BENSON IDAHOSA UNIVERSITY

BIU LAW JOURNAL

Vol 2. No. 1 October 2015 | ISSN -1115837

ARTICLES

- Blue chip acquisition v. zenith bank plc & 2 ors [2005] ISLR 72: A Milestone in investor's protection In Nigeria. *Agom, A, Ph.D,. Alubo, A.O., Professor of Law*
- Legal And Regulatory Framework For Resource Diversification In Nigeria: Globalization And The Prospects Of Resource Diversification. *Solomon O Afolabi, Ph.D; Halimat Tope Akaje, LL.M*
- Abuse Of Rights Doctrine: A Contending But Not Contentious Doctrine In The Contemporary Nigerian Tax Jurisprudence. *Olokooba S.M, Ph.D.; Sola Animashaun, LL.M*
- Episiotomy Of The Child Right Act And The Child's Right To Education. *E. Ibu Otor Esq. LLM. BL., Alubo, A.O., Professor of Law, A. M Izang, Esq. LLM., D. N. DASHE, Esq. LLM.*
- The Legality Of Online Arbitration Agreements: Whither Lays Nigeria? *Araromi, Marcus Ayodeji, Ph.D.*
- Balancing Market Growth And Quality Of Service: A Critique On Consumerism In The Nigeria Telecommunication Administration *Obokhai L. Obadan: LLM. Ojieifo Eikhenomian:, LL.M*
- MV Marevia Carriage Of Electronic And Toxic Waste: Legality Or Illegality Of Penalty Imposed And Its Implications On Maritime C mmerce. *Abdulrazaq O. Abdulkadir , Ph.D.*
- The German Penal Orders; A Prescription ROR Nigeria Criminal Justice System. *Joel Barde, Ph.D, Dr. Salomi Kookat Kigbu, LL.M.*
- An Examination Of The Principle Of The Freedom Of The High Seas Under Unclos Iii 1982. *Madubuike-ekwe, N. J., S.J.D.*
- The Role Of The United Nations High Commissioner For Refugees (unhcr) And The Protection Of Refugees In Africa. *Okoli Chinwe .K. Ph.D, Nwufo Cecilia .C., LL.M.*
- A Reflection On The Socio-legal Perspectives Of Islamic Banking In Nigeria. *Fagbemi, Sunday Akinlolu*
- Inequities In The Constitutional Allocation Of Taxing Rights In Nigeria. *Adure Uzo-Peters, LL.M.*
- The Evolution Of International Transactions And The United Nations Convention For The International Sale Of Goods (CISG): An Assessment Of Its Contradictions And Compromises. *Eghosa Osa Ekhator, Ph.D. Amede Alexandria Orieso, Ph.D.*
- Managing Infertility And The Law: The Surrogacy Option. *Ayobami Olaniyan, Ll.m. Ifeoluwayimika Bamidele, LL.M*
- Maternity Protection Of Working Women In Nigeria: A Need For Legislative Review. *Olubiyi Ifeoluwa, LL.M., Olusegun Olaitan O., LL.M.*
- Privatization Of The Prison System As A Panacea For Prison Problems In Nigeria: Myth Or Reality. *Simon-peter. Ayooluwa St. Emmanuel, LL.M.*
- The Protection Of Women's Rights In Nigeria: An Appraisal Of Judicial Intervention On Women And Inheritance. *Oyeniyi Ajigboye, LL.M., Temiloluwa Alabi, LL.M.*
- The Ombudsman In Nigeria: Staying Relevant In The 21st Century. *Lillian Akhirome Omonfuegbe, LL. M.*
- Compulsory Acquisition Of Land In Nigeria: An Analysis Of Its Process And Procedure. *Nwano T.C., LL.M.*
- Towards A New Approach To Defective Product Litigation In Nigeria: Time To Hold Regulators Liable. *Ayodele A. Adewole, LL.M.*
- X-raying The Institutional Framework For The Protection Of Women In Nigeria: Problems And Prospects. *Leah Mark Bulus (Mrs.), LL.M.*
- Infringing The Rights Of The Child To Education In Situations Of Internal Displacement: North- East Nigeria In Issue. *Bello Joseph Bamidele, LL.M.*
- Child Marri e In Nigeria; The Legal Perspective. *Obasohan, O.J. (Mrs.), L.L.M, BL, MPA, Ibrahim Shehu, LL.M.*
- Regulatory Framework For E-commerce.
- Judicial Bias As A Violation Of Fundamental Human Right In Other Jurisdictions: A Lesson For The Nigerian Judiciary *Obokhai L. Obadan: LLM. BL & Ojieifo Eikhenomian: LL.B (University of Benin), BL (Nigeria), LL.M*

Published by The Faculty of Law, Benson Idahosa University, Benin City, Nigeria

Scanned with CamScanner

BIU LAW JOURNAL

Vol 2. No. 1 of October 2015 ISSN – 1115837

CONTENTS

ARTICLES

BLUE CHIP ACQUISITION V. ZENITH BANK PLC & 2 ORS [2005] ISLR 72: A MILESTONE IN INVESTOR'S PROTECTION IN NIGERIA.
Agom, A, Ph.D,. Prof Alubo, A.O. 1

LEGAL AND REGULATORY FRAMEWORK FOR RESOURCE DIVERSIFICATION IN NIGERIA: GLOBALIZATION AND THE PROSPECTS OF RESOURCE DIVERSIFICATION.
Solomon O Afolabi, Ph.D; Haliimat Tope Akaje, LL.M...... 20

ABUSE OF RIGHTS DOCTRINE: A CONTENDING BUT NOT CONTENTIOUS DOCTRINE IN THE CONTEMPORARY NIGERIAN TAX JURISPRUDENCE.
Olokooba S.M, Ph.D.; Sola Animashaun, LL.M.....48

EPISIOTOMY OF THE CHILD RIGHT ACT AND THE CHILD'S RIGHT TO EDUCATION.
E. Ibu OTOR Esq. LLM. BL., A. O. Alubo, Professor of Law, A. M Izang, Esq. LL.M., D. N. DASHE, Esq. LL.M. 70

