available at https://www.jstor.org/stable 23916569, accessed 29 January, 2016

[897]Public Character here implies that their activities are of"public benefit",and, thus indirectly relieves government burden.

they may generally undertakes charitable work, exist primarily for religious worship and institution which the Nigerian government is constitutionally barred from performing[898] is not a subsidy to religion, and is therefore constitutional.[899]

In *Wale v Tax Commission of the City of New York*[900], the Court per Chief Justice Warren E. Burger, observed thus;

> Obviously, a direct money subsidy would be a relationship pregnant with involvement… but that is not this case…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 support the State… No one has ever suggested that tax exemption has converted libraries, art galleries or hospitals into arms of the State or put [their] employees on the "public payroll". There is no genuine nexus between tax exemption and the establishment of religion… we find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others… Churches vary substantially in the scope of such services… To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programmes, thus producing a kind of continuing day to day relationship which the policy of neutrality seeks to minimize.[901]

Apparently reasoning in this direction, a seasoned jurist has pointed out that since secular charitable institutions prevent destitute reasons from becoming a charge on the State and relieve the congestion that would otherwise exist in public establishments, it is

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[898]Pro and con Arguments: should churches (defined as churches, Temples, Mosque, Synagogues, etc) Remain Tax-Exempt?", available at https://www.churchesandtaxes.procon.org/, accessed 29 January 2016

[899]Kelly, *op cit,* p.416.

[900]*397 U.S 664,1970.*

[901]*Walz v Tax Commission of the City of New York* supra.

obvious that the burden of taxation is considerably lightened by these secular charitable institution even though they go beyond the work ordinarily done by the State[902]. The State, therefore, is making a very good bargain in having part of its work performed by them in consideration of the tax exemption granted them. The State would be decisively to loser if all secular charitable institutions were abolished, their property taxed, and the work done by transferred to the State. The public nature of the work voluntarily shouldered by these secular charitable institutions is, therefore, a full and sufficient justification – on a *quid pro quod rationale* – for the exemption extended to them.[903]

However, religious tax exemption is not so easily justified on principle as it is supported by authority. It is in fact easier to admire to motive which prompted it than to justified it by and sound reasoning.[904] While charity and education may be said to be established in the policy of the State, an establishment of religion is expressly prohibited in the constitution[905]. Accordingly, the strictly religious features of religious institutions can therefore furnish no valid reason for religious tax exemption. The only rational ground remaining on which it can be justified is the benefit accruing to the State through the positive influence exerted by the various religious institutions on their members. The religious and moral cultures afforded by religious institutions is deemed to be beneficial to the public, necessary to the advancement of civilization and the promotion of the welfare of the society. It has been argued that it is so even if the benefits received are of necessity a variable quantity; and in some instances even entirely absent.[906]

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[902]Carl Zollmann,"Tax Exemption of America Church Property"*Michigan Law Review,* vol.14, No.8 (June 1916)pp. 646-657 at646; available athttps://www.jstor.org/stable/1276446,accessed 29 January, 2016.
[903]*Ibid.*
[904]*Ibid.*
[905]Constitution of the Federal Republic of Nigeria 1999 (as amended) section 10.
[906]First M.E. *Church South v Atlanta,* 176 Ga.181,192.

It is worthy of note that Walz[907] majority case made it clear its view that property-tax exemption constitutionally differs from direct grant, "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 support the State".

Subsidy theory does not focus only on donors; tax exemptions can also be used to induce charities to undertake specific activities or to engage in certain behaviours. Under the classic conception of this *quid pro quo* approach, the State bestows exemption because charities lessen the burdens of government.[908]

However, conditioning exempt status on organization's provision of services that government might otherwise provide would eliminate some important types of entities currently exemption, including open associational organization such as churches.[909]

(iii) The "Social Benefit" or "Intangible Benefit" Theory

This theory recognizes the fact that non-profit organisations provide great benefits to society via their good works.[910]

Here, it is thought that charitable institutions and non profit organization generally meet the needs of poor and indigent in the society, provide numerous social or welfare services for downtrodden and reach out to the neglected in numerous ways.[911] The social benefit theory is closely related to the subsidy theory, as it is founded on some sort of

[907]Walz's case *supra.*

[908]Harvey Dale object to this declaration as "bad history, because there is no indication that the tax exemption, afforded since the end of the nineteenth century, was predicated on the quid pro quo rationale". H.Dale, 1995, "Foreign Charities"Tax Lawyer 48: 655-704.

[909]Zollman *op cit*p.646.

[910]Erick Stanley,"should churches be Tax Exempt",available at https://blog.speakupmovement.org/church/churches-and-politics/should-churches-be-tax-exempt,accessed on 29 January, 2016.

[911]*Ibid.*

quid pro quo rationale. It is seeks to justify non-profit sector tax exemption on the rationale that it is some kind of bargain-non-profit sector provide needed services to the society, so they are entitled to tax exemption in return.

However, there is a marked distinction between the reasoning attending the social benefit theory and that attending the subsidy theory. The former seeks to build on the weakness of the latter. It does not set out to argue that non-profit organisations are entitled to tax exemption on the grounds that they provide services that would otherwise fall to government expense.[912] It rather takes the modified position that though a majority of the services provided by non-profit organization do not otherwise ordinarily fall to government expense; they are nevertheless beneficial to the society at large via the enculturation of moral locals which indirectly benefit the government – a benefit which manifests in reduction of crime rate in society. Accordingly, the government encourages their social beneficial services via the waiver of their tax liabilities.

Thus, one corollary of the social benefit theory that is often overlooked is what a writer has termed "the intangible benefit" theory of religious tax exemption. This highlights the intangible and often unseen benefits provided by religious institutions to the society.[913]Some impact like reduced crime rates resulting from transformed lives, suicides prevented when people surrender to a higher power, and people with destructive behavioural patterns that harm the community changing into hardworking and virtuous citizens who contribute to the well-being of the community.[914] The argument here is that religious institutions provide more social services and intangible benefits to the society

[912]*Ibid.*
[913]Stanley*, op cit.*
[914]*Ibid.*

than they would ever pay in taxes. Thus, it makes no sense to tax religious institutions because the tax money taken from religious institutions reduce the amount of social and intangible benefits they can provide to the society. As such, in a very real sense, taxing religious institutions harm society.[915]

The obvious strength of this theory is that it avoids the most prominent weakness of the "Subsidy" or "Tax Expenditure" theory; that is, that the government cannot subsidize the provision of services it is constitutionally not empowered to provide in the first place. It also appeals to the religious sentiments of the average citizen who would ordinarily encounter no difficulties in relating to the assertion that his religion is one of peace,[916]integrity, virtue and acceptable social morals generally. The most prominent weakness of this theory, however, is that there exist no reliable criteria to determine the specific monetary worth of the social benefits provided by religious institutions; as they are very variable and even non-existent in some circumstance.[917] Besides, what are the parameters of measuring the "Intangible Benefits" of religious institutions? Furthermore, it shares a prominent weakness of the subsidy theory; it tends to violate the principle of separation of religion and State as enshrined in the Constitution.[918]

(iv) The "Impracticability" or "Double Taxation" Theory

This theory exponent the view that non-profit Organization are simply not part of the base to begin with, since their members already pay their (presumably fair) share of the

[915]*Ibid.*

[916]Even a religion that allegedly encourages the elimination of non-adherents of its faith on the grounds that they are"infidels",and has spawned various brutal terrorist organisations all over the world – especially in Nigeria, Kenya, et cetera, has been declared a religion of"peace".

[917]Zollmann*, op cit,* also, First M.E. Church v Atlanta*supra.*

[918]CFRN,1999 (as amended)10.

costs of the commonwealth in their capacity as private citizens. Accordingly, there should not be taxed again for activities they undertake out of "pure" motives of public service and from which they derive no personal monetary gain.[919] The argument here is that taxing theseorganizations when their members receive no monetary gain would amount to double taxation.[920] It has been suggested that nonprofit are granted exemption because they have no income in the sense in which that term is used in the relevant taxing statutes[921]. It was thus argued at length by a duo of learned jurists[922] that any effort to use ordinary tax accounting to define taxable income for a non-profit leads to absurdities.[923]

The obvious merit of this theory is that it avoids all the difficulties of both the "Subsidy" and "Social Benefit" theories of tax exemption, and instead focuses on the accounting practicability of imposing taxes on the income of religious institutions. It also seeks to prevent double taxation of citizens of the State, which is in line with the directive in item 8 of part II of Second Schedule to the 1999 Constitution of Nigeria. However, it would appear that a weakness inherent in this argument is the fact that theoretically, taxation of a corporate entity has nothing to do with the taxation of individuals constituting its membership.[924] The law is that a corporate entity, once incorporated, assumes a legal personality of its own different from that of the persons constituting its

[919]Kelly *op cit.*

[920]Hansmann *op cit*

[921]*Ibid.*

[922] B I Bittker and GK Rahdert, "The Exemption of Nonprofit organisations from Federal Income Taxation"[1976] *Faculty Scholarship Series. Paper 2292* (Yale Law School Legal Scholarship Repository) pp 299 -358, at 2.30.

