JURISPRUDENTIAL JUSTIFICATIONS FOR THE PROPOSED GENERAL ANTI-AVOIDANCE RULE

*Malavika Prasad & Devdeep Ghosh**

ABSTRACT

The General Anti-avoidance Rule is a landmark amendment to the Income Tax Act, 1961 that would serve as a 'catch-all' provision vis-a-vis instances of undesirable tax avoidance. In this paper, the authors seek to understand the jurisprudential motivations behind such an amendment along with a comprehensive analysis of similar Rules in other jurisdictions.

I. INTRODUCTION

Tax avoidance has been recognized as a problematic issue in many jurisdictions. It is a gray area of law located between outright prohibition i.e. tax evasion and explicit permission i.e. tax mitigation. Tax avoidance refers to measures employed to reduce one's tax liability within the boundaries of law, but in a manner that is not encouraged by the law. Frustrating tax avoidance measures through specific legislation[1] have mostly failed as taxpayers consistently innovate new devices that allow them to escape the black letter of the law.[2]

The problem is augmented in common law jurisdictions where the general rule of thumb is that the subjects may enforce their strict legal rights even when the resultant outcome is unfair to others[3] as opposed to civil law countries where the abuse of law doctrine accommodates a purposive interpretation of legislations.[4] In the context of tax law, common law jurisdictions allow for a tax to be imposed only

* Students, NALSAR University of Law, Hyderabad. The authors are grateful to Ms. Shreya Rao for her guidance and insight into the subject. However, any errors are the authors' alone.

1 Specific anti-avoidance provisions in Indian tax laws have been found to be inadequate to tackle all forms of tax-avoidance. P. Mo, Tax Avoidance and Anti-Avoidance Measures in Major Developing Economies 107 (Praeger 2003).

2 D.M. Schizer, *Sticks and Snakes: Derivatives and Curtailing Aggressive Tax Planning*, 2000 Southern California Law Review 73.p. 1339, 1349.

3 Z Prebble & J Prebble, *Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law*, 2008 Bulletin for International taxation 152.

4 Z Prebble, *Approaches to Tax Avoidance Prevention in Seven Asian Jurisdictions: A Comparison*, 2009 Asia-Pacific Tax Bulletin 31.

when it is explicitly mandated by the law.[5] Strict interpretation of taxing statutes is often used as a defence by tax avoiders to frustrate the object of the law.

Consider the case of *Boawater Property Developments v. IRC*[6] where the taxpayer sought to defeat a tax on the profits from a sale of land that exceeded a threshold limit by dividing the land into five pieces and selling them separately through an intermediate party for profits below the threshold. The Duke of Westminster principle, laid down in *IRC v. Duke of Westminster*,[7] allows for every man to reduce his tax liability within the confines of the law. The application of this principle would legitimize the actions of the taxpayer in the *Boawater.* However, the question whether it should be permitted in light of the detriment caused to both the Revenue as well as a similarly situated taxpayer who has paid the applicable tax transforms the debate.[8]

General Anti-Avoidance Rules ("GAAR") have found differential statutory recognition in several jurisdictions. Australia's approach has been to identify several prerequisites that must be met by an arrangement in order to infer that the taxpayer intended on obtaining a tax benefit.[9] On the other hand, the South African GAAR broadly states certain indicia possessed by a tax avoidance arrangement.[10] These indicators are extrapolated from common attributes shared by avoidance arrangements. The Indian GAAR has adopted a similar approach as explained later in this article. At the other end of the spectrum, the New Zealand GAAR thrusts discretion upon the courts to evolve principles to identify avoidance arrangements.[11]

5 See A.V. Fernandes v. State of Kerala, AIR 1957 SC 657.

6 1988 3 All ER 495.

7 [1935] All ER 259 (HL), [*"Duke of Westminster"*].

8 Consider the findings of the Australian Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, Final Report which revealed that a wealthy businessmen and some entrepreneurs had a minimal tax liability due to the employment of tax avoidance measures. Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, Final Report (1984) Vol 1 at 100-102.

9 J Cassidy, *Badges of Tax Avoidance: Reform Options for the New Zealand GAAR,* 17 New Zealand Business Law Quarterly 467, 468.

