

A Critical Analysis of Three Contentious Elements of the South African General Anti-avoidance Rule

by

Jan-Paul Berry

Student Number: brrjan011



**Research assignment presented in partial fulfillment of the
requirements for the degree of Master of Commerce in
South African Tax in the Faculty of Commerce at the
University of Cape Town**

Supervisor: Mr Darron West

February 2024

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

By submitting this research assignment, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by the University of Cape Town will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Signature:

Date: 01/02/2024

ABSTRACT

This research assignment critically analyses three contentious elements of the South African GAAR to enhance clarity in its interpretation and application.

In Chapter 3, the focus is on the purpose requirement, investigating whether it pertains to the subjective purpose of the taxpayer or the objective purpose of the arrangement itself having regard to the relevant facts and circumstances. Drawing on historical precedents, SARS documents, sections 80A and 80G of the ITA and tax scholars' opinions, the analysis suggests that the courts must rely on the objective surrounding facts and circumstances of the transaction, whilst also taking into account the subjective purpose and *ipse dixit* of the taxpayer.

Chapter 4 delves into the 'misuse or abuse' test, exploring the Canadian GAAR, relevant case law and scholars' opinions in order to shed light on what the 'misuse or abuse' test actually means and whether it should be retained in the GAAR at all or as it is worded currently. It contends that this test was introduced to prevent taxpayers from relying on excessively narrow or literal interpretations of the provisions of the ITA in conjuring up avoidance arrangements. However, the analysis suggests the 'misuse or abuse' test is redundant, given the establishment of the modern approach in interpreting statutes, proposing its repeal to avoid confusion and controversy.

In Chapter 5, the examination centers on the term 'tax benefit' and the viability of the binary defence in proving that no tax benefit has resulted from an arrangement. Analysing *ITC 1625* and *Absa v CSARS*, the research concludes that the binary defence can succeed if a taxpayer starts from a position in which, if he does not enter into any transactions or arrangements, no income in a taxable form would accrue to him. The binary defence is therefore viewed as context-dependent, and it cannot universally refute SARS's claim of a 'tax benefit'.

Overall, the research aims to provide insights into these key aspects of the South African GAAR, proposing nuanced interpretations and considerations for greater clarity in its implementation.

TABLE OF CONTENTS

1	<i>INTRODUCTION.....</i>	7
1.1	General background	7
1.2	Research objectives	9
1.3	Research questions	10
1.4	Selection of jurisdiction for comparison	10
1.5	Research methodology	10
1.6	Research limitations.....	11
1.7	Overview of research assignment	11
2	<i>INTERPRETATION OF FISCAL STATUTES.....</i>	13
2.1	General background	13
2.2	Sources used in interpreting the ITA	13
2.2.1	The Constitution of the Republic of South Africa, 1996	13
2.2.2	The ITA.....	14
2.2.3	The Tax Administration Act 28 of 2011	14
2.2.4	The Interpretation Act 33 of 1957	14
2.2.5	SARS interpretation notes.....	15
2.2.6	Judicial decisions	16
2.3	Development and changes in the rules of interpretation as laid down by our courts	16
2.3.1	Introduction	16
2.3.2	The strict literal approach.....	17
2.3.3	The intention of the legislature	18
2.3.4	The objective approach.....	18
3	<i>THE PURPOSE REQUIREMENT: SUBJECTIVE OR OBJECTIVE?.....</i>	20
3.1	General background	20
3.2	The purpose requirement as contained in the now-repealed s 103(1)	20
3.2.1	General.....	20
3.2.2	What was the test in determining purpose?	21
3.2.2.1	SIR v Geustyn, Forsyth and Joubert	22
3.2.2.2	ITC 1636	23
3.2.2.3	SIR v Gallagher	24
3.2.2.4	Conclusion	26

3.2.3	Problems and weaknesses	26
3.3	The purpose requirement as contained in sections 80A and 80G	28
3.3.1	What is the test in determining purpose?	28
3.3.1.1	The wording of sections 80A and 80G	28
3.3.1.2	The opinion of tax scholars.....	29
3.3.1.2.1	De Koker and Williams	29
3.3.1.2.2	Clegg and Stretch	30
3.3.1.2.3	Benetello, Davis, Engels-Van Zyl, Mollagee, Roeleveld and Urquhart	30
3.3.1.2.4	Davis, Emslie, Van Dorsten and Dachs.....	31
3.3.1.2.5	Louw	31
3.3.1.2.6	Broomberg	31
3.3.1.2.7	Van Schalkwyk and Geldenhuys	31
3.3.1.3	Conclusion	32
4	<i>MISUSE OR ABUSE OF THE PROVISIONS OF THE ACT</i>	34
4.1	General background	34
4.2	Misuse or abuse in the Canadian GAAR	34
4.3	What does misuse or abuse entail?	36
4.3.1	Introduction	36
4.3.2	De Koker and Williams	36
4.3.3	Clegg and Stretch	37
4.3.4	Stiglingh, Koekemoer, Van Heerden, Wilcocks & Van der Zwan.....	38
4.3.5	Benetello, Davis, Engels-Van Zyl, Mollagee, Roeleveld and Urquhart ...	38
4.3.6	Liptack and Kujinga.....	38
4.3.7	Conclusion.....	39
4.4	Is the 'misuse or abuse' test still relevant?	39
5	<i>TAX BENEFIT AND THE BINARY DEFENCE.....</i>	41
5.1	General background	41
5.2	Interpretation and application of 'tax benefit' by our courts	42
5.2.1	General.....	42
5.2.2	CIR v King	42
5.2.3	Meyerowitz v CIR	43
5.2.4	Smith v CIR	43
5.2.5	Hicklin v SIR.....	44

5.2.6	CIR v Louw.....	44
5.2.7	Conclusion.....	45
5.3	Can the binary defence be successfully utilized by a taxpayer in showing that no tax benefit has arisen?	46
5.3.1	General.....	46
5.3.2	ITC 1625.....	46
5.3.3	Absa v CSARS	48
5.3.4	Conclusion.....	49
6	CONCLUSION.....	51
	REFERENCES.....	54

1 INTRODUCTION

1.1 General background

“In this world, nothing is certain except death and taxes” – these are the well-known words of Benjamin Franklin.¹ As a result of this inevitability, taxpayers have constantly been looking to find ways to minimize, postpone or eliminate the tax burden placed on them by the relevant revenue authorities. However, taxpayers have the option to employ both legal or illegal means to lessen or eliminate their tax obligations. Tax evasion can be described as when a taxpayer intentionally engages in unlawful activity with the intention of minimizing or avoiding a potential tax liability.² On the other hand, tax avoidance describes a scenario in which a taxpayer sets up their affairs in a way that is both legal and legitimate, in order to reduce or eliminate their tax liability.³ There are two types of tax avoidance: permissible and impermissible tax avoidance. In *Duke of Westminster v IRC*, the court stated that:

“Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.”⁴

This remark implies that taxpayers have the right to reduce or eliminate their tax liability, as long as this is done within the parameters of any anti-avoidance laws that may be in effect.⁵ This kind of tax avoidance would consequently be considered permissible tax avoidance.

On the other hand, impermissible tax avoidance was defined as follows in the SARS Discussion Document of 2005 as:

“Artificial or contrived arrangements, with little or no actual economic impact upon the taxpayer, that are usually designed to manipulate or exploit

¹ B Franklin & H Smyth *The Writings of Benjamin Franklin* (1907) 410.

² AD Koekemoer, L van Heerden, JS Wilcocks & P van der Zwan *SILKE: South African Income Tax* 7 ed (2022) 1158.

³ Koekemoer et al *SILKE: South African Income Tax* 1158.

⁴ *Duke of Westminster v IRC* 51 TLR 467, 19 TC 490.

⁵ *CIR v Conhage* 61 SATC 391 para 1.

perceived loopholes in the tax laws in order to achieve results that conflict with or defeat the intention of the legislature.”⁶

Impermissible tax avoidance arrangements have a multitude of negative effects, such as decreased tax revenue to the fiscus, a decrease in taxpayer compliance, pressure to raise marginal tax rates, as well as the ongoing need for the legislature to review and amend current laws to close perceived loopholes that taxpayers are taking advantage of.⁷ Due to these detrimental consequences, revenue authorities all over the world have implemented measures to counteract impermissible tax avoidance arrangements. The General anti-avoidance rule (“GAAR”) is one of the main weapons in the South African Revenue Service’s (“SARS”) arsenal to combat the ever-more-ingenuous ways in which taxpayers try to minimize or avoid their tax burdens and is found in sections 80A – 80L of the Income Tax Act 58 of 1962 (“the ITA”).⁸

The effectiveness of the South African GAAR as a disincentive to impermissible tax avoidance has however been called into question for a number of years.⁹ This scrutiny has led to a number of amendments to the GAAR, the most recent of which was made in 2006. The 2006 amendment led to a complete overhaul of the GAAR, repealing section 103(1) of the ITA (“the old GAAR”) and substituting it with sections 80A – 80L of the ITA (“the new GAAR”). Due to the limited number of published rulings on its interpretation, the new GAAR’s application and effectiveness as a disincentive to impermissible tax avoidance have been greatly unclear.

Since the new GAAR has not been tested in our courts, further research is required to shed light on some of its ambiguous terms, which might lead to greater certainty regarding its interpretation and application.

⁶ SARS Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005) 4.

⁷ Koekemoer et al *SILKE: South African Income Tax* 1158.

⁸ Income Tax Act 58 of 1962.

⁹ CS Margo Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa (1988);

SARS Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005) 1.

1.2 Research objectives

First, the SARS Discussion Document of 2005 suggested that the purpose requirement contained in the GAAR be changed from a subjective test to an objective test.¹⁰ It is however uncertain whether the legislature did indeed introduce an objective test in the new GAAR, with diverging opinions amongst academic writers.¹¹ This research assignment will aim to establish whether the purpose requirement refers to the subjective purpose of the taxpayer or the objective purpose of the arrangement itself having regard to the relevant facts and circumstances.

Second, another problematic and contentious criterion in the new GAAR is the 'misuse or abuse' provision.¹² This novel criterion in the new GAAR has led to great uncertainty as the ITA contains no definition of what the term 'misuse and abuse' actually entails, and the term is therefore open to interpretation. As this criterion was drawn from the provisions of the Canadian GAAR, the Canadian GAAR and relevant case law will be analysed in order to shed further light on what this contentious term actually means.¹³

Third, in order for the Commissioner to invoke the GAAR, it must be shown that the arrangement in question resulted in a tax benefit for the taxpayer. However, if a taxpayer contends that absent the arrangement actually entered into by him, he would have entered into no arrangement, can it be said that a tax benefit has arisen? This research assignment will attempt to establish whether this defence (hereafter "the binary defence") can be utilized successfully by a taxpayer in showing that no tax benefit has in fact arisen as a result of the arrangement in question.

¹⁰ SARS *Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962)* (2005) 56.

¹¹ A de Koker & RC Williams *Silke on South African Income Tax* (2023) para 19.35; D Clegg & R Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.4; M Benetello, DM Davis, R Engels-Van Zyl, O Mollagee, J Roeleveld & G Urquhart *Juta's Income Tax* (2023) para 80A;

DM Davis, TS Emslie, JL van Dorsten, PJ Dachs "The sole or main purpose test – subjective or objective?" (2009) 181-182;

IDP Louw "The new general anti-avoidance rule: A comprehensive discourse on this statute" (2007) <https://open.uct.ac.za/bitstream/item/4509/thesis_law_lwxiza001.pdf?sequence=1> (Accessed 13/06/2023);

EB Broomberg "The new general anti-avoidance rule" (2007) Cape Town: SAFA Seminar; L van Schalkwyk & B Geldenhuys "The nature of the purpose requirement of an impermissible tax avoidance arrangement" (2010) 35 *JJS* 71 91.

