

AGGRESSIVE TAX AVOIDANCE IN NIGERIA: LIFTING THE CORPORATE VEIL AS AN ANTI-AVOIDANCE TOOL

DEREK A. OBADINA*

ABSTRACT

Aggressive tax avoidance strategies deployed by multinationals in the face of the failed statutory anti avoidance rule stated in section 22 of the Companies Income Tax Act, founded on a dichotomy between form and economic substance of transactions and exploitation of statutory infirmities, are a significant factor in accounting for the massive gap between potential and actual tax revenues in Nigeria. This should be a matter of concern because it distorts fairness, threatens the integrity of the tax system and ultimately undermines development. Drawing on developments in the UK and India, it is argued that the courts should be prepared to intervene by deploying the doctrine of lifting the corporate veil, alongside purposive interpretation as an anti-avoidance tool.

INTRODUCTION

Consistent with a huge body of literature in the matter,¹ the National Tax Policy identifies tax avoidance as a major source of leakage from the tax system and goes on to prescribe legislative and administrative action to block the loopholes that feed the phenomenon.² At a time when the country's oil revenues are receding and the debt profile of the country is deteriorating, this prescription is salutary. However, given the long established principle that taxpayers are entitled to structure their transactions to minimise tax liability³ and the large number of statutory provisions that enables taxpayers to reduce or avoid tax liability in specified circumstances, it is reasonable to conclude that what is being targeted for remedial action is not the proper use of tax saving opportunities, but, rather, tax avoidance that seeks to "reduce the incidence tax borne by an individual taxpayer contrary to the intentions of parliament"⁴ otherwise known as 'aggressive tax avoidance'.

Companies, particularly, multinationals are major practitioners of tax avoidance. It is not just that such companies incur significant expenditure on the purchase of bespoke and mass marketed, 'off the peg' tax avoidance products as part and parcel of the way they carry out their business operations,⁵ but also that the companies create and interpose other companies specifically for the purpose of giving effect to tax avoidance strategies.

*Ph.D, B.L. Solicitor of the Supreme Court of England and Wales and Associate Professor, Faculty of Law, Lagos State University

1. Weyziq, F, 'International Finance and Tax Avoidance via Dutch Special Purpose Entities' (Paper presented at the Research Seminar, Radboud University Nijmegen, Netherlands on 21 October 2013); Adebisi, J F and Gbegi D O, 'Effect of Tax Avoidance and Tax Evasion on Personal Income Tax Administration' (2013) 1 American Journal of Humanities and Social Sciences 125; Okorodudu M.T, 'Measures Against Tax Evasion and Avoidance: Some Equity Questions and Suggested Reforms' (Paper presented at the 15th Annual Senior Staff Conference of the Inland Revenue Department on Taxation as an instrument of Economic Development on 4-6 December) 25; Owolabi, B Tax Avoidance, Capital Flight and Poverty in Nigeria: The Unpatriotic Collaboration of the Elite, Multinational Corporations and Accountants (2006)
2. National Tax Policy (April 2012) Federal Ministry of Finance, 20
3. See Monroe H, *Fiscal Fitness: Tax Avoidance and the Duke of Westminster*, (1982) 39. See also the comments of Lord Steyn in *IRC v McCuckian* [1997] STC 908; also Asuzu C, Remember Lot's Wife: The Interpretation of Tax Statutes. <www.SSRNcom/abstract1920702> accessed 4 June 2014
4. Lord Templeman 'Tax Avoidance and the Law' in Andrian Shipwright (eds), (Kay Haven, London 1997) 1
5. D.A. Obadina, 'Tackling Aggressive Tax Avoidance in Nigeria: An Agenda for Reform' (2015) 1 Ife Juris Review 38



Ironically, the long established separate entity principle that a company, once incorporated, becomes a legal person, separate and distinct from its shareholders, is part of the problem where aggressive tax avoidance is concerned. Typically, such avoidance entails the taxpayer interposing one or more companies as part of a scheme for tax avoidance where each company carries a contrived transaction as part of a wider scheme whose overall aim is to enable the taxpayer to benefit from a statutory fiscal benefit, or to avoid a charging provision. The separate entity principle can impede judicial intervention by distorting the reality of composite transactions. This is because the principle effectively requires each transaction to be viewed separately. Consequently, where the ultimate transaction falls within the four corners of the statutory benefit or, as the case may be, outside a charging provision, the court may be compelled to treat it as benign, and so will be unable to counter the scheme.

Nigeria, like other jurisdictions around the world has a statutory General Anti Avoidance Rule (GARR) set out in Section 22 of the Companies Income Tax Act (CITA), with corresponding provisions in the legislation dealing with Personal Income Tax,⁶ Capital Gains Tax⁷ and Petroleum Profits Tax.⁸ However, the rule, which originates from the colonial period, has proved inadequate on account of interpretational difficulties and uncertainties. More particularly, it seems not to be wide enough to deal with composite transactions. These difficulties have been compounded by the absence of judicial guidance on the interpretation of the rule, with Tax authorities having all but turned their backs on the rule, on account of these difficulties.⁹ This article argues that the doctrine of lifting the corporate veil can provide an alternative means of constraining aggressive tax avoidance.

WHAT IS AGGRESSIVE TAX AVOIDANCE?

