Legal Perspectives on the Enactment and Interpretation of General Anti-Avoidance Tax Laws: Statutory Interpretation on the Road Less Travelled By.

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1.0 Introduction

Tax avoidance is an ancient practice, considering that records from 6000 years ago describe the Mesopotamian king imposing fines on those who swim across the river to avoid paying the toll on the local ferry.[2] While tax avoidance and evasion might be ancient, their significance has grown more recently.[3]

Changes in the role of government in modern society have increased the role of taxation, including raising revenue to meet the costs of government and playing a role in income redistribution and economic and social policy objectives. With the introduction of the Tax State (a government dependent on and defined by its power to tax), preventing the avoidance of taxation has become critical.[4] Reform in this area of the law is becoming almost quotidian, so in some countries, even in the last 20 years, we have witnessed significant changes with the introduction of new statutory GAARs,[5] while in other countries there have been ongoing further critical reforms.[6] These legislative reforms reflect that GAARs are vehicles of a legislative intention designed to regulate and exert a relatively high degree of control over the activities of citizens with respect to their revenue obligations.[7]

Tax avoidance laws, specifically general anti-avoidance rules, are unusual statutory provisions designed to operate in situations where there has been a taxpayer's full compliance with ordinary tax law provisions but a misuse, bringing about an outcome unintended by the legislature. The paradox of this area of law is that tax is imposed when it is lawfully not payable according to the provisions said to have been avoided. Yet the very reason why tax becomes payable is the successful avoidance of those provisions. This conflict between interpreting the "black letter" tax provisions and the anti-avoidance provisions gives rise to some relatively rare legal interpretation issues. In the context of a Tax State, it is no wonder that GAARs are controversial because they represent a trade-off between the principles of the rule of law and its certainty and broader concepts of tax equality and fairness.[8] Reconciling this conflict highlights the role of legal expertise in tax avoidance legislation,

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[1] Craig Elliffe is a Professor of Taxation Law at the University of Auckland Faculty of Law.
[2] Vern Krishna, *Tax Avoidance: The General Anti-Avoidance Rule*, Carswell, Toronto, 1990 at 8.
[3] In a 2017 note, the European Commission suggested that 17% of corporate income tax in the European Union was subject to aggressive tax planning, some €50-€70 billion per year.
[4] Miranda Stewart, "The Tax State, Benefit and Legitimacy", in *Studies in the History of Tax Law (volume 7)*, Hart, Oxford (2015), at 483, where Stewart identifies Joseph Schumpeter as the originator of this Tax State terminology in 1918. Schumpeter was an Austrian economist and sociologist who was briefly the Finance Minister of Austria and later moved to Harvard University in the United States.
[5] For example, in India (2012) and the United Kingdom (2013, General Anti-Abuse Rule).
[6] For example, in Australia (changes announced in the 2023-2024 Budget to expand the scope of the GAAR, but not yet enacted) and Canada (Bill C-59 received royal assent on June 20, 2024, introducing new changes effective 1 January 2024).
[7] Nabil Orow, *General Anti-Avoidance Rules. A Comparative International Analysis,* Jordan Publishing, Bristol (2000) at xxxiii.
[8] Paulo Rosenblatt and Manuel E. Tron *Anti-avoidance measures of general nature and scope - GAAR and other rules,* Cahiers de Droit Fiscal, vol 103a, Sdu, The Hague (2018), General Report, at 11.

interpretation and administration and "transfers great power and responsibility to the adjudicators"[9] because, as will be highlighted in this chapter, GAARS by their very nature deal with taxpayers and their arrangements unanticipated by the legislature.

This chapter addresses the role of legal expertise in enacting and interpreting general anti-avoidance legislation. The particular focus is on statutory general anti-avoidance rules rather than other purely judicial doctrines which might be based on abuse of law. However, the role of lawyers, as advocates or judges, remains critical in all types of GAARs.

The emphasis in the chapter is on the process of interpreting anti-avoidance rules and the role of lawyers, particularly judges, in developing this law. The chapter asserts that statutory interpretation follows a road less travelled by conventional processes of interpretation. In assessing the peculiar nature of GAARs, the views of various legal theorists are canvassed to rationalise an approach described as correctness-oriented interpretation, for this area of the law.

This approach rejects the suggestion that all interpretations of statutes must be similar. This means that GAARs have different statutory interpretation processes. Examining how courts have interpreted GAAR provisions, after analysing how these rules operate, provides a fascinating insight into this area of tax law and the role of lawyers in it. Such a study provides guidance for legislative bodies, tax administrators, taxpayers and their legal advisors, and the judiciary.

2.0 What are GAARs?

GAARs are predominantly domestic law rules[10] which determine whether a transaction is legitimate tax planning or otherwise, namely tax avoidance. While a GAAR usually takes the form of a statutory rule, with countries legislating significant variations in their statutory provisions, this is not always the case. Countries that lack a statutory rule may rely on judicial interpretation, yet this doctrinal approach is still considered a GAAR.[11]

GAARs are an implicit recognition of the deficiency of ordinary "black letter" tax legislation. That is, if there are flaws in the assessment or deduction provisions capable of being manipulated and exploited, then the GAAR would act to counter the problem.[12] Taxpayer abuse of poorly drafted or inadequately thought-through tax legislation is not a good reason for the existence of GAARs because the legislature should remedy such drafting deficiencies. Instead, GAARs exist because, as Zimmer says, even if there were "perfect tax legislation", "it is impossible to avoid rules that may create avoidance opportunities". Zimmer discusses numerous examples of transactions that may give rise to avoidance opportunities such as the timing and composition of the taxation of income and capital, the use of entities (companies and partnerships), the holding of shares and resulting planning opportunities in participation exemptions, grouping, et cetera, the use of sophisticated financial instruments (such as hybrids), deductions for losses, planning for different tax rates, and international tax arbitrage.[13] Judith Freedman observed that "[i]n the real world, no legislation, however detailed, can cover every issue that might arise. In fact, having excessive details in legislation often increases

