# *GST/VAT disputes and avoidance: Some preliminary findings from a comparative study of Australia and South Africa*

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## Abstract

The Goods and Services Tax (GST) or Value Added Tax (VAT) is evidently the most rapidly spread tax in the world history. It accounts for a reasonably high proportion of tax revenue in both developing and developed countries. Despite the rapid widespread and importance of GST/VAT around the globe, there is a paucity of studies concerning GST/VAT avoidance. This paper attempts to contribute to this small body of literature by investigating the comparative GST/VAT avoidance approaches in Australia and South Africa. The two chosen countries are contrasting in many interesting ways. The VAT in South Africa has a much longer history. It was first introduced on 29 September 1991 while the Australian GST commenced almost nine years later on 1 July 2000. At the same time, the Australian Taxation Office (ATO) was formally established under the *Tax Administration Act* (*Cth*) *1953* whereas the South African Revenue Service (SARS), South Africa's tax collecting agency, has a much shorter history, dating back to the *South African Revenue Service Act 34* of 1997, and more recently, the *Tax Administration Act 2011*. These historical differences and current similarities of the two tax systems provide an interesting case for a comparative analysis.

Because GST/VAT avoidance has a very wide scope and thus cannot be covered in a single paper, it is necessary to confine the paper to some relevant aspects of the GST/VAT. There are various different approaches that can be employed to study GST/VAT planning. They range from a pure legal analysis to a survey of tax practitioners or an examination of GST/VAT audits. In this paper, we propose to study GST/VAT avoidance approaches in Australia and South Africa by classifying GST/VAT disputes by categories and then analysing GST/VAT disputes in which avoidance has been alleged.

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## 1. Introduction and Context

The Goods and Services Tax (GST) or Value Added Tax (VAT) has been the most significant development in taxation around the world over the past 60 years. First implemented in France in 1954,[1] the expansion of GST/VAT was limited to less than 10 countries in the late 1960s. It is now one of the most important sources of government revenue, raising on average 20 per cent of tax revenue, in more than 160 countries worldwide.[2] The only major exception is the United States (US) although most States in the US impose a broad-based retail sales tax at widely varying rates.

The rapid widespread of GST/VAT in both the developed and developing worlds has been due to a number of different factors. They include

- GST/VAT's powerful revenue yield
- its ability to raise revenue in a neutral and transparent manner, especially with respect to international trade
- its pro-growth property relative to income tax[3]
- its self-policing property against tax evasion under the credit-invoice method
- trade grouping requirements
- pressure from multinational institutions on developing economies
- population ageing and the erosion of the income tax base over time.

On the negative side, GST/VAT is a complex tax or at least more complex than a revenue-equivalent narrow-based sales tax. In terms of legislation, GST/VAT tends to be longer and more complex than a narrow-based sales tax. More importantly, the operating costs (sum of tax compliance and tax administrative costs) of a GST/VAT can be very substantial. This is

[1] A Charlet and J Owens, "An international perspective on VAT" (2010) 59(12) *Tax Notes International* 943.
[2] Organisation for Economic Co-operation and Development (OECD), *Consumption Tax Trends* 2014 (OECD Publishing, Paris) 18.
[3] See Charlet and Owens, n 1 at 944.

because (i) GST/VAT is a transaction-based tax that requires comprehensive record keeping and periodical reporting and remitting,[4] and (ii) under a GST/VAT there are numerous business taxpayers acting as tax collectors on behalf of the government. In fact, for small and medium enterprises, there is evidence that their GST/VAT compliance costs have exceeded those of income tax.[5]

Against this back ground, the aim of this paper is to report some preliminary findings of an ongoing, comparative study of GST and VAT avoidance in Australia and South Africa respectively. While the paper focuses on GST/VAT cases where avoidance has been alleged, it also investigates the extent of GST/VAT disputes in Australia and South Africa. Note that this paper is not concerned with GST/VAT evasion or frauds.

