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REVISITING THE GENERAL ANTI-AVOIDANCE RULE IN SINGAPORE

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Singapore's broadly-worded general anti-avoidance rule ("GAAR") borrowed heavily from the anti-tax avoidance provisions of Australia and New Zealand. It was Parliament's intention that local courts be guided by the case law of these jurisdictions in interpreting and applying the GAAR. This article discusses the different approaches that the judiciary in these two countries had adopted in interpreting and applying their respective anti-avoidance provisions, and suggests that this divergence could be attributed to a fundamental difference in the level of importance accorded to the *Duke of Westminster* principle. It is unclear from the Singapore High Court decision of *UOL Development (Novena) Pte. Ltd. v. Commissioner of Stamp Duty* whether one approach is to be preferred over the other. This article argues that it is imperative to bear in mind the reason behind the different approaches of both Australian and New Zealand courts in charting the course for a local GAAR jurisprudence.

I. INTRODUCTION

When Parliament amended the *Income Tax Act*[1] in 1988 to give more teeth to the general anti-avoidance rule ("GAAR"), it was predicted that the provision will "likely … be considered many times by the [Inland Revenue Department (IRD)], the practicing tax profession and ultimately the judiciary".[2] While the GAAR has figured prominently in the minds of tax practitioners and the tax authority in the ensuing years, the issue was not considered by the Singapore judiciary until some twenty years later in the unlikely case of *UOL Development (Novena) Pte. Ltd. v. Commissioner of Stamp Duties*[3] which concerns the avoidance of stamp duty. This probably came as a surprise to many observers who assumed that it would be the field of income tax, with the extensive amount of tax planning undertaken in practice, that would provide fertile

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1 Cap. 134, 2008 Rev. Ed. Sing. [*SITA*].

2 John H. Telfer, "General Anti-Avoidance Provisions: The Singapore Position and Australasian Comparisons" (1990) 32 Mal. L.R. 311 at 321.

3 [2007] SGHC 173 [*UOL Development*].

grounds for the development of a GAAR jurisprudence for Singapore, and hence produce the first test case for the application of the GAAR. Notwithstanding that, the case has renewed interest in and concern over how the GAAR should be applied, as well as the distinction between permissible tax planning and impermissible tax avoidance.[4]

This article aims to consider, through an analysis of the development of the judicial interpretation of Australia and New Zealand's GAARs, the extent to which the various judicial doctrines developed in each of these jurisdictions may be applicable in the analysis of Singapore's own GAAR. To establish the relevance of Australian and New Zealand case law in the interpretation of Singapore's GAAR, I will first discuss the legislative background of Singapore's GAAR (Part II). Next, I will consider how the GAAR jurisprudence in these jurisdictions has evolved in opposing directions due to philosophical differences over the role of the GAAR (Part III). I will then take the discussion back to the local context by briefly setting out the facts and decision of the High Court in *UOL Development*, it being the first and to date only Singapore court decision on the current GAAR, even though (as I will later point out) the issue was not given the level of consideration that it really deserves (Part IV). I will argue that the decision in *UOL Development* leaves us none the wiser as to whether it is the Australian doctrine based approach or the New Zealand interpretative approach or both that is or are applicable in the local context, and that it is ultimately an issue to be resolved based on the philosophical position of the courts.

II. Background to the Amended Singapore GAAR

The GAAR applicable in the context of Singapore's income tax is set out in section 33 of the *SITA* , which was amended by Parliament in 1988 to bolster the powers of the Comptroller in order to deal with increasingly complex and sophisticated tax avoidance schemes.[5] Under the old section 33,[6] the Comptroller may only disregard any transaction which he considers artificial or fictitious. In contrast, the new section 33 is not merely an "annihilating section",[7] but instead enables the Comptroller to vary and reconstruct such transactions. The amended section 33 reads:

> (1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly—
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> (a) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;

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4 See *e.g.* Lim Gek Khim, *Tax Planning—When Does it Become Tax Avoidance?*, Singapore Accountant (September/October 2008) at 40.

5 Sing., *Parliamentary Debates*, vol. 50 at col. 358 (13 Jan 1988).

6 The old *SITA*, s. 33 reads:

> (1) Where the Comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessed accordingly.
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> (2) In this section, "disposition" includes any trust, grant, covenant, agreement or arrangement.

7 *CEC v. Comptroller of Income Tax* [1969-1971] S.L.R. 466, [1971] 2 Mal. L.J. 43 (H.C.), *per* Winslow J.

(b) to relieve any person from any liability to pay tax or to make a return under this Act; or

(c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,

the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.

(2) In this section, "arrangement" means any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.

(3) This section shall not apply to—

(a) any arrangement made or entered into before 29th January 1988; or

(b) any arrangement carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.

The amended section 33, as confirmed by then Minister for Finance Dr. Richard Hu Tsu Tau during the second reading of the *Income Tax (Amendment) Bill 1988*, was the result of the studying of "anti-avoidance provisions of a number of countries … including countries such as Hong Kong, Australia and New Zealand".[8] Hence, it is not surprising that the amended section 33 is *in pari materia* with the old section 99 of the New Zealand *Income Tax Act*[9] and is very similar to the old section 260 of the Australian *Income Tax Assessment Act*.[10] The relevance of Australia and New Zealand's GAAR jurisprudence to the interpretation of the Singapore GAAR was confirmed by the Singapore tax authority, then known as the IRD, in a reply entitled "Matters Arising From Income Tax (Amendment) Bill"[11] published after the passage of the 1988 amendment. The IRD wrote that:

> … safeguards provided under the amendment are to be found in the judicial interpretations of legislation having similar wordings such as New Zealand and Australia. For this, there is considerable body of case law on which we can rely for the purpose of construing the proposed section 33.

The GAAR subsequently found its way into the *Goods and Services Tax Act*[12] in the form of section 47 when the legislation was first passed in 1993, and was also

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8 Sing., *Parliamentary Debates*, vol. 50 at col. 365 (13 Jan 1988). Although Hong Kong was listed by the Minister as one of the jurisdictions which was studied in the amendment of s. 33, it should be noted that it was expressly rejected for being a "sweeping and 'catch all' clause" which the IRS had "deliberately avoided", and hence does not form part of the scope of this article. See the extract of the reply from the Inland Revenue Department on *SITA*, s. 33. Inland Revenue Department, Matters Arising From Income Tax (Amendment) Bill, Singapore Society of Accountants Circular No. A 10/99, dated 2 March 1988 (S.S.A. Circular).

9 1976/65 [*NZITA*].

10 Act No. 27 of 1936 [*AITAA*]. Similarities between the Singapore provision and these two sections can be found in Tan Wee Liang, "Tax Avoidance and Section 33 of the Income Tax Act" (1989) 31 Mal. L.R. 78 at 83-85.

11 Singapore Society of Accountants Circular No. A 10/99, dated 2 March 1988 (S.S.A. Circular).

12 Cap. 117A, 2005 Rev. Ed. Sing.

introduced into the *Stamp Duties Act*[13] in the form of section 33A through legislative amendment. The GAAR in both pieces of legislation are in essence identical to that found in the *SITA*. In other words, the interpretation of the GAAR, whether for income tax, GST or stamp duty purposes, requires a careful analysis of the development of Australian and New Zealand case law on the GAAR.

III. Comparative Developments in Anti-Avoidance Jurisprudence

A. *Australia*

Perhaps the most significant development of the Australian GAAR to date is the repeal of the old *AITAA* section 260 in 1981 and the introduction of a new GAAR in the form of Part IVA. This was in large part in response to judicial extrapolation of restrictions on the interpretation of the Australian GAAR in the 1970s, which had effectively emasculated the old provision.