10 The present South African GAAR contained in Part IIA of the Income Tax Act, 1962 mandates a purposive interpretation of its provisions as opposed to the literal interpretation required by its earlier GAAR contained in section 103. This change was necessitated after the decision in Commissioner of Inland Revenue v. Conhage (Pty) Ltd, (1999) (4) SA 1149 which nullified the effect of the GAAR by adopting the Duke of Westminster principle.

11 See the Draft Report of the Victoria University of Wellington Tax Working Group *Improving the Operation of New Zealand's Tax Avoidance Laws* (2011) at [1.4], [4.2] and [4.18] as in J Cassidy, *supra* n

The object of the researchers is two-fold: *first,* to put forth a theoretical basis to establish the necessity of the GAAR in the Indian tax framework by contextualizing anti-avoidance within the scheme of the Hohfeldian analysis of rights (Part III) and *second*, to address some of the concerns that are oft-repeated with regard to the Indian GAAR (Part IV). Before this though, to set the stage for analysis in this paper, the researchers attempt to briefly summarise the position of law prior to and on adoption of the GAAR (Part II).

II. INDIA'S JUDICIAL GAAR AND THE PROPOSED SHIFT

In England, the Duke of Westminster principle was followed by English courts till the case of *WT Ramsay Ltd. v. IRC*,[12] where the House of Lords held that the Revenue had the power to disregard an arrangement if it has no commercial purpose except for the avoidance of tax. Judicial discourse in the Supreme Court of India has wavered in its identification of tax avoidance. The Supreme Court initially endorsed the Duke of Westminster principle in *CIT v. A Raman*[13] and *Bank of Chettinad Ltd. v. CIT*.[14] However, in *McDowell& Co. v. CTO*,[15] a Constitutional bench of the Supreme Court held by a four to one majority that the use of colourable devices to avoid the payment of taxes was unlawful.[16] Justice Chinappa Reddy, in a separate but concurring judgment went so far as to say that "*the ghost of Westminister had been exorcised in England. Should it be allowed to rear its head in India?"* - words which expressed his understanding that *Ramsay* had overruled *Duke of Westminster* in England.[17] His judgment effectively stated that obtaining any tax benefit was impermissible tax avoidance unless the benefit was explicitly granted by law. Furthermore, *Ramsay* did not overrule the *Duke of Westminster* but sought to carve out an exception to it, in that a transaction had to be genuine in order to qualify as permissibly tax avoidant. This was an aspect of Justice Reddy's judgment that courted controversy. Another perplexing aspect of *McDowell* was that the majority agreed with Justice Reddy's

9, 467, 468. See also *Ben Nevis Forestry Ventures v. Commissioner of Inland Revenue* (2009) 24 NZTC 23, at 188

12 (1982) AC 300 HL, ["*Ramsay*"].

13 [1968] 67 ITR 11 (SC).

14 [1940] 8 ITR 522 (PC).

15 154 ITR 148 SC, ["*McDowell*"].

16 *Id.* at 254.

17 *Id.* at 241.

judgment despite having reached the conclusion that all tax avoidance was not illegal unless implemented through a colourable transaction.

The Revenue was emboldened by the decision in *McDowell* and used it as a tool to pursue all tax planning initiatives. Concerns of an extraordinarily aggressive tax machinery were raised in *Union of India v. Azadi Bachao Andolan*[18] where a Division bench of the Supreme Court sought to demilitarize the Revenue by categorically enforcing the taxpayer's right to mitigate tax by all means that have not been explicitly declared to be illegal by legislation. In *Vodafone International Holdings B.V. v. Union of India*,[19] the Apex Court held that the "look at" test must be implemented in that the Revenue must look at the entire transaction holistically rather than "look through" the transaction to assess individual components.[20] *Azadi* and *Vodafone* mandated that the Revenue permit avoidance arrangements unless the arrangement when holistically viewed was a sham.

It was in this backdrop that the Government of India decided to include the GAAR in Chapter XA of the Income Tax Act, 1961 ("IT Act"). Section 95 of the IT Act is the omnibus provision that allows the application of the GAAR to any arrangement entered into by an assessee. It contains a non-obstante clause and gives the provisions of Chapter XA an overriding effect over other provisions of the Act.

