AN ANALYSIS OF THE ANTI-AVOIDANCE PROVISION S.103 OF THE SOUTH AFRICAN INCOME TAX ACT

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TABLE OF CONTENTS

TABLE OF CASES:

ITC 963 (1961) 24 SATC 705.
ITC 983 (1961) 24 SATC 705.
ITC 989 (1961) 25 SATC 122.
ITC 1123 (1968) 31 SATC 48.
ITC 1178 (1972) 32 SATC 35.
ITC 1185 (1973) 35 SATC 122.
ITC 1274 (1978) 40 SATC 185.
ITC 1307 (1979) 42 SATC 147.
ITC 1347 (1981) 44 SATC 33.
ITC 1388 (1983) 46 SATC 126.
ITC 1540 (1992) (not bound yet).

Badenhorst and Others v CIR 1955 (2) SA 207.
Cape Brandy Syndicate v IRC (1921) 1 KB 64.
CIR v Britz 1952 (4) SA 624 (AD).
CIR v Challenge Corporation Ltd. [1986] STC 548.
CIR v Delfos 1933 (AD) 242.
CIR v Estate Kohler 1953(2) SA 584 (AD).
CIR v George Forest Timber Company Ltd 1924 (AD) 516.
CIR v King 1947 (2) SA 196 (AD).
CIR v Kirsch 1978 (3) SA 93.
CIR v Louis Zinn Organisation (Pty) Ltd 1958 (4) SA 477.
CIR v Louw 1983(3) SA 551 (AD).
CIR v Mc Neil 1959 (1) SA 481 (AD).
CIR v Middelman 1991 (1) SA 200.
CIR v Richmond Estates (Pty) Ltd 1956 (1) SA 602 (AD).
CIR v Simpson 1949 (4) SA 678 (AD).
CIR v Ocean Manufacturing Ltd 1990 (3) SA 610 (AD).
CIR v Wolf 1928 (AD) 177.
Commissioner of Taxes v Ferera 1976 (2) 653 [RAD].
Crossland (Inspector of Taxes) v Hawkins [1961] 2 All ER 812.
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Estate Reynolds and Others v CIR 1937 AD 57 (AD).
F v COT 1975 (4) SA 693 (R).
Furniss (Inspector of Revenue) v Dawson [1984] 1 All ER 530.
Glen Anil Development Corporation Ltd v SIR 1975 (4) 715(AD).
Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 (AD) 363.
Hicklin v SIR 1980 (1) SA 481 (AD).
IRC v Burmah Oil Co Ltd [1982] STC 30.
IRC v Duke of Westminster AC [1936] 1.
IRC v Joiner [1975] STC 657 (HL).
Israelsohn v CIR 1952 (3) SA 529 (AD);
L v COT 1975 (2) SA 649 (RAD)
Loewenstein v COT 1956 (4) SA 766 (FC).
Meyerowitz v CIR 1963 (3) SA 863.

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R v Hugo 1926 (AD) 268.
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S.A. Bazaars (Pty) Ltd v CIR 1952 (4) SA 505 (AD).
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SBI v Raubenheimer 1969 (4) SA 314 (AD).
SIR v Gallagher 1978 (2) SA 463 (AD).
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The Taxpayer

(1978) 27 The Taxpayer 111.
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Another Press Release'.
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The Taxpayer (continued)

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1 INTRODUCTION

The South African Income Tax Act contains a number of specific anti-avoidance sections, as well as a general anti-avoidance section. This dissertation will focus on the general anti-avoidance section 103 of the Income Tax Act No. 58 of 1962 and highlight the individual requirements and their interpretation by the courts. Special consideration will be given to the difficulties of the normality requirement. The amendments made to the section and a brief consideration of similar general anti-avoidance provisions in other countries shall also be evaluated.

Where tax cases are analysed it must be kept in mind that the burden of tax is imposed by Parliament in the form of the Income Tax Act or other laws while it is the Courts that apply these laws. The `task' of the Courts has accordingly been described by Lord Templeman in the recent case of Ensign Tankers (Leasing) Ltd v Stokes:[1]

> *`The task of the courts is to construe documents and analyse facts and to ensure the taxpayer does not pay too little tax or too much tax but the amount of tax which is consistent with the true effect in law of the taxpayer's activities. Neither the taxpayer nor the Crown should be deprived of the fiscal consequences of the taxpayer's activities properly analysed.'*

Having this `task' in mind we will see how the general anti-avoidance provision has been enforced by the Courts. We will see if section 103 is the powerful

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1 [1992] 2 All ER 275 at 286 (HL).

sword in the hands of the Commissioner of Revenue or just another `paper tiger'. Lastly I will deal with the general provision against the utilization of assessed losses s 103(2) and dividend and interest swaps s103 (5).

2 Evasion, avoidance and mitigation

The contest between the Revenue authority and the taxpayer is as old as the concept of tax itself. While it is in the interest of the Commissioner of Revenue to raise as much tax as possible, it is in the taxpayer's interest to minimize his burden of tax. With regard to this conflict Lord Tomlin made the following statement in the famous English case of IRC v Duke of Westminster:[2]

> *`Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax'.*

The principle enunciated in the Duke of Westminster's case has been recognised by the South African courts.[3] Nevertheless the principle is of no guidance in the search for the means and methods which can be employed by the taxpayer and more importantly find the approval of the courts. Lord Diplock spelled it out as follows:[4]

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2 IRC v Duke of Westminster AC [1936] 1 at 19.
3 CIR v King 1947 (2) SA 196 at 212; CIR v Estate Kohler 1953 (2) 584 at 591.
4 IRC v Burmah Oil Co Ltd [1982] STC 30 at 32.

> `...*Lord Tomlin's oft quoted dictum in IRC v Duke of Westminster tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straight-forward way.'*

The question to be posed remains: How far can the taxpayer go - can the taxpayer deliberately enter into all kinds of transactions to save tax? In other words: Is there a Rubicon that can't be crossed, and if so, when has the taxpayer crossed such a Rubicon ?

a) Freedom of choice

It was argued by David Clegg that a taxpayer has a "Freedom of choice":[5]

> `... *the taxpayer is entitled to create a situation by entry into a transaction which would attract tax consequences for which the Act makes specific provision and that the validity of the transaction is not affected by... (section 103) merely because the tax consequences which it attracts are advantageous to the taxpayer and he enters into the transaction deliberately with the view to gaining that advantage.'*

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5 David J M Clegg 1 SATJ 1986 224 at 229; it appears to me that David Clegg might have changed his position in this regard. The author accepted in an article the year following the distinction made between mitigation and avoidance in the New Zealand case of CIR v Challenge Corporation Ltd (1986); David Clegg (1987) 3 Tax Planning 67 at 68.

b) Criticism

I respectfully disagree with this opinion. It is my opinion that the taxpayer is limited in the scope of his transactions. The reasons therefore are twofold. Primarily the taxpayer would be allowed or even forced to enter into all kinds of artificial schemes in order to minimize his tax. These transactions would make no commercial sense except to attract a minimum amount of tax. Secondly the choice-principle would lead to severe restrictions on the operation of the anti-avoidance provision s 103. Past experience in Australia has shown that the acceptance of the choice-principle had crippled the former s 260 of the Australian Act (the Australian equivalent to our s 103).[6]

If it is accepted that the taxpayer is restricted in his choice of methods the question remains: Which methods can the taxpayer employ in order to arrange his affairs in the best possible way or in other words: When is the Rubicon crossed?

It is my opinion that the Rubicon is found in the distinction between tax evasion and avoidance on the one side and tax mitigation on the other side. The Rubicon is crossed where the taxpayer leaves the solid ground of tax mitigation and crosses over to the banks of tax avoidance.

I therefore understand the dictum of Lord Tomlin in the Duke of Westminster-case as follows: Only in cases of tax mitigation is the taxpayer free to arrange

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6 Section 260 has been replaced in 1981 by Part IV A of the Australian Assessment Act. The choice principle is dealt with now in s 177 B(1) and s 177(C)(2); For more information on the choice-principle in the Australian Law see: Y. Grbich, A.J. Bradbrook, K. Pose ; Revenue Law , Cases and Materials , 1990 at 922 ff. .

his affairs in a manner which attract a minimum of tax. This approach finds its authority in the dictum of Lord Templeman in Ensign Tankers (Leasing) Ltd v Stokes:[7]

> *`In the present case the argument for the taxpayer company amounts to no more than a repetition of the dictum of Lord Tomlin in the Duke of Westminster case ... . Subsequent events have shown that though this dictum is accurate so far as tax mitigation is concerned it does not apply to tax avoidance.'*

It is submitted that the distinction between tax mitigation and tax avoidance was neither considered nor implied in the Duke of Westminster's case.[8]

c) Distinction between tax evasion and avoidance

For the reasons given tax evasion and avoidance has to be distinguished from tax mitigation. Accordingly I will first differentiate between evasion and avoidance. I will then distinguish tax avoidance from tax mitigation.

Tax avoidance has to be distinguished from tax evasion. While tax avoidance is the lawful attempt to reduce the burden of tax, tax evasion is the unlawful attempt to escape from tax.

Tax evasion constitutes a criminal offence.[9] In the case of conviction the offender faces a fine not exceeding R 1000,- or imprisonment for a period not

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7 Ensign Tankers (Leasing) Ltd v Stokes [1992] 2 All ER 275 at 291 (HL).
8 CIR v Challenge Corporation Ltd. [1986] STC 548 at 554.

exceeding 2 years, or both. It is noteworthy that s 104(2) includes an important presumption. If it can be proved that any false statement or entry is made in any return rendered on behalf of or by the taxpayer, the taxpayer will be presumed to have caused that return with the intent to evade tax. Over and above these sanctions the offender might be prosecuted for fraud.

Besides the criminal charges there are severe tax consequences in the case of tax evasion for the delinquent. In terms of s 76(1)(c) a triple tax as an additional tax can be imposed on the offender. Strictly speaking this is not a triple tax but only twice the amount of the difference between the tax to be paid and the tax being paid. As the taxpayer also has to pay the tax for the current year one speaks of triple tax. While the Commissioner generally has the power to remit the additional tax as he thinks fit he cannot do so in cases of tax evasion.[10] It should be noted that the taxpayer can appeal against the additional assessment separately.[11] The courts may then in its discretion reduce, confirm or increase the amount of the additional charge imposed.[12] Furthermore can the additional assessment be made for the past disregarding the three-year rule of s 79 (1). Additional assessments for the past are in general limited to the time period of three years.

This time-limit has two reasons. First of all there must be a time from whereupon the taxpayer has his peace in regard to tax-liability for past tax-years.

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9 Section 104(1) does not declare tax evasion as such to be a criminal offence. The section only attaches to certain acts, listed as (i) - (iv), criminal sanctions as far as these acts were committed with the intent to evade or to assist in evasion.

10 Section 76 (2)(a).

11 See for example the recent case: ITC 1540.

12 Section 83 (13) (b).

There must be a finality of an assessment. Secondly the taxpayer is troubled with the onus of proof by s 82. The longer the time of investigation in tax matters goes back the harder it gets for the taxpayer to track record. The three-year rule of s 79 does not apply in the case of fraud, misrepresentation or non-disclosure of material facts.[13] Material facts are those which are material in relation to the liability for tax.[14] Tax evasion falls under these exceptions of the three-year rule. Therefore a full investigation will be launched into the evasion without time-limitations for the past.[15]

It should be noticed that the word `avoision' has been used as a term to describe the amalgam of tax avoidance and tax evasion.[16] This terminology is misleading as it disrespects the legal distinction between tax avoidance as legal and tax evasion as illegal.[17]

d) Distinction between tax mitigation and avoidance

The distinction has been made between tax mitigation and tax avoidance by Lord Templeman in IR Comr v Challenge Corporation Ltd:[18]

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13 Section 79(I)(i).

14 Meyerowitz and Spiro, Income Tax in South Africa, para 1838.

15 Professor J R P Morris `Tax Avoidance and Tax Evasion' (1985) 34 The Taxpayer 55 at 56.

16 `Tax Avoision' (1980) 29 The Taxpayer 141; `How Tax Avoision Increases Tax Revenues' (1987) 26 Income Tax Reporter 312.

17 Professor J R P Morris (n15) at 57; Fiona MacFarlane and Professor D M Davis `Substance over Form': A New Approach to Tax Avoidance (1987) 36 The Taxpayer 3 at 4.

18 Comr of Inland Revenue v Challenge Corp Ltd [1986] STC 548.

`Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his liability ...
Income tax is avoided ... when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction.'

The same Lord Templeman gave the judgement in the Ensign Tankers-case.[19] The facts of the case were like this. A transaction was entered into whereby the Victory Partnership expended 3.25 m pounds towards the production of a film in which Victory Partnership had a 25 % interest. The scheme had the apparently "magic result" of creating for tax purposes an expenditure of 14 m pounds while incurring a real expenditure of only 3.25 m pounds. The taxpayer subsequently claimed a generated first-year allowance of 14 m pounds. Lord Templeman held:[20]

`This is tax avoidance and falls within the principles of Ramsay[21] and subsequent decisions of the House.'

He then continues:[22]

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19 Ensign Tankers (Leasing) Ltd v Stokes [1992] 2 All ER 275 (HL).

20 ibid at 290.

21 W T Ramsay Ltd v IRC [1981] STC 174. The principle of Ramsay was summarized by Lord Fraser in Furniss (Inspector of Revenue) v Dawson [1984] 1 All ER 530 at 532:`The true principle of the decision in Ramsay was that the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately.'

`So far, at any rate, a tax avoidance scheme has been recognisable by "the apparently magic result" pointed out by Lord Fraser in Ramsay[23]... There is nothing magical about tax mitigation whereby the taxpayer suffers a loss or incurs expenditure in fact as well as in appearance.'

Following the above made distinctions it is submitted that only in the case of tax mitigation the taxpayer is enjoying the freedom of choice to enter into proper transactions to minimize his burden of tax.

It has been suggested that terms as `avoidance, evasion and avoision' should be replaced with the easily understood concept of compliance and non-compliance with the law.[24] I respectfully disagree as the word tax avoidance has a well known negative connotation for the majority of the taxpayers. If a new terminology should be introduced it should be the one of tax `mitigation' as opposite to tax `avoidance'.

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22 supra, (n19), at 290-1.
23 supra, (n21).
24 (1989) 28 Income Tax Reporter 69 at 72.

3. The general anti-avoidance provision of s.103

The anti-avoidance provision s 103 can be split up into three substantive provisions. The first, the general provision of s 103 (1) is focused on transactions and arrangements that have the effect of avoiding, postponing or reducing income tax. The second provision s 103(2) deals with the utilization of assessed losses for the purpose of tax avoidance and finally the third provision s 103(5) deals with dividend and interest swaps. Before I analyse the three provisions in detail some clarity about the interpretation of fiscal statutes has to be gained.

a) Interpretation of fiscal statutes

The interpretation of a statute is necessary where the provision in question is ambiguous or obscure. Where the meaning of a provision is perfectly clear, there is no need for interpretation.[25] But what is meant by `ambiguity'? The meaning of ambiguity has been explained by Sir Percy Spender in the following way:[26]

> *`Ambiguity may be hidden in the plainest and most simple of words even in their natural and ordinary meaning. Nor is it always evident by what legal yardstick words read in their natural and ordinary sense may be judged to produce an unreasonable result.'*

How are fiscal statutes then to be interpreted in the case of ambiguity? Lord Cairns made the following statement in Partington v The Attorney-General about the construction of fiscal statutes:[27]

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25 CIR v Britz 1952 (4) SA 624 at 629 (AD).
26 Sir Percy Spender in ICJ Reports 1962 at 184.
27 LR 4 HL 100 at 122.

> *`..., because as I understand the principle of all fiscal legislation, it is this: If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a contruction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'*

This construction of fiscal statutes has been adopted by the South African Courts.[28] Furthermore it was expressed per Rowlatt J in Cape Brandy Syndicate v IRC:[29]

> *`It simply means that in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'*

Both quotations emphasize the literal interpretation of tax statutes.[30] The principal or cardinal rule is therefore that the literal meaning of a taxation statute is decisive.

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28 CIR v George Forest Timber Company Ltd 1924 AD 516 at 531-2; CIR v Wolf 1928 AD 177 at 184-5; CIR v Estate Kohler 1953(2) SA 584 at 592 (AD).

29 (1921) 1 KB 64 at 71; CIR v Simpson 1949 (4) SA 678 at 695 (AD).

b) Intention of the Legislature

Tax statutes are not subject to special treatment which is not applicable in the interpretation of other legislation.

> *`There is no particular mystique about "tax law". Ordinary legal concepts and terms are involved and the ordinary principles of interpretation of statutes fall to be applied. One must look fairly at the language used to determine the intention of the Legislature'.*[31]

In CIR v Delfos Wessels CJ dealt with the interpretation of s 1 of the Act. After having approved the dicta in Partington v Attorney-General and its acceptance in CIR v George Forest Timber Company he then continued:[32]

> *`I do not understand this to mean that in no case in a taxing Act are we to give to a section a narrower or wider meaning, for in all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the Legislature.'*

Botha JA had the following to add to this:[33]

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30 Meyerowitz and Spiro, supra, (n14), para 24 ff, 26.
31 SIR v Kirsch 1978 (3) SA 93 at 94.
32 1933 (AD) 242 at 253-254.
33 Glen Anil Development Corporation Ltd v SIR 1975 (4) SA 715 at 727 (AD).