1. *Pre-1981: Section 260*

Prior to 1981, the operative GAAR provision in Australia was section 260[14] of the *AITAA*, which was *in pari materia* with section 33 of the *SITA*. To circumscribe the reach of the broadly-worded provision, the Australian courts engaged in judicial extrapolation which led to the development of three tests, variously described by academics and commentators as the *predication test*, the *choice principle* and the *antecedent transaction doctrine*.

(a) *Predication test*: The predication test was enunciated by Lord Denning in the Privy Council case of *Newton v. Federal Commissioner of Taxation*:[15]

> They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax … In order to bring the arrangement within the section, you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that

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[13] Cap. 312, 2006 Rev. Ed. Sing. [*SDA*].

[14] The old *AITAA*, s. 260 reads:

> (1) Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly—
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> (a) altering the incidence of any income tax;
> (b) relieving any person from liability to pay any income tax or make any return;
> (c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
> (d) preventing the operation of this Act in any respect,
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> be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.
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> (2) This section does not apply to any contract, agreement or arrangement made or entered into after 27 May 1981.

[15] (1958) 98 C.L.R. 2 (P.C.) [*Newton*].

> the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labeled as a means to avoid tax, then the arrangement does not come within the section … The section can still work if one of the purposes or effects was to avoid liability for tax.[16]

In other words, the test contemplates an assessment of the objective purpose of the transaction as opposed to the subjective motive of the participants in the transaction: was the transaction implemented in that way so as to avoid tax? Admittedly the breadth of the predication test posed a real threat to the *Duke of Westminster* doctrine that "[e]very man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be".[17] After all, under the predication test it matters not that the person had not subjectively intended to avoid tax—a transaction will be caught by the GAAR as long as the way that it was implemented is incapable of any explanation by way of reference to commercial reasoning in a particular way except to avoid tax. The predication test is clearly an assault on the idea of unbridled freedom by taxpayers to minimise tax liability.

(b) *Choice principle*: The potentially wide reaching and dampening effect that the predication test could have on tax-motivated transactions led to the resurrection and expansion of the choice principle by the courts in an attempt to counteract such impact. The choice principle was first enunciated by the High Court in *WP Keighery Pty. Ltd. v. Federal Commissioner of Taxation.*[18] In the words of Dixon C.J., Kitto and Taylor JJ.:

> [t]he very purpose or policy of [the undistributed profits tax rules] is to present the choice to a company between incurring the liability it provides and taking measures to enlarge the number capable of controlling its affairs. To choose the latter course cannot be to defeat evade or avoid a liability imposed on any person by the Act or to prevent the operation of the Act.

In other words, under the original choice principle, if the Act offers two express choices to a taxpayer, then even if the taxpayer exercises such a choice purely for tax purposes, his action cannot fall foul of section 260.

However, the choice principle had been expanded by the Australian courts in cases following *Newton*[19] to mean that taxpayers have a fundamental choice to avoid the Act entirely as long as they do so by legal means. In *Slutzkin v. Federal Commissioner of Taxation*,[20] the taxpayer sold a company with large accumulated profits in return for a non-taxable gain. However, the profits would have been taxable dividend if the taxpayer had chosen to liquidate the company instead. In rejecting an application of

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16 *Ibid.* at 8. It should be noted that there is a school of thought that the *Newton* decision was essentially an endorsement of the statutory construction approach in determining the applicability of section 260 in any given situation. See *Federal Commissioner of Taxation v. Gulland* (1985) 160 C.L.R. 55 (H.C.A.), *per* Dawson J. However, it appears that most of the authorities still regard the choice principle as a distinct exception to the predication test, rather than to view any given situation holistically as an issue of statutory construction.

17 *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 (H.L.) at 19-20 [*Duke of Westminster*], *per* Lord Tomlin.

18 (1957) 11 A.T.D. 359, 100 C.L.R. 66 (H.C.A.) [*Keighery*].

19 *Supra* note 15.

20 (1978) 7 A.T.R. 166 (H.C.A.).

section 260, Barwick C.J. held that the taxpayer had a fundamental right to make the choice to sell the company rather than to liquidate it.

In another case, *Cridland v. Commissioner of Taxation*,[21] the scheme in question involved a primary production unit trust consisting of units sold at $1 each to mostly university students. Upon the acquisition of units, the unitholders were able to average the subsequent four years' income by making use of a provision which deems the beneficiaries of a primary production trust as primary producers over all their incomes. However, the actual reason why Parliament had allowed the averaging of income in the first place was because of fluctuations in farm incomes and the progressive nature of the Australian tax system. Notwithstanding that, Mason J. held that the unitholders were nonetheless protected by the choice principle which extended to the choice of whether the *AITAA* is to apply or not.

(c) *Antecedent transaction doctrine*: Taken to its fullest extent, the choice principle would prohibit the Comptroller from disregarding any tax motivated transaction for tax purposes as long as a literal reading of the *AITAA* allows the taxpayer two express choices, regardless of Parliament's intention. Jeffrey Waincymer argued that the antecedent transaction doctrine was a compromise devised by the Court to avoid rendering section 260 completely impotent:

> Once the choice principles had got to the level it had in *Cridland*'s case and *Slutzkin*'s case, it left little room for the operation of s. 260. The Court obviously had to find some ambit of operation for the provisions otherwise it would be accused of defining the section to be wholly inoperative. At about this time, the Court developed what became known as the antecedent transaction doctrine.[22]

The antecedent transaction doctrine was developed by the Court in *Mullens v. Federal Commissioner of Taxation*,[23] which was also cited by the Singapore High Court in *UOL Development*.[24] Under this doctrine, the GAAR would apply to a taxpayer who had already embarked on a particular transaction which would have given rise to a particular tax liability but then changed his or her method of effecting the result for tax considerations and not commercial ones. The Court in *Mullens*[25] did not specifically reject the application of the choice principle. It follows that the antecedent transaction doctrine merely provides an exception to the choice principle: where the *AITAA* expressly allows two choices to the taxpayer, he is free to make either choice, but once he has already embarked on a particular transaction pursuant to the choice he made, he will be bound by the resulting tax consequences so that any change in the method of effecting the transaction for tax purposes and not commercial ones will be disregarded. Notwithstanding the mitigating effect of the antecedent transaction doctrine,

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21 (1977) 140 C.L.R. 330 (H.C.A.).

22 Jeffrey Waincymer, "The Australian Tax Avoidance Experience and Responses: A Critical Review" in Graeme S. Cooper, ed., *Tax Avoidance and the Rule of Law* (Amsterdam, The Netherlands: IBFD Publications in association with the Australian Tax Research Foundation , 1997) at 280.

23 (1976) 6 A.T.R. 504, 135 C.L.R. 290 (H.C.A.) [*Mullens*].

24 *Supra* note 3.

25 *Supra* note 23.

it was undeniable that Australian case law development subsequent to *Newton*[26] had severely curtailed the effectiveness of section 260.

