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Tax Avoidance Revisited: Exploring the Boundaries of Anti-Avoidance Rules in the EU BEPS Context

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1. The Meaning of Avoidance and Aggressive Tax Planning and the BEPS Initiative

1.1 The meaning of tax avoidance in South Africa

Tax avoidance does not carry a specific defined legal meaning in South Africa per se. Both specific anti-avoidance provisions and a general anti-avoidance rule exist within the income tax legislation. For the purposes of the general anti-avoidance rule (GAAR) for income tax purposes, the rule attempts to distinguish between permissible and impermissible tax avoidance. Essentially any arrangement (read transaction as well) that results in a ‘tax benefit’ is considered to be avoidance. However, only those avoidance arrangements meeting the requirements for the application of the GAAR are considered ‘impermissible’ tax avoidance. This is indicative of the GAAR being used to pursue aggressive tax avoidance rather than any tax avoidance.\(^2\)

The GAAR was replaced in 2006.\(^3\) The previous rule (as contained then in section 103(1)) was considered ineffective although supported by case law. The new rule was drafted largely with reference to Canadian legislation, but with some reference to UK and US legislation.\(^4\)

Apart from the GAAR, the administration has equally attempted to identify avoidance or potentially aggressive tax planning arrangements through the ‘reportable arrangements’ regime.\(^5\) Two categories of arrangement exist, firstly those that meet certain generic requirements\(^6\) and those that are publically listed\(^7\) as reportable arrangements. The list equally excludes certain arrangements rendering them potentially ‘permissible’. However, all that such a regime has served to do is to identify a limited number of targeted areas of suspected avoidance.

While an advance ruling system is operated by the South African Revenue Service (SARS) in addition to the reportable arrangements, no advance ruling may be issued which ‘involves the application or interpretation of a general or specific anti-

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1 A ‘tax benefit’ is defined in section 1 of the Income Tax Act 58 of 1962 as including any avoidance, postponement or reduction of a tax liability.
5 This regime is contained in the Tax Administration Act 28 of 2011 in sections 34-39.
6 As contained in section 35(1) of the Tax Administration Act 28 of 2011.
7 The most recent list at time of writing can be found at: http://www.sars.gov.za/AllDocs/LegalDocLib/SecLegis/LAPD-LSec-TAdm-PN-2016-02%20-%20Notice%2020140%20GG%2039650%202016-February%202016.pdf
avoidance provision or doctrine’.\(^8\) As a result, the advance ruling system does not add to the understanding of tax avoidance specifically.

The courts have access not only to the statutory rules for anti-avoidance but also to common law legal principles, in particular the test for a simulated transaction or substance-over-form (but this is not considered to extend to a consideration of economic substance).\(^9\)

All of the established case law considers the application of the former rule, but can still be consulted with respect to those aspects carried to the new rule. The case law tends to answer selected aspects with respect to the application of the statutory rules or clarifies the court’s position on the application of the common law doctrines, but cannot be said to give a definitive meaning of tax avoidance. The courts have confirmed the right of taxpayers to minimise their tax liability, but within the bounds of the common law and statutory rules.\(^10\) ‘In *Smith v CIR* it was held that the ordinary meaning of avoiding liability for a tax on income was “to get out of the way of, escape or prevent an anticipated liability”. In *Hicklin v SIR* the Appellate Division acknowledged that such liability may vary from “an imminent, certain prospect to some vague, remote possibility” and Trollip JA said that

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\text{“it is unnecessary and hence inadvisable to decide here whether a vertical line should be drawn somewhere along that wide range of meanings in order to delimit the connotation of “an anticipated liability”.} \]

The courts do have access to foreign judgments which may serve to be persuasive, but not binding on the court. Regular reference to UK, Australian and Canadian decisions are made by both counsel and the courts.

Specific anti-avoidance rules (SAARs) appear to be the legislative vehicle of choice for action by the revenue authority and for the implementation of the BEPS action plans. South Africa (separately and as a member of the G20) has indicated its support for the BEPS action plan and its implementation, particularly as regards to automatic exchange of information (in terms of FATCA) and with respect to transfer pricing.\(^12\) Transfer pricing, hybrid mismatches and treaty abuse are to be the key areas for reform.