`However that may be, it is clear from the remarks of Wessels C.J. in the Delfos-case, supra, that even in the interpretation of fiscal legislation the true intention of the Legislature is of paramount importance, and, I should say, decisive.'

It follows therefore that the intention of the Legislature is of great importance for the interpretation of statutes in general and for the interpretation of fiscal statutes in particular.

c) Contra fiscum rule

But what happens if the intention of the Legislature is not expressed in crystal clear terms? Statutes that impose a burden on a subject must, in the case of ambiguity, be interpreted in favour of the subject. This is a rule which applies for all legislation.[34] Taxation statutes are just a classical example of a statute that imposes a burden on a subject. L C Steyn, in his book on interpretation of statutes comes to the following conclusion:[35]

`Die beswaarde onderdaan moet altyd die voordeel van die twyfel geniet. As sy geval nie binne die duidelike bepaling van die wet staan nie, gaan hy vry uit.'

This general rule finds a special application in tax law in the form of the contra fiscum rule.[36] The Appellate Division of the Supreme Court has approved the

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34 L C Steyn, Die Uitleg van Wette, at 110.
35 ibid.
36 Glen Anil Development Corporation Ltd v SIR 1975 (4) 715 at 727 (AD).

contra fiscum rule numerous times.[37] But where there is ambiguity then the contra fiscum rule applies to all fiscal provisions.[38] It must be kept in mind that the contra fiscum rule is invoked only where there is a manifest ambiguity which creates a doubt in the taxing statute.[39]

d) The interpretation of s 103

The problem to be solved now is whether the contra-fiscum rule is applicable to the general anti-avoidance provision s103. Should the taxpayer be safeguarded by a narrow interpretation following the contra fiscum rule or should the legislature's paramount intention dominate? Botha JA was oppossed to a restrictive interpretation of the general anti-avoidance section 103 (2) in Glen Anil Development Corporation Ltd v SIR, holding:[40]

> *`In any event I do not understand the [contra fiscum][41] rule to be that every provision of a fiscal statute, whether it relates to the tax imposed or not, should be construed with due regard to any rules relating to the interpretation of fiscal legislation. Section 103 of the Act is clearly directed at defeating tax avoidance schemes. It does not impose a tax, nor does it relate to the tax imposed by the Act or to the liability therefore, or to the incidence thereof, but rather to*

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37 Estate Reynolds and Others v CIR 1937 AD 57 at 70 (AD); Israelsohn v CIR 1952 (3) SA 529 at 540 (AD); CIR v Mc Neil 1959 (1) SA 481 at 489 (AD).

38 The contra fiscum rule applies in South Africa to all legislation concerned with taxation. It does not matters whether the legislation relates to income tax, estate duty or transfer duty. SBI v Raubenheimer 1969 (4) SA 314 (AD); see also Lewis R Dison, `The Contra Fiscum Rule In Theory And Practice', 1976 SALJ 159 at 163.

39 Badenhorst and Others v CIR 1955 (2) SA 207 at 215.

40 Glen Anil Development Corporation Ltd v SIR 1975 (4) SA 715 (AD).

41 Own italics of author.

schemes designed for the avoidance of liability therefore. It should, in my view, therefore, not be construed as a taxing measure but rather in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed... The discretionary powers of the Commissioner should, therefore, not be restricted unnecessarily by interpretation.'

In Botha's opinion section 103 has to be given a wide interpretation in order to give the words their full breadth.

e) Criticism of the Glen-Anil approach

The dictum of Botha has received some criticism from academic writers.[42] Botha's first point is that the fiscal statutes are interpreted in the same manner as other statutes. Davis' point of view is that tax statutes should be interpreted differently than other statutes. The justification therefore is found in the existence of the contra fiscum rule. The contra fiscum rule is a recognised principle in the Roman-Dutch law **[non male judicat qui in dubio contra fiscum judicat]**.

There is no doubt that our law has accepted the contra fiscum rule.[43] This has also been acknowledged by Botha in Glen-Anil.[44] However it must be kept in

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42 D M Davis, `Tax Avoidance - the British example', in De Rebus 347 at 347; Lewis R Dison, `The Contra Fiscum Rule in Theory and Practice', SALJ (1976) 159 at 179.

43 Estate Reynolds and Others v CIR 1937 AD 57 at 70 (AD); Israelsohn v CIR 1952 (3) SA 529 at 540 (AD); CIR v Mc Neil 1959 (1) SA 481 at 489 (AD).

44 Glen Anil Development Corporation Ltd v SIR 1975 (4) SA 715 at 727 (AD).

mind that s 103 is not imposing a new tax on the taxpayer and therefore is not a penalty section.[45] Any liability of the taxpayer to pay tax must be found somewhere else. The criticism advanced against this argument is of more weight. Davis said that it is `questionable in the extreme' to argue that because a section does not impose a tax **per se** the conclusion must be reached that the provision does not come under the ambit of the contra fiscum rule, even if there is ambiguity in the legislature.[46]

f) English approach

I submit that such a `per se' conclusion is wrong. It is true that not only tax-imposing statutes can create a burden on the shoulders of the taxpayer; administrative statutes can also burden the taxpayer. Nevertheless, I consider the result reached in the Glen-Anil case to be correct for the following reasons. The interpretation of the anti-avoidance provision can not follow the contra fiscum rule.

Apparently Botha might have had this in mind when he said:[47]

> `... *in any event I do not understand the rule to be that every provision of the fiscal statute, whether it relates to the tax imposed or*

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45 See Schreiner in regard to s 90 in: CIR v King 1947 (2) SA 196 at 216 (AD).
46 D M Davis, `Tax Avoidance - the British example', in De Rebus 347 at 347.
47 Glen Anil Development Corporation Ltd v SIR 1975 (4) SA 715 at 727 (AD).

not, should be construed with due regard to any rules relating to fiscal legislation.'

Authority for this point is found in the House of Lords. Also English legislation does not know a general anti-avoidance provision and therefore doesn't have an equivalent to s 103. The English tax law nevertheless has specific anti-avoidance provisions. The interpretation of these provisions might throw some light on the treatment of the contra fiscum rule in our s103.

In IRC v Joiner[48] the taxpayer had obtained a tax advantage in consequence of a `transaction in securities' within s 467(1) of the Income and Corporation Tax Act of 1970. The commissioner issued a notice to the taxpayer under s 460(3) specifying the adjustments which were requisite for counteracting the tax advantage. The taxpayer contended that s460 did not apply to him since the distribution, being a step taken in the course of the liquidation of the company, was not a `transaction in securities', within ss 460(1) and 467(1) of the Act.

It was expressed per Lord Wilberforce:[49]

`..., it appears from the opinion of Lord Reid in Greenberg v Inland Revenue Comrs that the sections called for a different method of interpretation from that traditionally used in taxing Acts. For whereas it is generally the rule that clear words are required to impose a tax, so that the taxpayer has the benefit of doubts or

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48 [1975] STC 657 (HL).

49 ibid at 662.

ambiguities, Lord Reid made it clear that the scheme of the sections, introducing as they did a wide and general attack on tax avoidance, required that expressions which might otherwise have been cut down in the interest of precision were to be given the wide meaning evidently intended, even though they led to a conclusion short of which judges would normally desire to stop. If we are to follow this path, and I see no other open to us, we must continue to give `transactions in securities' and `transactions relating to securities' the widest meaning.'

The ruling of the House of Lords has been applied in William v IRC.[50] It is my opinion that the South African courts should follow that path as well. Considering the English jurisdiction it follows that the contra fiscum rule is not applicable to s 103. Ergo, the interpretation of s 103 always has to be seen in the light of the Legislature's paramount intention to provide a remedy against the mischief it was introduced for, or to put it into Botha's words:[51]

`It should, in my view, therefore, not be construed as a taxing measure but rather in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed.'

The courts should therefore give the words their full breadth of meaning.

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50 [1979] STC 598 at 613.

51 Glen Anil Development Corporation Ltd v SIR 1975 (4) SA 715 at 727-728 (AD).

g) Interpretation with two languages

Finally it should be noted that the Act exists in two languages. Section 108 (2) of the Republic of South Africa Constitution Act, No. 32 of 1961, provides for all Acts to be in both languages, but in the case of a conflict between the two copies of an Act that copy signed by the State President prevails.[52]

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52 Section 65.

4 s. 103 (1) and its requirements

(1)Whenever the Commissioner is satisfied that any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act, and including a transaction, operation or scheme involving the alienation of property) -

(a) has been entered into or carried out which has the effect of avoiding or postponing liability for the payment of any tax, duty or levy imposed by this Act or any previous Income Tax Act, or of reducing the amount thereof; and

(b) having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out -

(i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm`s length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; and

(c) was entered into or carried out solely or mainly for the purpose of the avoidance or the postponement of liabililty for the payment of any tax, duty or levy (whether imposed by this Act or any previous Income Tax Act or any other law administered by the Commissioner) or the reduction of the amount of such liability, the Commissioner shall determine the liability for any tax, duty or levy imposed by this Act, and the amount thereof, as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction.

The general avoidance provision consists of four elements. These elements have been summarized in SIR v Geustyn, Forsyth and Joubert as follows :[53]

(a) a transaction, operation or scheme entered into or carried out;

(b) which has the effect of avoiding or postponing liability for tax on income or reducing the amount thereof; and which

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53 1971 (3) SA 567 at 571-2 (AD); SIR v Gallagher 1978 (2) SA 463 at 470 (AD); Hicklin v SIR 1980 (1) SA 481 at 491 (AD).

(c) in the opinion of the Secretary,[54] having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out,-

(i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm`s length under a transaction, operation or scheme of the nature of the transaction operation or scheme in question; and that

(d) the avoidance, postponement or reduction of the amount of such liability was, in the opinion of the Secretary, the sole or one of the main purposes of the transaction, operation or scheme.

All of the four elements must be present for s 103(1) to apply.[55] If the taxpayer can prove that only a single one of these elements is missing, the liability for tax can not be determined under s 103 (1).

a) The First Element

(i) transaction, operation or scheme

The first element requires that a transaction, operation or scheme was entered into or carried out. A transaction or operation would be a contract, agreement, arrangement, plan etc..[56] The first anti-avoidance provision s 90 spoke of `transaction or operation'.[57] Just five years after its enactment the word `scheme' was added.[58] The word scheme includes transactions and operations. In practice it might be difficult to identify a series of transactions or operations

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54 The Commissioner was at that time called Secretary.

55 SIR v Geustyn, Forsyth and Joubert 1971 (3) SA 567 at 571-2 (A); Ovenstone v SIR 1980 (2) SA 721 at 730 (AD).

56 There are almost no cases reported which are helpful in defining the meaning of transaction or operation: In L v COT 1975 (2) SA 649 (RAD) it was held that the retention of profits constituted a transaction and operation but not a scheme.

57 Section 90 of Act 31 of 1941; see Apendix I.

58 Section 90 was substituted by s 20 of Act No.55 of 1946.

opposite to a scheme as the cases of Meyerowitz and Louw have shown. This cases will be discussed below.

In the case of Meyerowitz v CIR[59] the meaning of `scheme' was analysed. The facts of the case were as follows. The taxpayer and two others had formed a company to produce a magazine (The Taxpayer). The company later sold its right for a nominal sum to a partnership. Instead of the taxpayer, a trust for the taxpayer's minor children was a partner in this partnership. The taxpayer continued to render editorial services for a small remuneration. It was held that the taxpayer avoided tax on the income of the trust. The income produced was the sole product of the taxpayer's labour.

In this case the distinction between a `series of transactions' and a `scheme' was of relevance. The transactions in itself were sound as each of them on its own did not amount to tax avoidance. Only when one looked at the series of transactions as a scheme the whole picture resulted in tax avoidance.

The councel for Meyerowitz submitted that a scheme may consist of a series of transactions, nevertheless the **transactions must be connected in the sense of being parts of a preconceived plan.**[60] The council argued that this connection between the transactions was lacking in the case of his client.

Beyer J A who delivered the judgement opposed to this line of argumentation. His position was based on the English case of Crossland v Hawkins.[61]

In Hawkins' case it had to be considered if it was necessary in order to constitute an "arrangement" within s 397 that the whole of the matter should have been in contemplation at the outset.[62] Donovan L J held:

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59 1963 (3) SA 863.

60 ibid at 871.

61 Crossland (Inspector of Taxes) v Hawkins [1961] 2 All ER 812 at 817.

`.. I do not think that the language of s 397 requires that the whole of the eventual arrangement must be in contemplation from the very outset. ... Even were it otherwise, I think that there is sufficient unity about the whole matter to justify its being called an arrangement for this purpose, because the ultimate object is to secure for somebody money free from what would otherwise be the burden or the full burden of surtax. Merely because the final step to secure this objective is left unresolved at the outset, and decided on later, does not seem to me to rob the scheme of necessary unity to justify its being called an "arrangement".'

Beyer JA furthermore quoted Watermeyer J, who had delivered the Special Court Decision of Meyerowitzs case:

`The word "scheme" is a wide term and I think that there can be little doubt that it is sufficiently wide to cover a series of transactions such as those mentioned above.'

Both quotations were accepted by Beyer JA in Meyerowitz v CIR. It follows therefore that in order to constitute a scheme there must be a unity between the transactions. It is not necessary that the transactions must be part of a preconceived plan in order to form a scheme. The different steps taken must be so connected that in retrospective analysis they result in tax avoidance.

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62 Section 397 reads as follows:

(1) Where, by virtue or in consequence of any settlement to which this Chapter applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person.

Section 403 is a definition section, and provides among other things: "settlement" includes any disposition, trust, convenant, agreement, arrangement or transfer of assets.

In the case of CIR v Louw[63] the court had to decide whether the **lapse of time** could be a fatal interruption between different steps of a series of transactions. The facts of the case, in short, were the following. A firm of civil engineers had changed their form of business from a partnership into a company. Some five years after incorporation the company made loans to the directors. The Commissioner argued that the lending of moneys to directors was an integral part of the original scheme to incorporate the partnership.

It was held by Corbett JA that the loans to the directors created an independent transaction.[64] The granting of the loans was neither an integral part of the incorporation nor necessary for the formation of the company.

The lapse of time is no fatal interruption as long as there is sufficient unity between the ultimate step and what had gone before. The series of transactions will still be part and parcel of a single scheme. Only when this unity is lacking each transaction must be looked at on its own and each is capable of being hit by s 103. This unity was lacking in Louw's case.

It is noteworthy that the new anti-avoidance provision of the V.A.T.- Act might be of some guidance. Following the recommendation of the Margo-Commission[65] an additional anti-avoidance provision has been introduced with s 73 of the Value-Added Tax Act of 1991. The new anti-avoidance provision s 73 of the Value-Added Tax Act of 1991 embodies a definition of the word "**scheme**". Sub-section (2) of s 73 reads as follows:

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63 1983 (3) SA 551.

64 ibid at 572.

65 COMMISSION OF INQUIRY into the TAX STRUCTURE OF THE REPUBLIC OF SOUTH AFRICA para 27.29.

(2) For the purpose of this section -

`scheme' includes any transaction, operation, scheme or understanding (whether enforceable or not) including all steps and transactions by which it is carried into effect;

It is submitted that this new definition is wider in terminology[66] than the old s 103. However the terms transaction, operation or scheme in s 103 have sufficiently covered every form of arrangement in the past. There were no reported cases of taxpayers that could successfully argue that their `arrangements' would not fall under one of these three expressions. Each of these words has a wide ambit and there are very few activities of a taxpayer which will not be appropriately described by one or the other.[67] It is submitted therefore that the new definition in the V.A.T.- Act will hardly distinguish itself from the old definition. A possible field of application might be unenforceable arrangements. To be of any practical value the hurdle of evidence has to be overcome first. This hurdle could prove insurmountable for the Commissioner. It is therefore submitted that the new definition in the V.A.T.- Act will not influence the existing broad application of s 103.

(ii) entered into or carried out

The transaction, operation or scheme must have been entered into or carried out. The utilization of two different verbs lead in the case of Ovenstone v SIR[68] to the councils argument, that one has to look at the purpose of the taxpayer **at**

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66 The terminology of the second part of this definition is absolutely identical to s 99 of the New Zealand tax-avoidance provision. See Appendix II for the exact wording of s 99.

67 Commissioner of Taxes v Ferera 1976 (2) 653 at 658 [RAD].

68 1980 (2) SA 721 (AD).

the time when a scheme is formulated.[69] At the time of formulation there was no intention / purpose of the taxpayer to avoid tax. Only when the scheme was implemented the taxpayer had the purpose of tax avoidance.

This approach of Meyerowitz, who represented the taxpayer, was rejected by Trollip JA:[70]

> *"..the question whether or not the scheme in question is hit ... must be answered by reference to the effect and purpose of the scheme and the circumstances surrounding it at the time it is implemented or carried out, and not at the time it was formulated, ie conceived, decided or agreed upon, or otherwise evolved."*

Trollip JA continues that it is only at the moment when a scheme is implemented or carried out that it becomes a practical reality for the fiscus. He then carries on:[71]

> *True, s 103(1) repeatedly speaks of "any transaction, operation or scheme entered into or carried out". But "entered into" there does not mean "formulated" in the above-mentioned sense[72]. Because of its context it has, I think, a connotation of implementation that is similar to "carried out". Probably both expressions were used because it was considered that "carried out" is more appropriate to connote the implementation of a "scheme", while "entered into" is more apposite to connote the implementation (ie the taxpayer's actually engaging in) of a "transaction" or "operation" - cf The Concise Oxford Dictionary sv "entered into", "transaction", and "operation". That approach is supported by the Afrikaans text - "'n transaksie, handeling of skema aangegaan, verrig of uitgevoer". It will be observed that there three verbs instead of two are used. And the*

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69 ibid at 723.