Section 96 (1) contains the indicia that the Parliament has identified as the common trait of avoidance arrangements. Clause (2) states that Chapter XA may apply to an entire arrangement or a part of it thereby allowing the Revenue to "look through" a transaction instead of simply "looking at" it.[21] Section 96 (1) of the IT Act proposes the following two-pronged requirement for an avoidance arrangement to be impermissible:

(i) The "main purpose or one of the main purposes" of the arrangement must be to obtain a tax benefit (the "main purposes" test); and

18 2003 132 Taxmann 373 SC ["*Azadi*"].
19 (2012) 6 SCC 757, ["*Vodafone*"].
20 *Id.* at ¶60.
21 This directly overrules the judgment in *Vodafone* where it was held that the Revenue should look at a transaction i.e. assess the tax liability of a transaction holistically rather than look through the transaction and consider individual components of the arrangement.

(ii) The arrangement must fulfil one or more of the four conditions specified in clauses (a) to (d) (the "tainted elements" test).[22]

A plain reading of Section 96 (2) would make it appear that the burden of proof is on the taxpayer to establish that the impugned arrangement has not been entered into in order to obtain a tax benefit. However, the Draft Guidelines have clarified that the onus to establish both prongs of the test in Section 96 shall lie on the Revenue[23] which is a welcome change as it would serve as a safeguard against the indiscriminate application of the GAAR.

After establishing that the main purpose or one of the main purposes of the arrangement was to obtain a tax benefit, the Indian GAAR requires the Revenue to categorize the avoidance arrangement within one of four categories of impermissible arrangements which are informally referred to as "badges of indicia" or the "tainted elements" test.[24] The avoidance arrangement must be one that:

(i) creates rights or obligations that are not at arm's length (the 'arm's length' element);
(ii) misuses or abuses the law (the 'abuse of law' element);
(iii) lacks commercial substance (the 'commercial substance' element); or
(iv) is entered into or carried out in a manner or by means which are not ordinarily employed for *bona fide* purposes (the '*mala fide* purposes' element).

III. DO WE NEED A STATUTORY GAAR?

In this part, the researchers seek to better understand the jurisprudential justifications for the GAAR. Before we deliberate on whether we need the GAAR, we need to develop a nuanced understanding of what changes would be introduced with a statutory GAAR. Hohfeld's analysis of rights goes a long way in explaining the juridical relationship between the taxpayer and the Revenue. Hohfeld, in his much celebrated article titled 'Fundamental Legal Conceptions'[25] derides the

22 The Act does not use the term 'tainted elements'. It has been derived from the Explanatory Memorandum to the South African Revenue Laws Amendment Bill 2006 at 62.

23 Draft Guidelines Regarding Implementation of GAAR in terms of Section 101 of the Income Tax Act, 1961, accessible at http://pib.nic.in/newsite/erelease.aspx?relid=85066.

24 *Ibid,* 467, 482.

25 (1913) 23 Yale Law Journal 16.

ubiquitous practice of loosely using the terms 'right', 'privilege' and 'duty' among others in an unscientific manner.[26] He typifies juridical relationships into 4 pairs of relationships. We shall only concern ourselves with two of these pairs - that of "right - duty" and "privilege - no right".

A right is defined in relation to the duty it creates in another person. Therefore wherever a right exists in one person, a duty must exist in the other.[27] If A holds a right to enter B's land, it is B's duty to allow A to freely ingress into his land. This relationship has been termed as a correlative by Hohfeld.

A privilege, on the other hand, is defined as the negation of a duty.[28] A privilege to commit an act necessarily implies the absence of a duty to not commit it on the privilege holder i.e. A has a privilege to enter a park but no duty to keep out of it.

Just as a duty is the correlative of a right, a 'no-right' or the absence of a right is the correlative of a privilege. If both A and B simultaneously see a hundred rupee note on the street, they both have the privilege of seizing the note and neither has the right to prevent the other from trying. Therefore, wherever A has a privilege to do an act, B has "no right" to stop him.