¹² E Liptack "The GAAR's misuse or abuse test is dead (or should be)" (2016) 16 *WP* 24 24.

¹³ Clegg & Stretch *Income Tax in South Africa Commentary* para 26.3.5.

1.3 Research questions

The following research questions follow from the research objectives above:

- i. Does the purpose requirement contained in the new GAAR refer to a subjective or an objective test?
- ii. When will an avoidance arrangement result in the 'misuse or abuse' of the provisions of the ITA? Stated differently, how ought 'misuse or abuse' be interpreted in the new GAAR? Does the 'misuse or abuse' test still serve a purpose in modern times?
- iii. Could the binary defence be utilized successfully by a taxpayer in showing that no tax benefit has in fact arisen as a result of the arrangement in question?

1.4 Selection of jurisdiction for comparison

To ensure a suitable research scope, this study is limited to the legal jurisdictions of South Africa and Canada. The following criteria were used to choose these jurisdictions:

- Since the new GAAR in the ITA is the focus of this research, South Africa has been chosen as the main jurisdiction for the study.
- Canada's legal system and statutes are based on English law, which is why it was chosen as a comparative jurisdiction. Moreover, The SARS Discussion Document of 2005, which eventually resulted in the 2006 amendments to the GAAR, specifically mentioned Canada. As the 'misuse and abuse' criterion was drawn from the provisions of the Canadian GAAR, the Canadian GAAR and relevant case law will be analysed in order to shed further light on what this contentious term actually means.

1.5 Research methodology

In order to better comprehend the South African GAAR, this study uses an interpretive and qualitative research methodology. One way to characterise the research process

used is as a critical and comparative legal assessment of the pertinent literature, case law, and legislation.

1.6 Research limitations

The study will only address how the GAAR applies to income tax avoidance, even though it covers any tax, charge, or duty imposed by the ITA.

The comparative analysis will only look at the two jurisdictions - South Africa and Canada - that were previously mentioned and supported.

1.7 Overview of research assignment

CHAPTER 1: INTRODUCTION

The topic of the dissertation has been briefly explained in this chapter, together with the research objectives of the study and the research questions that need to be answered in order to reach them. The desired research methodology and research limitations have also been explained, together with an introduction and justification of the chosen jurisdictions for study.

CHAPTER 2: INTERPRETATION OF FISCAL STATUTES

Due to the lack of published rulings on its interpretation, there is a lot of ambiguity surrounding the implementation of the new GAAR. It can therefore be said that the issues relating to the application of the new GAAR, are mainly issues of interpretation. This chapter will briefly outline the position in South Africa with regard to the interpretation of fiscal statutes.

CHAPTER 3: THE PURPOSE REQUIREMENT

This chapter will consider whether the purpose requirement refers to the subjective purpose of the taxpayer or the objective purpose of the arrangement itself.

CHAPTER 4: MISUSE OR ABUSE OF THE PROVISIONS OF THE ACT

In this chapter, the Canadian GAAR and relevant case law will be analysed in order to shed further light on what this contentious term actually means and whether it still serves a purpose in modern times.

CHAPTER 5: TAX BENEFIT AND THE BINARY DEFENCE

This chapter will consider whether the binary defence can be successfully utilized by a taxpayer.

CHAPTER 6: CONCLUSION

This chapter will set out the conclusions, recommendations and areas for future research that follow from chapters 3 – 5.

2 INTERPRETATION OF FISCAL STATUTES

2.1 General background

Many of the key statutory concepts are not defined in the ITA and elude precise and comprehensive definition.¹⁴ The issues regarding the application of the new GAAR are therefore mainly issues of interpretation. In *Telkom v CSARS*¹⁵, the court confirmed the dictum in *SIR v Kirsch*, which states that:

*“Ordinary legal concepts and terms are involved in tax law and the ordinary principles of interpretation of statutes are applied in interpreting these terms.”*¹⁶

South African courts therefore do not apply any separate or special rules of interpretation when dealing with taxing statutes. Instead, taxing statutes are treated and interpreted in the same manner as any other legislation.¹⁷

The interpretation of statutes is however not a simple task and the rules of interpretation have continually changed and developed over the years.¹⁸

This chapter will briefly outline the sources used in the interpretation of the ITA, followed by an exposition of the development and changes in the approach to statutory interpretation as laid down by our courts.

2.2 Sources used in interpreting the ITA

2.2.1 The Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996 (“the Constitution”), is the supreme law of the Republic. Any law or conduct inconsistent with the Constitution is invalid and the obligations imposed by the Constitution must be fulfilled.¹⁹ No provision

¹⁴ De Koker & Williams *Silke on South African Income Tax* para 1.17A.

¹⁵ *Telkom SA SOC Limited v CSARS* 2020 (4) SA 480 (SCA) para 21.

¹⁶ *SIR v Kirsch* 1978 3 SA 93 (T) 94D.

¹⁷ Clegg & Stretch *Income Tax in South Africa Commentary Lexis* para 2.1.

¹⁸ Para 2.1.

¹⁹ Section 2 of the Constitution of the Republic of South Africa, 1996.

of the ITA may therefore contravene the provisions of the Constitution or the Bill of Rights contained in chapter 2 of the Constitution. Furthermore, in terms of section 39(2) of the Constitution, all interpretations of the ITA must promote the spirit, purport and objects of the Bill of Rights.²⁰

2.2.2 The ITA

The main source of definitions used in interpreting the ITA, is contained in section 1 of the ITA itself. If a term is specifically defined within this section, that is the meaning that will be ascribed to it for purposes of interpretation, unless a specific section of the ITA provides otherwise.

2.2.3 The Tax Administration Act 28 of 2011

The Tax Administration Act 28 of 2011 (“the TAA”) provides for the administrative implementation of the ITA.²¹ In the event that a term is defined in the TAA but not in the ITA, the definition in the TAA will also apply for purposes of the ITA.²² If there are any inconsistencies between the ITA and the TAA, the definition as contained in the ITA will apply.²³

2.2.4 The Interpretation Act 33 of 1957

Section 1 of the Interpretation Act 33 of 1957 (“the IA”) reads as follows:

“The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or in any portion thereof, and to the interpretation of all bylaws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, bylaw, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.”

²⁰ M Stiglingh, AD Koekemoer, L van Heerden, JS Wilcocks & P van der Zwan *SILKE: South African Income Tax* 24 ed (2022) para 2.4.

²¹ De Koker & Williams *Silke on South African Income Tax* para 25.1.

²² Section 1(2) of the Income Tax Act 58 of 1962.

²³ Section 4(3) of the Tax Administration Act 28 of 2011.

Accordingly, if there are any inconsistencies between a term defined in the ITA and the IA, the definition as contained in the ITA will take precedence over the latter, unless the context indicates otherwise. However, if a term is not defined in the ITA and the TAA, but is defined in the IA, the definition as contained in the IA will apply.²⁴ The provisions of the IA will therefore only apply if a term is not defined in the ITA or when ambiguities exist within the ITA.²⁵

2.2.5 SARS interpretation notes

SARS publishes interpretation notes giving its own interpretations and explanations of various provisions in the ITA.

Whether a court should have regard to interpretation notes in determining the proper interpretation of a provision was closely considered by the Constitutional Court in *Marshall v CSARS*.²⁶

It was decided by the court a quo (the Supreme Court of Appeal), that interpretation notes are only helpful justifications on how to read and apply the relevant statutory provision; they have no legal force on the courts or taxpayers.²⁷ This was confirmed by the Constitutional Court, asking rhetorically:

“Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.”²⁸

²⁴ Clegg & Stretch *Income Tax in South Africa Commentary* para 2.5.

²⁵ Stiglingh et al *South African Income Tax* para 2.4.1.

²⁶ *Marshall and Others v CSARS* 2018 ZACC 11.

²⁷ Para 33.

²⁸ Para 10.

It is therefore clear that interpretation notes contain SARS's own interpretation of the relevant provisions and do not form part of tax legislation.²⁹ Accordingly, courts ought not have regard to interpretation notes when interpreting the ITA.³⁰

2.2.6 Judicial decisions

South African courts have an essential role to play in interpreting tax law. Other than legislation, which forms the main source of income tax law, the judgements of South African courts also form an important source of tax law.³¹ This is a direct result of the English *stare decisis* rule being accepted in South African law. The *stare decisis* rule entails the principle of legal precedence, meaning that the rule of law established in a previous judgement is binding upon a lower court and that courts of equal rankings must follow their own previous decisions.³²

Tax Courts are therefore bound by decisions made in the Constitutional Court, the Supreme Court of Appeal and the Provincial Divisions of the High Court.

The judgements of the Tax Court are binding only between the parties before it, and therefore not binding on any other court. However, the judgements of the Tax Court are of persuasive value in other Tax Courts, the High Courts and the Supreme Court of Appeal.³³

2.3 Development and changes in the rules of interpretation as laid down by our courts

2.3.1 Introduction

The principles of statutory interpretation in South African courts have undergone radical changes over the last few decades. This has occurred as a result of changes

²⁹ Stiglingh et al *South African Income Tax* para 2.4.

³⁰ Marshall and Others v CSARS 2018 ZACC 10;

Cliffe Dekker Hofmeyr "Status of SARS interpretation notes" (2018) <

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status-of-sars-interpretation-notes-.html>> (Accessed: 25/03/2023).

³¹ Clegg & Stretch *Income Tax in South Africa Commentary* para 2.4.1.

³² Stiglingh et al *South African Income Tax* para 2.4.2;

Bayethe Maswazi "The doctrine of precedent and the value of s39(2) of the Constitution" (2017) <

<https://www.derebus.org.za/doctrine-precedent-value-s-392-constitution/>> (Accessed: 25/03/2023).

³³ SARS "Dispute resolution process" (2023) <

<https://www.sars.gov.za/legal-counsel/dispute-resolution-judgments/dispute-resolution-process/> > (Accessed: 26/03/2023).

in judicial philosophy and most importantly, the shift from parliamentary sovereignty to constitutional supremacy.³⁴

Although the regular changes in the rules of interpretation have made it difficult for our courts to apply these rules consistently, greater cohesion has been achieved through a series of judgements in the Supreme Court of Appeal.³⁵

The development and changes in the approach to statutory interpretation as laid down by our courts, are now considered.

2.3.2 The strict literal approach

The strict literal approach is also known as the 'golden rule of interpretation'.³⁶ According to this rule, legislation is interpreted based on the grammatical or ordinary meaning of the words of the statute.³⁷ Traditionally, this was the approach followed by our courts.³⁸ The courts adhered strictly to the words of the ITA and only deviated in exceptional circumstances.³⁹

However, problems often arise when interpreting legislation according to the strict literal approach, as the same word or phrase can often be interpreted in different ways by different people.

³⁴ De Koker & Williams *Silke on South African Income Tax* para 25.1; Anonymous "What is constitutional supremacy" (2023) <<https://www.concourt.org.za/index.php/constitution/what-is-a-constitution>> (Accessed: 26/03/2023).

³⁵ Clegg & Stretch *Income Tax in South Africa Commentary* para 2.1; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 20; CSARS v Bosch 2015 (2) SA 174 (SCA) para 17; CSARS v Reunert Ltd 2017 ZASCA 153 para 9-10; Telkom SA SOC Limited v CSARS 2020 (4) SA 480 (SCA) para 14; CSARS v United Manganese of Kalahari (Pty) Ltd (264/2019) 2020 ZASCA 16 para 8.

