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AN ANALYSIS OF THE ANTI-AVOIDANCE PROVISIONS CONTAINED IN THE SOUTH AFRICAN INCOME TAX ACT.

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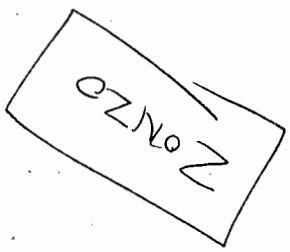

1) INTRODUCTION

The South African Income Tax Act No 58 of 1962 contains a number of specific as well as general anti-avoidance provisions. This dissertation places its main emphasis of focus on the general anti-avoidance provisions contained in section 103 of the Act. On a less detailed level, the more specific provisions contained in the Act are dealt with for sake of completion. These include the following provisions: s 7(2), s 7(3), s 7(3), s 7(4), s 7(5), s 7(6), s 7(7), s 8A, s 8E and lastly s 9A.

While the major portion of this dissertation deals with South African law, attention is also placed on the position in foreign jurisdictions so as to provide scope for comparison and facilitate discussion in the relevant areas.

In the English case of Furniss v Dawson[1] Lord Templeman made the following observation which illuminates the need for anti-avoidance provisions:

"*While tax avoidance is not, by definition, an illegal*

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[1] 1984 AC 474.

activity, a tax avoidance industry of the scale which developed in the 1970s had to be destroyed. The origins of the new approach by the courts had to be seen as a reaction to the growth and activities of this industry. An industry of that nature and size had the capacity to make considerable inroads into government revenues and essentially created two nations of taxpayers; those in the know with the financial resources enabling them to use artificial devices on offer to avoid tax altogether, and those to whom, through lack of knowledge or resources, such opportunities were not open."

It is now apposite to turn to our own jurisdiction to see how we have dealt with similar problems referred to by Lord Templeman above.

2) Judicial Response to Tax Avoidance

History

There is a natural tension between the taxpayer's desire to pay as little tax as possible and the Commissioner of Revenue's desire to collect as much tax as possible. This antagonism is illuminated by Lord Tomlin's well known dictum in the English case of IRC v Duke of Westminster [2] where the honourable judge held:

> *"Every man is entitled if he can to order his affairs so as that the tax attached 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 can not be compelled to pay an increased tax"*

The above approach was adopted by early South African cases [3]. The facts of the case, however, bear little similarity with the wide range of modern tax avoidance schemes which are in existence today. One of the main differences being that modern

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[2] IRC vDuke of Westminster AC[1936]1 at 19

[3] IRC v King 1947 (2) SA 196 at 212; CIR v Estate Kohler 1953 (2) 584 at 591.

tax avoidance schemes generally place little commercial risk on the participants, the main risk being that the scheme will not work.

In the Duke of Westminster case, the Duke wished to lesson his tax obligations. British legislation permitted him to do this by paying his annuities to his personal servants in lieu of wages. Although wages paid to personal servants were not tax deductible under the UK legislation, annuities paid by a taxpayer were deductible. The Duke paid an annuity to his gardener under a deed of covenant entered into for a seven year period. The gardener received reduced wages by an amount corresponding to his annuity receipt. However, evidence revealed that the agreement by the gardener to accept reduced wages in lieu of annuity was an undertaking only: the gardener remained entitled to claim his full wages and the annuity was payable despite the employees service performance.

The House of Lords held that the Duke was entitled to the deduction for the annuity. Lord Atkinson dissented and held that the payment which he received under the deed was in fact wages.

The problem with this approach is that it is somewhat general and should be seen rather as a general policy approach rather than

an indication of how far a taxpayer may go in arranging her affairs so as to avoid tax liability.

The lack of precise delineation in the dictum was pointed out in a later English case where the court held that the case was of little use when determining the methods which may be used by the tax payer to lesson the tax burden[4] .House of Lords' decisions such as WT Ramsay Ltd v IRC (1981) 11 ATR 752 and Furniss v Dawson (1984) 1 All ER 530 now make it clear that the Duke of Westminster principle has a restricted application. The House of Lords in Ramsay did not purport to overrule the Westminster principle and in fact Lord Wilberforce felt it was a cardinal principle but should not be over stated.

There have been situations where the Westminster principle has been directly applied, but in instances where the schemes were not very sophisticated. In Mullins Investment Ltd v FCT [5] the facts involved a transfer of rights to a new issue of shares in a petroleum exploration company. The transferees claimed the tax deduction which was then available for subscriptions to such a company. The original holders of the rights had an option to purchase. The taxpayers subscribed for the shares and the original holder repurchased. The Commissioner argued that this

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[4] IRC v Burmah Oil Co Ltd [1982]STC 30 AT 32.

[5] (1976) 6 ATR 504.

was tax avoidance. The High Court held that the taxpayers who subscribed capital to the petroleum explorations were entitled to a deduction and were protected by the Westminster principle.

Generally, however, the primitive facts of Duke of Westminster do not provide a sanction for modern tax avoidance schemes which lack any substantial commercial risk.

A number of approaches have been adopted by different jurisdictions in determining the ambit of ingenuity permitted with regard to avoiding tax. One view which has been adopted is that where a taxpayer formulates a particular transaction or situation with the intention of merely avoiding tax and that such an act is not affected by an any avoidance provisions in a relevant Act, such conduct should be permissible[6] . The major problem with this approach is that it has the potential to encourage the creation of artificial schemes which in turn mitigates the fiscal income for society and tends to render anti-avoidance provisions ineffectual to some extent [7].

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[6] see David J M Clegg " Section 103(1) - Freedom of Choice" 1 SATJ 1986 224 AT 229.

[7] The Australian experience is a good example in this regard:see Y Grbich, AJ Bradbrook,K Pose Revenue Law, Cases and Materials 1990 AT 922.

An effective approach which has been adopted by the courts in this regard is to distinguish between tax avoidance and tax mitigation. This approach demands that one makes a further distinction between tax avoidance and tax ~~mitigation~~ evasion. Tax avoidance involves a lawful attempt to reduce the burden of tax while tax evasion is the unlawful attempt to escape tax obligations. The latter carries with it certain penalties; offenders face a fine and or imprisonment depending on the severity of the evasion[8]. Apart from the implications stemming from the criminal offence there are also tax implications and offenders may have additional tax imposed on them.[9]

The term tax avosion is also used in this area. Tax avoision like tax evasion was a term coined to describe the amalgam of tax avoidance which is legal and tax evasion which is illegal. The word has been described as a moral blurring of a legal distinction without any economic difference. It has in fact been claimed that tax avoiders are public benefactors in the sense that although the impact of tax is placed on the rich its incidence may fall on the poor because the rich have greater control over the economy and thus are in a strong position to

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[8] see s104(1)(1)-(4)

[9] section 76(2)(a)

pass the burden of tax onto the poor [10]. The imposition of tax avosion would have the effect of closing loopholes which judging from the European examples would result in a sophisticated tax avoidance industry developing. It would seem therefore that tax avoidance should be tolerated[11].

The major problem with the term tax avosion is that it tends to lead to a disrespect of the legal distinction between tax avoidance which is legal and tax evasion which is illegal [12].

In the English case of IR Comr v Challenge Corporation Ltd[13] the court distinguished between tax avoidance and tax mitigation. Income tax is mitigated by a taxpayer who decreases his income or incurs expenditure which reduces his income while tax avoidance occurs when the taxpayer reduces his liability to tax without involving him in the loss which entitles him to such a reduction. The court opined that tax avoidance would necessarily

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[10] For more detail on the costs and benefits of tax avosion see D R Myddelton IEA Readings (England) vol 22 Oct 1979.