Tax avoidance is not the subject of statutory definition. The term is often used in a broad sense to contradistinguish tax evasion, each representing a particular approach to avoiding or limiting tax liability. Tax evasion refers to the avoidance of tax liability by means which are illegal; tax avoidance, by contrast, refers to 'the lawful carrying out of a transaction which was either entered into or which took a particular form, for the purpose of minimizing taxation'.¹⁰ In other words, the distinction is between "working outside the law and working within the law".¹¹

The legal propriety of tax avoidance, in the broad sense, has long been recognized by the courts¹² who, however, have not defined the term. Most recently the Supreme Court in *Federal Board of Inland Revenue v American International Insurance Company (Nig) Plc*,¹³ Belgore CJN, echoing *IRC v Duke of Westminster*,¹⁴ said:

Tax is an obligation not a duty. One is not a bad citizen if one can organize his business or trade in a legal manner to minimize his tax liability. He could and he should resist within legal means any unduly wide interpretation or unconventional implication of legislative intent of a tax law that might increase that burden. He can do so without being ashamed of walking in the street as a patriotic citizen. A shrewd business acumen and a legitimate protection of sweat of labour are not a dishonest act or an act having any moral turpitude. It is being pragmatic and practical. Being capitalistic might leave much to be desired but among what is left is not illegality.¹⁵

6. Cap C1 LFN 2004

7. Cap P8 LFN 2004

8. Cap P13 LFN 2004

9. Abdulrazaq, M.T., *Principles and Practice of Nigerian Tax Planning and Management*, (2nd edn, Sterling Horden Publishers Limited, Lagos 2013) 143

10. Fleisch M.C., 'Tax Avoidance – The Attitude of the Courts and the Legislature' (1968) 21 CLR 215 quoted in Abdulrazaq M.T., *ibid* 115

11. Head J and Krever R, 'Tax Reform in the 21st Century: A volume in Memory of Richard Musgrave' (1990) 74

12. *Ayrshire Pullman Motor Services v I.R.C.* (1920) 14 TC 754; *Akinsete Syndicate v Senior Inspector of Income Tax* FSC 164/63 unreported

13. [1999] 1 NLRN 50

14. *ibid* 56

15. *ibid* 61



As a normative yardstick, the term tax avoidance is problematic in that all action taken to reduce tax liability entails social and economic costs bearing on horizontal fairness between taxpayers and loss of revenue,¹⁶ yet, the law permits certain forms of tax avoidance as socially acceptable, while constraining other forms of it as undesirable.¹⁷ Typically, tax systems distinguish between 'tax planning' and tax avoidance, largely by reference to the 'intention of parliament'. Tax planning, majorly¹⁸ covering making use of statutory tax exemptions, concessions or incentives consistent with the intention of parliament, is conventionally seen as an acceptable form of tax avoidance.¹⁹ While tax avoidance, used in a pejorative sense, is reserved for tax minimization strategies that are "designed to conflict with the evident intention of parliament",²⁰ with tax authorities empowered to act against it.

In more recent times, the term aggressive tax avoidance/planning has been used to identify unacceptable tax avoidance, defined by the OECD²¹ as:

Planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences. Revenues' bodies concerns relate to the risk that tax legislation can be misused to achieve results which were not foreseen by the legislators.

This definition, which is really a description, is open to criticism because it suggests that test of whether a transaction is acceptable should be whether it is consistent with intention of parliament as adjudged by the revenue, rather than the intention of parliament as interpreted by the courts.²² Overall, however, the OECD definition has the merit of focusing on the behavioral and attitudinal characteristics that drive unacceptable tax avoidance.

Predatory and artificial nature of Aggressive Tax Avoidance

Tax liability is generally imposed 'by reference to the economic attributes or transactions that exist in the real world',²³ typically viewed from an accounting or business perspective. Consistently with this, statutory provisions providing for tax advantages, such as tax exemptions and tax reliefs are invariably framed on the basis that a qualifying taxpayer will have altered his economic position in some respect. Problematically, however, tax legislation customarily takes the form of highly prescriptive and detailed provisions, devoid of explicit reference to the economic propositions or conceptions that have informed the provisions.²⁴ Exploitation of this 'loophole' by means of artificial transactions is a distinguishing feature of aggressive tax avoidance. Thus, transactions 'will be structured in form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute'.²⁵ Alternatively, the taxpayer will seek to bring himself within scope of a statutory provision conferring a tax benefit by structuring his transaction in way that ostensibly meets the requirements of the provision, and but will not require him to suffer the economic consequences anticipated by the provision.²⁶ This is often achieved by means of bespoke or 'of the peg' multi-step tax avoidance schemes, comprising of apparently independent transactions that are intended to operate interdependently, as a composite whole.

