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A Tale of Two Tax Systems: A Comparative Analysis of General Anti-Avoidance Rules Provisions in India and Australia

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ABSTRACT

General Anti-Avoidance Rules (GAAR) is designed to curb tax evasion through legal loopholes, is explored in depth, shedding light on both jurisdictions' statutory intricacies and judicial decisions. While the overarching goals of GAAR align in both countries, notable disparities exist in their scope and application. In India, GAAR provisions extend to all arrangements, whereas in Australia, their application is limited to schemes. Notably, the Indian GAAR mandates a lack of commercial substance for the arrangement, a requirement absent in the Australian provisions. This paper examines a comprehensive comparative study of General Anti-Avoidance Rules (GAAR) in India and Australia, examining the legislative frameworks and judicial interpretations governing these provisions. The paper also scrutinizes judicial interpretations, revealing a more restrictive approach adopted by Indian courts in contrast to the comparatively liberal stance embraced by Australian counterparts. Drawing on the comparative analysis, the paper emphasizes the necessity of a nuanced, case-specific approach to the application of GAAR provisions, recognizing the distinct facts and circumstances of each situation. This paper contributes to a more profound understanding of the multifaceted nature of anti-avoidance principles in these jurisdictions by dissecting the divergences and convergences in India and Australia's statutory frameworks and judicial attitudes.

Keywords: *General Anti-Avoidance Rules, GAAR, India, Australia, tax avoidance, tax laws, statutory provisions, judicial interpretations*

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PROLOGUE

General Anti Avoidance Rules (GAAR) refer to a set of laws or regulations implemented by governments to prevent individuals or corporations from using tax laws in a manner that was not intended by the lawmakers, to avoid paying taxes.[2] The GAAR typically apply to situations where a taxpayer engages in a transaction or a series of transactions that, although legal, are considered to be artificial or abusive in nature, with the primary purpose of obtaining a tax benefit. In such cases, the GAAR give the tax authorities the power to disregard the tax benefit obtained and to reclassify the transaction for tax purposes. The goal of GAAR is to ensure that taxpayers pay their fair share of taxes and to prevent tax evasion and aggressive tax planning. The application of GAAR is usually determined on a case-by-case basis, taking into account the specific facts and circumstances of each situation. Many countries have introduced GAAR in their tax legislation, including Canada, the United Kingdom, Australia, India, and several others. However, the scope and application of GAAR can vary significantly across different jurisdictions.

In India, the GAAR was introduced in the Income Tax Act, 1961, in 2012, with the objective of countering aggressive tax planning and tax avoidance. The GAAR provisions empower the tax authorities to disregard any arrangement or transaction that is considered to be an impermissible avoidance arrangement, where the main purpose is to obtain a tax benefit, and it lacks commercial substance. The provisions are applicable to all arrangements entered into on or after April 1, 2017.

In Australia, GAAR is referred to as the Part IVA of the Income Tax Assessment Act, 1936.[3] The provisions were introduced in 1981 and have undergone several amendments since then. The objective of the provisions is to prevent taxpayers from obtaining tax benefits by entering into arrangements that are considered to be artificial or contrived. To invoke Part IVA, the arrangement must have been entered into with the sole or dominant purpose of obtaining a tax benefit, and the arrangement must be deemed to be a scheme. Both India and Australia have statutory provisions in place to counter tax avoidance, and the provisions are broadly similar in their objective. However, there are differences in the scope and application of the provisions. The Indian GAAR provisions apply to all arrangements, whereas the Australian provisions

[2] *'Understanding Basics of General Anti-Avoidance Rule (GAAR)' <https://taxguru.in/income-tax/understanding-basics-general-anti-avoidance-rule-gaar.html> accessed 13 April 2023.*

[3] *Richard Krever and Peter Mellor, 'Australia, GAARs – A Key Element of Tax Systems in the Post-BEPS World' (1 June 2016) <https://papers.ssrn.com/abstract=2800009> accessed 13 April 2023.*

only apply to schemes. Additionally, the Indian GAAR provisions require the arrangement to lack commercial substance, whereas the Australian provisions do not require such a test.

The approach taken by the judiciary in both countries is also significant. In India, the Supreme Court has held that the GAAR provisions should be invoked in cases of tax evasion and not tax avoidance. The court has emphasized the importance of commercial substance and has held that the provisions should not be invoked in cases where the transaction has economic substance. In Australia, the courts have adopted a more liberal approach and have upheld the application of Part IVA in several cases involving complex tax arrangements.

Thus, the GAAR provisions in India and Australia are similar in their objective but differ in scope and application. The judiciary in both countries has played a crucial role in interpreting and applying the provisions, and their approach has varied across jurisdictions.

