



ALLOWABLE EXPENDITURES UNDER THE INCOME
TAX LAW: THE DEVELOPMENT OF LEGAL
PRINCIPLES FROM THE COMMON LAW
PERSPECTIVE

BY

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A thesis submitted in fulfilment of requirement for the
degree of Doctor of Philosophy in Law

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JULY 2013

ABSTRACT

Allowable expenditure is a vital area available to taxpayers to explore for tax benefit. It is distinguishable from tax evasion, in the sense that the latter involves using unlawful means to circumvent the payment of taxes, it is therefore illegal and a crime punishable by the law; but allowable expenditure which may be described as an extended family member of tax avoidance is the process whereby taxpayers take advantage of legal opportunities to minimize their tax liability; the implication of this is that such taxpayers are knowingly trying to reduce their taxes, but they are not knowingly breaking the law. Allowable expenditure is an area of taxation law where the development of legal principles cannot be over emphasised as statutory provisions meant to control impermissible tax deduction may not cover all the schemes taxpayers and tax-lawyers (advisors) mechanically formulated for the purpose of tax benefit. This thesis addresses the issue of allowable expenditure in revenue law on which there are statutory provisions; it argues that in interpreting the statutes, the judiciary often comes up with legal principles relevant to this area of law. It is the development of these legal principles in relation to tax deduction of business expenses that the thesis evaluates, doing so from the perspective of common law jurisdictions. The concept of a loophole is an arresting proposition that illuminates revenue loss on the part of government, among other factors responsible for such loss. It hinders the tax authorities in carrying out their statutory duties of tax collections. In tax terminology, a loophole is defined as a technicality making it possible to circumvent the law's intent without violating the letter of the law; the thesis draws attention to the sophisticated schemes formulated by the taxpayers and their tax advisors to explore the loophole in the law for tax advantages. The thesis finds that the general consistency issue in impartiality of law requires that the principles sustaining the coherence of statutory framework, either on taxation or other legislative enactments, be observed when deciding, for instance, whether an expense is incurred for the purpose of producing income; hence the preference for interpretation that reduces the possibility of contradiction and inconsistencies among various statutory provisions. As a result of this finding, the thesis concludes that the ordinary principles of statutory construction must be applied to the words used by Parliament and this underscores the significance of interpretation of statutes. The thesis recommends that the principles of statutory construction should be upheld at all time and the implication of this is that a course of action that was designed to defeat the intention of Parliament should be treated as tax avoidance and dealt with accordingly since allowable expenditure as a tax benefit is meant for the deduction of expenses incurred in producing assessable income.