16. Famakinwa, V.B, 'Tax Evasion and Tax Avoidance' in O. Akanle Tax Law and Tax Administration in Nigeria, (eds), Nigerian Institute of Advanced Legal Studies, 35
17. Millet, P.J, 'A New Approach to Tax Avoidance Schemes' (April 1982) 98 Law Quarterly Review 210
18. The term tax planning has also seen as covering a situation where the taxpayer has ways in which he can lawfully carry out a genuine commercial transaction: "one paying the maximum amount of tax and the other paying no tax or less tax", and he chooses the latter. Baker P, 'Tax Avoidance, Tax Mitigation and Tax Evasion' (2005) 9. <<http://www.taxbar.com/artic/12.html>> accessed 15 March 2015
19. *ibid* 213
20. *IRC v Willoughby* [1977] 1 WLR 1071 HL
21. OECD, 'Study into the Role of Tax Intermediaries' (2008) ISBN 978 72-64-04179-0
22. Freedman J, Loomer L, and Vella, J, 'Corporate Risk and Tax Avoidance: New Approaches' (2009) 1(74) British Tax Review 79-80
23. *Barclays Mercantile Business Finance Ltd v Mawson*, [1985] ALLER 109
24. Hoffmann, L, *Tax Avoidance*, (2005) British Tax Review, 197 at 205
25. *ibid* 109
26. *IRC v Willoughby* (n 20) 142



A key feature of the schemes, which may be circular or linear, is that 'at the end of the series of operations, the taxpayer's financial position is precisely as it was at the beginning except that he has paid a fee and certain expenses to the promoter of the scheme'.²⁷

Aggressive cross-border tax avoidance

These schemes are not limited to the domestic scenes. There is now a massive body of literature highlighting how multinationals have perfected the art of shifting profits from the countries where the economic activity that produces the profits takes place to other countries. Typically, this involves the creation of legal structures, often nominee controlled companies in one or more other jurisdictions for the purpose of channeling profits to other countries, often secrecy jurisdictions, offering low or no tax. The recent OECD report, *Base Erosion and Profit Shifting*,²⁸ shows that this has been possible because international tax law has failed to keep pace with globalization as indicated by quantum of cross-border transactions being undertaken by multinationals and the rise of the digital economy, enabling multinationals to exploit the inconsistencies and discontinuities that arise from the interaction between national tax laws,²⁹ with the result they are able to obtain lower or no taxation in source countries and sometimes double non taxation” through profit shifting.³⁰

THE SEPARATE ENTITY PRINCIPLE

In *Salomon v Salomon & Co. Ltd.*,³¹ the House of Lords held, as a matter of general principle, that once the company is legally incorporated it becomes a legal person with legal personality and as such 'must be treated like any other independent person with its rights and liabilities appropriate to itself'.³² The effect of this principle, which has been given expression in the Companies and Allied Matters Act, is to “draw a veil over the company”³³ in a way that obscures the existence of its shareholders. This has four fundamental implications. First, a company's shareholders are not liable for the contractual obligations undertaken by or imposed on the company. In this respect, tax law generally follows company law in treating companies as separate and distinct from their shareholders. Thus, the Companies Income Tax Act imposes a charge on the profits of any company accruing in or derived from Nigeria in respect of specified income sources, and specifies that “the company shall be chargeable to tax” 'in its own name'.³⁴ Secondly, the motives of those who took part in the promotion of the company are 'absolutely irrelevant' in determining what the rights and liabilities of the company are.³⁵ Thirdly, a company is to be regarded as separate and distinct entity even where the company is under the effective control over a particular shareholder.³⁶ These principles apply just as much to groups of companies as one man companies. So a subsidiary is to be regarded as having its “own separate personality” and, therefore, as being independent of its parent, even where the parent effectively owns 100% of the subsidiary's shares.³⁷

27. *W.T. Ramsay v IRC* [1982] AC 300 at 317 (per Lord Wilberforce)

28. OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing

29. The OECD study also shows that base erosion and shifting has been possible as a result of weaknesses in double taxation treaties

30. *ibid*, esp. chapter 4

31. (1887) AC 22

32. *ibid*, Per Lord Halsbury

33. *Aderemi v Lain and Baker Nigeria Limited* (2000) 7 NWLR (Pt 663) 33 at 51, per Aderemi JCA; *Financial Services Ltd v Adeoso* [2002] 8 NWLR [Pt 668] 170 at 173

34. Section 47, CITA. But see sections 47(b) providing that: 'a company may be chargeable to tax in the name of any principal officer, agent or representative, receiver or liquidator'. It is not an exception to the separate entity principle because it does not extend to shareholder as such. In any event, strictly speaking, these provisions provide for derivative liability. That is, the liability that the provisions permit to be imposed on the specified persons is that of the company

35. *Salomon v Salomon* (n 31)

36. *Dunlop Nigerian Industries Ltd v Forward Nigeria Enterprises Ltd and Fafore* (1976) NCLR 243

37. *Union Beverages v Pepsicola International Limited* [1994] 3 NWLR (Pt 330) 1 at (per Adio, JSC); *Marina Nominees Ltd v Federal Board of Inland Revenue* (1986) 2 NWLR (Pt 20) 40; *Multinational Gases and Petrochemical Co v Multinational Gases and Petrochemical Services Ltd* (1983) 3 WLR 492; *Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366



The separate entity principle as a barrier to judicial scrutiny of Aggressive Tax Avoidance