CROSS-JURISDICTIONAL STUDY

India

The need for General Anti Avoidance Rules (GAAR) arose after the Vodafone deal with Hutchison-Essar, which took place in the Cayman Islands. Due to this deal, the government estimated a loss of over USD 2 Billion in taxes. GAAR was introduced in India through the Union Budget for 2012-13. The Finance Act of 2012 introduced Chapter X-A in the Income Tax Act 1961, which contains the provisions related to GAAR.[4] The purpose of GAAR is to prevent aggressive tax planning and curb taxpayers' use of abusive tax avoidance schemes. It empowers the tax authorities to look beyond the legal form of an arrangement to its substance and to disregard an arrangement if it is found to be entered into with the main purpose of obtaining a tax benefit.[5]

The Westminster principle, which was established in the case of *IRC vs Duke of Westminster*, has been the dominant principle in India for a long time. This principle is based on the idea that taxpayers have the right to structure their affairs to minimize their tax liability as long as the transactions are legal and not fraudulent.

General Anti Avoidance Rules (GAAR) were introduced in India through the Finance Act 2012. The rules provide the tax authorities with the power to scrutinize and deny tax benefits obtained through a transaction that is deemed to be an 'impermissible avoidance arrangement' (IAA).[6]

[4] *Sukumar Mukhopadhyay, 'General Anti-Avoidance Rule in Income Tax Law' (2012) 47 Economic and Political Weekly 24.*
[5] *Finance Act 2012-13.*
[6] *Mukhopadhyay (n 3).*

Under GAAR, an arrangement can be deemed to be an IAA if it satisfies any one of the following conditions:

i) It results in the misuse or abuse of tax laws.
ii) It lacks commercial substance or is not carried out in a bona fide manner.
iii) It is entered into with the primary purpose of obtaining a tax benefit.
iv) The introduction of GAAR has been a significant development in India's tax law framework. It has given the tax authorities greater powers to challenge and scrutinize tax arrangements that are deemed to be abusive or lack commercial substance.

However, the implementation of GAAR has also been a subject of debate and controversy. Critics have argued that the rules are vague and can be interpreted arbitrarily by tax authorities, leading to uncertainty for businesses and investors. The Indian government has taken measures to address some of these concerns, such as providing guidelines and setting up a panel to provide clarity on the application of GAAR. Nevertheless, this principle has been subject to judicial scrutiny in India, and the courts have developed certain limitations to prevent taxpayers from engaging in abusive tax avoidance practices. Three landmark cases in India have played a significant role in shaping the jurisprudence of anti-avoidance measures in the country.

Firstly, ***In McDowell & Co. Ltd. vs Commercial Tax Officer***[7], the Supreme Court held that tax planning is legitimate as long as it is within the framework of the law, but colorable devices cannot be part of tax planning. The court also held that the form of a transaction is not as important as its substance and that courts can look beyond the legal form of a transaction to determine its true nature.

Secondly, In ***W.T. Ramsay Ltd. vs Inland Revenue Commissioner***[8], the House of Lords departed from the Westminster principle and held that taxpayers could not rely on the form of a transaction to avoid tax if its substance is different from what it appears to be. The court also held that anti-avoidance measures should not be interpreted narrowly but given a broad and purposive interpretation to prevent taxpayers from exploiting loopholes in the law.

Thirdly, In ***Vodafone International Holdings B.V***. vs ***Union of India***[9]**,** the Supreme Court held that the acquisition of shares of an Indian company by a foreign company is not taxable in India if the transaction takes place outside India. The court also held that the government cannot impose tax retrospectively on already completed transactions. These cases and others

[7] *1977 AIR 1459*
[8] *1981 AC 300 (HL)*
[9] *2010 ITR 329 126*

have influenced the development of GAAR in India and have led to legislative measures to prevent tax avoidance practices.[10]

The legislation was brought in by amending the Income Tax Act 1961 and bringing in a new chapter X-A, which contained sections 95 to 102. The primary feature of the GAAR in Indian law is that if an arrangement has been made whose main purpose is to obtain a tax benefit and if it satisfies any of the one condition in s. 96 then that arrangement becomes an 'impermissible avoidance agreement'. The conditions under s. 96 are –

i) *the arrangement creates rights and obligations which are not normally created between parties dealing at an arm's length, or*

ii) *it leads to a misuse or abuse of the provisions of the tax law, or*

iii) *It lacks commercial substance or is deemed to lack commercial substance, or*

iv) *it is entered into or carried out in a manner which is not for a bonafide purpose.*[11]

Additionally, Section 96 in its sub-clause (2) also shifts the burden of proof on the taxpayer to establish that the main purpose of the arrangement was not to avoid tax benefits once the tax department has made a prima facie case against the assessee.[12]

Section 97 lays down conditions when an arrangement can be deemed to lack commercial substance. It is a comprehensive section capable of bringing into its purview several ways companies try to evade taxes.[13]

Section 98 deals with the consequences that will happen if an arrangement is declared to be an impermissible avoidance agreement.[14] Section 99 lays down what treatment would be meted out to connected persons and the accommodating party of an arrangement.