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\(^8\) Section 80(1)(c) of the Tax Administration Act 28 of 2011
\(^9\) As illustrative of this principle, see *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* (606/97) [1999] ZASCA 64 (17 September 1999) available at: [http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/1999/64.html&query=%20conhage](http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZASCA/1999/64.html&query=%20conhage)
\(^10\) See, for example, *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA) 3
Hybrid debt rules and limitation on interest deductions are recent amendments to the domestic legislation that have been directly influenced by the BEPS actions.

1.2 The meaning of tax planning, abusive tax planning and aggressive tax planning in South Africa

There is no definition of tax planning, aggressive tax planning or abusive tax planning. It has been suggested that all tax planning equates to avoidance but with a clear understanding of avoidance as the full and frank disclosure of the transaction and its steps with an absence of dishonesty. Simulated transactions, failure to disclose the arrangement and other transactions tend to contain elements of dishonesty that change the avoidance to evasion. However the clear distinction between avoidance and evasion must be carefully considered when utilising emotive terms such as aggressive tax planning or abusive tax planning.

The South African courts must also consider the ‘choice principle’ as developed from the Duke of Westminster decision.

‘The only reported example to date of a judge squarely facing the conflict between the choice principle and a statutory general anti avoidance provision is the passage in the judgment of Watermeyer CJ in CIR v King, where, apropos of an earlier GAAR, namely s 90 of the Income Tax Act which was the predecessor of s 103(1), he said:

“[…] there are many other 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, or he may invest the proceeds outside of the Union, or make investments which produce income not subject to normal tax in his hands eg Union Loan Certificates, deposits in the Post Office Savings Bank or shares in public companies. He can also sell shares in private companies, the holding of which may subject him to heavy taxation in his hands although he does not receive the income which is taxed, or he can sell shares in companies which pay high dividends and invest in securities which return him a lower but safer and more certain income. 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; if he is a trader he may reduce his rate of profit or sell his goods at a loss in order to earn a smaller income. He can also secure deductions from the amount of his gross income, for example by insuring his life. 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

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provisions of s 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."

There seems to be only one juridically satisfactory way of determining whether, in any given fiscal scenario, the choice principle trumps the GAAR, and that is to ask whether the choice exercised by the taxpayer was one which the Act explicitly or implicitly held out to him. If the answer is affirmative, then the GAAR is not applicable and the choice principle prevails.\textsuperscript{14}

The Tax Administration Act 28 of 2011 contains various administrative penalties. The understatement penalty levies varying penalties depending on the behaviours (not defined) of taxpayers including: 'no reasonable grounds for “tax position” taken'; 'gross negligence' and 'intentional tax evasion'. 'Tax position' is defined on the basis of the effect of a position or assumption made by the taxpayer with respect to the completion of the tax return that led to exemption, deduction or reduction of tax. This is clearly not an effective definition for tax planning as it is reactive to the behaviour rather than a positive definition of tax planning.

As the behaviours giving rise to understatement are not defined, it is unclear whether these behaviours will influence the application of the Income Tax Act GAAR. It is suggested that perhaps the meaning of these behaviours could be ‘borrowed’ from other branches of law such as the law of delict.

2. The Reaction of Avoidance and Aggressive Tax Planning in the BEPS Context from a non-EU State

2.1 South Africa’s general anti-avoidance rule (GAAR)

South Africa is not a member of the EU, but it is perhaps instructive to compare the South African GAAR with the key elements as identified by the general reporter. This comparison will only be with respect to the GAAR as substituted in 2006. However, the case law with respect to the South African GAAR only considers the former GAAR. Some lessons from the success and failure of the application of that rule before the courts remain relevant for the purposes of the new GAAR. To the extent relevant, some key cases and the success or failure of the revenue authority are considered.

