ESTUDIOS

THE ANTIABUSE RULE IN THE TAX FIELD AND THE REQUIREMENT OF ADMINISTRATIVE REASONING IN THE CLASSIFICATION OF LEGAL TRANSACTIONS

LA NORMA ANTIABUSO EN EL ÁMBITO TRIBUTARIO Y LA EXIGENCIA DEL RAZONAMIENTO ADMINISTRATIVO EN LA CALIFICACIÓN DE LOS NEGOCIOS

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DANIEL E. MÁRQUEZ LASSO

Abogado · Socio Director de Stellvest | Profesor Doctor de Derecho Financiero Tributario · Director del Área de Derecho Privado · Universidad Internacional de la Rioja

0000-0003-3014-7890

Abstract:

The principle of legal characterization is established as an ex lege power of the Tax Administration, enabling it to determine the existence and precise configuration of the actual taxable event, irrespective of the form or designation assigned to it by the parties. Since characterization entails an essential interpretative operation and constitutes a clearly anti-avoidance legal mechanism, it must be borne in mind that the influence of European Union law in this area lies precisely in delimiting the scope of such provisions. Accordingly, legal characterization is to be understood as a power subject, inter alia, to the principles of legal hermeneutics and further constrained by a set of limits specifically intended to preclude its abusive application.

Keywords:
Legal characterization, sham, antiabuse rule, abuse of law and business purpose test.

Resumen:
El principio de calificación jurídica se establece como una facultad ex lege de la Administración Tributaria, que le permite determinar la existencia y configuración precisa del hecho imponible, independientemente de la forma o denominación que le asignen las partes. Dado que la calificación implica una operación interpretativa esencial y constituye un mecanismo jurídico claramente antielusión, debe tenerse presente que la influencia del Derecho de la Unión Europea en este ámbito reside precisamente en delimitar el alcance de dichas disposiciones. En consecuencia, la calificación jurídica debe entenderse como una facultad sujeta, entre otros, a los principios de la hermenéutica jurídica y, además, limitada por un conjunto de límites específicamente destinados a impedir su aplicación abusiva.

Palabras clave:
Calificación jurídica, simulacro, norma antiabuso, abuso de derecho y prueba del propósito empresarial.

I. Introduction

As established by the recent judgment of the Spanish Supreme Court of 5 May 2025, the principle of legal classification falls within the powers that the tax legal system grants to the Tax Administration to impose the tax liability on the taxpayer, regardless of the form or designation used. The principle of legal classification is configured as a power conferred by law upon the Tax Administration, allowing it, for tax purposes, to determine the existence of the actual taxable event and to specify its concrete form, irrespective of the form or denomination assigned to it by the parties (Supreme Court judgments of 26 May 2016, cassation appeal no. 60/2015, and 12 July 2016, cassation appeal no. 1272/2015).

As stated by Constitutional Court judgment no. 65/2020 of 18 June, legal classification consists in analyzing whether a specific real-life situation (a fact, act or legal transaction carried out) falls within the abstract statutory provision and, if the outcome is affirmative, subsuming the former into the latter. It is, therefore, an essentially interpretative operation (…) This power conferred upon the Tax Administration by the tax legal order is not without limits, as it falls to the ordinary courts, without prejudice to the oversight exercised by the judiciary, to ensure proper judicial control over the exercise of said power of legal classification (Supreme Court judgment of 2 March 2006, cassation appeal no. 401/2003). Indeed, the power of legal classification belongs to the Tax Administration, but it is nonetheless subject to judicial review by the contentious-administrative courts (judgment of 22 March 2012, cassation appeal no. 2975/2008). Legal classification must be conceived as a strict legal operation, carried out through legal criteria, which reveal the true legal nature of the facts as they exist, so that it may be said that the mechanism of classification has been properly applied (judgment of 13 January 2011, appeal no. 1451/2006)[1].

In this regard, the judgment of 29 April 2025 states that taking as a starting point the essential Supreme Court judgment of 2 July 2020 (cassation no. 1433/2018), which denies the possibility for the Tax Administration to reclassify income under Article 13 (Legal Ground 4), it is not permissible, on the basis of Article 13 of Law 58/2003 of 17 December, the General Taxation Law, for the Tax Audit authorities to disregard economic activities formally declared by individuals, to reattribute the income obtained (...), and, ultimately, to reclassify it, adding that (...) it requires no particular rhetorical effort to conclude that an action of this nature goes well beyond the mere legal classification of the facts, acts or legal transactions in accordance with their true nature, if only because the tax assessment (and the decision of the Regional Economic-Administrative Court that upholds it, as well as the contested judgment which reproduces it) includes expressions incompatible with such a general power, such as referring to the presence of apparent sole traders, or the existence of artificially created companies (...) or the ascertained aim of reducing the tax burden that should have been borne by that entity.

These legal institutions were not created gratuitously by the legislator, nor were they placed at the free or discretionary disposal of public servants, but only to the extent that the conditions laid down for each of them are fulfilled. In short, they are not interchangeable.

To assert that tax classification enables an action such as the one under review would be tantamount to granting Article 13 of the General Taxation Law an expansive power that is incompatible with the remainder of the legal framework, for it would render unnecessary the existence of other legal constructs, such as the conflict in the application of the tax rule (fraus legis) or sham.

In other words, the Administration would hardly ever need to initiate the procedures set forth in Articles 15 and 16 of the General Taxation Law, since it would suffice to classify the factual situations, it encounters in practice and adapt them to legality by applying the corresponding regulations. Its power of classification, only with respect to acts, facts or legal transactions, would become practically absolute and all-encompassing regarding any imaginable situation[2].

Therefore, although it is beyond doubt that the legal possibility of classification granted to the Tax Administration by Article 13 of the current General Taxation Law constitutes a clearly anti-avoidance institution, it is equally unquestionable that such power is not only subject, among others, to the principles of legal hermeneutics, but is also conditioned by a series of limits which precisely prevent its abusive use.

Few issues should arise in the context of sham, given that it entails the mere creation of a legal fiction whose sole purpose is to conceal a reality with tax relevance. However, fraus legis as well as abuse of law in tax matters involves a higher degree of complexity, since the form or denomination attributed by the parties to the taxable factual situation finds support in a legal provision, or in a set of applicable legal provisions. Hence, Article 15 of the General Taxation Law provides that there shall be deemed to exist a fraus legis when the purpose or effect of the arrangement is to totally or partially avoid the taxable event or to reduce the taxable base or the tax liability, as an initial indication of the existence of tax avoidance. Nevertheless, the Court of Justice of the European Union has made it unequivocally clear that the mere obtaining of a tax advantage does not, in and of itself, constitute tax avoidance (understood in terms of abuse of law)[3].

The key issue lies in determining whether the conduct of the parties is solely aimed at obtaining a tax advantage which is, moreover, the direct consequence of such conduct.

To this end, the Court has developed through its case law a business purpose test, under which the tax administration must conduct, in light of all the facts and circumstances, a thorough analysis to determine whether the main objective of a given structure or transaction is the attainment of a tax advantage, which, by itself, would reveal the subjective intent (main purpose) of the actors involved[4].

II. The principle of legal classification in the tax field

1. Background

Pursuant to Article 12 of the General Taxation Law, the interpretation of tax rules shall be governed by the provisions of Article 3.1 of the Civil Code, which states that legal rules shall be interpreted in accordance with the proper meaning of their words, in relation to their context, legislative history, and the social reality at the time of their application, having particular regard to the spirit and purpose of the rules. In this respect, if the terms of a contract are clear and leave no room for doubt as to the intention of the contracting parties, the literal meaning of the clauses shall prevail.

However, the logic inherent in the interpretative process indicates that, if the wording appears to contradict the manifest intention of the parties, such intention shall prevail over the literal terms (Article 1281 of the Civil Code); and that, in order to determine the intention of the contracting parties, primary attention must be paid to their contemporaneous and subsequent conduct (Article 1282 of the Civil Code). Furthermore, no matter how general the terms of a contract may be, they shall not be construed as including matters or cases other than those to which the parties intended their agreement to apply (Article 1283 of the Civil Code).

For its part, Article 13 of the General Taxation Law provides that tax liabilities shall be determined in accordance with the legal nature of the act, transaction or arrangement carried out, regardless of the form or designation given by the parties and notwithstanding any defects affecting its validity[5].