[923]Hansmann*, op cit.*

[924]*In Rev. MF Shodipo& 2 ors v FBIR* [1974] INTC 273, it was held that the third claimant as a company was a legal person separate and distinct from the individual members that constitute its membership accordingly, the membership of the company could not affect its tax liability.

membership[925]. It therefore follows that the argument of double taxation in respect to taxation non-profit organization would be incorrect, at least in relation to the Companies Income Tax Act.[926]

In the view of Hansmann, many non-profits receive little or no income from donations, but rather derive all or nearly all of their income from sales of goods or services that they produce. These organisations – conveniently referred to as 'commercial' non-profits – in fact accounts for a large portion of the non-profit sector. For such organisations, it would be perfectly easy and natural to carry over the tax accounting that is applied to business firms, taking receipts from sales as the measure of gross income and permitting the usual deductions for expenses incurred in producing the goods or services sold. The resulting net earnings figure could be taxed just as in the case of a business firm. Since non-profits cannot distribute their net earnings, such a tax would effectively be levied on the sum of: (i) earnings saved for expenditure in future years; and (ii) net capital investment (that is, the excess of expenditures on capital equipment over depreciation allowances). This sum may simply be referred to as "retained earnings". At best, then, argument concerning the impossibility of applying ordinary tax accounting to non-profits apply only to nonprofits that receive substantial income in the form of donations. Conveniently, religious institutions fall under the category of "donatives non-profits".[927]

[925]Company and Allied Matters Act, Section 37, and also decision of the *court in Salomon v Salomon & co. ltd* [1897] AC 22.

[926]CITA, section 23(1)(c)grants tax exemption to "any company engaged in ecclesiastical, charitable and other activities".

[927]Hansmann*, op cit.*

Again, even for donative non-profits organization, there is a natural correlation to the concept of taxable income developed for business entities. For instance, as deductible from Hansmann's arguments on the point, if an individual makes a contribution to religious institutions; it is presumably with the intention that the money will be used to propagate the teachings of his faith. In other words, the contributor is in effect buying propagation of religious teachings.[928]

The relevant religious institution is, in a sense, in the business of producing and selling that relevant religious teaching. The transaction differs from an ordinary sale of goods or services, in essence, only in that individual who purchases the goods and services involved is different from the individuals to whom they are delivered.[929]

It then follows that we can view the contributions received by religious institutions and other such donative organisations as sales receipts, and hence – if such organisations were to be subjected to income taxation – as funds that are appropriately includable in gross income. The cost of the services, such as propagation of religious teachings, rendered by religious institutions would then be deductible, analogously to ordinary business expresses. The result is that religious institutions would be taxed annually on the amount, if any, by which their total receipts, from contributions as well as from other sources (such as tithes, offerings and gifts), exceed their total expenditures on the services to which they are dedicated. As with commercial non-profits, the tax would therefore effectively be levied on retained earnings. In Hansmann's view, there need be nothing troubling about such a definition of income.[930]

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[928]E. Onyeabor, "shall God's money be taxed"?*University of Nigeria Law Student's Journal*, Vol.2 No.1, 2015, p.16.

[929]Hansmann, *opcit.*

[930]Hansmann, *op cit.*

It is arguable whether all religious institutions in Nigeria qualify to be regarded as "donative non-profits". It would seem that some religious institutions in Nigeria today have amassed so much wealth, and engage in several business-oriented ventures, that they now qualify as "commercial non-profits.[931] Recently, four Nigerian pastors were listed among the top ten richest pastors in the world,[932] one of them strongly believes that his church has no reason whatsoever to pay taxes to the government – the government having not provided his church with basic amenities like roads, pipe-borne water and electricity.[933] It is worthy of note that a prominent Nigerian jurist[934] has called for taxation of what he called "Big Business Churches" on the grounds that they have become more commercialized than would rationally be considered appropriate.[935]

(v) The "Control" or Freedom of Religion" Theory

[931]When the federal Government imposed taxes on individuals who own private jets, Bishop Oyedepo of Winners Chapel was reported to have converted his four private jets into a private airline for hire business. He established Dominion Airlines. He also owns Dominion Publishers and has published numerous religious books under his imprint that enjoy a very wide readership at substantial costs amongst members of his church. Also, Apori*, op cit*p.178*.*

[932]"Top 10 Richest Pastor in the world 2014", available athttps://www.richestlifestyle.com/top-richest-pastors-in-the-world, accessed 30 January, 2016.

[933]"Pay tax for what?" Bishop Oyedepo React to Being Named Riches Pastor in the world", available at https://www.lindaikeji.blogspot.com/2014/10/pay-tax-for-what-Bishop-Oyedepo.html?=1, accessed 30 January, 2016.

[934] Mr. Femi Falana, SAN "Punch Interview: Let's Tax Big Business Churches – Falana,"Sahara Reporters, available at https://www.saharareporters.com/2012/12/11/punch-interview-let's-tax-big-business-churches %E2... Accessed 30 January, 2016.

[935]LekeBaiyewu, "Punch Interview: Let's Tax Big Business Churches – Falana,"Sahara Reporters, available at https://www.saharareporters.com/2012/12/11/punch-interview-let's-tax-big-business-churches %E2... Accessed 30 January, 2016.

This theory is premised on the argument that exempting religious institutions from taxation upholds the principle of separation of religion and State[936] as embodied in the provisions of section 10 of the 1999 constitution. The crux of this theory is that subjecting religious institutions to taxes would endanger the free expression of religion as guaranteed by the Constitution.[937]Propounder of this theory fear that by taxing religious institutions, the government would thereby be empowered to penalize or shutdown if they default on their payments, thereby infringing on their constitutionally guaranteed right to freely propagate their religion[938]. Taxation is, in essence, a very strong assertion of control by a sovereign over its subjects. Exempting religious institutions from taxation, therefore, is a way to ensure that the State cannot control religion.[939]

The validity of this theory may be assailed on the grounds that religious tax exemption indirectly forces all Nigeria tax payers to support religion, even if they oppose some, or all religious doctrines.[940] Accordingly, opponents of this theory have maintained that by providing financial benefit to religious bodies by way of tax exemption, government is supporting religion contrary to the apparent intendment of the constitution

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[936] "Pro & Con Arguments: should churches (defined as Churches, Temples, Mosque,Synagogues, etc.) remain tax-exempt?",*op cit.*

[937]The U.S Supreme Court, in a majority opinion written by Chief Justice Warren E. Burger in *Walz v Tax Commission of the City of New York* (supra), observed thus, "The exemption creates only a minimal and remote involvement between the church and State and far less than taxation of churches. It restrict the fiscal relationship between church and State, and tends to complement and reinforce the desired separation insulating each from the other*".*

[938]CFRN 1999, section 38(1), provides that every person be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others; and in public or in private) to manifest and propagate his religion or belief in worship, teaching, ;practice and observance.

[939]Stanley*, op cit*

[940]Mark Twain is reported to have argued that;"no church property is taxed and so the infidel and the atheist and the man without religion are taxed to make up the deficit in the public income thus caused". Also, "Pro & Con Arguments", *op cit.*

and the rights of citizens who profess no religion. This much was recognized in Australia by Kirby, J. in his dissenting opinion in *FCT v World Investments,*[941] when he observed thus:

> A taxation exemption for religious institutions, so far as it applies, inevitably affords effective economic support from the Consolidated Revenue Fund to particular religious beliefs and activities of some individuals. This is effectively paid for by others… across-transference of economic support. The court must recognize that this is deeply offensive to many non-believers, to people of different faiths and even to some people of different religious denominations who generally share the same faith… charitable and religious institutions should share with other taxpayers the ability to pay income tax upon their income. Exemptions need to be clearly demonstrated as conformable to law"

It is thus arguable that religious tax exemption violates the principle of separation of religion and State as enshrined in section 10 of the 1999 Constitution of the Federal Republic of Nigeria as amended.[942]

However, it would seem that the strongest arguments against this theory is that religious exemption amounts to discrimination on grounds of religion against citizens of

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[941][2006] FCA 144,250.