Subclause (iv) of section 99 empowers courts and the income tax authority to pierce the corporate veil when ascertaining whether an arrangement is an impermissible avoidance agreement.[15] Section 102 provides definitions for several key terms used in the above sections like – arrangement, connected person, tax benefit etc.[16]

The first major case was *McDowell & Co Ltd vs CTO,*[17] is significant as it marked a shift in the jurisprudence of tax avoidance in India. The Court held that tax planning may be legitimate but that the avoidance of tax through dubious means is not acceptable. The Court further

[10] *Inland Revenue Commissioners v. Duke of Westminster, 1931 A.C. 1 (H.L.)*
[11] *Section 96, Income Tax Act 1961.*
[12] *Ibid.*
[13] *Section 97, Income Tax Act 1961.*
[14] *Section 98, Income Tax Act 1961.*
[15] *Section 99, Income Tax Act 1961.*
[16] *Section 102, Income Tax Act 1961.*
[17] *McDowell & Co Ltd vs CTO, 1985 (3) SCC 230.*

observed that it is not relevant whether the tax statute should be construed literally or liberally, or whether the transaction is real or prohibited, while dealing with a tax avoidance device. The Court emphasized that it is the duty of every citizen to pay taxes honestly without resorting to subterfuges.[18] These observations have been relied upon in subsequent cases and have significantly impacted the interpretation and application of anti-avoidance provisions in India. Justice Ranganath Mishra, who wrote one of the opinions for the majority, addressed the Westminster principle, which was adopted in earlier case laws like *CIT vs A. Raman & Co.*[19] Justice Mishra states that – 'Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning, and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. He further observed that to determine whether a transaction is genuine, one needs to take a holistic approach and consider all relevant factors, including the commercial substance of the transaction and the legal rights and obligations of the parties involved. He also stated that the taxpayer has the burden of proving that the transaction is genuine and not a sham. These observations have been widely cited in subsequent cases and have influenced the development of the doctrine of substance over form in Indian tax law.

In the case of ***CIT vs B.M. Kharwar***.[20]Justice Mishra's opinion, in this case, reiterated the importance of distinguishing between legitimate tax planning and abusive tax avoidance. He emphasized that while taxpayers are entitled to arrange their affairs in a tax-efficient manner within the framework of the law, they cannot use artificial or sham transactions to avoid taxes. His observations helped shape the understanding of the difference between tax planning and tax avoidance in Indian jurisprudence and were later relied upon by courts and tax authorities in subsequent cases.

The Supreme Court, in this case, was willing to move away from the traditional Westminster principle and take a more nuanced approach to anti-avoidance cases, especially in light of the various dubious ways used by taxpayers to exploit tax laws and avoid paying taxes. Justice Reddy's concurring opinion, which critiqued the Westminster principle and emphasized the need to examine the purpose behind the transaction, has been widely used by tax authorities in India as a favourable judgment in anti-avoidance cases.[21]

[18] *'Eastern Book Company - Practical Lawyer' <https://www.ebc-india.com/lawyer/articles/2003v5a5.htm> accessed 13 April 2023.*
[19] *CIT vs A. Raman & Co., 1968 67 ITR 11 (SC).*
[20] *CIT vs B.M. Kharwar, 1969 72 ITR 603.*
[21] *W.T. Ramsay Ltd. vs IRC, 1982 AC 300.*

The decision in ***McDowell & Co.*** v. ***Commercial Tax Officer***[22] marked a departure from the traditional approach of relying solely on the form of a transaction and gave greater importance to the substance of the transaction and the intended effect. This shift in approach was later reflected in the introduction of General Anti-Avoidance Rules (GAAR) in the Income Tax Act in 2012, which allow tax authorities to disregard transactions that have been undertaken for the sole purpose of avoiding tax, even if they are technically legal.

Justice Reddy's opinion in the McDowell case emphasized the need to look into a transaction's true nature and purpose rather than just its form or appearance. He argued that the court should examine whether the transaction has been carried out with the sole purpose of avoiding taxes and whether it is such that the judicial process would approve of it. According to him, the Westminster principle was inadequate to deal with the complexities of modern tax planning, and a more realistic approach was needed to counter tax avoidance.

Additionally, the court observed that tax planning is legitimate and taxpayers are entitled to arrange their affairs in a manner that would minimize their tax liability. The court also emphasized that the tax authorities have to respect the treaty obligations entered into by India with other countries and cannot override them by issuing circulars or notifications. Furthermore, the court stated that the burden of proof lies on the tax authorities to establish that the taxpayer is not entitled to the treaty's benefits and that tax avoidance was the main purpose of the transaction. It also clarified that the residence of the Mauritius company was not conclusive and that the tax authorities could examine the genuineness of the transaction and the commercial substance of the arrangements to determine the entitlement of the taxpayer to the benefits of the treaty. Overall, this case was a significant development in the area of international tax law and provided clarity on the validity of circulars issued by the CBDT and the entitlement of taxpayers to the benefits of double taxation treaties.