The separate entity principle can obscure the reality of composite tax avoidance schemes. As we have seen, with such schemes, the taxpayer interposes one or more companies, with those companies undertaking separate transactions as part of the scheme. For instance, taxpayer A wants to sell an asset to C in a way that minimizes his tax liability on the income or capital gain derived from the sale. Taxpayer A, therefore first sells the asset to B (step 1), an interposed company that has been specifically created for the purpose, with B in turn selling the asset to C (step 2). On a strict application of the separate entity principle, the court is bound to treat A and B as separate entities and may, consequently, wish to treat step 1 and 2 as separate transactions. Furthermore, in determining the tax position of B, the court is precluded from having reference to the tax avoidance agenda of A, the controlling shareholder of B, in causing B to participate in the scheme. Effectively therefore, the court is required to treat step 2 as a benign transaction. In this way, the separate entity principle, without more, is capable of impeding judicial control of tax avoidance schemes. This is illustrated by *Marina Nominees v Federal Board of Inland Revenue*.³⁸ In this case, an accounting firm interposed a company to take over from the firm the function of providing secretarial service to corporate clients, with the work continuing to be done by the firm's employees, but on a fee paying basis. In focusing exclusively on the separate entity principle, the Supreme Court failed to appreciate that the charging mechanism enabled the firm to reduce the tax payable on income accruing from secretarial services.³⁹

The general anti-avoidance stated in Section 22(1) of CITA, replicated in the Personal Income Tax Act,⁴⁰ the Capital Gains Tax Act,⁴¹ the Petroleum Profits Tax Act,⁴² is inappropriately narrow in this respect.⁴³ In essence, this provision applies where the Federal Inland Revenue Service is of the opinion that any transaction 'which reduces or would reduce the amount of any tax is artificial or fictitious'. In such a case, the tax authority is entitled to adjust tax liability to counteract the reduction of tax liability. This provision is marred by the fact that the key terms, 'artificial or fictitious', are not statutorily defined.⁴⁴ Furthermore, even assuming that the word is to be read in the dictionary sense as meaning "unnatural, not genuine or not sincere", it is not clear the provision is adequate for composite transactions. Where, as will invariably be the case, the transactions comprised in a tax avoidance scheme are regular in form, the artificiality necessary to trigger the provision can only be found by construing the transactions as a composite whole. On a literal construction of the provision, it is transaction specific, using the word in the singular. This would seem to preclude such an approach.

Furthermore, the provision will be difficult to operate where the interposed company has been established offshore, in another country, because of the obvious difficulties in ascertaining the precise role played by the interposed company and gathering relevant evidence. These constraints have been compounded by the absence of judicial guidance on the interpretation of the provision. The resulting interpretational difficulties and uncertainties as to the scope of the provision have caused tax authorities to turn their backs on the provision.

38. (1986) NWLR 48

39. *ibid* (n 71) and surrounding text

40. *ibid*

41. *ibid*

42. *ibid*

43. Section 22(1) provides: 'Where the Board is of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company shall be liable accordingly'.

44. For a general discussion on the interpretational problems presented by section 22(1) CITA, see Abdulrazaq, M.T. (n 9) 134 -145



PURPOSIVE INTERPRETATION

The rule established by the House of Lords in *WT Ramsay Ltd v IRC*⁴⁵ counteracts the obfuscating effect of the separate entity principle in a tax avoidance context, by recognizing that taxing provisions must be construed purposively and that in that connection:

It is the task of the courts to ascertain the legal nature of any transaction to attach a tax or tax consequences to a transaction, and if that emerges from a series or combination of transactions, intended to operate as, it is that series or combination which may be regarded.

In other words, the court will construe the transactions as a whole and apply tax consequences to the end result. In *Furniss v Dawson*,⁴⁶ the House of Lords, through Lord Brightman⁴⁷ interpreted this rule as meaning:

First, there must be a pre-ordained series of transactions; or, if one like, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end.... Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax not 'no business effect'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result...⁴⁸

Viewed from the perspective of the separate entity principle, the *Furniss* principle effectively permits the court to look through an interposed company, to identify the company with the tax avoidance agenda of the company's controlling shareholders. Thus, in the *Furniss* case the court applied the principle, in striking down a linear tax avoidance scheme, by treating as a nullity, for fiscal purposes, a transfer of shares by the taxpayer to an interposed company pursuant to the scheme, with result that the taxpayer was treated as disposing of shares to the ultimate buyer, even though the disposal had in fact been undertaken by the interposed company. Lord Brightman's formulation was not, however, free from difficulty. First, and foremost, it looks like a general anti avoidance doctrine that strikes at tax avoidance schemes regardless of the content of legislative provisions bearing on the schemes and underlying legislative intent.⁴⁹ In particular, given that 'avoidance of tax liability' is not in itself unlawful, it is difficult to see what logical basis there can be for ignoring an intermediate transaction that is otherwise valid, as was the case in *Dawson v Furniss*. In any event, Lord Brightman did not establish any specific 'rules' for determining when a transaction should be ignored, rather it set forth the circumstances under which several transactions should be treated as one.⁵⁰

In *Barclays Mercantile Business Finance v Mawson*,⁵¹ the House of Lords reasserted "the primacy of the construction of taxing provisions and the illegitimacy of rules of general application"⁵² in clarifying that the Ramsay rule requires the court:

'To give the statutory provision a purposive construction in order to determine the nature of the construction to which it was intended to apply and then to decide whether the actual transaction

45. [1982]AC 300

46. [1984]AC 474

47. *ibid*, the other members of the court concurred in Lord Brightman's judgement

48. *ibid* 526-527. This case is discussed extensively by Abdulrazaq, M.T (n 9) 242 -254. See also 'Tax Avoidance in Lear Transactions: the Dilemma of Tax Systems' (1994) U. Pa. J. Int'l Bus. L., 59

49. Hoffman (n 24) 20

50. Hadari, Y, *ibid*, p 84

51. *ibid* (n 23) 280

52. Hoffman L, (n 24) 203



(which might involve considering the overall effect of a number of elements intended to operate together) answered the statutory description'.⁵³

The court acknowledged the principle that steps inserted into a composite transaction can be ignored where they lack business purpose, but subsumed it within the general theory of interpretation of statutes that it articulated, without giving it separate consideration. In the result, there are still no clear rules for determining, in particular fact situations, when it is appropriate to ignore a transaction undertaken by an interposed entity as part of a composite tax avoidance transaction.