[9] Richard Krever "General Report: GAARs" in *GAARs-A Key Element of Tax Systems in the Post-BEPS Tax World,* IBFD, European and International Tax Law and Policy Series, Vol 3, at 3.
[10] Some GAARs are contained in public international law and incorporated into tax treaties and, of course, because of the Multilateral Instrument and the mandatory requirements of the Inclusive Framework, many bilateral agreements now contain the principal purpose test (PPT).
[11] Ibid, Krever, n9, at 2.
[12] Ibid, Orow, n 7, at xxxv.
[13] Frederik Zimmer, "In Defence of General Anti-Avoidance Rules", *Bulletin for International Taxation*, April 2019, at 218, at *2.0 What Creates Tax Avoidance Possibilities?*

the opportunities for planning or avoidance."[14] Thus, excellently drafted tax legislation fully complied with by the taxpayer can still give rise to tax avoidance.[15]

2.1 Countries Differing Responses to the Avoidance Problem

There is a universal acknowledgement by those scholars who have undertaken comparative analysis that the forms of the GAAR, statutory or otherwise, vary considerably.[16] One can speculate on the reasons for this variation:[17]

(1) judicial perspectives on taxation and other statutory interpretations; do the courts take a very textual interpretation or a more purposive, even teleological interpretive approach?[18] In theory, where courts have taken a very textual approach, a prescriptive and detailed statutory GAAR might be the preferred mechanism to prevent avoidance.
(2) the role of legislatures and draftspeople to control taxpayers through enactment or delegate confidently to the courts and administrators. This might reflect the constitutional position of a country and how confident the government is in delegating significant power and authority to the judiciary and a responsible revenue authority; and
(3) the approach of ordinary citizens to tax planning and tax payments; this highlights the citizens' tax morale, or the extent of tolerance that society extends to aggressive tax planning and the extent to which taxpayers enter into this behaviour.[19] A commentator suggests that the divergence of views on anti-avoidance rules illustrates significant ideological differences in the tolerance of tax avoidance.[20] On the one hand, taxpayers should be free to utilise any of the legal and contractual options provided to them in the legal landscape in which they operate, giving rise to the possibility that they will reach similar economic consequences with quite different legal forms and structures and consequential tax obligations. On the other hand, a *carte blanche* approach to aggressive tax structuring allows taxpayers to use these options in a way not contemplated by the government. Aggressive tax planning can offend vertical and horizontal equity and create inefficiencies in business structures and the economy more generally through preferences in reduced tax payments for these aggressive taxpayers.[21]

Whatever the reasons behind the different GAAR models, Krever's analysis suggests that GAARs usually fall into four categories:[22]

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[14] Judith Freedman, 'Designing a General Anti-Abuse Rule: Striking a Balance' (Research Paper No 53/2014, University of Oxford Legal Research Paper Series, August 2014) 168.
[15] For example, if an interest deduction is claimed on money borrowed by the taxpayer via funding provided from another entity owned by the taxpayer, it is possible that, because of the circular nature of the funding in commercial and economic terms, no actual borrowing was incurred when the transaction is fully examined.
[16] See Krever, n9, at 3, Rosenblatt and Tron, n8, at 17, Orow, n7, at xxxvi, and Christine Osterloh-Konrad, *What is a GAAR? A Functional Analysis of General Anti-Avoidance Instruments based on Legal Comparison* (October 23, 2024). Available at SSRN: https://ssrn.com/abstract=4997300 or http://dx.doi.org/10.2139/ssrn.4997300
[17] As does Krever in the introduction of *GAARs-A Key Element of Tax Systems in the Post-BEPS Tax World* when he concludes that the intersection of general anti-avoidance rules (and specific anti-avoidance rules) with the operative provisions of tax law reveals much about all aspects of a country's tax system, Krever, n9, at 1.
[18] Zimmer, n13, at 220.
[19] This is a cultural element and may change in countries over time. This is a relevant consideration in the discussion of the extent to which judges' values might come into the interpretation of statutory provisions.
[20] Ibid, Orow, n 7, at xxx.
[21] Ibid, Zimmer, n13, at 220.
[22] Krever, n9, at 4. Jinyan Li and Eivind Furuseth in their General Report for the 2025 IFA Lisbon Congress, "Improper Use of Tax Treaties and Source Taxation: Policy, Practice and Beyond" suggest that there are three main approaches taken by countries in identifying improper transactions: a legal approach, an economic substance approach and a purposive approach, at xx. This 2025 analysis broadly accords with Krevers.

(1) a group of rules that allow tax authorities to identify transactions that have the purpose of providing a tax benefit (the transactional approach). The GAAR must highlight the tax advantage secured compared to a hypothetical transaction involving normal commercial behaviour to identify tax avoidance.[23] This GAAR is designed to overturn arrangements intended by the taxpayer to defeat the contemplated legislative intentions and policies of the ordinary black letter provisions of the tax legislation. That is, the tax-avoiding taxpayer was trying to alter the incidence of tax contrary to the purpose and the policy of the "ordinary tax" provisions.
(2) a group of rules, usually found in the statute but occasionally based solely on judicial practice, mandating an interpretation and application of tax law following the economic substance of a transaction rather than compliance with legal form.[24]
(3) a group of rules based on the adoption by the courts of a broad abuse of law doctrine.[25]
(4) a group of rules based on a statutory abuse of law model applicable when a taxpayer adopts either a fictitious arrangement or one valid in law that is used to defeat the intention of the tax legislation.[26]

Most jurisdictions will develop their anti-avoidance approach to address tax-aggressive behaviour. This might take the formal enactment of a GAAR, a series of specific anti-avoidance rules, or reliance on the courts to develop judicial tools which are functionally similar to a GAAR (and which might well be referred to in the same terminology).[27] Looking at the ubiquitous features of these anti-avoidance rules suggests that legal systems are far more consistent in the functioning and substance of general anti-avoidance rules than in the diverse forms of such rules.[28]

2.2 Common GAAR Features

The proposition put forward here is that common features of GAARs can be found in two simplified tests. This simplification intends to distil the *essence* of the GAAR from a comparative legal perspective. In suggesting only two major tests, it is immediately obvious that this is a generalisation. Additional requirements might be present to frame the critical rules; for example, a transactional approach GAAR might begin by requiring that there be something like "an arrangement" designed to focus on the scope of the transaction to ensure the complete picture is considered. Transactional GAARs might place the burden of proof differently between the taxpayer and the Revenue.[29] Alternatively, the rules might emphasise one limb of the test more than the other, or even exclusively; for example, an economic substance or abuse of law test will focus on the authenticity of the transaction, which, it is suggested, is primarily a factual question.