Below is a table depicting the relations in the scheme of jural correlatives:

If **A has** a…	**Right**	…then some person **B has** a	**Duty**
If **A has** a…	**Privilege**	…then some person **B has**	**No right to prevent**

Post *Azadi*, the taxpayer was empowered to use any scheme that reduced his or her tax exposure as long as it was not explicitly proscribed by the law i.e. the taxpayer possessed the liberty or the 'privilege' to employ any tax avoidance measure he deemed fit. This principle was articulated by Justice Srikrishna in the following words:

26 *Id.* at 16 - 23.
27 *Id.* at 31. Therefore when a right is invaded, a duty is violated.
28 *Id.* at 32.

> *The principle does not involve, in my opinion, that it is part of the judicial function to treat as nugatory any step whatever which a taxpayer may take with a view to the avoidance or mitigation or tax. It remains true in general that the taxpayer, where he is in a position to carry through a transaction in two alternative ways, one of which will result in liability to tax and the other of which will not, is at liberty to choose the latter and to do so effectively in the absence of any specific tax avoidance provision such as s.460 of the Income and Corporation Taxes Act, 1970.*[29]

Azadi also approved of the judgment in *Banyan and Berry v. Commissioner of Income Tax*[30] where the Gujarat High Court held as under:

> *The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes.. in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law.*[31]

According to Hohfeld's conception of rights, a privilege is the negation of a duty.[32] Post *Azadi*, the taxpayer enjoyed a privilege to avoid tax as he had no duty not to employ a tax avoidance scheme. The application of Hohfeld's definition of 'privilege' finds ample support in *Azadi* as the judgment effectively granted a privilege to tax payers to employ any means to reduce their tax liability which is not prohibited by law by way of an accompanying duty not to indulge in a tax avoiding schemes. Furthermore, a privilege must necessarily have a no-right as its correlative. In *Azadi*, it was held that while the taxpayer had the liberty to engage tax-avoidance means, the Revenue, unless specially granted a right by enacted legislation to prevent a particular type of avoidance has no right to prevent the taxpayer from avoiding such tax. In fact *Azadi* stated that legal reality was a "far cry" from Justice Reddy's assessment that the revenue had an inherent right to prevent tax-

29 Azadi*, supra* n 23, ¶144.

30 (1996) 222 ITR 831.

31 *Id.* at 850.

32 W. Hohfeld, *Fundamental Legal Conceptions Applied in Judicial Reasoning*, (1913) 23 Yale Law Journal, p. 16, 17.

avoidance.[33] *Azadi* stated that the Revenue must expressly be empowered to prevent tax-avoidance through a legal prohibition on the avoidance arrangement at which point the tax avoidance would become unlawful. Therefore, it is beyond doubt that post *Azadi*, the taxpayer had a privilege to enter tax-avoidance arrangements where the Revenue had no right to prevent such schemes.

On the other hand, the statutory GAAR expressly divides the entire spectrum of tax-avoidance arrangements into permissible and impermissible avoidance arrangements. Simply put, if a tax payer employs an arrangement that meets the criteria of section 96 (1), the Revenue is empowered to carry out any of the steps specified in section 98. This effectively transforms the privilege to indulge in tax-avoidance schemes that was enjoyed by taxpayers post *Azadi* into a right as envisioned by Hohfeld. In this juridical relationship, the taxpayer has a right to employ any arrangement that fails to meet the criteria of section 96 (1) and is therefore permissible, while the Revenue has the duty to allow the taxpayer to enter such arrangements.