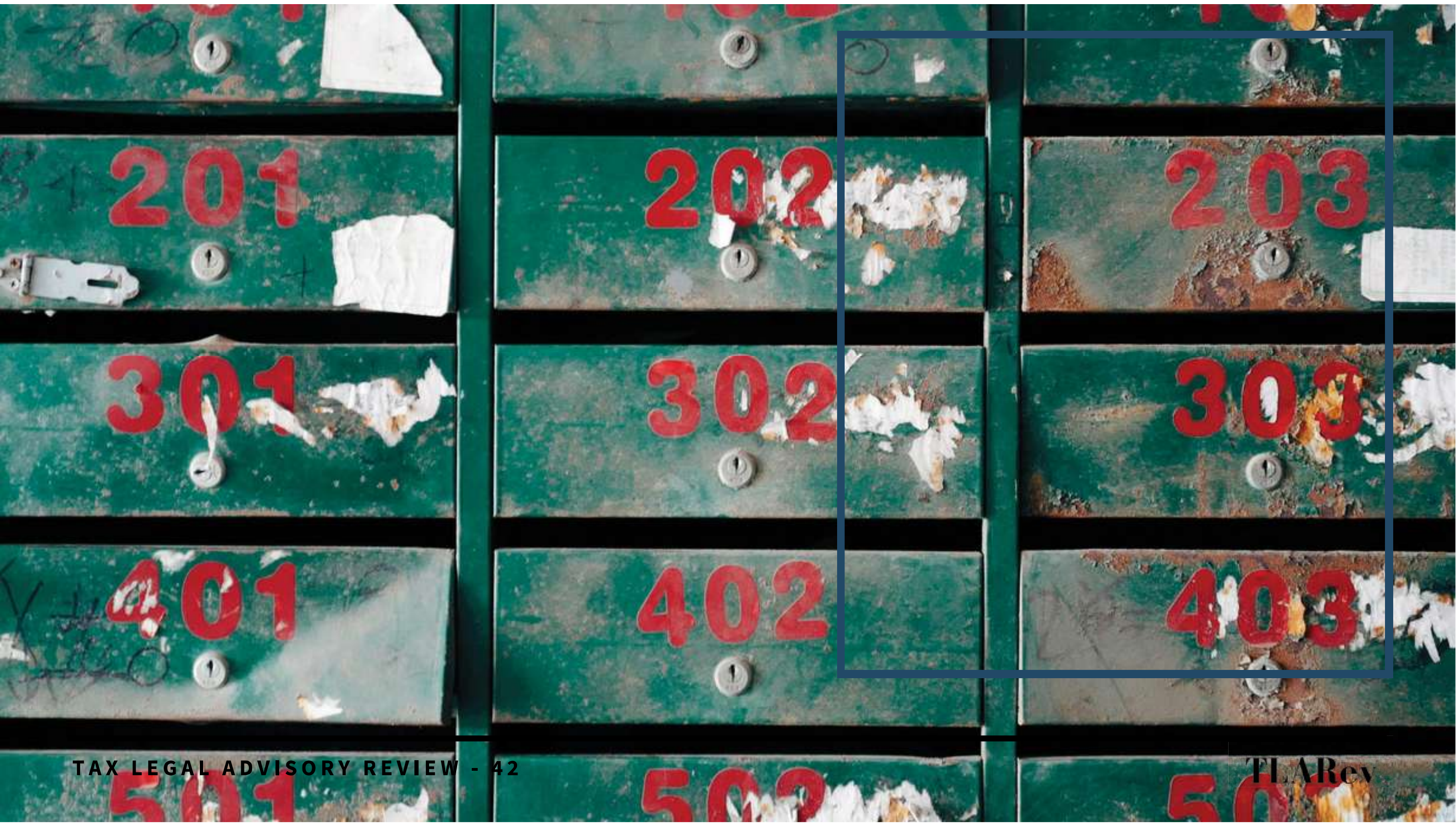
This entails granting the Tax Administration the power of legal classification for the purposes of establishing and enforcing tax obligations, without prejudging the civil law characterization of such acts. However, this does not imply conferring upon such power an expansive effect that would be incompatible with the remainder of the legal framework, as this would render other legal constructs (such as fraus legis or sham) superfluous (Supreme Court judgment of 2 March 2006, cassation appeal no. 401/2003).

2. The concept of legal tax classification and tax avoidance: criteria for distinguishing between tax planning, avoidance, fraus legis, sham and abuse

As GARCÍA FREIRÍA insightfully points out, in contrast to the wealth of doctrinal studies that, in the field of tax law, have examined the concept of interpretation, the same cannot be said of the notion of legal classification. For decades, scholarly attention has focused primarily on analyzing the specific features of legal interpretation within the tax domain, as well as on the hermeneutical rules guiding the interpretative process.

This has given rise to a rich body of literature and to the emergence of a wide array of doctrinal schools, sometimes radically opposed to their approaches. The limited interest shown in tax classification is merely a reflection of the way this concept has been understood by much of Spanish legal scholarship from the outset.

Thus, legal classification, as an intellectual operation, was originally regarded as merely part of the broader interpretative process, lacking autonomy and substantive content of its own sufficient to warrant treatment as a distinct and independent object of study. Few scholars in Spanish domestic tax law have sought to delineate the concept of legal classification. Little attention has been paid by the doctrine to the



analysis of the legal nature of this figure, its legal effects, or the appropriateness of its regulatory configuration by the tax legislator. And yet, numerous disputes have arisen in which tax classification has played a highly significant role, often being the central issue in the controversy[6].

Indeed, as previously noted, there are now numerous judgments in our case law warning that the Tax Administration may not, in the course of a tax audit or inspection, without invoking, as appropriate, the mechanisms set out in Articles 15 or 16 of the General Taxation Law, construe what was actually performed as something other than what was declared by the taxpayer — that is, to consider as real an activity different from the one actually carried out and to derive the corresponding tax consequences from this alternative reality, without observing the procedural guarantees and requirements laid down in the abovementioned Articles 15 and 16. When the Administration characterizes certain arrangements or activities as artificial, it is a sine qua non condition that the assessment decision formally and explicitly invoke either the existence of a conflict in the application of the tax rule under Article 15 of the General Taxation Law, or a case of sham under Article 16 of the same statute. Otherwise, the Administration's conduct would amount to a procedural irregularity with invalidating effect[7].

2.1. Tax planning and tax avoidance

A first premise that emerges when addressing, from a terminological standpoint, the notion of tax avoidance and its various manifestations is that its examination may lead to the conclusion that the differences between such categories are, on certain levels, substantively insignificant. This is because, regardless of the mechanism employed to reduce the tax burden, the practical effect pursued remains the same: for the taxpayer, taxation is perceived as a direct cost on business or patrimonial income, against which there exists a natural inclination to minimize its impact by resorting to legally available techniques.

Nevertheless, any strategy aimed in that direction inevitably operates on a boundary line, within which a distinction must be drawn between, on the one hand, entirely lawful conduct protected by the principle of tax planning, and, on the other, conduct that veers into two typical forms of unlawfulness: the first, in which the conduct formally conforms to the legal text (*secundum legem*) but contravenes its purpose or spirit (*contra legem* in substance); and the second, in which both formal and substantive elements of unlawfulness are simultaneously present (fully *contra legem*).

In this respect, classical legal doctrine has tended to draw a tripartite classification among: (i) direct violations of the rule (blatant breaches of its letter and spirit); (ii) indirect or oblique violations (which adhere to the literal wording of the rule but undermine its purpose); and (iii) conduct that is consistent both with the literal meaning and the normative purpose of the rule[8].

Indeed, semantic ambiguity has been a constant feature in the treatment of the concepts of tax avoidance, abuse of law, fraud, and evasion, which have at times been used interchangeably, as if they were overlapping or even synonymous in meaning. Such is the terminological disparity that the Court of Justice of the European Union itself has acknowledged that the notions of tax evasion, tax fraud, and abuse of tax law differ substantially across Member States. This asymmetry is reflected in its case law, which varies depending on the applicable legal framework and the fundamental freedoms at stake in relation to the provisions of the EU Directives. In its rulings, the Court has employed inconsistent terminology such as avoidance[9], fraud[10], evasion[11] or, more generally, they have used the term abusive practices[12] reaching to assimilate the concept of fraudulent practices[13]. In any case, it is well-established doctrine that the definition of the taxable event must be based on legal acts and transactions—primarily under private law—as manifestations of taxable economic capacity. In this respect, it is expressly recognized that taxpayers enjoy full freedom to structure their economic activity and to make decisions in accordance with their own interests, including the option to choose the legally most efficient route from a tax perspective, by virtue of the principle of freedom of contract, provided that such choice does not distort the legal forms employed or undermine their economic and legal purpose.

In the Anglo-Saxon legal tradition, this principle of freedom of contract is closely related to the Westminster principle[14], whereby every man is entitled to arrange his affairs, if he can, in such a way that the amount of tax payable is as low as possible. In line with this, the incorporation into Spanish law of the expression tax planning as representative of the various possibilities open to taxpayers to structure their legal and economic relations in the manner that is least burdensome from a tax standpoint, was conceived from the perspective of the exercise of private autonomy in the service of efficient tax planning—resulting in a reduced tax burden within the framework of applicable law[15].

Therefore, it may be affirmed that tax planning encompasses any form of optimization in the use of existing legal provisions with the aim of reducing tax burdens, deferring them over time, or even eliminating them entirely[16]—always within the strict bounds of legality. Nonetheless, it must be acknowledged that determining the negative formulation of its limits poses a considerable challenge, given its ongoing tension with the boundaries of fraus legis and the various forms of anomalous transactions. Even more complex is the task of positively defining its content and scope with precision.

The construction of such formulation by the Supreme Court—both in its positive content and in its negative delimitation—is evidenced in its assertion that tax planning is structured around two notions.

The first is a classical notion, understood as the explicit offering by the legal system of equally valid legal alternatives, and encompasses those situations in which the legal rule expressly provides the taxpayer with various options, allowing the selection of the one involving the lowest tax cost, without such choice amounting to tax avoidance strategies or abusive manipulation of legal configurations. This notion corresponds to the so-called tax options, which constitute a right conferred by law upon the taxpayer, placed in a specific legal position with respect to the tax, to freely exercise an option that affects the determination of the applicable tax regime. The second notion encompasses those cases in which the alternatives arise implicitly within the legal rule[17].

Evidently, explicit tax planning presents no difficulty in its application or even in its distinction from other related legal constructs. This is not the case, however, with so-called implicit tax planning, the delimitation and scope of which proves significantly more complex.

In this respect, it is necessary to address a question which, in our view, is essential, namely, whether tax planning, and therefore tax structuring, may be regarded as a true subjective right of the taxpayer, conferring upon them the ability to organize their economic affairs in such a way that their tax liability is reduced. This position appears to be supported by the Supreme Court, which has stated that tax planning arises in those cases where the legal system offers the taxpayer various possibilities for action, among which they may choose the one that best suits their interests and expectations[18].

However, various authors dispute the notion that tax planning may constitute subjective rights, arguing that the possibility afforded to taxpayers to choose the legal form of their transactions in a way that results in a lower tax burden is merely the natural consequence of the tax system attaching tax effects to certain legal acts. From this perspective, tax planning is nothing more than the use of tax options where such options are expressly provided for. In the case of tax rules serving strictly fiscal purposes, the above constitutes an exception, since taxpayers cannot choose the applicable tax burden in disregard of the economic capacity that has been demonstrated through the transaction or activity carried out[19].

In our view, tax planning is inescapable; it is embedded in the law and in its proper application, and it derives its advantages for the legal transaction underway from the very alternatives offered by the legal system. It consists in creating advantageous scenarios permitted by the legal framework.