The first test requirement is that a GAAR will enquire whether the taxpayer has used the relevant tax provision(s) in a way that the legislature would have contemplated. This is a legal test found in all

[23] Krever, n9 at 4, where he lists such GAARs as including those found in Australia, Canada, India, New Zealand, South Africa and the United Kingdom, but also outside of Anglo jurisdictions, including China.
[24] Krever points to the judicial substance over form test originating in case law but subsequently codified in the United States (Internal Revenue Code of 1986, section 7701 (o)). Another example is the Turkish GAAR, labelled the "real" substance test. Other examples are found in Switzerland and South Korea.
[25] An example is the Czech Republic.
[26] An example is France.
[27] Osterloh-Konrad, n 16, at 4.
[28] Ibid, Osterloh-Konrad, n 16, at 5.
[29] For example, the Canadian GAAR places the burden of proof on the taxpayer on the factual test (the existence of an avoidance transaction), but on the Minister in respect of the legal test (the abuse test).

transactional approach GAARs and focuses on the use of the particular provision by the taxpayer in the context of how, hypothetically, the provision's use was intended by the legislature.

The second is whether all the factual circumstances indicate the purpose of the transaction and contain elements of contrivance. In some jurisdictions, the purpose of the taxpayer might also be an express requirement, and in those jurisdictions where it is not, the taxpayer's purpose could well be part of the factual matrix. This is a factual test.

These two tests were identified as key in a study on the New Zealand GAAR,[30] also indicating that the tests resonated with other jurisdictions. Comparative analysis from other scholars looking at a wide range of jurisdictions supports a claim that the tests are universal in GAARs worldwide.[31]

2.2.1 Legal Use (or Misuse) of Tax Legislation

Most GAARS have a requirement that the impugned transaction results either in, or was entered into for the purpose of, an outcome (tax benefit) which is inconsistent with the object and purpose of the tax rules. If the transaction does not produce a tax benefit, then it is likely that the taxpayer is utilising the provision in the way in which it was intended to be used by the legislature. In some circumstances, however, tax rules designed to create a tax burden or obligation have been circumvented or sidestepped. In contrast, at other times, tax rules favourable to the taxpayer have been incorrectly utilised, perhaps when they were used when not intended.[32] In some jurisdictions, this first requirement is described as an *objective* element.[33]

The legal rationale of the GAAR is thus: "the principal function of GAAR, which serves to distinguish it from other provisions, is to restore liability to taxation which would have arisen under the ordinary provisions of the Act, had they operated as intended".[34] This is the primary role of the GAAR, which is designed to adjust the liability to tax in circumstances where the use of the ordinary and charging provisions has failed and instead ensure the proper and intended use of those provisions.

It would be wrong to think that discerning the purpose of tax legislation is always straightforward. Quite to the contrary, one common feature of tax legislation is complexity, exceptions, and interaction with both tax and non-tax legislation rules. It has been said that it is more difficult to ascertain the purpose of standalone provisions than a complete regime.[35] Notwithstanding the difficulty of this task,

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[30] Craig Elliffe, "Designing a Powerful General Anti-Avoidance Rule: Reflections on the New Zealand Experience." BTR (2023) no 5, 704 at 716 and 722.

[31] As illustrated succinctly by Osterloh-Konrad, n 16, at 11, and confirmed by a series of learned observations by Zimmer, n13, at 223, where 7.0 Object and Purpose of the Tax Rules is a legal test, whereas 8.0 Tax Benefit and 9.0 Purpose of the Taxpayer, fall into the factual analysis. See also the general report by Paulo Rosenblatt and Manuel E. Tron, *Anti-avoidance measures of general nature and scope - GAAR and other rules,* n8, where the authors characterised three tests, the arrangement, the tax benefit and the taxpayer's purpose or intent. The arrangement is an integral part of the scoping aspect of the enquiry, whilst assessing the tax benefit is an essential part of using the provision (legal test). In contrast, the taxpayer's purpose or intent, in the author's view, forms part of the assessment of the circumstances of the transaction (factual test).

[32] Zimmer, n13, at 223.

[33] See, for example, the Belgian GAAR, as described by Marc Bourgeois and Aymeric Nollet in chapter 5, Belgium, in *GAARs-A Key Element of Tax Systems in the Post-BEPS Tax World,* IBFD, European and International Tax Law and Policy Series, Vol 3, 83, at 5.2.2, 92.

[34] Orow, n 7, at 59.

[35] Paulo Rosenblatt and Manuel E. Tron, *Anti-avoidance measures of general nature and scope - GAAR and other rules,* n8, at *2.4.3 Parliamentary intention, the apparent policy of the legislation and purposive interpretation,* 26.

it is still an essential function of the GAAR to interrogate whether such a legal misuse of the provision has occurred.

Christine Osterloh-Konrad describes this phenomenon as a "mismatch", using this simple example under German tax law to illustrate the problem of an "unhappy interpreter".[36] Like many countries, Germany allows a deduction for interest payments on debt incurred for purchasing a rental property. Still, it prohibits a deduction for interest incurred where the taxpayer acquires their own home. If two people wanting to move into a newly constructed building with their families decide to purchase two units, which they will rent to each other, they will satisfy the technical rule that any interest incurred on borrowings is deductible because the funds are being applied to the purchase of a rent-producing property. Nonetheless, each family ends up living in an apartment identical to the one that they purchased. However, they claim an interest deduction on the borrowings, something that would seem counterintuitive to the overall purpose of the prohibition on the deduction for private expenditure.

Osterloh-Konrad's analysis suggests that some GAARs explicitly address the mismatch, using Art 6 ATAD as an example.[37] She adds that other GAARs address it implicitly[38] or point to a divergence between substance and form.[39] Still, her point is that there is *always* this identification of a difference between the use of the provision and its intended purpose.