2. *Post-1981: Part IVA*

The judicial extrapolation of section 260 through the development of the choice principle and the antecedent transaction doctrine "effectively undermined s. 260 and rendered it unable to deal with all but the most blatant and poorly constructed schemes".[27] To overcome the difficulties posed by the choice principle and the antecedent transaction doctrine, and specifically, to encapsulate the predication test, the Australian legislators decided to enact Part IVA. This was confirmed by the Explanatory Memorandum to Part IVA prepared by the Commissioner:

> [T]he new provisions are designed to apply where, on an objective view of the particular arrangement and its surrounding circumstances, it would be concluded that the arrangement was entered into for the sole or dominant purpose of obtaining a tax deduction or having an amount left out of assessable income.[28]

Part IVA consists of three basic requirements. First, there must be a "scheme".[29] Second, the taxpayer must derive a tax benefit from that scheme, which includes *inter alia* the incurrence of a capital loss during a year of assessment and the allowance of a foreign tax credit. Third, the scheme must have been entered into for the sole or dominant purpose of obtaining a tax benefit. This third requirement entails an *objective* determination based upon eight exhaustive factors as prescribed in section 177D.[30]

Although Part IVA was enacted with the predication test in mind, the majority in the High Court case of *Federal Commissioner of Taxation v. Spotless Services Ltd.*[31] stated that "Part IVA is to be construed and applied according to its terms, not under the influence of 'muffled echoes of old arguments concerning other legislation". Given that there was no reference whatsoever to the test in the*Newton* case or to the Explanatory Memorandum, "[o]ne may interpolate that the test in *Newton* concerning

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26 *Supra* note 15.

27 Waincymer, *supra* note 22 at 277.

28 Austl., *Explanatory Memorandum to Income Tax Laws Amendment Bill (No 2)* (1981) [*Explanatory Memorandum*].

29 This is defined under *AITTA*, s. 177A(1) as "(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and (b) any scheme, plan, proposal, action, course of action or course of conduct", including "a unilateral scheme, plan, proposal, action, course of action or course of conduct" (*AITTA*, s. 177A(3)).

30 These eight factors have been summarised by the South African Revenue Service as follows: (a) the manner in which the scheme was implemented, (b) its form and substance, (c) the timing of the scheme, (d) the result which would be achieved by the scheme but for Part IVA, (e) any change in financial position of the relevant taxpayer arising out of the scheme, (f) any change in the financial position of any other person, (g) any other consequences for the relevant taxpayer or any other person connected with the scheme, (h) the nature of the connection between or among parties to the scheme. See South African Revenue Service, Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) November 2005. For a full discussion of the eight factors, see ATO, Tax Office Comments on the Operation of Part IVA, 17 March 2005, available online: <http://www.ato.gov.au/content/downloads/TIA_March_2005_Att.pdf>.

31 (1996) 96 A.T.C. 5201, 186 C.L.R. 404 (H.C.A.) [*Spotless*].

as it did s 260 is now also to be disregarded in the construction of Part IVA".[32] In other words, by enacting Part IVA, the Australian Federal Parliament had essentially demolished the original GAAR as embodied in section 260 as well as the body of case law related to that section, and reconstructed an entirely new provision based on a self-contained objective standard. Any remaining vestiges of the section 260 framework should therefore be deemed eradicated for all intent and purposes.

Unlike Part IVA, Singapore's GAAR does not contain an objective eight-factor test to determine whether the sole or dominant purpose of a give scheme was to obtain a tax benefit. Instead, limbs (*a*), (*b*) and (*c*) of section 33(1) appear to be a blatant, almost wholesale import of limbs (*a*), (*b*) and (*c*) of the *AITTA* section 260(1). It is submitted therefore that Singapore's GAAR was modeled after section 260 rather than Part IVA, and given that the Australian High Court had made it clear in *Spotless* that cases relating to section 260 are not relevant for the construction of Part IVA, one may infer that cases on Part IVA are conversely not relevant for the purpose of interpreting and applying the Singapore GAAR which is based squarely on section 260.

B. *New Zealand*

At the time of the amendment of section 33 in 1988, the GAAR in New Zealand was found in section 99 of the *NZITA*. Since then, New Zealand has embarked on a rewrite of its tax laws, the stated aim of which was "to remove unnecessary complexities in the tax law" and "not … for any substantial policy reform". As such, the contents of the current sections BG 1 and GB 1 of the *Income Tax Act 2004*[33] are essentially identical to that of section 99 of the *NZITA*, which is *in pari materia* with section 33 of the *SITA*. Unlike the Australian legislative enactment of Part IVA, the New Zealand tax rewrite does not affect the substance of the GAAR. Accordingly, New Zealand case law on sections BG 1 and GB 1 are just as instructive on the way that the Singapore GAAR is to be interpreted and applied.

1. *The "Scheme and Purpose" Approach*

The New Zealand judiciary generally took the view that the GAAR cannot be interpreted literally given its potentially wide reach, which is philosophically similar to that of the Australian view. The most important judicial pronouncement in this area prior to the recent Supreme Court case of *Ben Nevis Forestry Ventures Ltd. v. Commissioner of Inland Revenue; Accent Management Ltd. v. Commissioner of Inland Revenue*[34] was Richardson J.'s decision in the Court of Appeal case of *Commissioner of Inland Revenue v. Challenge Corporation Ltd.*[35] That case was decided shortly after the 1974 amendment which removed the predication test as an automatic

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[32] William Thompson, *The Tax Specialist* (Volume 10, No. 4 of 2007).

[33] 2004/35 [*NZITA 2004*].

[34] [2008] N.Z.S.C. 115 [*Ben Nevis*].

[35] [1986] 2 N.Z.L.R. 513 (C.A.). The Court of Appeal decision was subsequently overturned by the Privy Council in *Commissioner of Inland Revenue v. Challenge Corporation* [1987] A.C. 155 (P.C.), but it is Richardson's scheme and purpose approach in the Court of Appeal which proved to be influential in later cases such as *Peterson v. Commissioner of Inland Revenue* [2006] 3 N.Z.L.R. 433 (P.C.) [*Peterson*].

defense. As such, a transaction will be set aside for tax purposes whenever the tax advantages are more than an incidental effect, even though the transactions are capable of being categorised as ordinary business or family dealing. Richardson J. relied on the *Keighery* test[36] (*i.e.*, the choice principle) as a particular application of general principles of statutory construction and considered that the only way to reconcile the GAAR with the rest of the Act was to similarly employ principles of statutory interpretation in accordance with New Zealand's Interpretation Acts:

> Clearly the Legislature could not have intended that section 99 should override all other provisions of the Act so as to deprive the taxpaying community of structural choice, economic incentives, exemptions and allowances provided for by the Act itself … On the other hand, section 99 would be a dead letter if it were subordinate to all the specific provisions of the legislation … Section 99 thus lives in an uneasy compromise with other specific provisions of the income tax legislation. In the end, the legal answer must turn on an overall assessment of the respective roles of the particular provision and section 99 under the Statute and of the relation between them. That is a matter of statutory construction and the twin pillars on which the approach to Statutes mandated by section 5(j) of the Acts Interpretation Act 1924 rests are the scheme of the legislation and the relevant objectives of the legislation. Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole statute, analyzing its structure and examining the relationships between the various provisions and recognizing any discernible themes and patterns and underlying policy considerations.[37]

In other words, one must examine the scheme and purpose of a particular statutory provision to see whether its use or application is properly within such scheme and purpose or whether the GAAR should apply to prevent such use or application.

This "scheme and purpose" approach was endorsed by the Privy Council in *Peterson*,[38] which involved two appeals by the same appellant. Both appeals involve the financing of two feature films, "Utu" and "The Lie of the Land", in part by a circular non-recourse loan. Under the scheme, taxpayers subject to high rates of income tax were invited to invest in the funding of both firms at a cost of $X + Y, by paying a sum of $X and extending a non-recourse loan of $Y through a third party financier. These investors then claimed depreciation allowances for the total cost of their investment in the first two years of their investment under the depreciation regime. However, the investors were unaware that the cost of production was only $X, and the $Y component of their investments were forwarded by the production company back to the third party financier.