70 ibid at 732.

71 ibid at 732.

72 Above, at p.732, Trollip spoke of "formulate" as i.e. conceived, decided or agreed upon, or otherwise evolved.

> *appositeness of each of them to each of their respective preceding subject-nouns is most striking; " 'n transaksie aangegaan, handeling verrig, skema uitgevoer".*

It follows therefore that "entered into" has a connotation of implementation similar to "carried out". A scheme will be looked at with regard to effect and purpose at the time of implementation and not at the time of formulation.

The **circumstances** surrounding the scheme must also be considered. In Hicklin v SIR[73] the counsel's contention that the whole respondents conduct must be seen as a scheme was rejected. Nevertheless the court held that even if a single agreement constituted a transaction, operation or scheme the circumstances of each case have to be looked at:[74]

> *`That does not mean, however, that the RN [Ryan Nigel][75] agreement must be looked at with blinkers on. Indeed, s 103(1) itself enjoins the respondent, and hence any court seized with the problem, to have regard to "the circumstances under which the transaction, operation or scheme was entered into or carried out".'*

The first element has to be understood very widely in order to give the anti - avoidance provision a broad application. With regard to time, subsection (1) expressly provides that the transaction, operation or scheme might have been entered into or carried out **before or after** the commencement of this Act. Furthermore, the alienation of property can be subject of a transaction, operation or scheme. In the following discussion I will refer to transaction, operation or scheme only as transaction.

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73 1980 (1) SA 481.
74 ibid at 492.
75 Own italics by author.

b) Second Element

The transaction must have the effect of avoiding or postponing liability for tax on income or reducing the amount thereof. The anti-avoidance provision does not only strike at the avoidance of tax but also at the mere postponement and reduction of tax.[76] The words "reducing the amount" in s 90 of Act 31 of 1941 mean reducing the amount of tax from what it ought to be in the tax year under consideration. The second necessary element requires an effect of the avoidance or postponement of tax liability or the reduction of the amount thereof on any tax imposed by this Act. It is important to notice that the effect must be one on `this' Act or any previous Income Tax Act.[77] The wording in sub-section (1) makes it clear that one has to distinguish between effect and purpose. It will be shown later that the purpose of the transaction might have been to avoid, for eg., transfer duty or value-added tax (V.A.T.) or any other tax administered by the Commissioner.

(i) taxes imposed

The effect of the transaction must be one on taxes imposed by the Income Tax Act. Taxes imposed by the Income Tax Act are Normal Tax, Non Resident Shareholders Tax (NRST) and Donations Tax.[78,79]

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76 Commissioner of Taxes v Ferera 1976 (2) 653 at 658 [RAD].

77 With `this' Act the Income Tax Act No.58 of 1962 in force is meant.

78 Huxham, Keith / Haupt, Phillip, Notes on South African Income Tax , 11 ed 1992 p.2ff.; Meyerowitz and Spiro, supra, (n14), para 1614.

79 Undistributed Profits Tax (UPT) was abolished on 01/03/1990.

(ii) existence of income

In order for the anti-avoidance provision to operate there has to be some kind of income in the hands of the taxpayer.

It was expressed in CIR v King[80] that a man can do a lot of things in order to avoid liability for tax:

> *`Liability for the payment of some expected tax can, in a wide general sense, be avoided by a taxpayer if he abstains from earning any income and acquires none in any other way. This abstention from earning an income can be brought about by many kinds of operations or transactions. A man can, for instance, simply close down his business or resign from his employment, but it is absurd to suppose that the Legislature intended to impose a tax upon a man who enters into such a transaction or operation as if he had an income, which in fact he has not got, merely because his purpose was to avoid exposing himself to liability for taxation by having an income.'*

To overcome these absurdities it was held in CIR v King that a distinction had to be made between a person who arranged his affairs so that he had no income at all and a person who escapes liability for income that would actually be his:[81]

> *`...there is a real distinction between the case of a man who so orders his affairs that he has no income which would expose him to liability for income tax, and the case of a man who so orders*

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80 CIR v King 1947 (2) SA 196 at 207 (AD).

81 CIR v King 1947 (2) SA 196 at 210 (AD); see also D M Davis: Tax avoidance - the British example; in De Rebus 1981 347.

his affairs that he escapes from liability for taxation which he ought to pay upon the income which is in reality his.

In King's case a father had sold to his son certain shares in a company. The Commissioner disregarded the sale and tried to tax the dividend income[82] in the hands of the father. It was held that the sale of the shares was an alienation of capital and not of income. For this reason the transaction did not have the effect of avoiding liability for payment of tax or reducing its amount. For the sake of completeness it should be noted that the alienation of property was inserted into s 90 (now s 103) with s 17 of Act No. 78 of 1959. Nowadays the sale of the shares to a minor child would also fall foul of s 7 (3). Any income received by a minor child as a result of a donation, settlement or other disposition will be deemed to be the parents income.

(iii) meaning of `liability'

The transaction must have the effect of avoiding or postponing liability for tax on income or reducing the amount thereof. The liability concerned is the one of the taxpayer towards the Revenue authority.[83]

For a long time it has been unclear what was meant by `liability'. Liability in s 103(1) does not refer to an existing one, for such a liability cannot be avoided by any transaction.[84] Watermeyer C J analysed in the King-case the meaning of `liability' with regard to s 90, the predecessor of s 103(1), and came to the following conclusion:[85]

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82 Dividend income it was held accrues uno ictu to the person entitled to the shares and not from day to day.

83 Hicklin v SIR 1980 (1) SA 481 at 492.

84 CIR v King 1947 (2) SA 196 at 207 (AD); Hicklin v SIR 1980 (1) SA 481 at 492 (AD).

85 CIR v King 1947 (2) SA 196 at 207 (AD).

> *`The expression "avoiding liability for the payment of any tax imposed by this Act or reducing the amount of any such tax" is ambiguous. The liability, which a transaction may be designed to avoid, may be a liability which was imposed upon a taxpayer in respect of a past accounting period, or it may be a liability which the taxpayer expects to incur in respect of the current accounting period, or it may be a liability which he expects to incur in respect of some future accounting period. The only liability for tax imposed by the Act which can exist at the time when a transaction is entered into is a liability for a past accounting period, and with regard to that it is impossible to avoid it.*
> *Sec. 90 must therefore refer to anticipated liabilities for tax, either in respect of a current tax year or in respect of future years.'*

It is settled law by now that liability refers to `**anticipated liability**'. The courts have approved this conclusion numerous times.[86] Uncertainty nevertheless arises as to the extent of anticipated liability. The courts have refused to draw an exact line of demarcation.[87]

> *`Now such a liability may vary from an imminent, certain prospect to some vague, remote possibility. ... However, it is unnecessary and hence inadvisable to decide here whether a vertical line should be drawn somewhere along that wide range of meanings in order to delimit the connotation of "an anticipated liability".'*

I concur with David Clegg who submitted that "some vague remote possibility" is referring to the time of a future receipt or accrual and not to the existence of liability per se.[88]

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86 Smith v CIR 1964 (1) SA 324 at 333 (A); Hicklin v SIR 1980 (1) SA 481 at 492 (AD).

87 Hicklin v SIR 1980 (1) SA 481 at 492-3 (AD).

88 David J M Clegg: Section 103(1) - "Freedom of choice" ; 1 SATJ (1986) 224 at 226.

(iv) avoiding liability

A detailed analysis of the words `**avoiding liability**' can be found in the Australian case of Newton v COT:[89] The councel for the taxpayer submitted that, in s 260(c), the words `liability imposed on any person' meant a liability which had already accrued; and that `avoid' meant displace.[90] He concluded that in order to avoid tax liability , it must be an arrangement which sought to displace a liability which had already come home to a taxpayer - in respect of income which had already been received by him.

The Court disagreed with the councel and came to the following interpretation of `avoiding liability':[91]

> `*... the word "avoid" is used in its ordinary sense - in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed". To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you.*'

In Smith v CIR this interpretation of the words `avoiding liability' was confirmed by Steyn CJ.[92] He made reference to the Australian case and further supports this interpretation with the Afrikaans version of s 103 (1):[93,94]

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89 Newton and Others v Commissioner of Taxation of the Commonwealth of Australia [1958] 2 All ER 759.

90 s 260 (c) of the Commonwealth Income Tax and Social Services Contribution Assessment Act, 1931 - 1951; see wording in Appendix II.

91 Newton and Others v Commissioner of Taxation of the Commonwealth of Australia [1958] 2 All ER 759 at 763.

92 `The ordinary natural meaning of avoiding liability for a tax on income is to get out of the way of, escape or prevent an anticipated liability.' Smith v CIR 1964(1) SA 324 at 333 (A).

93 Smith v CIR 1964(1) SA 324 at 333 (A).

94 See the Afrikaans text of s 103 in the Appendix I.

`The Afrikaans rendering of the phrase is "wat die uitwerking het dat dit aanspreeklikheid vir die betaling van 'n belasting ... op inkomste vermy". The ordinary meaning of "vermy" is "ontwyk" or "voorkom".'

Our legislation hasn't seen a necessity yet to define liability. A different approach has been taken in New Zealand. The equivalent to our general anti-avoidance provision in New Zealand is s 99 of the Income Tax Act 1976. In subsection (I) "liability" is defined:[95]

For the purpose of this section -
...
"liability" includes a potential or prospective liability in respect of future income:

It is admitted that a minimal effect is enough to satisfy the second requirement. In ITC 1178 the amounts saved by entering into a scheme were for the first year R 174,50 and the second year R 144. However it was held that this effect was enough for s 103 to apply.

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95 See section 99 in Appendix II.

c) The third requirement

The transaction must have been entered into solely or mainly for the purpose of avoiding any tax by the Income Tax Act or any other law administered by the Commissioner.

The purpose element will be discussed as the third element and not as the last of the four elements in order to point out the co-relationship between effect and purpose.

(i) purpose

It might well be that "effect" and "result" as retrospectively used in sub-section (1) and (4) of s 103 have the same meaning, there is nevertheless a clear distinction between `effect' and `purpose'. Purpose is used in s 103 (1) with the meaning of the **intention** with which the transaction was entered into and not with the effect of the transaction. The intention or purpose of any particular transaction is a matter of fact.[96]

(ii) subjective or objective test

In determining the purpose of a transaction it was argued by council in SIR v Gallagher [97] that the proper test to apply would be an `objective' one. An objective test meant a test with regard to the effect of a scheme, objectively viewed.[98]

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96 SIR v Geustyn, Forsyth and Joubert 1971(3) SA 567 at 576 (AD); CIR v Richmond Estates (Pty) Ltd 1956 (1) SA 602 at 606-7 (AD).

97 1978 (2) SA 463 (AD).

98 ibid at 471.

The contrary would be a `subjective' test focusing on the purpose which those carrying out the scheme intend to achieve by means of the scheme. The courts have adopted the subjective test with the following argumentation:[99]

> *Section 103 (1) draws a clear distinction between the `effect' of a scheme and the `purpose' thereof and this virtually rules out an interpretation which seeks to give `purpose' an objective connotation and to equate it, more or less, to `effect'.*[100]

The proper test to be applied in the determination of the purpose of a transaction is accordingly a `subjective' test.

The evidence of the taxpayer is in this regard of prime importance.[101] Such evidence is however not decisive.[102] The court is not bound to accept what a witness says in evidence, even under oath.[103]

In determining the purpose of a transaction Nicholas J held in ITC 1307 that despite the distinction between effect and purpose the effect of a scheme might be of some guidance:[104]

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99 SIR v Geustyn, Forsyth & Joubert 1971 (3) SA 567 at 576; Glen Anil Development Corporation v SIR 1975 (4) SA 715 at 730 in regard to the similar wording of s 103 (2); SIR v Gallagher 1978 (2) SA 463 at 471 (AD); Hicklin v SIR 1980 (1) SA 481 at 493 (AD).

100 SIR v Gallagher 1978 (2) SA 463 at 471 (AD).

101 ibid.

102 Glen Anil Development Corporation v SIR 1975 (4) SA 715 at 730 (AD).

103 SIR v Gallagher 1978 (2) SA 463 at 472 (AD); ITC 1307 (1979) 42 SATC 147 at 154.

104 ITC 1307 (1979) 42 SATC 147 at 150; The case is analysed in: (1981) 20 Income Tax Reporter 87; see also Silke, South African Income Tax, para 19-22, Fn 59.

`And although the subsection distinguishes between the `effect' and the `purpose' of a scheme, the effect of the scheme is of course not necessarily irrelevant to this part of the enquiry - the effect may in some circumstances tend to show what purpose the taxpayer had in mind.'

The fact that councel in Gallagher's case did not succeed with his attempt to apply an objective test did not prevent his final victory in the outcome of the case. The taxpayer had entered into a scheme with the sole intention to save estate duty. The purpose clause of s 103(1) at that time covered only transactions which were entered into for the sole or main purpose of avoiding income tax. Since the taxpayer could prove that his purpose was not to save income tax but estate duty the anti-avoidance provision was no longer applicable.
In consequence of cases as Gallagher's or ITC 1307 the anti-avoidance provision of s 103(1) was amended.[105],[106] It is submitted that Gallagher's case would now be covered by the amended s 103(1).[107]

The amendment took the following form. To begin with the purpose was no longer limited to the avoidance of income tax only but to all other laws administered by the Commissioner. The other laws administered by the Commissioner besides the Income Tax Act are the Estate Duty Act; the Value-

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105 Section 14 of the Amendment Act 101 of 1978.

106 In similar Rhodesian cases as F v COT 1975 (4) SA 693 (R) or COT v Ferera 1976 (2) SA 653 (RAD) the taxpayers sole purpose was to save death duty. It was held that the Legislature, in attacking the evil of tax avoidance, could not possible have intended to leave unscathed taxpayers who frankly admit that the transaction, operation or scheme had as its sole or main purpose the avoidance, postponement or reduction of tax.

107 Huxham/Haupt, supra, p 290.

added Tax (VAT) Act ; the Stamp Duties Act; the Sales Tax Act; the Transfer Duty Act and the Marketable Securities Act.[108]

In the second place the words `sole or main' purpose were displaced by `solely or mainly'. The meaning of this words will be looked at in the following paragraph.

(iii) solely or mainly

This criterion has experienced many changes in the history of the anti-avoidance provision. It is interesting to note that the first anti-avoidance provision, s 90 of Act 31 of 1941, only spoke of ...`the purpose'.[109] In CIR v AH King[110] the council argued that s 90 spoke of `the' instead of `a' purpose. Ergo it was concluded that s 90 did not include an incidental purpose but a **dominant** purpose.

The first major change in wording came with the second amendment of s 90.[111] The words `the purpose' were replaced with `the sole and main purpose'. Nicholas J gave the words `main purpose' this following connotation:[112]

> *` The word `main' means principal, major, most important, and the ascertainment of a main purpose involves a weighing against each other of the various purposes of a scheme. In a case such as the present, where at most two purposes have been suggested (a saving on income tax and a saving on estate duty), if one purpose preponderates over the other it cannot be said that the other is the main purpose.'*

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108 Meyerowitz and Spiro, supra, (n14) 1614 A.
See the complete text of s 90 of Act 31 of 1941 in the Appendix I.

110 CIR v IHB King ; CIR v AH King 1947 SA 196 at 215 (AD).

111 Section 17 of Act No 78 of 1959. For the detailed summary of all amendments of s 90 of Act 31 of 1941 and s 103 of Act 58 of 1962 see Appendix I.

112 ITC 1307 (1979) 42 SATC 147 at 153.

The present wording `solely or mainly' was introduced with Section 14 of Act No 101 of 1978 in response to the SIR v Gallagher[113] as mentioned above. The wording `solely and mainly' is narrower than `sole and main' purpose.[114]
The Oxford English Dictionary defines `solely' as:[115] Only, merely, exclusively, entirely, altogether.
`Mainly' stands for:[116] For the most part, in the main, as the chief thing, chiefly, principally.
The exact meaning of these two words in the context of s 103(1) is not quite clear. It was held in SBI v Lourens Erasmus (Eiendoms) BPK[117] that `mainly' lays down a purely quantitative standard of more than 50 per cent and the use of the alternative `solely' does not derogate therefrom.[118] This interpretation it was contended[119] would make the word `solely' superfluous and meaningless. It would disrespect the cardinal rule of interpretation that a statute should be interpreted and construed in such a way that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.[120]

Despite this contention the court held that draftsmen often use a number of terms without troubling about the question of overlapping, instead of relying on a single general expression.[121] This is certainly true for the wording of an avoidance provision which should make sure that its wording meets the intention

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113 SIR v Gallagher 1978 (2) SA 463.
114 Huxham / Haupt, supra, at 290.
115 The Oxford English Dictionary Vol. X.
116 ibid Vol VI.
117 1966(4) SA 434 at 442.
118 In SBI v Lourens Erasmus the court interpreted s 51 (f) of Act 43 of 1955 which dealt with the question if net profits derived "solely or mainly" from dividends.
119 SBI v Lourens Erasmus 1966(4) SA 434 at 441.
120 Loewenstein v COT 1956 (4) SA 766 at 770-1 (FC).
121 SBI v Lourens Erasmus 1966(4) SA 434 at 442.

of the draftsmen. The court then continued to give an explanation why the word `solely' has been introduced by the legislature:[122]

> *`Aangesien die woord `hoofsaaklik', in teenstelling met die woord `uitsluitlik', die bestaan van twee of meer vergelykbare groottes veronderstel, is dit goed denkbaar dat die woord `uitsluitlik' in art.51 (f) minstens ex abundanti cautela ingevoeg was om 'n moontlike opvatting dat 'n maatskappy wat inkomste uitsluitlik uit diwidende verkry, nie 'n maatskappy is wat dit slegs hoofsaaklik daaruit verkry nie, te voorkom.'*

This interpretation of `uitsluitlik' was made in context to art 51 (f). A similar interpretation is possible for s 103(1). Meyerowitz presumes that the word `solely' should prevent an argument that where the sole purpose is tax avoidance, it cannot be termed a main purpose.[123] Consequently the word `solely' is redundant since it is enough that the purpose is mainly tax avoidance. It is submitted that the change in wording lightened the taxpayer's burden in discharging the onus.[124] This will be shown later in context with s103(2) and the onus of proof.