2.2.2 Considering the Context for the Misuse of the Provision by highlighting the relevant factors of tax avoidance (Factual Assessment)

The second key test is made up of a great many factors, but it is submitted that they all have one common feature: they are relevant factual matters. Jurisdictions around the world have focused on these criteria. They include such matters as artificiality, contrivance, pretence, the circularity of funds, timing mismatches (e.g. current deductions or input credits versus future income or output tax), unnecessary insertion of steps in a transaction, a lack of business purpose, a divergence between the economic and legal effects of the transaction, dealing between non-arm's-length parties, the duration of an arrangement, and the list goes on. Osterloh-Konrad refers to them as highlighting the "degree of wrongness" between a *prima facie* application of statutory law and its purpose, suggesting that the two tests are closely related and that this second component highlights the intensity of the mismatch.[40]

In some jurisdictions, the statutory GAAR references specific criteria,[41] whereas in other jurisdictions,[42] it has been left to the courts to highlight the relevant factors of tax avoidance.

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[36] Osterloh-Konrad, n 16, at 6.
[37] Article 6 of ATAD requires that the tax advantage sought after by the taxpayer "defeats the object or purpose of the applicable tax law".
[38] Citing the German GAAR, Art 42 para 2 of the General Tax Code requiring an inadequate transaction, and the UK GAAR, Part 5, Finance Act 2013 s. 207 (2).
[39] Acknowledging economic substance as a standard test in the US, referencing also the UK GAAR and Part 5, Finance Act 2013 s. 207 (4) (b).
[40] Osterloh-Konrad, n 16, at 11.
[41] In Australia for example, see Income Tax Assessment Act 1936 (Australia) – s. 177D. The criteria specified are the following: how the scheme was entered into, the form and substance of the scheme, the time and the length of the period during which the scheme was carried out, the result achieved in relation to the operation of the tax act (were it not for the GAAR), any change in the financial position of any person who has any connection with the relevant taxpayer, any other consequence for the relevant taxpayer, and the nature of any connection between the relevant taxpayer any person who has a connection with the taxpayer.
[42] In New Zealand for example, the list has been judicially formulated in the leading Supreme Court judgment, *Ben Nevis v Commissioner of Inland Revenue* [2008] NZSC 115 at [108], where the Commissioner and the courts were provided with a list of relevant factors "the significance of which will depend on the particular facts". These are: the manner in which the arrangement is carried out, the role of all live in parties and the

While widespread agreement exists in countries' GAARs on a factual enquiry into artificiality and lack of commerciality, and most of the other factors referred to above, two factors in this second factual test can be highlighted as somewhat controversial because countries approach them differently.

a) The taxpayer's purpose or state of mind

The first is the question of the taxpayer's purpose or state of mind. One crucial element in the wide-ranging elements that make up the factual test is, according to Krever, "almost always a subjective test" involving an assessment of the taxpayer's purpose in using the transaction or arrangement to avoid tax.[43] Different countries' GAARs vary in how they establish the taxpayer's purpose. Some countries go straight to the taxpayer's intentions, requiring evidence of the motive behind the transaction. This is clearly a subjective test. [44] Other countries set out objective indicators to ascertain the taxpayer's purpose,[45] frequently adopting an objective test, such as whether it is reasonable to conclude that the taxpayer's main purpose was to obtain a tax benefit.[46]

There is both academic[47] and judicial support for the objective approach. The New Zealand Supreme Court, in a case involving an unrealistic transaction between ostensibly arm's-length parties, illustrated the objective approach when it made clear that under the New Zealand GAAR, the taxpayer's state of mind concerning taxation is not determinative of purpose.[48]

> The purpose of the arrangement may be deduced entirely from the arrangement and its effect.

A way to reconcile this objective/subjective debate is to recognise that different legislative bodies might have different approaches to the question of *evidence* of the taxpayer's purpose. Those requiring an objective test are still looking for evidence of the misuse of the provision by the taxpayer, rather than trying to find evidence of a mental state. So, they do so by looking objectively at the arrangement and other factual matters rather than for proof of the taxpayer's tax avoidance mindset *per se*. If this latter mindset, however, were readily displayed in the evidence, it would likely be material to the enquiry.[49]

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relationship to the taxpayer, the commercial and economic effect of documents and transactions, the duration of the arrangement, the nature and extent of financial consequences for the taxpayer, and the obtaining of a benefit in an artificial or a contrived way.

[43] Krever, n9, *1.4 Taxpayer's purpose*, at 7.

[44] Bourgeois and Nollet, n31, at 5.2.2, 94.

[45] Krever, n9, at 7, where he refers to Australia as an example, but the same is also true for New Zealand and the United Kingdom.

[46] An example is found in the United Kingdom's GAAR, which uses the words "it would be reasonable to conclude" to show that the test is an objective one to try and prevent manipulation: "it is almost always possible for a well advised taxpayer to construct some commercial purpose alongside the tax purpose". Judith Freedman, chapter 37, United Kingdom, in *GAARs-A Key Element of Tax Systems in the Post-BEPS Tax World,* IBFD, European and International Tax Law and Policy Series, Vol 3, 741, at 37.2.1 Definitions and the double reasonableness test, 749.

[47] A. Báez Moreno, "GAARs and Treaties. From the Guiding Principle to the Principle Purpose Test. What have we gained from BEPS Action 6?," 45 Intertax 6/7, p. 436 (2017).

[48] Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ, per Blanchard J, *Glenharrow Holdings Ltd v Commissioner of Inland Revenue,* [2008] NZSC 116, [2009] 2 NZLR 359, (2009) 24 NZTC 23,236, [2008] TXHNZ 108, 2008 WL 5432167 at [39].

[49] The New Zealand Supreme Court in *Ben Nevis*, delivering a tax avoidance judgement on the same day as Glenharrow Holdings, found such evidence in a memorandum written by the architect of the tax deal, which read as follows: "The real benefits of the deal are tax concessions that can be obtained now by the investors and the foundation." The majority of the Supreme Court found this memorandum to be "highly significant". *Ben*

(b) Economic substance

In some countries, an interpretation and application of tax law following the economic substance of a transaction is at the heart of the GAAR.[50] In other jurisdictions, there is a noticeable trend towards considering and comparing the economic position with the tax outcomes, but clearly in a context considering the broader commercial and economic consequences of the transaction.[51] Canada recently enacted legislation amending its GAAR with a new preamble and an economic substance test.[52] This last test does not inject the need or requirement for economic substance into the relevant provisions. Instead, it "is a means of giving effect to parliamentary contemplation when the pertinent provisions were contemplated to apply to transactions with economic substance."[53] That is, if it is expected that the cost for interest expense would be borne by the taxpayer, one would expect that to be the economic substance of the transaction.