ملخص البحث

يعتبر مبدأ "النفقات المسموحة بها" من أهم المجالات والفرص التي ينتهزها دافعوا الضرائب للحصول على المنفعة الضريبية. و يختلف هذا المبدأ عن مسألة التهرب من دفع الضرائب، حيث أن الأخير ينطوي على استخدام وسائل غير قانونية للتحايل على دفع الضرائب، وبناء على ذلك فإنها تعتبر عملية المخالفة للقانون والجريمة التي يعاقب عليها قانونياً، ولكن الإنفاق المسموح به الذي يمكن توصيفه كأحد أفراد عملية التجنب من دفع الضرائب هي عملية انتهاز الفرصة القانونية التي لفائدة تخفيض الضرائب من ذمة دافعي الضرائب، ومن الآثار المترتبة على ذلك هو أن دافعي الضرائب يحاولون تخفيض الضرائب من ذمتهم عن قصد، ولكنهم لا يعلمون بأنهم يخالفون القانون. وعلاوة على ذلك، فإن النفقات المسموحة بها مجال من مجالات القانون الضريبي التي تتم منها تطوير المبادئ القانونية والتي لا يمكن وصفها بالتأكيد على بأنها المواد القانونية التي تهدف إلى السيطرة على خصم الضرائب على طريقة غير جائزة، والتي لا تغطي جميع المخططات وآليات التي وضعها دافعوا الضرائب ومحامو الضرائب (المستشارون) لغرض الحصول على المنفعة الضريبية. فتهدف هذه الرسالة إلى تناول مسألة "الإنفاق المسموح به" في القانون الإيرادات والتي لا توجد لها المواد القانونية في القانون المدني، وتثبت الرسالة بأن السلطة القضائية تستنبط المبادئ القانونية الملائمة لهذا المجال القانوني أثناء شرح القوانين غالباً. وقد ركزت الرسالة على تقييم تطور هذه المبادئ القانونية المستنبطة وعلاقتها مع مسألة خصم الضرائب من النفقات التجارية، وذلك على وجهه نظر القانون النجليزي العام. وإن مفهوم الثغرة هي النسبة المقترحة التي تنير خسارة الإيرادات الحكومية، وتعتبر عامل واحد من بين عوامل أخرى التي تسبب تلك الخسارة. وتمثل هذه الثغرة عائق كبير أمام السلطات الضريبية في أداء واجباتهم القانونية لجمع الضرائب. وتعرف الثغرة تحت المصطلحات الضريبية، بأنها التقنية التي تمكن التحايل على نية وضع قانون الضرائب مع عدم مخالفة نص القانون. وقد تنبتهت هذه الرسالة إلى هذه التخطيطات المتطورة التي وضعها دافعوا الضرائب ومستشاروهم للضرائب للاستكشاف الثغرة الموجودة في القانون حتى يحققوها مصالحهم الضريبية. واكتشفت الرسالة بأن مسألة الاتساق العام في نزاهة القانون يتطلب الالتزام بمبادئ الحفاظ على الإطار القانوني، سواء في شأن الضرائب أو القوانين الأخرى، وذلك عند اتخاذ قرار، على سبيل المثال، وذلك فيما إذا كان هناك تكبد النفقات لغرض إنتاج الدخل، وحينئذ يتم تفضيل الشرح القانوني التي تقلل من إمكانية التضارب والتناقض بين الأحكام القانونية المختلفة. وبناء على هذه النتيجة، فقد خلص البحث إلى وجوب تطبيق المبادئ القانونية العادية بناء على الكلمات التي تستخدمها البرلمان، هذا ما يؤكد أهمية شرح القوانين. ويوصي الباحث بالتمسك بمبادئ وضع القانون في كل وقت، وأنه من الآثار المترتبة على ذلك هي اتخاذ مسار العمل لمعاملة أية محاولة تغلب على نية البرلمان في وضع القانون معاملة التهرب من دفع الضرائب ويكون جزاء هذه القضية وفقاً لها في القانون، وذلك لأن المبدأ "الإنفاق المسموح به" بوصفه المنفع الضريبي، إنما المقصود به هو خصم النفقات المتكبدة في إنتاج الدخل التي كان تقييمها ممكنة.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degree at IIUM or other institutions.

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This thesis is dedicated to my late parents, AbdulGafar Ishola Olaitan Nafiu and Taibat Abeni Nafiu for laying the foundation of what I turned out to be in life.

AND TO

My wife Omokeji Shakirat Olaitan for not letting my absence harm the up-bringing of our children; Dr. Salman Kolawole Raheem for faithfully playing the role Allah assigned him at a time challenges of life almost consumed me.

ACKNOWLEDGEMENTS

All glory is due to Allah, the Almighty, whose Grace and Mercies have been with me throughout the duration of my programme. Although, it has been tasking, His Mercies and Blessings on me ease the herculean task of completing this thesis.