THE LEGALITY OF ONLINE ARBITRATION AGREEMENTS: WHITHER LAYS NIGERIA? *Araromi, Marcus Ayodeji, Ph.D.* 88

BALANCING MARKET GROWTH AND QUALITY OF SERVICE: A CRITIQUE ON CONSUMERISM IN THE NIGERIA TELECOMMUNICATION ADMINISTRATION *Obokhai L. Obadan: LLM. Ojieifo Eikhenomian:, LL.M*.....118

Scanned with CamScanner

MV MAREVIA CARRIAGE OF ELECTRONIC AND TOXIC WASTE LEGALITY OR ILLEGALITY OF PENALTY IMPOSED AND ITS IMPLICATIONS ON MARITIME COMMERCE. *Abdulrazaq O Abdulkadir , Ph.D.* 152

THE GERMAN PENAL ORDERS; A PRESCRIPTION ROR NIGERIA CRIMINAL JUSTICE SYSTEM.
Joel Barde, Ph.D, Dr. Salomi Kookat Kigbu, LL.M. 178

AN EXAMINATION OF THE PRINCIPLE OF THE FREEDOM OF THE HIGH SEAS UNDER UNCLOS III 1982.
Madubuike-Ekwe, N. J., S.J.D 210

THE ROLE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) AND THE PROTECTION OF REFUGEES IN AFRICA.
Okoli Chinwe .K. Ph.D, Nwnfo Cecilia .C., LL.M. 238

A REFLECTION ON THE SOCIO-LEGAL PERSPECTIVES OF ISLAMIC BANKING IN NIGERIA.
Fagbemi, Sunday Akinlolu 273

INEQUITIES IN THE CONSTITUTIONAL ALLOCATION OF TAXING RIGHTS IN NIGERIA.
Adure Uzo-Peters, LL.M. 308

THE EVOLUTION OF INTERNATIONAL TRANSACTIONS AND THE UNITED NATIONS CONVENTION FOR THE INTERNATIONAI SALE OF GOODS (CISG): AN ASSESSMENT OF ITS CONTRADICTIONS AND COMPROMISES.
Eghosa Osa Ekhator, Ph.D. Amede Alexandria Orieso, Ph.D. 328

MANAGING INFERTILITY AND THE LAW: THE SURROGAC OPTION.
Ayobami Olaniyan, LL.M. Ifeoluwayimika Bamidele, LL.M 347

MATERNITY PROTECTION OF WORKING WOMEN IN NIGERIA: NEED FOR LEGISLATIVE REVIEW.
Olubiyi Ifeoluwa, LL.M., Olusegun Olaitan O., LL.M. 381

Scanned with CamScanner

PRIVATIZATION OF THE PRISON SYSTEM AS A PANACEA FOR PRISON PROBLEMS IN NIGERIA: MYTH OR REALITY, *SIMON-PETER, Ayooluwa St. Emmanuel, LL.M.* 410

THE PROTECTION OF WOMEN'S RIGHTS IN NIGERIA: AN APPRAISAL OF JUDICIAL INTERVENTION ON WOMEN AND INHERITANCE.
Oyeniyi Ajigboye, LL.M., Temiloluwa Alabi, LL.M. 432

THE OMBUDSMAN IN NIGERIA: STAYING RELEVANT IN THE 21ST CENTURY.
Lillian Akhirome-Omonfuegbe, LL. M. 458

COMPULSORY ACQUISITION OF LAND IN NIGERIA: AN ANALYSIS OF ITS PROCESS AND PROCEDURE.
Nwano T.C., LL.M. 474

TOWARDS A NEW APPROACH TO DEFECTIVE PRODUCT LITIGATION IN NIGERIA: TIME TO HOLD REGULATORS LIABLE.
Ayodele A. Adewole, LL.M. 509

X-RAYING THE INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF WOMEN IN NIGERIA: PROBLEMS AND PROSPECTS.
Leah Mark Bulus (Mrs.), LL.M. 527

INFRINGING THE RIGHTS OF THE CHILD TO EDUCATION IN SITUATIONS OF INTERNAL DISPLACEMENT: NORTH-EAST NIGERIA IN ISSUE.
Bello Joseph Bamidele, LL.M. 553

CHILD MARRIAGE IN NIGERIA; THE LEGAL PERSPECTIVE. *Obasohan, O.J. (Mrs.), L.L.M, BL, MPA,* 570

REGULATORY FRAMEWORK FOR E-COMMERCE.
Ibrahim Shehu, LL.M. 580

Scanned with CamScanner

JUDICIAL BIAS AS A VIOLATION OF FUNDAMENTAL HUMAN RIGHT IN OTHER JURISDICTIONS: A LESSON FOR THE NIGERIAN JUDICIARY
Obokhai L. Obadan: LLM. BL &
Ojeifo Eikhenomian: LL.B (University of Benin), BL (Nigeria), LL.M 611

Scanned with CamScanner

ABUSE OF RIGHTS DOCTRINE: A CONTENDING BUT NOT CONTENTIOUS DOCTRINE IN THE CONTEMPORARY NIGERIAN TAX JURISPRUDENCE

By Olokooba S.M* and Sola Animashaun*

Abstract

Taxpayers are given the right to plan and limit their tax liability trough tax avoidance. Unfortunately, some tax payers are now hiding under the shield of 'right to plan' to abuse and aggressively avoid tax payment; hence, the doctrine of abuse of right now introduced in the tax jurisprudence. This paper therefore examines what this doctrine is all about. The paper further highlights the applicability of the doctrine to Nigerian situation and concludes that, though the importance of the application of this doctrine could not be overemphasized but the doctrine should rarely be used once a taxpayer genuinely planned his liability through acceptable ways of tax avoidance.