Osterloh-Konrad concludes that "every GAAR… contains blurry criteria with which each legal system interprets in line with its own legal tradition."[54] She goes on to observe that the specific wording of each GAAR is less important than the understanding of how they operate, namely, the function of identifying the mismatch between the meaning and purpose of the statutory tax law (legal assessment) and the other various reasons for "playing by the rules" which go to the essence of whether the arrangements or transactions are abusive (factual assessment).

2.3 Implications on the nature of GAARs and the need for interpretation

The comparative GAAR studies referred to above reflect that despite significant variations in how GAARs look, their modus operandi and subsequent judicial implementation are far more consistent.[55] This suggests that any statutory (or judicial) GAAR will likely contain in its *essence* a test that inquires (1) whether the taxpayer's use (or the taxpayer arrangements' use, if the test is more objective) of the statutory provision is to obtain a tax benefit in a way that the legislature would not have intended or contemplated (a legal examination of the transaction), and (2) that enquiry takes place in the context of considering all the facts and circumstances of the arrangement (a factual examination).

A natural implication of the requirements in (1) and (2) is that the legislation is likely to be broad in its scope, which is reflected in its language.[56]

The need for interpretation of GAAR statutory provisions

Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue; Accent Management Ltd & Ors v Commissioner of Inland Revenue (2009) 24 NZTC 23,188 (SC) at [136].

[50] In their comparative analytical studies, both Krever, n9, at 4, and Osterloh-Konrad, n 16, at 11, both referred to the United States as an example of this type of test, the doctrine of economic substance was originally a common law doctrine but was codified in the Tax Code in 2010 (As defined in subsection (o) of the United States Code, Title 26 7701 as amended by the Health Care and Education Reconciliation Act of 2010.

[51] Elliffe, n 30, at 722, notes the developments in the tests in the United Kingdom, Australia and the development of jurisprudence in New Zealand.

[52] R.S.C. 1985 (5th Supp.), c. 1. Section 245 was enacted in 1988 and amended several times, most recently in 2024 (see Bill C-59, Royal Assent on June 20, 2024. Government of Canada).

[53] Jinyan Li, Michael Conroy, Sebastien Tuli, Kitty Wang and Patrick White, Canada's New GAAR Preamble: Pivoting Toward Fairness and Parliamentary Contemplation, Tax Notes April 17, 2025, at 323.

[54] Osterloh-Konrad, n 16, at 12.

[55] Orow, n 7, Krever, n9, Osterloh-Konrad, n 16, and Rosenblatt and Tron, n35.

[56] Rosenblatt and Tron, n35, 18, "Most branch reports affirm their GAAR is based on broad standards".

Even though statutes are drafted with care and by people with extraordinary skill, they are often before the courts with questions arising on their interpretation.[57] Carter describes, in general, numerous features of statutes requiring interpretation. There are two that are particularly relevant for the interpretation of GAARs. The first is when you have two contradictory or contrasting provisions in the same Act.[58] The second is when you have a "penumbra of uncertainty" caused by the generality of the words used in the provision.[59] Both features are critical attributes of the GAAR.

Conflicting Provisions

The relationship between provisions, the specific tax provision and the GAAR, necessarily results in a conflicting outcome, since the specific tax rule is complied with before the potential operation of the GAAR. Also, it is important to be clear that in discussing the interpretation of the GAAR, some countries' focus is on the interpretation of the actual GAAR provision itself and not the interpretation of the specific provision. A purposive interpretation of the specific provision prohibiting abuse is another approach to the misuse of the black letter tax law, i.e. judges not allowing the specific provision to be interpreted to facilitate avoidance.[60]

In the leading case in the New Zealand Supreme Court, the majority decision focused on the interpretation of the GAAR provision itself, reconciling this conflict as follows: "Parliament must have envisaged that the way a specific provision was deployed would, in some circumstances, cross the line in turn what might otherwise have been a permissible arrangement into a tax avoidance arrangement."[61]

Courts must therefore decide whether the GAAR is "the principal vehicle by means of which tax avoidance is addressed" or whether it has some lesser role, such as that of a "longstop."[62] If it is the former and the GAAR is designed to address tax avoidance, this purpose must itself be given full interpretive effect.

Lack of Certainty

Generality is also inherent in GAARs because they are designed to prevent any misuse of a provision. If it were possible to prevent the misuse of the specific tax provision through legislative drafting, then that would have to be the appropriate mechanism, either pre-emptively through a well-designed rule or with a specific anti-avoidance rule. Experience has taught us that creative and sophisticated tax

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[57] Carter, Ross. *Burrows and Carter Statute Law in New Zealand*, LexisNexis NZ Limited, 2021. *ProQuest Ebook Central*, https://ebookcentral.proquest.com/lib/auckland/detail.action?docID=6713241, at 249.
[58] Carter, n57 at *(ii) Relationship between two sections of Act*, at 251.
[59] Carter, n57 at *(v) Vagueness*, at 254.
[60] This discussion, of course, assumes the existence of the GAAR, but a much more fundamental discussion is whether a GAAR is in fact required. In the German-speaking tax community, "internal" and "external" theories of tax avoidance are fiercely debated. Internalists argue that dealing with tax avoidance is just about the purposive interpretation of the substantive tax provisions. In contrast, externalists hold that it is necessary to have a separate provision operating as a *deus ex machina* in conflict with the substantive tax provision. One advantage of the external position is the potential for more significant consideration of the factual elements in the GAAR test, since, in theory, the internal approach carefully evaluates the legal elements of the test.
[61] The New Zealand Supreme Court in its landmark decision proposed the tandem approach to interpretation, by which the specific provision and the general provision are meant to work together with the latter overriding the specific provision in cases of tax avoidance: see *Ben Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue; Accent Management Ltd & Ors v Commissioner of Inland Revenue* (2009) 24 NZTC 23,188 (SC) at [104], per Tipping and McGrath JJ for Tipping, McGrath and Gault JJ.
[62] *Ben Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue,* n 61, at [100], where the longstop role was rejected in favour of the role of principal vehicle in circumstances of tax avoidance [103].

avoiders can still find holes or structures to misuse even the most well-designed tax rules. Even though certainty is a highly desirable feature of the legal system, there are trade-offs between certainty and the protection of the tax base. Judith Freedman addressed this point when she said:[63]

> What should take priority is producing a practical system with a fair test which is workable for the compliant majority, but not as susceptible to manipulation as would be an entirely certain test, even assuming such a test could be devised.