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122 ibid at 441.

123 Meyerowitz and Spiro, supra, (n14), para 1618 Fn 22.

124 (1978) 27 The Taxpayer 111 at 112-3; Theo van Wyk: Section 103(1): Hicklin v SIR , De Rebus 1980 p 32 at 33.

(iv) Presumption

Section 103(4)(a) embodies a presumption that a transaction was entered into or carried out solely or mainly for the purpose of avoiding tax. The section reads as follows:

> **(4) Any decision of the Commissioner under subsection (1), (2) or (3) shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the transaction, operation, scheme, agreement or change in shareholding or members' interests in question would result in the avoidance or the postponement of liability for payment of any tax, duty or levy imposed by this Act or any previous Income Tax Act or any other law administered by the Commissioner, or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved -**
>
> **(a) in the case of any transaction, operation or scheme, that it was entered into or carried out solely or mainly for the purposes of the avoidance or the postponement of such liability or the reduction of the amount of such liability; or**
>
> **(b) in the case of any such agreement or change in shareholding or members` interests, that it has been entered into or effected solely or mainly for the purpose of utilizing the assessed loss or balance of assessed loss in question in order to avoid or postpone such liability or to reduce the amount thereof.**

The section 103(4) expressly provides that any decision of the Commissioner under s 103(1) shall be subject to objection and appeal. Regardless to this Corbett JA held:[125]

> *`The effect of this is, although a major criterion prescribed by s 103 (1) is the `opinion of the Secretary', this does not debar the Special Court from re-hearing the whole case and, if it so decides, substituting its own decision for that of the Secretary.'*

Of more practical relevance is the presumption in connection with the purpose requirement which s 103(4) contains. Whenever the Commissioner is satisfied that any transaction would result in the avoidance or postponement of tax it is

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125 SIR v Gallagher 1978 (2) SA 463 at 470 (AD).

presumed, until the contrary is proved, that the transaction was entered into solely or mainly for the avoidance of tax. The sub-section goes even further as it includes a presumption in respect of s 103(2) as well. The utilization of assessed losses will be dealt with at a later stage.

It is noteworthy that s 103(4) speaks of `result' of a transaction instead of `effect'. It is submitted that both words have the same meaning in this context. A possible explanation for the appearance of the word `result' instead of effect is that the term not only appears in s 103(2) but also in a simular presumption in the first anti-avoidance provision s 90.[126]

The presumption places a heavy burden of proof on the taxpayer.[127] However the question of onus will be discussed at a later stage.

(v) relevance of time for the purpose element

Whether or not a scheme is hit by s 103 (1) must be answered by reference to the effect and purpose of the scheme and the circumstances surrounding it at the time it is implemented or carried out, and not at the time it was formulated, ie conceived, decided or agreed upon, or otherwise evolved.[128] Trollip JA held in Ovenstone v SIR:[129]

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126 `Provided that any decision of the Commissioner under this section shall be subject to objection and appeal, and in any proceedings relating thereto, whenever it is proved that the transaction or operation in question would **result** in the avoidance of liability for the payment of any such tax, or in the reduction of the amount thereof, it shall be presumed, unless the contrary is proved, that the transaction or operation was entered into or carried out for the purpose of avoiding such liabilty or of reducing such amount.
For the complete text of s 90 see Appendix I.

127 De Koker / Urquhart, Income Tax in South Africa, para 26-19.

128 Ovenstone v SIR 1980 (2) SA 721 at 732; Meyerowitz and Spiro, supra, (n14), para 1619.

129 Ovenstone v SIR 1980 (2) SA 721 at 732.

> `... *even if the purpose or effect of the scheme when it is formulated is not to avoid liability for tax, it may have that effect or that may become one of the taxpayer's main purposes when he subsequently carries it out, thereby rendering s 103(1) applicable if its other requirements are fulfilled.'*

Beyer J A made in Meyerowitz v CIR the following statement in context to time:[130]

> `*It is true that the Special Court found that when it [the company]*[131] *was formed there was no purpose of tax avoidance. But although it may have come upon the scene with good intentions, it ceased almost at once to be an innocent bystander.'*

While investigating the purpose of the taxpayer one has to look at his purpose at the time of the implementation and not at the time of formulation of the transaction, operation or scheme. The change of intention from formulating a sound business transaction towards a scheme of tax avoidance makes the taxpayer fall foul of s 103. Hypothetically the vice versa situation - a change of intention from tax avoidance towards a sound business transaction - must lead to a case where the purpose-element is not fulfilled and s 103 is no longer applicable. This hypothetical situation will cause the taxpayer a `nightmare' as he has to prove to the court his change of intention which will be almost impossible.

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130 Meyerowitz v CIR 1963 (3) 863 at 875.
131 Own italics.

(vi) causation

The question might be asked whether the distinction drawn by the Courts between effect and purpose is a necessary one or just creates space for loopholes. It appears that the distinction between the two terms is of no real help. While analysing the underlying principle it seems that everything boils down to the question of causation. However it may be, this question has to be left open at this point. As long as the Legislature is not acting the distinction between effect and purpose is to be respected.

d) The fourth requirement: normality

In the opinion of the Secretary, having regard to the circumstances, a transaction must have been:

(i) entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(ii) created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction operation or scheme in question.

(i) normality requirement as the crux of s 103(1)

The normality-requirement is the crux of the anti-avoidance provision. Only if a transaction, operation or scheme is **abnormal** will it be hit by s 103, presuming that all the other elements are also fulfilled.

Some authors consider the purpose-requirement as the crux of s 103.[132] I respectfully disagree with De Koker / Urquhart. It is correct that the purpose-element also has to be fulfilled in order for s 103 to apply.[133] Nevertheless the section can't apply if the taxpayer frankly admits that his purpose was to avoid tax with a normal business-transaction. Broomberg put it this way:[134]

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132 De Koker / Urquhart, supra, para 26-18.

133 Only if "all" four elements are fulfilled is s 103 of application: Hicklin v SIR 1980 (1) SA 481 at 491 (AD).

134 Broomberg, Tax Strategy at 213.

`The first one of these defences [against s 103(1)][135] infuriates the Commissioner. Thus, a taxpayer can nakedly confess that a transaction was entered into solely for the purpose of avoiding tax, and yet he can pip the Commissioner, if the taxpayer can demonstrate that the transaction which he entered into did not manifest any abnormalities, either in respect of the rights and obligations which were created, or in regard to the manner in which it was entered into or carried out.'

The normality-requirement accordingly contains an important limitation for the application of the anti-avoidance section. If the means and manner are those **normally** employed in entering into or carrying out a transaction, operation or scheme of the same nature, and if the rights and obligations created are those which would normally be created under such a transaction, operation or scheme, between persons dealing at arm's length, the section would **not** apply, even if, of set purpose, a liability for income tax is being avoided or postponed or the amount thereof reduced.[136]

Interestingly enough the normality-requirement was not included in the tax avoidance provision when it was enacted in 1941. Only in 1959 did it become part and parcel of the anti-avoidance provision.

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135 Own words.

136 See i.e. the recent decision of ITC 1542 were it was held that where rights and obligations created were normal for person's dealing at arm's length no further investigation into the requirements of s 103(1)(ii) is necessary as s103 can't apply any more.

[137] The normality-requirement has been introduced to overcome the absurdities and unsatisfactory results as shown in the King-case[138]. Schreiner J A made the following remark:[139]

> *`It is intended, I think, to deal with cases in which the Commissioner, as representing the fiscus, is properly aggrieved by a transaction or operation designed to enable one of the parties thereto to escape tax. The Commissioner is not properly aggrieved merely because at a stage before income has accrued to a taxpayer it might have been predicted with confidence, amounting even to certainty, that if the taxpayer took no steps in the matter such income would accrue to him, and because he then takes the avoiding steps. But the Commissioner would be properly aggrieved if a transaction or operation were entered into which prevented income from accruing to the taxpayer while leaving him in the position of one to whom the income would normally and naturally accrue. The section is not, in my opinion, designed to implement the expectations, however reasonable, of the Commissioner that there will be no change in the taxpayer's affairs which will result in him getting less income; it is designed to meet the Commissioner's objections to the creation of abnormal or unnatural situations, to the detriment of the fiscus. Now normally and naturally the owner of an income-producing asset receives the income and the labourer receives the reward of his labour. Any departure from this order of things, if done with the object of prejudicing the fiscus, is the*

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137 The normality-requirement was introduced by section 17 of Act 78 of 1959.
138 CIR v King 1947 (2) SA 196 (A).
139 ibid at 216 (A).

subject of legitimate objection by the Commissioner, which is met by the machinery of the section.'

The abnormality of means, manners, rights and obligations, is a matter of opinion of the Commissioner, but in terms of sub-section (4) his decision is subject to objection and appeal.

(ii) observations out of Hicklins case

In Hicklin v SIR[140] three observations are made by Trollip J A with regard to s 103 (1) (i) and (ii) of the Act. The first observation is that the inquiry about the normality of a transaction which is an agreement should start with the arms'length criterion postulated in para (ii).[141]

`A few preliminary observations about paras (i) and (ii) of the sub-section. When the "transaction, operation or scheme" is an agreement, ..., it is important, I think, to determine first whether it was one concluded "at arm's length". That is the criterion postulated in para (ii). For "dealing at arms' length" is a useful and often easily determinable premise from which to start the inquiry. It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself. Indeed, in the Afrikaans text the corresponding phrase is "die uiterste voorwaardes beding". Hence, in an at arms'length agreement the rights and obligations it creates are more likely to be regarded as normal than abnormal in the sense envisaged by para (ii). And the means or manner employed in entering into it or

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140 Hicklin v SIR 1980 (1) SA 481 (AD); for a detailed analysis of the case see: Theo van Wyk,`Section 103(1) Hicklin v SIR', in: De Rebus 1980 32.

141 ibid at 494-5.

carrying it out are more likely to be normal than abnormal in the sense envisaged by para (i).'

The second observation of Trollip J A relates to the circumstances surrounding the transaction:[142]

`The next observation is that, when considering the normality of the rights or obligations so created or of the means or manner so employed, due regard has to be paid to the surrounding circumstances. As already pointed out s 103 (1) itself postulates that. Thus, what may be normal because of the presence of circumstances surrounding the entering into or carrying out of the agreement in one case, may be abnormal in an agreement of the same nature in another case because of the absence of such circumstances.'

Considering the facts of the Hicklin-case Trollip J A then held:[143]

`That does not mean, however, that the RN [Ryan Nigel][144] *agreement must be looked at with blinkers on. Indeed, s103(1) itself enjoins the respondent, and hence any Court seized with the problem, to have regard to " the circumstances under which the transaction, operation or scheme was entered into or carried out".'*

His last observation is linked to the conclusion that normality or abnormality is mainly a matter of fact:[145]

`The last observation is that the problem of normality or abnormality of such matters is mainly a factual one. The Court hearing the case may resolve it by taking judicial notice of the relevant norms or

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142 ibid at 495.
143 ibid at 492.
144 Own italics.
145 Hicklin v SIR 1980 (1) SA 481 at 95(AD).

standards or by means of the expert or other evidence adduced thereanent by either party.'

(iii) the arm's length test

Following the observations of Trollip J A I will begin with the **arm's length-test**. It is assumed that parties dealing at arm's length try to achieve the upmost possible advantage out of a transaction for themselves. Because each party knows what is best for itself the rights and obligations created will be regarded as normal.

Section 103(3) especially includes a **deeming provision** which is concerned with the arm's length test. Where a South African resident or a company (which carries on business in the Republic) disposes of shares in a South African company to a non-South African party (either individual or company), the transaction will be deemed to have been **not at arm's length** and as a result of that to be abnormal. For the ease of reference will sub-section (3) be printed here.

(3) For the purpose of sub-section (1) any transaction, operation or scheme (whether entered into or carried out before or after the commencement of the Act) whereby any person (other than a company) who is ordinary resident or carrying on business in the Republic, or any company registered or carrying on business in the Republic, has disposed of shares held by such person or such company in any company registered or incorporated in the Republic to any person (other than a company) not ordinary resident nor carrying on business in the Republic, or to any company registered outside the Republic, shall, unless it is proved to the satisfaction of the Commissioner that the parties are independent persons dealing at arm's length with each other, be deemed to be a transaction, operation or scheme entered into or carried out by means or in a manner not normally employed in the entering into or carrying out of such a transaction, operation or scheme of the nature of the transaction, operation or scheme in question.

This section was introduced to aid the Commissioner in his fight against tax avoidance. It is focused against foreigners and foreign companies that are involved in tax avoidance. As this is only a deeming provision and not a fiction it is up to the foreigner or the foreign company to prove that the parties involved were dealing at arm's length and consequently that the transaction was a normal one.

Still, it must be remembered that the deeming provision only covers the involvement of foreigners and is therefore not applicable to transactions between individuals that are residents of the Republic or companies that carry on business in the Republic.

It is submitted that the arm's length-test is a useful and easily determinable premise from which to start. However, not all parties have an arm's length relationship with each other.[146] In SIR v Geustyn, Forsyth and Joubert a professional partnership was converted into an unlimited liability company, the partners being the sole shareholders of the company. Ogilvie Thompson C J made this remark about `dealing at arm's length':[147]

> *`The criterion of "persons dealing at arm's length" mentioned in sec. 103(1)(ii) is, however, not easy of application in a case such as the present. For the section enjoins the application of that criterion in relation to a transaction, operation or scheme "of the nature of the transaction operation or scheme in question". Yet the Court is in the present case ex hypothesi concerned with partners who have, in the*

146 Trevor Emslie, `Dealing at arm's length', (1988) 3 Tax Planning 127.
147 1971 (3) SA 567 at 574 (AD).

circumstances outlined above, made over their practice, not to an independent third party with whom they would ordinarily deal "at arm's length", but to an unlimited company of which they are the sole shareholders and directors and whereof they have full and complete control.'

In the case of CIR v Louw the court also dealt with the conversion of a partnership into a limited company.[148] After having quoted the passage from Ogilvie Thompson C J above, Corbett J A continued:[149]

`In such a case should the Court, in applying the "normality"yardstick, take account of the special relationship between the erstwhile partners and the company which they have formed, or ignore it and apply the yardstick as though the company were a stranger? I do not see how the Court can ignore this special relationship and yet give proper effect to the concluding words of s 103(1)(ii), viz "under a transaction, operation or scheme of the nature of the transaction , operation or scheme in question" (my italics). For it is of the very nature of the incorporation scheme that the company to which the practice is sold by the partners will have as its shareholders and directors the self-same partners and will be controlled by them. Those are the realities of the situation.'

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148 1983(3) SA 551 (AD).
149 ibid at 574.

Corbett J A then goes on that despite the fact that there was an identity of persons involved - the former partners now being the sole shareholders of the company - there was still an arm's length transaction:[150]

> *`Moreover, it must be borne in mind that in a case such as the present the transaction is a multipartite one to which all the partners and the company are partners; and each partner contracts both with the company and his fellow partners and seeks to extract from the transaction the best possible advantage for himself.'*

I humble submit that this is **not** correct. The reason therefore is the following. A party is at arm's length with another if he is away from close contact or familiarity.[151] Where parties stand in an ongoing relationship with each other they are no longer at arm's length. Partners in a partnership that is subsequently converted into a company are in an ongoing relationship and are therefore not in an arm's length position. In the result however the case is decided correctly, as even persons not dealing at arm's length can still enter into `normal' bona fide business transactions.

(iv) circumstances

Taking the second observation of the Hicklin-judgement into account one has to consider the **circumstances** of the case. This criterion has caused a lot of head-aches as it makes the normality-requirement **ambiguous**. It is logically inconsistent to apply an objective test by looking at rights and obligations created at arm's length and then to take the peculiar facts of a scheme into account.

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150 ibid at 574.

151 Oxford Dictionary Volume I.

Silke suggests that the circumstances should only be taken into consideration in para (i) and not in para (ii):[152]

> *`How can a transaction be required to be "at arm's length" having regard to the circumstances that are anything but "at arm's length"? For example, having regard to the relationship between a man and his company or between a man and his son, many features of a transaction may be quite normal that would be abnormal between independent parties. The view that the phrase "having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out" refers only to s 103(1)(b)(i) and not(ii) would resolve the problem, since the question would then merely be whether the rights or obligations concerned are normal as between persons dealing at "arm's length". Unfortunately, however, the present wording of s 103(1)(b) makes it altogether clear that the quoted phrase applies both to s 103 (1)(b)(i) and (ii).'*

Silke himself points out that the present wording demands the circumstances to be considered both for the means and manner in which a transaction is entered into and for the rights and obligations created in an arm's length transaction.