³⁶ Stiglingh et al *South African Income Tax* para 2.4.3.

³⁷ L Roelofse & M Heyman "The interpretation of tax legislation" (2020) <<https://www2.deloitte.com/za/en/pages/tax/articles/the-interpretation-of-tax-legislation.html>> (Accessed: 26/03/2023).

³⁸ CIR v George Forest Timber Co Ltd 1924 AD 516;

CIR v Simpson 1949 (4) SA 678 (A).

³⁹ Clegg & Stretch *Income Tax in South Africa Commentary* para 2.1.

2.3.3 The intention of the legislature

In many instances where there were uncertainty, ambiguity or absurdity in the language used in legislation, our courts have deviated from the strict literal approach, rather seeking to give effect to the so-called 'intention of the legislature'.⁴⁰

The problem with attempting to give effect to the intention of the legislature is that intention is subjective, and one cannot possibly enter the mind of the legislature and ascertain their intention with certainty or accuracy.⁴¹

2.3.4 The objective approach

The earlier conventional wisdom that statutory interpretation seeks to determine and give effect to 'the intention of the legislature', was resoundingly rejected by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (hereafter "Endumeni").⁴² The court held as follows:

*"The sole benefit of expressions such as 'the intention of the legislature' or 'the intention of the parties' is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say."*⁴³

The court then went on to reformulate the proper approach to interpretation as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of

⁴⁰ Glen Anil Development Corp Ltd v SIR 1975 (4) SA 715 (A) para 14; CIR v South African Fire and Accident Insurance Co Ltd 1960 (3) SA 1 (A); M v COT 1956 (4) SA 197 (SR).

⁴¹ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 20.

⁴² De Koker & Williams *Silke on South African Income Tax* para 1.17A; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

⁴³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 24.

the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document... The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. All this is consistent with the emerging trend in statutory construction. It clearly adopts as the proper approach to the interpretation of documents one that, from the outset, considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.”⁴⁴

The approach formulated in *Endumeni* has subsequently been endorsed by our courts, erasing any doubt that an objective approach should be adopted when interpreting legislation, giving regard to the context in which the provision appears, the purpose of the provision and its surrounding circumstances.⁴⁵ This approach to the interpretation of statutes is also referred to as the modern approach to interpretation and requires a textual, contextual and purposive interpretation of the relevant provisions.

In analysing the selected elements of the GAAR in the following chapters, the objective approach as formulated in *Endumeni* will be used.

⁴⁴ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18 - 19.

⁴⁵ CSARS v Bosch 2015 (2) SA 174 (SCA) para 17;

CSARS v Reunert Ltd 2017 ZASCA 153 para 9-10;

Telkom SA SOC Limited v CSARS 2020 (4) SA 480 (SCA) para 14;

CSARS v United Manganese of Kalahari (Pty) Ltd (264/2019) 2020 ZASCA 16 para 8;

Airports Company South Africa v Big Five Duty Free (Pty) Ltd 2019 2 BCLR 165 (CC) para 29.

3 THE PURPOSE REQUIREMENT: SUBJECTIVE OR OBJECTIVE?

3.1 General background

The SARS Discussion Document of 2005 suggested that the purpose requirement contained in the GAAR be changed from a subjective test to an objective test.⁴⁶ It is however uncertain whether the legislature did indeed introduce an objective test in the new GAAR, with diverging opinions amongst academic writers.⁴⁷ This chapter considers whether the purpose requirement in the new GAAR refers to the subjective purpose of the taxpayer, or the objective purpose of the arrangement itself having regard to the relevant facts and circumstances.

3.2 The purpose requirement as contained in the now-repealed s 103(1)

3.2.1 General

The purpose requirement of section 103(1) was set out in subsections 103(1)(c) and 103(4) thereof. Section 103(1)(c) required a transaction, operation or scheme to be entered into or carried out solely or mainly for the purpose of obtaining a tax benefit. Section 103(4) provided that if a transaction, operation or scheme resulted in a tax benefit, it was rebuttably presumed that it was entered into or carried out with the requisite sole or main purpose of avoiding or reducing tax. The onus of rebutting this presumption, fell squarely on the taxpayer.⁴⁸

⁴⁶ SARS *Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962)* (2005) 56.

⁴⁷ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.35; Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.4; M Benetello, DM Davis, R Engels-Van Zyl, O Mollagee, J Roeleveld & G Urquhart *Juta's Income Tax* (2023) para 80A;

DM Davis, TS Emslie, JL van Dorsten, PJ Dachs "The sole or main purpose test – subjective or objective?" (2009) 181-182;

IDP Louw "The new general anti-avoidance rule: A comprehensive discourse on this statute" (2007) <https://open.uct.ac.za/bitstream/item/4509/thesis_law_lwxiza001.pdf?sequence=1> (Accessed 13/06/2023);

EB Broomberg "The new general anti-avoidance rule" (2007) Cape Town: SAFA Seminar; L van Schalkwyk & B Geldenhuys "The nature of the purpose requirement of an impermissible tax avoidance arrangement" (2010) 35 *JJS* 71 91.

⁴⁸ *SIR v Geustyn, Forsyth and Joubert* 1971 (3) SA 567 (A) para 6.

3.2.2 What was the test in determining purpose?

In *SIR v Gallagher*, the difference between an objective and a subjective test was explained by the court as follows:

*“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 opposed to a subjective test which takes as its criterion the purpose which those carrying out the scheme intended to achieve by means of the scheme.”*⁴⁹

From the wording of s103(1), it is clear that a subjective test is required, as it requires one to establish the subjective purpose of the taxpayer entering into the transaction, operation or scheme.⁵⁰ This was also confirmed in *SIR v Gallagher*, where Corbett JA held as follows:

*“In my view, the test is undoubtedly a subjective one. Section 103(1) draws a clear distinction between the ‘effect’ of a scheme and the ‘purpose’ thereof, and this virtually rules out an interpretation which seeks to give ‘purpose’ an objective connotation and to equate it, more or less, to ‘effect’.”*⁵¹

Although the wording of s 103(1) provides for a purely subjective test in determining the purpose requirement, our courts have weighed the taxpayer’s subjective intention against the surrounding facts and circumstances, thereby creating an element of objectivity in determining the purpose requirement.⁵² This is illustrated below through the following case law: *SIR v Geustyn, Forsyth and Joubert*⁵³, *ITC 1636*⁵⁴, *SIR v Gallagher*.⁵⁵

⁴⁹ *SIR v Gallagher* 1978 (2) SA 463 (A) para 12.

⁵⁰ Clegg & Stretch *Income Tax in South Africa Commentary* para 19.35.

⁵¹ *SIR v Gallagher* 1978 (2) SA 463 (A) para 12.

⁵² L van Schalkwyk & B Geldenhuys “The nature of the purpose requirement of an impermissible tax avoidance arrangement” (2010) 35 *JJS* 71 74.

⁵³ *SIR v Geustyn, Forsyth and Joubert* 1971 (3) SA 567 (A).

⁵⁴ *ITC 1636* 60 SATC 267.

⁵⁵ *SIR v Gallagher* 1978 (2) SA 463 (A).

3.2.2.1 SIR v Geustyn, Forsyth and Joubert

Since 1961, Geustyn, Forsyth and Joubert have operated as a partnership providing engineering services. In 1966, they formed an unlimited liability company of which they were the sole directors and shareholders. The practice of the partnership was sold to the company for a goodwill consideration of R240 000. Geustyn, Forsyth and Joubert were employed by the company and received an annual salary of R10 000 each. The goodwill consideration was determined on the basis of an aggregate of three years' profits and was credited to the loan accounts of the former partners.⁵⁶

The Secretary invoked section 103(1) of the ITA and taxed the profits of the company in the hands of its new directors and shareholders. The Secretary was of the opinion that the creation of the loan accounts made considerable tax advantages possible, since it would enable the three taxpayers to obtain, under the guise of capital and without paying tax thereon, what were in reality the profits of the engineering business which would, but for the formation of the company, have been taxable in the hands of the taxpayers.

Geustyn, Forsyth and Joubert contended that obtaining a tax benefit was not a factor taken into account in deciding to convert the partnership into a company. The subject purpose and *ipse dixit* of the taxpayers were then weighed against and confirmed by the following objective facts and circumstances:

- The South African Association of Consulting Engineers, of which the taxpayers were members, expressly sanctioned its members to form unlimited liability companies to conduct their practices;
- By the time the taxpayers converted their partnership into a company, more than half of the Association's had already adopted that form of practice;
- More than half of the non-members of the Association are registered companies; and

⁵⁶ TS Emslie & DM Davis *Income Tax: Cases & Materials* 4 ed (2012) 886.

- The majority of consulting engineers in England, Canada, France, Switzerland and Japan practice in corporate form.

Ogilvie Thompson CJ held that there are various reasons, unrelated to the incidence of tax, in favour of converting a partnership into a company. Partnerships are liable to dissolution upon the death or resignation of a partner and were also limited to twenty partners per partnership.⁵⁷

It was therefore held that obtaining a tax benefit was not the sole or main purpose in converting the partnership into a company.

3.2.2.2 ITC 1636

The appellant was a private company carrying on business on a major scale as a manufacturer of various products at its factory. The company wished to raise funds to be used in future expansions and proposed to do this by way of a sale and leaseback agreement, whereby it would sell various plant and equipment to a lessor, who would in turn lease the assets back to the company.

One of the benefits of the sale and leaseback agreement was that both the capital and interest portions of the rental were tax deductible. This is in contrast with a conventional loan, where only the interest is deductible and not the capital. The Commissioner therefore invoked section 103(1) of the ITA, contending that the sole or main purpose of concluding the sale and leaseback agreement, was to obtain a tax benefit.

The taxpayer conceded that the favourable tax consequences resulting from the arrangement played a part in choosing a sale and lease back transaction, but contended that this was not the sole or main purpose of structuring the transaction in that manner. As a total package, the transaction made good business sense. The sole or main purpose of entering into the sale and leaseback agreement was not to obtain a tax benefit, but to raise funds to be used in future expansions of the business. The tax benefit was merely a coincidence of raising the funds under the particular structure.

⁵⁷ SIR v Geustyn, Forsyth and Joubert 1971 (3) SA 567 (A) Para 20.

The taxpayer's *ipse dixit* was then weighed against the following objective facts and circumstances:

- A sale and leaseback agreement is a recognised method of transferring ownership without altering physical control or custody of property and is regularly used in the manufacturing industry;
- The company wished to raise funds to be used in future expansions of the business; and
- Had it not been necessary for the company to raise capital to fund its future expansions, no transaction or agreement would have existed at all.

The court therefore came to the conclusion that obtaining a tax benefit was not the sole or main purpose of the transaction. The raising of finance for capital expansion was the *fons et origo* of the transaction and remained the main purpose thereof.⁵⁸

3.2.2.3 SIR v Gallagher

In 1968, Gallagher formed a company of which he was the sole shareholder. Gallagher then sold various assets to the value of approximately R750 000 to the company, with the purchase price owed by the company remaining outstanding as an interest free loan. Three trusts for the benefit of his children were then formed, to which he donated his shares in the aforementioned company.

The Secretary invoked section 103(1) of the ITA and assessed Gallagher on the company's income during the 1969 to 1971 years of assessment. The sole question for decision by the court was whether the sole or main purpose of Gallagher entering into the transaction, was obtaining a tax benefit.