Tax savings do not reflect any legal defect; rather, they constitute an element of the ideal contract[20]. For this reason, we uphold the thesis that tax planning, stricto sensu, constitutes a genuine subjective right of the taxpayer, provided that their conduct remains within the bounds of legality. The real difficulty, therefore, arises at the point of determining which transactions must be regarded as tax-avoidance and thus unacceptable, and which may be considered as implicit within legitimate tax planning and therefore acceptable.

This issue has only served to deepen not only the terminological confusion between tax planning and fiscal planning more broadly, by treating them as isolated and unrelated terms, but has also led certain authors (particularly in the international sphere) to equate planning with tax avoidance, a conceptual identification which, in our view, is entirely misguided.

A relatively restrictive position would limit the legitimacy of tax planning exclusively to those actions that are expressly contemplated by law, thereby excluding any actions initiated by the taxpayer that are based on the exploitation of implicit options afforded by the legal system. Under such a view, one could defend the theory that whatever is not expressly permitted by law is implicitly prohibited. However, such conduct (although departing, in principle, from the spirit of the law) is not per se illegitimate, insofar as it does not go beyond the pursuit of a tax advantage because of the legal system offering alternatives concerning the subjection of facts, acts or legal transactions to taxation.

The problem, therefore, arises when the option exercised by the taxpayer is not explicitly provided for in the relevant legal provisions, and its potential consequence—always within the limits of legal interpretation—leads to a result not foreseen by the legislature.

Indeed, there have been numerous judicial decisions that place strong emphasis on the spirit of the tax law that is being circumvented, even where this is done through a lawful contractual mechanism or through an undesirable form of tax planning[21]. This interpretative approach leaves very limited room for the recognition of implicit tax planning strategies and for stricto sensu fiscal planning, on the basis that certain behaviors or transactions, although lawful and typical under private law, are deemed to be fiscally unlawful, insofar as they are used, under a restrictive interpretation, to frustrate the intent of the tax legislator.

The judgment of 30 May 2011 makes it unequivocally clear that tax planning can under no circumstances be understood as conferring upon the taxpayer the power to structure transactions or economic situations with tax implications in the absence of valid economic reasons and for the sole purpose of obtaining a tax advantage. Therefore, if tax planning is based on the possibilities derived from the freedom to structure legal transactions, which includes the ability to enter arrangements aimed at securing a tax benefit or saving, it is necessary, as case law has emphasized, to ensure that such freedom does not distort the proper and natural application of tax rules. This distortion arises when resort is made to contractual devices that fall under the category of anomalous legal transactions, which includes acts contrary to the law in *fraudem legis*, indirect transactions, fiduciary arrangements and simulated transactions. The presence of a valid economic reason becomes the test for the recognition of legitimate tax planning. However, the conceptual distinction between these legal categories, which externally and negatively delimit the scope of tax planning, does not eliminate the practical difficulties inherent in its application. Because of the foregoing, tax planning is based on the taxpayer's ability to choose among various lawful legal alternatives depending on their lower tax burden—not solely on that fiscal consideration, however, but also on the presence of another legally or economically relevant effect, namely the existence of a valid economic reason.

When that element is absent, one undoubtedly enters the domain of tax avoidance, whose prevailing definition rests on the idea that there is no direct infringement of any mandatory legal provision. The taxpayer's conduct remains formally lawful, yet it deviates from the spirit or purpose of the rule under which it is ostensibly sheltered, since the tax benefit is obtained using atypical or anomalous legal structures. Tax avoidance thus refers to an outcome that can be achieved by distorting contractual or transactional activity through the pursuit of lawful instruments whose objective is to avoid or reduce the tax burden, while formally complying with the applicable legal provision at least in their literal dimension.

Within the European Union[22], tax avoidance is defined as conduct by the taxpayers in the organization and structuring of their economic interests aimed at reducing their tax liabilities using arrangements that are formally in conformity with strict legal requirements yet contradict the intention or purpose of the law they purport to comply with.

In the German legal system[23], effective taxation is ensured based on a factual situation that gives rise to the mandatory tax liability, even where the taxpayer chooses an atypical legal arrangement that does not fall directly within the scope of the law, pursuant to Article 42 of the Fiscal Code (Abgabenordnung)[24].

The German legal tradition does not literally identify this concept with tax avoidance but rather assimilates it to the notion of abuse of law. This merely confirms the asymmetric use of these terms across different legal systems, as is likewise the case in the French legal system[25]. In the Anglo-Saxon legal system, there is no general anti-avoidance rule (GAAR) codified in a single legislative text; rather, there exists a set of judicial responses developed through a range of decisions, which have given rise to a body of case law doctrine on the matter[26], as is also the case in the U.S. legal system, where anti-avoidance doctrines have been developed as genuine policy instruments that influence the elasticity and efficiency of the tax system.

In the latter case, a step forward has been taken in the codification of U.S. anti-avoidance doctrine through Section 7701(o), introduced by Section 1409 of the Health Care and Education Reconciliation Act of 2010[27].

Ultimately, what is indisputable (because it is commonly accepted) is that the key element for determining the lawfulness or unlawfulness of the possibilities arising from the freedom to structure legal transactions with

the aim of obtaining a tax benefit or saving lies in the cause of the legal transaction. That is, in the use of legal forms for purposes other than those which justify their protection by the legal system.

The difference between tax planning and legitimate tax structuring, on the one hand, and tax avoidance, on the other, accordingly resides in the fact that the former does not infringe the spirit or purpose of the law, whereas *fraus legis* does. It is thus understood that in addressing the use of legal constructs to achieve the desired result with a lower tax burden than that associated with the usual acts or legal transactions expressly contemplated by the tax rules, three doctrinal categories are generally used: tax avoidance, which does not breach tax law but circumvents its application; tax evasion, which directly violates the law; and tax planning, which involves the lawful choice among several legal alternatives that result in a lower tax burden. In this way, it may be stated that, unlike in tax planning, in cases of tax avoidance the legal system intends taxation to occur, even though the taxpayer has resorted to valid legal acts or transactions not formally covered by the rule as taxable events. Thus, to prevent tax avoidance, various legal categories are employed, which may be grouped around two distinct traditions: one based on the concept of *fraus legis*, either in its classical formulation under private law or in its specifically tax-oriented version; and the other relying on anti-avoidance clauses, whether general or specific. Additionally, the doctrines of piercing the corporate veil and fiscal transparency are also used in a complementary manner[28]. And, in the sense outlined above, we can indeed identify two of the most severe manifestations of tax avoidance under Spanish law in what is known as conflict in the application of the tax rule (formerly referred to as tax fraud in the form of *fraus legis*) and sham.

2.2. Fraus legis and sham

Fraus Legis is characterized by using an artificial arrangement which, while appearing lawful, serves to avoid the occurrence of the taxable event. Its essential element lies in the absence of any direct breach of a legal provision: the conduct in question is, on its face, in accordance with a covering rule, yet produces a result that is contrary to another rule, to several others, or to the legal system (defrauded rule)[29].

This refers, therefore, to conduct by the taxpayer that produces a result contrary to a legal rule, relying instead on another provision enacted for a different purpose.

Paradoxically, in certain cases, the covering rule may even consist of the absence of a specific legal provision governing the act in question. This figure corresponds, in principle, to the general notion set out in Article 6(4) of the Spanish Civil Code, which states that acts carried out under the literal wording of a rule that pursue a result prohibited by the legal system, or contrary to it, shall be deemed to have been performed in fraud of law and shall not prevent the proper application of the rule that was intended to be circumvented[30].

Within the legal order of the European Union, there is no positive definition of conflict in the application of the rule (i.e., tax fraud in the form of fraus legis); however, the Court of Justice of the European Communities (CJEC) has gradually developed the concept over time (albeit with still diffuse contours) and its doctrine can only be properly understood if one takes into account that each element of the national anti-abuse tax framework must be defined in a manner that is coherent with, or aligned to, the fundamental freedoms.

Given that, in most cases, an operation or transaction carried out in exercise of the fundamental freedoms cannot be regarded as abusive, one may observe a trend toward interpreting general anti-abuse rules in accordance with the parameters established by the CJEC. In particular, the concept is increasingly structured around a business purpose threshold when assessing whether a given arrangement constitutes tax fraud in the form of *fraus legis*[31] as can be inferred from the very wording of current Article 15 of the General Taxation Law[32], which refers to artificial or improper acts.

To state that an act or transaction is improper implies a judgment based on frequency. By contrasting the adverb frequently, which denotes what is usual, with the expression notoriously improper used in Article 15, it is not difficult to discern the conceptual void toward which we may be heading. Let us not forget toward which we may be heading. Let us not forget that the disjunctive conjunction employed (improper versus proper) opens the door to the application of the clause solely based on unusualness[33].

It is therefore necessary to resort to what is known as the appropriateness test to determine whether the legal arrangement under consideration was suitable for achieving the intended purpose. This implies that by using the term improper transaction, Law 58/2003 acknowledges that, to produce certain legal-economic effects, the legal system establishes standard and typical legal transactions.

This implies elevating to the level of an essential element of the legal transaction the legal control that the typical cause exerts over the legitimacy of the purposes pursued by each specific act or transaction.

Therefore, in order to determine whether a specific legal transaction may trigger the application of the provision governing *fraus legis* (that is, whether it has been abusively used by private parties to avoid the occurrence of the taxable event or to obtain a tax advantage) the Tax Administration will be required to ascertain whether the typical legal act or transaction in question pursues the socio-economic purposes inherent to it, i.e., the practical ends protected by the legal system through the essential element of the legal transaction: its cause[34].

Accordingly, the appropriate test may also be understood as a causa-based test[35]. Sham, for its part, entails the creation of an apparent legal reality that conceals either a different legal reality (relative sham) or the complete absence of any legal act or transaction (absolute sham), in accordance with Article 16 of Law 17/2003.

A certain sector of legal scholarship argues that two figures so clearly distinguished at the theoretical level overlapped in practical application, blurring their respective contours to the point of making them nearly indistinguishable. It has been stated that from a technical perspective, *fraus legis* is based on the existence of valid legal acts or transactions carried out under the protection of a certain legal provision (covering rule) that does not adequately shield them, and thus the tax rule that should truly apply (defrauded rule) must be applied considering the surrounding circumstances.