I am most indebted to my supervisor, Assoc. Prof. Dr Mohsin Hingun, whose enduring disposition, kindness, promptitude, thoroughness and friendship have facilitated the successful completion of my work. I put on record and appreciate his detailed comments, useful suggestions and inspiring queries which have considerably improved this thesis. His brilliant grasp of the aim and content of this work led to his insightful comments, suggestions and queries which helped me a great deal. Despite his commitments, he took time to listen and attend to me whenever requested. The moral support he extended to me is in no doubt a boost that helped in building and writing the draft of this research work. I am also grateful to my co-supervisor, Asst. Prof. Dr. Zuraidah Ali, whose support and cooperation contributed to the outcome of this work.

Sincere thanks to the entire management and staff of AIKOL particularly the Dean of Law, Prof. Dr. Hunud Abia Kadouf. My thanks to the entire staff of the Postgraduate Units, AIKOL, particularly to the Deputy Dean (Postgraduate) Prof Dr Abdul Ghafur Hamid, Sister Nurhanisah Binti Mohd Taib and Sister Norhanieza Binti A. Hamid for their support, cooperation and useful information given when requested.

I also express my thanks to Prof. Dr. Aiman Nariman Mohd Sulaiman for making my path cross that of Assoc. Prof. Dr. Mohsin Hingun who eventually turned out to be my supervisor, Deputy-Dean, (Academic Affairs) Prof. Dr. Najibah bt Mohd Zin for her motherly advice and moral support. I also register my appreciation to the many academic staff of Ahmad Ibrahim Kulliyah of Law from whose fountain of knowledge I have drawn and used. Special thanks to Assoc. Prof. Dr Mohsin Hingun whose Revenue Law lectures have broadened my knowledge of Taxation Law in particular and Revenue Law as a whole.

I am highly indebted to my friend, Dr Salman Kolawole Raheem and Hussain Folorunsho Ahmad (Saddam) for the role they played in my coming to Malaysia.

My profound gratitude goes to the following people without whose financial backing this research work would have been impossible. Mrs Olaitan Omokeji Shakirat, Ms Olasode Ramata Bola, my late mother Taibat Abeni Nafiu, Brother Moshood Usman (Accountant), Mrs Owolabi Bunmi, Gloria Asiedu-Larbi. To them all I say may God continue to enrich you (Amin).

I will like to also appreciate the contributions of my colleagues in diaspora with whom I share ideas. Dr Salman Kolawole Raheem; Dr Ibrahim Kayode Adam; Dr. Bashir Omipidan; Dr David I. Efevwerhan; Dr Umar Oseni; Brother Abdul Ganiyy, Brother Maruf Abdul Azeez and Mrs Salman Ramota Titilayo. They are all

wonderful people. I am also grateful to Fathima Shiunny and her husband Brother Firdaw.

To my family is my heartfelt appreciation, particularly my late parents for their prayers without which I could not have succeeded in this programme and made such tremendous success in my undertakings. Special thanks to my sisters, Mrs Olatunji Temitope Basirat, Mrs Olajide Asimotu, Momudat Nafiu, and Late Muibat and their families for their prayers and support. To my in-laws, Elder Jamiu Olasode, (Baba Adia) and his family, is my deepest appreciation for his support, encouragement and prayers. I cannot thank him enough.

Lastly, my gratitude goes to my beloved lovely children; Fathima Omolola Olaitan, Abdeen Tumininu Olaitan, Ahmed Ajibola Olaitan and Abdullah Temitope Olaitan for their prayers, understanding and endurance while away.

Once again, we glorify Allah for His endless mercy on us one of which is enabling us to successfully round off the efforts of writing this thesis. Alihamdulilahi!