Any transaction (hereinafter arrangement), or part thereof resulting in the avoidance, reduction or postponement of any liability for tax in terms of the Income Tax Act is considered to be a tax benefit. An arrangement that generates a tax benefit, but for the application of the GAAR, is considered an avoidance arrangement.\textsuperscript{15} Such

\textsuperscript{14} A.P. de Koker and R.C. Williams, Silke on South Africa Income Tax: Anti-Avoidance 19.3 (LexisNexis 2015)

\textsuperscript{15} The ‘but for’ test with respect to the definition of the ‘avoidance arrangement’ has been criticised: ‘For example, what if, as Broomberg suggests, there would not have been any transaction if the tax effects had been otherwise? In other words, it may be difficult to mentally eliminate the tax benefit without also
arrangement is only an impermissible arrangement if it meets the remaining requirements of the GAAR, these being, firstly that the sole or main purpose of the arrangement was the ‘avoidance, reduction or postponement of any liability for tax’ (defined as a ‘tax benefit’). The second requirement is broken into three alternatives either that the arrangement is in a business context; that the arrangement is in a context other than business, or; certain elements are in place in any context.

For the business context the arrangement must have been entered into or carried out in a means or in a manner which would not normally be employed for bona fide business purposes other than to obtain the tax benefit. Alternatively, the arrangement lacks commercial substance (a concept developed in a separate provision).

For the context other than business the arrangement must have been entered into or carried out in a means or in a manner which would not normally be employed for a bona fide purpose other than to obtain the tax benefit.

Finally, in any context, the arrangement must have created rights or obligations that would not normally be created between persons acting at arm’s length or would directly or indirectly result in the misuse or abuse of the provisions of the Income Tax Act (one of the so-called purposive tests of the provision).

Should the sole or main purpose be to obtain a tax benefit and any one of the second requirement elements exist, then the arrangement is an impermissible avoidance arrangement.

As can been seen from the above, the South African GAAR has elements of the proposed EC Recommendation, but differs in a number of respects. Complicating the analysis is the use of different terms in the South African GAAR, for example, the use of ‘essential purpose’ in the EC Recommendation may not necessarily be interpreted in the same way as the phrase ‘sole or main purpose’. Secondly while the avoidance of tax may involve some artificiality; that is not a set criterion of the South African GAAR unless one considers the second requirement purpose tests as a test for artificiality. Thirdly, legal artificiality (a simulated transaction) may already be removed by a court using the common law doctrines. Fourthly, while the South African courts have moved from a literal interpretation to a more purposive interpretation, it cannot necessarily be said that the remedy (adjustments) that the

eliminating the underlying transaction itself. A different problem is that it may be easy to imagine a whole variety of different transactions that might hypothetically have been concluded. Surely it could not be suggested that either the most or least favourable hypothetical alternative should simply be used as yardstick? However, the alternative – that there may be a whole range of hypothetical possibilities – is also unworkable, since it implies that the existence or otherwise of an ‘avoidance arrangement’ may be a matter of degree or perspective’. C. Cilliers, Silke on International Tax: Anti-Avoidance 46.14 (A.P. de Koker ed. LexisNexis 2010)
Commissioner will impose would be to purely achieve the economic substance. As Prebble et al state:

‘An income tax law necessarily levies tax on the results of legal transactions rather than their underlying economic effect. It is not legally possible to tax economic profits, the target of the income tax, directly. Instead, a legal description of the economic profits is the subject of the tax, but the legal description is never anything more than a simulacrum of the profits. There is always a gap between the legal description of a set of transactions and the underlying economic reality’.\(^{16}\)

The remedy therefore finds its basis in the legislative purpose as found in the language used and in the context of the legislation (i.e. there is the aim in the purposive approach to prevent an overly literal interpretation of the words of the legislation).\(^{17}\)

Finally, it appears from the recommendation that the entire arrangement would be overturned in terms of the EC Recommendation whereas the remedy of the South African Commissioner may be with reference to the entire arrangement or any part or parts thereof.

Testing the above GAAR against the five elements identified by the general reporter with respect to the EU/EEA concept of abuse, it can be seen that the main objective test (being the accrual of a tax advantage the grant of which is contrary to the purpose of the legal provision) is not an essential element in the South African GAAR. Rather the test that the objective of the arrangement is contrary to the legislative intent is merely a subsidiary element in the lack of commercial substance and mis-use or abuse of the legal provisions tests.