1.0 INTRODUCTION.

Tax avoidance is a legal means of minimizing taxpayers' liability with regards to tax payment. Unlike tax evasion which is purely criminal in nature, taxpayers all over the world are permitted to plan and arrange their tax liability in a way that such payment will not be too high; however same must be done in accordance with the law. Unfortunately, while hiding under the pretence of tax avoidance, some individuals and corporate ogranizations are found to be wrongfully and fraudulently

* B.A. P.G.D.E, LL.B., Ph.D. (Unilorin), LL.M(Ife), BL. Senior Lecturer, Department of Business Law, Faculty of Law, University of Ilorin.
* B.Sc, M.Sc, MBA, LL.B., LL.M., B.L., Kwara State University, Malete Ilorin

Scanned with CamScanner

hiding paying their due rate; hence the abuse of right doctrine evised by courts in checking fraudulent practices in tax planning. The interesting developments of tax jurisprudence in the last decade is the importation of the concept of abuse of rights in setting the limits that a tax payer may go in legally planning his tax affairs in a way to limit his liability[1]. The concept which was explained in the case of *Barclays Mercantile Business Finance Ltd v Mawson*[2] was that a practice was abusive if the transactions concerned resulted in a tax advantage the grant of which would be contrary to the purpose of legal provisions. The more interesting development is that of the Centros Case[3] and other European Court's decided cases where the argument was advanced that as the concept may be use to check abuse of right in tax payment, it may also be used to protect the citizen against a State Institution or an exercise of the law[4]. However, the European Court of Justice was clear in stating that the doctrine was not a general anti-avoidance principle, nor could it be used to invalidate all structures where tax mitigation comprised merely one of a number of drivers[5]. Indeed the doctrine does not operate in a vacuum-it must be considered in conjunction with other well established principles of community law such as legal certainty and fiscal neutrality[6].

---

1 Abdulrazaq M.T. *Principles & Practice of Nigeria Tax Planning and Management* (2nd Edition, Stirling Horden Publishers Ltd. Lagos, 201) .

p 1

2*(2005) STC1.* See, also Abdulrazaq *ibid*, p.32

3*(1999) ECR 1-1459* See also *ibid*

4 This doctrine was also applied by the European Court of Justice in Halifax case. Case C-255/02,(2006)STC 919

5<www.taxbar.com/documents/Abuse_of_Rights Doctrine_on_VAT_planning_Hui_Ling_mcCarthy pdf.>accessed on 20 December 2014

6 *ibid*

Scanned with CamScanner

The concept of abuse of rights refers to situations in which a right is formally exercised inconformity with the conditions laid down in the rule granting the right, but where the legal outcome is against the objective of that rule. Thus, the tension between the strict application of a rule and the true spirit of that rule is at stake. In such situations, the principle of the prohibition of abuse of rights functions as a corrective mechanism to the strict application of a rule of law, thus, it will reduce the 'abusive' exercise of the right granted by that rule to a normal use through reliance on fundamental standards of behaviour, such as good faith, fairness, morality, justice, or the respect of the finality of the law[7]. Structured into six sections, the next section is on the notion of what right of abuse in tax matters entails while section three focuses on the theoretical background of the doctrine of abuse of right in tax matters. Section four of the paper discuses the acceptable forms of tax planning and section five focuses on the contending nature of the doctrine of abuse of right in the tax jurisprudence. The paper ends in the sixth section with conclusion and recommendations.

2.0 THE NOTION OF ABUSE OF RIGHT

An abuse of rights in civil law is when a person may be liable for harm caused by doing something the person has a right to do if the right is exercised for the purpose or primary motive of causing harm, or is exercised against moral rules, good faith, or for

---

[7]A. Kjellgren, 'On the Border of Abuse: The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community law' EBL Rev (2000), 179., L. Baudenbacher 'Uberlegungun zum verbot des Rechtsmissbrauchs im Europaischen Gemeischaftsrecht, ZfRV (2008)205, V. Karayannis, 'L'abuse de droits decoulant de l'ordre juridique communauraire. A propos de l'arret C-367/96 Ale', all cited in Annekatrien L 'The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in A Codified European Contract Law' available at< www.iuscommune.eu/html/prize/pdf/2010-Lenaert... > accessed on 20 December 2014.

Scanned with CamScanner

a purpose other than the one it was granted for[8]. There are many names used interchangeably for this concept or group of overlapping concepts such as *'abuse of law', 'abuse of right', 'abus de droit', 'fraus legis', 'fraud on the law', 'abusive practice'*[9].Advocate General La Pergola opined that " it is however by no means easy to define the scope of that(abuse) principle"[10] The European Court was not always very coherent towards the scope of Abuse[11], sometimes naming it *"avoidance"*[12], *"evasion"*[13], *"circumvention"*[14], *"fraud"*[15], *or simply "abuse"*[16]. Abuse has been the only term used since 1999[17] and it is regarded as common denominator of all the above mentioned terms.[18]

There is still no precise definition of "abuse of rights". Instead there is an evolving body of EU case-law, formulating the circumstances in which abuse may be present. In the absence of a national abuse provision prescribing those circumstances, the purpose of the doctrine is to catch cases where either a person is attempting to rely on a European legal right to circumvent or

---

[8] Bryan A.G *Black's Law Dictionary*, (Paul MInn Publishing Company, 1999)p.10

[9] Roderick Cordara QC Abuse Of Law :Origins and History in EU Law Paper presented at the Bar European Groups Annual General Meeting in Ljubljana, Slovenia, June 2006

[10] Case-212/97, *Centros Ltd v Erhvervs-og Selskabsstyrelson*,1999ECR I-0145

[11] Bobic Ana (2011) Prohibition of Abuse of Rights in the EU

[12] Case C-23/93 TV 10 Commissariat voor de media ECR I -4795

[13] Case 115/78 j *Knoors v Staatssaecretaris van Economische Zaken* (1979) ECR 399.

[14] Case 229/83 *Leclerc and ors v Au Blevert and ors* (1985) ECR1

[15] Case c-367/96 *Kefalas & ors v Elliniko Dimosio* (Greek State)& OAE (1998) I-02843

[16] Case c-441/93 *Panagis Pafitis & ors v Trapeza Kentrikis Ellados A.E. & ors* (1996) ECR I-1363

[17] Case c-110/99 *Emsland-Starke GmbH v Hauptzollamt Hamburg-Jonas*(2000) I-779

[18] Bobic Ana *op cit*, note 11

Scanned with CamScanner

displace national law, or a person is looking to gain a financial or other advantage by way of an abusive use of community law[19].

