Abstract

TAX ABUSE: A THEORY

Tax abuse is always a topical subject. Tax abuse is a legal principle developed by the Court of Justice that prevents a person from relying on a right in law where such reliance would constitute an abuse of that right. The case law demonstrates two circumstances when the principle has been applied, or its potential applicability recognized: a person seeks to rely on a European legal right to circumvent or displace national law; and a person seeks to take advantage of a right in European law, but in a manner running contrary to its spirit. The ECJ is recognizing the full and proper construction of the European right upon which a person wishes to rely, but prevents its use in any event. This principle of abuse sits alongside other developed principles of law that maintain fundamental rights already accepted in the legal systems of the Member States and in internationally recognized treaties. These general principles are not closed and include equality, proportionality, neutrality, and legal certainty. The main thrust of the application of fraus legis by the commissioners has been in relation to tax avoidance but one might consider that this abuse of law or fraus legis principle has a potentially vast application in Community Law, both in tax harmonized and in tax non-harmonized area.