Now that the change ushered in by a statutory GAAR is evident, we are in a position to address the question of whether we need such rules. The researchers are of the opinion that a GAAR would benefit the Indian tax system on two closely linked but equally important grounds. *First*, this shift from a "privilege - no right" relationship to a "right - duty" relationship as between the taxpayer and the Revenue would serve the purpose of tax equity as has been elaborated upon earlier in this article. Protecting the tax-base is not important solely because it prevents the erosion of the Government's revenue but also because it ensures that all taxpayers enjoy a level-playing field commensurate to their incomes. Consider a free market situation with only two competitors - one that has employed a highly fraudulent but legal scheme to reduce its tax liability and one that hasn't. To allow an unfair advantage to accrue to the former would militate against the interests of the latter as well as society as a whole. *Second*, it is evident even post *Azadi*, that the Tribunal and the Authority for Advance Rulings have relied on *McDowell* to employ the 'substance over form test' in order to protect the tax-base for the abovementioned reasons. For example, the CBDT came out with Circular 789 where it stated that a 'Tax Residency Certificate' was sufficient proof for a Mauritius resident to benefit

33 Azadi, *supra* n 23, ¶143.

from the Indo-Mauritius DTAA but the Revenue, the Tax Tribunal[34] and several AAR[35] decisions continued to deny treaty benefits to corporations holding Mauritian TRCs even after the validity of Circular 789 was upheld by the Supreme Court in *Azadi*. A "right-duty" relationship between the taxpayer and the Revenue would serve to permanently resolve this uncertainty and also to legitimize the efforts of the Revenue to protect its tax base.

IV. COMBATING THE CONCERNS

The GAAR across jurisdictions has been a subject of much controversy for several reasons. The researchers, in this part, offer reasons for why most of these concerns are not justified while suggesting proposed changes to address the ones that are.

[A] Is the GAAR 'too uncertain'?

Primarily, a statutory GAAR is said to fall prey to the vice of uncertainty, by creating rules that are far too ambiguous to fulfil the rule of law requirement of certainty.[36] However, uncertainty is integral to the GAAR for two reasons *first,* specific modes and methods of tax evasion can never be <u>exhaustively</u> laid out or defined, given the myriad number of ways in which the principle of tax equity can be flouted[37]; *second,* whatever certainty may be achieved by formalism in legislation creates scope for "creative compliance" which is a term used to describe the act of

34 See Saraswati Holding Corporation v. Deputy Director of Income Tax, 2007 111 TTJ Delhi 334.

35 E* Trade Mauritius Ltd.(AAR No 826 of 2009); D B Zwirn Trading No 3 Ltd. (AAR No. 878 of 2010).

36 See Price Waterhouse Cooper's assessment of the Indian GAAR accessible at http://www.publications.pwc.com/DisplayFile.aspx?Attachmentid=5747&Mailinstanceid=24703; ASSOCHAM strongly opposes GAAR, Press Release, Thursday, August 16, 2012, accessible at http://www.assocham.org/prels/shownews.php?id=3650.

37 Here, it may be useful to draw an analogy from Dworkin's thought experiment in *Taking Rights Seriously,* Dworkin distinguishes constitutional *concepts* from competing *conceptions* of the said concepts, by demonstrating that when a father instructs his children not to treat people unfairly, while he may have had specific instances of unfairness is his mind at the time of issuing the instruction, he would not intend to restrain the applicability of the instruction to just those situations in his contemplation. Instead, he would want his children to follow the instruction in situations that he may not have foreseen or contemplated thus far. Also, he would not oppose a contravention of the instruction if his child can put forth a reasoned defence of his or her acts. He concludes with the statement that he meant for his children to be guided by the <u>concept of fairness</u> and not by any specific <u>conception of fairness</u>. Similarly, he argues that constitutional principles are designed to be abstract constitutional *concepts*. *See* Ronald Dworkin, Taking Rights Seriously 134 (Cambridge, MA: Harvard University Press, 1977).

devising new and ingenious ways to avoid tax when more detailed rules are available to manipulate and circumvent.[38]

[B] Must tax statutes always be interpreted literally?

The researchers believe that the GAAR can only be effective if interpreted purposively i.e. through the adoption of a principle-based rather than rule-based approach to reading the GAAR.[39] Evidence that GAAR provisions ought not to be treated as rules to be interpreted literally can be found in the failure of the original Australian GAAR in Section 260 of the ITAA, 1936 owing to the judicial exemptions that were formulated by way of the 'choice principle' and the 'antecedent transactions test', which only served to legitimize tax avoidant practices, as they were then.[40] Moreover, there is ample evidence to show that the literal interpretation of GAAR provisions has failed in several countries[41] and countries are now moving towards a purposive interpretation of GAAR provisions alone.[42]

---

38 Doreen McBarnet, *When Compliance is Not the Solution but the Problem: From Changes in Law to Changes in Attitude*, as in Valerie A. Braithwaite, Taxing Democracy: Understanding Tax Avoidance and Evasion, 229-244 (Ashgate Publishing, Ltd., 2003); D. McBarnet and C. Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*; (1991) 54 MLR 848.