The former situation arises in relation to direct tax, where taxpayers seek to rely on a fundamental Community freedom to influence the domestic tax treatment arising thereon, as was held in Cadbury Schweppes plc.[20]

The doctrine is by no means a general anti-avoidance provision such that all transactions obtaining a tax advantage are caught. On the contrary, the unequivocal language used in decisions of the ECJ suggests that forfeiture of a taxpayer's rights should only be justified in circumstances where the taxpayer's actions are so extreme that they severely distort or frustrate Community law. The ECJ[21] defined the scope of abusive actions as those where a person sought to rely on a provision of community law for the purpose of deriving "an improper advantage, manifestly contrary to the objective of that provision"

Doctrine of abuse of right in tax matter is essentially a concept of the French civil law with varying reflections in many, but not all, continental European systems. In its basic form, it may be defined as the exercise of a person's rights in a manner which is unreasonable, with consequent harm to another, whether there was intent to harm or mere carelessness or indifference as to harm resulting[22]. It is related to proportionality - at least in its private law manifestations. The excessive or inappropriate use of private rights is not to be supported by the law[23]. If not now that countries of the world are titling toward purposive legal interpretation, there appears to be no equivalent doctrine in English common law,

---

19<www.taxbar.com/documents/Abuse_of_Rights Doctrine_on_VAT_planning_Hui_Ling_mcCarthy pdf.>accessed on 20 December 2014

20 Case C-196/04,(2006) STC 1908

21 In *Diamantis's case* , Case-373/97.(2000)ECR I-1705 para 33

22 Roderick Cordara QC *op cit*, note 9

23 *ibid*

Scanned with CamScanner

Bradford v Pickles[24] continues to be the law. It held that if a right exists, no enquiry is made as to the motives with which it is exercised, nor the harm it will cause (assuming the right is exercised properly and with discretion). The English law espoused the 'clean hands' and 'clear conscience' concepts in English equity law and practice[25].

The concept of Abuse of rights is well developed in the European Union Law and this made O'Shea to define it as "an improper advantage gained from exercising the fundamental freedoms or utilising EU law rules"[26].

3.0 THEORETICAL BACKGROUND

The best starting point is to answer the pertinent and deep questions of legal theory put forward by Schammo[27], *viz* 'Why should one's freedom be limited if one respect the letter of the law? Should individuals not be allowed to choose the most permissive or cost-efficient legal regime?' French legal theorist Planiol[28] in criticizing the doctrine affirmed that '*le droit cesse où l'abus*' (a right cannot be abused) and that such a proposition was '*logomachies*' (having a right and abusing it is a contradiction). Rebecca and John Pebble[29] opined that while certain anomalies such as aggressive tax avoidance which rely on mere technicalities should be arrested,

---

24 [1895] AC 587

25 Roderick Cordara QC *op cit*, note 9

26 O'Shea Tom 'Tax Avoidance and Abuse of EU Law'. *The EC Tax Journal* Vol112010 -II

27 P. Schammo, 'Arbitrage and Abuse of Rights in the EC Legal System' (May 2008) 14(3) *European Law Journal* p.356

28 Planiol.M. , Planiol M *et al* in Wolfgang .S.

29 Rebecca P. and John P. *Saint Louis University Law Journal, Vol. 55 Sanford E. Sarasohn Memorial Conference on Critical Issues in International and Comparative Taxation, 2010 Victoria University of Wellington Legal Research Paper No. 8/2012*

Scanned with CamScanner

the need for certainty of law should not be a casualty. Even t most fervent advocate of the doctrine cautioned that the doctri of abuse of rights is 'a civilian concept which is applied only limited circumstances because its application rende unenforceable one's otherwise judicially protected rights.' Peacock and Forte [31] stated that an individual faced with high t burden and multifarious taxes is entitled to maximization of h net wealth by manipulating his affairs within the law; they furth stated that the relative large size of the public sector and th concentration of the power in the hand of the government pu individual tax payer at a disadvantage . They espoused thre models to drive home their point. First, that an individual taxpaye has limited power or what was described as 'fiscal illusion', th only influence he has is his single vote; second, taxpayers react t tax burden by forming an interest group and favouring candidate that are likely to lessen their tax burden, however the posited that the candidate talk about their expenditure rather tha the manner of raising revenue. Third, the existence of differer class interest, which lobbies and influence tax policy creates clas conflicts. Thus the group that obtains substantial tax concession must do so at the expense of the other groups[32].

A proponent of this doctrine stated that while certain lega planning may be legal technically, they constitute an abuse whic is 'immoral, socially and politically unacceptable behaviour'[33]. H further singled out Multinational Corporation for pauperizin their host countries through corporate tax avoidance and that ha

---

[30] Court of Appeal of Louisiana, Fourth Circuit in *Schwegmann Bank and Trus Company v. Stephen Lewis Dunne, Charlotte Gwendolyn Robinson Dunne, and Hacket & Dunne, A Partnership*. LCA-96-CA-2410. Decided: April 30, 1997

[31] Peacock Allan and Forte Francesco 'Tax Planning, Tax Analysis and Tax Policy in *The Political Economy of Taxation Peacock* (Allan and Forte Francesco, 1981), p 5

[32] *Ibid* p 15-17.

[33] Llyod Lipsett: ' Tax abuse as a Business and Human Rights Issue' Shift Project <http:www.shiftproject.org/article/taxabuse-businness-and-human-rights-issue> accessed on 18 October 2014

Scanned with CamScanner

negative implication on development, poverty and human rights. He admonished lawyers to play a positive role in addressing tax abuse, given their involvement in drafting tax laws, structuring transactions and advising corporate clients on tax planning matters. András Sájo,[34] a European Court of Human Rights judge argued that the doctrine was a legal reaction to cure selfish individualism, a constitutionally necessary reaction to individualistic liberalism; a kind of legal tool to cure moral turpitude.