The second key element is present as a critical component of the South Africa GAAR, being that the obtaining of the tax advantage is the main aim of the arrangement.

A business purpose test or economic activity test does exist within the second requirement options for the South African GAAR. Critically the lack of commercial substance test considers arrangements containing round-trip financing or accommodating or tax-indifferent parties as indicative of a lack of commercial substance (essentially a form of an economic activity test).

The subjective element consisting of the intention to obtain a tax advantage is present to an extent in the South African GAAR in that should an arrangement generate a tax advantage, there is a legislative presumption that the sole or main purpose was to obtain such advantage unless ‘the party obtaining a tax benefit proves that, reasonably considered in the light of the relevant facts and


\(^{17}\) C. Cilliers, Silke on International Tax: Anti-Avoidance 46.3 (A.P. de Koker ed. LexisNexis 2010)
circumstances, obtaining a tax benefit was not the sole or main purposes of the avoidance arrangement’.

The principle of proportionality is not explicitly stated in the South African GAAR, however the general principle can be said to be drawn from the Constitution of the Republic of South Africa, 1996 and the supporting legislation of the Promotion of Administrative Justice Act, 3 of 2002. This is perhaps an element that deserves further clarity in the development of the South African GAAR.

It can therefore be concluded that while one of the aims of the South African GAAR would be to prevent abuse of the domestic law, it is certainly not its sole aim.

The tax cases on tax avoidance consider the former GAAR. However, it remains instructive to consider these cases.

It is recognised that the South African courts have adopted the Duke of Westminster principle with respect to tax planning / avoidance in that a taxpayer is free to minimise the tax as much as the law allows. The principle is, of course, tempered with a purposive interpretation and the common law in maxims such as plus valet quod agitur quam quod simulate concipitur and fraudem legis. The common law rules do have limitations, but even where transactions may pass the common law tests, they may still fail the GAAR requirements. All of the above mechanisms though do result in the transaction being recharacterised by the courts to reflect the economic reality as the legislation does not contain such a concept. The case of Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd) (606/97) [1999] ZASCA 64 (17 September 1999) clearly illustrates this impact. In this case Conhage had entered into a sale and leaseback arrangement with respect to certain assets in an attempt to raise finance i.e. chose a sale and leaseback arrangement rather than borrowing from a bank. This structure led to tax advantages (deductions) greater than that which would have been achieved through direct borrowing. As the parties followed and demonstrated the intent to properly achieve the sale and leaseback, no simulation existed and the legal substance did not differ from the legal form. Simulation should not however be automatically considered as dishonesty. ‘South African law recognises that effect will be given to the legal consequences which the parties involved actually intended to create, even if they harboured the bona fide but mistaken belief that they concluded a transaction of a particular type or nature under which different legal consequences would follow’.18

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18 C. Cilliers, Silke on International Tax: Anti-Avoidance 46.7 (A.P. de Koker ed. LexisNexis 2010)
3. Transfer Pricing Rules, GAARs, Specific Anti-Avoidance Rules (SAARs) and Linking Rules

The South African fiscal legislation contains a number of specific provisions aimed at preventing certain avoidance behaviours, including transfer pricing, CFC and other SAARs. Within the treaty network, a few of the South African treaties have LOB provisions. These measures are reviewed in turn below.

Transfer pricing
While legislation measures preventing abuse of transfer pricing have been included for some time, it is interesting that no matter on transfer pricing has been decided by the courts. It would seem that disputes arising from transfer pricing are settled with the Revenue Authority instead.

The transfer pricing legislation was modernised in 2010 to better align with OECD transfer pricing guidelines and to better align with concepts as reflected in tax treaties. Specifically, it was stated that: ‘The new transfer pricing rules are closely aligned with the wording of the OECD and UN Model Tax Conventions and are in line with tax treaties and other international tax principles. Accordingly, South Africa will continue to follow the OECD Transfer Pricing Guidelines closely both with respect to transfer pricing in general and the power to recharacterise transactions in the application of the transfer pricing rules’. Further amendments were made in 2011 with an effective date of 1 April 2012. To date, no guidance as to the application of the transfer pricing legislation has been issued by the revenue authority.