Furthermore, it is unlikely that any legislature could anticipate the creativity and ingenuity of sophisticated tax planning. This is because, as noted by Orow, "the methods of tax avoidance are often unknown and unforeseeable."[64] So, this means that the GAAR is inherently uncertain, a problem that taxpayers, particularly those who embark on tax planning, bemoan. Once again, however, in the same way as conflict between provisions, this aspect of lack of certainty must be considered a deliberate feature of Parliamentary intention, so a court might say both "but Parliament has left the general anti-avoidance provision deliberately general" and "the court should not strive to create greater certainty than Parliament has chosen to provide".[65]

The Role of a GAAR as the Statutory Purpose "Gatekeeper"

Osterloh-Konrad says that the attitude of the interpreter (the courts) governs the application of the GAAR.[66] Any legislative rule (the GAAR) requiring an assessment of the use of a tax provision (the substantive tax rule) measured against a hypothetical intended use of the substantive tax rules requires a significant role for the judge or adjudicator to act as a "gatekeeper". The intended use of the tax rule, as contemplated by parliament or its members, is sometimes not clearly expressed in the statute, so the use of the substantive tax rule, when faced with the fact situation of the case, makes this legal examination test difficult.[67] GAARs do not operate and attach "specific legal consequences to cases in which certain criteria are fulfilled", but instead they instruct interpreters on "how to (not) apply substantive tax law provisions" because of the discrepancy between the actual legal analysis and the legislature's intended use of the rule.[68] Gatekeepers must ensure that the substantive tax provisions have been appropriately used, and this requires both the breadth of the language and the unique characteristics of the GAAR as a gatekeeper of the use of the substantive provision to be formulated in the legal test.

Add to the substantial judicial element of this legal test, the judgment needed to assess the factual component of the test, which requires the assessment of the transaction for any of the myriad indicia or tax avoidance features, and you can clearly see that the legal process of interpretation and decision making is complex and difficult.

Rosenblatt and Tron say, "Since avoidance is based on ambiguous, indeterminate concepts, there is a necessary reliance on the judiciary."[69] General anti-avoidance rules are truly vague and uncertain, general, and deliberately so, to prevent unforeseen but highly creative transactions or arrangements,

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[63] J. Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle", BTR, p. 354 (2004)
[64] Orow, n 7, at 4.
[65] *Ben Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue,* n 61, at [112].
[66] Osterloh-Konrad, n 16, at 10.
[67] Rosenblatt and Tron, n35, 26: "These methods are subjective and may lead to speculation." They reference Malcolm Gammie, 'Tax avoidance and the rule of law: A perspective from the United Kingdom' in G. S. Cooper (ed), Tax avoidance and the rule of law (Amsterdam: IBFD, 1997), 198-204.
[68] Osterloh-Konrad, n 16, at 10.
[69] Rosenblatt and Tron, n35, 31.

and formulated to require the interpreter to assess the use of the substantive provision against a hypothetical conventional standard use that Parliament would have intended. All of this requires a lot of work to be done by the interpreter of the GAAR, but as Krever and Allen discuss in their chapter of this book, courts can undertake the delegated task of law-making well when interpreting tax law terms for which there are no definitions that could be transplanted from common law doctrines in other areas of law.[70]

3.0 Statutory Interpretation of the GAAR

The above analysis explains that the GAAR measures the use of the tax provision against its intended use in the light of the factual circumstances using broad language and vague purpose-related tests. Still, it does not explain *how* the GAAR works regarding statutory interpretation.

The New Zealand experience reflects its position as a country with an Anglo-legal system. However, because the New Zealand GAAR is the earliest of any statutory GAAR in the world,[71] it has a lengthy history, highlighting the development in statutory interpretation.[72] New Zealand is somewhat typical of common law countries in that you can trace over time the major trends in statutory interpretation.[73] Such interpretation began with strict rules around literal interpretation, including some presumptions relevant to taxing statutes, which required even more literal interpretation. Over time, statutory interpretation progressed to a purposive form of interpretation, including consideration of the context. Thus, in New Zealand, the meaning of a statute is ascertained from its text and in the light of its purpose and context.[74]

In tax avoidance statutory interpretation, it can be argued that the judges, at least in New Zealand, took the judicial superhighway. Whereas close textual interpretation was very much the order of the day for other areas of the law, the New Zealand tax avoidance cases led the way in the early adoption of purposive interpretation, a feature noted by Dame Susan Glazebrook,[75] a current New Zealand Supreme Court judge.[76]

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[70] Krever and Allen, Developing Judicial Doctrines in a Legislative Vacuum – Can Law Making be Delegated to the Courts? (How Australian Courts Find the Geographic Source of Income), in xxx.

[71] There has been a GAAR in New Zealand tax legislation since 1878 (section 62 of the Land Tax Act 1878 (NZ)).

[72] For a description of the history of the GAAR and for further reference, see Elliffe, n30, 704.

[73] For an analysis of the history and developments in statutory interpretation in New Zealand, see Carter, n57, at 234–236. It seems clear from other commentators/cases that the history is somewhat similar in Australia, see the discussion by Hon Michael Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2002) 24 Statute Law Review 95, 96–97, the United Kingdom, see Andrew Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement*. of *The Hamlyn Lectures*. Cambridge: Cambridge University Press, 2018, and Canada in the Canadian Supreme Court, see *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at [48].