[11] "How Tax Avoision Increase Tax Revenue"(1987) 26 Income Tax Reporter 312

[12] F MacFarlane, D M Davies "Substance over Form:A New Approach to Tax Avoidance"(1987)36 The Tax Payer 3 at 4

[13] [1986]STC 548

fall within the so-called Ramsay principles.[14]

It was in the Ramsay case where the House of Lords first expounded the so called fiscal nullity principle which was later developed in Furniss v Dawson[1984]1 All ER 350. In terms of this principle the revenue authorities may look behind the legal effect of certain aspects of a transaction and determine the taxpayer's liability on the basis of substance. The implications of this for the above made distinction between avoidance and mitigation is that it is only in the latter where the taxpayer can specifically enter into transactions to reduce tax.

As a result of the high degree of exposure which the terms avoidance and evasion receive, and the fact that these terms are largely misunderstood, coupled with the fact that anti-avoidance legislation is not as powerful as it once was, it has been suggested that these terms be superseded by the concepts of compliance and non-compliance with the law. A person who engages in non-compliance with the law is guilty of an offence and must be suitably punished. A person who complies with the law suffers no censure if his compliance results in the payment of less tax than the fiscal authorities hoped to extract from him. Thus the solution lies not with the taxpayer but with the law makers which

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[14] W T Ramsay Ltd v IRC [1981] STC 174

presupposes a skilled law making body.[15]

The advantage with this approach is that it shifts the blame from the taxpayer to those who draft the law and administer it.Not with standing this shift in blame the term tax avoidance still evokes negative connotations in most taxpayers and it is submitted that the introduction of yet another formulation in the tax avoidance arena is largely unnecessary. The distinction between tax avoidance and mitigation should suffice.

A further judicial weapon developed against tax avoidance in foreign jurisdictions is the so-called doctrine of sham. In terms of this doctrine, the validity of the transaction can be rejected because it is a sham. Lord Wilberforce in Ramsay[16] defined a sham document or transaction as follows: " While professing to be one thing, it is in fact something different." The doctrine of sham was given a narrow meaning in Snook v London and West Riding Investment Ltd[17] where Diplock LJ held:

> *"I apprehend that, if it has any meaning in the law,[sham] means acts done or documents executed by the parties to the*

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[15]J Morris "Tax Avoidance and Tax Evasion" The Tax Payer (1985) vol 34,p 55.

[16](1981) 11 ATR 752 at 756.

[17][1967] 1 ALL ER 518 at 520.

sham which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights or obligations different from the actual rights or obligations which the parties intended to create...all the parties thereto must have a common interest that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

While the use of the doctrine is fairly wide spread[18] the approach has not been adopted by South African jurisdictions. However, the abnormality requirement contained in section 103(2) of the Act bears some resemblance in the sense that both approaches aim at ignoring fictions. There are also hints of the sham doctrine in section 7(6) of the Act.

Interpretation of fiscal statutes.

The interpretation of statutes can become important when the

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[18] For an American example where the doctrine is given a wider meaning see Dominion Bridge Company ltd v R (1975) DTC 5150.

legislative provisions are unclear or ambiguous. The manner in which the statutes are interpreted can become a problem since the adoption of a particular approach as opposed to another could lead to different constructs. In Partington v The Attorney General [19] the court took the approach that:

> *"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."*

The above dictum is a locus classicus of the literal approach where the courts take the literal meaning of a fiscal statute as decisive.This approach has been endorsed by South African courts[20].The major problem with the approach is that it somewhat fictitious in the sense that words and phrases can never have meaning on their own but need to be understood in the context of a complex of tacitly understood rules which are in constant

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[19] LR 4 100 at 122

[20] CIR vGeorge Forest TimberLtd 1924 AD 516 at 513.
CIR v Wolf 1928 AD 177 at 184.
CIR v Simpson 1949(4) SA 678 at 659.

flux[21].Judges who appear to adopt a literal approach or who claim to do so resort to a particular approach which justifies their construction rather than informing it.[22]

An important characteristic of tax law which needs to be taken into account when interpreting fiscal statutes is the fact that the aim of the statute is to disturb pre-existing rights of the taxpayer. Thus it becomes counter productive to look towards principles of equity to determine an equitable claim in these circumstances. This is not to suggest that there is no equity about tax. In the words of Cobett JA:

> *"It has been said that their is no equity about tax. While this may in many instances be a relevant guiding principle in the interpretation of fiscal legislation, there is nevertheless a measure of satisfaction to be gained from a result which equitable, both from the point of view of the taxpayer and from the point of view of the fiscus. And it may be fairly inferred that such a result is in conformity with the intention of the legislature."*[23]

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[21]see Baxter Administrative Law 317-9

[22]see Cowen "The Interpretation of Statutes and the Concept of The Intention of legislature"(1980) 43 THRHR 374

[23]see CIR v Nemojim (Pty) Ltd 1962 3 SA 45 SATC 241 at 958.

The canons of construction of interpretation of statutes law are equally applicable to fiscal statutes. An important canon in this regard is the so called contra fiscum rule which is an application of the wider principle that where any statutory provision which makes inroads on the rights of the individual is ambiguous, the ambiguity must be resolved in favour of the individual whose rights are thereby mitigated. The contra fiscum rule applies in South Africa to all legislation concerned with taxation in no matter what form it comes.[24]

What is of paramount importance when interpreting a statute is a determination of the intention of the legislature[25]which must be done in the context of the statute as a whole[26].

The question now arises as to which approach should be adopted when looking at fiscal statutes. Botha JA took a non restrictive approach and held:

> *" 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*

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[24]L R Dison,"The Contra Fiscum Rule In Theory and in Practice"1976 SAJJ 159 at 163.

[25]Glen Anil Development Corporation ltd v SIR 4 SA 715 at 727 AD.

[26]SIR v Kirsch 1978 3 SA 93 at 94

liability thereof, or to the incidence thereof, but rather to schemes designed for the avoidance of liability thereof. 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"[27]

Botha's above view that fiscal statutes should be interpreted as any other statutes since the section does not impose a tax per se is somewhat questionable. As Davies and other academics argue, the mere fact that the section does not apply a direct tax is not a bar to the application of the contra fiscum rule.[28]

It is interesting to note that the English courts have adopted a similar approach to the Glen Anil approach when interpreting their tax legislation. In IRC v Joiner[29] Lord Wilberforce opined that the relevant specific anti-avoidance provisions called for a different method of interpretation from that traditionally used

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[27]op cit at 728.

[28]see DMS Davies "Tax Avoidance - the British example"in De Rebus 347.

[29][1975] STC 657 (HL).

in taxation Acts.[30] The judge recognised that as a general rule clear words are required to impose tax and that the taxpayer has the benefit of ambiguity, but felt that in the case of anti-avoidance legislation expressions which might have otherwise been cut down for lack of precision should be given the wide meaning evidently intended by he legislature.[31] Should this approach be adopted by South African courts the contra fiscum rule would be undermined; Lord Wilberforce's approach has in fact been adopted by our courts[32].

A novel approach has been adopted by the Australian courts which to some extent follows international trends(that is, a movement away from the Duke of Westminster principle as demonstrated by the Fiscal nullity principle first presented in Ramsay's case). The Australian courts began the process of moving towards a more substance based approach[33], climaxing in the High Court decision of Cooper Brooks (Wollongong) Pty Ltd v FCT[34] where an anti-avoidance provision which was ineffective on a literal

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[30]English legislation does not have a general anti avoidance tax provision such as s103,but specific anti avoidance provisions.

[31]op cit 662

[32]Williams v IRC [1979] STC 598 at 613

[33]see for example Ure v FCT (1981) 11 ATR 484 and FCT v Ilbery (1981) 12 ATR 563.

[34] (1981) 11 ATR 949.

interpretation was interpreted by the court to give effect to parliament's intention, not withstanding the drafting defect.

The general anti-avoidance provisions of s103

The general anti avoidance provisions in s103 of The Income Tax Act No 58 of 1962 as amended regulates three major areas. Transactions which have the effect of avoiding, postponing or reducing income tax are regulated in terms of s103(1). Section 103(2) deals with the utilisation of assessed loss, while s103(5) deals with dividend and interest swapping. Below is a copy of the relevant sections of s103:

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(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 liabilility 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.