[942]It has been argued that religious tax exemption blurs the separation between religion and the Nigerian State, contrary to the intendment of section 10 of the 1999 Constitution. He pointed out that non-religious groups argue that section 10 of the 1999 Constitution was intended to make Nigeria a secular State and that reality ought to be reflected in denying preference to religion in tax exemptions. They also argue that the present tax dispensation is inequitable; as religious tax exemptions cost imposts on the public generally and, the benefits are for the purposes of advancing religion and not national interest. These sentiments are based on the premise that as Nigeria is a secular State, there is no need to advance any religion. This view is expressed by M.T. Abdulrazaq, "Banking and Taxation in Name of God and the Law", available at https://www.nigerian/guru.com/articles/commercial%20law/Banking%20and%20taxation, accessed 30 January,2016.

the State who do not subscribe to any particular religion[943]. For religious institutions are thereby accorded a privileged not enjoyed by atheist.[944]

Having discussed the various theories of tax exemption, it is pertinent for us to analyze whether or not there is need for these organisations to continue to enjoy tax exempt status.

Critique of Tax Exemptions

The recent pronouncement by the Federal Inland Revenue Service (FIRS),[945] that Non-Government organisations (NGOs) in Nigeria are required by law to discharge tax obligations to the government came as a surprise to many NGO operators.[946] It therefore means many of the NGOs have never been paying tax. People evade tax with impunity in Nigeria despite the numerous extant tax regulations in operation. Indeed, payment of tax is a fiscal responsibility of all the non-profit organisations and their evasion remains condemnable. As an emerging economy, Nigeria quest for sustainable development is largely hung on the attitude of the citizens to tax.[947]

It should be borne in mind that the performance of government depends on tax payment by citizens and corporate organisations. Any government that does not

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[943] Associate Justice of the U.S Supreme Court, Williams O. Douglas, in his dissenting opinion in *Walz v Tax Commission of the City of New York* (supra), observed thus, "If believers are entitled to public financial support, so are non-believers. A believer and nonbeliever under the present law are treated differently because of the articles of their faith…I conclude that this exemption is unconstitutional".

[944] CFRN 1999 (as amended) section 42 (1)(b) provides that a citizen of Nigeria of a particular religion, shall not, by reason only that he is such a person, be accorded either expressly by or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other opinions.

[945]"Guidelines on the Tax Exemption Status of Nongovernmental Organisations (NGOs)"Information circular by FIRS Published August 2010 as PC-T 1.2.2.3.1028.

[946]OnikeRahaman, "NGOs and Tax Evasion" available at Newsdiaryonline.com/ngos-tax-evasion onike-rahaman.

[947]*Ibid.*

encourage citizens to pay tax promptly will lack the financial wherewithal to achieve its objectives.

Over the years, there had been clarion calls for the NGOs to be paying tax. These calls, no matter how loud and far-reaching, cannot yield results, if deliberate and practical measures are not taken to address obvious tax evasion by the NGOs in Nigeria.

There is no gainsaying, that tax evasion and avoidance practices, in a way, constitute acts of corruption. The evasion is however, made possible by sharp practices and collusion between the tax officials and the operators of the NGOs.

Obviously, tax evasion and avoidance practices are two major fiscal challenges that must be addressed with utmost urgency by the government. There is no ambiguity in Nigeria tax regulations, and its enforcement procedures are equally not contentious. Yet, Nigerians have ways of circumventing the laws.

It is on record that the issue of over dependence on revenue accruing from oil, even in the face of dwindling economy as we have presently, has been a major cause of failure of government to maximally explore taxation for a national development. It is submitted that if Nigeria can move from resource dependence especially taxation, then, government cannot but tax all commercial ventures of non-profit organisations in any guise.

Notwithstanding, the clearly defined tax obligations of NGOs by the Federal Inland Revenue Service[948] (FIRS), the operators of NGOs are still insisting on exemption provisions of the law on the basis that their activities are not for profit. It is worthy of mention that statutory obligations of NGOs among others are; maintaining accurate

[948]"Guideline on the Tax Exemption Status of NGOs", *op cit*

record of employees; maintaining proper book of accounts; deducting Pay As You Earn (PAYE) from employees' salary and remit same to the appropriate tax authority; payment of Value Added Tax (VAT) on goods and services with the exception of humanitarian projects or activities carried out by them; deducting withholding tax (WHT) on payments made to its contractors/suppliers and remit same to the appropriate authority in accordance with the laws; such remittance is to be accompanied with schedule of deduction; and pay tax as when due on non-exempt activities.[949]

Incontrovertibly, there are civil society groups that venture into businesses with a lot of investment portfolios. Many of the NGOs are not willing to discharge their tax obligations to the government. Without doubts, many NGOs do conceal information to public on their financial profile, even some do not maintain proper books of accounts as stipulated by the FIRS guidelines.

In our view, NGOs should be made to pay certain types of tax particularly capital gains tax where it disposes of any asset for valuable consideration. In any event of such disposal of a capital asset, the organization should be made to pay ten percent (10%) of the consideration sum to the appropriate revenue authority as capital gains tax. Again, where it engages in profit-oriented activities or commercial activities like any other profit making corporate or entity, it should be mandated to pay companies income tax like other profit making entities. For it will prejudice the interest of other corporations, if these organization are allowed to use their tax-free income to compete unfavourably with others. Though, in practice, these not-for-profit organization will embark on commercial

[949] *Ibid,* pp.5-6.

ventures and make profit out of them. But such profits will not be assessed and chargeable to tax on the guise that they exempted from taxation.

Nevertheless, some NGOs instead of rendering the said services for which they were established free of charge, they charge fees for the delivery of the such services. For instance, some members of International Federation of Women Lawyers instead of rendering *pro bono* services, now charges fees from prospective clients. Then, the question is if they are exempted from taxation on the premise that they render *pro bono* legal service, why then are they charging fees? It has become obvious most of these NGOs are used as haven for tax evasion or avoidance.

The tax authority need to streamline between activities of the organization for which it is granted exemption and that for which it is not, so that when it has gone outside such activities, particularly, profit making, the tax authority should plough into such income and assess them accordingly.

Even when it appears that the law on tax exemption is clear and sufficient, there still exist a wide-range of avenues for tax evasion and avoidance. This is basically due to paucity of enforcement mechanisms. The tax authorities should devise a workable enforcement measures to ensure strict compliance of the relevant tax exemption provisions. The existence of loopholes in the enforcement procedures in tax administration has occasioned a great loss of revenue to the government. The tax authorities do not engage any organisations after granting them exemption from payment of taxes. These organisations take undue advantage of their tax exempt status to engage in various profit-oriented ventures and the tax authorities will not charge or assess those incomes for tax purposes.

Again, the exemption granted to the NGOs with respect to Value Added Tax is only when they purchase goods and services purely for humanitarian project. Suffice to State that when they make purchases on goods and services for non-humanitarian projects, they will bond to pay value added tax (VAT).

Further, NGOs are expected to deduct and pay personal income tax from salaries and allowances of their employees. Under the personal Income Scheme[950], the personal income tax is charged on the income of every taxable person for the year from a source inside or outside Nigeria in respect of, but not restricted to the following;

(a) The gains or profit from any trade, business, profession or vocation for whatsoever period of time such may have been carried out.

(b) Any salary, wages, fees, allowances or other gains or profit from an employment including gratuities, compensations, bonuses, premiums, benefits or other prerequisites allowed, given or granted by any person to an employee.

(c) Gain or profit including any premiums arising from a right granted to any person for the use or occupation of any property.

(d) Dividend, interest or discount;

(e) Any pension, charge or annuity; and

(f) Any profit, gain or other payments no falling within paragraph a-e inclusive of this subsection.

Flowing from the above, it is obvious that income in the form of salary, wages, fees, allowance or gains or profits received by virtue of employment is chargeable to tax. In other words, the salaried employees of the NGOs and other like organization should pay

[950]Section 3 Personal Income Tax (Amendment) Act, 2011.

personal income tax like other employees in the public or private sector. Thus, the NGOs should deduct a certain amount monthly from the emoluments of their employees is personal income tax under the "pay as you earn scheme"

There is no gainsaying that NGOs play intervention roles on national emergencies and equally perform social responsibilities. Notwithstanding the contributions of NGOs to National development, these do not in any justify continuous tax evasion by some of the NGOs.