39 A "principle", as understood by Dworkin, is a standard that is observed not because it advances some social, economic or political goal (i.e. a "policy") but because it is a "requirement of justice or fairness or some other dimension of morality". A rule on the other hand is "applicable in an all-or-nothing fashion" i.e., if the conditions it stipulates are met by a fact situation, then the rule is considered valid and the situation is answered on application thereof. Principles on the other hand do not result in a consequence automatically attaching to a situation once the conditions of the principle are met. For instance, sometimes, depending on specific facts of the situation at hand, the principle will admit of derogations – a telling example is the principle that 'no man can benefit of his own wrong' and its obvious counter-instance in the form of the rule of 'adverse possession'. Dworkin then argues that use of terms like "unreasonable", "unjust", "significant" renders legal rules' application dependent to some extent on the principles or policy justifications underlying the rule, thus making the "*rule itself more like a principle*." But the fact of it being a rule implies that the confining terms therein used *"restricts the kind of other principles and policies on which the rule depends". See* Ronald M. Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14, 24-28, 1967-1968.

40 The choice principle states that a taxpayer who merely made a choice between two amounts of liability, to pay a lesser tax, such act was not unlawful under Section 260: Slutzkin v FCT, (1977) 140 CLR 314; Brambles Holdings Ltd v. FCT, (1977) 138 CLR 467; Cridland v. Federal Commissioner of Taxation, (1977) 140 CLR 330 (HCA) at 339 and 340. The antecedent transactions test forbade the recharacterisation a step in the arrangement to reconstruct the income: FCT v. Kareena Hospital Pty Ltd, (1979) 10 ATR 525; Europa Oil (NZ) Ltd v. Commissioner of Inland Revenue, [1976] 1 WLR 464 (PC) at 475; Mullens v Federal Commissioner of Taxation, (1976) 135 CLR 290 (HCA) at 294.

41 Australia: Mullens v. Federal Commissioner of Taxation, (1976) 135 CLR 290 (HCA); Patcorp Investments Ltd v. Federal Commissioner of Taxation, (1976) 140 CLR 247 (HCA); Slutzkin v. Federal

The GAAR must thus be interpreted keeping in mind the morality captured by the principle of horizontal tax equity among taxpayers[43] as well as achieve the policy objective of crafting a "narrow spectrum GAAR" i.e. one that seeks to protect the tax base and not to expand it.[44]

The distinction between impermissible and permissible tax avoidance, an oft neglected detail in Indian writing on the GAAR may also be conceptualised as a principle. The test employed in *Commissioner of Inland Revenue v Challenge Corporation Ltd*.[45] serves well to lay out the principle underlying all avoidance rules. The Privy Council drew from the principle justification for tax mitigation in taxation laws to lay down the test for deciphering tax avoidance that is permissible:

> *Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability.*[46]

Thus, the legitimacy of mitigation is derived from the fact that the tax benefit that accrues is due to the reduction of income which he suffers or the expenditure which he incurs and not from an "arrangement".[47] Thus, the taxpayer

---

Commissioner of Taxation, (1977) 140 CLR 314 (HCA); Cridland v. Federal Commissioner of Taxation, (1977) 140 CLR 330 (HCA); Federal Commissioner of Taxation v. Westraders Pty Ltd., (1980) 80 ATC 4357 (HCA); South Africa: Commissioner of Inland Revenue v. Conhage (Pty) Ltd, (1999) (4) SA 1149 at 1155.

42 Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, at para. 44; See also, "Statutory Purpose Element" in Legal and Policy Division, South African Revenue Service, Tax Avoidance and Section 103 of the Income Tax Act, 1962: Revised Proposals, September 2006 at 15-16.