SECTION 103 AND ITS REQUIREMENTS

In SIR v Geustyn Forsyth & Joubert[35], Ogilvy Thompson C J held that to warrant a determination by the Commissioner of liability for tax in terms os s103(1), there must be established:

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

(b)which has the effect of avoiding or postponing a liability for tax imposed by the Act or reducing the amount thereof.

(c)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-

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

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

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[35] 1971 3 SA 567 A

(d) the avoidance, postponement or reduction of the amount of the liability to pay any tax imposed by the Act or any other law administered by the Commissioner was, in the opinion of the Commissioner, the sole or one of the main purposes of the transaction, operation or scheme.

Each of these requirements are now dealt with in detail.

FIRST ELEMENT

1) Transaction,operation or scheme

The reference to transaction, operation or scheme casts a very wide net and there are no reported cases where a taxpayer has successfully contended that no operation, transaction or scheme was in existence. The first anti-avoidance provision only made reference to operation and transaction[36]and it was only five years later when scheme was added to the provision. The wide ambit of the section was highlighted in the case of Meyerowitz v CIR[37]. The facts were as follows: the appellant was the author

[36]section 90 of Act 31 of 1941

[37]1963 3 SA 863

of books on which he received royalties. He also held shares in the Taxpayer Ltd which produced a monthly journal. The appellant entered into a cessionary agreement in which he ceded rights in the books to a cessionary for consideration. The cessionary then ceded these rights to a trust set up for his children. The rights in the journal were ceded by the Taxpayer Ltd to a partnership consisting of the appellant's trust which meant that it was the appellant's trust which held the rights in the books and as a partner, the rights in the monthly journals.

The effect of this transaction with regard to tax implications was that no income accrued to the taxpayer, but rather to his children as members of the trust, even though the income was a direct result of the appellants labour. The Commissioner included the amount in the taxpayer's income in terms of s103. The appellant contended that these transactions were in no way part of a preconceived plan and that the connection between the various steps were by no means a scheme as envisaged by the Act. The appellant argued that scheme should be defined as a series of connected transactions, forming a preconceived plan[38].

The court per Beyer J A did not accept the appellant's approach and held that the transaction did constitute a scheme even though not all the steps which were made were contemplated initially. The test which should be applied was whether the different steps,

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[38]op cit 871E

upon examination in retrospect, appear to be so connected with one another to ultimately lead to tax avoidance.[39]

Beyer J A's view was based on the English approach expounded in Crossland v Hawkins[40] where the court had to decide if it was necessary in order to constitute an arrangement within s397 that the whole of the matter should have been in contemplation at the outset. Donovan L J took the view that:

> *" The language of s397 requires that the whole of the eventual arrangement must be in contemplation from the very outset. ...Even where it is otherwise, I think that there is sufficient unity about the whole matter to justify its being called an arrangement for this purposes, 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 object 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."*

An important question which the case law has addressed is whether the lapse of time could serve as an interruption between

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[39] op cit 875D

[40] [1961]2 All ER 812 at 817

different steps in a transaction. Corbett J A opined that a lapse of time is not a fatal interruption as long as there is sufficient unity between the final result and the previous steps.[41]

Considering the wide interpretation which has been accorded to "transaction,operation and scheme" it is unlikely that taxpayers will be able to claim that their "acts" fall outside the ambit of s103 because such acts can not be characterised as a scheme. It is difficult to determine what the dividing line is between what constitutes a scheme and what does not. There are no cases which present a helpful delineation in this area and the courts seem to have approached the problem in a somewhat ad hoc manner.In L v Cot the court held that the retention of profits constituted a transaction or operation but not a scheme.[42]It is difficult to see how a scheme is differentiated from an operation or transaction. It is submitted that the word scheme should include transaction and operation. This view is supported by the fact that the anti-avoidance provision s73 of the Value Added Tax Act of 1991 defines scheme as including "any transaction, operation, scheme or understanding including all steps and transactions by which it is carried out."

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[41]CIR v Louw 1983 3 SA 551 at572

[42]1975 2 SA 649 (RAD)

2) Entered into or carried out.

The transaction, operation or scheme must have been entered into or carried out. The fact that the legislature speaks of both "carried out" and "entered into" has resulted in the view being adopted that the purpose of the taxpayer at the time of the formulation of the scheme in question must be examined. This was the argument forwarded by the taxpayer in Ovenstone v SIR[43] who felt that at the time of formulation there was no purpose of the taxpayer to avoid tax. Trollip JA
rejected this approach and stated that whether or not the scheme in question fall within the ambit of s103 should be determined with reference to the effect and purpose of the scheme and the circumstance surrounding it at the time it was carried out or implemented, and not at the time it was conceived.[44]

The learned judge opined that entered into does not mean formulated in the sense of conceived. With reference to the context in which the verb is placed it has a connotation which is similar to carried out. The judge held that:

> *"Both expressions were[probably] used because it was considered that "carried out" is more appropriate to*

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[43]1980 2 SA 721 AD

[44]ibid at 723

connote the implementation of a scheme, while "entered into" is more apposite to connote the implementation ... of a "transaction or operation".[45]

3) Having regard to the circumstances under which the transaction,operation or scheme was entered into or carried out

It is important that the surrounding circumstances be considered when determining the applicability of s103 to a particular transaction. This point was made clear in Hicklin v SIR[46] where the court held that even if a single agreement constituted a transaction, operation or scheme the circumstances of each case must be looked at.

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[45]ibid at 732

[46]1980 1 SA 481

SECOND ELEMENT

a) Avoiding liability

The second element of the enquiry demands that the transaction must have the effect of avoiding or postponing liability for tax on income or reducing the amount thereof. In Smith v CIR[47] the court held that to avoid liability for tax on income is to get out of the way of,escape or prevent an anticipated liability. Steyn CJ made reference to the Australian case of Newton v COT[48] where the phrase avoiding liability was analyzed. The Australian court took the approach that avoiding liability should be interpreted:

> "[as]....the word avoid is used in its ordinary sense - in the sense 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's case the court felt that the above quoted approach should be adopted and noted that this interpretation could be

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[47]1976(3)SA863(A)

[48][1958]2 All ER 759

further supported by the Afrikaans version of s103(1) which states :

> *"wat die uitwerking het dat dit aanspreklikheid vir die betaling van 'n belasting ... op inkomste vermy"*

The normal meaning attributed to "vermy" is "ontwyk" or "voorkom". Thus the judge felt that the approach adopted by the Australian courts should be adopted.

b) meaning of "liability"

The precise meaning of liability was somewhat unclear in South African law. In CIR v King[49] the court held that "liability referred to in s103(1) does not refer to an existing liability since such a liability can not be avoided by any transaction[50]. Watermeyer CJ analyzed the meaning of "liability" and held:

> *"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*

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[49]CIR v King 1947(2) SA 169

[50]op cit at 207;see also Hicklin v SIR 1980(1)SA 481at 429 AD

in respect of the current 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."[51]

The position in South African law now is that liability refers to anticipated liability. The difficulty still arises as to the ambit of anticipated liability and the courts have not been willing to define its content.

David Clegg[52] argues that it is the degree of certainty with which income can be anticipated that should be the deciding factor in determining wether tax is avoided. The author analyses the dictum in the Hicklin case where Trollip JA stated that a liability for tax "may vary from an imminent certain prospect to some vague remote possibility" and expressed the view that it was unwise and unnecessary to decide whether a line should be drawn some where a long that wide range. David Clegg felt this view was correct, but suggested that the "vague remote possibility" describes the timing of the receipt or accrual of income liable to tax rather than the existence of a liability to tax per

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[51]CIR v King 1947(2) SA 196 AT 207 (AD).

[52]Davic Clegg:section 103(1) - "Freedom of Choice":SATJ(1986)224 at 226

se. Reasonable certainty must exist as regards there being income although its timing may be remote and uncertain.