LIFTING THE CORPORATE VEIL AS AN ANTI-AVOIDANCE TOOL

The courts have an inherent power to lift or pierce the corporate veil so as to look at the 'economic realities' behind the veil.⁵⁴ This may result in the company being identified with the shareholders who control it,⁵⁵ and in this way provides an alternative tool for dealing with transactions undertaken by interposed companies pursuant to a composite tax avoidance scheme.

While there is much uncertainty as to the circumstances in which the courts will be prepared to derogate from the separate entity principle,⁵⁶ they have been fairly consistent in asserting that the corporate veil will be lifted or pierced where the separate personality of a company has been 'abused' or used in a way that runs counter to public policy. *Gilford Motor Company Ltd v Horne*,⁵⁷ probably the first reported case where the courts lifted the veil of incorporation, has often been cited as exemplifying misuse of the separate entity principle. Horne was an ex-employee of the Gilford Motor Company and his employment contract provided that he could not solicit the customers of the company. In order to defeat this, he incorporated a limited company in his wife's name and solicited the customers of the company. The company brought an action against him. The Court of Appeal was of the view that "the company was formed as a device, a stratagem, in order to mask the effective carrying on of business of Mr. Horne"; in this case it was clear that the main purpose of incorporating the new company was to perpetrate fraud. Thus the Court of appeal regarded it as a mere sham to cloak his wrongdoings.⁵⁸

The doctrine of lifting the veil has been much criticized over the years,⁵⁹ mainly on the ground that there has been a 'lack of coherent principle' in the application of the doctrine, with some jurists arguing that it is little more than a means of rationalizing decisions ex post facto.⁶⁰ Responding to this, in *Prest v Petrodel Resources Limited*,⁶¹ the Supreme Court of England and Wales re-examined and rationalised the English case law in this area, with Lord Sumption, delivering the lead judgement, formulating a new approach. Observing that all legal systems 'imposed limitations on the logical implications of the separate entity principle', his Lordship said that the doctrine fell to be viewed in the context of 'the general approach of English to the problems raised by the use of legal concepts to defeat mandatory law'. Here he cited with approval the dictum of Lord Denning in *Lazarus v Beasley*, that 'no court in this land will allow a person to keep an advantage which he has obtained by fraud', which he considered to be akin to the continental

53. *ibid* 110

54. Generally, see Orojo, J.O., *Company Law and Practice in Nigeria* (5th edn, Lexis Nexis, Ibadan 2008) 88-97; Davies P and Worthington S, *Principles of Modern Company Law* (6th edn, Sweet and Maxwell, London 2012)

55. Barnes k, *Cases and Materials on Nigerian Company Law*, (Obafemi Awolowo University Press Limited, Ile Ife, 1994) 70

56. *ibid*

57. (1933) Ch 935

58. *Jones v Lipman* [1962] 1 WLR 832 is another case often cited in support of the proposition that the courts are entitled to lift the corporate veil to counter wrong doing. Here, Mr Lipman had entered into a contract to sell land, but then sought to avoid the sale by transferring the land to a company that he controlled. Russell J ordered specific performance against both Mr Lipman and the company on the basis that the company was "a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity"

59. *Briggs v James Hardie & Co Pty* [1994] NZLR 14

60. Winchop M, 'Overcoming Corporate Law: instrumentalism, Pragmatism and the Separate Legal Entity Concept' (2007) MLR 17

61. [2013] UKSC 34; (2013) 2 AC 415



doctrine of abuse of rights in precluding a person from benefiting from some apparently absolute right if he has obtained it dishonestly. He considered that this outcome applied equally to the 'dishonest or improper use of corporate personality'. Against this background, his Lordship argued that, properly viewed, the case law expressed two distinct principles.

The first, the 'concealment principle', does not involve piercing veil at all. It is that the interposition one or more companies to conceal the identity of the "real actors" will not deter the courts from identifying them, assuming that their identity is legally relevant. Here the court is not disregarding the facade of corporate personality, but simply looking behind it to discover the facts which the corporate structure is concealing. Over and above this, there was a limited principle of English law permitting the court to pierce the corporate veil to prevent the abuse of corporate personality:

...When a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.⁶²

Limiting the apparent width of this principle, Lord Sumption said "It is not an abuse to cause a legal liability to be incurred by the company in the first place"; nor was it "an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's, because "that is what incorporation is all about". This is consistent with the view expressed by the English Court of Appeal in *Adams v Cape Industries Plc*⁶³ that the courts are not entitled to lift corporate veil of a parent company merely because the corporate structure has been used to ensure legal liability in respect of possible future activities of the group will fall on another company within the group.