Corbett JA confirmed that a subjective test is to be used in determining the purpose of a taxpayer in entering into an agreement. He then cited the following *dictum* delivered by the *court a quo*:

⁵⁸ See also CIR v Conhage 61 SATC 391.

*“The sworn testimony of a witness, given with the appearance of truthfulness and candour, is not lightly to be discarded unless some reason appears for disbelieving the witness. What he says may be discarded if there is credible evidence to the contrary, or if there are such weighty probabilities against what he has deposed to, that the court does not feel justified in accepting his evidence. A witness may be found to have been wilfully untruthful, or he may be found to have been mistaken or confused.”*⁵⁹

According to Gallagher, the sole or main purpose of the arrangement was to reduce his estate duty. The court confirmed that there was no evidence to contradict his *ipse dixit*, nor could any criticism be made of the manner in which he gave his evidence.⁶⁰ Gallagher’s evidence was then weighed against the following objective facts and circumstances:

- The share-market was escalating rapidly, which could have impacted Gallagher tremendously from an estate duty point of view;
- Gallagher’s work carried a ‘more than normal’ hazard;
- The attorney whom Gallagher consulted did not prepare any calculations regarding income tax and was not asked to do so; and
- The Accountant Member of the court pointed out that if income tax avoidance or saving had been an object, there was a refinement which could have been introduced into the scheme which would have assisted the appellant in that regard. However, this was not done.

The court therefore held that obtaining a tax benefit was not Gallagher’s sole or main purpose in entering into the transaction.⁶¹

⁵⁹ SIR v Gallagher 1978 (2) SA 463 (A) para 17.

⁶⁰ Para 13.

⁶¹ Para 29.

3.2.2.4 Conclusion

It is therefore very clear that the wording of section 103(1) of the ITA required a subjective test in determining the purpose of a taxpayer entering into a transaction, operation or scheme.⁶² However, the test applied by our courts was not purely subjective. Instead, the taxpayer's subjective intention and *ipse dixit* was weighed against the surrounding facts and circumstances, thereby creating an element of objectivity in determining the purpose requirement.⁶³ The courts would not easily discard a taxpayer's *ipse dixit* that was given with the appearance of truthfulness and candour. However, if objective factors exist that contradict the taxpayer's *ipse dixit* and the court does not feel justified in accepting the evidence led, the taxpayer's *ipse dixit* may be discarded.⁶⁴

It was therefore a subjective test, measured against objective facts and circumstances.

3.2.3 Problems and weaknesses

As illustrated by the aforementioned case law, the fiscus had difficulty proving that the sole or main purpose of a taxpayer entering into a transaction was to obtain a tax benefit.⁶⁵ The SARS Discussion Document of 2005 identified two main reasons for this.⁶⁶

The term 'main purpose' has generally been construed to mean the 'dominant purpose' of a taxpayer entering into a transaction.⁶⁷ Therefore, if a transaction has both a tax and commercial purpose, a taxpayer can escape the purpose requirement simply by showing that the commercial purpose was the dominant purpose. Since most transactions do have a commercial rationale, the Commissioner is tasked with the difficult task of having to disprove a taxpayer's *ipse dixit* through circumstantial

⁶² SIR v Gallagher 1978 (2) SA 463 (A) para 12.

⁶³ L van Schalkwyk & B Geldenhuys "The nature of the purpose requirement of an impermissible tax avoidance arrangement" (2010) 35 JJS 71 74.

⁶⁴ SIR v Gallagher 1978 (2) SA 463 (A) para 17.

⁶⁵ SIR v Geustyn, Forsyth and Joubert 1971 (3) SA 567 (A);

ITC 1636 60 SATC 267;

SIR v Gallagher 1978 (2) SA 463 (A);

CIR v Conhage 61 SATC 391.

⁶⁶ SARS Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005) 43.

⁶⁷ ITC 1636 60 SATC 267 292;

CIR v Conhage 61 SATC 391 para 15.

evidence.⁶⁸ This was clearly displayed in *ITC 1636* and *CIR v Conhage*, where the taxpayers escaped the purpose requirement simply by showing that the transactions had a commercial purpose, which was the raising of capital.⁶⁹

Another aspect of the purpose requirement creating difficulty for the fiscus, was the fact that it required a subjective test.⁷⁰ RC Williams therefore aptly stated the following:

*“In essence . . . a taxpayer could with impunity enter into a transaction with the (subjective) sole purpose of avoiding tax provided that there was no (objective) abnormality in the means or manner or in the rights and obligations which it created. Conversely, a taxpayer could with impunity enter into a transaction which was objectively ‘abnormal’ provided that he did not, subjectively, have the sole or main purpose of tax avoidance.”*⁷¹

As a result of these inherent problems and weaknesses in the purpose requirement and taxpayers consequently escaping its application with ease, the SARS Discussion Document of 2005 suggested that the purpose requirement contained in the GAAR be changed from a subjective test to an objective test.⁷² However, in the SARS Revised Proposals Document of 2006, SARS clarified its statements in the 2005 Document by stating the following:

“It was never the intent of the original proposals to prevent a taxpayer’s explanation of the reasons for an arrangement from being taken into account. Rather, it was intended to ensure that a taxpayer’s statements of intent be rigorously tested against the relevant facts and circumstances. The

⁶⁸ SARS Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005) 43.

⁶⁹ *ITC 1636* 60 SATC 267 274;

CIR v Conhage 61 SATC 391 para 15.

⁷⁰ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.4;

SIR v Gallagher 1978 (2) SA 463 (A) para 12.

⁷¹ RC Williams “The 1996 Amendments to the General Anti-Avoidance Section of the Income Tax Act” (1997) 114 SALJ 675.

⁷² SARS Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005) 56.

revised proposals are intended to better reflect that intent and reinforce existing precedent in this regard".⁷³

These statements have led to much debate amongst tax scholars on whether the purpose requirement contained in the new GAAR requires a subjective or objective test.⁷⁴

3.3 The purpose requirement as contained in sections 80A and 80G

3.3.1 What is the test in determining purpose?

3.3.1.1 The wording of sections 80A and 80G

The purpose requirement of the new GAAR is contained in section 80A and 80G of the ITA. Section 80A states that "*an avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose is to obtain a tax benefit*". Once it has been established that an avoidance arrangement exists, section 80G creates a rebuttable presumption that it was entered into or carried out for the sole or main purpose of obtaining a tax benefit. This presumption can be rebutted if the taxpayer shows that reasonably considered, in light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement.

It is important to note the subtle differences in wording between the purpose requirement in section 103(1) of the old GAAR and sections 80A and 80G of the new GAAR.

⁷³ SARS Revised Proposals on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2006) 21.

⁷⁴ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.35; Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.4; Benetello et al *Juta's Income Tax* (2023) para 80A; Davis et al "The sole or main purpose test – subjective or objective?" (2009) 181-182; IDP Louw "The new general anti-avoidance rule: A comprehensive discourse on this statute" (2007) <https://open.uct.ac.za/bitstream/item/4509/thesis_law_lwxiza001.pdf?sequence=1> (Accessed 13/06/2023); EB Broomberg "The new general anti-avoidance rule" (2007) Cape Town: SAFA Seminar; L van Schalkwyk & B Geldenhuys "The nature of the purpose requirement of an impermissible tax avoidance arrangement" (2010) 35 *JJS* 71 91.

Section 103(1)(c) required a transaction, operation or scheme to be entered into or carried out solely or mainly for the purpose of obtaining a tax benefit. Section 103(4) provided that if a transaction, operation or scheme resulted in a tax benefit, it was rebuttably presumed that it was entered into or carried out with the requisite sole or main purpose of avoiding or reducing tax. In determining the purpose requirement in section 103(1), the subjective purpose with which a taxpayer entered into a transaction, operation or scheme therefore had to be established.⁷⁵

In terms of section 80A, an avoidance arrangement will constitute an impermissible avoidance arrangement if 'its' sole or main purpose is to obtain a tax benefit. The presumption created by section 80G can then be rebutted by the taxpayer if it can be shown that reasonably considered, in light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement. What is of importance is therefore the purpose of the arrangement itself and its surrounding facts and circumstances, as opposed to the purpose of the taxpayer entering into the arrangement, as was the case in the old GAAR.

The wording of sections 80A and 80G therefore connotes that an objective test must be applied in determining the purpose requirement, and that the subjective purpose of the taxpayer is irrelevant.⁷⁶

Whether this is indeed the case, has been the subject of debate and diverging opinions amongst tax scholars. The opinions of various tax scholars will now be considered.

3.3.1.2 The opinion of tax scholars

3.3.1.2.1 De Koker and Williams

These tax scholars have no doubt that an objective test must be applied in determining the purpose requirement.⁷⁷ Due to the wording of section 80A, specifically the use of the word 'its', they believe that the word 'purpose' refers to the purpose of the arrangement itself, which must be objectively determined. The subjective purpose of

⁷⁵ Clegg & Stretch *Income Tax in South Africa Commentary* para 19.35.

⁷⁶ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.35.

⁷⁷ Para 19.35.

the taxpayer entering into the transaction is therefore irrelevant. The word ‘purpose’ can be used interchangeably with ‘effect’, referring to the effect of the arrangement itself.

De Koker and Williams therefore submit that the test for determining ‘purpose’ in the context of section 80A will be whether, if examined objectively, the avoidance arrangement in question had the effect or result of obtaining a tax benefit.⁷⁸

3.3.1.2.2 Clegg and Stretch

These tax scholars believe that in order for a taxpayer to displace the presumption contained in section 80G against him, not only must the taxpayer be able to show compelling reasons for entering into the arrangement, but a court must also be persuaded that ‘reasonably considered in light of the relevant facts and circumstances’, obtaining a tax benefit was not the sole or main purpose.⁷⁹

Clegg and Stretch therefore submit that in order to determine the purpose requirement, the courts must take an objective view of the facts and circumstances surrounding the transaction or arrangement, whilst also taking into account the *ipse dixit* of the taxpayer.⁸⁰ These scholars therefore suggest an objective test, measured against subjective facts and circumstances such as the taxpayer’s *ipse dixit*.

3.3.1.2.3 Benetello, Davis, Engels-Van Zyl, Mollagee, Roeleveld and Urquhart

These tax scholars still view *SIR v Gallagher* as authority for the application of a subjective test in determining the purpose requirement.⁸¹ Accordingly, they are of the belief that a subjective test must be applied, in which the *ipse dixit* of the taxpayer is evaluated within the context of objective facts and circumstances, to establish the true purpose.

⁷⁸ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.38.

⁷⁹ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.4.

⁸⁰ Para 26.3.4.

⁸¹ Benetello et al *Juta’s Income Tax* (2023) para 80A.

3.3.1.2.4 Davis, Emslie, Van Dorsten and Dachs

Davis et al believe that an arrangement itself can never have a purpose, and that the purpose requirement must be determined by determining the purpose of those entering into the arrangement.⁸² They therefore submit that the test remains a subjective one, despite the fact that section 80A refers to the purpose of the arrangement itself.

3.3.1.2.5 Louw

Louw emphasises the change in wording from the now-repealed section 103(1) to that of section 80A of the new GAAR, and states that the wording makes it clear that an objective test must be applied in determining the purpose requirement.⁸³ In order to determine the purpose requirement, regard must therefore be had to the effect of the arrangement, and not the subjective purpose of the taxpayer.

3.3.1.2.6 Broomberg

Broomberg examines the wording of both sections 80A and 80G in coming to a conclusion that an objective test must be applied in determining the purpose requirement.⁸⁴ Both these sections refer to the purpose of the arrangement itself, rather than that of the taxpayer entering into the arrangement.