By contrast, sham involves the creation of an apparent (simulated) legal reality that conceals a different (underlying) one. It is precisely in the sham of the causa of the transaction—given its imprecise configuration under Spanish law and its close connection with the purpose pursued by the parties—where the overlap with *fraus legis* emerges: when a contract is entered into not for its ordinary purpose (typical causa) but to achieve a singular outcome, it suffers from a defect in its causa, to the point of lacking it altogether and thus deserving to be qualified as simulated.

In both cases alike, the legal system provides for the imposition of the tax liability that would have corresponded to the avoided taxable event. The possible concurrence of sham and *fraus legis* arises when the simulated transaction is also fraudulent, and the fact that part of the legal doctrine (under Article 24 of the 1963 General Taxation Law) required the presence of a subjective element in tax *fraus legis* (namely, proof of the deliberate intent to avoid the tax)[36], leads to an unavoidable overlap between the two figures[37].

Another strand of legal scholarship, for its part, maintains that although the theoretical distinction between the two is clear, practical difficulties may arise in determining whether a given case involves sham or *fraus legis*, because in a certain sense (though certainly not in the strict legal-technical sense) those who engage in a transaction in *fraus legis* do not so much pursue the typical legal effects of that transaction as they do its economic consequences[38]. Another line of legal doctrine, for its part, holds that despite the clarity of the theoretical distinction, practical difficulties may indeed arise in determining whether a given case involves sham or a situation of *fraus legis*, because, in a certain sense—though not in the strictly legal-technical sense—those who engage in transactions in fraud of tax law do not seek the typical legal outcome of such transactions, but rather their economic consequences.

Indeed, both types of conduct share a common defining element: whereas in conflict in the application of the rule the taxpayer obtains a tax advantage by exploiting potential normative loopholes (through the interplay of the defrauded rule and the covering rule), in sham there is a deviation from the typical purpose of the transaction, relying instead on an artificially constructed arrangement designed solely to achieve one objective: the intended tax benefit[39]. However, the nuance that may be identified as a distinguishing factor lies in the very definition of artificial, meaning something done or devised with craft, skill, and artifice—disguised, cautious, duplicitous. This matters because, in conflict in the application of the rule, as previously noted, the transaction executed between the parties is genuinely intended and fully utilized in its legal nature and cannot be said to be concealed or to lack full effect between the parties and vis-à-vis third parties. By contrast, sham necessarily involves an act that conceals another which is considered the true one—an act which does not exist, has no real effect between the parties, and is not opposable to third parties. Therefore, in this context, we may conclude that conflict in the application of the rule entails a form of relative artificiality, whereas sham involves what may be regarded as absolute artificiality.

2.3. Abuse of law

Under Spanish law, Article 7 of the Civil Code provides that rights shall be exercised in accordance with the requirements of good faith and that the law does not protect the abuse of rights or their antisocial exercise. Any act or omission which, by reason of the intention of its author, its object, or the circumstances in which it is carried out, clearly exceeds the normal limits of the exercise of a right, causing harm to a third party, shall give rise to the corresponding compensation and to the adoption of judicial or administrative measures to prevent the continuation of the abuse. If we attempt to grasp the full scope of the provision in question, we soon realize that its wording does not offer a clear and precise definition of the concept of abuse of rights, in particular, in terms of what is to be understood by normal limits in the exercise of a right, or, more simply, where such a limit is to be drawn. In this regard, the Constitutional Court has held, in numerous judgments, that the reasonable use of a right is found in what is justified and non-arbitrary (see STC 84/1987 of 29 May, Legal Ground 3), and subsequently extended the notion to encompass what is ordinary, normal, and reasonably to be expected (see STC 30/1987 of 11 March, Legal Ground 2; STC 69/1989 of 20 April, Legal Ground 1).

The notion of abuse of law is therefore derived from the perspective of the lawfulness of the reasonable exercise of one's own rights or the reasonable fulfilment of a legal obligation. This must be assessed by reference to the purposes the law intended to serve when recognizing such rights and obligations. That which clearly exceeds the normal limits of the exercise of a right, according to the legal standards of good faith, morality, and public decency, may be considered abusive and, accordingly, unreasonable. Indeed, abuse of law does not consist in the transgression of a rule per se, but rather in the appearance of compliance: a legal semblance of conformity that conceals conduct which, though formally permitted, ought not to be carried out under the normative framework that is properly applicable. Abuse thus presupposes that, through the exercise of a recognized subjective right protected by a legal rule, harm is caused to a third-party interest (whether individual or collective, private or public) which is not protected by a specific legal prerogative and which, by its very nature, may be deemed ethically reprehensible[40].

However, this initial construction is, in our view, open to criticism due to its fundamental linguistic inconsistency regarding the term “ethically reprehensible. As this paper has already sufficiently examined, globalization has profoundly impacted the breakdown of economic borders—not only through the internationalization of markets, but more fundamentally in the way it drives and establishes new implementation processes. This evolution, as is often the case, advances at a pace far beyond the reach of the ordinary legislator, who must watch as judicial rulings are repeatedly required to fill the legal gaps resulting from the poor quality of legislative technique.

Moreover, in our view, ethics as a constitutive element of any limitation on a subjective right always presents an inherent obstacle that is difficult to overcome: namely, the moral condition of the person asserting that right.

In any case, focusing exclusively on the European acquis, it may be stated at the outset that the notion of abuse of law is by no means novel in this context. Since the seminal Van Binsbergen judgment[41], the Court of Justice of the European Union—although not expressly using the term abuse—laid down the initial foundations of its jurisprudential construction. However, in the process of developing the concept, the Court has employed a wide variety of terms as if they were interchangeable, synonymous, or, in some cases, indistinct elements devoid of their own autonomous meaning.

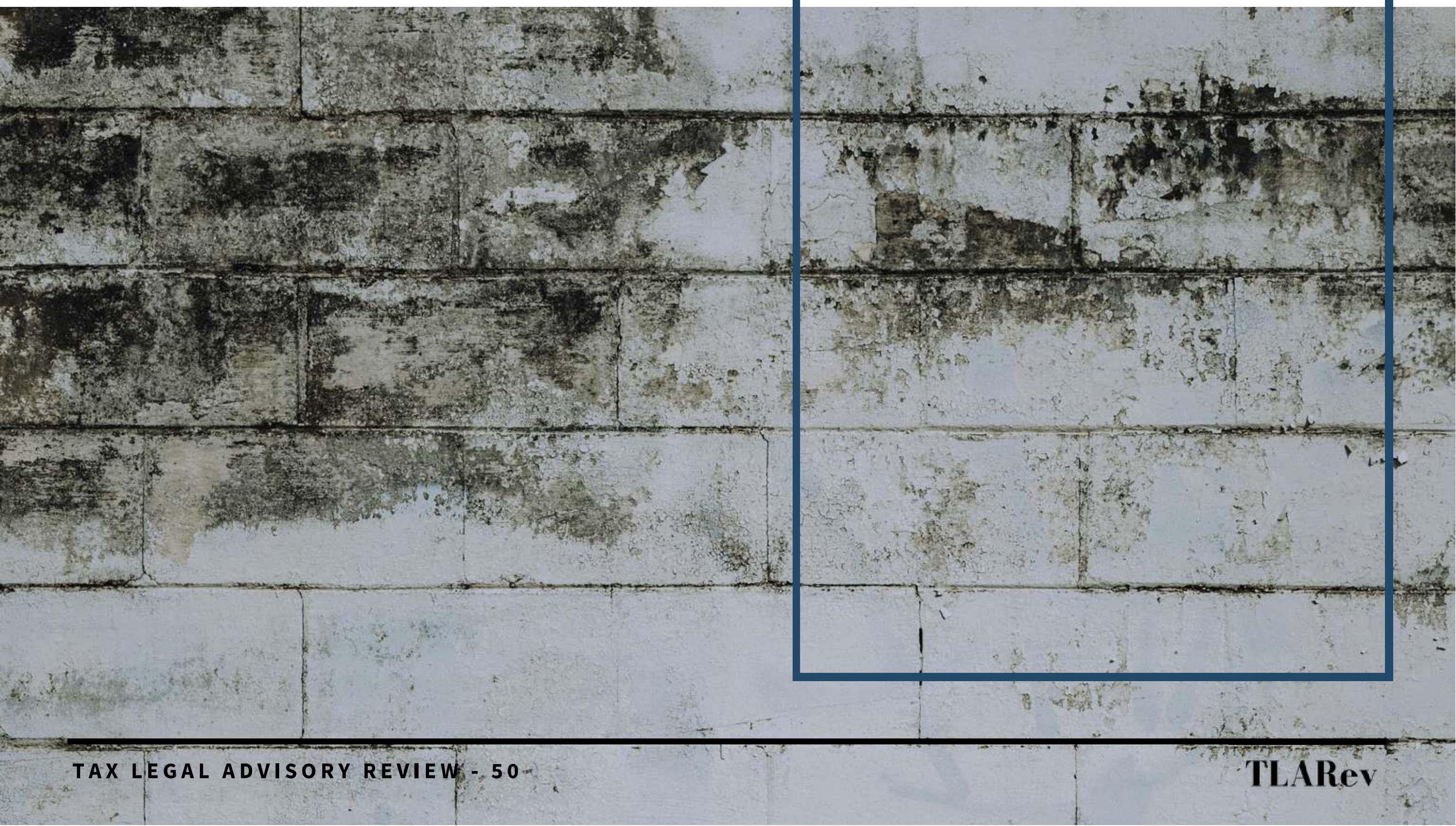
The jurisprudential construction of the concept of the unusual transaction can be found (developed in considerable depth) within the case law of the Court of Justice of the European Union in its numerous rulings on abuse of law. In the vast majority of these cases, the Court has accepted the compatibility with EU law of anti-abuse measures adopted by Member States, provided that their purpose is essentially to dismantle artificial or anomalous arrangements (lacking real economic substance) that have been devised to obtain an advantage or benefit which would not have arisen in the absence of such abusive conduct, and provided that, in analyzing the exercise of the fundamental freedoms, no abuse thereof is committed.