4.0 ACCEPTABLE FORMS OF TAX PLANNING STRATEGIES

Tax avoidance is the legal usage of the tax regime to one's own advantage, to reduce the amount of tax that is payable by means that are within the law. Tax sheltering is very similar, and tax havens are jurisdictions which facilitate reduced taxes[35]. The term tax mitigation is sometimes used; its original use was by tax advisers as an alternative to the pejorative term tax evasion. "Tax aggressive" strategies fall into the grey area between commonplace and well-accepted tax avoidance and evasion. This has made some developed countries such as the United States (since 2010); Canada, Australia, New Zealand, South Africa, Norway and Hong Kong have passed General Anti-Avoidance Rule (GAAR) statutes which prohibit "*aggressive tax*" avoidance[36]. In addition, judicial doctrines have accomplished the similar purpose, notably in the United States through the "*business purpose*" and "*economic*

---

[34] A. Sájo, 'Abuse of Fundamental Rights or the Difficulties of Purposiveness' in A. Sájo (ed.), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Publishing, 2006),p 2

[35] <en.wikipedia.org/wiki/Tax taxation accessed> accessed on 21 May 2014

[36] Rebecca Prebble and John Prebble *Saint Louis University Law Journal, Vol. 55 Sanford E. Sarasohn Memorial Conference on Critical Issues in International and Comparative Taxation, 2010 Victoria University of Wellington Legal Research Paper No. 8/2012*

Scanned with CamScanner

substance" doctrines established in *Gregory v. Helvering*[37] where the Supreme Court of the United States ruled that although the letter of the law have arguably been complied with, the intention of the Act was not to allow reorganizations merely for the purpose of tax avoidance; and in the UK through the *Ramsay* case[38], where the House of Lords decided that where a transaction has pre-arranged artificial steps that serve no commercial purpose other than to save tax, the proper approach is to tax the effect of the transaction as a whole[39].

Though the specifics may vary according to jurisdiction, these rules invalidate tax avoidance which is technically legal but not for a business purpose or in violation of the spirit of the tax code. The provision of the French tax Anti avoidance law, Art L 64 under the heading *"procedure de repression des abus de droit"* is instructive. It stated thus:

> Acts which conceal the true nature of a contract or of an agreement are ineffective against the tax administration if they employ clauses:
>
> (a) which give rise to lower registration duties or real estate registration tax;
>
> (b) or which disguise either the generation or the transfer of profits or income;
>
> (c) or which permit the avoidance, either in whole or in part, of turnover taxes on the transactions carried out pursuant to the contract or agreement.
>
> *The tax administration is authorised to restore the true nature of the transactions challenged."*[40]

---

[37](1935) 293 U.S. 465 ,

[38] *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300.

[39] The *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.*,[1982] S.T.C. 30, H.L.(Sc.); see also Collector of Stamp Revenue v Arrowtown Assets Ltd [2003]; *Eilbeck (Inspector of Taxes) v. Rawling,* [1982] A.C. 300.

[40] *See, for example, in Germany Article 42 of the Abgabenordnung (see Kruse and Düren, in Tipke and Kruse, Abgabenordnung, Finanzordung, Otto Schmitdt, Köln, 2003, § 42),*

Scanned with CamScanner

In French law, the doctrine is of two variants: *abus de droit* and *fraude á la loi*[41]. The former is described as 'the exercise by a person of his or her rights in an excessive manner which causes harm to another'; the latter occurs when 'a person performs a legal act or places himself/herself in a specific legal situation with the intent

---

which embodies the ***concept of abuse of legal institutions*** *('Steuerumgehung durch Mißbrauch von Gestaltungsmöglichkeiten'); in Austria, Article 22 of the Bundesabgabenordnung (BGBl. Nr. 194/1961), as amended, which also incorporates a* ***similar concept of abuse of civil law forms and legal structures*** *('Missbrauch von Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechts'); in Finland, Article 28 of the Laki verotusmenettelystä 1558/1995, which likewise applies* ***a notion of abuse of civil law structures in tax law;*** *in Luxembourg, Article 6(1) of the Loi d'adaptation fiscale, 1934, which again applies* ***a similar concept of abuse.*** *In Portugal, Article 38(2) of the Lei Geral Tributária (Decreto Lei 398/98 of 17 December), as amended by Lei No 100/99 of 27 June and subsequent legislation, contains a general anti-avoidance provision according to which* ***'legal acts essentially or mainly designed, by the use of artificial means ... or by the abuse of legal forms'****, to reduce tax obligations may not produce effects in the tax domain. In Spain, Article 15 of the Ley General Tributaria (Ley 58/2003, of 17 December 2003) concerning conflicts in the application of tax law provisions ('Conflicto en la aplicación de la norma tributaria') relies on* ***concepts such as that of manifestly artificial acts or transactions;*** *in France, Article L. 64 of the Livre des procédures fiscales applies the notion of abuse of rights in tax law,* ***comprising the abuse of rights by sham operations and abuse of rights by evasion of the law;*** *in Ireland, section 811(2) of the Tax Consolidation Act 1997 contains a general anti-avoidance provision under the heading of transactions to avoid liability to tax, making use of notions such as that of transactions* ***'not undertaken or arranged primarily for purposes other than to give rise to a tax advantage'*** *(see section 811(2)(c)(ii)); in Italy, Article 37bis of Decreto Legge 600/1973, introduced by the Decreto Legislativo No 358 of 8 October 1997 (Gazzetta Ufficiale n. 249 of 24 October 1997) contains a general anti-avoidance provision based on the notion of* ***legal acts without legitimate economic justification*** *('atti privi di valide ragioni economiche'); in Sweden, Article 2 of the Lag om skatteflykt (1995:575) (Law on tax avoidance) contains a general anti-avoidance provision, referring to the notion of tax advantage as the main reason for a legal act. In the Netherlands, the courts frequently refer to the case-law concept of* ***fraus legis*** *in tax law, so that the question must be considered whether the sole or decisive aim underlying a transaction is to gain a tax advantage.".* see generally Roderick Cordara QC *op cit*, note 9

[41] P. Schammo, 'Arbitrage and Abuse of Rights in the EC Legal System' (May 2008) 14(3) *European Law Journal* p 355-357

Scanned with CamScanner

to avoid or to circumvent otherwise applicable mandator provisions'[42].