A possible solution might be found in the new s 73 of the V.A.T.-Act. The section reads as follows:

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152 Silke, supra, para 19-29.

Schemes for obtaining undue tax benefits

73.(1) Notwithstanding anything in the Act, whenever the Commissioner is satisfied that any scheme (whether entered into or carried out before or after the commencement of this Act, and including a scheme involving the alienation of property) -

(a) has been entered into or carried out which has the effect of granting a tax benefit to any person; and

(b) having regard to the substance of the scheme -

(i) was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of the tax benefit; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm's length; and

(c) was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit,

the Commissioner shall determine the liability for any tax imposed by this Act, and the amount thereof, as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminuation of such tax benefit.

It will be seen that the `circumstances'-requirement has been substituted by the `substance'-requirement. The introduction of a new anti-avoidance provision is to be appreciated. The section is a direct response to some of the recommendations made by the Margo-Commission.[153]

(v) transaction, operation or scheme of the nature of the transaction, operation or scheme in question

Another difficulty within the normality-test is the term `**transaction, operation or scheme of the nature of the transaction, operation or scheme in question**'. This difficulty has been addressed by Corbett J A in Louw's case:[154]

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153 The Insertion of general anti-avoidance provisions in all fiscal legislations, para 27.29

154 CIR v Louw 1983(3) SA 551 at 574 (AD).

> *`I do not see how the Court can ignore this special relationship (not an arm's length relationship)*[155] *and yet give proper effect to the concluding words of s 103(1)(ii), viz "under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question".'*

De Koker and Urquhard suggest solving the problem by giving the words "of the nature of the transaction, operation or scheme" in para (ii) a certain connotation:[156]

> *`The only possible method of resolving the ambiguity, it is considered, lies in regarding the words "of the nature of the transaction, operation or scheme", as referring in general terms to the transaction, which is implicitly regarded as taking place at arm's length.'*

This ambiguity was solved in s 73 of the V.A.T.-Act by simply omitting the term `transaction, operation or scheme of the nature of the transaction, operation or scheme in question'.

(vi) ordinary business man-test

Thus, if the arm's length test is not the standard test for normality which other test should be applied? In ITC 1113 the `**ordinary business man'-test** has been applied by Watermeyer J. The test has been slightly modified for s 73 of the

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155 Own italics by author.
156 De Koker & Urquhart, supra, para

V.A.T.-Act. The relevant test is now the `**bona fide business purpose'-test**. As this section is a quite young one it first has to earn its merits in practice.
It is noteworthy that the tax planning branch has long ago adopted the `bona fide business purpose'-test. Broomberg in his book on tax strategy made this remark with regard to a successful defence against an attack under the normality-requirement:[157]

> *`From the point of view of the tax planner, however, the approach is clear. If a transaction is proposed, which will have the effect of tax avoidance, and the planner is relying on the normalcy test to defeat an attack by the Commissioner, the planner should be able to account for each right and each obligation created by the transaction, by way of providing a* ***sound business purpose*** *for such right or obligation. The planner should test his proposed contract by asking the following question: leaving aside altogether for the moment the tax effects of this particular clause, can the provisions of this clause be justified on commercial grounds? A negative answer must make the transaction vulnerable to attack under the provision of s 103(1), if all other requirements of the section are present.'*

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157 Broomberg, supra, at 213-214.

5 Utilisation of assessed losses s 103(2)

The Income Tax Act entertains with s 20 a provision that allows the taxpayer to set off an assessed loss against income from trade under certain conditions. An assessed loss occurs where the allowable deductions under ss 11 - 19 in one year exceed the income of the taxpayer.[158] Section 20 further provides that the assessed loss may be carried forward to the next or subsequent tax years in order to be set off against income in that year. The following constellations are possible in regard to the balance of the assessed loss.

`Whenever there has been a trading loss in the tax year, or where there has been a balance of assessed loss brought forward from the previous year, there has to be a determination of the balance of the assessed loss to be carried forward into the next year. There may have been a profit in the tax year, but not large enough to obliterate the balance of assessed loss carried over from the previous year. Then the new balance of assessed loss will be smaller than the previous one. If there has been a working loss in the tax year the balance to go forward will be increased. If there has been no previous balance the assessed loss in the tax year will be the balance of assessed loss carried forward.'[159]

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158 Section 20 (2) provides a definition of assessed loss:
(2) For the purpose of this section "assessed loss" means any amount, as established to the satisfaction of the Commissioner, by which the deductions admissible under sections *eleven* to *nineteen*, inclusive, or the corresponding provisions of any previous Income Tax Act exceeds the income in respect of which they are so admissible, or, if the context so requires, means an assessed loss as determined under the provisions of section *thirty* or the corresponding provisions of any previous Income Tax Act.

159 CIR v Louis Zinn Organisation (Pty) Ltd 1958 (4) SA 477 at 485.

It should be noted that the carry forward is from "the preceding year". Where in a particular year no balance of assessed loss is determined in preparation for future use, there cannot be, in the next year, a looking back to the past. [160] It follows that if the business is making no profits a large assessed loss is built up. This does not concern Revenue as far as individuals are concerned because assessed losses are not transferable. But where on the other hand a company is involved is the situation a different one. A company is a separate entity distinct from its members.[161] Where a company has accumulated an assessed loss it can be `transferred' by passing ownership in the company through the sale of the shares.[162] The new owner of the company then channels income through the acquired company in order to absorb the assessed loss. This "trafficking" in companies with accumulated assessed losses is the raison d'etre for the enactment of s 103(2). The sub-section reads as follows:

> **(2)Whenever the Commissioner is satisfied that any agreement affecting any company or any change in the shareholding in any company or in the members' interest in any company which is a close corporation, as a direct or indirect result of which income has been received by or has accrued to that company during any year of assessment, has at any time before or after the commencement of the Income Tax Act, 1946, been entered into or effected by any person solely or mainly for the purpose of utilizing any assessed loss or any balance of assessed loss incurred by the company, in order to avoid liability on the part of that company or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set-off of any such assessed loss or balance of assessed loss against any such income shall be disallowed.**

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160 New Urban Properties v SIR 1966 (1) SA 217 at 224 (AD).

161 Salomon v Salomon & Company Ltd [1897] AC 22; Cilliers and Benade, Company Law 4ed. at 10.

162 Donald M Steward, `The Prohibition of Tax Avoidance: an Evaluation of s 103 of the South African Income Tax Act (No 58 of 1962), in CILSA 1970 168 at 189.

The section can be dissected into three parts. Its three parts have been listed in ITC 1123 as follows:[163]

`An assessed loss must be disallowed by the Commissioner if he is satisfied -

a) that any agreement has been concluded affecting any company, or that a change in the shareholding of a company has taken place;
b) that as a direct or indirect result thereof income has been received by or accrued to that company during the year of assessment; and
c) that the agreement was concluded or the change in shareholding effected solely or mainly for the purpose of utilizing any assessed loss incurred by the company in order to avoid liability on the part of the company or any other person for the payment of income tax.

a) First requirement

For the first requirement to be fulfilled there has to be an agreement affecting the company or a change in shareholding. Although the section applies in the alternative it is in practice the change in shareholding which is more common.[164] The enquiry whether or not a change in share-holding has taken place is a factual one.[165] The change of the members' interests in a close corporation additionally covered by the section.

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163 ITC 1123 (1968) 31 SATC 48 at 49-50; see also ITC 1388 (1983) 46 SATC 126 at 130-131.

164 Only the Glen Anil case is concerned with an arrangement while all other cases deal with a change in shareholding. For a detailed list of cases see: De Koker, A.P. & Urquhart,supra, Vol I, para 26-23 Fn. 110.

165 ITC 1123 (1969) 31 SATC 48 at 52.

(i) change in shareholding necessary?

Prior to its amendment there existed some doubt whether the section could be invoked where there was no change in shareholding.[166] The wording of the corresponding s 90 (1)(b) of the 1941 Act read like this:[167]

"Whenever the Commissioner is satisfied... that any agreement or any change in shareholding in any company, as a direct or indirect result of which income has been recieved by or has accrued ... to <u>any company</u>.

The words "any company" have been replaced by the words "that company". This change in wording created an obscurity in the s 90 (1) (b) which has been carried forward in the re-enactment of that section by s 103 (2).[168]

`The words "that company" clearly refer to the company in the shareholding in which there was a change and, as the words "any agreement" are not related to any company, the words cited above in relation to "any agreement" do not make sense.'

This obscurity was solved by Botha by simply adding the words `affecting any company':[169]

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166 See : Section 103(2) - Is a change in shareholding required? (1987) The Taxpayer 226.

167 The section was introduced by s 20 of Act 55 of 1946.

168 Glen Anil Development Corp. v SIR 1975 (4) SA 715 at 728 (AD).

169 ibid at 729 (AD).

`... it seems clear that in the case of an agreement it can only be a company having an assessed loss, which is affected by or concerned with the agreement, and which receives any income resulting therefrom, that the Legislature could have had in mind. If, therefore the words "any agreement" in the opening words of that section were construed as if the words "affecting any company" were inserted after the words "any agreement", as I think they should be, the opening words of the section would make sense and would give effect to what in my view the Legislature intended.'

The proposed interpretation of Botha has been enacted in s 103(2) by s 14 of Act No.101 of 1978.

(ii) agreement affecting any company

(1) agreement

In the case of CIR v Ocean Manufacturing Ltd the term "agreement" turned out to be the pivot of the defence against the Commissioner's attack.

The facts were as follows. A company had been the subject of a reverse take-over agreement in order to obtain a `back-door listing' on the Johannesburg Stock Exchange. The parties involved entered into a take-over agreement and a transfer agreement. The taxpayer argued that only the merger-agreement was relevant. As far as the merger-agreement was concerned it was possible for the taxpayer to prove that the assessed loss was not the sole or main purpose for entering into the above agreement. The council for the taxpayer (Model Homes) argued that `in legal form' Model Homes was not a party to the merger-

agreement, but only to the transfer-agreement. Effectively, however, from an economic and business point of view there was only one transaction.
Nicholas AJA, disturbed by councel's argument, delivered the judgement of the Appellate Division:[170]

`I am at a loss to understand all this. The word agreement as used in s 103(2) connotes a contract, that is, an agreement which is legally binding and enforceable between the parties. Any implication that an agreement `in legal form' is something less than or different from such an agreement, is to be rejected.'

(2) agreement affecting any company

The alternative argument advanced by councel was that the expression `any agreement affecting any company' is restricted to an arrangement which affects the control of the company or one which affects any person's right to participate in the profits or dividends of the company. Nicholas was not impressed by this argument and based his opposing judgement on two old quotes of Innes CJ:[171]

`In my opinion there is nothing to warrant that interpretation. Any is "a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited." (per Innes in R v Hugo[172])`In its natural and ordinary sense, any - unless restricted by the context - is an indefinite term which includes all of the things to which it relates.'(per Innes in Hayne & Co v Kaffrarian Steam Mill Co Ltd[173]).

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170 CIR v Ocean Manufacturing Ltd 1990 (3) SA 610 at 618 (AD).
171 ibid.
172 1926 AD 268 at 271.
173 1914 AD 363 at 371.

It is submitted that the first requirement is of a very wide ambit in order to bring almost all transactions of a company with an assessed loss into the focus of s 103(2).

b) Second requirement

Insofar as the second requirement is concerned there has to be some income received by or accrued to that company as a direct or indirect result of the agreement or the change in shareholding. The receipt or accrual of income is again a matter of fact.[174]

(i) diverted and own income

In ITC 1123 a company which had previously been engaged in manufacture became unable to pay its debts and went into liquidation.[175] The liquidators disposed of all the movable assets and only the immovable property remained. An entrepreneur acquired the company (the remaining piece of property) with its assessed loss and revived the business. The new income produced fell into two categories. a) Income received from connected companies and; b) Income produced by transactions with outside parties.

The appellant submitted that the set-off of the income from connected companies was correctly disallowed, as this income was diverted to the company by the entrepreneur from other companies controlled by him in order to avoid tax. However, where the company had earned income as a result of better

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174 De Koker & Urquhart, supra, Vol I, para 26-23.

175 ITC 1123 (1968) 31 SATC 48.

management or business efficiency introduced by the new majority-shareholder the set-off must be allowed.[176] Trollip J. disagreed:

`That the section was intended to apply where income was diverted from another person to a company in order to avoid liability for tax on the part of that person is clear from its very language. But its wording is wide and there is no warrant for limiting its application to such cases. It refers in the first place to `income ... received by or ... accrued to that company during any year of assessment..'. That is wide enough to include income produced by its own activities in contradistinction to income diverted to it. Secondly the section speaks of avoiding liability for tax `on the part of that company' in addition to and in contradistinction to avoiding liability for tax `on the part of ... any other person'; that shows that not only diverted income but income produced by the company's own activities can fall within the ambit of the section if its other requirements are fulfilled.'

(ii) fatal interruption

In New Urban Properties v SIR a company which was involved in land-dealing went completely insolvent and had an accumulated assessed loss of a few hundred thousand Rand.[177] The shares of the company were taken over by individuals who were also involved into land-dealing. They intended to use the assessed loss in order to set off income channelled through the company with the assessed loss. It was admitted on behalf of the taxpayer that tax avoidance was the main purpose. Nevertheless, it was contended by the taxpayer that even

176 ITC 1123 (1968) 31 SATC 48 at 51; see also ITC 1388 (1983) 46 SATC 126 at 131.

177 New Urban Properties v SIR 1966 (1) 217 (AD).

though the assessed loss was not available in this particular year for set off against the channelled income it would be available for set off against future income.[178] The Appellate Division disagreed. Where s `103(2) applies the `tainted' income resulting from the transaction in question will not be allowed to be set off against the assessed loss.[179] Furthermore, if the assessed loss cannot be set off and balanced in any particular year, there is then no "balance of assessed loss which has been carried forward from the preceding year of assessment"; in other words, the essential continuity is **fatally interrupted.**[180] The fatal interruption is similar to a company which did not carry on trade in a particular year.[181] It follows that if the company doesn't earn any `untainted' income its assessed loss is irretrievably lost.

To overcome this problem from a tax planning point of view it is suggested by Broomberg that the target company is left in possession of some pre-existing assets which are capable of generating `untainted' income,[182] This income can then be regarded as an `insurance policy' in order to escape the consequences of a successful attack of the Commissioner under s 103(2) and consequently keeps the assessed loss alive. It is possible therefore for a company to be issued with two assessments; one reflecting the income which is not set off in cause of the interruption by s 103(2) and the other which is set off against the assessed loss.[183]

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178 ibid at 223.
179 ibid at 224.
180 ibid at 224.
181 S.A. Bazaars (Pty) Ltd v CIR 1952 (4) SA 505 at 510-511 (AD); see also Sub-Nigel Ltd v CIR 1948 (4) SA 580 at 589-590; were a company carried on trade but didn't earn income.
182 Broomberg, supra, at 219.
183 De Koker, Urquhart, supra, Vol I, para 26-24.

c) Third requirement

The point at issue is whether the agreement had been entered into solely or mainly for the purpose of utilizing any assessed loss in order to avoid liability for the payment of tax. The Legislature aimed s 103(2) at an agreement or a change in shareholding which has as its sole or main purpose the avoidance of tax. This criterion is accordingly the hurdle which will decide the majority of cases in regard to s 103(2).

(i) presumption

The purpose element must be read together with sub-section (4) of s 103. The sub-section presumes that the sole or main purpose of utilising an assessed loss is to avoid tax. For ease of reference s 103(4)(b) is set out below:

(4) Any decision of the Commissioner under subsection (1), (2) or (3) shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the transaction, operation, scheme agreement or change in shareholding or members` interests in question would result in the avoidance or the postponement of liability for payment of any tax, duty or levy imposed by this Act or any previous Income Tax Act or any other law administered by the Commissioner, or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved -

(a) ....

(b) in the case of any such agreement or change in shareholding or members` interests, that it has been entered into or effected solely or mainly for the purpose of utilizing the assessed loss or balance of assessed loss in question in order to avoid or postpone such liability or to reduce the amount thereof.

Once it is shown to the satisfaction of the Commissioner that the arrangement or change in shareholding would result in tax avoidance it is up to the taxpayer to discharge the onus which is placed upon him in terms of s 103(4)(b). The problem of the onus will be discussed at a later stage.

(ii) purpose

For analysing the purpose - element one has to look at the intention of the taxpayer at the time of entering into the agreement.[184] Thus the test to apply is a subjective one. Where the dominant motive is one other than the avoidance of tax, the section will not apply.[185]

(1) to avoid liability for tax

As the meaning of the words is identical to the wording in s 103(1) may I refer to the above made observations. A typical example of a case where the sole or main purpose was the avoidance of tax is the one of New Urban Properties v SIR.[186] Because the company was dormant and as a result of its enormous deficit and complete lack of funds it was impossible to imagine how the company could have traded at present or in the future.[187]

(2) sound business purpose

Where sound business decisions govern the agreement or the change in shareholding s 103(2) can't be invoked as the main reason would then be a commercial one and not the avoidance of tax.[188] For that reason s 103(2) can't be invoked, where the main reason is to obtain company's assets, goodwill, trade-marks, permits and the like.[189] Finally it should be noted that only when all three requirements are met can s 103(2) be invoked.[190]

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184 ITC 1388 Vol 46 (1984) 126 at 132.
185 ITC 1388 Vol 46 (1984) 126 at 133.
186 1966 (1) SA 217 (AD).
187 New Urban Properties v SIR 1966 (1) SA 217 at 222 (AD).
188 See i.e.: ITC 983 (1961) 24 SATC 705; ITC 989 (1961) 25 SATC 122; ITC 1347 (1981) 44 SATC 33.
189 Meyerowitz and Spiro, supra, para 1621.
190 De Koker and Urquhart, supra, Vol I, para 26-23.