The Privy Council was split 3-2 (the majority ruled in favor of the taxpayer) due to disagreement on how certain aspects of the facts are to be interpreted. The majority in a judgment by Lord Millett held that section 99 of the *NZITA* could not operate to strike down the transactions simply because the taxpayers were obviously motivated by the tax advantages associated with the investment. In this case, the GAAR would apply only if the taxpayers had reduced their income tax liability without incurring the expenditure that created the tax deduction. However, the Commissioner could

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[36] See *supra* note 18.

[37] *Peterson, supra* note 35 at 548.

[38] *Supra* note 35.

have applied the GAAR if it was established that the limited recourse loan involved contained un-commercial terms, in which case the consideration paid for the acquisition of the film could be apportioned and the deduction disallowed to the extent that it was financed by the limited recourse loan. On the other hand, the minority did not find that the taxpayers had suffered the economic burden of paying the purchase price for the two films on the facts of the case. An examination of what actually happened to the money after it was paid by the taxpayers to the producers of both films indicates that the limited recourse loan was circular in nature.

Notwithstanding these differences, all the Law Lords agreed that the Commissioner could not adopt a literal interpretation of the GAAR, and that taxpayers have the right to structure their affairs based on tax consequences. Transactions should not be struck down simply because they were motivated by a possible tax advantage. Instead, the "scheme and purpose" approach is to be applied to the interpretation of the GAAR,[39] and this was expressly endorsed in both the majority and minority judgments.[40]

2. *Primacy of GAAR Over Specific Provisions?*

Peterson was the last tax avoidance decision by the Privy Council on appeal from New Zealand. With the passage of the *Supreme Court Act 2003*, the Supreme Court of New Zealand is now the final arbiter of the laws of the land. When the Court of Appeal ruled on *Accent Management Ltd. v. Commissioner of Inland Revenue*,[41] it was still bound by the decision of the Privy Council in *Peterson* as the Supreme Court had not yet been presented with the opportunity to consider the issue of the GAAR. The arrangements in *Accent* concerned a forestry development in Southland known as the Trinity scheme. In essence, investors of the scheme claimed deductions from assessable income for payments of (a) license premium for the right to use the land on which the forest was established, and (b) an insurance premium. The investors provided promissory notes to secure the payment of both premiums, but actual payment of the premiums is not required to be made until 2047.

While endorsing the *Peterson* scheme and purpose approach, the Court of Appeal in *Accent* certainly spared no effort in indicating to the Supreme Court its desire to afford greater primacy to the GAAR. The Court of Appeal observed that "how [the scheme and purpose approach] should be applied is not altogether easy".[42] Instead, "a simpler way to resolve the problem would be to give general anti-avoidance provisions a primacy that is displaced only where there is a discernable legislative intention that a particular type of transaction should not be subject to them".[43] The Court also questioned the extent to which specific deductibility rules are more "specific" than

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[39] In response to the *Peterson* decision, ss. GC 29 to GC 31 of the *NZITA* 2004 (the deferred deduction rule) were passed to overcome the tax benefits associated with limited recourse loans and highly leveraged investments. Deductions are deferred until the scheme is commercially successful where attributable to limited recourse loans, and become a permanent deduction where the scheme is a commercial failure.

[40] *Peterson*, *supra* note 35, *per* Lord Millett at para. 36-37 and *per* Lords Bingham and Scott at para. 61.

[41] [2007] NZCA 230 [*Accent*].

[42] *Ibid.* at para. 113.

[43] *Ibid.* at para. 114.

the GAAR:

> In a real sense, general anti-avoidance provisions are at least as "specific" in their targeting of tax avoidance as specific deductibility rules are in relation to deductions and thus there is no obvious reason why specific deductibility rules should occupy the whole or most of the ground.[44]

However, "the drift of modern authority (including *Peterson*) puts it beyond the power of [the Court of Appeal] to adopt the stance that the general anti-avoidance provisions are to be accorded primacy over specific tax rules".[45] Presumably as a result of the need to be bound by the "scheme and purpose" approach, the Court of Appeal sought to bring in an economic substance requirement by attributing it to Parliamentary intent. Referring to the *Peterson* case, the Court of Appeal opined that the "two formulations of the test [in *Peterson*] are similar and the difference between the two approaches seems to have come down to a difference of opinion as to whether the investors had, in truth, suffered the pretax economic consequences which were intended by the legislature to be the prerequisite of deductibility".[46] In other words, in the context of deductibility, the taxpayer must incur real economic consequences. This is because "deductibility rules are premised on a legislative assumption that they will only be invoked by those who engage in business activities for the purpose of making a profit".[47] Therefore, even though the taxpayers in *Accent Management* had legally incurred the relevant expenditure through the provision of promissory notes, the Court felt that they would not be honored and hence no real expenditure was incurred as a matter of substance.

In an appeal brought by the taxpayers on the decision of the Court of Appeal, the Supreme Court upheld the decision of the court below and, taking into account "continuing uncertainty about the inter-relationship of the general anti-avoidance provision with specific provisions", deemed it "desirable … to settle the approach which should be applied in New Zealand".[48] The resulting judgment proved to be a massive victory for the New Zealand IRD, confirming that compliance of a transaction with a specific provision in the Act is not enough to preclude the application of the GAAR to that transaction. All the Justices essentially agreed that there are two distinct steps in analysing whether or not a particular transaction constitutes tax avoidance. The first question is whether it complies with a specific provision in the *NZITA*, failure of which means that the transaction cannot qualify for the treatment provided for under the specific provision at all and any further analysis would be unnecessary. If however the first question is answered in the affirmative, the next question would be whether the taxpayer has demonstrated that the specific provision he had relied on "had been used in manner which was within Parliament's purpose and contemplation when it enacted them". This much was agreed on by the Justices.

The difference in the decisions of the majority (comprising Tipping, McGrath and Gault JJ.) and the minority (comprising Elias C.J. and Anderson J.), however, lies in the way the first question is to be dealt with. The majority arrived at its

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44 *Ibid.* at para. 116.
45 *Ibid.* at para. 115.
46 *Ibid.* at para. 123.
47 *Ibid.* at para. 126.
48 *Ben Nevis*, *supra* note 34 at para. 100.

position through a distinction between the purpose of specific provisions and that of the general anti-avoidance provision: the GAAR is designed as "the principal vehicle by means of which tax avoidance is addressed, whereas individual specific provisions have a focus which is determined primarily by their ordinary meaning, as established through their text in the light of their specific purpose".[49] The function of the GAAR, according to the majority, is "to prevent uses of specific provisions which fall outside their intended scope in the overall scheme of the Act".[50] As such, "judicial glosses and elaborations on the statutory language should be kept to a minimum".[51]