Regarding the Vodafone case, it is important to note that it was a landmark judgment that had significant implications for the taxation of cross-border transactions in India. The Supreme Court held that the transfer of shares between two foreign companies, which resulted in the transfer of a controlling interest in an Indian company, did not give rise to any taxable income in India. The Court reasoned that India's tax jurisdiction did not extend to transactions that occurred offshore between two non-resident entities.

[22] *'Mcdowell & Company Ltd. v. Commercial Tax Officer, Vii Circle, Hyderabad ., Supreme Court Of India, Judgment, Law, Casemine.Com' (https://www.casemine.com) <https://www.casemine.com/judgement/in/5609abbbe4b014971140d27a> accessed 13 April 2023.*

The Vodafone case had far-reaching consequences and sparked a debate on the validity of India's tax laws and their impact on foreign investment. The Indian government responded to the decision by amending the tax laws to provide for retrospective taxation, which was criticized by investors and international organizations. The case highlights the need for clarity and consistency in tax laws, particularly in cross-border transactions, to avoid uncertainty and disputes.

The Indian tax authorities held that this transfer of shares was a taxable event in India as it resulted in the transfer of controlling interest in an Indian company. The Supreme Court, however, held that the transfer of shares between two foreign companies which lead to the extinguishment of controlling interest in the Indian company held by one foreign company to another foreign company cannot fall within the jurisdiction of the Indian tax authorities. The court observed that the transaction took place outside India, and the Indian tax authorities did not have jurisdiction over the same. The court also noted that the Indian tax authorities could not tax a transaction merely because it had an indirect effect in India. The decision was controversial and led to amendments to the Income Tax Act by the Finance Act, 2012 to clarify the scope of the tax authorities' jurisdiction over offshore transactions.[23]

The Vodafone case was a landmark decision that had significant implications for the taxation of cross-border transactions in India. The case highlighted the importance of carefully structuring transactions to ensure tax efficiency, while also demonstrating the limits of India's tax jurisdiction in the context of cross-border deals. It also raised important questions about the role of tax planning and the use of tax havens in structuring cross-border transactions. The decision has had far-reaching implications for global corporations operating in India, and has underscored the need for careful tax planning and compliance in this complex and rapidly evolving area of the law.

In the case of ***Vodafone India Services Pvt. Ltd***. v. ***Union of India*** **(2012)**[24] was a landmark judgement in India's jurisprudence on GAAR. The judgement had important implications for the interpretation of GAAR provisions and provided clarity on several issues that were previously unresolved. The case laid down the conditions under which the corporate veil can be pierced and also reaffirmed the importance of the dominant purpose test. Despite the Finance Act of 2012 nullifying some of the key observations made by the Supreme Court in this case, it remains an important precedent for courts to refer to when dealing with GAAR cases.

[23] *Vodafone International Holdings B.V. vs Union of India, 2012 (204) Taxmann 408.*

[24] *'Vodafone India Services Pvt .Ltd. vs Union Of India ' <https://indiankanoon.org/doc/177723533/> accessed 13 April 2023.*

Overall, the Vodafone case represents a significant milestone in the development of India's anti-avoidance regime and provides a roadmap for the future interpretation and implementation of GAAR provisions in the country.

The above analysis highlights the similarities and differences between the Indian and Australian jurisprudence with respect to GAAR provisions. Both countries have adopted comprehensive anti-avoidance laws, but their origin and interpretation differ significantly. While India relied heavily on judicial precedents to develop GAAR, Australia had a legislative approach. Both countries, however, have struggled with balancing the need to prevent tax avoidance with the right of taxpayers to engage in legitimate tax planning. The analysis also points to the need for courts to provide clear and consistent interpretations of GAAR provisions to avoid confusion and ensure their proper implementation. As countries around the world continue to grapple with the issue of tax avoidance, the insights gained from the comparative analysis of India and Australia's GAAR provisions can provide valuable guidance.

India and Australia have adopted their own unique approaches towards tackling anti-avoidance measures through the implementation of GAARs. While similarities exist in terms of the adoption of the dominant purpose and commercial substance tests, there are notable differences such as the absence of a legislative act in India until 2012 and the empowerment of courts to pierce the corporate veil. Furthermore, the dominance of the Westminster principle in both jurisdictions has led to a complex jurisprudential history that requires careful consideration and implementation by the courts. Despite these challenges, the implementation of GAARs in both India and Australia represents an important step towards curbing tax avoidance and promoting fairness in their respective tax systems.