(iii) differences to s 103 (1)

The obvious difference between the two sections lies in the absence of the normality-requirement in s 103(2). A further point of distinction is the fact that s 103(2) does not refer to the postponement of a liability. The word "postpone" in relation to s 103(2) appears only in section 103(4).[191]

(iv) can s 103(1) be invoked instead of s 103(2)

A question which hasn't received much attention yet is whether a transaction must be attacked under s 103(2) or if the Commissioner can apply s 103(1)? In other words can s 103(1) be invoked to prevent the set-off of an assessed loss. South African Courts have not yet been asked to decide this question. Silke is of the opinion that the Commissioner could also make use of the general anti-avoidance provision in order to set aside an assessed loss.[192] It is submitted that this is correct, especially as the wording `sole and main purpose' has been changed in both sub-sections into `solely or mainly'.

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191 `Assessed Losses and Section 103(2)', (1987) 26 Income Tax Reporter 119 at 121.

192 Silke, Tax Avoidance and Assessed Losses, (1977) 16 Income Tax Reporter 94 at 95-96; Silke, supra, para 19-37 and 19-38.

6 S. 103 (5) The swopping of dividends and interests

This sub-section is different to s 103(1) and (2) as it is a special anti-avoidance provision and not a general one. It is focused at the cession of interest income in exchange for receiving dividend income. The subsection reads as follows:

(5)(a) Where under any transaction, operation or scheme any taxpayer has ceded his right to receive any amount of interest in exchange for any amount of dividends, and in consequence of such cession the taxpayer`s liablilty for normal tax, as determined before applying the provisions of this subsection, has been reduced or extinguished, the Commissioner shall determine the liability for normal tax of the taxpayer and any other party to the transaction, operation or scheme as if such cession had not been effected.

(b) Paragraph (a) shall be deemed to have come into operation on 22 December 1988 and shall apply -

(i) to any transaction, operation or scheme concluded on or after that date; and

(ii) to any transaction, operation or scheme concluded before that date, if the taxpayer is at liberty to terminate the operation of such transaction, operation or scheme without incurring liability for damages, compensation or similar relief.

The special anti-avoidance provision is deemed to have come into operation on 22 December 1988.[193] Thus all relevant transactions **on or after** this date will fall foul of this sub-section.[194] Furthermore, will this section apply in respect of accruals **before** this date where the taxpayer can terminate the scheme without incurring any liability.[195] Three conditions have to be met in order for s 103(5) to apply:[196]

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193 Section 103 (5)(b).

194 Section 103 (5)(b)(i).

195 Section 103 (5)(b)(ii).

196 The conditions have been summarized by De Koker and Urquhart, Vol I para 26-24.

(a) the taxpayer has ceded his rights to receive any amount of interest in exchange for any amount of dividends

(b) the cession has taken place under any transaction, operation or scheme; and

(c) in consequence of the cession the liability of the taxpayer for normal tax, determined before applying this section, has been reduced or extinguished.

This special anti-avoidance provision has been enacted to attack a certain form of tax avoidance where the parties involved in the scheme were companies and insurers. The scheme only functioned as a result of peculiar features with regard to the participants of the scheme. On the side of the company it is the fact that it is not liable for dividend income but for interest income. The peculiar feature of the insurer is that his investment income is immaterial for tax purposes and that its rate of tax is lower than that of companies. By the dividend-interest swop the company was able to reduce its tax liability for taxable interest-income. The insurer shared a certain portion of the tax saved as `bonus' for his trouble.[197] As the section came retrospectively into effect it immediately put an stop to the divident-interest swops.

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197 (1989) 38 The Taxpayer 1 at 2; `Voiding Tax Avoidance: Another Press Release'.

7 Onus of proof

A question of immense practical importance is that of onus with respect to the avoidance of tax. Although s 103(4) includes a presumption as to the purpose-element and s 103(3) includes a presumption concerning an arm's length transaction with foreigners, the question of the burden of proof is not expressly dealt with in the section.

a) Onus on the Commissioner?

Certain academic writers have expressed the opinion that the onus of proof lies on the Commissioner.[198] The argument advanced is that it would have been entirely redundant to make any provision in s 103 where the onus of proof already lies on the taxpayer in terms of the general provision of s 82 of the Act.[199] The Appellate Division hasn't yet dealt with the problem expressly .

b) Onus on the taxpayer

I respectfully disagree with the above mentioned authors. Where the Legislature intended to shift the general onus (s 82) from the taxpayer to the Commissioner it has to do so in clear language. The mere fact that s 103(4) includes a presumption in favour of the Commissioner does not change the onus. It simple creates an additional onus for the taxpayer.[200] A shifting of the onus would also be contrary to the intention of the anti-avoidance provision to attack schemes that

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198 Meyerowitz and Spiro, supra, para 1623; De Koker & Urquhart,supra, Vol I, para 26-25.

199 Meyerowitz and Spiro, supra, para 1623 Fn 44.

200 De Koker & Urquhart, supra, Vol I,para 26-25.

are entered into to the detriment of the fiscus. The wording of the section chosen doesn't speak of onus but of a state of mind (satisfaction) of the Commissioner. To find this satisfaction the Commissioner ascertains the liability for tax with and without the scheme.[201] In his calculations he takes into account the tax affect on third parties involved into the scheme as well. Where he finds that less tax is payable in consequence of the implementation of the scheme his `initial' hurdle of investigation is overcome.

c) Discharge of onus

In order to decide whether or not the taxpayer has discharged the onus of proof his intention and ipse dixit must be looked at. While objectively reviewing the relevant facts the court has to take the circumstances into consideration.[202] Whether the onus has been discharged or not has to be established on the balance of probability.[203] Where the court has no reason to disbelieve the evidence brought forward by the taxpayer and his evidence is not contradicted by objective facts, then the taxpayer has discharged the onus borne by him.[204] In ITC 1178 this was said in the matter of the onus:[205]

> *`In assessing this evidence and determining whether the onus cast upon appellant in regard to this issue has been discharged or not, the question is not so much whether the reasons or purposes advanced by*

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201 Broomberg, supra, at 215.
202 ITC 1185 35 SATC (1973) 122 at 123.
203 Reliance Land & Investment Co (Pty) Ltd v CIR 14 SATC 47.
204 CIR v Middelman 1991 (1) SA 200 at 203-204.
205 ITC 1178 at 35-36.

the witnesses for the formation and carrying out of the scheme - and for doing this at the time when they did - are logically watertight as whether they were, as a matter of probability, the main purposes which the appellant - or, more precisely, its directors - in fact had in mind when the scheme was formulated and carried out. Naturally the logical cogency of the alleged purposes play an important role in determining what the true purposes were - since the less cogent they are the less acceptable becomes the assertion that they were the true motivating causes - but this cannot be allowed to obscure the real inquiry, which is as to the actual state of mind of appellant's directors at that time. Another point of importance in this connection is that these purposes must be considered in their cumulative effect.'

Taxpayers have been quite successful in the past in contests with the Commissioner based on s 103(2). Where the taxpayer could show that there was a sound commercial reason for the acquisition of a company with an assessed loss he will resist the Commissioner's attack. Such good reasons are to obtain the company's assets, trade-marks, permits and the like.[206] The position of the taxpayer is a more difficult one, where the target company is not in the line of the his business.

It is submitted that it is much easier for the Commissioner to succeed, as the Court only needs to reach a conclusion that is reasonable in the circumstances, while the taxpayer has to go further to a point of satisfying the Court on a balance of probabilities and credibility.[207]

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206 Meyerowitz and Spiro, supra, para 1621.

207 Peter Surtees, `A Question of Onus', (1991) 30 Income Tax Reporter 114 at 118.

8 Consequences

Once the Commissioner is satisfied that all requirements of s 103 are met various options are given to him. He can treat the scheme in such a manner as in the circumstances of the case he deems appropriate. He can even ignore the transaction completely and ascertain the tax as if the transaction hasn't been entered into.[208] Nevertheless, the transaction remains valid and enforcable between the parties to it.[209] The Commissioner is precluded from arguing the applicability of s 103 where he hasn't formed an opinion on the various matters.[210] The taxpayer should therefore be adviced in the assessment notice or another appropriate manner that the Commissioner has applied a certain section.[211] It must be kept in mind that all requirements must be fulfilled before the transaction may be wholly or partly ignored. In cause of a change in wording the Commissioner `must' invoke s 103 were all requirements are met. While s 90 of the Act of 1941 gave the Commissioner a discretionary power with the word `may' speaks s 103 now of `shall'.[212] An important limitation of the Commissioner's powers is found in ITC 963.[213] The ratio of this case is that the Commissioner cannot apply the provisions of s 103 so as to collect more tax than would have been assessable if there had been no transaction. If the Commissioner attempts to increase tax by applying s 103 he will consequently loose, unless `the taxpayer bungles the job'.[214]

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208 Section 103(1).

209 Meyerowitz and Spiro, supra, (n14) para 1612.

210 ITC 1274 (1978) 40 SATC 185 at 197.

211 Natal Estates v CIR 1975(4) SA 177 at 208 (AD); This case dealt with s 79 and not s 103.

212 The wording of s 90 was changed by s 17 of Act No. 78 of 1959; even under the discretionary power of s 90 was `may' interpreted as a `must'. See CIR v King 1947 (2) SA 196 at 209-210.

213 ITC 963 (1961) 24 SATC 705.

214 Broomberg at 218.

All the taxpayer has to loose under a successful attack of the Commissioner under s 103 is, at worst, that he has to pay the tax that would have been due in any way.[215] Besides that he has to cover the costs of the unsuccessful implementation of the scheme.

The ballgame is a different one where the Commissioner has successfully launched an attack under s 103(2). All income resulting from the attacked transaction will be treated as `tainted' income and not be allowed for set off against the asssessed loss. Furthermore, the assessed loss is irretrievably lost when the company hasn't earned any other `untainted' income. This are the consequences as a result out of the twin-ruling of the Appellate Division in SA Bazaars and New Urban Properties.[216]

The impact of this rulings is by-passed where the company has some `untainted' source of income. Broomberg's tax planning advice is therefore the following:[217]

> *`It follows, that when a planner is negotiating a contract that involves a change in shareholding in a company with an assessed-loss company, it is essential that the target company be left in possession of some pre-existing assets which are capable of generating `untainted' income. This is an insurance policy.'*

The consequence of the existence of untainted income is that although the set off of tainted income will be disallowed, the set off of untainted income has to be allowed and the assessed loss will be conserved for future set offs. The affect of the successful application of s 103(2) will therefore be nil.

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215 Report of the Margo Commission at para 27.28(b). Phillip Haupt, `The Commissioner's remedy', (1987) 2 Tax Planning 93 at 93.

216 SA Bazaars v CIR, 1952 (4) SA 505 (AD); New Urban Properties v SIR, 1966 (1) SA 217 (AD).

217 Broomberg, tax Strategy at 219.

As a result of the recommendations of the Margo - Commission certain changes have been implemented in the V.A.T.- Act.[218] The Commissioner is now entitled, for example, by s 62 of the V.A.T.-Act to publish by notice in the Gazette a list of names of persons who have been convicted of tax evasion. The amount of the fine has been increased to R 10.000.

It appears to me that tax evasion is still treated as `gentlement's crime'. The Legislature seems to have lost the sight for proportions and reality. Insider dealing, for example, can now be punished with a fine of up to R 500.000. It is questionable if a total amount of money serves the purpose at all, or if rather a triple amount of the avoided tax would be more threatening. As this is a political and not a legal question its answer has to be found in Parliament.

Finally it is noted that every decision of the Commissioner is subject to objection and appeal.[219]

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218 Report of the Margo Commission at para 27.34.

219 Section 103(4).

9. Conclusion

A distinction must not only be drawn between tax evasion and tax avoidance but also between tax avoidance and tax mitigation. Only in cases of tax mitigation is the taxpayer enjoying the freedom of choice to enter into proper transactions to minimize his burden of tax. The interpretation of s 103 follows general rules of interpretation. However, the applicability of the contra fiscum rule should be limited following the English Jurisdiction in order to provide a remedy against the mischief the section was enacted for by Parliament.

The first element of s 103(1) has to be understood very widely in order to give the anti avoidance provision a broad application. The wording of sub-section (1) makes it clear that the effect and the purpose of a transaction must be distinguished contrary to foreign anti avoidance provisions. This distinction has caused certain problems in the past but they were overcome by reason of amendments made to the section.

The crux of s 103(1) is the normality requirement. The arm's length test, also easily to establish, is not the standard test as it only covers certain situations.

Insurmountable difficulties within the normality requirement are created by the `circumstances' and the term `transaction of the nature of the transaction in question'. A new approach is found in s 73 of the V.A.T.-Act. The same section also provides a new test of normality - the bona fide business purpose test. The utilization of assessed losses for purposes of tax avoidance is covered by s 103(2). Although the first element is set out in the alternative it is the change in shareholding which is more common. The income received can be diverted or own income. Where sound business purposes dominate an arrangement the attack of the Commissioner will be resisted successfully.

The onus of proof lies on the taxpayer and not on the Commissioner. The consequences of a successful attack under s 103(1) are not so dramatic for the taxpayer as only the tax due has to be paid. Where on the other hand section 103(2) can be invoked successfully by the Commissioner the assessed loss might be at stake. When the taxpayer doesn't have an `insurance policy' in form of `untainted' income his assessed loss will be irretrivably lost. The South African anti avoidance provision s 103 is in its application alike an old, but experienced tiger. When it comes to the consequences of the encounter it is more a paper tiger.

Appendix I Amendments & s 73 V.A.T. - Act

s 90 of Act No. 31 of 1941

s 20 of Amendment Act No. 55 of 1946

s 17 of Amendment Act No. 78 of 1959

s 103 of Act No. 58 of 1962

s 14 of Amendment Act No. 101 of 1978

s 37 of Amendment Act No. 121 of 1984

s 19 of Amendment Act No. 70 of 1989

Transactions or operations designed to avoid liability for or reduce amount of tax.

90. Whenever the Commissioner is satisfied that any transaction or operation has been entered into or carried out for the purpose of avoiding liability for the payment of any tax imposed by this Act, or reducing the amount of any such tax, any liability for any such tax, and the amount thereof, may be determined, and the payment of the tax chargeable may be required and enforced, as if the transaction or operation had not been entered into or carried out: Provided that any decision of the Commissioner under this section shall be subject to objection and appeal, and in any proceedings relating thereto, whenever it is proved that the transaction or operation in question would result in the avoidance of liability for the payment of any such tax, or in the reduction of the amount thereof, it shall be presumed, unless the contrary is proved, that the transaction or operation was entered into or carried out for the purpose of avoiding such liability or of reducing such amount.

Transaksies of handelings met oogmerk om belastingpligtigheid aan belasting te ontduik of bedrag van belasting te verminder.

90. Wanneer die Kommissaris oortuig is dat een of ander transaksie of handeling aangegaan of uitgevoer is met die oogmerk om aanspreeklikheid vir die betaling van 'n deur hierdie Wet opgelegde belasting te ontduik, of om die bedrag van 'n sodanige belasting te verminder, kan belastingpligtigheid aan so 'n belasting, en die bedrag daarvan, vasgestel word, en die betaling van die hefbare belasting kan vereis en afgedwing word, asof die transaksie of handeling nie aangegaan of uitgevoer was nie: Met dien verstande dat 'n beslissing van die Kommissaris ingevolge hierdie artikel aan beswaar en appèl onderhewig is, en dat dit in enige verrigtings met betrekking daartoe, wanneer dit bewys word dat die betrokke transaksie of handeling die ontduiking van aanspreeklikheid vir die betaling van sodanige belasting of die vermindering van die bedrag daarvan tot gevolg sou hê, vermoed word, tensy die teendeel bewys word, dat die transaksie of handeling aangegaan of uitgevoer is met die oogmerk om sodanige aanspreeklikheid te ontduik of om sodanige bedrag te verminder.

Substitution of section 90 of Act 31 of 1941.

20. (1) The following section is hereby substituted for section *ninety* of the principal Act :

"Transactions, operations or schemes for purpose of avoiding liability for or reducing amounts of taxes on income.

90. (1) Whenever the Commissioner is satisfied—

(*a*) that any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act) has been entered into or carried out for the purpose of avoiding liability for the payment of any tax, duty or levy on income (including any such tax, duty or levy imposed by a previous Act) or reducing the amount thereof, and has the effect of avoiding liability for the payment of any tax, duty or levy on income or of reducing the amount thereof, the liability for any tax, duty or levy on income and the amount thereof may be determined as if the transaction, operation or scheme had not been entered into or carried out ;

(*b*) that any agreement or any change in the shareholding in any company, as a direct or indirect result of which income has been received by or has accrued or has under section *thirty-six* been apportioned to any company during any year of assessment, has at any time before or after the commencement of the Income Tax Act, 1946, been entered into or effected by any person solely or mainly for the purpose of utilizing any balance of assessed loss incurred by the company, in order to avoid liability on the part of any person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set-off of any such balance against any such income may be disallowed.