Bobic[43] stated that the concept of abuse encountered by the ECJ i of three forms: u turn construction, fraud and misuse. Sh distinguished the three terms i.e. the central difference betwee circumvention and misuse is that in the case of circumventior individuals are using Union law as a tool to escape the applicatio of national legislation of one Member State, and to cause th application of national legislation of some other Member State When it comes to misuse, individuals are using rights conferre upon them by Union law contrary to its purpose by acting contrar to good faith.

Both misuse and fraud involve the improper use of Union law However, while fraud requires certain "illegal" activity, such a forgery, misuse represents reliance on Union law without acting in good faith. The final difference is the one betweer circumvention and fraud. The difference here is the most obvious and results from two circumstances. The first being that when it comes to circumvention, an individual is using Union law to avoid the national legislation, whereas when it comes to fraud, an individual is invoking the rights conferred upon him by Union law. The second reason for distinguishing fraud from circumvention is the same as the one distinguishing it from misuse. Fraud necessarily contains an illegal element in the behaviour of the individual, whereas no such conduct takes place with circumvention.

A) Methods of Tax Avoidance[44]

There are various methods of avoiding or planning tax devised by specialist tax practitioners and consultants, it includes

[42] *Ibid* 355

[43] Bobic, Ana *op cit*, note 11

[44] See generally <en.wikipedia.org/wiki/Tax taxation> accessed 21 May 2014

Scanned with CamScanner

the followings. A company may choose to avoid taxes by establishing their company or subsidiaries in an offshore jurisdiction. Individuals may also avoid tax by moving their tax residence to a tax haven, or by becoming a nomad. They may also reduce their tax by moving to a country with lower tax rates. However, United States and Eritrea tax their citizens on their worldwide income regardless of where they reside, whilst Hungary, Finland, France, Italy and Spain apply it in limited circumstances[45].

Personal taxation may be legally avoided by the creation of a separate legal entity usually a company, trust, private foundations to which one's property is donated, which may also be located offshore. Assets are transferred to the new legal personality which appropriates the gains realized, or income earned, within this legal entity instead of the original owner. If assets are later transferred back to the original owner then capital gain taxes would apply on all profits. Also income tax would still be due on any salary or dividend drawn from the legal entity.

For a settlor to avoid tax there may be restrictions on the type, purpose and beneficiaries of the trust. For instance, the law may disallow the settlor from being a trustee or a beneficiary, thus losing control of the assets transferred and/or may be unable to benefit from them.

Tax results depend on definitions of legal terms which may be unclear or ambiguous, such as the distinction between "business expenses" and "personal expenses". More generally, any term of tax law, has a vague penumbra, and is a potential source of tax avoidance.[46]

Tax shelters are investments that allow, and purport to allow, a reduction in one's income tax liability. Although things such as

---

[45] *Ibid*

[46] "Pasternak M., and Rico C., 'Tax Interpretation, Planning, and Avoidance: Some Linguistic Analysis', 23 Akron Tax Journal, 33 (2008)."

Scanned with CamScanner

home ownership, pension plans, and Individual Retirement Accounts (IRAs) can be broadly considered "tax shelters", insofar as funds in them are not taxed, provided that they are held within the Account for the required amount of time, the term "tax shelter" was originally used to describe primarily certain investments made in the form of limited partnerships.

Fraudulent transfer pricing, sometimes called transfer mispricing, also known as transfer pricing manipulation, refers to trade between related parties at prices meant to manipulate markets or to deceive tax authorities by creating artificial entities. For example, if company A, a farming concern in Nigeria, processes its produce through three subsidiaries: X (Nigeria), Y (tax haven) and Z (United States). Company X sells its product to Company Y at an artificially low price, resulting in a low profit and a low tax for Company X based in Nigeria. Company Y then sells the product to Company Z at an artificially high price, almost as high as the retail price at which Company Z would sell the final product in the U.S. Company Z, as a result, would report a low profit and, therefore, a low tax.

4.1 Unacceptable "Tax avoidance" Strategy

In *Marks and Spencer*[47], the Court identified two different types of tax avoidance.

The Court noted that the Member States *"are free to adopt or to maintain in force rules having the specific purpose of precluding from a*

[47] ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, *("Marks and Spencer")*, [2005] ECR I-10837. For analysis see Tom O'Shea, *"Marks and Spencer v Halsey (HM Inspector of Taxes): restriction, justification and proportionality"*, EC T.R. 2006, 15(2), 66-82; *Peter Elliot, "Marks and Spencer Plc v David Halsey (HM Inspector of Taxes)"*,EC T.R. 2006, 15(3), 184-185 and *Melchior Wathelet, "Marks & Spencers Plc v Halsey: lessons to be Drawn"*,B.T.R. 2006, 2, 128-134.

Scanned with CamScanner

to benefit wholly artificial arrangements whose purpose is to circumvent or escape national tax law"[48].

But the Court also identified another form of tax avoidance which did not amount to "*wholly artificial arrangements*" designed to circumvent the national tax system[49].

In *SGI*[50], the Court stated that there two types of tax avoidance to be considered – tax avoidance involving wholly artificial arrangements, devoid of economic reality, designed to circumvent the national tax system and tax avoidance not involving purely artificial arrangements but which taken together with the need to preserve the balance in the allocation of taxing powers between the Member States. The former type of avoidance is a stand-alone justification for the national anti-avoidance rules; the latter type of avoidance is not sufficient in itself to constitute a justification in the general interest, however, when taken together with the need to safeguard the balance in the allocation of taxing rights it constitutes the jeopardy (or the conduct on the part of the taxpayer that the national rules are designed to deter) to that balance sufficient for that Member State to argue that its rules are necessary to protect that balance in the allocation of taxing rights[51].