It is therefore evident that every anti-abuse rule must necessarily establish a link between the objective pursued by the rule being circumvented and that pursued by the person exercising their right to obtain a benefit or advantage.

In this regard, the Court consistently holds that the fundamental freedoms of the European Union may not be used abusively to access a more favorable legal regime than the one avoided, by means of artificial or anomalous arrangements. In other words, all actions recognized as valid under the legal system are subject to a single limiting condition: the presence, in their exercise, of an additional element of abuse[42].

In line with this approach, the Court holds that the determination of the existence of abuse requires the interpretation of Community law, since conduct that falls within the essential content of the rights conferred upon individuals by Community law can never be regarded as abusive[43].

And, fundamentally, to determine the existence of abusive conduct, it is required that even if such conduct is formally lawful, it nevertheless deviates in substance from the purpose or actual objective of the



provision that has been circumvented, by means of artificial or anomalous mechanisms derived from the exercise of fundamental freedoms.

Subsequently, the Court's construction of the concept of abuse of law progressed towards a more fully developed formulation, or in other words, the establishment of the first abuse test, which requires the presence of specific elements to conclude that conduct is abusive.

The first element is objective: a formally valid arrangement, protected by EU provisions, but which, in essence, diverges from the purpose or real object of the rule used to justify the behavior, as compared to the rule that has been circumvented.

What is required, in short, is proof that the conditions created have been artificially devised and with an objective different from that intended by the rule. This requires a case-by-case analysis, both the meaning and purpose of the applicable EU rule and of the conduct of prudent economic operators who manage their affairs in accordance with the relevant legal norms and in line with prevailing commercial and economic practices in the sector concerned. The second element is subjective: the intention to obtain a benefit under EU law by deliberately creating the conditions required for its application.

It must be shown that the transaction or factual arrangement at issue was essentially carried out with the sole aim of obtaining a benefit that is incompatible with the objective of the EU provision invoked. In this regard, the need to consider the elaboration of a non-exhaustive inventory of factual indicators of artificial arrangements has already been highlighted—for instance, the creation of a secondary establishment intended to supply goods or services from another territory without any real economic substance or material activity taking place therein, or, more generally, transactions that lack any commercial purpose (or that may even run counter to general business interests), where such transactions have been undertaken solely for the purpose of avoiding taxation.

As the Court of Justice of the European Union has also stated in some depth, the existence of abuse must be assessed on a case-by-case basis, since presumptions *iuris et de iure* of abuse are rejected as overly general or inadequate for achieving the intended aim, namely, preventing the abuse of fundamental rights and freedoms under EU law.

To the extent that the primary objective of a rule is to prevent the use of avoidance mechanisms, the principle of proportionality requires that the contested rule be applied only to prevent wholly artificial arrangements.

However, although it is correct to state that the Court of Justice, in most of its judgments, accepts only those anti-abuse rules whose purpose is to prevent transactions that are artificial, lacking any economic reality, and whose sole or main objective is to obtain a tax advantage without any valid commercial reason, the real difficulty lies in defining the term artificial. The concept is framed in such a way that it closely approximates sham, due to the total absence of economic substance. In addition, a close cause-and-effect relationship is required between the suspicious transaction and the tax advantage obtained, which implies that any anti-abuse rule must establish a clear connection between the taxpayer’s aim of securing a favorable tax treatment and the definition of a wholly artificial arrangement. This once again calls for a substance-over-form analysis to determine whether the arrangement in question is, in fact, purely artificial. In this respect, the so-called Business Purpose Test is to be understood as a development of the purposive or teleological interpretation of tax law, and encompasses various doctrines that share a common core: the denial of legal protection to acts or transactions carried out without a genuine commercial purpose, or that abuse legal provisions by using recognized legal forms to obtain a result (the tax advantage) that is not the purpose for which the rule was created[44].

Accordingly, it becomes evident that it is appropriate to apply a test based on three elements, through which one may distinguish between a wholly artificial arrangement and a legitimate exercise of the freedom of establishment. The first requirement concerns the actual establishment of the subsidiary in the host State. The second relates to the effective nature of the services provided by the subsidiary, understood in terms of the level at which decisions concerning those services are made.

This implies that, if all decisions are taken outside the subsidiary, the latter is reduced to a mere instrument of execution, which would amount to classifying it as an artificial arrangement. Finally, the third requirement, concerning the added value generated by the activity of the subsidiary, is undoubtedly more difficult to assess where the services in question genuinely correspond to real economic activity carried out in the host State. This criterion allows for consideration of the objective situation in which the services provided by the subsidiary lack any economic interest in relation to the activity of the parent company. In such a case, it could be concluded that the arrangement constitutes a wholly artificial construction, insofar as the parent company's payments for the services lack any real consideration and may therefore be regarded as a mere transfer of profits from the parent to the subsidiary.

It is from the Emsland-Stärke judgment[45] onward that the Court more precisely defines the notion of a wholly artificial arrangement, requiring for this purpose the concurrence of two elements: on the one hand, a subjective element, consisting in the intention to obtain a tax advantage; and on the other, that such intention be evidenced by objective and verifiable factors, particularly concerning the physical presence of the establishment in terms of premises, personnel, and equipment.

This leads to the conclusion that, although the formal conditions laid down by EU law may have been fulfilled, the objective pursued by the freedom of establishment has not been achieved. If, upon verification of these elements, it is determined that the establishment constitutes a fictitious set-up that does not carry out any genuine economic activity in the territory of the host Member State, such creation must be regarded as a wholly artificial arrangement. This may occur, in particular, in cases involving so-called shell, letterbox, or phantom companies.

In this sense, abuse arises from the conjunction of these two intrinsically linked criteria: the subjective element, consisting in the intention to obtain a tax advantage, which must be established through the combination of several factors verifiable by third parties; and the objective element, consisting in the existence of a contradiction between the result achieved and the purpose pursued by the provision or the fundamental freedom concerned.

However, the mere contradiction between the outcome obtained and the objectives pursued is not sufficient to characterize an abusive practice. It is also necessary that the advantage obtained through EU law provisions cannot be objectively justified by any reason other than that of circumventing the provisions of national law.

Accordingly, the analysis must focus on identifying the objectives pursued by the relevant EU rule; once these are determined, it must be assessed whether the factual situation under examination falls within the scope of those objectives. The objective element entails two distinct requirements: first, a complete departure from the purpose for which the circumvented rule was created; and second, the carrying out of operations who's essential (if not sole) purpose is to obtain a benefit that could not have been achieved otherwise. The subjective element is more problematic, as it must be further refined to include the requirement that such benefit be obtained by deliberately creating the conditions necessary for its acquisition.

Starting from the premise that a Union national cannot be deprived of the possibility of invoking the provisions of the Treaty merely because they seek to benefit from the tax advantages lawfully offered by the legislation in force in a Member State other than that in which they reside[46], the subjective element (which the Court expressly identifies as the intention to obtain a tax advantage) must be interpreted with great caution.

In this regard, what is referred to as the subjective element of abuse does not alter the interpretative nature of the concept itself, since the Court of Justice linked that subjective element to the conclusion that the situation giving rise to the application of a given EU rule was merely artificial. That conclusion of artificiality must not be based on an assessment of the subjective intentions of those invoking EU law but rather must be determined based on a series of objective circumstances, verified in each specific case. The intention, therefore, is not decisive for establishing abuse. Rather, it is the activity itself, itself, objectively considered, that constitutes the essential core of this legal figure.

The party's intention to obtain a benefit abusively is simply inferred from the artificial nature of the situation, which must be assessed considering a series of objective circumstances. The subjective element is relevant only to the extent that it confirms the purpose behind the activities carried out to obtain the intended avoidance outcome.

The finding of abusive conduct must thus be based on objective and verifiable elements, accessible to third parties, and relating to factual indicators which, if absent, could lead to the conclusion that the structure constitutes a wholly artificial arrangement and, ultimately, that we are faced with an abusive use of the rule. Around this definition of artificiality, the concept of abuse of law has been extensively constructed as a practice consisting in the unlawful attainment of a tax advantage through wholly artificial arrangements lacking any real economic substance and designed solely to circumvent the application of tax legislation which, under normal circumstances, would have been binding.

The difficulty arises, however, when the term artificial is defined in such a way that it closely approximates sham and conflict in the application of the rule, due to the total absence of economic substance, making it difficult to distinguish these concepts from one another. This leads to the inference that, for the Court, the concept of abuse is effectively equivalent to that of sham, as it focuses on behaviors that resemble gross or blatant shams[47], applying the criterion of artificiality as the essential nature of any abusive conduct. Indeed, we share this interpretation, since if one considers that sham involves the creation of an apparent legal reality or the concealment of the inexistence of an act or legal transaction (implying a deliberate distortion of reality by its very nature), then reducing the concept of abuse of law to the absence of any economic substance makes the distinction between the two notions practically imperceptible.

For a simulated transaction to produce legal effects, it is necessary to justify the requirements set out in Article 1,261 of the Spanish Civil Code, and in particular, the existence of a lawful and genuine cause underlying the act that the parties intended to conceal beneath another that either lacks a cause or is based on a false one[48].

In sham stricto sensu, the intentional and subjective element is essential for the conduct of the party to be considered simulated, as sham entails a departure from the typical purpose (causa) of the legal transaction, relying on a deliberately constructed deception, with the manifest intention of obtaining a tax benefit that would not have applied had the sham not occurred. However, it is not necessary for a subjective element of intent to be present for a given legal structure to be regarded as abusive, as such a structure may arise from a broad interpretation of the law which, nonetheless, may result in an unintended tax advantage. As previously noted, the conclusion of artificiality must not be based on an assessment of the subjective intentions of those invoking EU law but must rather be determined based on a series of objective circumstances, verifiable in each individual case.