(2) Any decision of the Commissioner under subsection (1) shall be subject to objection and appeal, and in proceedings relating thereto, whenever it is proved that the transaction, operation, scheme, agreement or change in shareholding in question would result in the avoidance of liability for payment of any tax, duty or levy on income or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved—

(*a*) in the case of any such transaction, operation or scheme, that it was entered into or carried out for the purpose of avoiding such liability or of reducing the amount thereof ; and

(*b*) in the case of any such agreement or change in shareholding, that it has been entered into or effected solely or mainly for the purpose of utilizing the balance of assessed loss in question in order to avoid such liability or to reduce the amount thereof.".

Vervanging van artikel 90 van Wet 31 van 1941.

20. (1) Artikel *negentig* van die Hoofwet word hiermee deur die volgende artikel vervang :

„Transaksies, handelings of skemas met oogmerk om belastingpligtigheid ten opsigte van belasting op inkomste te ontduik of bedrag van belasting te verminder.

90. (1) Wanneer die Kommissaris oortuig is—

(*a*) dat een of ander transaksie, handeling of skema (onverskillig of dit voor of na die inwerkingtreding van hierdie Wet aangegaan, verrig of uitgevoer is) aangegaan, verrig of uitgevoer is met die oogmerk om aanspreeklikheid vir die betaling van 'n belasting of heffing op inkomste (met inbegrip van so 'n belasting of heffing deur 'n vorige Wet opgelê) te vermy of om die bedrag daarvan te verminder, en die uitwerking het dat dit aanspreeklikheid vir die betaling van 'n belasting of heffing op inkomste vermy of die bedrag daarvan verminder, dan word die belastingpligtigheid ten opsigte van enige belasting of heffing op inkomste, asook die bedrag daarvan vasgestel asof die transaksie, handeling of skema nie aangegaan, verrig of uitgevoer is nie ;

(*b*) dat een of ander ooreenkoms of een of ander verandering in die hou van aandele in 'n maatskappy, as 'n direkte of indirekte gevolg waarvan inkomste gedurende 'n jaar van aanslag ontvang is deur of toegeval het of kragtens artikel *sewen-en-dertig* toegedeel is aan 'n maatskappy, te eniger tyd voor of na die inwerkingtreding van die Inkomstebelastingwet, 1946, deur enige persoon aangegaan of teweeggebring is, uitsluitlik of hoofsaaklik met die oogmerk om 'n balans van vasgestelde verlies wat die maatskappy gely het, aan te wend ten einde aanspreeklikheid aan die kant van enige persoon vir die betaling van 'n belasting of heffing op inkomste te vermy of die bedrag daarvan te verminder, dan kan die in vergelyking bring van so 'n balans met sulke inkomste van die hand gewys word.

(2) 'n Beslissing van die Kommissaris ingevolge sub-artikel (1) is aan beswaar en appèl onderhewig, en wanneer in enige verrigtings wat daarop betrekking het, bewys word dat die onderhawige transaksie, handeling, skema, ooreenkoms of verandering in die hou van aandele, die vermyding van aanspreeklikheid vir betaling van enige belasting of heffing op inkomste of die vermindering van die bedrag daarvan ten gevolg sou hê, word vermoed, totdat die teendeel bewys word—

(*a*) in die geval van so 'n transaksie, handeling of skema, dat dit aangegaan, verrig of uitgevoer is met die oogmerk om bedoelde aanspreeklikheid te vermy of die bedrag daarvan te verminder ; en

(*b*) in die geval van so 'n ooreenkoms of verandering in die hou van aandele, dat dit aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om die onderhawige balans van vasgestelde verlies aan te wend ten einde bedoelde aanspreeklikheid te vermy of die bedrag daarvan te verminder.".

Substitution of section 90 of Act 31 of 1941, as substituted by section 20 of Act 55 of 1946.

17. The following section is hereby substituted for section *ninety* of the principal Act:

"Transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing amounts of taxes on income.

90. (1) (*a*) Where any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act, and including a transaction, operation or scheme involving the alienation of property) has been entered into or carried out, which has the effect of avoiding or postponing liability for any tax, duty or levy on income (including any such tax, duty or levy imposed by a previous Act), or of reducing the amount thereof, and which in the opinion of the Commissioner, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out—

(i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question,

and the Commissioner is of opinion that the avoidance or the postponement of such liability, or the reduction of the amount of such liability, was the sole or one of the main purposes of the transaction, operation or scheme, the Commissioner shall determine the liability for any tax, duty or levy on income and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction.

(*b*) Whenever the Commissioner is satisfied that any agreement or any change in the shareholding in any company, as a direct or indirect result of which income has been received by or has accrued to that company during any year of assessment, has at any time before or after the commencement of the Income Tax Act, 1946, been entered into or effected by any person solely or mainly for the purpose of utilizing any assessed loss or any balance of assessed loss incurred by the company, in order to avoid liability on the part of that company or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set off of any such assessed loss or balance of assessed loss against any such income shall be disallowed.

(*c*) For the purposes of paragraph (*a*) any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act) whereby any person (other than a company) who is ordinarily resident or carrying on business in the Union, or any company registered or carrying on business in the Union, has disposed of shares held by such person or such company in any company registered or incorporated in the Union to any person (other than a company) not ordinarily resident nor carrying on business in the Union or to any company registered outside the Union, shall, unless it is proved to the satisfaction of the Commissioner that the parties are independent persons dealing at arm's length with each other, be deemed to be a transaction, operation or scheme entered into or carried out by means or in a manner not normally employed in the entering into or carrying out of such a transaction, operation or scheme of the nature of the transaction, operation or scheme in question.

(2) Any decision of the Commissioner under sub-section (1) shall be subject to objection and appeal, and in proceedings relating thereto, whenever it is proved that the transaction, operation, scheme, agreement or change in shareholding in question would result in the avoidance or the postponement of liability for payment of any tax, duty or levy on income or in the reduction of the amount thereof it shall be presumed, until the contrary is proved—

(*a*) in the case of any such transaction, operation or scheme, that its sole or one of its main purposes was the avoidance or the postponement of such liability, or the reduction of the amount of such liability; and

(*b*) in the case of any such agreement or change in shareholding, that it has been entered into or effected solely or mainly for the purpose of utilizing the assessed loss or balance of assessed loss in question in order to avoid or postpone such liability or to reduce the amount thereof.".

17. Artikel *negentig* van die Hoofwet word hierby deur die volgende artikel vervang:

Vervanging van artikel 90 van Wet 31 van 1941, soos vervang deur artikel 20 van Wet 55 van 1946.

„Transaksies, handelings of skemas met oogmerk om belastingpligtigheid ten opsigte van belasting op inkomste te ontduik of uit te stel of bedrag van belasting te verminder.

90. (1) (*a*) Waar 'n transaksie, handeling of skema (onverskillig of dit voor of na die inwerkingtreding van hierdie Wet aangegaan, verrig of uitgevoer is, en met inbegrip van 'n transaksie, handeling of skema waarby die vervreemding van eiendom betrokke is) aangegaan, verrig of uitgevoer is wat die uitwerking het dat dit aanspreeklikheid vir die betaling van 'n belasting of heffing op inkomste vermy of uitstel (met inbegrip van so 'n belasting of heffing deur 'n vorige Wet opgelê) of om die bedrag daarvan te verminder, en wat na die oordeel van die Kommissaris, inagnemende die omstandighede waaronder die transaksie, handeling of skema aangegaan, verrig of uitgevoer was—

(i) aangegaan, verrig of uitgevoer was deur middele of op 'n wyse wat nie normaalweg by die aangaan, verrigting of uitvoering van 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema aangewend sou word nie; of

(ii) regte of verpligtings geskep het wat nie normaalweg tussen persone wat by 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema, die uiterste voorwaardes beding, geskep sou word nie,

en die Kommissaris van oordeel is dat die vermyding of die uitstelling of die vermindering van die bedrag van sodanige belastingpligtigheid die enigste of een van die hoofoogmerke van die transaksie, handeling of skema was, stel die Kommissaris die belastingpligtigheid ten opsigte van enige belasting of heffing op inkomste asook die bedrag daarvan vas asof die transaksie, handeling of skema nie aangegaan, verrig of uitgevoer is nie of op so 'n wyse as wat hy in die omstandighede van die geval gepas ag vir die voorkoming of beperking van sodanige vermyding, uitstelling of vermindering.

(*b*) Wanneer die Kommissaris oortuig is dat 'n ooreenkoms of 'n verandering in die aandelebesit in 'n maatskappy, as 'n direkte of indirekte gevolg waarvan inkomste gedurende 'n jaar van aanslag ontvang is deur of toegeval het aan daardie maatskappy, te eniger tyd voor of na die inwerkingtreding van die Inkomstebelastingwet, 1946, deur 'n persoon aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om 'n vasgestelde verlies of 'n balans van vasgestelde verlies wat die maatskappy gely het, aan te wend ten einde aanspreeklikheid aan die kant van daardie maatskappy of 'n ander persoon vir die betaling van 'n belasting of heffing op inkomste te vermy of die bedrag daarvan te verminder, dan word die in vergelyking bring van so 'n vasgestelde verlies of balans van vasgestelde verlies teen bedoelde inkomste van die hand gewys.

(*c*) By die toepassing van paragraaf (*a*) word 'n transaksie, handeling of skema (onverskillig of dit voor of na die inwerkingtreding van hierdie Wet aangegaan, verrig of uitgevoer is) waarby 'n persoon (behalwe 'n maatskappy) wat gewoonlik in die Unie woonagtig is of daarin besigheid dryf, of 'n maatskappy wat in die Unie geregistreer is of daarin besigheid dryf, aandele wat so 'n persoon of so 'n maatskappy besit in 'n maatskappy wat in die Unie geregistreer of ingelyf is, aan 'n persoon (behalwe 'n maatskappy) wat nie gewoonlik in die Unie woonagtig is of daarin besigheid dryf nie of aan 'n maatskappy wat buite die Unie geregistreer is, van die hand gesit het, geag 'n transaksie, handeling of skema te wees wat aangegaan, verrig of uitgevoer is deur middele of op 'n wyse wat nie normaalweg by die aangaan, verrigting of uitvoering van so 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema aangewend word nie, tensy tot bevrediging van die Kommissaris bewys word dat die partye onafhanklike persone is wat met mekaar die uiterste voorwaardes beding het.

(2) 'n Beslissing van die Kommissaris ingevolge sub-artikel (1) is aan beswaar en appèl onderhewig, en wanneer in enige verrigtings wat daarop betrekking het, bewys word dat die onderhawige transaksie, handeling, skema, ooreenkoms of verandering in aandelebesit, die vermyding of die uitstelling van aanspreeklikheid vir betaling van enige belasting of heffing op inkomste of die vermindering van die bedrag daarvan ten gevolg sou hê, word vermoed, totdat die teendeel bewys word—

(*a*) in die geval van so 'n transaksie, handeling of skema, wat die enigste of een van die hoofoogmerke daarvan die vermyding of die uitstelling van of die vermindering van die bedrag van sodanige belastingpligtigheid was; en

(*b*) in die geval van so 'n ooreenkoms of verandering in aandelebesit, dat dit aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om die onderhawige vasgestelde verlies of balans van vasgestelde verlies aan te wend ten einde bedoelde aanspreeklikheid te vermy of uit te stel of die bedrag daarvan te verminder."

Transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing amounts of taxes on income.

103. (1) Where any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act, and including a transaction, operation or scheme involving the alienation of property) has been entered into or carried out which has the effect of avoiding or postponing liability for any tax, duty or levy on income (including any such tax, duty or levy imposed by a previous Act), or of reducing the amount thereof, and which in the opinion of the Commissioner, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out—

(i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question,

and the Commissioner is of the opinion that the avoidance or the postponement of such liability, or the reduction of the amount of such liability was the sole or one of the main purposes of the transaction, operation or scheme, the Commissioner shall determine the liability for any tax, duty or levy on income and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction.

(2) Whenever the Commissioner is satisfied that any agreement or any change in the shareholding in any company, as a direct or indirect result of which income has been received by or has accrued to that company during any year of assessment, has at any time before or after the commencement of the Income Tax Act, 1946, been entered into or effected by any person solely or mainly for the purpose of utilizing any assessed loss or any balance of assessed loss incurred by the company, in order to avoid liability on the part of that company or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set-off of any such assessed loss or balance of assessed loss against any such income shall be disallowed.

(3) For the purposes of sub-section (1) any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act) whereby any person (other than a company) who is ordinarily resident or

carrying on business in the Republic, or any company registered or carrying on business in the Republic, has disposed of shares held by such person or such company in any company registered or incorporated in the Republic to any person (other than a company) not ordinarily resident nor carrying on business in the Republic or to any company registered outside the Republic, shall, unless it is proved to the satisfaction of the Commissioner that the parties are independent persons dealing at arm's length with each other, be deemed to be a transaction, operation or scheme entered into or carried out by means or in a manner not normally employed in the entering into or carrying out of such a transaction, operation or scheme of the nature of the transaction, operation or scheme in question.

(4) Any decision of the Commissioner under sub-section (1), (2) or (3) shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the transaction, operation, scheme, agreement or change in shareholding in question would result in the avoidance or the postponement of liability for payment of any tax, duty or levy on income or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved—

(*a*) in the case of any such transaction, operation or scheme, that its sole or one of its main purposes was the avoidance or the postponement of such liability or the reduction of the amount of such liability; or

(*b*) in the case of any such agreement or change in shareholding, that it has been entered into or effected solely or mainly for the purpose of utilizing the assessed loss or balance of assessed loss in question in order to avoid or postpone such liability or to reduce the amount thereof.

Transaksies, handelinge of skemas om aanspreeklikheid vir belasting te vermy of uit te stel of bedrag van belasting te verminder.

103. (1) Waar 'n transaksie, handeling of skema (ongeag of dit voor of na die inwerkingtreding van hierdie Wet aangegaan, verrig of uitgevoer is, en met inbegrip van 'n transaksie, handeling of skema waarby die vervreemding van eiendom betrokke is) aangegaan, verrig of uitgevoer is wat die uitwerking het om aanspreeklikheid vir die betaling van 'n belasting of heffing op inkomste te vermy of uit te stel (met inbegrip van so 'n belasting of heffing deur 'n vorige Wet opgelê) of om die bedrag daarvan te verminder, en wat na die oordeel van die Kommissaris, met inagneming van die omstandighede waaronder die transaksie, handeling of skema aangegaan, verrig of uitgevoer was—

(i) aangegaan, verrig of uitgevoer was deur middele of op 'n wyse wat nie normaalweg by die aangaan, verrigting of uitvoering van 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema aangewend sou word nie; of

(ii) regte of verpligtings geskep het wat nie normaalweg tussen persone wat by 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema, die uiterste voorwaardes beding, geskep sou word nie,

en die Kommissaris van oordeel is dat die vermyding of die uitstel of die vermindering van die bedrag van sodanige belastingpligtigheid die enigste of een van die hoofoogmerke van die transaksie, handeling of skema was, stel die Kommissaris die belastingpligtigheid ten opsigte van enige belasting of heffing op inkomste asook die bedrag daarvan vas asof die transaksie, handeling of skema nie aangegaan, verrig of uitgevoer is nie of op so 'n wyse as wat hy in die omstandighede van die geval gepas ag vir die voorkoming of beperking van sodanige vermyding, uitstel of vermindering.

(2) Wanneer die Kommissaris oortuig is dat 'n ooreenkoms of 'n verandering in die aandelebesit in 'n maatskappy, as 'n direkte of indirekte gevolg waarvan inkomste gedurende 'n jaar van aanslag ontvang is deur of toegeval het aan daardie maatskappy, te enige tyd voor of na die inwerkingtreding van die Inkomstebelastingwet, 1946, deur 'n persoon aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om 'n vasgestelde verlies of 'n balans van vasgestelde verlies wat die maatskappy gely het, aan te wend ten einde aanspreeklikheid aan die kant van daardie maatskappy of 'n ander persoon vir die betaling van 'n belasting of heffing op inkomste te vermy of die bedrag daarvan te verminder, word die in vergelyking bring van so 'n vasgestelde verlies of balans van vasgestelde verlies teen bedoelde inkomste van die hand gewys.

(3) By die toepassing van sub-artikel (1) word 'n transaksie, handeling of skema (ongeag of dit voor of na die inwerkingtreding van hierdie Wet aangegaan, verrig of uitgevoer is) waarby 'n persoon (behalwe 'n maatskappy) wat gewoonlik in

die Republiek woonagtig is of daarin besigheid dryf, of 'n maatskappy wat in die Republiek geregistreer is of daarin besigheid dryf, aandele wat so 'n persoon of so 'n maatskappy besit in 'n maatskappy wat in die Republiek geregistreer of ingelyf is, aan 'n persoon (behalwe 'n maatskappy) wat nie gewoonlik in die Republiek woonagtig is of daarin besigheid dryf nie of aan 'n maatskappy wat buite die Republiek geregistreer is, van die hand gesit het, geag 'n transaksie, handeling of skema te wees wat aangegaan, verrig of uitgevoer is deur middele of op 'n wyse wat nie normaalweg by die aangaan, verrigting of uitvoering van so 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema aangewend word nie, tensy tot bevrediging van die Kommissaris bewys word dat die partye onafhanklike persone is wat met mekaar die uiterste voorwaardes beding het.