The ‘Large Business Centre' within SARS has within its ambit a focus on transfer pricing. Transfer pricing risk is carefully considered by SARS. It is specifically stated on the revenue authority website that:

‘Transfer pricing is also a key focus area for SARS. It can lead to the erosion of the South African tax-base through South African businesses transacting with their foreign connected parties on a ‘non-arm’s length’ basis. The purpose of the project is to improve our current approach to identifying and dealing with transfer pricing risks. As foreign investment and global trade is imperative to grow the South African economy, we are also considering the implementation of Advance Pricing Arrangements (APAs) in the near future. When the APA program is implemented, taxpayers will be able to engage SARS prior to entering into transactions with foreign connected parties to agree their pricing arrangements. This will provide taxpayers with certainty around the pricing of their transactions with connected persons, limiting their risk to transfer pricing adjustments and the potential of double taxation.’

Controlled foreign companies

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19 Explanatory Memorandum on the Taxation Laws Amendment Bill 2010 at page 76.
CFC legislation in varied forms has been in place in South Africa since the transition from a source to a residence basis in 2000. Essentially the CFC rules do not target genuine business activity offshore where significant shareholding by South African resident taxpayers exists.

Where ‘participation rights’\(^{21}\) are held in the majority by South African tax residents, the foreign company is considered a controlled foreign company. However, such classification does not necessarily create a tax effect for a resident taxpayer. A portion of a legislatively determined ‘net income’ will only be included in the resident taxpayer’s taxable income if the participation rights held amount to 10% or greater of total participation rights. Furthermore, a number of exclusions may then be applied, but most importantly, should the foreign taxes on income proven to be payable to a foreign government with no right of recovery equate to 75% or more of the taxes that would have been levied on the taxable income of the CFC had the CFC been a resident taxpayer in South Africa, then no inclusion is required. Should an amount still remain to be attributed to the South African resident shareholder, then the net income may be further reduced by a number of exclusions from net income, most critically to the extent that the amount is attributable to a ‘foreign business establishment’.\(^{22}\) A number of other exclusions, reductions to net income and anti-avoidance provisions are also included in the legislation.

In the event that the ‘net income’ of a CFC is included in the taxpayer’s taxable income, the dividend received from such CFC will be exempt to the extent profits have been included in taxable income.

The CFC rules have been seen as a critical anti-avoidance measure.

**Domestic SAARs**
The South African Income Tax Act is littered with specific anti-avoidance measures. For ease of reference, these have been categorised into groupings.

(a) Trusts
Trusts have been used extensively for tax planning (particularly estate planning) purposes. Seen largely as an avoidance tool, it is understandable that a number of specific anti-avoidance provisions have arisen with respect to trusts.

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\(^{21}\) “‘participation rights” in relation to a foreign company means—
(a) the right to participate in all or part of the benefits of the rights (other than voting rights) attaching to a share, or any interest of a similar nature, in that company; or
(b) in the case where no person has any right in that foreign company as contemplated in paragraph (a) or no such rights can be determined for any person, the right to exercise any voting rights in that company’.

\(^{22}\) This definition essentially looks to the operations in the foreign jurisdiction and how such operations function i.e. a test for genuine business operation rather than a conduit or passive income holding structure.
The first of the category of avoidance rules are attribution rules. Attribution rules, where income or capital is attributed to the beneficiary or to the founder/donor of the trust exist. The mechanisms in place are in an attempt to prevent the transfer of income and capital gain to minor children done for income and capital gain splitting purposes. Furthermore, income or capital gains retained in a trust may also be attributed back to the founder/donor. Finally where a non-resident benefits in terms of a trust, the amount may be attributed back to the resident as the founding cause of such benefit. In all cases, the income or capital gain must have arisen by virtue of some gratuitous element in the acquisition by the trust of the underlying asset. The courts have also ruled that the provisions cannot be circumvented by, for example, retaining the income in the trust and only distributing investment returns earned on such retained funds in later years.