In *Halifax*[52], the court found an abuse when a company that normally had little turnover of the type which entitled it to recover

---

[48] *Ibid* paragraph 57

[49] Thus, the Court found that the Member States could (i) deny companies the option of having their losses from being "taken into account in the Member State in which they are established or in another Member State"; (ii) have rules which prevented "double-dipping"; and (iii) prevent "loss-trafficking" whereby losses could be transferred within groups to Member States "in which the tax value of the losses is therefore the highest".

[50] ECJ, 21 Jan. 2010, Case C-311/08, *Société de Gestion Industrielle (SGI) v Belgian State* ("SGI"), [2010] ECR I-0000

[51] O'Shea T *op cit* note 26, p 106

[52] ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, ("Halifax")*, [2006] ECR I-1609.

Scanned with CamScanner

input tax on supplies consumed by it, faced a large input bill created group companies and non-arms' length contracts, in order to be entitled to a deduction. However in *Cadbury Schweppes*[53] the Court held that the decision of a U.K resident company to establish a subsidiary in Ireland ostensibly to take advantage of the favourable 10% tax regime did not constitute an abuse but an exercise of a fundamental freedom. Similarly, the court failed to find an abuse in Thin Cap Glo[54]. Here, the UK argued that its *"thin cap" ("thin capitalization")* rules were targeted at a particular form of tax avoidance, whereby, group of companies attempted to reduce the tax obligation of its subsidiaries by funding that subsidiary through loan capital, in this case, from a member country institution, rather than by equity capital, thereby allowing that subsidiary to transfer profits to its parent company in the form of interest which was deductible in the calculation of its taxable profits.

The result of the ECJ's deliberation in Halifax was the two-stage test for abuse. Readers will be familiar with the objective and subjective limbs respectively:

> ... first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
>
> Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. ... the prohibition

---

[53] ECJ, 12 Sep. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, ("Cadbury Schweppes")*, [2006] ECR I7995

[54] ECJ, 13 Mar.2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue,*
("Thin Cap GLO"), [2007] ECR I-2107.

Scanned with CamScanner

> of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages."

The Court's retreat from the consideration of purely subjective factors such as motive and intention is encouraging for tax planning. Provided there is a sound commercial basis for embarking on a series of transactions, it suggests that the manner in which those transactions are performed is up to the individual taxpayer and should not be called into question[55].

5.0 APPLICATION OF THE DOCTRINE OF ABUSE OF RIGHT IN THE NIGERIAN TAX MATTERS

Tax is a product of statute and liability to it arises from the taxing statutes according to their true meaning and effect. This presupposes that if any tax is to be supported at all, it must be found within the clear language of a statute.[56] The position of the law in this regard was aptly captured by Lord Blackburn in *Coltness Iron Company v. Black*[57] that:

> No tax can be imposed on the subject without the words in an Act of parliament clearly showing an intention to lay a burden on him. But when that intention is sufficiently shown, it is vain to speculate on what would be the fairest and most equitable mode of levying that tax.

---

[55] *Op. Cit*, note 9

[56] Adedokun, K.A *Enforcement and Recovery Income Tax in Nigeria* (Law and Procedure)(Corporate Transaction Ltd, Lagos, 2010), p.10, see also Olokooba S.M., K.A Kareem and L.K Zakariya 'Ambiguities in the Nigerian Tax Laws', (2014), 3(1)Ife Juris Review 'p. 725, see also, *Styles v. Middle Temple* (Treasurer)(1899) Vol. 68 QB p.157

[57] (1881) 6.A.C 315.

Scanned with CamScanner

The above dictum confirms the fact that taxing statutes are essential component of tax system.[58]The tax rate, tax base as well as the tax payer's liability are all determined by tax law. A good tax law must conform to the following; clarity of language, procedural aptness, and devoid of legal incorrectness for most people to understand. There is no doubt that a tax law that fulfils these requirements will definitely mobilize and educate tax payers by engendering the desired voluntary compliance culture[59].
The application of the doctrine in Nigerian law is suspect and its introduction to our legal system would create one of the greatest challenges for the Nigeria judiciary[60], but in certain instances the courts have refused to allow both the tax payer and the tax gatherer to abuse their rights and privileges respectively. In *Federal Board of Inland Revenue v S. O. Adenubi*[61], it was held that the total income (salary, profit from trade and rentals) of a schoolmaster engaged in trade are assessable to tax and the loss he claimed to have made in business could not be deducted from his other incomes, it could only be carried over till the business return to profit. Similarly, in *Oando Plc v Federal Board of Inland Revenue*[62], the applicant company claimed that its tax liability for a particular year should be nil as it made a loss in that year; though, it paid dividend to its shareholders, which it claimed was from preceding years' accumulated profit. The Court however held that since it paid dividend to its shareholders, the company was projecting to the whole world that it had made a profit, thus liable to pay tax.
The Nigerian courts would not be confused in resolving tax cases by importing other issues, for instance, the cases of *Nasr v Federal Board of Inland Revenue*[63], *Marina Nominees Ltd v. Federal Board of*

---

[58] Adedokun, *op.cit*, note. 56, p.10
[59] *ibid*
[60] AbdulRazaq M.T *op cit*, note 1
[61] (1960-2010) 2NTLR 710-714 esp at 714
[62] (1960-2010) 2NTLR 715-736.
[63] (1964) NCLR 93

Scanned with CamScanner

Inland Revenue[64] *Sampson D Ukpong &ors v Commissioner of Finance and Economic Development & ors*[65]and *Shell Petroleum Development Company Ltd v. Federal Board of Inland Revenue*[66] *Hon. Minister for Justice and Attorney-General of the Federation v Honourable Attorney-General of Lagos State*[67] are instructive.

The *Nasr case* which involved a tax avoidance scheme of a Deed of Gift of Property was decided on the basis of onus of proof. *Marina Nominees*, a tax planning scheme was decided on the basis of corporate personality. The *Ukpong case* was decided largely on the failure of the respondent to obtain the leave of the Court of Appeal rather than the additional assessment and increase of the tax burden of the plaintiff who are employees of Mobil Producing Co. and the *Shell case* which veered into the general area of equity in a contractual relationship. In the *AGF case*, the issue of the imposition of a further 5% Hotel and consumption tax by Lagos State on goods and services consumed in Hotels, Facility or Event centers within the State in addition to the 5% federally imposed VAT, pursuant to the Hotel Occupancy and Restaurant Consumption Law No 30 Volume 42 of Lagos State was decided under the concept of Federalism and constitutionalism.