Australia

In the case of Australia, GAAR provisions can be analysed by dividing it into two phases. The pre-1981 phase and the post-1981 phase.[25] In the pre-1981 phase, section 260 of the Australian Income Tax Assessment Act (ITAA) was used to combat tax avoidance. Section 260 gave the Commissioner of Taxation wide powers to disregard or recharacterize transactions entered into for tax avoidance purposes. The courts applied the section strictly, and its use had several limitations. However, with the introduction of Part IVA in the ITAA in 1981, the scope of GAAR provisions was significantly expanded. Part IVA sets out a comprehensive scheme that targets tax avoidance arrangements. The section provides the Commissioner with the power to

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[25] Barbara Conradt, Yi-Chun Wu and Ding Xue, 'Programmed Cell Death During Caenorhabditis Elegans Development' (2016) 203 Genetics 1533.

cancel tax benefits if the arrangement was entered into for the sole or dominant purpose of obtaining the tax benefit. The test for determining the dominant purpose is subjective, and the courts have adopted a case-by-case approach in interpreting the provisions.[26] dealt with anti-avoidance rules. Section 260 reads – 'Every contract, agreement or arrangement writing, whether before or after the commencement as it has or purports to have the effect of

a. *altering the incidence of any income*
b. *relieving any person from liability to pay return;*
c. *defeating, evading or avoiding any duty person by this Act; or*
d. *preventing the operation of this Act*
e. *be absolutely void as against the Commissioner, proceeding under this Act but without may have in any other respect or for any other purpose.'*

Section 260 of the Australian Income Tax Assessment Act (ITAA) addressed GAARs by scrutinizing the purpose behind a transaction,[27] making those done with the intention of avoiding taxes being noncompliant. The courts established three tests to mitigate its broad language: the predication test, the choice principle (Westminster principle), and the antecedent transaction doctrine. The predication test, established in the case of Newton vs Federal Commissioner of Taxation, determined that the section is not concerned with the subjective motive of the individuals to avoid tax. Instead, it evaluated the objective purpose of the transaction and predicated whether it was implemented in a particular way to avoid tax. If it cannot be predicated so and is an ordinary way of doing business, the section is not attracted. Conversely, the choice principle, first introduced in Australia in the case of ***WP Keighery Pty. Ltd*** vs ***Federal Commissioner of Taxation*** stated that if the Act provides two express choices to a taxpayer, and they choose an option purely for tax purposes, their actions cannot be in violation of section 260. The courts preferred the choice principle over the predication test as it evaluated the subjective motive of the participant and aligned with commercial reasoning. The case involved a taxpayer who had sold a company with significant accumulated profits for a non-taxable gain, whereas if the taxpayer had opted to liquidate the company instead, the profits would have been taxable. The tax authorities argued that this transaction fell under the purview of section 260, but the court disagreed and upheld the taxpayer's right to choose the option that resulted in a non-taxable gain. The court held that the taxpayer's fundamental right

[26] *Section 260, Income Tax Assessment Act 1981.*
[27] *INCOME TAX ASSESSMENT ACT 1936 - SECT 260 Contracts to Evade Tax Void' <http://classic.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s260.html> accessed 13 April 2023.*

to make a choice should be respected and that section 260 could not be used to impinge on that right.

The choice principle was further affirmed by the Australian courts in the case of ***Slutzkin*** vs ***Federal Commissioner of Taxation***.[28] In this case, the taxpayer had entered into a scheme to reduce his tax liability by creating a trust and transferring his shares to it. The court held that the taxpayer was entitled to choose the form of the transaction as long as he had not entered into a sham transaction or one lacking in commercial substance. This case further solidified the choice principle as a key component in the analysis of GAAR provisions in Australia.[29]

The ***Cridland*** vs ***Commissioner of Taxation*** case further reinforced and applied the choice principle in Australia. In this case, the taxpayer created a trust and transferred shares to the trust to avoid paying dividend taxes. The tax authorities argued that this tax avoidance scheme fell under the GAAR provisions. However, the court ruled that the taxpayer had made a genuine choice to transfer the shares to the trust and that this choice was not solely based on tax reasons. Therefore, section 260 did not apply to this arrangement. This case highlighted the importance of the choice principle in determining the validity of tax arrangements in Australia.[30]

The application of the choice principle became a concern for the tax authorities as it could potentially allow taxpayers to engage in numerous tax-motivated transactions as long as the statute presents two choices. Such an interpretation would render section 260 of the statute useless as it is intended to prevent tax avoidance.

In the case of ***Mullens*** vs ***Federal Commissioner of Taxation***,[31] the Australian courts developed a new doctrine called the antecedent transaction doctrine. This doctrine was developed to curb the choice principle's excesses and ensure that GAARs could be applied in cases where there was only one choice available to the taxpayer. Under this doctrine, if a series of transactions are carried out in such a way that they achieve a particular tax result, then the court may look beyond the immediate transaction and examine the antecedent transactions to determine whether the tax result was intended. This allows the court to ignore the taxpayer's choices in individual transactions and look at the larger picture of the series of transactions as a whole to determine whether the overall purpose was tax avoidance.