The two chosen countries are contrasting in many interesting ways. The VAT in South Africa has a much longer history. It was first introduced on 29 September 1991 while the Australian GST commenced almost nine years later on 1 July 2000. The Australian Taxation Office (ATO), Australia's federal tax administrative agency, has its root in the *Land Tax Act 1910* (*Cth*) and is formally established under the *Tax Administration Act* (*Cth*) *1953*. On the other hand, South African Revenue Service (SARS), South Africa's tax collecting agency, has a much shorter history, dating back to the *South African Revenue Service Act 34* of 1997, and more recently, the *Tax Administration Act 2011*. Yet, as shown in the next section, the Australia's GST is very similar to South Africa's VAT. Thus, historical differences and current similarities of the two taxes provide an interesting case for a comparative analysis.

The remainder of the paper is organised as follows. Section 2 presents a brief overview of the GST in Australia and VAT in South Africa to prepare the ground for the discussions that follow. Section 3 discusses relevant conceptual issues and sketches out the research approach

[4] C Sandford, M Godwin, P Hardwick and M Butterworth, *Costs and Benefits of VAT* (Heinemann, London, 1981).

[5] P Lignier, C Evans and B Tran-Nam, "Tangled up in tape: The continuing plight of the small and medium enterprise sector" (2014) 29(2) *Australian Tax Forum* 217, 239.

to be employed in this article. Section 4 examines the incidence of GST/VAT disputes in Australia and South Africa. In Section 5, the anti-avoidance approaches to GST/VAT by the legislatures and the courts are compared. Section 6 concludes.

## 2. Brief Overview of GST/VAT

### 2.1 Australia

Australia's GST has a long period of gestation and a difficult birth. The idea of a broad-based consumption tax was first proposed in the 1975 Asprey Report.[6] After several false starts,[7] the GST was finally introduced by the Howard-led Federal Coalition Government with effect on 1 July 2000. Although he has always favoured a GST,[8] it was suggested that the timing of the GST introduction was not one of Prime Minister Howard's own choosing. The successful introduction of the GST, the centrepiece of the A New Tax System (ANTS) package,[9] was due to several key factors such as the 1997 High Court decision,[10] support for (or at least lack of opposition against) the GST by the social welfare lobby, and an acceptable package of compensation. However, due to a compromise with the Australian Democrats (a minor Party in the Senate), basic food was excluded from GST, representing a fundamental deviation from the Coalition Government's original ANTS package. The 11 September

[6] Australian Commonwealth Taxation Review Committee, *Full Report 31 January 1975* (Australian Government Publishing Service, Canberra, 1975) 35.

[7] These refer to the ill-fated Treasury's Option C for a Retail Sales Tax; see National Tax Summit, *Record of Proceedings* (Australian Government Publishing Service, Canberra, 1985); John Hewson's Fightback Package; see Liberal Party of Australia, *Fightback!* (1991, 1992); and the Coalition's loss at the 'unlosable' 1993 federal election.

[8] After the 1993 debacle, Mr Howard ruled out a GST as part of the Coalition's policy for the next (1996) federal election. However, it has always been his intention to introduce such a tax. As early as 1984 he wrote "I have long believed that the single most important reform which is needed to the Australian taxation system is the broadening of the taxation base towards a greater reliance on general consumption taxes with a corresponding reduction in our current over-reliance on personal taxation as a source of revenue." See JW Howard, "Taxation reform" (1984) 1(1) *Australian Tax Forum* 12.

[9] This package sought to replace the then federal Wholesale Sales Tax and a number of indirect Stat taxes by the GST.

[10] *Ha v New South Wales* (1997) 189 CLR 465. In this case, a slim majority of the High Court ruled that licence fee was in fact an excise, which Australian States are barred from imposing.

attacks and the Tampa incident returned the Coalition Government to office in 2001, effectively ending any serious opposition to the GST.