3.3.1.2.7 Van Schalkwyk and Geldenhuys

These tax scholars submit that the amendments to the purpose requirement merely establishes the approach which was applied by our courts under the now-repealed section 103(1).⁸⁵ They therefore believe that the test remains subjective, and that the *ipse dixit* of the taxpayer must be weighed against the surrounding facts and circumstances.

⁸² Davis et al “The sole or main purpose test – subjective or objective?” (2009) 181-182.

⁸³ IDP Louw “The new general anti-avoidance rule: A comprehensive discourse on this statute” (2007) <https://open.uct.ac.za/bitstream/item/4509/thesis_law_lwxiza001.pdf?sequence=1> (Accessed 13/06/2023).

⁸⁴ EB Broomberg “The new general anti-avoidance rule” (2007) Cape Town: SAFA Seminar.

⁸⁵ L van Schalkwyk & B Geldenhuys “The nature of the purpose requirement of an impermissible tax avoidance arrangement” (2010) 35 *JJS* 71 91.

3.3.1.3 Conclusion

The opinion of tax scholars vary between a pure subjective test⁸⁶, a subjective test where the *ipse dixit* of the taxpayer is weighed against objective facts and circumstances⁸⁷, a pure objective test⁸⁸ and an objective test taking into account the *ipse dixit* of the taxpayer⁸⁹.

The wording of the purpose requirement contained in the now-repealed section 103(1) required a subjective test.⁹⁰ However, a pure subjective test could lead to the anomaly where a taxpayer could, without penalty, enter into an objectively abnormal transaction, as long as he did not have the subjective sole or main purpose of obtaining a tax benefit.⁹¹ Therefore, our courts did not apply a pure subjective test in determining the purpose requirement, instead weighing the taxpayer's subjective intention and *ipse dixit* against the surrounding facts and circumstances of the transaction.⁹² It was therefore a subjective test, weighed against objective facts and circumstances.

As a result of the inherent problems and weaknesses in the purpose requirement and taxpayers consequently escaping its application with ease, SARS suggested that the purpose requirement contained in the GAAR be changed from a subjective test to an objective test.⁹³ However, SARS later clarified these statements in the Revised Proposals Document of 2006, stating that it was never the intent of the original proposals to prevent a taxpayer's explanation of the reasons for an arrangement from being taken into account.⁹⁴

⁸⁶ Davis et al "The sole or main purpose test – subjective or objective?" (2009) 181-182.

⁸⁷ Benetello et al *Juta's Income Tax* (2023) para 80A;

L van Schalkwyk & B Geldenhuys "The nature of the purpose requirement of an impermissible tax avoidance arrangement" (2010) 35 *JJS* 71 91.

⁸⁸ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.38;

IDP Louw "The new general anti-avoidance rule: A comprehensive discourse on this statute" (2007) <https://open.uct.ac.za/bitstream/item/4509/thesis_law_lwxiza001.pdf?sequence=1> (Accessed 13/06/2023);

EB Broomberg "The new general anti-avoidance rule" (2007) Cape Town: SAFA Seminar.

⁸⁹ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.4.

⁹⁰ Para 19.35.

⁹¹ RC Williams "The 1996 Amendments to the General Anti-Avoidance Section of the Income Tax Act" (1997) 114 *SALJ* 675.

⁹² L van Schalkwyk & B Geldenhuys "The nature of the purpose requirement of an impermissible tax avoidance arrangement" (2010) 35 *JJS* 71 74.

⁹³ SARS Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005) 56.

⁹⁴ SARS Revised Proposals on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2006) 21.

The purpose requirement was therefore amended, and its wording in the new GAAR leads one to believe that that an objective test must be applied in determining the purpose requirement, and that the subjective purpose of the taxpayer is mostly irrelevant.⁹⁵

However, considering the historical application of the now-repealed section 103(1), the suggestions made by SARS in the 2005 Discussion Document and the 2006 Revised Proposals Document, the wording of sections 80A and 80G and the opinions of various tax scholars, it is suggested that the test cannot be purely objective.

Instead, in determining the purpose requirement under the new GAAR, it is submitted that our courts must apply an objective test by taking into account the surrounding facts and circumstances of the transaction – which also include the *ipse dixit* of the taxpayer.⁹⁶ The same factors will therefore be considered by our courts in determining the purpose requirement under sections 80A and 80G, as was the case in the now-repealed section 103(1): the surrounding facts and circumstances of the taxpayer entering into the transaction, and the subjective purpose and *ipse dixit* of the taxpayer. The real distinction lies in which of these factors our courts will rely on most in coming to a decision.

Under the now-repealed section 103(1), our courts relied on the subjective purpose and *ipse dixit* of the taxpayer, but also weighed this up against the objective facts and circumstances surrounding the transaction. It was therefore a subjective test, weighed against objective factors.

It is submitted that in determining the purpose requirement under sections 80A and 80G, our courts must rely on the objective surrounding facts and circumstances of the transaction, whilst also taking into account the subjective purpose and *ipse dixit* of the taxpayer. The courts must therefore follow an objective test, weighed against subjective factors.

⁹⁵ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.35.

⁹⁶ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.4.

4 MISUSE OR ABUSE OF THE PROVISIONS OF THE ACT

4.1 General background

Another problematic and contentious criterion in the new GAAR, is the ‘misuse or abuse’ provision contained in section 80A(c)(ii) of the ITA.⁹⁷ Where an avoidance arrangement with a sole or main purpose to obtain a tax benefit would directly or indirectly result in the misuse or abuse of the ITA, including the provisions of the GAAR itself, that avoidance arrangement would constitute an impermissible avoidance arrangement.⁹⁸ The ‘misuse or abuse’ criterion applies in any context and is an alternative to the abnormality and lack of commercial substance tests.⁹⁹

This novel criterion in the new GAAR has led to great uncertainty, as the ITA contains no definition of what the term ‘misuse or abuse’ actually entails and the term is therefore open to interpretation. Furthermore, some tax scholars have been critical of its inclusion in the new GAAR.¹⁰⁰ Whether the ‘misuse or abuse’ test still serves a purpose in modern times have also been called into question.¹⁰¹ As this criterion was drawn from the provisions of the Canadian GAAR, the Canadian GAAR and relevant case law (as well as the opinions of various tax scholars) will be analysed in order to shed further light on what this contentious term actually means and whether it should be retained in the GAAR at all or as it is worded currently.

4.2 Misuse or abuse in the Canadian GAAR

As the ‘misuse or abuse’ test derives from the Canadian GAAR, the Canadian GAAR is naturally the point of departure in attempting to analyse and understand this provision.

The Canadian GAAR is contained in section 245 of the Canadian Income Tax Act (“the CITA”).¹⁰² Section 245(4) of this Act provides as follows:

⁹⁷ E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 24.

⁹⁸ Section 80A(c)(ii) of the Income Tax Act 58 of 1962.

⁹⁹ Benetello et al *Juta’s Income Tax* (2023) para 80A.

¹⁰⁰ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.39.

¹⁰¹ E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 25.

¹⁰² Income Tax Act R.S.C., 1985, c. 1 (5th Supp).

“The Canadian GAAR applies to a transaction only if it may reasonably be considered that the transaction . . . would, if this Act were read without reference to this s 245 (4), result directly or indirectly in a misuse of the provisions of certain stipulated Acts and rules, as well as a tax treaty; or . . . would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.”

The *Canada Trustco Mortgage Co v Canada* case provides great insight into how the ‘misuse or abuse’ test is applied by Canadian courts.¹⁰³ The Supreme Court of Canada held as follows:

“Section 245(4) imposes a two-part inquiry. First, the courts must conduct a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act. Second, the court must examine the factual context of the case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose. Abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions contemplated by the provisions.”¹⁰⁴

¹⁰³ *Canada Trustco Mortgage Co v Canada* 2005 SCC 54.

¹⁰⁴ Para 55 and 58.

The Canadian ‘misuse or abuse’ test therefore requires a two-part enquiry. Firstly, one must determine the object, spirit and purpose of the provisions giving rise to the tax benefit, connoting an approach similar to that formulated in *Endumeni*. This is then followed by an examination of the factual context of a case to determine whether the avoidance arrangement in question defeats the spirit, purpose and object of the provisions in issue.¹⁰⁵

In Canada, the purpose of the ‘misuse or abuse’ test is to promote the proper approach to interpretation. It demands a textual, contextual and purposive interpretation of the provisions of the CITA relied on by the taxpayer, in order to find a meaning that harmonizes the wording, object, spirit and purpose of the CITA.¹⁰⁶

4.3 What does misuse or abuse entail?

4.3.1 Introduction

As the ITA provides no definition as to what the term ‘misuse or abuse’ entails, the inclusion of the ‘misuse or abuse’ criterion in the new GAAR was met with much debate amongst tax scholars, with some scholars also criticizing its inclusion.

4.3.2 De Koker and Williams

De Koker and Williams believe that the ‘misuse or abuse’ criterion was inserted into the new GAAR to provide SARS with a last-resort argument where none of the other tainting elements can be shown to be present.¹⁰⁷ Furthermore, they criticize the ‘misuse or abuse’ criterion in that a taxpayer who misuses or abuses the provisions of the ITA can still escape application of the GAAR, provided that the arrangement was entered into without the requisite sole or main purpose of obtaining a tax benefit.¹⁰⁸ Although this is the case for any of the tainting elements (misuse or abuse, abnormality and lack of commercial substance), I agree with the authors’ submission that a taxpayer who misuses or abuses the provisions of the ITA, should not be able to escape without any fiscal consequences. Surely ‘misuse or abuse’ of the ITA should

¹⁰⁵ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.39.

¹⁰⁶ *Canada Trustco Mortgage Co v Canada* 2005 SCC 54 para 44 and 47.

¹⁰⁷ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.39.

¹⁰⁸ Para 19.39.

not be tolerated, irrespective of what the purpose of a particular arrangement or transaction was.¹⁰⁹

This is in contrast to the Canadian GAAR, where a tax avoidance transaction will not be impugned unless ‘misuse or abuse’ of the provisions of the CITA can be proven.¹¹⁰ Although other criteria must still be met to invoke application of the Canadian GAAR, the ‘misuse or abuse’ test plays a much more central role in the Canadian GAAR compared to that in South Africa. Application of the Canadian GAAR is subject to the presence of ‘misuse or abuse’ of Canadian fiscal legislation, whereas in South Africa it merely serves as one of the tainting elements.

4.3.3 Clegg and Stretch

These tax scholars submit that the ‘misuse or abuse’ test simply enshrines the modern approach to interpretation in the ITA, as it conforms with the approach taken by South African courts to the interpretation of statutes since *Endumeni*.¹¹¹ The provision therefore prevents a taxpayer from relying on a provision in the ITA in a manner that is inconsistent with the object, spirit and purpose of the ITA.

Establishing the object, spirit and purpose of a statutory provision requires an interpretational approach similar to that formulated in *Endumeni*. An objective approach should be adopted when interpreting legislation, giving regard to the context in which the provision appears, the purpose of the provision and its surrounding circumstances.¹¹²

Clegg and Stretch however caution that deducing the underlying spirit and purpose of tax legislation can be an extremely onerous task, as fiscal policies in South Africa are

¹⁰⁹ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.39.

¹¹⁰ BT Kujinga “Analysis of misuse and abuse in terms of the South African general anti-avoidance rule: lessons from Canada” (2012) 45 *CILSA* 42 53.