Secondly, the creation of a foreign trust by a non-resident in favour of a South African beneficiary has its own anti-avoidance measures to prevent recharacterisation of income as capital.

Distribution of tax losses from trusts is equally prevented.

(b) Hybrid instruments
New rules with respect to hybrid debt and hybrid equity instruments have been introduced seeking to recharacterise the income arising from such instruments. Further avoidance rules exist for preference share arrangements of less than three years and dividends from third-party backed shares.

(c) Limitation of deductions
Deductions and allowances must be read in conjunction with a plethora of limitations and disallowances.

(d) Special regimes
Special regimes for, for example mining, insurance, micro business, public benefit organisations, recreational clubs and associations all come with SAARs peculiar to those regimes.

(e) Selected special rules
Rules with respect to corporate restructuring naturally are accompanied by SAARs within each provision.

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24 Section 7(3) of the Income Tax Act 58 of 1962.
27 These are largely contained in sections 23 to 23O of the Income Tax Act 58 of 1962.
Further avoidance measures apply to the utilisation of assessed losses and dividend swap arrangements.

**Linking rules and domestic legislation with reference to BEPS**

Domestic law measures of themselves do not always prevent avoidance actions. Linking with the treaty provisions should be considered a critical element, particularly where the characterisation of the transaction, entity or instrument may differ between the contracting states. It is often insufficient where a treaty’s provisions override the domestic position if terms are not defined in the treaty. In this regard and with reference to Hybrid Instruments, the OECD recommended ‘linking rules’ ‘that align the tax treatment of an instrument or entity with the tax treatment in the counterparty jurisdiction but otherwise do not disturb the commercial outcomes’.

In this regard, South Africa has not yet gone so far as to insert provisions with links to the treaty country, but has attempted to create hybrid debt and hybrid equity rules that aim to reflect the commercial reality of the instrument rather than the legal form. The Davis Tax Committee tasked with reviewing the tax system noted in its recommendations for Action 2 that:

‘The hybrid debt and interest rules require attention as they are not linked to the tax treatment in the hands of the counterparty and may themselves lead to mismatches and double taxation. A rule needs to be put in place that links the hybrid rules to the treatment in foreign counties. This would prevent tax abuse in cases where there is a denial of deduction in SA but not in other countries’.

It further noted and recommended that:

- It is strongly recommended that South Africa moves away from anti-avoidance sections aimed at particular transactions and establish anti-avoidance principles which can be applied to a broad range of transactions without undue technicality; even if there is a risk that one or two transactions fall through the cracks, a principle approach to drafting legislation is significantly preferential to a transaction-by-a-transaction [sic] approach which we currently appear to have. An example explained in the main report is section 8F and 8FA which unintentionally provide a solution to the problems encountered in section 8E and 8EA. This type of unintentional tax effect only arises due to overly complex and poorly thought out tax legislation.
- There is need for specific double tax treaty anti-avoidance clauses.
- The inconsistencies between hybrid debt and hybrid equity rules should be addressed. For instance there should be alignment with respect to security for equity as is the case for debt.

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It is important that the rules are in line with international best practices otherwise they would result in double taxation or double non-taxation of income.\textsuperscript{30}

One provision with respect to the limitation of interest deductions has, however, been inserted into domestic legislation with the explanation for its insertion, in part, directly linked to BEPS.\textsuperscript{31} Essentially the deduction of interest is limited where the amount is loaned directly or indirectly to a South African resident company from a foreign entity that is in a controlling relationship with the South African resident company. The provision contains various exclusions, adjustments, interest rate caps and formulae to derive the allowable deduction. A critical feature of the provision is that it applies where the interest will not be subject to tax in the hands of the person to which it accrues.