While Lord Sumption's formulation has the merit of placing the doctrine within a distinct conceptual framework, it states the law in narrow terms than the courts in Nigeria have. Thus the courts in this country have said that the corporate veil of a company can be lifted or pierced not only where it has been used to conceal the identity of a wrong doer or where it has been interposed to avoid a liability, but also where "the canopy of legal entity is being used to defeat justice or justify wrong, or perpetuate and protect fraud to other party",⁶⁴ and when the company is used as 'front or stratagem'. It remains to be seen whether the Nigerian courts will be prepared to adopt Lord Sumption's narrower formulation of the doctrine.⁶⁵

62. *ibid* 16. His Lordship emphasized that the principle is properly described as a limited one, "because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil". In other words, if the relationship between the company and its controller is such that the advantage sought to be obtained can be denied through application of some other principle or rule of law, it is not necessary for the court to pierce the veil

63. [1990] Ch 433. The question before the court was whether an award of damages by a US court in favour of employees of a subsidiary with respect to health related injuries caused by the alleged negligence of subsidiary could be enforced against the parent, a UK company. This in turn depended on whether the parent company was parent in the US at the relevant time. The employees argued that the parent was present there, through the subsidiary *inter alia*, by virtue of the fact it was wholly subsidiary of the parent and was incorporated and carried on business there. The court rejected the application. Lord Justice in delivering judgment on behalf of the court said:

'we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this way is inherent in our corporate law'

64. *Fairline Pharmaceutical Industries Ltd v Trust Adjusters* [2012] LPELR 20860. Also see *Public Finance Securities v Jefia* [1998] 3NWLR (543) 602

65. For Commentary on Lord Sumption's formulation, see Obadina D.A., 'Piercing the Veil of Incorporation: *Prest v Petrodel Resources Ltd*' (2014) 1(4) Babcock Socio-Legal Journal 188



Tax Avoidance as ground for lifting the corporate veil

The question whether tax avoidance can be a ground for lifting or piercing the corporate veil does not appear to have been explicitly addressed by the courts in Nigeria. Indeed the courts have shied away from dealing with the question. In *Marina Nominees Limited v Federal Board of Inland Revenue*⁶⁶ the Supreme Court was presented with an opportunity to build on Reiss, but failed to recognize it. Peat Marwick, a firm of accountants, had been providing secretarial services to a number of companies. Each time a member engaged on the work resigned or retired, in keeping with the Companies Act 1968, the firm filed a return with the Registrar of Companies. To obviate this, it incorporated, Marina Nominees Limited to provide certain services including the secretarial services. The only two directors of the company were partners of Peat Marwick. The secretarial work was undertaken by Peat Marwick employees in the name of Marina Nominees, with bills for the work being raised in the firm's name, who retained all the fee income from the secretarial services. On an assessment for tax by the Inland Revenue, Marina Nominees argued that it was not liable for income tax on the income from the secretarial work because in providing the secretarial services, it was acting as Peat Markwick's agent. There was however an avoidance angle: the interposition of Marina Nominees by Peat Marwick to reduce tax liability in respect of the secretarial services by charging the company fees for the work performed by its employees in providing the secretarial services. On reviewing the case law, the Court acknowledged that the corporate veil can be lifted not only where a company has acted as an agent, but also where it has been incorporated as "a sham, front, or stratagem". Ultimately however, the court rejected the argument of Marina Nominees Ltd, on the ground that it was a distinct and separate entity, with its own liability to pay tax, without addressing whether Marina might be considered a "front or stratagem"⁶⁷

In *Reiss & Co (Nigeria) Ltd v Federal Board of Inland Revenue*,⁶⁸ where there was a faint suggestion of transfer pricing abuse, although the court found that there was a 'cloud of suspicion' over the genuineness of the transaction between a foreign parent company and its local subsidiary, it nevertheless upheld the validity of the transaction on the basis of the separate entity principle. Ayua is critical of this decision arguing that:

Our judges are just too ready to take the law and legal consequences of transactions as they find them without the willingness to set aside the legal form of transactions and see what lies behind them. In this way they seem to encourage tax avoidance schemes particularly those cleverly devised by multinational enterprises operating in Nigeria through subsidiaries.⁶⁹

There are certainly strong arguments that can be put forward in favour of the view that the courts should be prepared to lift the corporate veil where a company has been interposed for the purposes of facilitating aggressive tax avoidance. Tax avoidance undermines the objective of the tax system to secure horizontal

66. [1986] 2 NWLR (Pt 20) 40

67. Discussed by Abdulrazaq M T, (n 9) 109 -110, who argues that, "the inability of the Supreme Court to categorise this type of arrangements made to avoid tax or even to define its limits was a missed opportunity"

68. 1979 3 FRCR 251. Here, the appellant, Reiss & Co (Nigeria) Ltd a company registered in Nigeria introduced customers to Reiss & Co Limited, a company registered in Holland, pursuant to an agency agreement between the two companies, with the appellant being entitled to 50% of the profits made on the transactions. The Board sought to tax the appellant on the entire profits made by Reiss & Co, on the ground that the income was derived from Nigeria. The evidence before the court was that prior to 1968, the appellant was only a branch office of Reiss & Co and that following the enactment of the Companies Decree 1968 (which required all foreign companies carrying on business to incorporate locally as companies in Nigeria), the Nigerian branch became incorporated as Reiss & Co. The Judge, Karibi-Whyte J, made a veiled reference to the possibility of tax abuse, and seems to have treated the Board's argument as amounting to a request for the court to lift the appellant's corporate veil to identify it with it Reiss Co Ltd. However, having noted that Reiss & Co still had a controlling interest in the appellant, he noted that "there was no evidence before me of any actual control of the affairs of the appellant company by Reiss & Co", holding that in that circumstances "the separate legal personality of the two companies cannot be denied. Respondents cannot impugn the legal situation successfully without adducing sufficient information to the contrary"