[74] Section 10 of the Legislation Act 2019. The predecessor provision (s 5 of the Interpretation Act 1999) was discussed by the New Zealand Supreme Court in Commerce Commission v Fonterra Cooperative Group Limited [2007] NZSC 36, where the court noted that even if the meaning of the text appears plain in isolation of its purpose, that meaning should be always cross checked against its purpose to observe the requirements of the section.

[75] Dame Susan Glazebrook, *Statutory interpretation and tax avoidance* (17 May 2013), Tax Avoidance in the 21st Century Conference, University of Melbourne, *https://www.courtsofnz.govt.nz/assets/speechpapers/sihg.pdf* [Accessed 31 October 2023].

[76] Glazebrook, "Statutory interpretation and tax avoidance" (2013), p.2, referring to the article by D.A.S. Ward, "Trends in the interpretation of Statutes" (1956–1958) 2 VUWLR 155, 160 and 168–171, in support of this proposition.

The problem with the New Zealand GAAR, which is also found in other jurisdictions' statutory GAARS, is that the width of various definitions in the language of the GAAR requires judges to consider the purpose of the provisions with much greater focus than emphasising the nonsensical statutory text.[77] A key to the section is the definition of tax avoidance,[78] which involves any *arrangement* that *in any way alters* the *incidence* of tax or *relieves* a taxpayer from paying tax. This necessarily would include a sole trader whose business had grown to the point where, commercially, it was desirable to incorporate.[79] The provision would catch many other ordinary business or everyday events that might occur[80] and lead to its application to cases hardly conceivable the legislature had in mind when formulating the provision,[81] resulting in the "avoidance of transactions which were obviously not aimed at by the section".[82] Although judges have recognised the deficiencies of the statute, they have successfully worked with the GAAR to formulate judge-made law with a complete focus on the purpose of the provision.

Recently retired New Zealand Supreme Court judge, Sir William Young (author of the majority judgment in *Frucor*, the most recent Supreme Court tax avoidance decision)[83] is uncertain that purposivist or intentionist interpretive analysis illuminates the problem of deciding whether it is the GAAR or the other tax provision relied upon by the taxpayer, which should prevail.[84] In Sir William's view, "Orthodox statutory interpretation principles provide, at best, only limited assistance."[85] This suggests that the interpretation of GAAR tax avoidance legislation is something else: a valid observation, but hard to explain.

4.0 Theorising the Interpretation of the GAAR

The interpretation of statutes is one of the great questions of law and is full of theoretical controversy.[86] The theories of statutory interpretation can be constructive in shedding light on the puzzling question of how GAARs are interpreted. What is clear from the discussion at 3.0 above is that purely textual interpretation of the New Zealand GAAR will not get you very far.

Correctness-independent and Correctness-oriented Interpretive Techniques

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[77] Elliffe, n30, 704 at 713.
[78] Income Tax Act 2007 s.YA1 defines that *tax avoidance* includes: (a) directly or indirectly altering the incidence of any income tax; (b) directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax; (c) directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax.
[79] For context, the current New Zealand corporate income tax rate is 28%, whereas the current highest marginal personal income tax rate is 39 per cent.
[80] For example, technical tax avoidance includes a tax lawyer deciding to leave his/her partnership and become a tax academic, who would experience a significant reduction in (or relief of) their tax liability because of the lower income. Also, someone who decided to leave New Zealand and go to work in another country.
[81] Per Fullager J, when considering a similar provision (Australian Income Tax Assessment Act 1936 s.260, which was in turn based upon New Zealand provision found in the Land and Income Tax Assessment Act 1900 s.82) in the High Court of Australia decision of *Federal Commissioner of Taxation v Newton* [1957] HCA 99; (1956) 96 CLR 577 at 646.
[82] Per McCarthy P, in the New Zealand Court of Appeal decision *Commissioner of Inland Revenue v Gerard* [1974] 2 NZLR 279 at 280.
[83] *Frucor* [2022] NZSC 113.
[84] Young, "The evolution of the approach of the New Zealand courts to tax avoidance" (2016) 11(1) *Journal of the Australasian Tax Teachers Association* 1, Pt II.
[85] Young, "Looking back on the approaches of the courts to tax, after more than 24 years on the Bench" (2022) 17(1) *Journal of the Australasian Tax Teachers Association* 8, 19.
[86] Arie Rosen, "Statutory Interpretation and the Many Virtues of Legislation", (2017) Oxford Journal of Legal Studies, Vol 37, No 1, 134.

Arie Rosen envisages two visions of legislation and its virtues, and the consequential duties imposed on an interpreter of the legislation. The first vision sees the value of legislation in "correctness-independent values of political morality such as procedural fairness, political equality and self-government." Under this vision, the interpreter should not deviate from the decision of the legislature because such a process of interpretation diminishes the legislature's legitimate control over the content of statutory law.

The second vision sees the value of legislation and its ability to generate good laws for our community, the content of which is likely to correspond to a standard of correctness. He describes the interpretation of such legislation as requiring "correctness-oriented" interpretive techniques, by which he means the type of interpretation which might cut through the legislative decision and seek "the correctness that statutes embody and approximate".[87]

Under the first vision of correctness-independent values, the scope of the legislative decision will be determined by the plain meaning of the statutory text (textualism) or the decision may exceed the plain meaning of the statutory text (intentionalism). In other words, the textualists insist that the interpretation of the legislative decision is expressed only in the plain text, whilst intentionalists claim that the identification and motivation behind the statutory text is the goal of the interpretive practice. Both textualists and intentionalists agree that the content of statutory law defines the limit of legitimate statutory interpretation, meaning that it cannot exceed the plain meaning of the statutory text (in the case of textualism) or intention (in the case of intentionalism).[88] Rosen describes this content limitation as "control-maximising", in that the interpretive technique gives control to the author (the legislature).[89]

In contrast, the second vision referred to above, namely "correctness-oriented" interpretation, does not necessarily prescribe strict adherence to the text of the legislative decision or the intent behind it. This is described as the "substantive amelioration of the legislative decision". Whether or not interpreters adopt this ameliorating approach depends on the legislation and "the service that it provides to the political community."[90] Under the second view, maximising the author's control over the interpretive process does not always maximise the correctness of the outcome in circumstances where the instructions only partly articulate the reasons and there is a much broader and wider policy objective than that which could be definitively articulated. Rather than slavishly following texts or intentions, the interpreter could engage in an "open process of reasoning in which the particular facts of the case at hand, knowledge from other sources, commonsense and substantive value considerations inform the interpretation and application of the instruction."[91] Statutes that require interpreters to go beyond