In CIR v Louw[53] the court looked at the consequences of loans advanced to directors subsequent to the incorporation of a partnership out of surplus funds held by the company. Since the directors received little by way of salary or dividends and the fact that substantial loans were made to the directors with out the need for security,the court felt that the salaries which were payable to them, were in fact credited to their loan account and these loans in fact represented salaries. Corbett JA took the view that had the loans not been made to the directors, they would have received equivalent proportions in the forms of salaries or dividends and this showed that the actual effect of the transaction was to avoid or postpone liability for income tax.

This approach has received much criticism since it creates the concept of notional income on which tax might have to be paid. The approach in Louws case may also lead to difficulties in interpreting the powers granted to the Commissioner under this section. De Koker and Urquhart[54] contend that before the

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[53]1983(3) 551 AD at581 A-C

[54]De Koker & Urquhart Income Tax in South Africa (1989)Vol 1,26 -11.

avoidance of tax can be said to have taken place for the purposes of this section, the anticipated accrual of income,
which would have been subject to tax in the hands of the taxpayer, must, as a result of the transaction, operation or scheme, accrue to a third party, in whose hands the tax on such income is less than it would have been in the hands of the taxpayer.

c) existence of income

The anti-avoidance provisions only come into operation when there is in fact a receipt or an accrual in the hands of a taxpayer. It can be difficult to determine whether in fact the taxpayer has received income. In CIR v King[55] the learned judge distinguished between the case where a man so orders his affairs that he has no income which would expose him to liability of income tax, and the case where he orders his affairs so that he escapes from liability for taxation which he ought to pay upon the income which is in reality his.

[55]op cit at 210

THIRD ELEMENT

1) Subjective or objective test?

The transaction operation or scheme must be entered into or carried out solely or mainly for the purposes of tax avoidance. The question as to whether a subjective or objective test should be adopted in discovering the purpose of the taxpayer when entering into a transaction, operation or scheme has been analyzed by our case law. The view has been taken that one should determine the effect of the scheme as seen from an objective point of view. The intention of the taxpayer is seen as secondary in importance as compared to the actual effect of the transaction.[56]

This view has been overruled by a number of cases[57].In SIR v Gallagher[58]the court held:

" *It is submitted in the heads of argument of the appellant's counsel that, in determining the purpose of a*

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[56]In SIR v Gallagher 1978(2) SA 463 (AD) AT 471 counsel's argument that an objective test was not appropriate was overruled

[57]see for example:Glen Anil Development Corporationv SIR 1975(4)SA 715 at 730 (AD); Hicklin v SIR 1980(1)SA 481 at 471

[58]1978(3) SA 567 at 576

transaction, operation or scheme, an objective test should be applied. By an objective test in this context is evidently meant a test which has regard rather to the effect of the scheme, objectively viewed as apposed to a subjective test which takes as its criterion the purpose which those which carrying out the scheme intends to achieve by means of the scheme. Although appellant's counsel did not press this submission in argument before us, he did not abandon it. In this circumstance, it is appropriate to say that, in my view, the test in undoubtedly a subjective one."

Thus a subjective test is adopted and the evidence of the taxpayer is of prime importance in determining the purpose of a said transaction. In Gallagher's case the taxpayer had entered into a scheme with the sole purpose of saving estate duty tax.However,since s103(1) of the Act only covered income tax, the taxpayer managed to prove that he was avoiding estate duty tax and not income tax.

As a result of this kind of reasoning[59]the legislation was amended to cover all other laws administered by the

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[59]see for example ITC 1307.

Commissioner.[60] The provision therefore covers the Estate Duty Act, VAT, the Stamp Duty Act, the Sales Act,the Transfer Duty Act and the Marketable Securities Act.

2) "solely or mainly"

The meaning to be attributed to these words in the context of s 103(1) is somewhat unclear. In SBI v Lourens Erasmus (Eiendoms) BPK[61] the court held that "mainly" lays down a purely quantitative standard of more than 50 per cent and the use of the alternative "solely" did not subtract therefrom. Thus the court saw "solely and mainly" as a general phrase. The courts explanation for the inclusion of the word "solely" was as follows:

> "Aangesien die word 'hoofsaaklik", in teenstelling met die woord "uitsluitlik", die bestaan van twee of meer vergelykbare groottes veronderstel, is dit goed denkbaar dat die word "uitsluitik" in art.51 (f) minstens ex abundanti cautela ingevoeg was om 'n moontlikke opvatting

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[60]section 14 of the Amendment Act 101 of 1978.

[61]1966(4) SA 434 at 442.

dat 'n maatskappy wat inkomste uitsluitlik uit dividende verkry, nie 'n maatskappy is wat dit slegs hoofsaaklik daaruit verkry nie, te voorkom."

3) Presumption

In terms of s 103(4) of the Act, if it is proved that the transaction operation or scheme would result in the avoidance or postponement of liability for payment of any tax, duty, or levy imposed by the Act or any other law administered by the Commission, or in the reduction thereof, it shall be presumed, until the contrary is proved, that any such transaction operation, or scheme was entered into or carried out solely or mainly for the purpose of the avoidance or the postponement of such liability or the reduction of the amount of such liability.

The ipse dixit of the taxpayer is of great relevance when discharging the taxpayer's onus and he must establish positively what the purpose of the scheme was[62]. The presumption places a heavy burden of proof on the taxpayer[63]

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[62]SIR v Gallagher 1978(2) SA 463 A

[63]De Koker/ Urquhart, Income Tax in South Africa, para26-29.

4) Importance of time.

Section 103 (1) will only come into operation at the time the time it was implemented or carried out, and not at the time it was formulated.[64] The court held in the Ovenstone case that even where the purpose or effect of the scheme at the time of formulation was not to avoid tax, if such purpose or effect changes in nature when he subsequently carries it out, s102(1) will come into operation.[65]

THE FOURTH REQUIREMENT(THE NORMALITY REQUIREMENT)

The Commissioner must be satisfied that having regard to the circumstances under which the transaction operation or scheme was entered into:

1) was entered into or carried out by means or in a manner which would not normally be employed in entering into or carrying out of a transaction of the nature of the transaction in question[66]

2) created rights or obligations which would not normally

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[64]Ovenstone v SIR 1980(2) SA 721 at 732

[65]op cit at 732.

[66]s103(1)(b)(1)

be created between persons dealing at arms length under a transaction of the nature of the transaction in question[67]

The above requirement affords the taxpayer the opportunity to raise the defense that the transaction in question is not abnormal. Thus the taxpayer can frankly confess that the sole reason of the transaction in question is to avoid tax and if he can demonstrate to the Commissioner that the transaction in question does not manifest any abnormalities, either in respect of the rights and obligations which were created, or in the manner in which it was carried out, the taxpayer can escape s103(1) of the Act.[68]

The abnormality requirement was introduced in 1959 to prevent the unacceptable results which occurred for example in Kings's case. Shreiner J A took the approach that the requirement was introduced to deal with the cases where the Commissioner is properly aggrieved by a transaction or scheme designed to enable one of the parties thereto to escape tax.

The judge held that the section was not designed to implement the expectations, however reasonable, of the Commissioner that there

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[67]s103(1)(b)(2)

[68]Broomberg, Tax Strategy at 213.

will be no change in the taxpayer's affairs which will result in the taxpayer getting less income. Rather, it is designed to meet the Commissioner's objection to the creation of abnormal or unnatural situations, to the detriment of the fiscus.[69]

The requirement of normality is clearly highlighted in the above two sections and there has been a tendency to merge the two requirements into one single test of normality. However, in certain circumstances the courts have found it more appropriate to apply the twofold test. This classically occurs in the situation where the parties to the transaction were not independent parties dealing with each other at arms length. For example, in SIR v Geustyn, Forsyth and Joubert[70] where a professional partnership was converted into an unlimited liability company, the partners being the sole shareholders of the company, the court held per Ogilvie Thompson C J:

> *" The criterion of persons dealing at arms length mentioned in s 103(1) 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*

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[69]CIR v King 1947 2 sa 196 (A) at 216.