It is trite that in interpreting tax statutes, the court should simply adhere to the clear words of the statute. There is no room for an intendment and no equity about a tax. However while resolving the issue of abuse of right doctrine the Nigerian courts have imported the principles of equity and good conscience to resolve issues arising from the exercise of some discretionary powers vested on the tax authority by the tax statute[68] or in other instance

---

64 (1986) 2 NWLR 48

65 (1960-2010) 1 NTLR 55-81

66 1996) NWLR 8 (Pt 446) 256

67Suit no SC. 340/2010 delivered 19th July 2013

68 Abdulrazaq M.T.and Adedokun K A Nigerian Courts and the Development of Tax Jurisprudence: An Analysis of Selected Judgment of the High Court, Court

Scanned with CamScanner

in favour of the tax authorities usually against companies and Multinationals. The case of *Mobil Oil Nigeria Limited v Federal Board of Inland Revenue*[69] is instructive, the dictum of Bello JSC is apt here

> In construing a statute, regard shall be given to the cause and necessity of the Act and then such construction shall be put upon it as would promote its purpose and arrest the mischief which it is intended to deter ...Some companies have been manipulating their accounts with the intent to hide their true assessable profits and in that manner have been avoiding tax which they ought to have paid. The purpose of section 30C of the Companies Income Tax Act) is to deter companies from engaging in such a fraudulent practice.

The Supreme Court also applied the same equity consideration in *Shell Petroleum Development Company Ltd v. Federal Board of Inland Revenue (supra). Phoenix Motors Limited v. NPFMB*[70] where Bello JSC stated thus "If a statute is revenue based or revenue oriented, the provisions thereof must be construed liberally in favour of revenue or in favour of deriving revenue by government, unless there is a clear provision to the contrary. This is because it is in the interest of the generality of the public and to the common good and welfare of the citizenry for Government to be in revenue and affluence to cater for the people."

Even though there is no settled approach to the interpretation of taxing statutes in Nigeria[71], the Courts most of the time on tax

---

of Appeal and the Supreme Court. Presented at the Ilorin Bar Biennial Conference held on 10 April, 2014.

[69] (1977/78) NSCC Vol. 11

[70] (1993) 1NWLR (Pt 272)

[71] Abdulrazq and Adedokun *op cit*, note 1 at p22

Scanned with CamScanner

matters have given strict construction to tax law even for multi-nationals. In *Halliburton West Africa Ltd. v. Federal Board of Inland Revenue*[72], Mustapha J stated thus "tax laws are strictly construed; a taxpayer has a right to stand upon literal construction of the words used in a taxing statute whatever might be the consequence."

In similar vein, the court in *Alhaji Ibrahim and Alhaji Aliyu Ahmadu v. Governor of Kogi state*[73], a tax provision under the Nigerian law must be interpreted literally. In nutshell;

> ..in a taxing legislation,...one has to look merely at what is clearly said...there is no room for any intendment. There is no equity about a tax. Nothing is to be read and nothing is to be implied. One can only look fairly at the language used[74].

However, on the issue of application of doctrine of abuse of right, the court can usually apply literal rule in a situation where the words are straight forward and unambiguous. While mischief rule will be used in order to establish the purpose of the enactment and to cure the mischief therein due to incorrectness and ambiguities. The advantage of this is that, it gives the explanation of phenomena by the purpose the statutes are to serve rather than postulated "form" doctrine.

Invariably therefore, once the court are of the opinion that the right which the taxpayers is trying to take advantage of is inequitable, the doctrine of abuse of right would be applied. In some other instances, if this principle is not applying *strictu sensu*, the court under certain circumstances may apply the principle of constructive interpretation. The court will do this to

---

72 (1960-2010)1 NTLR 82-108

73 (1960-2010) 1 N.T.L.R

74 *Alhaji Ibrahim and Alhaji Aliyu Ahmadu v. Governor of Kogi State* (1960-2010) 1 N.T.L.R

Scanned with CamScanner

extract the intention of the legislature in the affected law juxtapose same with the action of the taxpayer to hold whether the action is equitable and legally. If it is legal in nature, such action will be treated as tax avoidance, but if the benefit which the taxpayer intended to derive from his action is inconsistent and at variance with the intention of the law, then the doctrine of abuse of right applies. .

6.0 CONCLUSION AND RECOMMENDATIONS

The use of sham, artificial arrangements or fraud have made the courts to eschew the strict construction of tax laws in certain instances as shown above and it oscillates between low ebb and high tide, that is sometimes it favours the tax payer or the tax gatherer. The Concept of abuse in tax matters becomes more important due to increased competition, globalization, and introduction of supra national government (e.g. EU), climate change and similar challenges. Tax payers are now hiding under the shield of 'right' to plan to abuse and aggressively avoid tax payment; hence, the doctrine of abusive of right. The importance of the application of this doctrine need not be overemphasized. For this, this paper recommends for restrain in the use of the doctrine of abuse of right once a tax payer genuinely planned his liability through the acceptable ways of tax avoidance. In addition to this the court should strive while adjudicating on abuse of right in tax matter to always apply the two parts 'abusive test' as established in Emsland's case[75]. The essence of this is to show that even though

[75] The test as laid down in that case was that'...if the transaction concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the law and the national legislation transporting it, result in accrual of tax advantage, the grant of which would be contrary to the purpose of those provisions....and it is must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage....', then in such circumstances, a right is abused; and therefore, a right of abuse doctrine should be applied while adjudicating on such matter. For further detail, see Annekatrien *op. cit*, note, 7.

Scanned with CamScanner

the application of the doctrine of right of abuse tc contending but it is never contentious in natu jurisprudential basis of the doctrine is to guard aga tax avoidance which indirectly amounted to ta criminal in nature.

Scanned with CamScanner