¹¹¹ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.5.

¹¹² CSARS v Bosch 2015 (2) SA 174 (SCA) para 17;

CSARS v Reunert Ltd 2017 ZASCA 153 para 9-10;

Telkom SA SOC Limited v CSARS 2020 (4) SA 480 (SCA) para 14;

CSARS v United Manganese of Kalahari (Pty) Ltd (264/2019) 2020 ZASCA 16 para 8.

designed to achieve certain socio-political and economic results and are therefore subject to many exceptions and variations.¹¹³

4.3.4 Stiglingh, Koekemoer, Van Heerden, Wilcocks & Van der Zwan

Stiglingh et al, in agreement with Clegg and Stretch *op cit*, submit that the ‘misuse or abuse’ provision in terms of the rules of interpretation and the Constitution, requires a textual, contextual and purposive approach to its interpretation.¹¹⁴ Therefore, in applying the provision, the question is therefore whether a particular transaction defeats the object, spirit or purpose of the provisions of the ITA.¹¹⁵

4.3.5 Benetello, Davis, Engels-Van Zyl, Mollagee, Roeleveld and Urquhart

These tax scholars believe that the ‘misuse or abuse’ test provides a statutory authority, if not imperative, to apply the modern approach to the interpretation of statutes, instead of the so-called golden rule of interpretation which gives effect to the plain words of the statute unless this would lead to absurdity.¹¹⁶ It therefore provides legislative authority to apply the modern approach to the interpretation of the provisions of the ITA.

4.3.6 Liptack and Kujinga

These scholars submit that the purpose of the ‘misuse or abuse’ test is to provide SARS with a weapon to combat impermissible avoidance arrangements where taxpayers rely on excessively narrow or literal interpretations of the provisions of the ITA.¹¹⁷ The provision therefore intends to deny tax benefits that are obtained in a manner that strictly conforms to the letter of the law, but is not accordance with the object, purpose and spirit of the ITA.¹¹⁸ This is done by requiring a modern approach to the interpretation of statutes.

¹¹³ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.5.

¹¹⁴ Stiglingh et al *South African Income Tax* para 32.2.

¹¹⁵ Para 32.2.

¹¹⁶ Benetello et al *Juta's Income Tax* (2023) para 80A.

¹¹⁷ E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 25.

¹¹⁸ BT Kujinga “Analysis of misuse and abuse in terms of the South African general anti-avoidance rule: lessons from Canada” (2012) 45 *CILSA* 42 45.

4.3.7 Conclusion

Tax scholars seem to be in agreement as to what the term ‘misuse or abuse’ entails: it was inserted into the new GAAR to provide legislative authority to apply the modern approach to the interpretation of statutes when interpreting the provisions of the ITA - as was the case in the Canadian GAAR at the time, thereby preventing taxpayers from relying on excessively narrow or literal interpretations of the provisions of the ITA in conjuring up avoidance arrangements.¹¹⁹ Similar to the ‘misuse or abuse’ test in the Canadian GAAR, it requires a textual, contextual and purposive interpretation of the provisions of the ITA relied on by the taxpayer, in order to find a meaning that harmonizes the wording, object, spirit and purpose of the ITA.¹²⁰ If the arrangement in question defeats this wording, object, spirit and purpose, the tainting element of ‘misuse or abuse’ will be satisfied.

Therefore, the ‘misuse or abuse’ test required the provisions of the ITA to be interpreted in line with the modern approach to the interpretation of statutes, before this was established as the proper approach to the interpretation of statutes by *Endumeni* in 2012. The ‘misuse or abuse’ test therefore boils down to the proper interpretation of the provisions of the ITA.

4.4 Is the ‘misuse or abuse’ test still relevant?

At the time of introduction of the ‘misuse or abuse’ test in the new GAAR, the modern approach to interpretation of statutes was not yet well established. The ‘misuse or abuse’ test was therefore introduced to provide SARS with a weapon to combat impermissible avoidance arrangements where taxpayers rely on excessively narrow or literal interpretations of the provisions of the ITA.¹²¹ It provides legislative authority to apply the modern approach to the interpretation of statutes when interpreting the provisions of the ITA.¹²²

¹¹⁹ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.5;

Stiglingh et al *South African Income Tax* para 32.2;

Benetello et al *Juta’s Income Tax* (2023) para 80A;

E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 25;

BT Kujinga “Analysis of misuse and abuse in terms of the South African general anti-avoidance rule: lessons from Canada” (2012) 45 *CILSA* 42 45.

¹²⁰ *Canada Trustco Mortgage Co v Canada* 2005 SCC 54 para 44 and 47.

¹²¹ E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 25.

¹²² SARS Revised Proposals on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2006) 16.

However, the modern approach to the interpretation of statutes have now been firmly established by our courts, with the Constitutional Court also endorsing it as the proper approach to the interpretation of statutes.¹²³ Furthermore, the Constitution also supports the modern approach to the interpretation of legislation, albeit only in respect of the Bill of Rights. Section 39(1) and (2) of the Constitution reads as follows:

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) Must consider international law; and*
- (c) May consider foreign law*

(2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

As the supreme law of the Republic, the Constitution therefore effectively requires legislation to be interpreted according to the modern approach.¹²⁴

As the modern approach to the interpretation of statutes has been established by our courts and is also endorsed by the Constitution, I submit that the ‘misuse or abuse’ test is superfluous. As this provision no longer serves the purpose for which it was created, I believe that an opportunity exists to repeal a provision from the GAAR that is unnecessary and, if retained, might continue to cause further confusion and controversy.¹²⁵

¹²³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18 - 19. CSARS v Bosch 2015 (2) SA 174 (SCA) para 17; CSARS v Reunert Ltd 2017 ZASCA 153 para 9-10; Telkom SA SOC Limited v CSARS 2020 (4) SA 480 (SCA) para 14; CSARS v United Manganese of Kalahari (Pty) Ltd (264/2019) 2020 ZASCA 16 para 8; Airports Company South Africa v Big Five Duty Free (Pty) Ltd 2019 2 BCLR 165 (CC) para 29.

¹²⁴ BT Kujinga “Analysis of misuse and abuse in terms of the South African general anti-avoidance rule: lessons from Canada” (2012) 45 CILSA 42 47.

¹²⁵ E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 25.

5 TAX BENEFIT AND THE BINARY DEFENCE

5.1 General background

The term 'tax benefit' is found in both the preamble to section 80A and the definition of an 'avoidance arrangement' in section 80L of the ITA. In order for the Commissioner to be empowered to invoke the GAAR, the Commissioner bears the onus of proving that the arrangement in question resulted in a 'tax benefit' for the taxpayer.¹²⁶

The term 'tax' is defined as any tax, levy or duty imposed by the ITA or any other Act administered by the Commissioner, (which includes the Estate Duty Act 45 of 1955, the Value-Added Tax Act 89 of 1991, the Transfer Duty Act 40 of 1949, the Uncertificated Securities Tax Act 32 of 1948, the Customs and Excise Act and the Skills Development Levies Act 9 of 1999).¹²⁷

The term 'tax benefit', as defined in section 1 of the ITA, includes the avoidance, postponement or reduction of any liability for tax.

If an arrangement leads to the avoidance, postponement or reduction of tax, a tax benefit exists, which could trigger the application of the GAAR in relation to income tax. However, Section 80B(1) of the ITA empowers the Commissioner to determine the tax consequences of a party to an impermissible avoidance arrangement exclusively under the ITA. As such, a tax benefit in relation to normal income tax must also exist.¹²⁸

However, if a taxpayer contends that absent the arrangement actually entered into by him, he would have entered into no arrangement at all, can it be said that a tax benefit has arisen? The argument in this instance is that there cannot have been any avoidance of tax. This study will describe this notion as "the binary defence" and asks whether such an argument could be utilized successfully by a taxpayer to show that no tax benefit has in fact arisen as a result of the arrangement in question.

¹²⁶ ITC 1940 83 SATC 202;

Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.3.

¹²⁷ Section 80L of the Income Tax Act 58 of 1962.

¹²⁸ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.3.

5.2 Interpretation and application of ‘tax benefit’ by our courts

5.2.1 General

In order to determine whether the binary defence can be utilized successfully by a taxpayer, the manner in which our courts have interpreted and applied the term ‘tax benefit’ in previous cases ought to be analysed.

5.2.2 CIR v King

The court considered when a liability for tax exists and when a taxpayer is deemed to have avoided such liability. The court held that the liability that a taxpayer must seek to avoid, postpone or reduce in order for the GAAR to be invoked is not an accrued or existing liability (as such liability can no longer be avoided), but an anticipated liability.¹²⁹ Watermeyer J pointed out the following:

“There are many . . . ordinary and legitimate transactions and operations which, if a taxpayer carries them out, would have the effect of reducing the amount of his income to something less than it was in the past, or of freeing himself from taxation on some part of his future income. For example, a man can sell investments which produce income subject to tax and in their place make no investments at all, or he can spend the proceeds in buying a house to live in, or in buying shares which produce no income but may increase in value . . . He might even have conceived such a dislike for the taxation under the Act that he sells all his investments and lives on his capital or gives it away to the poor in order not to have to pay such taxation. If he is a professional man he may reduce his fees or work for nothing . . . He can carry out such operations for the avowed purpose of reducing the amount of tax he has to pay, yet it cannot be imagined that Parliament intended by the provisions of section 90 to do such an absurd thing as to levy a tax upon persons who carry out such operations as if they had not carried them out.”¹³⁰

¹²⁹ CIR v King 1947 (2) SA 196 (A) 207.

¹³⁰ *Ibid* at 208 - 209.

The court therefore emphasised that in order to prevent such absurd results as those mentioned above, a distinction must be made between a man who orders his affairs so that he has no income which would expose him to liability for income tax, and a man who orders his affairs so that he escapes from liability for taxation which he ought to pay on income which is his.¹³¹

The phrase 'avoiding a tax liability' should therefore be given its ordinary, natural meaning, which is 'to get out of the way of, escape or prevent an anticipated liability for income tax'.¹³²

5.2.3 Meyerowitz v CIR

The taxpayer had by way of an artificial manoeuvre arranged for the income from his labour to accrue to his children and not to himself.¹³³ The court found that the Commissioner was entitled to tax the income in the hands of the taxpayer, as that is the person to whom the income 'actually belonged' and who obtained the tax benefit.¹³⁴

The court therefore established that the fruits of an individual's labour are 'in reality his' and cannot be separated from the individual with ease, without falling foul of the anti-avoidance provisions contained in the ITA.¹³⁵

5.2.4 Smith v CIR

The taxpayer made use of an elaborate scheme to ensure that dividends were not paid directly to himself, but rather to a company of which he was the sole shareholder.¹³⁶ Counsel for the taxpayer argued that the transactions did not have the effect of 'avoiding liability for tax', as the income which the Commissioner sought to tax was in reality not his, but that of the company.

¹³¹ CIR v King 1947 (2) SA 196 (A) 210.

¹³² De Koker & Williams *Silke on South African Income Tax* (2023) para 19.37; Smith v CIR 1964 (1) SA 324 (A) 333.

¹³³ De Koker & Williams *Silke on South African Income Tax* (2023) para 19.37.

¹³⁴ Meyerowitz v CIR 1963 (3) SA 863 (A) 871.

¹³⁵ DJM Clegg *Tax Law Through the Cases* (1991) 545.

¹³⁶ Smith v CIR 1964 (1) SA 324 (A) 325.