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[28] *'SLUTZKIN v. FEDERAL COMMISSIONER OF TAXATION' <https://staging.hcourt.gov.au/assets/publications/judgments/1977/065--SLUTZKIN_v._FEDERAL_COMMISSIONER_OF_TAXATION--(1977)_140_CLR_314.html> accessed 13 April 2023.*

[29] *Slutzkin vs Federal Commissioner of Taxation, (1978)7 A.T.R. 166 (H.C.A.).*

[30] *Cridland vs Commissioner of Taxation, 1977 140 C.L.R. 330 (H.C.A.).*

[31] *Mullens vs Federal Commissioner of Taxation, (1976) 6 A.T.R. 504, 135 C.L.R. 290 (H.C.A.)*

In the post-1981 phase, the Australian government introduced Part IVA to the ITAA in order to address the issues arising from the three tests. According to the explanatory memorandum to Part IVA, the provisions were designed to apply when it was objectively determined that an arrangement was entered into with the sole or dominant purpose of obtaining a tax deduction or excluding an amount from assessable income. Part IVA essentially codified the concept of GAAR into the Australian tax law. Unlike the previous Section 260, Part IVA provided a more structured approach to identifying tax avoidance arrangements. The provision required the Commissioner of Taxation to examine all the relevant circumstances of the arrangement and determine whether it had been entered into for the dominant purpose of obtaining a tax benefit. If the Commissioner was satisfied that the arrangement had been entered into for such a purpose, he could disallow the tax benefit or adjust the taxpayer's liability accordingly.[32]

Part IVA was enacted to overcome the problems created by the three tests that had severely curtailed the effectiveness of section 260 of the ITAA. It consists of three basic requirements - the existence of a scheme, the taxpayer deriving some benefit from the scheme, and the scheme being entered into for the dominant purpose of obtaining a tax benefit. The dominant purpose test is an objective determination that can be determined from eight exhaustive factors as laid down in section 177D of the ITAA. These factors include the manner in which the scheme was implemented, its form and substance, the timing of the scheme, the result that would be achieved by the scheme but for Part IVA, any change in the financial position of the relevant taxpayer or any other person, and the nature of the connection between or among parties to the scheme. Part IVA was enacted with the predication test in mind, and it aims to prevent taxpayers from engaging in artificial or contrived transactions solely for the purpose of obtaining a tax benefit.

In the case of *Federal Commissioner of Taxation vs Spotless Services Ltd*, the Australian High Court provided guidance on the application of Part IVA. The case involved Spotless Services Ltd, which had entered into a scheme to sell its business to a newly formed subsidiary for a high price and then lease the business back at a much lower rent, resulting in a significant tax benefit. The Court found that the scheme was entered into for the dominant purpose of obtaining a tax benefit and that the arrangement lacked commercial reality. The Court also rejected the argument that the arrangement was an ordinary commercial transaction that happened to have tax consequences. The case established the principle that Part IVA applies to

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

schemes that lack commercial reality, even if they are implemented in a legally effective manner.[33]

Therefore, the development of anti-avoidance rules in Australia has been a complex process. The court's initial interpretation of Section 260 led to the formulation of the choice principle and the antecedent transaction doctrine, which severely limited the statute's effectiveness. The enactment of Part IVA brought in a self-objective standard with three basic requirements and eight exhaustive factors. The recent decision in the Spotless case disregarded the jurisprudential history of Australia and held that the new provision should carry a self-objective standard. The Australian jurisprudence has also been influenced by the Westminster principle, which has been partially accepted in the new statute.

Recent Expansion of GAAR in Australia

Recently, Australia amended its GAAR to address specific base erosion and profit shifting (BEPS) concerns. Also, as part of the 2023-2024 Budget, the government announced an expansion of the GAAR for income tax. The expanded GAAR includes schemes that reduce tax paid in Australia by accessing a lower withholding tax rate on income paid to foreign residents. Also, the schemes that achieve an Australian income tax benefit, even if the dominant purpose was to reduce foreign income tax.

Comparison and Analysis

The similarity between the two countries is the existence of anti-avoidance rules in their respective tax laws. In India, a specific provision in the Income Tax Act 1961, known as section 37(1), allows the tax authorities to disallow expenses incurred to avoid tax. Similarly, in Australia, Part IVA of the Income Tax Assessment Act, 1936 contains anti-avoidance provisions that allow the tax authorities to disregard arrangements that have been entered into for the dominant purpose of obtaining a tax benefit.

One key difference between the two countries is the scope of the anti-avoidance rules. In India, the anti-avoidance provision applies to any arrangement that has been entered into with the sole purpose of avoiding tax, while in Australia, the provision applies to arrangements that have been entered into with the dominant purpose of obtaining a tax benefit. This difference in scope reflects the different approaches that the two countries have taken towards combating tax avoidance.