Nevertheless, the ecclesiastical bodies, though exempted from taxation,[951]it is submitted that they should be robbed of their tax-exempt status. The essence or rationale for exempting religious institutions and other not-for-profit organisations from the payment of tax is that they are expected to embark on charities and other welfare programmes, which the State cannot readily meet. The pertinent question to ask is have these organisations been able to fulfill the welfare/charitable obligations to warrant the continued enjoyment of their tax exempt status? This question and other issues were brought to fore at the last concluded National Conference, held in Abuja.[952] One of the recommendations of the Confab was that religious organisations in Nigeria should be taxed, after it was put to vote by the delegates. Some of the delegates expressed the view[953] that the extreme flamboyant lifestyle of some religious leaders in the country is indicative of the excessive wealth at their disposal and as such the organisations which

[951]Particularly when profits and gains are not derived from trade or businesses engaged by these bodies.
[952] CONFAB of 2014.
[953] T Ogunbiyi, "On religious bodies and taxation", available at www.pmnewsnigeria.com/2014/06/09on-religious-bodies-and-taxation/.

they preside over, which generate such excessive fund in the first place, must be subjected to taxation.[954]

Other delegates have equally argued that business ventures of the most of these religious bodies should be subjected to taxation since they are strictly profit making undertakings.[955] On the other hand, those who were against the move to tax religious bodies have argued that since the income of religious bodies are largely made up of voluntarily gifts, donations, offerings and contributions from willing members, who have already paid taxes on their income, taxing them would amount to double taxation.[956]

Another argument that was put forward by those opposed to taxation of religious bodies was that what they brought to "tables" in terms of providing spiritual coverage for the country is invaluable and cannot be quantified. Consequently, subjecting them to taxation would be considered an act of ingratitude by government, since they are the reason Nigeria has not disintegrate. According to those who held this view, the only reason why the country has not disintegrated completely is because of the fervent prayers being offered, on behalf of the country, by these religious organisations.[957]

Some has gone further to declare that taxing religious bodies is an affront on God, whose interests the bodies are projecting. And when God is angry, he would complicate the country's troubles and woes.[958]

Flowing from the above analysis, it is submitted that arguments and opinions expressed by those objecting to taxation of religious institutions were merely founded on

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[954] *Ibid.*
[955] *Ibid.*
[956] *Ibid.*
[957] *Ibid.*
[958] *Ibid.*

sentiments. Beyond rational and historical reasons in favour of taxing the church, the money currently going to faith organisations is not used for non-profit or charitable activities that could help the poor or alleviate poverty or even improve the welfare scheme to any extent in Nigeria.

Centuries ago, calling for religious bodies and their leaders to be taxed, would have been regarded by many as a blasphemous move. However, current trend within our religious organization has shown that lots of them have sacrificed piety on the altar of mundane pursuit. It is for instance, immoral and unjustiable for religious bodies to establish institutions of learning that charge fees that are beyond the reach of majority of their members.

In the pre-colonial and colonial periods, when the European Missionaries introduced Western education into the country, what they offered was "free education". Their ultimate goal was to massively educate the people. Indeed, most modern day religious leaders benefitted from the erstwhile free education of the early missionaries. It is ironic that same people could preside over organization that are taking education beyond the reach of the ordinary masses, even their members. A lot of views have been expressed specifically the fact that churches and mosques alike would use the donations of the respective congregations to build private schools and universities that impose exorbitant fees which their members and followers cannot afford to send their children there. For instance, Al-Hikmah University[959] and Christian Universities such as Covenant University[960], Babcock[961], Benson Idahosa University[962], Redeemers University,[963]

[959]An Islamic University in Ilorin, KwaraState founded in 2005 by Abdul RaeemOladimeji Islamic foundation and World Assembly of Muslim Youths.

[960]Established in 2002 by Living Faith Church.

[961] Established by Seventh Day Adventist Church.

Bowen, AjayiCrowther University, et cetera. These universities charge from Five Hundred Thousand Naira (N500,000) to One Million naira (N1,000,000). Though, it has been argued that it takes huge funds to set up quality institutions of learning, but in all sincerity, it is indefensible for religious Organisations that used members funds, donations and contributions to establish schools to charge exorbitant fees that are well above the reach of average "income earner members".

Even though, educational establishments or institutions are exempted from taxation, but these are premised on the ground that proprietors or owners of these institutions will help the government in providing education for the populace. Hence, the exemption they enjoy cannot be justified when they charge exorbitant fees which church members or followers whose resources were primarily used in funding the schools cannot afford.

Thus, these institutions of learning have become only for the affluent in the society. It should be noted that in Ghana, all privately owned educational establishments or institutions are naturally taxed. Therefore, even if their Ghana counterparts, charge exorbitant fees, it can be justified since they are captured within "tax dragnet" of the Ghana Revenue Authority and from their chargeable fees, they pay into the coffers of the government as tax. This is highly commendable of the Ghanaian government and the revenue authority. Thus, notwithstanding, the amount charged as fees, they are assessed and chargeable to tax and the government in turn derives revenue from such venture.

This is not the case in Nigeria, where religious based educational institutions, established majorly from donations, contributions, offerings, et cetera of members and

[962] Established by Church of God Mission.

[963] Established by Redeemed Christian Church of God.

followers are operated as business ventures, whereby they charge exorbitant fees, which can only be afforded by politicians and business tycoons. Little wonder, most religious bodies in rivalry and competition among themselves crave to establish schools because these are seen as very lucrative business venture. Most religious bodies have already established two institutions, those with only one, crave to establish the second one.

It is submitted that if the government can remove the "exempt status", these organization enjoy and tax their "educational venture" and as well as those owed by other private persons. Thus, the government can derive some revenue from the tax on "educational ventures". Thus, it is unjustifiable for religious-based Organisations who are exempted from tax on the ground that they promote charity and welfare of the public, to commercialize education as a business venture. This explains why some State governments like Imo State have started making efforts to begin to tax religious institutions. Imo State Commissioner for Internally Generated Revenue and Pension Matters, Dr. OrikezeAjumbe, recently described the initiative as a way of increasing the State's Internally generated revenue (IGR). That the state is capturing churches and hotels in the tax net.

It is obvious that religious bodies are taking undue advantage of their tax-free income to diversity into businesses and other investments.

Their business empires include Television stations, Guest Houses in their camp grounds, petrol stations, bakeries, restaurants and fast food joints, hospital, microfinance Banks, publishing outfits, universities and schools across all levels, internet café, supermarkets, water purification factories (including the production of bottled and sachet water) plant

(Bulldozers et cetera) hiring, bookshops, rental shops in plazas, eventcentres, sales of audio and visual materials end, real estates.

Nonetheless, the tax-exempt status granted to religious institutions in Nigeria under the relevant taxing statutes does not contemplate the carrying on of any trade or business by the relevant religious institutions. The position of the law as envisage under CITA[964], section 23 (1)(c), is 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 activities are not derived from a trade or business carried on by such company.[965] Also, a similar provision in PITA[966], provides that the income of any ecclesiastical, charitable or educational institution of a public character is exempt from income tax,in so far as such income are not derived from a trade or business carried on by such institution.

Furthermore, Capital Gains Tax[967], section 26 (1)(a) provides that a gain shall not be chargeable to capital gains 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 trade or business carried on by the institution.[968]

From the foregoing, if the provisions of the law are clear on the tax treatment of these institutions when they carry on trade or business related activities, why is it that they are not paying taxes on those business or trade related ventures? The answer is

[964] Company Income Tax Act, Cap C21, LFN 2010.
[965] Underlining mine, for emphasis.
[966] Personal Income Tax (Amendment) Act,2011 , section 19 (1) and paragraph 1 and 13 of the Third Schedule.
[967] Cap C1, LFN 2010.
[968] Underlining mine, for emphasis.

simple, these organisations do business under the guise that they are registered as tax-exemptorganisations.

Nevertheless, the pertinent questions arising from the religious tax exempting provisions[969] highlighted above are; what constitutes "trade" or "business" for the purpose of the said exempting statutes? And how do we know if a religious institution is engaged in a trading activities? Unfortunately, what constitutes "trade" or "business" for the purpose of determining what part of the profits of a religious institution are assessable to tax is not conveniently defined in the relevant statutes, although a less than feeble attempt was made in the PITA.[970]

However, a learned author has expressed the view thatwhether or not an activity is a trade is a mixed question of law and fact.[971] For him, it would seem that a person does not trade if he simply process other trade; he must be involved in buying and selling of goods or rendering services.[972] If there is regular buying and selling or rendering of services, this is clearly trading and the profits and gain are taxable.[973] It is worthy of note that for purposes of tax assessment, it is immaterial whether a relevant trading activity is

[969]CITA, S.23 (1)(c), CGTA, S.26(1) (a) and PITA, S.19(1) items 1 and 3 of the Third Schedule.