On the application of the GAAR, the majority held that "tax avoidance can be found in individual steps or, more often, in a combination of steps" and that "even if all the steps in an arrangement are unobjectionable in themselves, their combination may give rise to a tax avoidance arrangement".[52] As for the factors to be taken into account in determining whether a tax avoidance arrangement exists, the majority noted that "[t]he general anti-avoidance provision does not confine the Court as to the matters which may be taken into account" and "[h]ence the Commissioner and the courts may address a number of relevant factors, the significance of which will depend on the particular facts".[53] These include "[t]he manner in which the arrangement is carried out", "[t]he role of all relevant parties and any relationship they may have with the taxpayer", "[t]he economic and commercial effect of documents and transactions", "the duration of the arrangement and the nature and extent of the financial consequences that it will have for the taxpayer".[54] The majority also noted that "it will often be the combination of various elements in the arrangement which is significant".[55] According to the majority, there are only two situations in which the use of specific provision which alters the incidence of tax does not amount to a tax avoidance arrangement: when the specific provision is used in a manner which is within Parliamentary contemplation, and when the tax avoidance purpose or effect of the arrangement is "merely incidental". While the two situations are not mutually exclusive, the majority were of the view that it will "rarely be the case" where the use of a specific provision in a way not within Parliament's contemplation could result in the tax avoidance purpose or effect being merely incidental.[56]

While the minority agreed with how the majority applied the GAAR in resolving the second question, they felt that it was not necessary to consider it at all as the transaction would not have satisfied the specific provisions in addressing the first question. The proper approach to answering the first question, according to the minority, is to adopt a substance-based or purposive approach of interpreting specific provisions similar to that in the United Kingdom.[57] Drawing support from

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[49] *Ibid.* at para. 103.
[50] *Ibid.* at para. 106.
[51] *Ibid.* at para. 104.
[52] *Ibid.* at para. 105.
[53] *Ibid.* at para. 108.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid.* at para 114.
[57] In *Barclay Mercantile Business Finance Ltd. v. Mawson* [2005] 1 A.C. 684 (H.L.) [*Mawson*], the House of Lords rejected the notion of an independent *Ramsay* (*W.T. Ramsay v. Inland Revenue Commissioners*

Lord Cooke's judgment in *Inland Revenue Commissioners v. McGuckian*,[58] a purposive approach to the construction of specific tax provisions should be "antecedent to or collateral with … general anti-avoidance provisions such as are found in Australasia".[59] This was necessary to prevent "distortion of overuse and unnecessary expansiveness in application of the general anti-avoidance provision".[60]

The majority, of course, played down the relevance of UK case law on tax avoidance by highlighting the absence of a GAAR in the UK. In doing so, the majority had clearly rejected Lord Hoffmann's view in *Commissioner of Inland Revenue (New Zealand) v. Auckland Harbour Board* that the principles of statutory construction set out in UK case law since *Ramsay* are the principal means by which the issue of tax avoidance should be tackled, and that the GAAR merely acts as a useful "longstop for the Revenue".[61] What is less clear, perhaps, is whether the majority's decision has answered the Court of Appeal's call to accord the GAAR a form of primacy that is displaced only where there is a discernable legislative intention that a particular type of transaction should not be subject it. It would seem that the approach of the Supreme Court is somewhat different from that advocated by the Court of Appeal. According to the latter, the primacy of the GAAR will be displaced only if there is clear legislative intention that the GAAR is not applicable to the specific transaction in question. However, this bare assertion of primacy does not address the fundamental question of how specific provisions are to be interpreted, and the type of role that the GAAR should assume as a result. For the minority of the Supreme Court in *Ben Nevis*, the issue of the GAAR arises only if the relevant specific provision of the statute does not *upon its true construction* apply to the facts as found. Therefore, depending on how cautious the quorum of a court is in analysing the specific provision, the GAAR could well be left out of consideration altogether since the transaction would not have crossed the first hurdle posed by an expansive purposive interpretation of the specific provision. In such a situation, it is doubtful that the GAAR will have the chance to assume any form of primacy in analysing an avoidance issue, since it would probably not have figured in the analysis of the court in the first place.

In contrast, for the majority of the Supreme Court, the first step is to ascertain whether the ordinary meaning of the specific provision in the *NZITA* is satisfied, before applying the GAAR to the transaction in light of the overall scheme of the *NZITA*, which would have inadvertently taken into account any part of the legislation which might suggest that the GAAR is not to apply to the transaction in question. Given the difficulty for taxpayers to prove that the steps taken are within the intention

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[1982] A.C. 300 (H.L.) [*Ramsay*]) doctrine, *per* Lord Nicholls of Birkenhead at para. 33: "… the Ramsay case did not introduce a new doctrine operating within the special field of revenue statute". Instead, in *Mawson* at para. 32, Lord Nicholls held *Ramsay* to have merely "liberated the construction of revenue statutes from being both literal and blinkered":

> The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description … the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found.

58 [1997] 1 W.L.R. 991 (H.L.).

59 *Ibid.* at para. 7.

60 *Ibid*. at para. 2.

61 [2001] 3 N.Z.L.R. 289 (P.C.) at para. 11.

of Parliament in enacting the specific provision relied on, it would be unlikely for the taxpayer to be successful on the second question, and even though the majority provided for the non-application of the GAAR in situations where the tax avoidance purpose or effect of the arrangement is "merely incidental", it had also noted that this exception to the application of the GAAR where such arrangement is not contemplated by Parliament is rare. The effect of this, it is submitted, is that the GAAR under the majority's approach is now, in most cases, accorded a primacy displaced only in the case of discernible legislative intent to exclude a particular type of transaction.[62]

IV. Analysing *UOL Development* and Section 33

A. *Adopting the Minority's Position in* Ben Nevis*: Purposive Interpretation of Specific Provision*

The interpretation and application of the GAAR in both Australia (prior to the enactment of Part IVA) and New Zealand reflected a shared judicial consciousness of the inhibiting effect an overreaching GAAR may have on businesses. Not surprisingly, a literal interpretation of the broadly worded GAAR was expressly rejected in both jurisdictions. The crucial difference, however, lies in the relative importance placed by the judges on the *Duke of Westminster*[63] doctrine. Whereas the importance of the taxpayer's right to arrange his affairs in the most tax efficient manner necessitated the emergence of an extended choice principle for the Australian judges (which inadvertently led to the demise of the original section 260 GAAR), the New Zealand judges were clearly more comfortable in acknowledging that the GAAR was an exercise of volition by the legislature to encroach upon this right. This philosophical divide manifested itself in the approaches adopted by each jurisdiction. The Australians chose to develop a series of doctrines to deal with the potentially overreaching ambit of the GAAR, while the New Zealanders dealt with it as an issue of statutory interpretation. Effectively, the pre-Part IVA Australian approach required the Comptroller to

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[62] This is the author's understanding of the test set out by the majority in *Ben Nevis*, although it seems that the New Zealand High Court has adopted different interpretations of the *Ben Nevis* test in each of the three first-instance decisions on the GAAR subsequent to *Ben Nevis*. In *Penny v. Commissioner of Inland Revenue; Hooper v. Commissioner of Inland Revenue* (2009) 24 NZTC 23 at 406 [*Penny & Hooper*], MacKenzie J. viewed the Supreme Court's decision as endorsing a "scheme and purpose" approach, *i.e.* whether the alteration of tax incidence is consistent with the scheme and purpose of the Income Tax Act, *supra* note 33. It is not the function of the GAAR to supplement specific provisions by proscribing arrangements merely based on some notion of morality external to the Act. In contrast, Wild J. in *BNZ Investments Limited & Ors v. Commissioner of Inland Revenue* CIV 2004-485-1059 (15 July 2009) [*BNZ Investments*] expressly took a different view that is largely similar to this author's understanding of the *Ben Nevis* test. In *Westpac Banking Corporation v. Commissioner of Inland Revenue* CIV 2005-404-2843 (7 October 2009) [*Westpac*], Harrison J. approached the anti-avoidance issue with an analysis of the form of the arrangement as the starting point of the inquiry, followed by a substantive scrutiny within the scope prescribed by the ratio of *Ben Nevis*. Emphasis was placed on the fact that there was no objectively ascertainable business purpose, no underlying prospect of profitability and therefore no commercial justification. Both the *Penny* & *Hooper* decision and the *BNZ Investments* decision have been appealed to the Court of Appeal, and the appellant in *Westpac* is expected to do the same. All three appeals are expected to be heard only in 2010.