[70]1971 (3) SA 567 at 574 (AD).

is in the present case ex hypothesi concerned with partners who have, in the circumstances outlined above, made over their practice, not to an independent third party with whom they would ordinarily deal at arms length, but to an unlimited company of which they are the sole shareholders and directors and wherefore they have full and complete control."[71]

In ITC 963 [72] Galgutt J held that a taxpayer who changes his investment so as to have an investment, the income from which is not taxable, for example, from shares in a building society to union loan certificates is not indulging in an abnormal transaction or scheme. If, due regard being had to the proximity of South West Africa and its relationship to South Africa, the taxpayer finds that he can also invest in South West Africa and avoid or reduce tax, his conduct, or the transaction, is not tainted with abnormality.

While there is no universally accepted test to establish abnormality as required by the section, various guide lines were illuminated by the Trollip JA in Hicklin v SIR [73]:

[71]1971 (3) SA 567 at 574 (AD).

[72]ITC 963 24 SATC 705 at 709

[73]Hicklin v SIR 1980 (1) SA 481

" When the transaction operation or scheme is an agreement, as in the present case, it is important, I think, to determine first whether it was concluded at arms length. That is the criterion postulated in para (2). For dealing at arms length is a useful and often easily determinable premise from which to start the enquiry. 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 voorwaades beding ". Hence, in an arms length agreement the rights and obligations it creates are more likely to be regarded as normal than abnormal in the sense envisaged by par (1). 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."[74]

The precise role which "surrounding circumstances" should take in such a determination has caused difficulties since an anomaly is created when one has to apply an objective test by looking at the rights and obligations created at arms length and then to take the subjective facts of the particular scheme in question

[74]op cit at 494 H

into account. This difficulty is acknowledged by Silke[75]:

> *"How can a transaction be required to be at "arms length" having regard to the circumstances that are anything but at "arms 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 s103(1)(b)(1) and not (2) would resolve the problem, since the question would merely be whether the rights or obligations concerned are normal as between persons dealing at "arms length". Unfortunately, the wording of the section... [makes it clear that the quoted phrase applies to both sections]"

In SIR v Louw[76], the court analyzed the somewhat ambiguous phrase "under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question..." in the context of an incorporation of a practice:

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[75]Silke, supra, para 19 - 29.

[76]op cit at 574 CF

"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 s103(1)(ii) ..... 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. Moreover, it must be borne in mind that in a case such as the present the transaction is a multi-partite one to which all the partners and the company are parties; each partner contracts both with the company and his fellow partners and seeks to extract from the transaction the best possible advantage for himself."

The ambiguity created by section 103(1)(ii) can perhaps be solved by reading "of the nature of the transaction, operation or scheme in question" as referring in general terms to the transaction, which is implicitly regarded as taking place at arms

length[77]. Alternatively, the problematic phrase could be deleted from the legislation as has occurred in s73 of the V.A.T Act[78].

In conclusion, it would seem that from a taxplanner's perspective, the cases illustrate that each right and obligation created by a transaction should be based on a sound business purpose. Thus, one should ask whether the provisions of a particular contract can be justified on commercial grounds[79].

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[77]De Koker & Urquhart, Income Tax in South Africa,1989, Vol 1 paras 26-18.

[78]see appendix 3.

[79]Broomberg op cit at 213-214.

THE REMEDIES OF THE COMMISSIONER

In terms of s103(1) the Commissioner shall determine the liability for any tax imposed by the Act and the amount thereof as if the transaction, operation or scheme has not been entered into or carried out, or in such a manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction.

In H v COT[80] the court held that the Commissioner may pull down the whole artificial edifice which has been erected by the taxpayer for the purpose of avoiding tax, but if in the circumstances it is not appropriate to do so, he can pull down part of that edifice and tax on the basis that part of the edifice had never existed, while at the same time leaving in existence another part of the edifice and accept tax from that part as if that part was a legitimate structure in the taxpayer's business. The Commissioner can do this provided that the result is not to subject any portion of the taxpayer's income to double income tax, since were he to do this he would not be acting in a fair and appropriate manner, as this section is not a penal one.

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[80]1972(2) SA 719(RAD).

De Koker and Urquhart[81] confirm the above and state that the Commissioner is not entitled to create or tax notional income. The authors argue that he is empowered to attribute actual income to the taxpayer by ignoring all or part of the structure put in place by the taxpayer, provided that the income is subject to tax.

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[81] op cit at 26-21.

SECTION 103(2) - TRAFFICKING IN ASSESSED LOSS

Section 20 of the Income Tax Act enables the taxpayer to set off an assessed loss against income from trade in certain circumstances. The general rule is that a taxpayer can carry forward to his current year of assessment a balance of assessed loss incurred by him in the immediately preceding year of assessment for the purpose of setting it off against any income derived by him in the current year.

The term "balance of assessed loss " is not defined by the Act, but has been interpreted as being the excess of an assessed loss brought forward from the preceding year of assessment over the income of the current year.[82]It is this excess which can be carried over to the succeeding year of assessment. Alternatively, if an assessed loss arises from trading operations of the current year, the assessed loss brought forward from the preceding year must be added to the assessed loss of the current year, and it is this aggregate loss which represents the balance of assessed loss to be carried forward to the next year of assessment for the set off against the income of the year.

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[82]ITC 664 (1948) 16 SATC 125 at 126.

It is important to make a distinction between an individual and a company. While an individual is entitled to carry forward a balance of assessed loss from one year of assessment to the next, even though he stops trading during the whole of the second year of assessment or derives no income at all during that year, s 20(2A) forbids a company from doing so.[83]The right of a company to carry forward an assessed loss from one year of assessment to the next is much more restrictive than an individual's. If in any year a company does not carry on a trade as defined in the Income Tax Act, it is, in terms of s20(1), not permitted to carry forward to that year any assessed loss incurred in the preceding year of assessment.[84] The company will forever lose its right to carry forward that assessed loss, even if it starts to trade in a later year of assessment. The company need not carry on trade for the whole year of assessment; it is sufficient that it carries on trade for some of the year of assessment.[85]

A method which was adopted by taxpayers to avoid tax is to acquire the shares in a company with a balance of assessed loss and then either to divert income from elsewhere to the company or to improve its existing trading operations. The idea behind

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[83]see Silke " Assessed loss of Companies and s103" Income Tax Reporter vol30 (1991) p47 at 48.

[84] SA Bazaars (Pty) Ltd v CIR 1952 (4) 505 (A).

[85]Silke op cit at 48.

these forms of purchase being to set income off against the assessed loss, the result being that no tax would be payable so long as a balance of assessed loss remains. The legislature's response to this method of tax avoidance is to be found in section 103(3) of the Act.

Section 103(2) prohibits the setting off of an assessed loss, or the balance of such a loss, whenever the Commissioner is satisfied that:

(a) an agreement affecting that company has been entered into; or

(b) a change in the share holding of any company or in the members interest in any close corporation has taken place; and

(c) as a direct or indirect result of the agreement or change in share holding, income has been received by or accrued to the company concerned during the year of assessment; and

(d) the agreement has been entered into, or the change in share holding affected solely or mainly for the purpose of utilising any assessed loss or any balance

of assessed loss incurred by the company concerned in order to avoid liability, or reduce the amount of that liability, for the payment of any tax, duty, levy or income, by:

(i) the company concerned;or

(ii) any other person.

FIRST REQUIREMENT

For the first requirement to be fulfilled there must be an arrangement effecting the company or a change in share holding. To determine whether a change in share holding has taken place a factual determination needs to take place.[86]

In CIR v Ocean Manufacturing[87] the court analyzed the word "any" in the first requirement and held that it was a word of "wide and unqualified generality". Thus,it can be restricted by the subject matter in the instance of section 103(2), but this does not mean that it is used in a limited sense in that context.

SECOND REQUIREMENT

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[86]ITC 1123 (1969) 31 SATC 48 at 52.

[87]1990 (3) SA 610 at 618 GJ.

The second requirement demands that there has to be a receipt or accrual of income to the company as a direct result of the agreement or change in share holding.