[970] PITA, paragraph 1(d)(11) of the fifth schedule provides that "trade or business" means trade or business or that part of a trade or business the profits of which are assessable to tax under PITA. Clearly, this definition is of use in trying to understand, what constitute "trade" or "business" activity capable of depriving a religious institution of its exemption from income tax under the PITA.

[971]Abdulrazaq, *op cit.* however, another learned author, has expressed a somewhat discrepant view. For him, "neither the word "trade" nor Business" was defined by the Act (CITA), but Nigerian court have treated the question of trade as one of fact" Orojo, *opcit.*

[972]*Ibid.* This view appears very much open to question. It could afford the religious institutions the opportunity to carry on business or trade through third parties or even subsidiaries and still remain tax exempt, provided in all cases that they remain careful not to be directly involved in the management of the relevant trade or business.

[973]*Ibid.*

regularly carried on or it is a one of transaction as far as it can been seen that profits or gains emanates from such activity.

The classic case on the issue of taxation of religious institutions in Nigeria is that case of *Rev. M. F. Shodipo& 2 Ors. v FBIR*[974]. In that case, the third claimant; (Development Trust (Nig) Ltd;, a corporate entity engaged in charitable activities setup as subsidiary of the Methodist Church in Nigeria) was the owner of a property situated in Lagos and known as Wesley House, which leased to various tenants. The first and second claimants: Revered M.F Shadipo and T.R.B Macaulay; Trustees of the Methodist Church. Income derived from the property was said to be applied to charitable and educational purposes, namely for maintenance of various missionary establishments and educational institutions of the Methodist Mission in Nigeria.

The defendant raised income tax assessment on the rental income derived by the third claimant from the property contending that since the company was involved in activities of developing and letting of property, the income was derived from "trade" or "business" within the meaning of CITA, 1961, section 26 (1)(c)[975]. The claimants contended that the income was tax exempt as the third claimant was engaged in charitable and educational activities. Upon these, the contentious, the claimants brought this action seeking a declaration that the third claimant was exempted from tax on rental income and to obtain an injunction to restrain the defendant from taking steps to assess, collect or enforce the payment of tax.

It was led by the Federal Revenue Court, Lagos, per Lambo, J.)as he then was), that the third claimant was carrying on business of a company dealing in real estate and

[974](1974) 1 NTC 273.

[975] An equivalent of CITA, section 23(1)(c).

was therefore carrying on a trade or business within the meaning of CITA, 1961, section 26(1)(c). It was further held that third claimant as a company was a legal person separate and distinct from individual members that held shares in it. Accordingly, the fact that the first and second claimants owned all the shares of the third claimant as trustees of the Methodist Mission of Nigeria, and that dividend could not be paid to them, did not effect the liability of the third claimant to tax under the CITA, 1961.

Of even more interest was the holding of the court that even if the rental income was wholly devoted to charity, the third claimant was still assessable to tax on such income, having derived said income from a trade or business carried on by it –thereby forfeiting its tax-exempt status under CITA 1961, section 26(1)(c) and the claim for declaration and injustion could therefore be considered.

In reaching this decision, the court relied on seven English cases, two of which are of interest to the subject matter of this research work. In *Rotunda Hospital Dublin (Governors) v Coman,*[976]the Hospital, which was a maternity hospital incorporated in 1956 for the care of poor women, owned certain rooms. These rooms were let by the Governors of the hospital for concerts and other entertainments. It contended that all the receipts from the hiring out of the rooms were devoted to the purposes of the charity and therefore, not assessable to tax. The House of Lords perViscount Cava, observed thus;

> No doubt the hospital, like other charities yields no profit;
> but if the Governors in the course of their management

[976]*The Balowbie Land Trust Ltd v The Commissioner of Land Revenue* [1992] 14 TC 684, where the first Division of the Court of session in Edinburgh, while determining the question whether an isolated commercial transaction could amount to "trade" or "business" for tax purposes, observed thus, "A single plunge may be enough provided it is shown to the satisfaction of the court that the plunge is made in the waters or trade".

> carry on a profitable business, the profits of the business are subjected to taxation.[977]

The judicial opinion considered above would appear to sufficiently establish that an isolated or one off transaction which is in the nature of trade or of a commercial activity is taxable, irrespective of whether or not it is carried on by a religious institution.

"Trade" or "business" for the purpose of determining the tax liability of a religious institution in Nigeria is to be construed in the widest sense of the phrase; such that any activity of a commercial nature – however minute – amounts to trade or business sufficient to deprive a religious institution of its qualified tax –exempt status. And where it is established that a religious institution in Nigeria is carrying on trade or business, it is taxable under CITA, and PITA, (whichever is applicable) on gain(s) or profit(s) of the trade.[978]

From the foregoing, it is incontrovertible that where a religious institution in Nigeria lets out property for rent, the rental income accruing therefrom is deemed derived from a trade or business carried on by the relevant religious institution and therefore assessable to tax. Most contemporary religious institutions in Nigeria would seem to have transformed themselves into "Commercial non-profits" and therefore not entitled to religious tax-exemption – their income, gains or profits being arguably derived from trade or business carried on by them.

In line with the above principle, the income from commercial activities of the religious institutions which among others are; guest houses, event centers, rental shops in

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[978]CITA, section9 (1)(a) PITA, section 3 (1)(a)

plaza and other real estate must be harnessed into the hotchpotch and assessed and charged to tax accordingly.

Also proceeds from bakeries, restaurants and fast food chain, microfinance banks, publishing outfits, petrol stations, water purification factories, supermarket, sales of audio and visual materials, books, hiring, internet cafés, et cetera as operated by these religious institutions must be accessed and tax appropriately. As already expressed, that it would be unjustifiable and unconscious for religious institutions operating business ventures under the guise of tax exempt organisations to compete unfavourably with other taxpaying companies or enterprises involve in the same trade related activities or businesses.

Though, Churches pay certain amount of money to building authorities of any relevant State to get approval plan, building permit, building plan and other necessary authorizations. The application for building plan approval must be received, processed and assessed at the payment of various sum of money to the appropriate office.

This must be distinguished from tax exemption granted to religious bodies. This in turn means that religious are exempted from all forms of taxation, with the exception of Value Added Tax (except where they purchase goods and services which will be used majorly for humanitarian projects). On the other hand, sums of money demanded from the religious bodies for building plan, permit, approval plan or other necessary authorization are basically statutory levies which are payable to the appropriate state building authorities before any development is carried out on any land or improvement is carried out on an existing structure.

According to Pope Francis,[979] the Italian Church began to pay tax on profit making buildings[980]in 2013. Recently[981], the founder of INRI Evangelical Spiritual Church; Elijah Ayodele, was interviewed on whether the churches should pay tax. He took a swipe at churches in Nigeria that they do not do enough to alleviate the sufferings of their members. According to him, that churches receive donations in billions, they find it hard to give to the less-privilege in their congregations. Again, that if churches are allowed to pay taxes, they will become accountable to their donors as well as the government.

A business analyst and management expert,[982] expressed the view that some churches and Mosques have a continuous cash flow for stipulated periods. They have their Statement of income and expenditures. Whenever their income exceeds expenditure, then the organization should pay a portion of their surplus as tax. For him, some taxpaying companies and other business organization do not realize half of what religious bodies make. He said government can generate more revenue from these establishment as there seem to be increase in the number of churches and Mosques in recent years.

Even though, the argument expressed above sound cogent, it is submitted that imposition and payment of taxes on religious institutions should not be hinged on surplus. This is because, if it was the case, when their Statement of income and expenditures show no surplus, they would not be liable to pay tax. A better view would be to access all their

[979]"Pope Francis supports the call for churches to pay taxes on their businesses" available atwww.ionigeria.com.popefrancis-supports-the-call-for-churches-to-pay-taxes-on-their-businessesaccessed 30 January, 2016.

[980]The portfolio is huge, the Italian church owns at least 100,000 buildings including thousands of schools, universities, private clinics retirement homes, restaurants and sports canters.

[981]He was interviewed live on channels Tv on 15th March 2016.

[982] Mr. MoshoodAdetoro.

income generated from profits or gains on commercial activities and charge them as tax on income.

A research conducted by the University of Tampa, in the United States of America suggests that the government losses an estimated $71billion due to exemption of religious institutions from taxation. The research shows that despite the fact the religious bodies claimed to be charitable organization, that even when the embark on charity, only 29 percent of their revenue are spent on charity, while 71 percent goes into operating expenses. That is nowhere close to the America Redcross which uses 92.1 percent of revenue for charity (physical assistance) and just 7.9 percent on operating expenses.