Meanwhile, in the general domain of legal transactions, the essence of sham lies in the divergence between the real cause and the one declared, which may be, as previously stated, either absolute or relative: in the first case, there is no cause whatsoever behind the created appearance; in the second, there is a real cause that differs in content or character from the one declared, insofar as the simulated transaction conceals another that reflects the parties' true intention.

In any case, to establish the existence of a simulated transaction, the sham itself must be duly proven, that is, the constitutive elements of the concept must be demonstrated—namely, the deliberate discrepancy between the declared intent and the parties' true will, and the concealment purpose. Sham, or a simulated legal transaction, therefore, has a factual component subject to a certain degree of evidentiary assessment or evaluation[49], whereby the subjective element is, in essence, decisive in determining the existence of sham in the conduct of the taxable persons.

With regard to the conflict in the application of the law, we concur that there is a notable convergence between the doctrine developed by the Court and the clause contained in Article 15 of the General Taxation Law, insofar as, under the aforementioned article, the Tax Administration must prove the manifestly artificial or inappropriate nature of the acts or transactions carried out. At first glance, this is not the case under the general anti-abuse clause, where it is sufficient to demonstrate that such acts or transactions give rise to a tax advantage that is contrary to the spirit of the law and was sought as the primary aim of the arrangement. However, it must not be overlooked that this requirement is implicitly contained in the case law of the Court of Justice of the European Union, which seeks to determine in which cases there has been an abuse of law. This objective is usually achieved through the performance of artificial or contrived acts or transactions. Nonetheless, some scholars argue that the doctrine of the Court introduces an additional element not expressly provided for in Article 15 of the General Taxation Law, namely, the requirement that the advantage obtained must be contrary either to the applicable EU Directive or to the domestic tax legislation governing the specific tax at issue[50].

It is worth noting, finally, that in Poland a general rule applies to transactions carried out primarily for the purpose of obtaining a tax advantage, or where one of the main purposes was to obtain such an advantage, if that advantage is contrary to the object or purpose of the tax legislation or any provision thereof. In this regard, the rule establishes that the tax advantage shall not be deemed to have arisen if the transaction or arrangement is considered artificial, if it would not have been implemented by a person acting reasonably and for legitimate purposes, based on predominantly sound economic reasons. These valid reasons, by definition, exclude the sole purpose of obtaining a tax benefit, and their assessment shall take into account various aspects, such as: the unjustified fragmentation of transactions; the involvement of intermediaries despite the absence of economic or business justification; or the existence of elements leading to a situation that is identical or nearly identical to that which existed prior to the transaction. Other elements that warrant consideration include those that cancel each other out or are mutually offset; the presence of an economic risk exceeding the expected non-tax advantages to such an extent that a prudent person would not have chosen that course of action; situations in which the tax benefit obtained is not reflected in the economic risk borne by the entity or in its cash flows; the occurrence of a pre-tax profit that is insignificant compared to the tax advantage and not directly attributable to a real economic loss; or the involvement of an entity that does not engage in genuine economic activity or perform any significant economic function, or that is established in a country or territory applying harmful competitive tax practices.

The logical consequence of determining the absence of valid economic reasons shall be the application of the tax effects of such transactions based on the situation that would have arisen had the transactions been carried out by an entity pursuing legitimate objectives other than obtaining a tax advantage. In a situation where the circumstances indicate that the sole purpose of the transaction was to obtain a tax benefit, the tax consequences shall be determined based on the situation that would have existed had the transaction not been executed[51]. Along these lines, in February 2023, the Regional Administrative Court of Warsaw issued three rulings in proceedings related to the abuse of law[52], two of which concerned the so-called incentive schemes based on financial instruments.

These essentially constituted artificial arrangements aimed at reducing personal income tax (PIT) liability by creating a basis for payments to be taxed as capital income (at a 19% rate), whereas in reality, they represented remuneration for the work performed by a member of the company's board of directors (taxed at a 32% rate). The financial instrument contracts were concluded in parallel with the employment relationship and had a motivational purpose. However, they did not transfer any investment risk to the taxpayer, nor did they expand their responsibility beyond the professional duties performed within the company. The court determined that the funds received in this manner effectively constituted a component of the remuneration, of a bonus nature, and thus were subject to taxation under the progressive income tax scale. Of the judgments, the most significant concerned a scheme involving the use of a shell company to execute the sale of shares by a natural person in a limited liability company (sp. z o.o.)[53]. As a result of selling the shares through a company specifically set up for that purpose (to which the shares had been transferred via a tax-neutral share swap) and subsequently dissolved, artificial acquisition costs were generated, which led to the seller avoiding taxation. Before the dissolution of the company, the proceeds from the sale were transferred into the private assets of the shareholders through loans.

The court held that, had there been no opportunity to obtain a tax advantage, the taxpayer would not have opted to carry out the sale through the intermediary company, but would have instead executed the sale directly. Furthermore, in its rulings, the court reaffirmed the doctrine according to which decisions may be issued based on the moment the tax benefit arises (regardless of when the underlying acts or series of acts constituting tax avoidance were performed), and that such benefit shall be deemed to arise for personal income tax purposes upon the closing of the tax year. This interpretation therefore includes the possibility of applying the general anti-avoidance rule (GAAR) to tax obligations arising in the 2016 fiscal year. The court also emphasized the legal nature of decisions issued under the so-called decyzje klauzulowe (GAAR decisions), considering them to be declaratory decisions. In the oral reasoning of the judgments, it was stressed that the proper legal act is neither abstract nor does it constitute an independent source of taxation; rather, it must be identified during the tax proceedings, and the corresponding tax consequences must then be established in accordance with the applicable tax provisions.

Conversely, the legal theses put forward during attempts by legal representatives to reinterpret the provisions to argue for the constitutive nature of decisions under the said clause were found to be untenable[54].

III. The requirement of administrative reasoning in the legal classification of transactions

Considering the foregoing, it is undeniable that the legal classification of transactions entered by the taxpayer, as carried out by the tax authorities, constitutes a qualified expression of their interpretative powers, with direct effects on the determination of the tax liability.

This is based on an undisputed premise under European Union law, namely that (...) nationals of a Member State may not, by availing themselves of the opportunities created by the Treaty, seek to abuse fully circumvent the application of their national legislation. Nor may they invoke Community rules in an abusive or fraudulent manner[55].

However, the exercise of the tax administration’s power to classify legal transactions cannot be detached from the principle of legality, nor from the formal limits deriving from the acquis, which requires that administrative action be not only consistent with the law, but also properly reasoned, proportionate, and aligned with the purposes justifying it. Reasoned justification thereby becomes an essential guarantee for the taxpayer, insofar as it enables both administrative and judicial review of the classification criteria adopted by the tax authorities. This requirement becomes even more stringent when such classification leads to the disregard of the legal form chosen by the parties, rendering the transactions entered into devoid of tax effect by the direct application of Article 13 of the General Tax Act, though necessarily with reference to the figures of sham or conflict in the application of the rule.

As developed throughout this paper, the doctrine of the Business Purpose Test aims to support anti-abuse rules whose purpose is to declare ineffective those transactions or structures deemed artificial due to their sole objective being tax avoidance through abusive use of the legal norms that support them. This means that the assessment is not limited to the validity of the transaction or structure in question — i.e., the existence of valid economic reasons — but must also examine its alignment with the interpretation of the legal provision on which it relies. This is because a given action may simultaneously result in a tax benefit while also exhibiting economic rationality in its design, thereby providing a seemingly perfect cover within the framework of the doctrine analyzed. Ultimately, it is the essentiality of the tax advantage in the transaction that determines the application of the doctrine, insofar as an inadequate legal form is used for the economic purpose pursued, with no justification other than the tax benefit sought.

The difficulty lies in the fact that, under Spanish law, the notion of artificiality — as thus understood — may fall within either the category of conflict in the application of the rule, as defined in Article 15 of the General Tax Act, or within the concept of sham — whether absolute or relative — under Article 16 of the same legal text.

As this paper has shown, these two figures are distinct under Spanish law, unlike in other jurisdictions, such as the United States, where the doctrine of sham transactions is closely associated with the Business Purpose Test, effectively blurring the boundaries between sham and abuse[56].

For this reason, the case law of the Court of Justice of the European Union requires the proper application of both legal provisions, particularly in relation to the existence of sham, since the substantial difference between these two legal constructs — and the consequences arising therefrom — has led the courts to demand a heightened standard of reasoning when the legal characterization adopted by the parties is modified. Such interference may, in practice, substantially alter the tax effects initially arising from the legal acts performed. Accordingly, Spanish case law has consistently held that the administration must provide a sufficiently detailed and reasoned explanation of the elements that led it to disregard the legal form chosen by the taxpayer, specifying the real legal transaction that is deemed to have taken place. This reasoning cannot consist of general or formulaic statements — such as generic references to fraud of law or the distortion of legal form — without a substantiated account of the facts and the corresponding legal reasoning. As stated in the abovementioned judgment of the Spanish Supreme Court of 29 April 2025, in the tax context, the distinction between legal characterization and sham may be of critical importance, particularly from the perspective of tax penalty law. A case of legal characterization might be defensible, at least arguably, based on the absence of negligence or a reasonable interpretation of the law, thereby excluding the existence of a tax infringement. However, such defense would not be available in cases of sham, where the concealment inherent in the simulated transaction might even serve as an aggravating factor. Therefore, a distinction which may appear innocuous at first glance can in fact produce highly significant consequences in the realm of sanctioning power. From a rights-based perspective, the requirement for a specific and well-founded justification referring explicitly to the legal concepts of sham, conflict in the application of the legal norm, or abuse of law acquires a structural dimension: it is not merely a formal requirement, but a substantive one[57].

In short, the tax classification of legal acts demands that the tax administration provide a rigorously reasoned explanation, enabling the taxpayer to understand why their legal position has been rejected and on what normative and factual grounds the administration's alternative classification is based. Only in this way can the legitimate exercise of the administration's interpretative and classificatory powers be ensured within the limits imposed by the principle of tax legality. The examination of tax qualification must follow the interpretative criteria laid down by current case law concerning the boundaries between legal qualification, conflict in the application of the rule, and sham. Case law has repeatedly stressed the legal requirement to distinguish appropriately between these figures, and the obligation incumbent upon the administration to tailor the use of its powers of legal qualification, declaration of conflict in the application of the rule, and assessment of sham to the actual characteristics of the legal act, transaction or event with tax relevance that is being reviewed. Only by maintaining the necessary rigor in applying, in each specific case, the figure that is truly pertinent can the legal framework designed by the legislator achieve its intended effectiveness[58].