In ITC 1123[88] the court held that a shareholder who had acquired all the shares in a company with an assessed loss had done so with the sole purpose of using the assessed loss to avoid paying tax on income which had ensued from the company's new line of business. The court refused to allow this set off by the taxpayer. Trollip J held:

> *" 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 to in the first place "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*

[88]ITC 1123 31 SATC 48.

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 the other requirements are fulfilled. "[89]

D M Stewart[90] makes the important point with regard to ITC 1123 that the case indicates that no particular causative relationship need be established between the agreement or the change in share holding and the subsequent earning of income. The author takes the view that the words " direct or indirect result of which " are satisfied if the income is earned by the efforts of the new personalities in the company at some point in time subsequent to their becoming interested therein.

In terms of the decisions in S A Bazaars (Pty) Ltd v C I R[91] and New Urban Properties Ltd v S I R[92] the position is now clear that if a company earns no income other than income against which the assessed loss cannot be set off, the carrying forward of the assessed loss is fatally interrupted. Should the company have made other income as well as the tainted income, the assessed

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[89] op cit 51.

[90] D M Stewart " The Prohibition of Tax Avoidance: an Evaluation of section 103 of the South African Income Tax Act" (1970) 111 CILSA 168 at 191.

[91] 1952 (4) SA 505 (A).

[92] 1966 (1) SA 215 (A).

loss may be set off against such income. Thus, the essential continuity of the companies activities is broken. Similarly, there will be a fatal interruption where the company remains dormant and does not trade in a particular year.

In the New Urban Properties Ltd case, the facts involved owners of land - dealing companies which, because of its large assessed loss, had acquired the taxpayer company so as to channel income into it. The company did not dispute the Commissioner's contention that the income flowing to it was caught by section 103(2) and that the assessed loss could not be set-off against it, but it did argue that it should be able to keep the assessed loss alive and carry it forward to a subsequent year.

Beyers J A held that in terms of both CIR v Louis Zinn Organisation (Pty) Ltd 1985 (4) SA 477 (A) and Sub-Nigel Ltd v CIR 1948 (4) SA 580 (A) sub-section (3) " envisages a continuity in setting off an assessed loss in every year succeeding the year in which it was originally incurred, so that in each succeeding year a balance can be struck to the satisfaction of the Secretary which can then be carried forward from year to year until it is exhausted; if, for any reason, the assessed loss cannot be set off and balanced in any particular year, there is then no "balance of assessed loss" for that year... which can be carried forward to the succeeding year, or (viewed from the succeeding

year of assessment) there is no "balance of assessed loss which can be carried forward from the preceding year of assessment "; in other words, the essential continuity has been fatally interrupted."[93]

The court held that, based on the evidence submitted, the continuity was interrupted and that consequently the balance of assessed loss failed to survive the 1959 tax year and would not be available for set-off in future years.

An interesting point to emerge from the New Urban Properties Ltd case is whether the assessed loss could have been carried forward had the court found that the separate trading activities could not be traced to the change in share holding. Meyerowitz and Spiro take the view that in such a case the Commissioner must levy two assessments on the company concerned; one for the income which is caught by s 103(2) and the other for the untainted activities and any income they might produce.[94]

Broomberg[95]suggests that a taxpayer who wishes to overcome the possibility of falling foul of section 103(2) should make sure

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[93]op cit at 224 D-F.

[94] Meyerowitz and Spiro Meyerowitz and Spiro on Income Tax para 855.

[95]Broomberg, supra, at 219.

that the relevant company is left with some pre-existing assets which are capable of producing untainted income.

THIRD REQUIREMENT

The agreement must have been entered into solely or mainly for the purpose of utilising any assessed loss in order to avoid liability for the payment of tax. The case law bears testimony to the fact that once the taxpayer can show a sound business reason for the utilisation of the assessed loss, the provisions of section 103(2) will not be applicable.

In ITC 983[96] shares in the appellant's company were purchased by another company. The appellant's company had an assessed loss and had stopped its operations during the year of assessment. The following year the company began operations and made a profit. The company's attempt to set-off this profit against the assessed loss was disallowed by the Commissioner. On appeal, the court accepted the taxpayer's argument that the main purpose of the purchase of the shares was to obtain a productive unit which could be brought into use at once.

In ITC 989[97] a company's shares (the taxpayer) were bought by

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[96]ITC 983 25 SATC 55.

[97]ITC 989 25 SATC 122.

another company. These shares carried with them an assessed loss. The court held that the companies purchase of the shares was to increase its productivity and that the purchase of the shares would have been profitable even without the assessed loss, and the court allowed the utilisation of the assessed loss by the company.

Provided that the taxpayer can show that the main purpose for the transaction is not to avoid tax, section 103(2) will not apply.[98]It is important to read section 103(2) with the sub-section (4) of section 103(2). In terms of this section the following presumption is made:

(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 or scheme agreement or change in share holding or member's interest in question would result in the avoidance or the postponement of liability for the payment of tax, duty or levy imposed by this Act or any previous Income Tax Act or any other law administered by the Commission, or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved

[98]see also ITC 1123 31 SATC 48.

(a)....

(b) in the case of any such agreement or change in share holding or member's interest, that it has been entered into or affected solely or mainly for the purpose of utilizing the assessed loss or the balance of the assessed loss in question in order to avoid or postpone such liability or to reduce the amount thereof.

A point which has been raised is whether the use of assessed loss in a scheme for the avoidance of tax may be attacked by the Commissioner also under s 103(1) in appropriate circumstances or whether it must be attacked exclusively under s 103(2) of the Act. Silke adopts the view that s 103(1) may also be invoked in the appropriate circumstances.[99] In an unreported decision of the High Court of Swaziland delivered on the 21 March 1973, the court did not reject the use of s 103(1) by the Collector of Taxes as a legitimate weapon for the disallowance of assessed loss (even though it did reject its application, on the facts, to the case before it).[100]

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[99] Silke on South African Income Tax, supra 19.17 at 19-38 and 19-39.

[100] see "Tax Avoidance and Assessed Losses"(1977) 16 Income Tax Reporter 94.

SECTION 103 (5)

This section deals with situation where a taxpayer cedes his right to income in the form of interest in exchange for income in the form of dividends. The subsection reads as follows:

(5)(a) Where under any transaction, operation or scheme any taxpayer has ceded his right to receive an amount of interest in exchange for any amount of dividend, and in consequence of such a 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 the 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 following three conditions must be met for the section to apply:[101]

1) There must be transaction, operation or scheme

2) The taxpayer must under the transaction, operation or scheme have ceded his rights to receive an amount of interest in an exchange for amount of dividends

3) In consequence of the cession, the taxpayer's liability for normal tax as determined before the provision is applied, must have been reduced or extinguished.

Once the above conditions are met, the Commissioner is obliged to determine the taxpayer's liability for normal tax as if the cession had not been effected.

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[101]Silke para 19 25.

THE ONUS OF PROOF

The question of who bears the onus of proof with regard to avoidance of tax in not specifically dealt with by section 103 of the Act. While section 103(4) contains a presumption as to the purpose element and section 103(3) includes a presumption concerning an arm's length transaction with foreigners, there is no section which directly deals with onus.

Ever since the first Income Tax Act was promulgated in South Africa, the taxpayer has been burdened with the onus of proving that a receipt or an accrual is not taxable or a payment is deductible. According to section 82 of the Act:

> **" The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act, shall be on the person claiming such exemption, non-liability, deduction, abatement or set-off, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong."**

The question which needs to be addressed is whether the

presumptions contained in s103(3) and s103(4) are strong enough to rebut the general presumption contained in s82 of the Act. Meyerowitz and Spiro[102] argue that the onus of proof lies on the Commissioner since, they argue, it would have been entirely redundant to make any provisions in s103 where the onus of proof already lies on the taxpayer in terms of the general provision of s82 of the Act.[103]

The debate has not been decided on by the Appellant Division. The fact that the section does not expressly invert the general provision in s 82 needs to be borne in mind, and it is submitted, is strong evidence for taking a contrary view to Meyerowitz and Spiro. Should the onus be shifted to the Commissioner the result would be to mitigate the strength of the anti-avoidance section.