It is worthy of note to state that religious ministers, officers and employees are expected to pay personal income tax. No provision of the law exempts them from paying personal income tax. The situation we have in practice is that most clerics, pastors, et cetera, who are full-time ministers and some under salaried employment of the religious institution, alongside with other employees of religious institutions (who are regarded as "church staff") labour under the impression that since religious institutions are exempted, therefore all religious paraphernalia are also exempted.

This is not the position, it is trite law that all employees in any Nigerian employment shall pay personal income tax through "Pay As You Earn" (PAYE). The employer being the religious institution is required under this scheme to deduct an appropriate amount from the weekly or monthly wages/salary of the employee in anticipation of the employee's tax liability for the whole year[983]. An employer will be given a tax table to assist in the calculation by the relevant authority upon request.[984]

[983] PITA, sections 81 and 82.
[984] *Ibid.*

The authorized employers who also deduct the PAYE taxes will make regular returns to the relevant tax authorities in such manner as the relevant tax authority may prefer for the deductions so made, and in the event of failure by the employer to make the deduction or properly to account thereof, the amount thereof together with a penalty of ten per centum per annum of the amount plus interest at the prevailing commercial rate shall be recoverable as a debt by the employer to the relevant tax authority.[985]

The religious institutions are in default of these requirements of the law. It is pertinent to understand the meaning of the term "employment". The term "employment", simply put, includes any service rendered by anybody in return for any gains or profits.[986] The pursuit to PITA, income tax is payable on any salary, wage, fee, allowance or other gain or profit from employment, including compensations, bonuses, premiums, benefits or other prerequisites allowed, given or granted by any person to an employees.[987]

Thus, an employee of a religious institution in Nigeria is taxable, if it is shown that his salary or any other compensation is derived from his employment with the religious institution. And the relevant religious institution – as his employer – is under obligation to deduct the taxes due on its employee's income and remit same to the relevant tax authority on request. The religious institution may be penalized for non-deduction and/ or remission of the said tax under the PAYE scheme.

Finally, it is worthy of mention that the income of the founders, general superintendents, et cetera, of religious institutions shall be chargeable to tax by virtue of the gain or profit they derive from their profession or vocation (as religious clerics) for

[985] *Ibid.*
[986] PITA, section 3 (2)(d).

[987] Other than those enumerated in PITA, section 3(1)(b)(i)-(xii).

whatever period of time such profession or vocation may have been carried on or exercised.[988]

Hence, for tax purposes, members of the clergy will not be considered as employees of religious institution; but rather as individuals engaged in profession or vocation by virtue of the position they occupying and therefore taxable in respect of income accruing therefrom under PITA.[989]This is the clear distinction between clergymen and other officers/employees of religious bodies for tax purposes.

[988]PITA, section 3(1)(a).
[989]*Ibid.*

CHAPTER EIGHT
CONCLUSION AND RECOMMENDATIONS

8.1. Conclusion

This thesis dissertation work has examined the fundamentals in taxation of income in Nigeria. The concepts of income, gains and profits were x-rayed. No liability to pay tax will arise, except there is an income emanating from gains or profits of the taxpayer's trade, business, vocation, employment, office or profession. It is observed that in charging income tax, the income chargeable must be within the contemplations of CITA, section 9 and PITA section 3. Thus, tax is payable for each year of assessment upon all income or profits from a source inside or outside Nigeria as far as it accrued, derived from; brought into or received in Nigeria. Also, on the aggregate amounts each of which is the income of every taxable person for the year, from a source inside and outside Nigeria. It must be noted that the said CITA, section 9 and PITA section 3 embodied the charging clause, and any gain, profit or income not envisaged by the said provisions, such will be absolved from tax.

In the course of this research, the nature of charitable trust was examined. Charity simply put has been seen a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons either by bringing their minds or heart under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life or erecting and maintaining public building or works, or otherwise lessening the burden

of government.[990] It is observed that charitable trusts has a lot of advantage over private trusts which among others include; objects need not be certain, the issue of perpetuity, fiscal benefits. Due to fiscal benefit attributable to charitable trust, most people create charitable trust to be absolved from the liability of tax. Three essential requirements must be met before a valid charitable trust must be of; charitable nature, public benefit and exclusively charitable.

Also considered in this research is the nature of Non-Government Organisations (NGOs). NGO is a legally constituted organisation created by natural or legal persons that operates independently from any government. NGOs are generally considered to be any non-state, non-profit voluntary organisations and independent from government influence. NGOs have different types, which can be classified according to the approach they undertake, the projects they operates, et cetera. Objectives of the NGOs were also considered, which among others include; alleviation of poverty, improving on the welfare of the populace, research into cheaper and more effective vaccines and ensuring that children are immunized, et cetera.

Attempt was made to x-ray the nature of religious organisations. Religious organisation, no doubt was observed to play an active role in shaping beliefs. It has been assumed that an individual's affiliation with a religious organisation endows him with religious beliefs. The various types of religious organisation was examined, these are the church, which can be the ecclesia or denomination, mega church, sect and cult. Religion as a basic requirement of group life is observed as integrative force,

[990]Per Gray, J. *in Jackson v Philips* supra.

enhanced of a moral community, emotional support, source of identity, promoter of social solidarity, welfare, et cetera.

Furthermore, a considerable part of this thesis dissertation examined the Nigerian tax regime and their exempting provisions. It was observed that exempt income is an income primarily subject to tax but exempt under another provision of the law. Exempt income ordinarily is income liable to tax but exempted from the liability to tax by express provision of the law. As it is seen that Capital Gains Act, by virtue of its section 26; excludes from liability to tax, gains accruing to ecclesiastical, charitable, educational institutions of a public character, at the disposal of any of their assets, so far as the gains are not derived from the disposal of assets acquired in connection to a trade or business. Companies Income Tax Act, on one hand, by its section 23(1) exempt from liability to tax, the profits of any company engaged in any ecclesiastical, charitable or educational activities of a public character, but such profits must not be derived from trade or business engaged by the company. It is shown that Petroleum Profits Tax Act, unlike other tax legislations, did not exempt any company or organisation from liability to petroleum profits tax, but made provision for all allowable deductions. These allowable deductions are expenses incurred by the company exclusively, wholly necessary and reasonably in the course of their operations, which the revenue authority must under consideration before the assessment of such company. Since, value added tax is a tax on goods and services, no person, artificial or natural is exempted from the tax. Though, the Value Added Tax Act made provision for exemption on g2oods and services purchase for humanitarian projects by not-for-profit organisations. Also, examined is the Personal

Income Tax Act. Personal income tax is a tax on personal income derived from trade, business, employment, office, vocation or profession. The Act exempted the income of ecclesiastical, charitable or educational institutions of a public character, provided the income is not derive from trade or business undertaken by them. The Stamp Duty Act as a tax on documents or instruments executed by parties, did not exempt any person, natural or artificial. But certain duties are exempted from the payment of stamp duty.

Also, analyzed in this work are the tax exemptions of the various organisations that formed the bulk of the discourse. Due to the exempt status, the charitable organisation enjoy, taxpayers can claim tax credits for charitable donations. Charitable donations are expected to devote all their resources to charitable activities; which include the relief of poverty, the advancement of religion, the advancement of education or activities intending for the benefit of the community as a whole. Though, that is not often the case. The non-governmental organisations are basically organisations that engage in benevolent, social, educational or scientific activities of a public character. In recognition to role played by the NGOs in building a strong, caring and well functioning society, thereby are exempted from taxation. Thus, they are exempted from all forms of tax, with the exception of Value Added Tax (VAT), when they procure goods and services for humanitarian projects. Though, in South Africa, tax exemption is not automatic, the organisation must apply for the exemption, if approved by South Africa Revenue Service (SARS), then the organisation is registered as a Public Benefit organisation (PBO). Thereafter will be allocated a PBO reference number. Thus, an organisation that has a non-for-profit

motive or is registered as Non-profit organziation does not automatically qualify for preferential tax treatment.

But, in Nigeria, the NGOs are exempted to register with the nearest Integrated Office (ITO) of FIRS. Even though, they are exempted, they are required to file returns in accordance with CITA, section 55.

Religious organisations as analyzed are also exempted from the payment of tax or liability to tax. Though, this exemption is subject to not embarking on trade or business related activities. In the event of such trade or business activities, the exemption is withdrawn thus, they become liable to tax like other commercial ventures. The position in South Africa is quite similar to that of Nigeria. South Africa tax regime made provision for tax exemption of religious, charitable and educational institutions of a public character by virtue of Income Tax Law Amendment Act, 2001, section 10(1) (CN). There is also a limitation on trading as observed in Nigeria, SARS recognizing the difficult financial situations in which most non-profit organisation find themselves. Thus, the law allows organisations to earn income from a wider variety of business and commercial activities without jeopardizing their tax-exempt status subject to certain conditions.