IV. References

[1] STS 05.05. 2025, ROJ 1931/2015.

[2] STS 29.04.2025, ROJ 1906/2015.

[3] Judgment of 26 September 2000, Commission/Belgium (Case C- 478/98) ECLI:EU:C:2000:497, para. 45; Judgment of 21 November 2001, X e Y (Case C-436/00) ECLI:EU:C:2002:704, para. 62; Judgment of 4 March 2004, Commission/France (Case C-334/02) ECLI:EU:C:2004:129, para. 27 and Judgment of 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas (Case C-196/04) ECLI:EU:C:2006:544 para. 50.

[4] Judgment of 22 December 2010, Weald Leasing, Case C-103/09, ECLI:EU:C:2010:804, par. 30: It must also be evident from a range of objective factors that the principal purpose of the transactions at issue is to obtain a tax advantage.

[5] Maintaining continuity with the wording of Article 25 of the repealed Law 230/1963, which expressly provided that the tax shall be levied in accordance with the true legal or economic nature of the taxable event. Where the taxable event consists of a legal act or transaction, it shall be classified according to its true legal nature, regardless of the form chosen or the designation used by the parties, and irrespective of any intrinsic or formal defects that may affect its validity. Where the taxable event is defined by reference to economic concepts, the criterion for its classification shall take into account the economic situations and relationships that in fact exist or are established by the parties, regardless of the legal rules employed.

[6] GARCÍA FREIRÍA, M., «La calificación jurídica en el Derecho tributario», Marcial Pons, 2024.

[7] STS 05.05. 2025, ROJ 1931/2015.

[8] MARÍN BENÍTEZ, G., «¿Es lícita la planificación fiscal?», Thompson Reuters, Valladolid, 2013, p. 44.

[9]Judgment of 3 December 1974, Van Binsbergen, 33/74, ECLI:EU:C:1974:131.

[10]Judgment of 12 July 1988, Direct Cosmetics Ltd and Laughtons Photographs Ltd v Commissioners of Customs and Excise (Joined Cases 138/86 and 139/86) ECLI:EU:C:1988:383.

[11]Judgment of 17 July 1997, Leur-Blomen (Case C-28/95) ECLI:EU:C:1997:369.

[12]Judgment of 12 March 1996, Pafitis (Case C-441/93) ECLI:EU:C:1996:92.

[13]Judgment of 2 May 1996, Paletta (Case C-206/94) ECLI:EU:C:1996:182, para. 13.

[14] Lord Tomlin, IRC v. Duke of Westminster, 1936.

[15] PONT CLEMENTE, J., «La economía de opción», Informes AEDAF, núm. 6, febrero 2002, p. 1.
[16] RUBIO GUERRERO, J., «Cauces de evasión fiscal y planificación fiscal internacional: procedimientos de actuación en esquemas básicos», MORENO GONZÁLEZ, S. / COLLADO YURRITA, M. (Dirs.), Estudios sobre fiscalidad internacional y comunitaria, Colex, Madrid, 2005, p. 687.
[17] STS 30.05. 2011, ROJ 4147/2011.
[18] STS 23.02. 2012, ROJ 1175/2012.
[19] RUIZ ALMENDRAL, V. / SEITZ, G., «El fraude a la ley tributaria (análisis de la norma española con ayuda de la experiencia alemana)», Revista de Contabilidad y Tributación, núm. 257-258, Centro de Estudios Financieros, Madrid, 2004, p. 10.
[20] ROSEMBUJ, T., «El fraude de ley, la simulación y el abuso de las formas en el Derecho tributario», Marcial Pons, Madrid, 2ª ed., 1999, pp. 69-72.
[21] STC 17.02. 2000, ROJ 46/2000.
[22] SWD (2012) 403 final, cit.
[23] Abgabenordnung (AO) § 42 Missbrauch von rechtlichen Gestaltungsmöglichkeiten: (1) Durch Missbrauch von Gestaltungsmöglichkeiten des Rechts kann das Steuergesetz nicht umgangen werden. Ist der Tatbestand einer Regelung in einem Einzelsteuergesetz erfüllt, die der Verhinderung von Steuerumgehungen dient, so bestimmen sich die Rechtsfolgen nach jener Vorschrift. Anderenfalls entsteht der Steueranspruch beim Vorliegen eines Missbrauchs im Sinne des Absatzes 2 so, wie er bei einer den wirtschaftlichen Vorgängen angemessenen rechtlichen Gestaltung entsteht. (2) Ein Missbrauch liegt vor, wenn eine unangemessene rechtliche Gestaltung gewählt wird, die beim Steuerpflichtigen oder einem Dritten im Vergleich zu einer angemessenen Gestaltung zu einem gesetzlich nicht vorgesehenen Steuervorteil führt. Dies gilt nicht, wenn der Steuerpflichtige für die gewählte Gestaltung außersteuerliche Gründe nachweist, die nach dem Gesamtbild der Verhältnisse beachtlich sind.
[24] LEHNER, M., «Elusión fiscal / Evasión fiscal», Cahiers de Droit Fiscal International, Studies on International Fiscal Law, Association Fiscal e Internationale (IFA), Volume LXVIII a, Rotterdam, 1983.
[25] RAPPORT DU SYNDICAT NATIONAL SOLIDAIRES FINANCES PUBLIQUES, «Evasions et fraudes fiscales, contrôle fiscal», 2013: «*il existe un autre terme permettant de définir une opération légale effectuée pour payer moins d'impôts ; l'optimisation. En général, une optimisation est légale, l'évasion consistant à utiliser les mécanismes légaux et/ou illégaux dans le seul but d'éluder l'impôt. Certes, en théorie, la limite juridique entre le légal et l'illégal se situe au niveau de l'abus de droit, qui consiste à utiliser les mécanismes légaux dans le seul but d'éluder l'impôt. Il incombe alors à l'administration de prouver qu'il y a abus de droit. Or, l'administration n'a la possibilité de prouver qu'il y a abus de droit que dans une minorité de cas. On ne peut donc pas valablement s'appuyer sur cette notion pour arrêter la limite qu'il y a entre optimisation et évasion*».
[26] PEREZ ROYO, F., «La doctrina de los Lores sobre la elusión fiscal (examen de casos recientes)», p. 2: «*the starting point of this judicial reaction is the Ramsay case, decided in 1981, which gave its name to what may be referred to as the House of Lords' doctrine on tax avoidance, commonly known in this context as the Ramsay Doctrine, Ramsay Principle, or Ramsay Approach*».
[27] ROBERTSON, J., et al: «Codification of the Economic Substance Doctrine» en Journal of Business Administration Online, vol. 9, núm. 2, 2010: «*the Health Care and Education Reconciliation Act of 2010 (Public Law No. 111-152) contains numerous tax provisions. One of these provisions (Act Section 1409) contains the codification of the Economic Substance Doctrine. This doctrine has been used since the Gregory case in 1935 (Gregory v. Helvering) to deny tax benefits when it is determined that no "economic substance" exists in a particular transaction apart from federal tax considerations. However, there has been some definitional split among the circuits as to exactly what constitutes economic substance. The Treasury Department has argued for codification of the economic substance doctrine for years and Newly adopted Section 7701(o)(1) requires a conjunctive test for determining if a transaction has economic substance*».
[28] STS 17.03. 2014, ROJ 1060/2014.
[29] STS 20.05. 2012, ROJ 6618/2012.
[30] CLEMENTE CASAS, I., «El fraude de ley tributaria no constituye Delito fiscal porque no implica ocultación ni engaño: la sentencia del Tribunal Constitucional 120/2005 se opone a la tesis del Tribunal Supremo», Actualidad Jurídica Uría Menéndez, núm.12, 2005.
[31] RUIZ ALMENDRAL, V., «El fraude a la ley tributaria

a examen. Los problemas de la aplicación práctica de la norma general antifraude del artículo 15 de la LGT a los ámbitos nacional y comunitario», Thompson, Pamplona, 2006.

[32] Art. 15: A conflict in the application of tax law shall be deemed to exist when the taxable event is wholly or partially avoided, or the tax base or tax liability is reduced, through acts or transactions in which the following conditions are met: a) That, whether considered individually or as a whole, they are manifestly artificial or inappropriate for achieving the result obtained; b) That their use does not give rise to relevant legal or economic effects other than the tax saving and those effects that would have been obtained through ordinary or customary acts or transactions.

[33] LÓPEZ TELLO, J., «La «cláusula antiabuso» del Anteproyecto de nueva Ley General Tributaria», Actualidad Jurídica Uría & Menéndez, núm. 5, 2003, p. 49.

[34] CALATAYUD PRATS, I., «Comentario al artículo 15 de la nueva ley General Tributaria. Conflicto en la aplicación de la norma tributaria», Hacienda Canaria, núm. 10, 2, p. 18.

[35] GARCÍA NOVOA, C., «La cláusula antielusiva en la nueva Ley General Tributaria», Marcial Pons, Madrid, 2004, p. 365.

[36] Ley 230/1963, de 28 de diciembre, General Tributaria, Art. 24: 1. In order to prevent abuse of law, and for the purposes of the preceding paragraph, there shall be no extension of the taxable event where actions are taxed that were carried out with the proven intention of avoiding the tax, provided that they produce a result equivalent to that of the taxable event.

[37] LINARES GIL, M., «El conflicto en la aplicación de la norma tributaria en la Ley 58/2003 de 17 de diciembre, General Tributaria», InDret, núm.3, Working Paper núm. 25, Barcelona, 2004.

[38] ZORNOZA PÉREZ, J., «La simulación en Derecho tributario», en ARRIETA MARTÍNEZ DE PISÓN, J. (Dir.), Tratado sobre la Ley General Tributaria, Tomo I, Aranzadi-Thomson, Madrid, 2010, p. 560.