The legislation was passed on 28 June 1999 as *A New Tax System (Goods and Services Tax) Act 1999* and came to effect on 1 July 2000. Australia's GST is based on the destination principle, and utilises the invoice credit method with both cash and accrual basis of accounting. It has a relative wide base (but has a number of zero rates for health and medical care, educational supplies and child care, food and beverages, and some others), a standard rate of 10 percent and a reasonably low registration threshold (currently annual turnover of A$75,000 or about R810,000). Any change to the base and standard rate of GST requires unanimous agreements between the Federal and the State Governments.[11]

GST is now the third highest tax in Australia, behind individual income tax and company income tax. In 2013–14, the latest year on which tax statistics are available, the net GST accounted for A$51,738 million or about 16 per cent of all (federal) taxes collected by the ATO plus customs.[12] Using OECD data, Australia's GST as a percentage of total tax revenue increased steadily from 11.1 per cent in 2000 to a peak of 13.9 per cent in 2009, and then declined to 12.1 per cent in 2012.[13] Relative to GDP, Australia's GST varied within a narrow range from 3.3 to 3.9 percent during the period 2000–12.[14] Under the current arrangements, the entire GST revue is distributed to the States and Territories according to the principle of horizontal fiscal equalisation.[15]

The Australian GST Act is quite massive in size. Its length is in excess of 850 pages, significantly longer than the now repealed *Wholesale Sales Tax (WST) Act*. The GST Act is

[11] Council of Australian Governments, *Intergovernmental Agreement (IGA) on Federal Financial Relations*, Clauses A4c(i) and A6.
[12] See Australian Taxation Office (ATO), *Taxation Statistics 2013–14* (ATO, Canberra, 2016) Table 2.
[13] See OECD, n 2 at 40.
[14] See OECD, n 2 at 39.
[15] See Council of Australian Governments, n 11 at Part 4, Clause 25.

difficult to read with an estimated Flesch readability index of about 40.3.[16] This value indicates that a university education is required to read the Act.

The GST is regressively burdensome to Australian businesses. A recent Australian study indicated that, for micro, small and medium businesses (annual turnover not exceeding A$100 million) in 2011–12, the mean annual compliance time on GST was 68.8 hours or more than 37 percent of that on all taxes.[17] However, for large Australian businesses (annual turnover exceeding A$250 million) in the same fiscal year, GST only accounted for 9 percent of total external costs and nearly 16 percent of total internal staff compliance costs.[18]

### 2.2 South Africa

As early as 1968 the Franzsen Commission recommended that a greater emphasis should be placed upon indirect taxes in South Africa (Franzsen Commission, 1968). As a result of this recommendation, South Africa first introduced a selective sales tax (upon mostly luxury goods) which was followed by a general sales tax (as it was called) in 1978 (Hanlon, 1986). One of the recommendations of the Margo Commission in 1987 was the introduction of a Value Added Tax (VAT) (Margo Commission, 1987). Resulting from this VAT was introduced in the Republic of South Africa on 30 September 1991 (Botha, 2015: 1) and is largely based on New Zealand's *Goods and Services Tax (GST) Act* (141/1985).

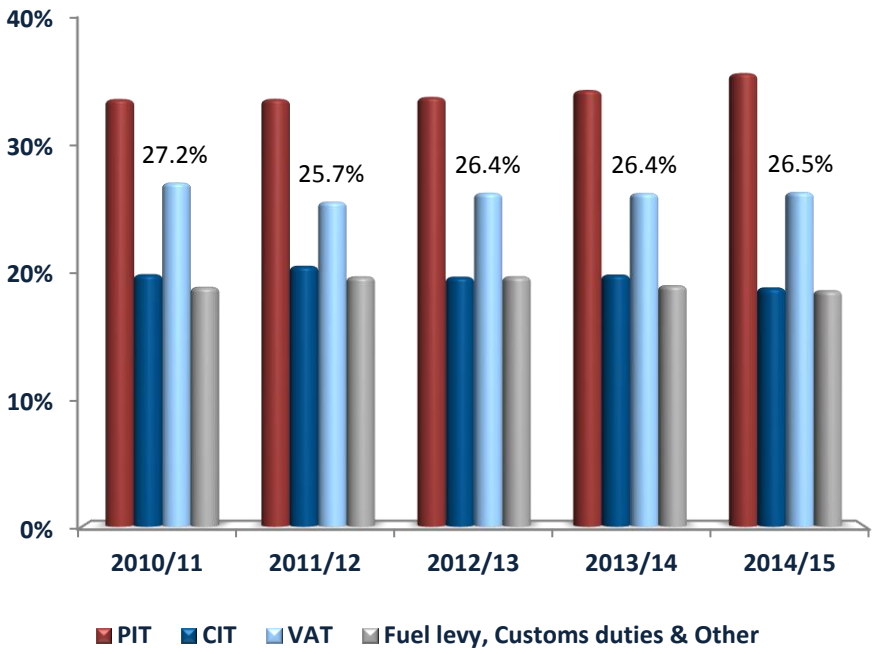
This VAT was initially introduced at a single standard rate of 10 percent and was increased in 1993 to 14 percent. It applied the destination principle and used the invoice credit method and accrual basis of accounting. (In very limited instances and only with the approval of SARS the cash basis of accounting may be used.) After the initial implementation the only significant changes in structure of the VAT act were:

[16] G Richardson and D Smith, "The readability of Australia's Goods and Services Tax legislation: An empirical investigation" (2002) 30(3) *Federal Law Review* 475, 481.
[17] See Lignier, Evans and Tran-Nam, n 5 at 239.
[18] C Evans, P Lignier and B Tran-Nam, "The tax compliance costs of large corporations: An empirical inquiry and comparative analysis" (2016) 24(4) *Canadian Tax Journal*, forthcoming.

- The inclusion of most fee-based financial services in 1996 following a report by the Katz Commission),
- an increase of the compulsory registration threshold (from R300,000 to R1 million) in 2008; and
- the voluntary registration threshold (from R20,000 to R50,000) in 2010.

The latest statistical data from SARS presented in Figure 1 indicates that VAT accounted for approximately 26 percent of the total tax revenue in South Africa and has also consistently since 2011 been the second largest contributor to tax revenue.

**Figure 1: Distribution of tax revenue by type, South Africa, 2010/11 to 2014/15**




Source SARS (2015), *Tax Statistics*.

A vendor for the purposes of the VAT is any person who is registered for VAT or is required to be registered for VAT. The VAT has a compulsory registration threshold of R1,000,000 taxable supplies over a period of 12 months or R50,000 taxable supplies a month in the case of persons supplying electronic services from outside South Africa. Persons can also register

voluntarily if they made, or it is expected that they will make, taxable supplies in excess of R50,000 over a period of 12 months.

Section 7 of the *VAT Act* which is the basic charging provision stipulates that supplies of goods and services by a vendor in the course or furtherance of an enterprise, as well as imported goods by any person, are taxable at 14 percent. Imported services by any vendor are also taxable to the extent that they are imported for purposes other than making taxable supplies. Imported services by non-vendors are taxable by way of self-assessment. Certain supplies of goods or services are also zero-rated (Section 11) or exempt (Section 1 and Section 12) from VAT.

### 2.3 Comparison

It is apparent that Australia's GST and South Africa's VAT are highly similar in terms of registration threshold, tax base and tax rate. This is not surprising because they were both based on the New Zealand's GST model. However, it is interesting to note that it took South Africa only four years from the release of the Margo Commission Report to introduce its VAT whereas, in Australia, a quarter of century elapsed before the Asprey's recommendation was implemented. This confirms the much more substantial inertia of the Australian tax system and the general opposition of public support to a new tax. Further, while GST is a federal tax, the States (and Territories) in Australia not only receive the GST revenue in full but also play an important role in their ability to influence the GST base and rate, Also, the relative importance of the tax is higher in South Africa (26.5 percent) than in Australia (about 12 percent), reflecting South Africa's wide base and higher rate, and the presence of State taxes in Australia.

## 3. Conceptual Issues and Research Approach

Given the objective of the paper, it now seems appropriate to clarify a number of relevant concepts (such as GST/VAT planning and avoidance) and then proceed to discuss the research approach to be employed. Note that GST/VAT evasion and fraud lie outside the scope of this paper.

### 3.1 GST/VAT planning and avoidance

GST/VAT impacts on many operational aspects of businesses regardless whether they are registered for GST/VAT or not. The rules are generally complex and, in some cases, there may be frequent changes in the legislation. Businesses thus need to engage in GST/VAT planning to ensure compliance with the requirements of the law and to optimise their business outcomes. The latter objective may include maximising business profit or minimising net tax burdens (broadly defined to include both the tax itself and the net compliance costs associated with it).