Additional difference between the two countries is the way in which the courts have interpreted and applied the anti-avoidance provisions. In India, the courts have generally taken a strict view

[33] *Federal Commissioner of Taxation vs Spotless Services Ltd, (1996) 96 A.T.C. 520.*

of tax avoidance and have upheld the validity of the anti-avoidance provision in section 37(1). In contrast, the Australian courts have been more willing to apply a purposive approach to the interpretation of Part IVA, and have been more willing to look at the substance of transactions rather than their form.

Hence, while there are similarities and differences between the Indian and Australian jurisprudence and laws with regard to anti-avoidance rules, both countries recognize the importance of preventing tax avoidance and have taken steps to address the issue.

Prof. Aakash Singh Rathore raises this larger philosophical concern in his book Rethinking Indian Jurisprudence: An Introduction to the Philosophy of Law. He argues that despite gaining independence in the literal sense, countries like India and Australia have not been able to fully decolonize their jurisprudence and continue to be colonized by the legacy of British rule. This legacy is evident in the continued use of the Westminster principle, which has been a central tenet of British legal philosophy and continues to shape the legal systems of these countries. According to Rathore, this raises important questions about the nature of legal philosophy and the extent to which it is influenced by historical and cultural factors.

India and Australia have anti-avoidance provisions that follow the dominant purpose and commercial substance tests. In India, the General Anti-Avoidance Rule (GAAR) was introduced in 2012, which provides for the application of the "main purpose" test, i.e., if the main purpose of a transaction is to obtain a tax benefit, then GAAR can be invoked to deny such benefit. Similarly, in Australia, Part IVA of the ITAA provides for the application of the dominant purpose test to determine the genuineness of a transaction. Both these tests have been developed over time and have become an integral part of the tax jurisprudence of these countries.

Secondly, the scope of GAAR in India is much broader than in Australia. Under Indian law, GAAR can apply to any arrangement entered into with the main purpose of obtaining a tax benefit. On the other hand, in Australia, Part IVA of the ITAA applies only if the dominant purpose of the scheme is to obtain a tax benefit. Additionally, the Australian law provides a list of eight factors to be considered in determining the dominant purpose, whereas Indian law gives broad discretion to the tax authorities to determine the main purpose. Another difference is in the consequences of violating GAAR. In India, if the tax authorities invoke GAAR, they have the power to declare the entire arrangement as void, and the tax consequences of such an arrangement will be determined based on the substance of the transaction. In Australia, however, the tax consequences are adjusted, rather than the entire arrangement being declared void.

India introduced a provision to grandfather investments made before a certain date, while Australia does not have any such provision. This means that investments made before the introduction of GAAR in India are not affected by GAAR provisions, while in Australia, all arrangements are subject to Part IVA regardless of when they were entered into.

In India, courts have generally given more importance to the right of taxpayers to do tax-planning and have been cautious in applying GAAR. The Supreme Court, in the case of *Vodafone International Holdings BV v. Union of India*, held that tax planning is not illegal and that taxpayers are entitled to organize their affairs in such a manner as to minimize their tax liability. However, the court also recognized that tax planning cannot be used as a colorable device or a subterfuge to avoid tax liabilities.

On the other hand, in Australia, the courts have been more willing to disregard tax planning arrangements that are entered into for the dominant purpose of obtaining a tax benefit. The introduction of Part IVA in the ITAA in 1981 was a legislative response to court decisions that were perceived to have placed too much emphasis on the form of transactions rather than their substance. Part IVA seeks to focus on the substance of transactions and applies a subjective test to determine whether the scheme was entered into for the dominant purpose of obtaining a tax benefit.

Indeed, the similarities and differences between the Indian and Australian jurisdictions in terms of GAAR are worth noting. While both countries follow the dominant purpose test and commercial substance test, the origins of the GAAR law are different in both countries. In India, it was created through judicial interpretation, while in Australia, it was a purely legislative act that was extrapolated by the judiciary. Additionally, the right to tax planning is declared to be a fundamental right in Australia and a legal right in India, which can have different implications. Finally, the Indian GAAR rules empower the courts to pierce the corporate veil, while there is no such provision in Australian law. These differences highlight the unique nuances in the application of GAAR in both jurisdictions.

CONCLUSION

In conclusion, the adoption of GAAR provisions has become a common trend globally in response to the growing complexity of tax structures and the increasing use of tax avoidance measures by global corporations. India and Australia, both former British colonies, have adopted comprehensive laws to deal with anti-avoidance measures, with some similarities and differences. While the Westminster principle continues to influence jurisprudence in both countries, the ways in which GAAR provisions have been introduced and implemented differ

significantly. It is crucial that the courts interpret and implement these laws correctly to avoid confusion and ensure that the goals of these provisions are achieved. Furthermore, it is important to note that while GAARs can be an effective tool in combating tax avoidance, it can also be a double-edged sword if not implemented and applied correctly. There is a fine line between legitimate tax planning and aggressive tax avoidance, and the interpretation of these laws by the courts can greatly impact the business environment and economic growth of a country. Therefore, it is crucial for the judiciary to strike a balance between preventing tax avoidance and ensuring that legitimate tax planning activities are not unduly curtailed. In conclusion, the development and implementation of GAARs require a delicate balance between effective tax administration and the promotion of legitimate economic activities.