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LIST OF ABBREVIATIONS

AC	Appeal Court / Appeal Case
A-G	Attorney-General
Anor	Another
ASEAN	South East Asian
AU	African Union
ECOSOC	Economic and Social Council
ed. / eds.	Editor/ editors
EHR	European Human Rights Report
ESR	Economic and Social Rights
etc.	(<i>et cetera</i>): and so forth
EU	European Union
IBFC	The International Business and Financial Centre
ICTA	Income and Corporations Tax Act, (ICTA), 1988
ITTOIA	Income Tax (Trading and Other Income) Act, 2005
JAKIM	Jabatan Kemajuan Islam Malaysia (Department of Islamic Development Malaysia)
LOBATA	Labuan Offshore Business Activity Tax Act, 1990
LOC's	Labuan Offshore Companies
No.	Number
OECD	Organisation for Economic Co-operation and Development
OIC	Organisation of Islamic Conference
Ors	Others
p. / pp.	Page/Pages
Para	Paragraph/s
Pt.	Part
SAW	<i>Salla Allahu 'Alayhi wa-sallam</i> (Blessings and Peace of Allah be upon him)
SC	Supreme Court
U.S.	United States
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
Vol.	Volume / Volumes

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

The income tax law is complex in nature due to its objectives; this is in addition to the understanding that through it the legislature seeks to balance many principles of law. Indeed, different policy objectives can be pursued through a tax system; as a result some provisions in the statutes relating to revenue underscore the extension of the Income Act in common law jurisdictions and other recognised political territories from an ordinary instrument of source of fund or means of the cost of government to a mechanism through which the economic and the fiscal policy for the regulation of commerce and industry of a sovereign state is exercised. As Professor Clair rightly observes: “the tax system is a powerful tool used to direct social and economic activities...”¹

In the same tone, Major J in allowing an appeal from a judgement of the Federal Court of Appeal had argued that: “although the principal goal of the Income Tax Act is to raise national revenue, there are competing demands and priorities which may shape tax policy in any given circumstances.”²

Similarly, on rejecting a submission that the courts should adopt a test which required a strict business purpose for a transaction, independent of the goal of tax avoidance, before an entitlement to a deduction or exemption would be recognised, Estey J was of the view that such recognition would run counter to the modern

¹ See Young Clair F.L. “*Impact of Feminist Analysis on Tax Law and Policy*,” in ‘Feminist Analysis: Challenging Law and Legal Processes,’ Institute of Continuing Legal Education, January 31, 1992. Toronto: Canada Bar Association – Ontario, (1992) at p.1

² See *Friesen v Canada* [1995] 3 S.C.R. 103 at61(per L ‘Heureux-Dube, Sopinka and Major JJ)

legislative intent infusing the provisions of the Income Tax Act. He insists that the statute had to be viewed as not only a tool of raising revenue, but also a device for the attainment of certain economic policy objectives.³

It is from this perspective of multiple objectives of statute on taxation we should view measures such as tax deduction which Parliament has expressly allowed on the basis that expenses incurred, for instance, within a business or revenue-producing circle⁴ should be deductible while some expenses are disallowed on the ground of public policy. Good examples of that are penal fines or other such expenses which may frustrate the legislative purpose of other statutes if allowed to be deducted.⁵

The concept of a tax deduction is not a new phenomenon, neither is it an offence nor immoral in its outlook even though it results in a loss or reduction in the tax revenue for the government. However, equity in a tax system may sound reasonable but it is pertinent to note that equality is an elusive concept⁶ and the myth of law's neutrality has been largely eroded.⁷

Income tax legislation is said to be by its nature both overtly and systemically discriminatory, for instance, in Malaysia and in virtually other common law jurisdictions, the tax law does discriminate in favour of residents against non-residents by imposing higher rates of tax on some forms of income realised by the latter; it

³ See *Stubart Investments Ltd v The Queen* [1984] 1 S.C.R. 536, at p.576 (per Beetz, Estey and McIntyre JJ)

⁴ See *Symes v Canada* [1993] 4 S.C.R. 695 (per Iacobucci J)

⁵ See *British Columbia Limited v Her Majesty The Queen* [1999] 3 S.C.R. 804 (per Bastarache J)

⁶ See *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143

⁷ See Brockman J. 'Social Authority, Legal Discourse, and Women's Voices,' 21 Man. L.J. 213, (1992) at p.233