The court dismissed the taxpayer's argument, finding that the taxpayer utilised the arrangement in question to 'avoid, get out of the way of and escape' his anticipated liability for tax on the dividends.¹³⁷ The court therefore confirmed that there is no need for the income to economically belong to the taxpayer in order for the GAAR to be invoked.¹³⁸

5.2.5 Hicklin v SIR

The shareholder of a virtually dormant company which held considerable distributable reserves anticipated that the distributable profits would at some time need to be declared to him by way of a dividend and that this dividend would be subject to income tax.¹³⁹ The taxpayer sold the shares as part of a 'dividend stripping' arrangement, and the court confirmed that this was done to enable the taxpayer to 'get out of the way' of the anticipated tax liability.¹⁴⁰

A liability for tax may therefore vary from an imminent, certain prospect to some vague, remote possibility.¹⁴¹

5.2.6 CIR v Louw

A partnership of consulting engineers, of which the taxpayer was a member, incorporated the practice and the partnership was sold to a newly formed company. The directors then caused the company to make loans to them in lieu of increased salaries.¹⁴²

In answering the question of whether the transaction enabled the taxpayer to 'avoid' an anticipated liability for tax, the court held as follows:

"There is no doubt that had the amounts advanced to Respondent and his co-directors on loan during the tax years under review, been paid to them as additional salary or increased dividend or both, they would have been

¹³⁷ Smith v CIR 1964 (1) SA 324 (A) 325.

¹³⁸ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.3.

¹³⁹ Hicklin v SIR 1980 (1) SA 481 (A) 485.

¹⁴⁰ *Ibid* at 493;

Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.3.

¹⁴¹ Hicklin v SIR 1980 (1) SA 481 (A) 492.

¹⁴² CIR v Louw 1983 (3) SA 551 (A) 558.

taxable on these amounts. As it is, the amounts were in fact paid to them as loans and consequently (subject to the application of section 103), did not attract tax in their hands. In order to determine whether the advancing of the loans enabled respondents to get out of the way of, escape or prevent an anticipated liability for tax one must, I think, ask oneself the question whether, but for the loans, equivalent or even lesser amounts would probably have been received by respondent in a taxable form, ie. as salary or dividend.”¹⁴³

The court therefore formulated the ‘but for’ test in determining whether a liability for tax has been avoided and concluded that ‘but for’ the loans made to the directors, the taxpayer would have received taxable income in the form of salaries or dividends. The loans therefore enabled the taxpayer to ‘avoid and escape’ an anticipated tax liability.¹⁴⁴

5.2.7 Conclusion

In light of the case law discussed above it can be deduced that the following conditions must be met before it can be said that a taxpayer has received a tax benefit:¹⁴⁵

- The accrual of income must be anticipated with some degree of likelihood (varying from a remote prospect to an imminent certainty) in the sense that a basis must exist for income to accrue to the taxpayer, whether in the immediate or distant future;¹⁴⁶ and
- The income must be taxable in the hands of the taxpayer if it is received by or accrues to him;¹⁴⁷ and

¹⁴³ CIR v Louw 1983 (3) SA 551 (A) 579.

¹⁴⁴ *Ibid* at 572 - 573.

¹⁴⁵ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.3.

¹⁴⁶ Para 26.3.3;

CIR v King 1947 (2) SA 196 (A) 207;

Hicklin v SIR 1980 (1) SA 481 (A) 492.

¹⁴⁷ Meyerowitz v CIR 1963 (3) SA 863 (A) 871.

- After concluding the arrangement, the tax liability of the taxpayer is less than it would have been had it not been for the arrangement in question.¹⁴⁸

5.3 Can the binary defence be successfully utilized by a taxpayer in showing that no tax benefit has arisen?

5.3.1 General

Although the binary defence has not been utilized regularly in South African courts, two cases have dealt with it (albeit without attaching the moniker of “binary defence” used in this study).¹⁴⁹ These cases will now be analysed to determine how and to what degree of success the respective taxpayers raised this argument successfully to show that no tax benefit arose as a result of the arrangement in question.

5.3.2 ITC 1625

The Commissioner wanted to invoke the then section 103(1) of the ITA on the basis that the taxpayer entered into an arrangement that had the effect of avoiding or reducing his liability for tax.¹⁵⁰

In coming to its decision, the court confirmed the use of the ‘but for’ test as established in *CIR v Louw*, in determining whether a taxpayer has ‘avoided, escaped or reduced’ his tax liability.¹⁵¹ Therefore, the question that should be asked is as follows:

“But for the transaction or arrangement in question, would the taxpayer have suffered tax?”

The court held as follows in allowing the taxpayer’s appeal:

“In most of the reported cases, the taxpayer started from a position in which, if he had done nothing, income in a taxable form would have accrued to him.

¹⁴⁸ CIR v Louw 1983 (3) SA 551 (A) 579.

¹⁴⁹ ITC 1625 59 SATC 383;

CSARS v Absa 596/2021 (2023) ZASCA 125;

Absa v CSARS (2021) 3 SA 513 (GP).

¹⁵⁰ ITC 1625 59 SATC 383.

¹⁵¹ CIR v Louw 1983 (3) SA 551 (A) 579.

The transaction that he entered into had the effect of enabling the taxpayer to get out of the way of, or escape, or prevent the anticipated liability, for tax on that income.

For example, in the cases of Smith v CIR and CIR v King, but for the transactions in issue, dividend income would have accrued to the taxpayer, as the then beneficial owner of shares. In Meyerowitz v CIR, royalty income would have accrued to the taxpayer but for the transactions in issue. In ITC 963, interest from a South African source would have accrued to the taxpayer but for the transaction which resulted in interest being derived from a non-South African source. In all of these cases it is easy to see that the taxpayer would have suffered tax but for the transaction or operation. Hence it can properly be said that the transaction had the effect of avoiding tax.

That test cannot be applied in the present case. The issue of tax avoidance only arises because the appellant, as part of the scheme, borrowed money. If there had been no scheme, there would have been no borrowing by the appellant, and no tax avoidance issue would have arisen. If the transaction in issue in this case had not been entered into the appellant would not have acquired the property, it would not have earned the income and it would not have incurred the interest expenditure. I can see no basis on which it can successfully be argued that by incurring expenditure on interest in order to earn the income on which it has to pay tax the appellant avoided tax or reduced tax. It had to incur that expenditure in order to earn the income. Without it, it would have not been able to earn the income and no tax would have been payable at all.”¹⁵²

Before the taxpayer entered into the transaction in question, there was no basis for income to accrue to the taxpayer.¹⁵³ The taxpayer’s liability for tax was also in no way

¹⁵² ITC 1625 59 SATC 383 397.

¹⁵³ CIR v King 1947 (2) SA 196 (A) 207;
Hicklin v SIR 1980 (1) SA 481 (A) 492.

less than it would have been, had the taxpayer not entered into any transaction.¹⁵⁴ Stated differently, in contrast to the cases considered under 5.2 above, had the taxpayer not entered into the arrangement, there would have been no transaction (and hence no tax) at all.

Therefore, it cannot be said that the arrangement in question enabled the taxpayer to avoid, reduce or escape any anticipated tax liability. On the contrary, had it not been for the transaction, no income would have accrued to the taxpayer and subsequently no income tax would have been payable. The transaction created an income stream and a consequent tax liability, rather than avoiding any potential liability for tax.

5.3.3 Absa v CSARS

Absa entered into an arrangement that consisted of a series of interlinked transactions, the details of which are as follows: Absa subscribed for preference shares in PSIC Finance 3 (Pty) Ltd (PSIC 3), which used the proceeds of the share issue to subscribe for preference shares in PSIC Finance 4 (Pty) Ltd (PSIC 4). In turn, PSIC 4 made a capital contribution to Delta 1 Finance Trust (D1 Trust), which applied the capital contribution to make interest-bearing loans to Macquarie Securities South Africa Ltd (Macquarie). The D1 Trust invested the interest earned on the Macquarie loans in Brazilian Government Bonds, which in terms of the Double Taxation Agreement between South Africa and Brazil, provided a tax-free income stream to the D1 Trust. D1 Trust distributed the income stream to PSIC4, which paid this to PSIC 3 as dividends. Finally, PSIC 3 distributed the income stream to Absa in the form of tax free dividends.¹⁵⁵

The Commissioner was of the opinion that in substance, the income received by Absa was interest that would be subject to tax in its hands, rather than tax free dividends.¹⁵⁶ As such, Absa received a tax benefit in the form a tax free dividend, and was therefore party to an impermissible tax avoidance arrangement that could be subject to the provisions of the GAAR.

¹⁵⁴ CIR v Louw 1983 (3) SA 551 (A) 579.

¹⁵⁵ CSARS v Absa 596/2021 (2023) ZASCA 125 para 2.

¹⁵⁶ Absa v CSARS (2021) 3 SA 513 (GP) para 16.

The Gauteng High Court again confirmed the use of the ‘but for’ test in concluding that the Commissioner had failed to establish that Absa evaded or escaped an anticipated tax liability.¹⁵⁷

Prior to Absa’s acquisition of preference shares in PSIC 3 and the consequent interlinked transactions, no basis existed for the dividend income to accrue to Absa.¹⁵⁸ Absa’s liability for tax was also in no way less than it would have been, had it not made any investment.¹⁵⁹

Had Absa not made the investment in PSIC 3, no dividend income would have accrued to it. The transaction created an income stream, albeit tax free income in the hands of Absa, which, but for the investment in PSIC 3, would not have existed. As such, it cannot be said that the arrangement in question enabled Absa to avoid, reduce, escape or get out of the way of any anticipated liability for tax.¹⁶⁰

On appeal, the Supreme Court of Appeal (SCA) held that the dispute did not involve solely a question of law, but a question of law and fact. As such, the High Court did not possess the required jurisdiction to deal with the matter. The SCA therefore did not decide on the issue of whether a tax benefit existed, as the High Court ought to have dismissed the application on jurisdictional grounds.

5.3.4 Conclusion

ITC 1625 and *Absa v CSARS* show that the binary defence can be utilized successfully by a taxpayer in showing that no tax benefit has arisen as a result of the arrangement in question, provided that it is raised in the correct circumstances.

If the binary defence is raised by a taxpayer who started from a position from which, if he had done nothing, income in a taxable form would have accrued to him, then in all likelihood the taxpayer will not be successful.¹⁶¹ This is because in this scenario, the

¹⁵⁷ *Absa v CSARS* (2021) 3 SA 513 (GP) para 42 - 43.

¹⁵⁸ *CIR v King* 1947 (2) SA 196 (A) 207;

Hicklin v SIR 1980 (1) SA 481 (A) 492.

¹⁵⁹ *CIR v Louw* 1983 (3) SA 551 (A) 579.

¹⁶⁰ *CSARS v Absa* 596/2021 (2023) ZASCA 125 para 33.

¹⁶¹ *ITC 1625* 59 SATC 383 397.

impugned transaction or arrangement entered into by the taxpayer enabled him to get out of the way of or escape an anticipated liability for tax on the very taxable income that was anticipated in the first place.

In each of *Smith*, *Meyerowitz* and *Hicklin* it is clear that the taxpayer would have suffered tax but for the transaction or arrangement in question. The transaction or arrangement therefore clearly had the effect of avoiding tax.

However, *Smith*, *Meyerowitz* and *Hicklin* are clearly distinguishable from *ITC 1625* and *Absa v CSARS*. In both *ITC 1625* and *Absa v CSARS*, the taxpayers started from a position in which, had they had not entered into any transactions or arrangements, no income in a taxable form would have accrued to them. The relevant transactions entered into by the taxpayers created an income stream and a consequent tax liability, rather than avoiding any potential liability for tax.