When deciding whether the taxpayer has discharged the onus of proof the evidence needs to be assessed objectively. This does not mean that the court should not look at the relevant facts pertaining to the circumstances of the case.[104]The court held with regard to onus in ITC 1178:[105]

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[102]Meyerowitz and Spiro, supra para 1623.

[103]op cit 1623 Fn 44.

[104] ITC 1185 35 SATC (1973) 122 at 123.

[105] ITC 1178 at 35-36.

" *In assessing this evidence and determining whether the onus cast upon the appellant in regard to this issue has been discharged or not, the question is not so much whether the reasons or purposes advanced by the witness for the information 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 purpose 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 purpose play an important role in determining what the true purposes were... but this cannot be allowed to obscure the real inquiry, which is as to the actual state of mind of the appellant's directors at that time.*"

THE PROVISIONS OF SECTION 7 OF THE ACT

Section 7 of the Act is principally an anti-avoidance provision. The section extends the general accrual principle to include certain categories of income which are deemed to have been received or accrued. The subsections (2), (3), (4), (5), and (6) are analyzed.

SECTION 7(2)

Section 7(2) of the Act provides that income received by or accrued to a married person is deemed to be income accrued to such a person's spouse in certain circumstances. In terms of section 7(2)(a) income is deemed to have accrued to the donor if such income was derived by the recipient in consequence of a donation, settlement or other disposition by the donor, and the sole or main purpose of such a donation or settlement was the reduction, postponement or avoidance of the donor's liability for any tax, levy or duty which, but for such a donation, would have been payable to the Commissioner.

For a married woman's income to accrue to her husband, or vice a versa, it is important that such income can not be seen as a donation, but should rather be seen as non-independent income

arising from trade. The Income Tax Act gives a wide definition of trade:

> **" Trade includes every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent...design....trademark...or any other property which in the opinion of the Commissioner is of a similar nature."**

Thus a spouse's income derived as a result of "trade" will not generally be deemed to be part of the other spouse's income. Should, for example, a wife receive income from a husband's trade, this could be seen as non-independent income. It will, however, have to be proven that she was entitled to the income through her services. If the amounts received by a spouse are excessively disproportionate to what such a spouse should actually receive for services rendered, the courts may well feel that section 7(2) provisions should come into operation.

SECTION 7(3) AND 7(4) OF THE ACT

These sections deal with the rights of parents to divert income to their minor children. Once the section comes in to operation, any income accruing to a minor child as a result of a disposition

made by a parent will be deemed to be income of the parent for tax purposes.

(a) In terms of 7(3) of the Act:

> **" Income shall be deemed to have been received by the parent of any minor child, if by reason of any donation, settlement or other disposition made by the parent of that child -**
> **(a) it has been received by or has accrued to or in favour of that child or has been expended for the maintenance, education or benefit of that child; or**
> **(b) it has been accumulated for the benefit of that child."**

The question as to the meaning of " other disposition " was analyzed in Barnett v COT[106] where a father was obliged to pay tax on dividends derived by his minor children from shares in a company, to which he sold his dividend producing shares. These shares had been donated to his children by his brother-in-law. The court held that a disposition included a transfer, transaction, plan, scheme, or arrangement not in the form of a gift or donation, and that consequently a disposition in terms of section 7(3) had arisen. The court took the approach that it was by no means clear that transactions for full value and on a

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[106]1959(2)SA713(FC).

commercial basis between father and child would necessarily be excluded from the ambit of section 7(4).

The approach in Barnett's case was qualified in Ovenstone v SIR[107]. The facts of this case involved a situation where a taxpayer lent money to his minor children to enable them to take up shares which would produce dividends. The taxpayer showed no favouritism to his children in the transaction in the sense that he charged his minor's the same interest as a bank would have. Trollip J A held with reference to the meaning of other "disposition":[108]

> *" The critical phrase in section 7(3) - "any donation, settlement or other disposition" - excludes any disposal of property that is a wholly commercial or business one, i.e. made for due consideration. It covers any disposal of property made wholly gratuitously out of liberty or generosity; it also concerns any disposal of property made under a settlement or other disposition for some consideration but in which there is an appreciable element of gratuitousness and liberality or generosity."*

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[107]1980(2) SA 713 (FC).

[108]op cit at 740 A.

In Joss v CIR[109] a taxpayer sold dividend producing shares to a company in which his minor daughter and a trust owned shares, in return for a loan which was interest free for some time. The company declared dividends to the daughter and the trust, the amount of the said dividend being less than it would have been had the company paid interest on the loan.

The court held that the portion of the dividends that the company would have paid had interest been charged on the loan be charged in the taxpayer's income.

The effect of the decision is that the court permitted the Commissioner to apply the provisions of section 7(3) only to the extent that the income accruing to the minors did not exceed the interest which could have been charged in the circumstances.

The precise meaning of "by reason of" was considered in CIR v Widan[110] where Centlivres C J opined that there has to be some causal relation between the donation and the income in question, and that it was important to look at the real effective cause of the receipt or accrual of the income. Centlivres held:[111]

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[109]1980(1) SA 674 (T).

[110]1955(1) SA 226(A).

[111]op cit at 228.

"Difficult cases may conceivably arise. Where for instance, a father donated a sum of money to a minor child and the child buys a business to which he contributes his skills and labour and from which he earns, that income may be regarded as being attributable to two causes, viz. the donation, and the skill and labour of the child. In such a case it may be impossible to say which part of his income was the result of the donation and which part as a result of his skills and labour and it may be that the Commissioner....will not be able to apply [the section]."

The approach in Widan's case widened the test which had been adopted in Kohler v CIR[112] Murray J took the view that the section should be interpreted strictly and that it was only the proximate cause and no the remote cause which should be considered. The court held:[113]

"Though the original donation may have been a causa sine qou non it was not the causa by reason of which the amounts now in issue came to the minors."

The legal causation approach adopted by the court in Kohler's case has been replaced by factual causation which was adopted in

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[112] 1949(4) SA 1022(T).

[113] op cit at 1028.

Widan's case, thereby enlarging the ambit of the section.

b) In terms of section 7(4):

> **"Any income received by or accrued to or in favour of any minor child of any person, by reason of any donation, settlement or other disposition made by another person, shall be deemed to be the income of the parent of such minor child, if such parent or his spouse has made a donation, settlement or other disposition or given some other consideration in favour directly or indirectly, of the said other person or his family."**

Section 7(4) deals with reciprocal donations by some a donor making a donation, settlement or other disposition in favour of a minor child and that child's parent's making a reciprocal donation, settlement or other disposition to the donor,either directly or indirectly. Thus, there must be some reciprocity between the dispositions on either side before section 7(4) will come into operation.[114] A good example to illustrate the point is where a grandfather donates to his children and on the grandfather's birthday his son were to give him a present unconnected with the prior donation, in this instance the section

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[114]ITC 960(1961)24 SA TC 643.

would not apply.[115]

SECTION 7(5)

Section 7(5) provides:

> " If any person has made any donation, settlement or other disposition which is subject to a stipulation or condition, whether made or imposed by such a person or anybody else, to the effect that the beneficiaries thereof or some of them shall not receive the income or some contingent, so much of any income as would, but for such stipulation or condition, in consequence of the donation, settlement or other disposition be received by or accrued to or in favour of the beneficiaries, shall, until the happening of that event or the death of that person, whichever first takes place, be deemed to be the income of that person."

In terms of the section the following conditions must be met for the section to come into operation:

(1) There must be a deed of donation, settlement or other

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[115]example taken from Meyerowitz and Spiro op cit at 541.

disposition.

(2) There must be a stipulation to the effect that the beneficiaries shall not receive the income until the happening of an event, whether it be fixed or contingent.

(3) But for the stipulation the income would be received or accrue to or in favour of the beneficiaries by reason of the donation, settlement or other disposition.