[63] See *supra* note 17.

respect all transactions as long as a literal reading of the Act allows the taxpayer two express choices, regardless of Parliament's intention or the taxpayer's motivation, while the New Zealand approach requires the taxpayer to satisfy the court, on top of literal compliance with the specific provision, that the specific provision he had relied on had been used in a manner which was within Parliament's purpose and contemplation at the time of enactment. The opposing approaches of both jurisdictions present a conundrum for Singapore—to which country should the local courts be looking at as guiding reference for the interpretation of the Singapore GAAR?[64] *UOL Development*[65] presents the first occasion for the Singapore judiciary to consider the issue, but unfortunately the High Court did not seize on the opportunity to deal with the issue head-on and practitioners and lawyers are left none the more wiser as to how section 33 would affect the activities of their clients.

The facts of *UOL Development* are fairly straightforward. The registered proprietors ("vendors") of 53 properties[66] at Minbu Road, Singapore ("Minbu properties") had decided to sell their properties on an *en bloc* basis by tender to obtain a higher price than what would have been secured had they sold their properties individually. The Appellant, UOL Development (Novena) Pte. Ltd. ("UOLD"), made an offer to purchase the Minbu properties on the terms of the tender for $61 million. When informed that its offer would be accepted, UOLD's solicitor requested that the vendors' solicitor forward 53 separate letters of acceptance from the vendors of all 53 units in the Minbu properties, and the vendors' solicitor obliged. UOLD claimed that it had entered into 53 separate contracts and presented 53 letters of acceptance, one for each of the 53 units in the Minbu properties, for stamping. The Commissioner however took the view that there was a single transaction for the *en bloc* sale of the Minbu Properties, and that stamp duty should accordingly be levied on a single instrument with the remaining instruments to be charged at a nominal rate of $10 each.

The Commissioner raised two arguments in defense—one based on contract and one based on section 33A which is the GAAR in the Stamp Duties Act. Tan Lee Meng J. ruled in favor of the Commissioner on both grounds. Perhaps in accordance with the relative importance placed by the Commissioner in his submissions on each of these two arguments, the learned judge considered the contract issue in considerable depth but devoted no more than five paragraphs to the issue of tax avoidance, including the supposed ambit of the GAAR according to Parliamentary intention:

> Tax avoidance schemes are purely tax-driven with little or no commercial value or rationale. This is unlike tax planning where the transactions or schemes have some commercial basis, and where the issue is structuring the most tax-efficient arrangement in accordance with the relevant tax laws. Generally, tax planning, if carried out within the confines of existing laws, would not be caught under s33A.

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64 In fact, this problem was raised by Tan Wee Liang:

> From the perspective of the taxpayer, or even a person sitting on the fence and trying to be the proverbial reasonable man, the section, as appears form the study just embarked upon, is fraught with uncertainty. The uncertainty stems from the conflicting guidance in the Australian and New Zealand decisions on some major issues.

See Tan, *supra* note 10 at 106.

65 *Supra* note 3.

66 The properties consist of both freehold titles and strata titles.

> In assessing whether a particular scheme or arrangement would fall under the ambit of section 33A of the Act, the Inland Revenue Authority would amongst other things look at the presence of artificiality or contrived transactions to reduce or avoid tax liabilities but which have little or no commercial basis.[67]

In other words, there is a distinction between permissible tax planning and impermissible tax avoidance, and only the latter is caught by the GAAR. Therefore, even if the tax minimising transaction or arrangement entered into by a taxpayer is facially legitimate, the Comptroller may still disregard or vary such transaction or arrangement if it, for example, lacks commercial basis.

The learned judge came to this conclusion by adopting a broad purposive interpretation of the specific provision relied on by the Appellant. The purposive approach to statutory interpretation is hardly something new to the Singapore courts. Section 9A(1) of the Singapore *Interpretation Act*[68] specifically provides:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

Coupled with the Singapore Court of Appeal's decision in *Planmarine AG v. Maritime and Port Authority of Singapore*[69] that a provision can be read purposively even if the provision itself is not ambiguous or inconsistent, it could be said that Singapore adopts a broad and liberal purposive approach towards statutory interpretation.

In *UOL Development*, the Appellant relied on section 22(1) of the *SDA*,[70] which provides that a contract for sale of property shall be chargeable with the same *ad valorem* duty payable by the purchaser *as if it were an actual conveyance* on the sale of the estate. The Appellant argued that the instrument that is liable for stamp duty is the "conveyance on sale", and since the transfer of the title to the 53 units in the Minbu properties to UOLD requires 53 separate transfers, stamp duty must be paid on each of the 53 instruments. In rejecting this argument, Tan J. looked to the background leading up to the amendment of section 22 of the Act in 1996. The learned judge placed much emphasis on the fact that section 22(1) was part of the anti-speculation measures introduced in 1996 to prevent an overheating of the property market, and taking into account the Minister for Finance's speech in Parliament,[71] he concluded that it was Parliament's intention at that time that buyers under an en bloc sale would pay stamp duty on the global price for all properties sold collectively. Thus the appellant could not have relied on the words "as if it were … an actual conveyance" in section 22(1), which merely indicate the rate of stamp duty

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67 See Sing., *Parliamentary Debates*, vol. 70 at col. 2155 (18 Aug 1999).

68 Cap. 1, 1999 Rev. Ed. Sing.

69 [1999] 2 S.L.R. 1 (C.A.).

70 *Supra* note 13.

71 *UOL Development*, *supra* note 3 at para 33. When the *Stamp Duties (Amendment) Bill 1996* was considered in Parliament on 12 July 1996, then Minister for Finance, Dr. Richard Hu, while explaining another anti-speculation measure, namely the imposition of stamp duty on a seller who disposes of residential property within 3 years of its acquisition, informed Parliament as follows [see Sing., *Parliamentary Debates*, vol. 66 at col. 451 (12 Jul 1996)]:

> Sir, this is to enable the new seller's duty to be computed on the basis of a rate. *Buyers under en bloc sales will have their duty computed on the global price.* [emphasis added]

payable for the contract of sale. The rules on property conveyancing are irrelevant to the assessment of stamp duty on contracts of sale of properties. What the learned judge had in effect done was to examine the legislative intention behind the provision that the appellant had alleged as authority as to why he had structured his transaction as such. Since the provision under scrutiny (*i.e.*, section 22(1) of the *SDA*) did not even permit the use or application as alleged by the appellant in the first place, the question of the applicability of GAAR does not even arise.