However, contrary to popular assumption, the tax-exempt status enjoyed by not-for-profit organisations in Nigeria is not absolute; and is indeed associated with a number of qualifications. These qualifications are; (i) the organisation must be of a public character, that is, its activities must one of a "public benefit" within the legal meaning of the term; (ii) the organisation must not derive its profits from a trade or business, that is, it must not be derive its income from any activities of a commercial

nature; and (iii) the organisation must apply its profits or gains "purely" to its charitable purposes, that is, its income or assets may not inure to the private benefit of any person having an interest in the organisation. It must be noted that these conditions are conjunctive and not disinjunctive, that is, all the condition must be satisfied before the organisation will be entitled to tax exemption. Where any of the conditions are unsatisfied, the relevant organisation will be statutorily unentitled to tax exemption. What constitutes "trade" or "business" sufficient to deprive a not-for-profit organisation of its tax-exempt status is not satisfactorily defined in the relevant exempting statutes, although a less than weak attempt was made in PITA, paragraph 1(a)ii of the Fifth Schedule. However, the relevant judicial opinions on the point appear to suggest that: (1) any activity of a commercial nature carried on by such organisation amounts to "trade" or "business" sufficient to deprive the organisation of its tax-exempt status in respect of the particular transaction, and it is immaterial that the transaction is one-off transaction or isolated transaction; and (ii) even where the proceeds of the transaction are wholly applied to the charitable purposes of the organisation, it will be subject to tax – the institution having for forfeited its tax-exempt status via carrying on a trade or business.

Attempts were made to consider some selected jurisdiction with the view of examining whether the tax exempt status granted to the organisations under consideration were absolute. In the United Kingdom, all these organisations are classified as charities. Though, charity law within the UK varies between England, Wales, Scotland and Northern Ireland; but the fundamental principles are the same. These organisations enjoy tax exemptions in the UK. By the combined effect of the

charities Act, 2006, sections 1(i), 3(i), 4(i) and ii, these Organisations must satisfy certain requirements before it can be entitled to the charitable tax exemption; these among others are; (a)the organisation must be of charitable nature, (b) the organisation must exist for the benefit of the public and (c) the organisation's purpose must be exclusively charitable. Though, the Act, by section 4(2), the Charity Commission maintains that the public benefit status of these organisation must be shown to exist by evidence. As envisage under the Act, by section 17(1) and (4), the Charity Commission is empowered to issue and publish guidance as to the operation of the public benefit requirement. The Commission is required to maintain a register of charities in England and Wales which is open to the public. It must be noted that not all the income and gains of recognized religious institutions in the UK that are tax-exempt. Though, religious organisation recognized as tax exempt by the HMRC are still required to pay tax on dividends from UK companies, profits from developing land or property and special VAT rules for purchases of goods and services apply to religious organisations. They also pay business rates on non-domestic building, but they get 80% discount. Also, required of them, are the payment of tax on part of their income not applied to the advancement of their religious purpose. Such taxable part of the income of a religious organisation is regarded as "non-charitable expenditure". Also, some religious ministers are exempted from liability on certain types of connected with their occupation of property.

In United States of America, these organisations are colloquially known as 501(c) organisations. The United State Internal Revenue Code, section 501 (c) provided that these organisations are exempted from some federal income taxes.

Consequently, by this tax-exempt status, these organisations are refrain from payment of taxes and donors who donate to these organisations have the privileged of deducting the value of those donations on their individual tax returns. Churches are accorded additional benefit; which is, they qualify automatically for tax exempt status. Though, there is no requirement to apply for recognition, many churches seek recognition of tax-exempt from IRS in a bid to reassure their contributors of their tax-exempt status. Since contributors will now know that their contributions are tax deductible.

In US, these organisations must adhere to certain rules if they wish to continue to enjoy their tax-exempt status. These rules among others are; prohibition on investment and private benefit, restriction on lobbing activity, prohibition on political campaign activity. Though, subject to certain conditions, any income derived from trade or business by these organisations are liable to be tax as Unrelated Business Income Tax (UBIT).

In India, the organisations are exempted from tax by virtue of Income Tax Act, 1961. organisations here, may qualify for tax-exempt status, if the following conditions are met; (a) the organisation must be organized for religious or charitable purposes (b) the organisation must 85% of its income in any financial year (April 1st to March 31st) on the object of the organisation.

Also, examined is Australia, under the Income Tax Assessment Act, 1997, a not-for-profit organisation must pay tax on any “taxable income” unless it qualifies for an exemption. To qualify for exemption, it must be registered with the Australia Charities and Not-For-Profit Commission (ACNC) to apply for charity concession

from the Australia Tax Office (ATO). These concessions include; income tax exemptions; a higher Goods and Services Tax (GST) registration threshold; the ability to make supplies GST free in certain circumstances; GST input credits; capped exemption form (or rebates of) Fringe Benefit Tax and the ability to receive tax deductible gifts (DGR).

In South Africa, preferential tax treatment are also provided for Not-for-profit organisations. The preferential tax treatment for not-for-profit organisations that meet the requirements set out in the Income Tax Act 1962, must apply for this exemption. If the exemption application has been approved by South African Revenue Service (SARS), the organisation is registered as a Public Benefit Organisation(PBO) and allocated a unique PBO reference number. 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).

Similarly, information released from the Ghana Revenue Authority suggests that religious and other not-for-profit organisations enjoy similar tax exemption as they do in Nigeria.

On the other hand, an organisation is charitable, if it meets the following conditions; (i) it is a public organisation resident in Tanzania (ii) its main functions are; (a) relief of poverty (b) relief of distress of public (c) advancement of education (d) provision of general public health, education, water or road construction or maintenance (iii) approved by Tanzania Revenue Authority (TRA).

When a charity conducts the activities mention in (b) above, it is said to conduct charitable business. If it conducts other activities apart from those mentioned above, then these activities shall be treated separately from the charitable business.

Attempts were made to criticize the tax exemption made available by law to the said organisation under discussion. It became obvious that the privilege of tax-exempt status granted to these organisations have been abused out-rightly. The researcher expressed the view that the said tax exemption enjoyed by these organisation should be modified and stringent measures be put in place to checkmate their operations.

8.2. RECOMMENDATIONS

The following recommendations are proffered in a bid to sanitize the operations of these organisations.

Need for Modification of the Legislative Framework.

There should be a review of the Nigerian tax regime, particularly as it relates to the extant provisions of the laws on taxation. It is submitted that tax exemption be removed out-rightly on educational institutions, particularly, private owned schools in Nigeria. It is advocated that Nigeria should adopt the approaches of Uganda and Ghana towards enforcement of tax on these privately owned schools. In Uganda, for example, effective from 27th of January 2015, all the privately owned schools are expected to pay 30% of their profit annually to Uganda Revenue Authority (URA). Also, in Ghana, all privately owned universities are made liable to tax annually on their profits. Therefore, if Nigeria adopt the same approach and remove entirely tax

exemption from educational institutions, particularly private owned educational institutions, whether religiously affiliated or not. Then, the Nigerian revenue authority; be it Federal Inland Revenue Service; as it relates to educational institutions established in the Federal Capital Territory (FCT) or State Board of Internal Revenue (SBIR) where they are established in various States, can now assess and charge their income to tax appropriately. Thus, worthy of recommendation, is the approach of the Imo State government in establishing legal framework to tax privately owned schools in Imo State.

Also, there is a need to review the extant laws on tax exemption in other to streamline or delineate expressly the activities of Charitable, Non-governmental and Religious organisationssw that will warrant or justify exemption and those that will not. In that case, when they embark on those activities which they are not granted exemption, revenue authority will drag such activities automatically within their "tax net", assess and charge them accordingly.

Again, there is need to incorporate the meaning of the terms "Trade and Business" in the extant tax laws. It was pointed in the course of the research, that only a weak attempt to define the terms "Trade and Business" was made in Personal Income Tax Act (PITA). Paragraph 1(d)(ii) of the Fifth Schedule to the said Act, where it provides that "Trade and Business" means trade or business or that part of a trade or business the profits of which view that this definition is of very minute or, indeed, no use at all in aiding an understanding of what would constitute "Trade and Business" capable of depriving these organisations of their exemption from income tax. Therefore, it is advocated that the Personal Income Tax Act (PITA), Companies

Income Tax Act (CITA) and Capital Gains Tax Act (CGTA) should be amended to incorporate the meaning of trade as appropriated to in the six badges of trade[991] in the interpretation sections of the various statutes. This will in turn solve the problem of constructing the meaning of "Trade and Business" in determining the taxable income of these organisations.