A distinction is often drawn between acceptable and aggressive GST/VAT planning. Acceptable GST/VAT planning refers to planning that is consistent with both the literal interpretation of the words of the law and the policy intention of the law. On the other hand, aggressive GST/VAT planning (avoidance) refers to planning that is consistent with both the literal interpretation of the words of the law but not with the policy intention of the law.

GST/VAT avoidance thus refers to the use of lawful means by businesses (typically with the assistance of professional tax advisers) to decrease their net GST/VAT payable below the level intended by tax policy. It usually involves the exploitation of loopholes in the legislation to the advantage of taxpayers. In the context of GST/VAT there are three broad categories of tax avoidance:

- Characterisation of supply: making use of different treatments or rates between different types of supply;
- Timing of supply: bringing input GST/VAT credit forward or delaying output GST/VAT; and
- Registration threshold: making supplies GST/VAT exempted by staying outside the GST/VAT system.

GST/VAT avoidance contributes to tax non-compliance which leads to losses in tax revenue. A recent study in 2013 for the European Union (EU) suggested that the average VAT gap[19] for EU countries in 2011 was approximately 193 billion Euros or 20 per cent of the actual VAT revenue collected.[20] The 2013 study also showed that VAT avoidance appears to rise when VAT rates are increased, at least in countries with relatively weaker institutions for enforcement and compliance, in particular during recession.

The boundary between acceptable GST/VAT planning and GST/VAT avoidance can be fuzzy in practice. While the distinction discussed above is academically helpful, it may be of limited use in practical situations. As indicated in Section 5 of the paper, avoidance for purposes of this paper means a breach of the specific and general anti-avoidance rules enshrined in the tax law. This is a different meaning to that ascribed to avoidance earlier.

### 3.2 Research approach

As mentioned in the introductory section, there not many studies on GST/VAT avoidance by tax academics, practitioners or administrators. This may be so for a number of different reasons. First, it may be possible that that GST/VAT provides less opportunities for tax planning and avoidance than income tax. Second, especially in Australia, GST is a relatively new tax so that in the early stage the ATO was feeling its way around the GST and might not

[19] VAT gap includes unintentional errors, avoidance, evasion and frauds.
[20] See OECD, n2 at 29.

have enforced the rules as rigorously as it does today. As a result of these two reasons, there are not many GST/VAT disputes in which tax avoidance has been alleged. Third, as pointed out below, a comprehensive study of GST/VAT is very labour intensive as it requires a thorough analysis of GST/VAT laws and law amendments.

To study the incidence of GST/VAT avoidance there are a number of complementary, alternative approaches:

- A theoretical analysis of the GST/VAT rules to determine whether the literal meaning of the law matches its policy intents. In this sense, it can be interpreted as a 'formal' analysis of GST/VAT avoidance. Since the GST/VAT acts tend to be quite massive, a section-by-section analysis is not only prohibitively time-consuming but also likely to be overtaken by events.
- An analysis of GST/VAT disputes where avoidance is alleged: such a study examines the interaction of the law and the conduct of taxpayers. In this sense, it can be interpreted as an 'effective' analysis of GST/VAT avoidance. Given a relatively small number of cases of GST/VAT disputes where avoidance is alleged, this is perhaps the most feasible approach.
- An analysis of GST/VAT law amendments: such approach assumed that, despite a general anti-avoidance enshrined in the law, some of the frequent changes in the law are brought about by taxpayers' tax planning conduct. This is a potentially very labour-intensive study because there can be a massive number of changes to the GST/VAT law. Further, it is also difficult to determine whether a change in the law is caused by a change in policy, the law is not working well in practice, or the conduct of taxpayers.
- An analysis of GST/VAT audit records: this kind of approach is typically not possible due to the issue of data confidentiality.