REFERENCE

- AAKASH SINGH RATHORE AND GARIMA GOSWAMY, RETHINKING INDIAN JURISPRUDENCE: AN INTRODUCTION TO THE PHILOSOPHY OF LAW, (Routledge 2018).
- Austl., Explanatory Memorandum to Income Tax Laws Amendment Bill (No 2) (1981).
- Barbara Conradt, Yi-Chun Wu and Ding Xue, 'Programmed Cell Death During Caenorhabditis Elegans Development' (2016) 203 Genetics 1533.
- Cridland vs Commissioner of Taxation, 1977 140 C.L.R. 330 (H.C.A.).
- Case Analysis: Union of India v. Azadi Bachao Andolan (2004)' <https://taxguru.in/income-tax/case-analysis-union-india-vazadi-bachao-andolan-2004.html> accessed 13 April 2023
- Conradt B, Wu Y-C and Xue D, 'Programmed Cell Death During Caenorhabditis Elegans Development' (2016) 203 Genetics 1533
- 'Eastern Book Company - Practical Lawyer' <https://www.ebc-india.com/lawyer/articles/2003v5a5.htm> accessed 13 April 2023
- CIT vs A. Raman & Co., 1968 67 ITR 11 (SC).
- CIT vs B.M. Kharwar, 1969 72 ITR 603.
- 'INCOME TAX ASSESSMENT ACT 1936 - SECT 260 Contracts to Evade Tax Void' <http://classic.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s260.html> accessed 13 April 2023
- Inland Revenue Commissioners v. Duke of Westminster, 1931 A.C. 1 (H.L.)
- Krever R and Mellor P, 'Australia, GAARs – A Key Element of Tax Systems in the Post-BEPS World' (1 June 2016) <https://papers.ssrn.com/abstract=2800009> accessed 13 April 2023
- 'Mcdowell & Company Ltd. v. Commercial Tax Officer, Vii Circle, Hyderabad ., Supreme Court Of India, Judgment, Law, Casemine.Com' (*https://www.casemine.com*)

<https://www.casemine.com/judgement/in/5609abbbe4b014971140d27a> accessed 13 April 2023

- Sukumar Mukhopadhyay, 'General Anti-Avoidance Rule in Income Tax Law' (2012) 47 Economic and Political Weekly 24.
- Section 96, Income Tax Act 1961.
- Section 97, Income Tax Act 1961.
- Section 98, Income Tax Act 1961.
- Section 99, Income Tax Act 1961.
- Section 102, Income Tax Act 1961.
- Slutzkin vs Federal Commissioner of Taxation, (1978)7 A.T.R. 166 (H.C.A.).
- Section 260, Income Tax Assessment Act 1981.
- 'SLUTZKIN v. FEDERAL COMMISSIONER OF TAXATION' <https://staging.hcourt.gov.au/assets/publications/judgments/1977/065--SLUTZKIN_v._FEDERAL_COMMISSIONER_OF_TAXATION--(1977)_140_CLR_314.html> accessed 13 April 2023.
- Mukhopadhyay S, 'General Anti-Avoidance Rule in Income Tax Law' (2012) 47 Economic and Political Weekly 24
- Mullens vs Federal Commissioner of Taxation, (1976) 6 A.T.R. 504, 135 C.L.R. 290 (H.C.A.)
- Federal Commissioner of Taxation vs Spotless Services Ltd, (1996) 96 A.T.C. 520.
- McDowell & Co Ltd vs CTO, 1985 (3) SCC 230.
- 'Mcdowell & Company Ltd. v. Commercial Tax Officer, Vii Circle, Hyderabad ., Supreme Court Of India, Judgment, Law, Casemine.Com' (*https://www.casemine.com*) <https://www.casemine.com/judgement/in/5609abbbe4b014971140d27a> accessed 13 April 2023.
- 'SLUTZKIN v. FEDERAL COMMISSIONER OF TAXATION' <https://staging.hcourt.gov.au/assets/publications/judgments/1977/065--SLUTZKIN_v._FEDERAL_COMMISSIONER_OF_TAXATION--(1977)_140_CLR_314.html> accessed 13 April 2023
- 'Understanding Basics of General Anti-Avoidance Rule (GAAR)' <https://taxguru.in/income-tax/understanding-basics-general-anti-avoidance-rule-gaar.html> accessed 13 April 2023
- 'Vodafone India Services Pvt .Ltd. vs Union Of India on 15 April, 2019' <https://indiankanoon.org/doc/177723533/> accessed 13 April 2023
- Vodafone International Holdings B.V. vs Union of India, 2012 (204) Taxmann 408.
- W.T. Ramsay Ltd. vs IRC, 1982 AC 300.