Rendering Financial Account to Federal Reporting Council of Nigeria

Religious Organisations are expected to render financial accounts of Federal Reporting Council of Nigeria.

Recently, Chief Executive Officer; Mr Jim Obazee in an interview[992], called upon Corporate Affairs Commission to delist churches and mosques that are not willing to file financial accounts with the Council. Currently, religious institutions in Nigeria are objecting to making their financial conducts public. Some churches are now in court to challenge the authority of the Federal Reporting Council to inquire into the accounts of the church.

It is the law and practice in all the selected jurisdictions x-rayed in this work to render financial accounts with the appropriate authority, failure to do so, the religious institution will be delisted and its tax-exempt status will be removed, thus, its income will automatically be taxable. In South Africa, such organisation will be delisted as "public benefit organisation" and its income will be taxable. The same is applicable in

[991]These are the subject matter of the transaction, length of the period of ownership, the frequency or number of similar transaction by the same person, adaptation of supplementary work and resale, the circumstances responsible for realization and motive.

[992]www.nigeriaeye.com/2016/01churches-Mosques-should-pay-tax.html, accessed 30 January, 2016

UK, the organisation will be delisted as "Charitable" by the Charity Commission and its income will be taxable.

It is therefore, advocated that all religious institutions in Nigeria shall make their financial accounts public by filling financial accounts with the Federal Reporting Council of Nigeria and failure to do so, they will be delisted by Corporate Affairs Commission and their income will be chargeable to tax.

It is also, recommend that the court should dismiss all pending suits filed by churches, challenging the authority of the FRCN to inquire into their accounts. This will deter others and force them to comply with the directive.

Establishment of Charity Commission

Just as it is obtainable in United Kingdom, it is recommended that there be established Charity Commission of Nigeria that will supervise charitable obligations of all these organisations.

In the United Kingdom, the Charity Commission checkmate and probe the activities of all these organisations. They are expected to render accounts and file returns with the Charity Commission, failure to do so, they are slammed with massive tax. For instance, Christ Embassy Church in United Kingdom, in 2014, was taken over by the Charity Commission to supervise the affairs of the church, when there was irregularity in the accounts filed by the church. Similarly, Living Faith church and its founder were banned from United Kingdom, when the church's accounts did not depict any involvement with charitable obligations, and inability to comply with penalty imposed on them. On the other hand, the same stringent policies of the

Commission forced the Nigerian-UK based pastor Matthew Ashimolowo of Kings Way International Christian Centre back to Lagos, Nigeria.

It is submitted that if the Nigerian Charity Commission is established, it will monitor the activities of these organisations, particularly religious organisations. This will make the church to be accountable and in turn cut down the show of flamboyancy and affluence lifestyle exhibited by most religious ministers. This will also make them to fulfill their charitable obligations.

Thus, subjecting churches to thorough supervision and checkmate would regularize the system. The practice could also reduce the proliferation of churches.

Organisation of Sensitization Programmes

It is also advocated that the Federal Inland Revenue Service should sensitize the leaders of civil society groups (NGOs), charitable and religious organisations on their tax obligations. Most of the founders and leaders of these organisations are not even aware that they have obligations to the revenue authority. This sensitization programme, if organized frequently will give the leaders of these organisations a better understanding of what the Federal Inland Revenue Service expects from them.

Strict Enforcement Measures

Given the negative attitude of most operators of NGOs, founders or leaders of charitable and religious organisations, the need to ensure strict enforcement of tax laws by the government becomes imperative. There shall be need to impose stiffer penalties for non-compliance to file returns and other statutory obligations.

Registration with Integrated Tax Office (ITO)

It is advocated that all these organisations under consideration should register with Integrated Tax Office of the FIRS. There will not be proper documentation, if these organisations are not registered.

Considering the current performance of the tax authority as it relates to the activities of these organisations, it seems the agency lacks reliable and comprehensive database of finances and operations of these organisations. If there is a mandatory requirement for registration with ITO, it will be easier for the FIRS to monitor and checkmate the activities of these organisations. Hence, these organisations should be mandated to register with ITO and obtain their tax clearance certificate.

Adoption of Unrelated Business Income Tax (UBIT)

Like the position in United States of America, where income emanating from trade or business of not-for-profit organisation are taxed as unrelated business income tax (UBIT).

Thus, it advocates for the adoption of UBIT Scheme, whereby all profit or gains or income emanating from trade or business related activities or other commercial ventures of charitable, religious and non-governmental organisations will be taxed under this scheme, is hereby recommended.

In that case, all prevalent commercial activities of these organisation should be brought into the hotchpotch, assessed and charged under UBIT.

Deduction of Employment Tax

It is recommended that all these organisations should deduct some percentage of their employees' income and pay to the appropriate State Board of Internal Revenue (SBIR) through the Pay As You Earn (PAYE) as personal income tax. The law is explicit on what income is taxable as personal income tax, and the employment income is one of such.

If the employees of these organisations, whether full-time or part-time receive emolument in the form of salary, these organisation should be obliged to deduct and remit same to the appropriate SBIR.

It is also advocated that the same is applicable to the founders, leaders or minister of these organisations, who receive income by virtue of their office or profession shall be expected to deduct and remit same to the appropriate State Board of Internal Revenue (SBIR) as personal income tax.

Prohibition on Political Campaign Activity

It is advocated that these organisations particularly religious organisation should refrain from engaging in political campaign activities. Religious organisations should absolutely be prohibited from directly or indirectly participating in, or intervening in any political on behalf of (or in opposition to) any candidate for elective public office. Thus, in the United States of America, the prohibition include; contributions to political campaigns funds or public statement of position (verbal or written) made by or on behalf of the organisation in favour of (or in opposition to) any candidates for

public office clearly violated the prohibition, and this may result in denial or revocation of tax-exempt status and the imposition of excise tax.

It is therefore advocated that if the above position is adopted in Nigeria, most organisations would lose their tax-exempt status. For instance, in the last presidential election, many organisations were actively involved in campaigning activities. A prominent Nigerian cleric was reported to have allegedly promised to "open the gates of hell" on those who oppose the incumbent president in the just concluded 2015 presidential elections.[993] Another was reported to have allegedly told a candidate in the said elections to "go and sit-down", on the grounds that said candidate is "too old".[994]

Again, another prominent Nigerian cleric had allegedly advised members of the public against voting a particular candidate in the said concluded election.[995] For the same cleric the then incumbent has become badluck due to many ongoing societal ills and poor administration.[996]

By this, it has become imperative that these organisations must be prohibited absolutely from engaging in political campaign activities, whether verbal or written or

[993]"We will open the gate of hell on those who oppose president Janathan" Bishop Oyedepo, available athttps://www.nigeriaeye.com/2015/01/we-will-open-gate-of-hell-on-those-who.html, accessed on 30 January 2016.
[994]Emma Amaize, "Bishop Okah to Buhari", "sit Down, You're too old", vanguard, available at http://www.vanguardngr.com/2015/01/Bishop-okah-buhari-sit-you-are-old, accessed on 30 January, 2016
[995] "Video of Rev. Mbaka Asking Nigerians to vote for Buhari"(part1) available at http://www, nairaland. com/2073264/accessed 30 January, 2015.
[996] "Rev. Mbaka insists President GEJ Must Go, says we Need Change", available at http://ooduarere. com/news-from-nigeri/local-news/rev_for_mbaka_insists_press_gej_must_go..., accessed 30 January, 2015.

in any other guise, noncompliance with the above will warrant the denial or revocation of their tax-exempt status and they will become liable to tax.

Public Enlightenment of the Masses

Most Nigerians need to be enlightened on the tax obligations of these organisations. In this era, where tax officials and tax authorities are still seen in the eyes of Zaccheus of the holy bible, the masses are always quick to attack and criticize every move of the tax authorities, even where the masses are ignorant of the tax obligations of these organisations. Therefore, it is advocated that public enlightenment programme in the form of seminars, workshops, symposia, radio jingles, television advertisements, billboards and in the social media should be carried out to enlighten the public on the tax obligations of these organisations.

Conclusively, it would be recalled that some months ago, the federal government announced that N50 stamp duty would be deducted from money deposited into any customer's bank account as part of the efforts to boost government's revenue, this directive has now been implemented. It is therefore advocated that if all these recommendations are considered, more revenues will be accrued to the government in the face of the dwindling oil price.

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