43 Richard E. Krever, Structure and Policy of Australian Income Taxation, in Australian Taxation: Principles And Practice 1, 11 (Richard E. Krever ed., 1987).

44 R. Prebble and J. Prebble, *supra* n 56, 40.

45 Privy Council, 20 October 1986, [1987] 2 W.L.R. 24, [1987] A.C. 155 ["*Challenge Corporation"*].

46 *Ibid*, 167

47 *See* Challenge Corporation *supra* n. 45 at 168-169: "*Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.…In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax*"

must suffer a detriment in order to claim a deserved tax benefit that mitigates his liability.

It is essential to keep in mind that the detriment that ought to be suffered must be substantial and not be the mere cost that is suffered in "devising and implementing the arrangement". Thus, this detriment must not be one that can be fabricated or orchestrated for the sole purpose of claiming entitlement to the tax benefit.[48]

[C] Why we should not retain a broad-spectrum GAAR.

The GAAR, while fulfilling its purpose of being a catch all provision, must also ensure that it does not stifle legitimate commercial transactions that accommodate a tax benefit. To this end, the Indian GAAR as it presently stands, is arguably too broad in its ambit, and ideally ought to have its scope narrowed down.[49] This change in the GAAR may be effectuated through two changes:

48 The facts in this case exemplify this distinction. The taxpayer company in the Challenge group sought to defend the buying out of a loss-making subsidiary of the Merbank group to offset the group profits by using S. 191 of the Income Tax Act, 1976 of New Zealand that allowed the setting off of losses of a subsidiary against the profits of other companies in the same group. The Privy Council recognised that the principle of group profits was that members of the group must not be made liable to tax when the group makes neither a profit nor a loss, as a whole, owing to losses of some members of the group negating profits of others.[48] In that case however, the loss made by the company that the Challenge group bought out was borne by the Merbank group and not by the Challenge group. Therefore, acquisition of a company *after the fact of its loss* amounted to an attempt to merely use the loss reflected in the company's balance sheet to negate the profits in the Challenge group. The Challenge group itself had suffered no detriment in terms of an expenditure or reduction of income that entitled it to claim the tax advantage. The consideration to buy out the loss making subsidiary of the Merbank group does not qualify for a detriment that creates entitlement to a tax benefit as it is the mere cost of implementation of the arrangement devised to obtain that tax advantage.

49 The shortcomings of a broad-spectrum GAAR were a motivating factor behind the formulation of the draft UK GAAR. Graham Aaronson, an eminent tax practitioner who spearheaded the UK GAAR study, stated the following: *"....[I]ntroducing a broad spectrum GAAR would not be beneficial for the UK tax system. This would carry a real risk of undermining the ability of business and individuals to carry out sensible and responsible tax planning.[I]ntroducing a moderate rule which does not apply to responsible tax planning, and is targeted at abusive arrangements would be beneficial for the UK Tax system...."*Graham Aaronson QC, Study to Consider Whether a General Anti-Avoidance Rule Should be Introduced Into the UK Tax System, ¶ 3 available at http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.PDF.

i. By omitting the "main purposes" test

The first limb of Section 96 states that "the main purpose or one of the main purposes" of the arrangement must be to obtain a tax benefit in order to bring the arrangement under the scope of the GAAR. This is problematic in light of the globally accepted practice of structuring commercial transactions in a manner that creates an accompanying tax benefit. Therefore, if a tax benefit accompanies an otherwise commercially motivated transaction as one of its main purposes, GAAR would be attracted regardless of whether the transaction was chosen out of panoply of options available to the taxpayer solely due to the existence of the tax benefit.[50] Similar concerns have been raised in the recently released Shome Committee Report.[51]

In the opinion of the researchers, the most efficacious method of narrowing the Indian GAAR is by omitting the phrase 'or one of the main purposes' from the wording of section 96 (1). By changing the existing test to a 'main purpose' test, the GAAR would circumscribe the power of the Revenue by stating that only those arrangements which have a tax benefit as their dominant purpose would fall within the ambit of GAAR. If the arrangement was entered into for both commercial as well as tax reasons, GAAR should not be applicable.