- Surveys of business taxpayers, professional tax advisers and tax administrators: such surveys can be utilised to collect information on the conduct of taxpayers in complying with GST/VAT requirements and the role played by professional tax advisers in the process. This represents a very time-consuming and expensive approach.

In our study, we adopt a mixed-mode research methodology. First, we examine the number of GST/VAT disputes by classifying them into a number of categories. Second, we compare the approach of the Australian legislature and courts to schemes intended to avoid a GST/VAT liability with that operating in South Africa. These two phases are reported in Sections 4 and 5 respectively.

## 4. GST/VAT Disputes

### 4.1 Australia

GST disputes may arise at any stage after the disagreement between the tax administrators and business taxpayers. In Australia GST disputes are classified into four broad categories:[21]

a. Complaints;

b. Objections to reviewable rulings;

c. Disputes as to facts or the application of GST legislation by a taxpayer as matters are being assessed (by the ATO); and

d. Objections to assessments (Commissioner adjustments).

Categories b and d generally refer to statutory rights, while a and c relate to administrative due process. Item c can also be the subject matter of court proceedings. The remedies of a and c are thus founded in administrative due process largely recognised in common law principles. Categories b and d are slightly different as they are based on rights established

[21] Commissioner of Taxation, *In Search of Solutions* (Speech delivered at the Administrative Appeals Tribunal and the ACT Bar Association seminar, Canberra, 26 August 2009).

under the relevant statutes which allow, and set out the process for, review of decisions and the precise terms and extent of objections to assessment. They are thus statutory rights, but their scope and effect can overlap with rights available under administrative due process. Of these categories only b to d could result in litigation.

Apart from the ATO's internal review (before the dispute is taken further) and the Administrative Appeals Tribunal (AAT), the Federal Court of Australia (Federal Court) and ultimately the High Court of Australia (High Court) have jurisdiction to finalise substantive federal GST disputes.

The taxpayer may refer the objection decision to either the AAT or the Federal Court. In principle, it is the taxpayer's choice and the ATO has no say in which review body is chosen. As an administrative review body, the AAT is fundamentally and structurally different from the Federal Court, which is a judicial review body.

The AAT, being an administrative body, is able to "stand in the shoes" of the Commissioner of Taxation and re-examines all powers and discretions available which are relevant to the objection decision. In its determination of tax disputes, the AAT may affirm, set aside, vary, remit or dismiss the objection decision while the Federal Court can confirm or vary the decision.[22]

Until recently, the taxation division of the AAT was divided into the Tax Appeals Division (TAD) and the Small Taxation Claims Tribunal (STCT). These bodies differ substantially in terms of jurisdiction, application fee, confidentiality, conduct and timeliness.[23] The STCT ceased to exist from 1 July 2015 and applications that were in the STCT are now dealt with in the Taxation & Commercial Division of the AAT. Table 1 summarises the GST cases lodged and finalised by the TAD and STCT from 2003-04 to 2014-15.

[22] *Taxation Administration Act 1953* (Cth), s 14ZZP.

[23] For a more detailed discussion refer to B Tran-Nam and M Walpole, "Access to tax justice: How costs influence dispute resolution choices" (2012) 22(1) *Journal of Judicial Administration* 1, 10.

**Table 1: Number of GST cases lodged and finalised at the AAT, 2003-04 to 2014-15**

| Year | Tax Appeals Division | | Small Taxation Claims Tribunal | |
|---|---|---|---|---|
| | Lodged | Finalised | Lodged | Finalised |
| 2014-15 | 97 | 112 | 2 | 4 |
| 2013-14 | 103 | 169 | 3 | 2 |
| 2012-13 | 149 | 142 | 3 | 3 |
| 2011-12 | 162 | 91 | 3 | 4 |
| 2010-11 | 97 | 131 | 3 | 2 |
| 2009-10 | 99 | 109 | 2 | 2 |
| 2008-09 | 98 | 256 | 4 | 6 |
| 2007-08 | 182 | 246 | 6 | 4 |
| 2006-07 | 258 | 152 | 4 | 4 |
| 2005-06 | 240 | 128 | 3 | 4 |
| 2004-05 | 145 | 91 | | |
| 2003-04 | 103 | 41 | | |
| **Total** | **1,733** | **1,668** | **33** | **35** |

Sources: AAT, *Annual Reports* (AAT, Sydney, various years).