What the learned judge had really adopted was the approach of the minority of the Supreme Court of New Zealand in *Ben Nevis*, even though the latter judgment was not delivered until one year after *UOL Development*. It s also in essence the UK approach in identifying impermissible tax avoidance, even though the UK does not have a statutory GAAR like Singapore or New Zealand. Under such an approach, the GAAR merely acts as a longstop and would be rarely applicable, since most offensive arrangements have made use of specific provisions in the tax legislation in a manner and for a purpose unintended by Parliament. However, such an approach gives no regard to the fact that section 33 was originally amended to give the Comptroller more flexibility in his treatment of impermissible tax avoidance transactions. Section 33 empowers the Comptroller to not only set aside such arrangements, but also to vary and reconstruct them accordingly. The problem with the minority's approach is that the question of the application of the GAAR would not even have arisen in the vast majority of cases since the court would have ruled that the facts did not accord with the intention of Parliament in enacting the specific provision in question. Thus in most cases, the specific provisions would not have been applicable in the first place, the effect of which is to annihilate the transaction altogether. This appears to be a cutting back of the power that Parliament had intended to confer upon the Comptroller when he finds a transaction to be impermissible tax avoidance, whatever that may mean.[72] Instead, the majority's approach in *Ben Nevis* appears to be more consistent with Parliament's ostensible intention, acknowledging that tax motivated transactions are often facially compliant with the black letter law, and the GAAR is intended to capture those transactions which are facially compliant but lack real commercial reason.

Of course, if the Singapore judiciary were to follow the majority's decision in *Ben Nevis*, it would be an uphill task for taxpayers to exonerate themselves when accused by the Comptroller to have engaged in tax avoidance since most transactions (particularly innovative financial instruments) would not have been foreseen by Parliament at the time of enactment. Besides, it is arguably not reasonable for the courts to divine the will of Parliament, *i.e.*, whether Parliament would have considered the transaction in question to be permissible at the time of enactment of the specific provision. In such a situation, the final arbiter of what is permissible tax planning and what is not

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[72] It could be argued that in the *UOL Development* case, the only possible anti-avoidance response of the court was to disregard the 53 separate contracts, and that therefore it would seem excessive to view this as a cutting back of Parliament's power. However, this statement was not made based on the decision of the learned judge in that case to disregard the 53 separate contracts *per se*. Rather, it was made in relation to the general approach of the judge in looking to the intention of Parliament in enacting s. 22(1). Such an approach would have inadvertently excluded the application of the GAAR in most cases, and therefore in other factual scenarios where the court could have chosen to modify the transaction in ways other than disregarding the transaction altogether, the outcome would more likely than not be one of an annihilation of the transaction in question.

could well be the Comptroller, since all innovative forms of financing or investment would fall within the ambit of section 33 and what could be modified or set aside by law depends on which transactions or arrangements the Comptroller decides to invoke section 33 against. This could be the judiciary's position if it believes that the intention of Parliament, at the time of enactment of the GAAR, was to put a draconian end to the *Duke of Westminster*[73] doctrine, and more specifically, to severely limit all new types of transactions or arrangements not envisaged by Parliament at the time of enactment of the specific provision, unless the taxpayer can demonstrate that the tax avoidance purpose or effect of the arrangement not contemplated by Parliament to be "merely incidental", which according to the Supreme Court of New Zealand, would be rarely the case. Obviously, such an approach would be a massive victory for the Comptroller, but would most probably be deemed by businesses and their tax agents as undermining Singapore's tax competitiveness—lack of tax certainty would negate the positive effects any tax incentive may have, however favorable it may be.

B. *Doctrine-Based Approach?*

Notwithstanding the problems that a purposive interpretation of specific provisions may have on defining the relationship between specific provisions and the GAAR in Singapore, the learned judge may have unintentionally added a layer of complication to the analysis when he tried to reject the Appellant's reliance on the Australian case of *Mullens*[74] "for the proposition that a tax payer cannot be faulted if he chooses to rely on specific provisions offering tax relief or where the incidence of tax is that contemplated by the legislature".[75] The learned judge noted that the Appellant had not demonstrated "any commercial reason for the 53 separate acceptances".[76] Instead, the Appellant referred to Barwick C.J.'s words in *Mullens* on the antecedent transaction doctrine:

> [T]here will be no relevant alteration of the incidence of tax if the transaction, being the actual transaction between the parties, conform to and satisfies a provision of the Act even if it has taken the form in which it was entered into by the parties in order to obtain the benefit of that provision of the Act. It would be otherwise if there had been some antecedent transaction between the parties, for which the transaction under attack, was substituted in order to obtain the benefit of the particular provision of the Act.[77]

The learned judge then proceeded to dismiss the Appellant's contention on the grounds that "the actual transaction in the present case was in truth an *en bloc* sale of the Minbu properties and not, as UOLD had contended, 53 separate contracts with the registered proprietor or proprietors of each of the 53 units in the Minbu properties".[78] In doing so, it seems that the High Court had implicitly endorsed the Australian antecedent transaction doctrine—the GAAR would not have been

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73 See *supra* note 17.
74 *Supra* note 23.
75 *UOL Development*, *supra* note 3 at para. 39.
76 *Ibid*.
77 *Supra* note 23 at 4294.
78 *UOL Development*, *supra* note 3 at para. 39 and 40.

applicable if the parties had intended for the sale and purchase of 53 individual units instead of that for the sale and purchase of the entire strata development as a unitary whole as the "antecedent transaction" between the parties would have been the sale and purchase of the 53 units separately. This begs the question of whether the doctrines developed by the Australian courts prior to the enactment of Part IVA supercede or complement the purposive interpretation approach, and in any case, which of the doctrines are applicable.

One thing that is clearly implied in the judgment is that the *Duke of Westminster* doctrine cannot operate in its broadest form, *i.e*. taxpayers no longer have an unbridled right to engage in tax minimisation so long as they do so within legitimate means. This could be inferred from the Court's reference to Dr. Richard Hu's speech in Parliament on the amendment of section 33[79] and to the plain wordings of the legislative provision, that the GAAR requires "sound commercial basis" and that, therefore, any tax minimising arrangement without a *bona fide* commercial rationale may be subject to the Comptroller's adjustments or variations for tax purposes under section 33. In other words, the Comptroller's right to disregard or vary the arrangement and to make such adjustments as he deems appropriate so as to counteract any tax advantage prohibited by section 33 takes precedence over the individual's right to minimise his tax liabilities.

It follows from the implicit rejection of the *Duke of Westminster* doctrine that the expanded choice principle cannot have a place in Singapore tax law. Unlike the old section 260 of the *AITAA* (1936) from which the expanded choice principle was developed, section 33 expressly requires *bona fide* commercial reasons for any particular arrangement to be carried out. Thus, to hold that taxpayers have a fundamental right to avoid the Act entirely as long as they do so by legal means would effectively obliterate the requirement of *bona fide* commercial reasons under section 33(3)(b). However, having a genuine commercial consideration requirement tells us little about the standard by which it will be held. The effectiveness of section 33 as a GAAR depends on the level at which the genuine commercial consideration requirement is pitched. Connected with this is the other requirement that the transaction does not have tax avoidance as one of its *main* purposes.