\textit{Preventing treaty abuse through the use of LOB provisions}

South Africa has LOB provisions in a few of its tax treaties. These rules vary in form, but the purpose is generally the same, that is to prevent the entitlement to treaty benefits in certain circumstances. The South African tax treaties with LOB provisions are provided below with a brief description of the LOB provision used. The countries with which the treaties specify a limitation of benefits as a separate article include: Denmark (1995), Ghana (2004), Mexico (2009), Norway (1996), Sweden (1995), Tunisia (1999), US (1997), UK (2002). But the limitation of benefits is not always included as a separate article as in the case of the treaty with Australia which expresses limitations for and within the articles for dividends, interest and royalties.

The LOB provisions of Denmark and Sweden are identical. The protection offered refers to one of the contracting states not taxing selected activities onshore or taxing such activities as if they were offshore, results in the limitation to tax imposed by the treaty being removed for the other State. Furthermore, for dividends, should the dividend arising in the contracting state be deemed to be derived from a source outside the state and therefore not taxed, the other contracting state is freed from limitations to tax in terms of the treaty. This additional aspect of dividends in the treaties with Denmark and Sweden appears as the LOB provision in the treaty with Norway.

More general and principle rules appear in the treaties with Ghana and the United Kingdom as regards the non taxation of incomes by one of the Contracting States. The treaty with Tunisia, however, links the LOB to instances where a person has changed residence to one of the contracting states in order to access the treaty

\textsuperscript{30} ibid at 14-15.

\textsuperscript{31} Section 23M in the Income Tax Act 58 of 1962.
benefits. In such cases MAP is used to address the exclusion of the person from the treaty.

The treaty with Mexico has a general exclusion category for a person resident in a contracting state obtaining relief from taxation in terms of the treaty unless a controlling beneficial ownership is held either alone or in a combination of individuals resident in one of the contracting states, listed companies or the contracting state itself, its political subdivision or local authorities. Further rules are provided for the dividends, interest and royalty provisions. Key is the override of this provision where it is shown that the principal objective was not to obtain the benefits under the treaty. The rule further requires that the competent authorities consult before applying the rule denying relief.

Finally, the US treaty has a limitation of benefits article based on the 1996 US Model Income Tax Treaty. Some variations occur within the actual LOB provision of the South Africa-US treaty. The variations are generally to clarify the impact for selected entities, such as trusts and charitable organisations. The only variation of significance is a paragraph of exclusions from the LOB provision and the insertion of a paragraph addressing the situation of a South African company operating in the US but where the income earned is attributable to a permanent establishment in a third State.

4. Application of GAARs, TP Rules and SAARs
In terms of the application and interaction of GAARs, TP rules and SAARs, there is no legislative authority indicating any hierarchy, co-ordination or overlapping measures. There is equally a lack of clarity as to whether the GAAR can be extended to treaty abuse. However, it is clarified that the GAAR may be used “in the alternative for or in addition to any other basis for raising an assessment”.32

The GAAR has tended to be used by the revenue authority as the last option. With respect to its application, the procedure was summarised as:

“The SA GAAR includes specific notice provisions. SARS is obliged to give notice of its intention to apply the GAAR and it is also obliged to set out its reasons for this. The taxpayer is then given a specified period to submit reasons why the GAAR should not be applied. Thereafter, also within a fixed period of receipt of the taxpayer’s statement, SARS must request additional information in order to determine whether or not the GAAR applies, or it must give notice to the party that its GAAR notice has been withdrawn, or it must determine the tax liability.”

If the GAAR is applied, the taxpayer can appeal the decision and the

32 Section 80I of the Income Tax Act 58 of 1962
33 Section 80J of the Income Tax Act 58 of 1962
matter is dealt with by the relevant tax court. Under the Income Tax Act, the burden of proof to show that any amount is exempt from or not liable to tax is usually on the taxpayer. Under the GAAR, the onus of proving the existence of tainted elements falls on SARS. However, the express provisions that would indicate lack of substance and the presumptions of purpose would assist SARS to discharge that onus. The onus of proof that tax avoidance was not the main purpose of the transaction falls on the taxpayer.\(^{35}\)

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\(^{34}\) See Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tyson (Pty) Ltd) 1999 (4) SA 1149 (SCA), dealing with the previous version of the SA GAAR in s103(1).