69. Ayua I.A, *The Nigerian Tax Law*, (Spectrum Law Series. Ibadan, 1996) 256



fairness by throwing the burden of taxation onto the shoulders of taxpayers who do not do it. More fundamentally, tax avoidance deprives the government of funds necessary for social and economic development. While these vices apply to tax planning as well, the added feature of aggressive tax avoidance involving avoidance action contrary to the intention of parliament, arguably tips the balance in favour of the courts lifting or piercing the veil of incorporation in cases where the separate entity principle has been utilised in aid of such avoidance.

As *Prest v Petrodel Resources Limited*⁷⁰ relates to the common law, it is potentially relevant as precedent in Nigeria, at least as persuasive authority. On this basis, it becomes relevant to consider whether Lord Sumption's formulation permits the lifting or piercing of the corporate veil on tax avoidance grounds, a question the English courts are yet to consider. It is relevant to note the court at first instance in *Prest* found that Mr Prest had organized the group of companies under his control for conventional purposes of 'wealth protection and tax avoidance', but the Supreme Court did not consider that this was sufficient to trigger the evasion principle. This is consistent with Lord Sumption's view that "It is not an abuse to cause a legal liability to be incurred by [a] company in the first place", and the view expressed by the Court of Appeal in *Cape Industries*, that it is permissible for a parent company to use the corporate structure to ensure that a future liability falls on a subsidiary. On this basis, it is not 'abuse' to interpose a company for the purpose of avoiding or deferring future tax liability, at least to the extent that liability to pay tax is contingent upon prior assessment and service of a notice of assessment by the tax authority.

The concealment principle may, however, have wider application. Lord Sumption said that where companies have been interposed to conceal the identity of the 'real actors', it was permissible for the courts to look behind the veil to identify them as such, where their identity is in issue. If 'concealing identity' is read as including acting indirectly through an interposed company, the concealment principle will apply to tax avoidance. For instance, taking the example considered above; taxpayer A wishing to transfer an asset to C to avoid or defer tax, transfers the asset to an B, an interposed company, with B in turn transferring the asset to C. It might be argued that the concealment principle applies, on the basis that in interposing B, A had sought to conceal its identity as the person who has effectively made the disposal, with the consequence that the court is entitled to lift B's corporate veil, the result being that A must be treated as transferring the asset directly to C and so as being liable to tax.

DIRECTIONS FROM INDIA

In contrast to the uncertain position in Nigeria and England, in India, the courts have held in a number of cases that the corporate veil can be lifted in appropriate cases where there is evidence of tax avoidance activity.⁷¹ The leading case in India on this point is now *Vodafone International Holdings BV v Union of India & Another*,⁷² where the Supreme Court of India considered the matter, in the context of cross-border tax avoidance transaction.

In that case, Vodafone International Holdings BV (Vodafone), an offshore company⁷³ and part of the Vodafone group, acquired from Hutchinson Telecommunications International Ltd (Huthinson), a share representing the entire share capital of CGP Investments (Holdings) Ltd, an offshore company⁷⁴ on

70. Ibid (n 61)

71. Rupendra Jadaun, <www.academia.edu/6374739/Piercing_the_Corporate_Veil_in_Taxation_Matters_India_and_International_Transactions_with_special_reference_to_Direct_Tax_Codes_A_Code_to_Decode_Greed>

72. [SLP C] No 265259 of 2010, dated 2012. For a summary of the decision see: The Vodafone decision - a Synopsis, KPMG, 20 January 2012

73. The company was resident for tax purposes in the Netherlands

74. The company was registered for tax purposes in the Cayman Islands



February 11, 2007 for about \$11 billion. CGP, through various intermediate companies/contractual arrangements, controlled 67% of Hutchinson Essar Limited (HEL), an Indian company. The acquisition resulted in Vodafone acquiring control over Hutchinson-Essar, a joint venture between the Hutchison Group and the Essar Group, which had obtained telecom licenses from the Indian government to provide cellular telephony in different provinces in India in November 1994. Because the sale was supposed to have been made overseas, the parties took the view that no taxes were paid in India.

The Indian tax authorities viewed the transaction as a device to enable Vodafone to acquire Hutchinson's 67% controlling interest in Hutchinson Essar Limited. They therefore sought to tax the capital gains arising from the sale of CGP's share capital by applying section 9(1)(i) of the Income Tax Act 1961 on the basis that CGP, while not a tax resident in India, held the underlying Indian asset, and that the profit made by HTIL from the transfer of the share to Vodafone, was generated in India. It followed that Vodafone, the buyer of the share, had an obligation to withhold and pay the tax in India, before making the payment to HTIL.⁷⁵ Vodafone argued that neither it nor Hutchinson was liable to pay the tax as both the companies were located outside India and the deal happened outside India. The Bombay High Court decided in favour of the Revenue, holding that that the transaction was a tax avoidant one for the transfer of Hutchinson's controlling interest and capital assets in Hutchinson-Essar and that since those assets were situated in India, the tax demand had been justified. This involved piercing CGP's veil and treating it as the alter ego so as to attribute its 67% shareholding in Hutchinson-Essar to Hutchinson.