In light of what was acknowledged in the judgment, the expanded choice principle cannot be applicable in Singapore. The learned judge also appeared to be of the view that the antecedent transaction doctrine may have some role to play in the local GAAR jurisprudence. What then, one may ask, about the predication test? Given that the High Court seemed to have somewhat endorsed a doctrine-specific approach through the implicit acceptance of the antecedent transaction doctrine, it would not be too far a stretch to suggest that the court had also applied the Australian predication test in determining if the genuine commercial consideration requirement had been met. This involved examining the overt acts by which the arrangement was implemented and determining whether the transaction implemented in that particular way so as to avoid tax. While the learned judge in *UOL Development* did not expressly endorse the predication test, he might have applied it implicitly. The judge asserted that "the plan for 53 separate contracts had no sound commercial basis and was

[79] See Sing., *Parliamentary Debates*, vol. 70 at col. 2155 (18 Aug 1999), reproduced in text accompanying footnote 66.

so contrived that it was clearly intended to reduce or avoid tax liabilities".[80] This conclusion was arrived at after an analysis of the overt acts of the parties: UOLD's solicitors had asked for the vendors' solicitors for 53 separate "acceptances" at the very last minute;[81] the vendors had neither been consulted on nor had they given any thought to replacing the terms of the *en bloc* sale with 53 separate contracts for the sale and purchase of their individual units;[82] and the vendors' solicitors also did not give any thought to converting the *en bloc* sale and purchase to 53 separate contracts.[83]

It seems then that the learned judge had predicated that the transaction had taken the form that it did purely for tax avoidance purpose with no sound commercial basis through an examination of the overt acts by which it took place. What is less clear is whether he had so predicated based on the appellant's subjective intention or on what a reasonable man would conclude to be the purpose of the appellant (*i.e.*, an objective analysis). In Australia, there are eight factors listed in section 177D of the *AITAA* which are not "intended to result in a factual finding about the [taxpayer]'s actual dominant purpose",[84] but rather, whether a reasonable person would conclude by reference to the eight factors that the purpose of a party to the scheme, including the taxpayer, was to obtain the tax benefit for the taxpayer. However, the eight factors listed in section 177D are arguably not applicable in Singapore's context. Unlike Australia, Parliament did not explicitly legislate section 33 with a view to encapsulate the predication test. Given that the draftsmen had studied the GAAR provisions of various jurisdictions, one may infer that Parliament had explicitly rejected the option to encapsulate the predication test in section 33 by mirroring Part IVA. Of course this does not mean that Parliament had precluded the courts from using the predication test altogether. However, by failing to provide for a list of factors like the Australians have with section 177D, the courts now have two additional questions to deliberate in addition to the dilemma of whether or not to employ the predication test: whether it should be concerned with the subjective or objective intention of the taxpayer, and if the latter, the factors by which the court should determine the objective intention.

This leaves the question of how the predication test and the antecedent transaction doctrine interact with the interpretative approach in the local GAAR jurisprudence. Are the doctrine based approach and the interpretative approach mutually exclusive? As suggested earlier, the difference in directions taken by the Australian and New Zealand courts can be attributed to a philosophical divide in the judicial attitudes towards Parliament's intention and the *Duke of Westminster* doctrine. An interpretative approach accepts the responsibility that the legislature has conferred upon the judiciary to decide what is impermissible tax avoidance, while a doctrine based approach essentially seeks to minimise the tax impact on taxpayers' affairs. If both approaches are to be applied in Singapore, it would unnecessarily fudge the philosophical grounds on which the two approaches were premised. Therefore, the

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80 *Supra* note 3 at para. 41.
81 *Ibid.* at para. 17.
82 *Ibid.* at para. 18.
83 *Ibid*. at para. 20.
84 *Federal Commissioner of Taxation v. Sleight* (2004) A.T.C. 4477 (F.C.A.) at 4509 *per* Carr J.

approach to be followed in Singapore really depends on the philosophical views of the judiciary on the role of the GAAR and Parliament's intention in enacting it.

V. Conclusion

Amidst the intricacies of the operation of the GAARs in Australia and New Zealand, it is perhaps useful to take a step back and consider the conceptual basis and purpose of the GAAR, which Richardson J. had described in *Commissioner of Inland Revenue v. BNZ Investments*[85] as follows:

> [The GAAR] is perceived legislatively as an essential pillar of the tax system designed to protect the tax base and the general body of taxpayers from what are considered to be unacceptable tax avoidance devices. By contrast with specific anti-avoidance provisions which are directed to particular defined situations, the legislature through [the GAAR] has raised a general anti-avoidance yardstick by which the line between legitimate tax planning and improper tax avoidance is to be drawn … Line drawing and the setting of limits recognize the reality that commerce is legitimately carried out through a range of entities and in a variety of ways; that tax is an important and proper factor in business decision making and family property planning; that something more than an existence of a tax benefit in one hypothetical situation compared with another is required to justify attributing a greater tax liability that what should reasonably be struck at are artifices and other arrangements which have tax induced features outside the range of acceptable practice—as Lord Templeman put it in *Challenge* at p. 562, most tax avoidance involves a pretence and that certainty and predictability are important but not absolute values.

The Renton Committee in considering the simplification of legislation noted quite rightly that "[t]he real problem is one of confidence. Would Parliament be prepared to trust the courts?"[86] and if so, the "interpretation of Acts drafted in a simpler, less detailed and less elaborate style than at present would present no greater problems provided that the underlying purpose and the general principles of the legislation were adequately and concisely formulated".[87] In this case, Parliament was arguably prepared to trust the courts by introducing a broadly worded GAAR. One could argue that it was the wisdom of Parliament that it would be humanly impossible and in any case inefficient to put into place a comprehensive tax system replete with specific anti-avoidance rules. It follows that some level of discretion must be accorded to the courts in order to clamp down on the most impeccably planned tax avoidance schemes which would otherwise have satisfied every technical requirement and avoided every specific anti-avoidance rule made. However, the problem is that the intention of Parliament may not always be so readily ascertainable. Moreover, the fact that tax legislations are replete with specific anti-avoidance provisions and are continuously

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85 [2002] 1 N.Z.L.R. 450 (C.A.).

86 Renton, *The Preparation of Legislation: Report by the Committee appointed by the Lord President of the Council* (London: HMSO, 1975) at para. 19.41.

87 *Ibid.*

amended to cover up loopholes[88] potentially reinforces the view that the GAAR is really just a longstop or maybe even merely symbolic in nature. The dearth of cases on tax avoidance in past years also calls to question the reason behind the Comptroller's reluctance to invoke section 33—was it due to fear that it would have a dampening effect on business, or that the Comptroller prefers to address the issue of avoidance on a piecemeal basis by enacting specific anti-avoidance provisions only when the need arises?

I have sought to demonstrate that there are difficulties in both the interpretative and the doctrine-based approaches in applying the GAAR, and that the Singapore judiciary is left with the unenviable task of having to choose between either approaches or a combination of both. Given that the divergence in approaches stemmed from a philosophical divide in the judiciaries of both countries, it seems that the first question to ask in deciding which approach is to be preferred in Singapore would be whether the extent to which the taxpayer's right to arrange his affairs in the most tax efficient manner under the *Duke of Westminster* doctrine is violable. But perhaps the approach to be adopted by the courts is not that important. After all, the GAARs in Australia and New Zealand "have evolved as a result of the application of the law by the Courts to a variety of commercial transactions" such that "[w]here the application of the law by the Courts was not in accord with the objectives of the legislature, the rules have been amended (by the legislature) in order to achieve those objectives".[89] If the course undertaken by the judiciary does not give effect to the intention of Parliament, section 33 could well be modified, subject to the desirability of the political signaling such a move may have on businesses. For the time being, however, the challenge for the courts lies in balancing the various conflicting interests: the Comptroller's responsibility to collect the amount of revenue intended by Parliament on the one hand, and taxpayers' ability to minimise taxes (arguably no longer a given right) and tax certainty and predictability on the other.

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[88] The amendment of s. 19B to insert a new subsection (s. 19B(10A)) to prevent companies from claiming writing-down allowance for transferring intellectual property rights to its related parties is just one of many recent examples of such specific anti-avoidance measures.

[89] Tom Delany, "Tax Avoidance—A Trans-Tasman Comparative Study" (2005) 11 N.Z. J. Tax. L. & Pol. 161 at 184.