The Appellate Division had the opportunity to consider the provisions in section 7(5) in Estate Dempers v SIR[116] where the donor had ceded the funds of a trust to his grandchildren, the trust dissolving on his death. Prior to the donor's death, the annual income of the trust would go to various charitable organisations and towards the upkeep of the grandchildren;this was left to the discretion of the trustee.

The provisions of the trust on dissolvement were that one-third would be paid to the donee when he attained the age of 25. Fifty percent of the remaining balance would be transferred to the donee at the age of 30, and the remainder would go to him on reaching the age of 35. If the donee died before the termination

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[116] 1977(3) SA 410 (A)
see also SIR v Sidley 1977(4) SA 913(F).

of the trust the trust fund would be paid out to the remaining survivors in equal shares.

The Commissioner taxed the donor for the respective years on the income which had not yet been paid out by the trustees during such time. The court addressed the question of whether the trustee's discretion constituted an event as contemplated in 7(5). The court left the question open, while stating that there was some force in the view that the exercise of discretion was not such an event.

Should the exercise of discretionary power be seen as falling within the ambit of section 7(5) certain unacceptable anomalies could take place. For example, income that accrues to a trust during the year of assessment would be deemed to be that of the donor even if on the last day of the year the trustee exercised his discretion and paid the whole amount to the beneficiaries. The aim of section 7(5) however is to tax the income of the trust in the hands of the donor only when it was not received by the beneficiaries.[117]

A question which was raised in the context of Demper's case was whether section 7(5) was only applicable if the beneficiaries had

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[117]example taken from Silke, Divaris and Stein Silke on South African Income Tax (10 ed) 848.

vested rights to the accumulated income. The donor argued that since the beneficiaries did not have a vested right to the income that the section was not applicable. The court held that a vested right was not a *sine qua non* for the section to come into operation, but that it could be a strong factor in leading to the conclusion that, but for the stipulation withholding the income it would have been received by them.[118]

SECTION 7(6)

In terms of section 7(6):

> **" If any deed of donation, settlement or other disposition contains any stipulation that the right to receive any income thereby conferred upon another, so much of any income as in consequence of the donation, settlement or other disposition is received by or accrues to or in favour of the person on whom that right is conferred, shall be deemed to be the income of the person by whom it is conferred, so long as he retains those powers."**

Broomberg has described the section as a pure loophole stopper

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[118]This approach is in line with preceding precedent.See IT C 903 1959 (23) SATC 516 AND ITC 974 24 SAC 802.

to prevent what could be regarded as a sham transaction.[119]

Silke adopts the view that the section envisages an express cause in a deed or donation that reserves the right of the donor to deprive the donee of the right to income conferred on him and to transfer this right to income to someone else.[120]

A case which deals with section 7(6) is ITC 673[121] where a trust deed left various controls in the hand of the donor. The court took the approach that in the absence of an express provision in the deed, an implied power to revoke the rights to receive income was not sufficient to bring the section into play.

A case which falls squarely into the provisions of section 7(6) is that of ITC 543[122] where on the retirement of one member of a partnership, the other members executed a trust deed ceding their rights in a mortgage bond which was to constitute a trust fund. The trustees had the sole discretion on the death of the beneficiary (the retired member) to elect to pay the income to the widow or to the donors. On making this selection to the

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[119]Broomberg at 212
See also ante p8 on Doctrine of Sham.

[120]op cit at para 12.21.

[121](1948) 16 SATC 230.

[122](1943) 13 SATC 118.

widow, the Commissioner taxed the donors on the trust income. The court held that the provisions of section 7(6) were directly applicable since the trustees were not obliged to pay the income to the widow, but could have split such income between the beneficiaries.

SECTION 7(7)

This section attempt to prevent taxpayers from avoiding tax by diverting income to others gratuitously in rems of which rights to income would be ceded subject to reversionary rights.

Section 7(7) provides that where, by reason of any donation, settlement or other disposition:

1) the donor confers on another person, or third party for the other person's benefit, his right to receive any amount by way of rent, dividends, interest, royalties or similar income in respect of any movable or immovable property (including leases, company shares, marketable securities, deposits, loans, copyrights, design or trade marks in respect of the use of or grant of permission to use that property), in such a way that the donor remains the owner

of or retains an interest in the property; or

2) the donor transfers, delivers or makes over to the other person or to a third party for the benefit of the other person the property or interest in such a way that the donor remains the owner of or retains an interest in the property; or

3) the donor cedes or otherwise makes over to any person or to a third party for the benefit of the other person, his right to receive or to have paid to him by any other person acting in a fiduciary capacity in such a way that the donor is or will at a determinable time be entitled to regain the said right.

In these circumstances any income listed above which is received by or accrues for the benefit of the other person on or after 1 July 1983, and which, but for any donation, settlement or other disposition would have accrued to the donor, will be deemed to have accrued to the donor even if the amount would have been tax-free in the hands of the other person.

SECTION 8A AND 8E.

Section 8A and 8E are two specific anti-avoidance provisions aimed at schemes involving shares and dividends

8A Share options

In terms of this section any gains made by directors or employees, in exercising options to acquire shares are taxed. Thus should an employee, in recognition of services, be given an option to acquire shares for R1,00 each and exercises this option at a time when the shares have a market value of R6,00, the gain of R5,00 will be included in the taxpayer's income.

The section contains an anti-avoidance provision which prevents the holder of a right from avoiding tax if the gain is made by any other person. In terms of s8A(6) a gain made by any other person shall be deemed to be made by the taxpayer and shall be included in his income if:

(a) the right was acquired by any person other than the taxpayer by reason of the taxpayer's office (or forme office) as a director, or by reason of any services rendered by the taxpayer as an employee.

(b) the right was originally acquired by the taxpayer and was

ceded by him under a cession not made at arms length, or the gain was made by a relative of the taxpayer.

8E Preference share financing schemes

Section 8E was introduced, and took effect from 23 March 1989 to counter the tax avoidance brought about by the so-called preference share finance schemes.

The schemes typically formed the following pattern: instead of borrowing money and paying interest on the loan, a company would issue preference shares to the "lender" and pay dividends on the shares instead of interest on a loan. Where the investor was a bank, for example, it would receive the dividend free of normal tax and free of undistributed profits tax, whereas had it received interest, the interest would have been liable for tax.

Section 8E combats such schemes by deeming the dividend received by the holder of the share to be interest if the share is an affected instrument.

SECTION 9 AND 9A

Section 9A is aimed at countering tax avoidance schemes based on the formation of investment companies in neighbouring countries.

In terms of this section, certain investment income of a foreign company is deemed to be income from a source within the Republic in the hands of the shareholders, if such share holders are ordinarily resident in the Republic or are domestic companies.[123]

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[123]for more detail see De Koker & Urquhart, supra, 8 -39 et seq.

CONCLUSION

This dissertation has focused on the anti-avoidance provisions contained in the Act. The general anti-avoidance provisions contained in section 103 have found to be not specific enough with the result that a number of more specific provisions have been created in the Act.

When dealing with anti-avoidance schemes it is important to make a distinction between tax evasion and tax avoidance, and between tax avoidance and tax mitigation.

The interpretation of fiscal statutes is not characterised by unique rules of construction. They have no independent life of their own in relation to tax law, and are rooted in the general law of interpretations.It should however be noted that the contra fiscum rule should be given limited scope of application.

The anti-avoidance provisions contained in the Act and their judicial interpretation has largely been moulded by the tax-avoidance industry which has developed over the years. As this industry becomes more complex it will be necessary for the courts and legislature to change their approach to meet the demands of the situation.

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.

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.".

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.

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.

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.".

(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, 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]** 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."

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) 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.".

Amendment of section 103 of Act 58 of 1962.

14. (1) Section 103 of the principal Act is hereby amended—

(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

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 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.

(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.

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

Act No. 58 of 1962.

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

Act No. 58 of 1962.

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.

(*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."!

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 hooforogmerke 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*) 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.".

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.

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 enige 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.

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 a 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 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 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.".

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.

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