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[87] Rosen, n85, 134 at 136. Correctness-orientated approaches to interpretation are not new, being a canon of statutory interpretation since the rediscovery of Roman law a 1000 years ago. They are, however, uncommon in tax law, particularly considering the strict textual approaches to interpreting tax statutes in the 19th and early 20th centuries. Another way to view correctness-oriented approach is to interpretation is through the lens of epistemic and decisionist modes of reasoning, suggesting that some forms of legal interpretation do not demand literal interpretation, but rather "call upon their interpreters to look for the reason and objective purpose that underlie them", illustrating that the "particular plain meaning of positive rules" … "divulge an attachment to an epistemic understanding of the grounds of political authority." Arie Rosen, "Two Logics of Authority: Reason and Fiat in Modern Law", The University of Toronto Law Journal, Fall 2014, Vol. 64, No. 5 (Fall 2014), pp. 669-702, at 702.

[88] Rosen, n85, 134 at 139.

[89] See Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, (2009) OUP, 282, where he discusses how legislators make the law that they intend to make by expressing the intention to do so.

[90] Rosen, n85, 134 at 141.

[91] Rosen, n85, 134 at 143.

text and intent, perhaps to consider issues in the light of moral principles,[92] or an objective purpose and consideration of values[93] might benefit, or more importantly, require a correctness-oriented approach.

Rosen contends, therefore, that exhibiting proper respect to legislative decisions may not necessarily entail "a single, unitary interpretive approach".[94] Instead, legitimate modes of statutory interpretation might differ in reading statutes depending on the legislative activity that created the statute. This viewpoint reflects that statutes "serve as a shared point of reference for achieving coordination" and "our community's best attempt at achieving substantive justice".[95]

Reconciling Theory and Practice

This chapter contends that there is a universal nature to any GAAR which involves the misuse of a provision by a taxpayer, or, in some jurisdictions, more objectively, the taxpayer's arrangement. Further, the factual circumstances involving that misuse will be carefully evaluated, with an increasing focus on the commercial and economic factors involving the transaction. Such legal and factual tests, which this chapter asserts necessarily use broad terms and vague concepts, involve an interpreter to exercise significant judgment in balancing competing values. These situations are examples of the very type of statutes that Rosen suggests requiring correctness-oriented interpretation because, in providing respect to the legislative decision to impose a GAAR, the interpreters are reflecting communal values. The communal values have conflicting and competing perspectives and objectives.[96]

Obviously, a GAAR reflects the communal value of, and is designed for, the prevention of aggressive taxpayer behaviour. The community does not accept such behaviour on the grounds of equity and fairness because it is not right that one person in the same or similar circumstances should avoid tax when another pays it. This causes a problem for society, not just because there is a shortfall in revenue which must be made up from other taxpayers, but also because the confidence in the integrity of the tax system is essential to maintain social cohesion.

On the other hand, another communal value facilitates genuine commercial activity and the use of appropriate business structures, which legitimate tax planning encourages. A fundamental feature of good legal systems includes certainty, which the Rule of Law upholds. This promotes efficiency in economic activities and encourages material prosperity.

The balancing of communal values can lead to some significant uncertainty, where judges in one court are overturned on appeal, because of the different weightings applied.

This type of correctness-oriented interpretation can be used to explain the inability to reconcile the interpretation of the GAAR to orthodox textual or purposive statutory interpretation techniques and so, in part, answer Sir William Young's musings referred to above.[97] While societal and communal

[92] Ronald Dworkin, "Law's Ambitions for Itself", (1985) 71 VA L Rev 173.
[93] Aharon Barak, *Purposive Interpretation in Law*, (2007) Princeton University Press, 148-57.
[94] Rosen, n85, 134, at 161.
[95] Rosen, n85, 134, at 162.
[96] The new Canadian GAAR amendments in 2024 contain a preamble which states that the Canadian GAAR is intended to strike a balance between the Canadian government's responsibility to protect the tax base and fairness of the tax system and the taxpayers need for certainty and planning their affairs, see Li et al, n53, at 323.
[97] At the conclusion of part 3.0 of this chapter.

values help to explain the correctness-oriented approach to interpretation, it may be best to think of this legal phenomenon as purely a product of judicial interpretation.[98]

5.0 Conclusion

It is hard to envisage an area of tax law where the role of legal expertise is more demonstrable than the area of the interpretation of the GAAR. At this high peak of judicial statutory interpretation, the air is rarefied. This chapter claims that there are some uniform tests found in GAARs and that they deal with the misuse of an ordinary tax provision by examining the extent of mismatch with an intended legislative purpose (the legal test) in a contrived situation where the economic and commercial reality is fragile (the factual test).

Further, the need for interpretation is high because of both the breadth and generality of language used in a GAAR to articulate these uniform tests, and the underlying generality necessitated by its function of countering unanticipated tax planning and structures. Given this background, the further claim is that the GAAR falls into the type of statute which requires correctness-oriented interpretation, and that means that judges will reference societal and communal values to balance the undesirability of aggressive tax planning with the need to encourage entrepreneurial behaviour and sound commercial structuring.

[98] The idea of interpretation in accordance with the fundamental values of our system, a point noted by John Burrows in his analysis of trends in statutory interpretation, is closer to correctness-oriented interpretation but is still different from the interpretation of the GAAR. See John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981, at 990. The concept of abuse of law being elevated to a general principle or fundamental value in a legal system, such as the preservation of human rights, belongs to a different constitutional legal framework. That may well be true for some jurisdictions, such as those that are members of the European Union. Wolfgang Schön suggests that recent European Court of Justice judgments have elevated the concept of abuse of law to the rank of a general principle of European law. See Wolfgang Schön *The Concept of Abuse of Law in European Taxation: A Methodological and Constitutional Perspective* in: G. Loutzenhiser, R. de la Feria (eds.), The Dynamics of Taxation, Essays in Honour of Judith Freedman, Hart Publishing, Oxford 2020, p. 185 – 208.