

Interpreting Taxing Statutes # 39 – Presumption that evasion not to be allowed

A construction which advances the legislature's aim of providing a remedy for the mischief against which the enactment is directed is to be preferred to a construction that attempts to find some way of circumventing it.^{^1}

SYNOPSIS

Court's duty to counter evasion

Distinction between evasion and avoidance

Court's duty to counter evasion

The court's task is one of construing the enactment and applying it to the facts in question.

“If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden such as income tax, I do not think that it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. If they do not work, the reason is simply that upon the true construction of the statute, the transactions which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes.” ^{^2}

The court do not facilitate the circumvention of legislative intent.
Said as follows:

¹ Bennion 2020 s 12.10

² Norglen Ltd v Reeds Rains Prudential Ltd (1999) 2 AC 1 cited in Bennion 2020 p 457

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“Parliament does not intend the plain meaning of its legislation to be evaded. And it is the duty of the court not to facilitate the circumvention of the parliamentary intent.”<sup>3</sup>

The court have frequently held that a construction is to be preferred that prevents evasion of the intention evinced by the legislature to provide an effective remedy for the mischief against which the enactment is directed.<sup>4</sup>

To prevent evasion, the court turns away from a construction that would allow a person (a) to do what a legislature has indicated by the Act it considers mischievous or (b) to refrain from doing what the legislature has indicated it considers desirable.<sup>5</sup>

When deliberately embarked on, such evasion sometimes been judicially described as a fraud on the Act.<sup>6</sup>

The desire of the courts to prevent rules created by statutory provisions being evaded is manifest in many fields.<sup>7</sup>

The principle requiring a construction against evasion is not limited to cases where a person has deliberately set out to get around the Acts, perhaps with a motive connoting moral blame. It extends to other ways in which the integrity of an Act may be undermined, even unwittingly.<sup>8</sup>

An Act may contain provisions intended to counter evasion of its requirements.<sup>9</sup>

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<sup>3</sup> R v J (2004) UKHL 42 cited in Bennion 2020 p 458

<sup>4</sup> Bennion 2020 p 458

<sup>5</sup> Bennion 2020 p 458

<sup>6</sup> R v J (2004) UKHL 42 cited in Bennion 2020 p 458

<sup>7</sup> Bennion 2020 p 458

<sup>8</sup> Bennion 2020 p 460

<sup>9</sup> Bennion 2020 p 462

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The presence or absence of such provisions (which may have been included out of an abundance of caution) does not affect the general duty of the courts to counter evasions.^{^10}

Distinction between evasion and avoidance

There is a distinction between lawfully escaping the requirements of an enactment by arranging matters so that the requirements of an enactment do not apply (avoidance) and contravening or failing to comply with the requirements (evasion).^{^11}

Though in principle there may be a distinction between evasion and avoidance but the labels themselves ('evasion and avoidance') do not assist. Where an enactment applies the certain cases (for examples where a certain kind of transaction has been entered into), the court will approach the question of whether the enactment applies by looking at the substance of what has occurred (rather than, for example, by reference to any label that a party has attached to the transaction).^{^12}

Example 1: An Act gave a servant the right to a poor law settlement if he was hired for a year. With the intention of avoiding this, an employer hired him for 360 days. Held, this was outside the Act.^{^13}

Example 2: A shopkeeper was licensed to sell beer for consumption only off the premises. Held, the shopkeepers was properly convicted of selling beer for consumption on the premises where it was sold to person who consumed it while

¹⁰ Bennion 2020 p 462

¹¹ Bennion 2020 s 12.11

¹² Bennion 2020 p 464

¹³ R v Little Coggeshall Inhabitants (1817) 6 M&S 264 cited in Bennion 2020 p 465

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sitting on a bench just outside, that was provided by the  
shopkeeper.<sup>14</sup>

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<sup>14</sup> Cross v Watts (1862) 32 LJMC 73 cited in Bennion 2020 p 465