[39] CLEMENTE CASAS, I., «El fraude de ley tributaria no constituye Delito fiscal porque no implica ocultación ni engaño: la sentencia del Tribunal Constitucional 120/2005 se opone a la tesis del Tribunal Supremo», cit.

[40] PALOMBELLA, G., «El abuso del Derecho, del poder y del rule of Law», en Cuadernos de Filosofía del Derecho, núm. 29, Doxa, 2006, pp. 33-57.

[41] Judgment of 3 December 1974, Van Binsbergen, 33/74, ECLI:EU:C:1974:131.

[42] GONZALEZ GARCIA, G., «Una aproximación al contenido de los conceptos de discriminación y restricción en el Derecho de la Unión», Documentos de Trabajo, núm. 8, Instituto de Estudios Fiscales, 2004, p. 42.

[43] MARTÍN JIMÉNEZ, A., «Globalización y derecho tributario: el impacto del derecho comunitario sobre las cláusulas anti-elusión/antiabuso del derecho interno», Documentos, núm. 7, Instituto de Estudios Fiscales, 2007, p. 6.

[44] RUIZ ALMENDRAL, V., «¿Tiene futuro el test de los motivos económicos válidos en las normas anti abuso? (sobre la planificación fiscal y las normas anti-abuso en el derecho de la Unión Europea)», Revista de Contabilidad y Tributación, Centro de Estudios Financieros, núms.329-330, 2010, p. 36.

[45] Judgment of 14 December 2000, Emsland Stärke, C-110/99, ECLI:EU:C:2000:695.

[46] Judgment of 11 December 2003, Barbier, C-364/01, ECLI:EU:C:2003:665, para. 71.

[47] CALDERÓN CARRERO, J. / MARTÍN JIMÉNEZ, A., «Acerca de la necesidad de reconfigurar la política española en materia de cláusulas antiabuso y fiscalidad directa: las consecuencias derivadas de los casos Cadbury Schweppes y Test Claimants in the Thin Cap Group», Jurisprudencia Tributaria, núm. 2, Aranzadi, 2007.

[48] CALVO VERGEZ, J., «La simulación en el Derecho tributario: análisis de la reciente doctrina del Tribunal Supremo», Quincena Fiscal, núm. 14, 201.

[49] STS 19.05 2011, ROJ 9066/2011.

[50] RODRIGUEZ MÁRQUEZ, J., «Nuevas aportaciones del TJCE a la doctrina del abuso de Derecho en el ámbito del IVA: la sentencia Weald Leasing», Crónica Tributaria, núm. 2, 2011.

[51] Vid. PIEKIELNIK, T., «Charakter zobowiązania podatkowego powstającego w związku z wydawaniem przez Szefa KAS decyzji z zastosowaniem klauzuli przeciw unikaniu opodatkowania (GAAR)», Przegląd Podatkowy 1/2023, str. 41-49.

[52] wyroki WSA z 21 lutego 2023 r., sygn. akt III SA/Wa 2386/22 oraz III SA/Wa 2387/22 (Sentencias del Tribunal Administrativo Regional de 21 de febrero de 2023, referencias III SA/Wa 2386/22 y III SA/Wa 2387/22).

[53] wyroki WSA z 14 lutego 2023 r., sygn. akt III SA/Wa 1695/22 (Sentencia del Tribunal Administrativo Regional de 14 de febrero de 2023, referencia III SA/Wa 1695/22).

[54] Finanse.mf.gov.pl, Creative Commons Uznanie Autorstwa 3.0 Polska, en https://www.podatki.gov.pl/: Art. 119a. [Unikanie opodatkowania] Dz.U.2025.111 t.j. Czynność nie skutkuje osiągnięciem korzyści podatkowej, jeżeli osiągnięcie tej korzyści, sprzecznej w danych okolicznościach z przedmiotem lub celem ustawy podatkowej lub jej przepisu, było głównym lub jednym z głównych celów jej dokonania, a sposób działania był sztuczny (unikanie opodatkowania). §2. W sytuacji określonej w §1 skutki podatkowe czynności określa się na podstawie takiego stanu rzeczy, jaki mógłby zaistnieć, gdyby dokonano czynności odpowiedniej. §3. Za odpowiednią uznaje się czynność, której podmiot mógłby w danych okolicznościach dokonać, jeżeli działałby rozsądnie i kierował się zgodnymi z prawem celami innymi niż osiągnięcie korzyści podatkowej sprzecznej z przedmiotem lub celem ustawy podatkowej lub jej przepisu, a sposób działania nie byłby sztuczny. Czynność odpowiednia może polegać także na zaniechaniu działania. §4. Jeżeli w toku postępowania strona wskaże czynność odpowiednią, skutki podatkowe określa się na podstawie takiego stanu rzeczy, jaki zaistniałby, gdyby dokonano tej czynności. §5. Przepisy §2-4 nie mają zastosowania, jeżeli okoliczności wskazują, że osiągnięcie korzyści podatkowej było jedynym celem dokonania czynności, o której mowa w §1. W takiej sytuacji skutki podatkowe określa się na podstawie takiego stanu rzeczy, jaki zaistniałby, gdyby czynności nie dokonano. §6. Jeżeli korzyść podatkowa została osiągnięta w rezultacie dokonania czynności, o której mowa w §1, w wyniku zastosowania przepisu ustawy podatkowej określającego warunki przyznania zwolnienia podmiotowego lub przedmiotowego, wyłączenia z podstawy opodatkowania, w tym wyłączenia przychodów (dochodów) z opodatkowania, lub odliczenia od przychodu, dochodu lub podatku, to skutki podatkowe określa się na podstawie stanu prawnego, jaki zaistniałby, gdyby dany przepis ustawy podatkowej nie miał zastosowania. Przepisów §2-5 nie stosuje się. §7. Jeżeli dokonane przez stronę cofnięcie skutków unikania opodatkowania, o którym mowa w art. 81b §1a, w całości uwzględnia ocenę prawną organu podatkowego związaną z unikaniem opodatkowania, zawartą w zawiadomieniu wydanym na podstawie art. 200 §3, organ podatkowy zawiera w decyzji wskazanie korzyści podatkowej lub dochodu stanowiącego podstawę ustalenia dodatkowego zobowiązania podatkowego, o którym mowa w art. 58d. Czytaj więcej w Systemie Informacji Prawnej LEX: https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/ordynacja-podatkowa-16799056/art-119-a.

[55] Judgment of 7 December 1979, Knoors, 115/78, ECLI:EU:C:1979:31.

[56] WARREN KLASING, D., «What is the Sham Transaction Doctrine», in Tax Law Library. This doctrine tends to be applied where a taxpayer attempts to disguise a transaction and make it appear to be something that, in reality, it is not. When it is applied, the courts will ignore the form of the transaction and declare it to be a "sham" and then proceed to ascertain the tax impact based upon the court's view of the substantive nature of the transaction. A transaction that is labeled a sham when it is deemed to not be motivated by a legitimate business purpose other than its anticipated tax benefits (in other words, tax savings does not qualify as a legitimate tax purpose), will be deemed to lack economic substance because there is no reasonable expectation of profit and thus will be disregarded for tax purposes, so in this cases: a) D.M. Fender v US, CA-5, 577 F2d 934, a sale of bonds to a bank where the taxpayers owned the controlling block of stock was disregarded as non bonafide because they did not in the government's opinion suffer a genuine economic loss which is a requirement for a loss deduction; In T.F. Abbott, Jr. v Commr, 23 TCM 445, TC Memo. 1964-65, aff'd, per curiam, CA-5, 342 F2d 997, the Court of Appeals in the 5th Circuit affirmed the Tax Court in holding that a major stockholder of a corporation (and not his related corporation) in reality realized a gain from the sale of stock. The major stockholder purportedly transferred stock to the corporation as a capital contribution and then his related corporation turned around and immediately sold the stock at a gain. The Tax Court justified setting aside the form of the transaction by holding that the stockholder in substance had sold stock as an individual using the corporation as a conduit and then contributed the proceeds to the corporation as a capital contribution; In the Est. of S. Ravetti v Commr, 67 TCM 3064, TC Memo. 1994-260, the losses flowing to a limited

partner related to a purchase of a film by a partnership were disallowed because the acquisition was held to lack economic substance. Factors that the court focused on to justify the disallowance were (i) over-inflated purchase price for the film in order to support tax benefits, and (ii) the lack of personal liability of the limited partner. The transaction was held to not be the result of a true arms-length negotiation; In H.J. Smith, Jr. v Commr, 50 TCM 1444, TC Memo. 1985-567 a sale of stock at auction was held to be invalid where the seller's son purchased the stock with money given to him by the seller (his father) because the father (in economic terms) did not receive anything for the stock; In P.J. Batastini v Commr, 53 TCM 1500, TC Memo. 1987-378; Milbrew, Inc. v Commr, 42 TCM 1467, Dec. 38,363(M), TC Memo. 1981-80, aff'd, CA-7, 83-2 USTC 9467, 710 F2d 1302; F.C. LaGrange v Commr, 26 TC 191, Dec. 21,699 (1956) a series of sale-leaseback transactions were disallowed because the court believed the transactions were entered into solely to inflate the value of the assets used in a school bus business. In reality title to the asset of the business were never transferred to the buyers and the agreed upon purchase price greatly exceeded the true value of the underlying assets. These factors along with others led to the disallowance under the transaction lacked economic substance by the court; In W.G. Hock v Commr, 54 TCM 407, TC Memo 1987-444, the limited partners in a mining operation's expenses and losses were disallowed because the investment in the mining operation was held to not be motivated by a valid business purpose. The transactions as a whole lacked economic substance because of the relationship and lack of knowledge or experience in the mining industry of the parties and the overstated purchase price.Moreover, no one was ever mined or sold, and no payments were actually made to the seller, and factors were apparent that indicated the mine was never a profitable business venture.

[57] STS 29.05. 2025, ROJ 1906/2015.

[58] STS 05.05. 2025, ROJ 1931/2015.