(4) 'n Beslissing van die Kommissaris ingevolge sub-artikel (1), (2) of (3) is aan beswaar en appèl onderhewig, en wanneer by verrigtings wat daarop betrekking het, bewys word dat die onderhawige transaksie, handeling, skema, ooreenkoms of verandering in aandelebesit, die vermyding of die uitstel van aanspreeklikheid vir betaling van enige belasting of heffing op inkomste of die vermindering van die bedrag daarvan ten gevolg sou hê, word vermoed, totdat die teendeel bewys word—

(*a*) in die geval van so 'n transaksie, handeling of skema, dat die enigste oogmerk of een van die hoofoogmerke daarvan die vermyding of die uitstel van of die vermindering van die bedrag van sodanige belastingpligtigheid was; of

(*b*) in die geval van so 'n ooreenkoms of verandering in aandelebesit, dat dit aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om die onderhawige vasgestelde verlies of balans van vasgestelde verlies aan te wend ten einde bedoelde aanspreeklikheid te vermy of uit te stel of die bedrag daarvan te verminder.

14. (1) Section 103 of the principal Act is hereby amended— Amendment of section 103 of Act 58 of 1962.

(a) by the substitution for subsections (1) and (2) of the following subsections:

"(1) **[Where]** Whenever the Secretary is satisfied that any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act, and including a transaction, operation or scheme involving the alienation of property)—

(a) has been entered into or carried out which has the effect of avoiding or postponing liability for the payment of any tax, duty or levy **[on income (including any such tax, duty or levy imposed by a previous Act)]** imposed by this Act or any previous Income Tax Act, or of reducing the amount thereof; and **[which in the opinion of the Secretary,]**

(b) having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out—

(i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question;

and

[the Secretary is of the opinion that the avoidance or the postponement of such liability, or the reduction of the amount of such liability was the sole or one of the main purposes of the transaction, operation or scheme,]

(c) was entered into or carried out solely or mainly for the purposes of the avoidance or the postponement of liability for the payment of any tax, duty or levy (whether imposed by this Act or any previous Income Tax Act or any other law administered by the Secretary) or the reduction of the amount of such liability,

the Secretary shall determine the liability for any tax, duty or levy **[on income]** imposed by this Act, and the amount thereof, as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction.

(2) Whenever the Secretary is satisfied that any agreement affecting any company or any change in the shareholding in any company, as a direct or indirect result of which income has been received by or has accrued to that company during any year of assessment, has at any time before or after the commencement of the Income Tax Act, 1946, been entered into or effected by any person solely or mainly for the purpose of utilizing any assessed loss or any balance of assessed loss incurred by the company, in order to avoid liability on the part of that company or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set-off of any such assessed loss or balance of assessed loss against any such income shall be disallowed."; and

(b) by the substitution for subsection (4) of the following subsection:

"(4) Any decision of the Secretary under subsection (1), (2) or (3) shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the transaction, operation, scheme, agreement or change in shareholding in question would result in the avoidance or the postponement of liability for payment of any tax, duty or levy **[on income]** imposed by this Act or any previous Income Tax Act or any other law administered by the Secretary, or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved—

(a) in the case of any such transaction, operation or scheme, that **[its sole or one of its main]** it was entered into or carried out solely or mainly for the purposes **[was]** of the avoidance or the postponement of such liability or the reduction of the amount of such liability; or

(b) in the case of any such agreement or change in shareholding, that it has been entered into or effected solely or mainly for the purpose of utilizing the assessed loss or balance of assessed loss in question in order to avoid or postpone such liability or to reduce the amount thereof.".

Wysiging van artikel 103 van Wet 58 van 1962.

14. (1) Artikel 103 van die Hoofwet word hierby gewysig—

(a) deur subartikels (1) en (2) deur die volgende subartikels te vervang:

„(1) **[Waar]** Wanneer die Sekretaris oortuig is dat 'n transaksie, handeling of skema (ongeag of dit voor of na die inwerkingtreding van hierdie Wet aangegaan, verrig of uitgevoer is, en met inbegrip van 'n transaksie, handeling of skema waarby die vervreemding van eiendom betrokke is)—

(a) aangegaan, verrig of uitgevoer is wat die uitwerking het om aanspreeklikheid vir die betaling van 'n belasting of heffing opgelê deur hierdie Wet of 'n vorige Inkomstebelastingwet **[op inkomste]** te vermy of uit te stel **[(met inbegrip van so 'n belasting of heffing deur 'n vorige Wet opgelê)]** of om die bedrag daarvan te verminder; en **[wat na die oordeel van die Sekretaris,]**

(b) met inagneming van die omstandighede waaronder die transaksie, handeling of skema aangegaan, verrig of uitgevoer was—

(i) aangegaan, verrig of uitgevoer was deur middele of op 'n wyse wat nie normaalweg by die aangaan, verrigting of uitvoering van 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema aangewend sou word nie; of

(ii) regte of verpligtings geskep het wat nie normaalweg tussen persone wat by 'n transaksie, handeling of skema van die aard van die onderhawige transaksie, handeling of skema, die uiterste voorwaardes beding, geskep sou word nie, en

[die Sekretaris van oordeel is dat die vermyding of die uitstel of die vermindering van die bedrag van sodanige belastingpligtigheid die enigste of een van die hoofoogmerke van die transaksie, handeling of skema was,]

(c) aangegaan, verrig of uitgevoer was uitsluitlik of hoofsaaklik vir die doeleindes van die vermyding of die uitstel van aanspreeklikheid vir die betaling van 'n belasting of heffing (hetsy opgelê deur hierdie Wet of 'n vorige Inkomstebelastingwet of 'n ander wet deur die Sekretaris uitgevoer) of die vermindering van die bedrag van bedoelde belastingpligtigheid,

stel die Sekretaris die belastingpligtigheid ten opsigte van enige belasting of heffing deur hierdie Wet opgelê, **[op inkomste]** asook die bedrag daarvan, vas asof die transaksie, handeling of skema nie aangegaan, verrig of uitgevoer is nie, of op so 'n wyse vas as wat hy in die omstandighede van die geval gepas ag vir die voorkoming of beperking van sodanige vermyding, uitstel of vermindering.

(2) Wanneer die Sekretaris oortuig is dat 'n ooreenkoms rakende 'n maatskappy of 'n verandering in die aandelebesit in 'n maatskappy, as 'n direkte of indirekte gevolg waarvan inkomste gedurende 'n jaar van aanslag ontvang is deur of toegeval het aan daardie maatskappy, te eniger tyd voor of na die inwerkingtreding van die Inkomstebelastingwet, 1946, deur 'n persoon aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om 'n vasgestelde verlies of 'n balans van vasgestelde verlies wat die maatskappy gely het, aan te wend ten einde aanspreeklikheid aan die kant van daardie maatskappy of 'n ander persoon vir die betaling van 'n belasting of heffing op inkomste te vermy of die bedrag daarvan te verminder, word die in vergelyking bring van so 'n vasgestelde verlies of balans van vasgestelde verlies teen bedoelde inkomste van die hand gewys."; en

(b) deur subartikel (4) deur die volgende subartikel te vervang:

„(4) 'n Beslissing van die Sekretaris ingevolge subartikel (1), (2) of (3) is aan beswaar en appèl onderhewig, en wanneer by verrigtings wat daarop betrekking het, oewys word dat die onderhawige transaksie, handeling, skema, ooreenkoms of verandering in aandelebesit, die vermyding of die uitstel van aanspreeklikheid vir betaling van enige belasting of heffing **[op inkomste]** wat opgelê is deur hierdie Wet of 'n vorige Inkomstebelastingwet of 'n ander wet deur die Sekretaris uitgevoer, of die vermindering van die bedrag daarvan, ten gevolg sou hê, word vermoed, totdat die teendeel bewys word—

(a) in die geval van so 'n transaksie, handeling of skema, dat **[die enigste oogmerk of een van die hoofoogmerke daarvan]** dit uitsluitlik of hoofsaaklik aangegaan, verrig of uitgevoer is vir die doeleindes van die vermyding of die uitstel van of die vermindering van die bedrag van sodanige belastingpligtigheid **[was]**; of

(b) in die geval van so 'n ooreenkoms of verandering in aandelebesit, dat dit aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om die onderhawige vasgestelde verlies of balans van vasgestelde verlies aan te wend ten einde bedoelde aanspreeklikheid te vermy of uit te stel of die bedrag daarvan te verminder."

Amendment of section 103 of Act 58 of 1962, as amended by section 14 of Act 101 of 1978.

37. Section 103 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) Whenever the Commissioner is satisfied that any agreement affecting any company or any change in the shareholding in any company or in the members' interests in any company which is a close corporation, as a direct or indirect result of which income has been received by or has accrued to that company during any year of assessment, has at any time before or after the commencement of the Income Tax Act, 1946, been entered into or effected by any person solely or mainly for the purpose of utilizing any assessed loss or any balance of assessed loss incurred by the company, in order to avoid liability on the part of that company or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set-off of any such assessed loss or balance of assessed loss against any such income shall be disallowed.";

(b) by the substitution in subsection (4) for the words preceding paragraph *(a)* of the following words:

"Any decision of the Commissioner under subsection (1), (2) or (3) shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the transaction, operation, scheme, agreement or change in shareholding or members' interests in question would result in the avoidance or the postponement of liability for payment of any tax, duty or levy imposed by this Act or any previous Income Tax Act or any other law administered by the Commissioner, or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved—"; and

(c) by the substitution for paragraph *(b)* of subsection (4) of the following paragraph:

"*(b)* in the case of any such agreement or change in shareholding or members' interests, that it has been entered into or effected solely or mainly for the purpose of utilizing the assessed loss or balance of assessed loss in question in order to avoid or postpone such liability or to reduce the amount thereof.".

Wysiging van artikel 103 van Wet 58 van 1962, soos gewysig deur artikel 14 van Wet 101 van 1978.

37. Artikel 103 van die Hoofwet word hierby gewysig—

(a) deur subartikel (2) deur die volgende subartikel te vervang:

"(2) Wanneer die Kommissaris oortuig is dat 'n ooreenkoms rakende 'n maatskappy of 'n verandering in die aandelebesit in 'n maatskappy of in die ledebelange in 'n maatskappy wat 'n beslote korporasie is, as 'n direkte of indirekte gevolg waarvan inkomste gedurende 'n jaar van aanslag ontvang is deur of toegeval het aan daardie maatskappy, te eniger tyd voor of na die inwerkingtreding van die Inkomstebelastingwet, 1946, deur 'n persoon aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om 'n vasgestelde verlies of 'n balans van vasgestelde verlies wat die maatskappy gely het, aan te wend ten einde aanspreeklikheid aan die kant van daardie maatskappy of 'n ander persoon vir die betaling van 'n belasting of heffing op inkomste te vermy of die bedrag daarvan te verminder, word die in vergelyking bring van so 'n vasgestelde verlies of balans van vasgestelde verlies teen bedoelde inkomste van die hand gewys.";

(b) deur in subartikel (4) die woorde wat paragraaf *(a)* voorafgaan deur die volgende woorde te vervang:

" 'n Beslissing van die Kommissaris ingevolge subartikel (1), (2) of (3) is aan beswaar en appèl onderhewig, en wanneer by verrigtings wat daarop betrekking het, bewys word dat die onderhawige transkasie, handeling, skema, ooreenkoms of verandering in aandelebesit of ledebelange, die vermyding of die uitstel van aanspreeklikheid vir betaling van enige belasting of heffing wat opgelê is deur hierdie Wet of 'n vorige Inkomstebelastingwet of 'n ander wet deur die Kommissaris uitgevoer, of die vermindering van die bedrag daarvan, ten gevolg sou hê, word vermoed, totdat die teendeel bewys word—"; en

(c) deur paragraaf *(b)* van subartikel (4) deur die volgende paragraaf te vervang:

"*(b)* in die geval van so 'n ooreenkoms of verandering in aandelebesit of ledebelange, dat dit aangegaan of teweeggebring is uitsluitlik of hoofsaaklik met die oogmerk om die onderhawige vasgestelde verlies of balans van vasgestelde verlies aan te wend ten einde bedoelde aanspreeklikheid te vermy of uit te stel of die bedrag daarvan te verminder.".

Amendment of section 103 of Act 58 of 1962, as amended by section 14 of Act 101 of 1978 and section 37 of Act 121 of 1984

19. Section 103 of the principal Act is hereby amended by the addition of the following subsection:

"(5) *(a)* Where under any transaction, operation or scheme any taxpayer has ceded his right to receive any amount of interest in exchange for any amount of dividends, and in consequence of such cession the taxpayer's liability for normal tax, as determined before applying the provisions of this subsection, has been reduced or extinguished, the Commissioner shall determine the liability for normal tax of the taxpayer and any other party to the transaction, operation or scheme as if such cession had not been effected.

(b) Paragraph *(a)* shall be deemed to have come into operation on 22 December 1988 and shall apply—

(i) to any transaction, operation or scheme concluded on or after that date; and

(ii) to any transaction, operation or scheme concluded before that date, if the taxpayer is at liberty to terminate the operation of such transaction, operation or scheme without incurring liability for damages, compensation or similar relief.".

Wysiging van artikel 103 van Wet 58 van 1962, soos gewysig deur artikel 14 van Wet 101 van 1978 en artikel 37 van Wet 121 van 1984

19. (1) Artikel 103 van die Hoofwet word hierby gewysig deur die volgende subartikel by te voeg:

"(5) *(a)* Waar ingevolge 'n transaksie, handeling of skema 'n belastingpligtige sy reg om 'n bedrag aan rente te ontvang, gesedeer het in ruil vir 'n bedrag aan dividende, en as gevolg van bedoelde sessie die belastingpligtige se aanspreeklikheid vir normale belasting, soos vasgestel voor die toepassing van die bepalings van hierdie subartikel, verminder of uitgewis is, kan die Kommissaris die aanspreeklikheid vir normale belasting van die belastingpligtige en enige ander party tot die transaksie, handeling of skema vasstel asof bedoelde sessie nie uitgevoer is nie.

(b) Paragraaf *(a)* word geag op 22 Desember 1988 in werking te getree het en is van toepassing—

(i) op enige transaksie, handeling of skema wat op of na daardie datum gesluit is; en

(ii) op enige transaksie, handeling of skema wat voor daardie datum gesluit is, indien dit die belastingpligtige vrystaan om die werking van bedoelde transaksie, handeling of skema te beëindig sonder om aanspreeklikheid vir skadevergoeding, skadeloosstelling of soortgelyke verligting aan te gaan.".

Schemes for obtaining undue tax benefits

73. (1) Notwithstanding anything in this Act, whenever the Commissioner is satisfied that any scheme (whether entered into or carried out before or after the commencement of this Act, and including a scheme involving the alienation of property)—

(*a*) has been entered into or carried out which has the effect of granting a tax benefit to any person; and

(*b*) having regard to the substance of the scheme—

(i) was entered into or carried out by means or in a manner which would not normally be employed for *bona fide* business purposes, other than the obtaining of a tax benefit; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm's length; and

(*c*) was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit,

the Commissioner shall determine the liability for any tax imposed by this Act, and the amount thereof, as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such tax benefit.

(2) For the purposes of this section—

'scheme' includes any transaction, operation, scheme or understanding (whether enforceable or not) including all steps and transactions by which it is carried into effect;

'tax benefit' includes—

(*a*) any reduction in the liability of any person to pay tax; or

(*b*) any increase in the entitlement of any vendor to a refund of tax; or

(*c*) any reduction in the consideration payable by any person in respect of any supply of goods or services; or

(*d*) any other avoidance or postponement of liability for the payment of any tax, duty or levy imposed by this Act or by any other law administered by the Commissioner.

(3) Any decision of the Commissioner under this section shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the scheme concerned does or would result in a tax benefit, it shall be presumed, until the contrary is proved that such scheme was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.

Appendix II Foreign anti-avoidance provisions

s 260 in Australia

s 108 in New Zealand

s 99 in New Zealand

AUSTRALIA

SECTION 260 – CONTRACTS TO EVADE TAX VOID

TEXT OF SECTION 260

260 (1) [Defeating, evading, avoiding etc taxes] Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly –

(a) altering the incidence of any income tax;
(b) relieving any person from liability to pay any income tax or make any return;
(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
(d) preventing the operation of this Act in any respect,

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

260 (2) [Scope of application] This section does not apply to any contract, agreement or arrangement made or entered into after 27 May 1981.

[sub-s (2) insrt Act 110 of 1981 s 10]

NEW ZEALAND

'108. Agreements purporting to alter incidence of taxation to be void—

Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void in so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax.'

Section 99 is headed 'Agreements purporting to alter incidence of tax to be void' and, so far as material, provided in the relevant income tax year ended 31 March 1978 as follows:

'(1) For the purposes of this section—

"Arrangement" means any contract, agreement, plan, or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect:

"Liability" includes a potential or prospective liability in respect of future income:

"Tax avoidance" includes—

(*a*) Directly or indirectly altering the incidence of any income tax:

(*b*) Directly or indirectly relieving any person from liability to pay income tax:

(*c*) Directly or indirectly avoiding, reducing, or postponing any liability to income tax.

(2) Every arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes if and to the extent that, directly or indirectly,—

(*a*) Its purpose or effect is tax avoidance; or

(*b*) Where it has two or more purposes or effects, one of its purposes or effects (not being a merely incidental purpose or effect) is tax avoidance, whether or not any other or others of its purposes or effects relate to, or are referable to, ordinary business or family dealings,—

whether or not any person affected by that arrangement is a party thereto.

(3) Where an arrangement is void in accordance with subsection (2) of this section, the assessable income and the non-assessable income of any person affected by that arrangement shall be adjusted in such manner as the Commissioner considers appropriate so as to counteract any tax advanatge obtained by that person from or under that arrangement . . .'