ITC 1625 and *Absa v CSARS* demonstrate the circumstances in which the binary defence can succeed. In *ITC 1625*, Wunsch J made the following apposite remarks which summarise the question succinctly:

*“If a taxpayer has a commercial or a family purpose for entering into an agreement which is not itself a tax avoidance purpose and chooses a method to achieve his or her objective which is tax effective, that does not convert the transaction into one for the avoidance, reduction or postponement of tax.”*¹⁶²

It must follow that the binary defence cannot be an “argument for all seasons” to refute an allegation by SARS that a ‘tax benefit’ is present.

¹⁶² ITC 1625 59 SATC 383 398.

6 CONCLUSION

In this research assignment, three contentious elements of the South African GAAR were critically analysed in quest of greater certainty regarding its interpretation and application.

Chapter 3 contained an analysis of the purpose requirement, specifically answering whether this requirement refers to the subjective purpose of the taxpayer, or the objective purpose of the arrangement itself having regard to the relevant facts and circumstances. After considering the historical application of the now-repealed section 103(1), the suggestions made by SARS in the 2005 Discussion Document and the 2006 Revised Proposals Document, the wording of sections 80A and 80G and the opinions of various tax scholars, it was suggested that the test cannot be purely objective. Instead, in determining the purpose requirement under the new GAAR, it is submitted that our courts must apply an objective test by taking into account the surrounding facts and circumstances of the transaction – which also include the *ipse dixit* of the taxpayer.¹⁶³ The same factors will therefore be considered by our courts in determining the purpose requirement under sections 80A and 80G, as was the case in the now-repealed section 103(1): the surrounding facts and circumstances of the taxpayer entering into the transaction, and the subjective purpose and *ipse dixit* of the taxpayer. The real distinction lies in which of these factors our courts will rely on most in coming to a decision. Under the now-repealed section 103(1), our courts relied on the subjective purpose and *ipse dixit* of the taxpayer, but also weighed this up against the objective facts and circumstances surrounding the transaction. It was therefore a subjective test, weighed against objective factors. It is submitted that in determining the purpose requirement under sections 80A and 80G, our courts must rely on the objective surrounding facts and circumstances of the transaction, whilst also taking into account the subjective purpose and *ipse dixit* of the taxpayer. The courts must therefore follow an objective test, weighed against subjective factors.

¹⁶³ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.4.

In Chapter 4, the Canadian GAAR, relevant case law, as well as the opinions of various tax scholars were analysed in order to shed light on what the ‘misuse or abuse’ test actually means and whether it should be retained in the GAAR at all or as it is worded currently. It is submitted that the ‘misuse or abuse’ test was inserted into the new GAAR to provide legislative authority to apply the modern approach to the interpretation of statutes when interpreting the provisions of the ITA, thereby preventing taxpayers from relying on excessively narrow or literal interpretations of the provisions of the ITA in conjuring up avoidance arrangements.¹⁶⁴ Similar to the ‘misuse or abuse’ test in the Canadian GAAR, it requires a textual, contextual and purposive interpretation of the provisions of the ITA relied on by the taxpayer, in order to find a meaning that harmonizes the wording, object, spirit and purpose of the ITA.¹⁶⁵ If the arrangement in question defeats this wording, object, spirit and purpose, the tainting element of ‘misuse or abuse’ will be satisfied. Therefore, the ‘misuse or abuse’ test boils down to the proper interpretation of the provisions of the ITA. Since the ‘misuse or abuse’ test was inserted into the GAAR, the modern approach to the interpretation of statutes has been firmly established by our courts as the proper approach to the interpretation of statutes. As such, I submit that the ‘misuse or abuse’ test is superfluous. As this provision no longer serves the purpose for which it was created, I believe that an opportunity exists to repeal a provision from the GAAR that is unnecessary and, if retained, might continue to cause further confusion and controversy.¹⁶⁶

Chapter 5 contained an analysis of the term ‘tax benefit’ and whether the binary defence can be successfully utilized by a taxpayer in showing that no tax benefit has in fact arisen as a result of the arrangement in question. *ITC 1625* and *Absa v CSARS*, two cases that dealt with the binary defence comprehensively, were examined. Both these cases proved that the binary defence can be successfully utilized by a taxpayer in showing that no tax benefit has arisen as a result of the arrangement in question,

¹⁶⁴ Clegg & Stretch *Income Tax in South Africa Commentary* (2023) para 26.3.5;

Stiglingh et al *South African Income Tax* para 32.2;

Benetello et al *Juta's Income Tax* (2023) para 80A;

E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 25;

BT Kujinga “Analysis of misuse and abuse in terms of the South African general anti-avoidance rule: lessons from Canada” (2012) 45 *CILSA* 42 45.

¹⁶⁵ Canada *Trustco Mortgage Co v Canada* 2005 SCC 54 para 44 and 47.

¹⁶⁶ E Liptack “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 WP 24 25.

provided that it is raised in the correct circumstances. If the binary defence is raised by a taxpayer who started from a position from which, if he had done nothing, income in a taxable form would have accrued to him, then in all likelihood the taxpayer will not be successful.¹⁶⁷ This is because in this scenario, the impugned transaction or arrangement entered into by the taxpayer enabled him to get out of the way of or escape an anticipated liability for tax on the very taxable income that was anticipated in the first place. But for the transaction or arrangement in question, the taxpayer would have suffered tax.¹⁶⁸ Contrastingly, in both *ITC 1625* and *Absa v CSARS*, the taxpayers started from a position in which, had they had not entered into any transactions or arrangements, no income in a taxable form would have accrued to them. The relevant transactions entered into by the taxpayers created an income stream and a consequent tax liability, rather than avoiding any potential liability for tax. *ITC 1625* and *Absa v CSARS* therefore demonstrate the circumstances in which the binary defence can succeed. In *ITC 1625*, Wunsch J made the following apposite remarks which summarise the question succinctly:

*“If a taxpayer has a commercial or a family purpose for entering into an agreement which is not itself a tax avoidance purpose and chooses a method to achieve his or her objective which is tax effective, that does not convert the transaction into one for the avoidance, reduction or postponement of tax.”*¹⁶⁹

It is therefore submitted that the binary defence cannot be an “argument for all seasons” to refute an allegation by SARS that a ‘tax benefit’ is present.

¹⁶⁷ ITC 1625 59 SATC 383 397.

¹⁶⁸ CIR v Louw 1983 (3) SA 551 (A) 558.

¹⁶⁹ ITC 1625 59 SATC 383 398.

REFERENCES

Books:

Franklin B & H Smyth *The Writings of Benjamin Franklin* (1907), New York: The Macmillan Company.

Koekemoer AD, L van Heerden, JS Wilcocks & P van der Zwan *SILKE: South African Income Tax* 7 ed (2022).

Stiglingh M, AD Koekemoer, L van Heerden, JS Wilcocks & P van der Zwan *SILKE: South African Income Tax* 24 ed (2022): Lexis Nexis.

Clegg D & R Stretch *Income Tax in South Africa Commentary* (2023) South Africa: Lexis Nexis.

De Koker A & RC Williams *Silke on South African Income Tax* (2023) South Africa: Lexis Nexis.

Emslie TS & DM Davis *Income Tax: Cases & Materials* 4 ed (2012) South Africa: The Taxpayer.

Benetello M, DM Davis, R Engels-Van Zyl, O Mollagee, J Roeleveld & G Urquhart *Juta's Income Tax* (2023) Cape Town: Juta.

Case law:

Telkom SA SOC Limited v CSARS 2020 (4) SA 480 (SCA).

SIR v Kirsch 1978 (3) SA 93 (T).

Marshall and Others v CSARS 2018 ZACC 11.

Glen Anil Development Corp Ltd v SIR 1975 (4) SA 715 (A).

CIR v South African Fire and Accident Insurance Co Ltd 1960 (3) SA 1 (A).

M v COT 1956 (4) SA 197 (SR).

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

CSARS v Bosch 2015 (2) SA 174 (SCA).

CSARS v Reunert Ltd 2017 ZASCA 153.

Telkom SA SOC Limited v CSARS 2020 (4) SA 480 (SCA).

CSARS v United Manganese of Kalahari (Pty) Ltd (264/2019) 2020 ZASCA 16.

Airports Company South Africa v Big Five Duty Free (Pty) Ltd 2019 2 BCLR 165 (CC).

SIR v Gallagher 1978 (2) SA 463 (A).

SIR v Geustyn, Forsyth and Joubert 1971 (3) SA 567 (A).

ITC 1636 60 SATC 267.

CIR v George Forest Timber Co Ltd 1924 AD 516.

CIR v Simpson 1949 (4) SA 678 (A).

CIR v Conhage 61 SATC 391.

Duke of Westminster v IRC 51 TLR 467, 19 TC 490.

Canada Trustco Mortgage Co v Canada 2005 SCC 54.

Legislation:

Constitution of the Republic of South Africa, 1996.

Income Tax Act 58 of 1962.

Tax Administration Act 28 of 2011.

Income Tax Act R.S.C., 1985, c. 1 (5th Supp).

Internet sources:

Cliffe Dekker Hofmeyr “Status of SARS interpretation notes” (2018) <

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status-of-sars-interpretation-notes-.html>>.

Bayethe Maswazi “The doctrine of precedent and the value of s39(2) of the

Constitution” (2017) < <https://www.derebus.org.za/doctrine-precedent-value-s-392-constitution/>> (Accessed: 25/03/2023).

SARS “Dispute resolution process” (2023) < [https://www.sars.gov.za/legal-](https://www.sars.gov.za/legal-counsel/dispute-resolution-judgments/dispute-resolution-process/)

[counsel/dispute-resolution-judgments/dispute-resolution-process/](https://www.sars.gov.za/legal-counsel/dispute-resolution-judgments/dispute-resolution-process/) > (Accessed: 26/03/2023).

Anonymous “What is constitutional supremacy” (2023) <

<https://www.concourt.org.za/index.php/constitution/what-is-a-constitution>>

(Accessed: 26/03/2023).

L Roelofse & M Heyman “The interpretation of tax legislation” (2020) <

<https://www2.deloitte.com/za/en/pages/tax/articles/the-interpretation-of-tax-legislation.html>> (Accessed: 26/03/2023).

IDP Louw “The new general anti-avoidance rule: A comprehensive discourse on this statute” (2007) <

https://open.uct.ac.za/bitstream/item/4509/thesis_law_lwxiza001.pdf?sequence=1>

(Accessed 13/06/2023).

Journal articles:

Van Schalkwyk L & B Geldenhuys “The nature of the purpose requirement of an impermissible tax avoidance arrangement” (2010) 35 *Journal for Juridical Science*.

Williams RC “The 1996 Amendments to the General Anti-Avoidance Section of the Income Tax Act” (1997) 114 *South African Law Journal*.

Davis DM, TS Emslie, JL van Dorsten, PJ Dachs “The sole or main purpose test – subjective or objective?” (2009) *South Africa: The Taxpayer*.

Broomberg EB “The new general anti-avoidance rule” (2007) Cape Town: SAFA Seminar.

Liptack E “The GAAR’s misuse or abuse test is dead (or should be)” (2016) 16 *Without Prejudice*.

Kujinga BT “Analysis of misuse and abuse in terms of the South African general anti-avoidance rule: lessons from Canada” (2012) 45 *Comparative and International Law Journal of Southern Africa*.

Official publications:

SARS Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005).

SARS Revised Proposals on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2006).

Margo CS *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa* (1988).