ii. By eliminating subjectivity

A change to a "main purpose" test would not *ipso facto* result in a more narrowed spectrum GAAR. The main purpose test may be either objectively or subjectively determined depending on whether it is attributed to the arrangement itself or the taxpayer's intentions in entering the arrangement.[52] The researchers

50 The Australian GAAR, on the other hand, requires the "sole or dominant" purpose of the GAAR to be the receipt of a tax benefit as is evident in Section 177D of the Income Tax Assessment Act 1936. This Section must be read with Section 177A(5) which further states that if a transaction has several purposes, receiving a tax benefit must be the dominant purpose i.e. the most 'influential' purpose. See Federal Commissioner of Taxation v. Spotless Services Ltd, [1996] HCA 34, 96 ATC 5201, 5206, 5210. See also*;* Federal Commissioner of Taxation v. Spotlight Stores Pty Ltd, 2005 ATC 4001, 4015; Hart v. Federal Commissioner of Taxation, [2004] HCA 26, 2004 ATC 4599, 4613 as in J Cassidy, *supra* n 9, 467, 478.

51 Report on the GAAR in the Income Tax Act, 1961, p. 4, 5.

52 The South African and the New Zealand GAAR requires the main purpose of the *arrangement* to be considered while the Australian GAAR looks at *the mindset of the taxpayer*. J Cassidy, *supra* n 9, 467, 474, 478.The Australian approach has proven to be very litigious. See Federal Commissioner of Taxation v. Spotless Services Ltd., (1996) 95 ATC 4775 (HC).

argue that if the GAAR is interpreted subjectively, there exists the possibility of a tax-payer with commercial motives being brought into the ambit of GAAR. While it is appreciated that the onus is on the Revenue to satisfy the main purpose test,[53] the researchers are of the opinion that eliminating the subjective element would prove to be another efficacious safeguard from an indiscriminately applied GAAR. In order to prevent this, reference may be had to the approach adopted by New Zealand courts which have held that a transaction with a valid commercial objective with an accompanying tax benefit, however substantial, cannot be brought within the ambit of GAAR.[54] The test evolved by the courts is *whether the parties to the transaction would have entered into the transaction had it not been for the resultant tax advantage*.[55]

V. CONCLUSION

In this paper, the motives of the researchers were not to defend the GAAR or deride it but to assess the tenability of some of the concerns that have been voiced in the recent past. After analyzing the changes brought about by a statutory rule, the researchers have sought to test the GAAR against the anvil of Hohfeld's celebrated rights analyses.

The researchers also put forth that uncertainty is of inherent value in a statutory GAAR and the temptation of crystallizing the terminology used therein ought to be resisted. A purposive and principle based interpretation ought to be adopted while dealing with the GAAR as opposed to a strict interpretation to complement and capitalise on the value of uncertainty in the GAAR.

The researchers find merit in the stance adopted by certain critics on the ground that the Indian GAAR was too broad and could bring within its ambit, several legitimate transactions that have a tax benefit as one of its motivations. Such an inhibitive approach would certainly have a lasting impact on the manner in which India and transactions with Indian entities were commercially viewed. However, in the researcher's opinion, this reason by itself is not sufficient to

53 Draft Guidelines, *supra* n 28.

54 See Challenge Corporation; Accent Management Ltd. v. Commissioner of Inland Revenue, [2007] BCL 728 (CA); Peterson v. Commissioner of Inland Revenue, [2006] 3 NZLR 433 (PC).

55 Challenge Corporation; Case V20, (2002) 20 NZTC 10, 233 (TRA).

completely debunk the established benefits of a well reasoned GAAR. In order to correct this discrepancy, the researchers suggest a two prong remedy:

- the "main purposes" test in Section 96 ought to be redrafted into the proposed "main purpose" test; and
- the subjective element present in the "main purpose" test ought to be eliminated through the objective assessment of whether the taxpayer would have entered the arrangement had there been no tax advantage.

In summation, the researchers conclude that while a lot has been written about the GAAR, some of the concerns are misplaced. The Indian GAAR as it currently stands is far from perfect but those who are most vocal in their absolute opposition to a GAAR of any form would find that it might just be in their interests to have in place a GAAR that is judicious in its application.