The Supreme Court draws a fundamental distinction between 'tax planning' 'within the law devoid of 'colourable devices' as being legitimate and 'tax avoidance'.⁷⁶ Applying the decision of the House of Lords in *W.T. Ramsay Ltd v IRC*,⁷⁷ the court also said that it was the duty of the courts to ascertain the true nature of a transaction and that in the case of a scheme, "this means looking at the entire transaction as a whole in the context to which it properly belongs".⁷⁸ In this context, the courts are entitled to invoke the lifting of the corporate veil doctrine in respect of multinational group structures where 'abuse' has been established, in the sense of tax avoidance in the creation and/or use of such structures".⁷⁹ This includes cases 'where the Revenue finds that in a holding structure, an entity which has no commercial/business substance has been interposed only to avoid tax'.⁸⁰

Applying these principles, the Supreme Court held that the High Court had misdirected itself on the relevant facts and thereby failed to ascertain the true nature of the transaction.⁸¹ Properly viewed, CGP had been created as part of a bona fide structured foreign direct investment scheme, providing Hutchinson with "participation investment" that fell outside India's territorial tax jurisdiction. As part of the foreign direct investment scheme, it was legitimate for Hutchinson to divest from India by means of the impugned offshore transaction; and the fact that the method chosen resulted in a tax advantage did not make the transaction one of tax avoidance so as to justify the court in piercing CGP veil and treating the transaction as a nullity.

75. The tax demand was \$2.5 billion

76. *ibid*, Per Kapadia, CJI, 43

77. [1982] AC 300

78. *ibid* 45

79. *ibid*

80. *ibid* 44

81. Having regard to the fact that the Hutchinson structure had been in place since 1994, that CGP had been part of the structure since 1998, that it had paid a substantial amount in taxes during the period until the sale, that the telecom business undertaken by it was continued by HTIL's successor, and that the successor had paid substantial amounts in tax



SUMMARY AND RECOMMENDATIONS

While the separate entity principle classically asserted by the House of Lords in the *Salomon* case is the most pervasive concept of company law⁸² and has been of fundamental importance in the emergence of modern market based economies around the world,⁸³ in the hands of tax planners it has become a tool for constructing aggressive tax avoidance devices and schemes, designed to avoid the tax net or otherwise bring the taxpayer within the scope of fiscal benefits provided by statute in ways which ran counter to the intention of parliament. This is a matter of concern not simply because it subverts the sovereign will of Parliament, but also because it deprives governments of income, thereby subverting timely development.

Conventional wisdom ascribes the prevalence of tax avoidance to loopholes in the law, but the problem is more profound. This is to the extent that where aggressive avoidance schemes work, it is because tax planners have been able to exploit tax legislation by creating a dichotomy between the form and economic substance of transactions. The legislative vice that enables them to do this is very often not a specific loophole, but the settled practice of draftsmen in not specifically setting out in tax legislation the economic predicates that are intended to trigger tax liability or entitlement to a tax benefit.

It has long been established that the courts are entitled to derogate from the separate personality by lifting the corporate veil where the principle has been abused or misused. Drawing upon the 'Ramsay Rule' as clarified by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson*,⁸⁴ and the decision of the Supreme Court of India in *Vodafone International Holdings BV v Union of India & Anor*,⁸⁵ the argument of this paper has been that given the contemporary need to stem aggressive tax avoidance as a means of boosting tax revenue and the inadequacy of the statutory anti-avoidance rule, our courts should be prepared to utilise the doctrine of lifting the veil, alongside purposive interpretation, as an anti-avoidance tool. Adopting the words of Professor Abdulrazaq,⁸⁶ these decisions "are not being cited as binding precedent... [but] to demonstrate that in another common law jurisdiction, which shares with us the same fundamental legal and tax principles, the courts had been faced with the same problems and had found a logically satisfying and acceptable solution which could be legitimately considered".⁸⁷

The utility of the doctrine of lifting the corporate veil arises from the fact that it is one of a number of devices that the courts have evolved over the years to enable them to reach and subject to legal control, the substance of contrived transactions as well as the actors behind such transactions in circumstances where the separate entity principle has been abused. In the tax context where the court finds impermissible tax avoidance, the device can be used to enable taxation of underlying assets. Thus, it is not determinative of the existence of tax avoidance, but may be relevant as a threshold matter to enable the court to look through the corporate entity to ascertain the economic and other reality behind the corporate form, ultimately exposing the underlying arrangement to tax consequences. As compared to the principle asserted in the *Dawson* case permitting the courts to ignore a transactional step lacking commercial purpose regardless of the parliamentary intention, the doctrine of lifting the veil provides a principled basis for ignoring transactions undertaken with or by companies that have interposed in aid of tax avoidance. The courts in Nigeria can and should deploy the device in this way, on the ground that interposing a company to facilitate a tax avoidance strategy that is contrary to the intention of parliament, is both abusive and contrary to public policy.

82. Akanki, E.O, 'The Relevance of the Corporate Personality Principle' (1997-80) NLJ 9, 10

83. See the comments of Lord Sumption in *Prest v Petrodel Resources Limited* (n 61)

84. *ibid* (n 23) 280

85. *ibid* (n 71)

86. *ibid* 148

87. *ibid*