The data presented in Table 1 suggests two things. First, the number of GST disputes at the AAT level seems to be broadly stable in recent years. The relatively very large number of cases received by the AAT from 2005-06 to 2007-08 may reflect a possible change in the ATO's enforcement approach from education/consultation to auditing after the first five years of the GST. Second, the STCT played a minor and declining role in resolving GST disputes, possibly leading to its eventual demise.

GST disputes at the AAT level predominantly involve individual taxpayers (sole traders and partners) and arise out of GST audits – either under-paying output GST or over-claiming input GST credits. There was seemingly only one case which could be classified as an avoidance case.[24] This case (*VCE*) will be further discussed in the next section. In the case *Sunraysia Harvesting Contractors Pty Ltd*,[25] which arose from an ATO audit, the

[24] *VCE and Commissioner of Taxation* [2006] AATA 821

[25] *Sunraysia Harvesting Contractors Pty Ltd and Commissioner of Taxation* [2015] AATA 764.

Commissioner concluded taxpayer's arrangements were sham and thus disallowed input GST credits, and the AAT concurred.

**At the Federal Court and High Court levels**

Table 1 summarises the GST cases decided at the Federal Court and High Court from 2003-04 to 2014-15. A summary of these cases is available from the authors upon request.

**Table 2: Number of GST cases decided at the Federal Court and High Court, 2003-04 to 2014-15**

| Year | Federal Court | High Court |
|---|---|---|
| 2014-15 | 2 | 1 |
| 2013-14 | 5 | |
| 2012-13 | 5 | 2 |
| 2011-12 | 7 | |
| 2010-11 | 7 | 1 |
| 2009-10 | 11 | |
| 2008-09 | 4 | 1 |
| 2007-08 | 4 | 1 |
| 2006-07 | 1 | |
| 2005-06 | 4 | |
| 2004-05 | 2 | |
| 2003-04 | | |
| **Total** | **52** | **6** |

Sources: Federal Court, *Annual Reports* (Federal Court, Canberra, various years) and High Court, *Annual Reports* (High Court, Canberra, various years).

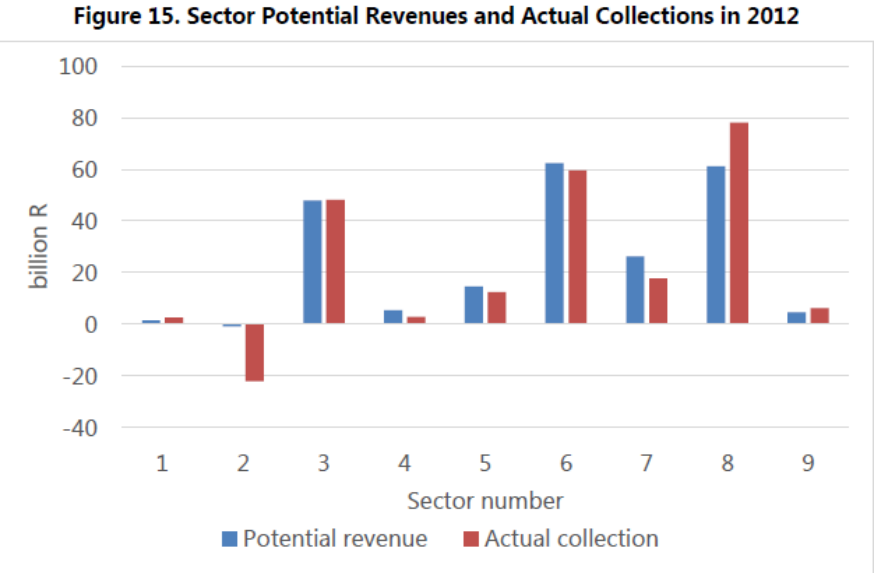
Due to high litigation costs the number of GST cases at the Federal and High Courts are very few, especially at the High Court level. The most common issues in the Federal cases relate to the margin scheme[26] and to residential/commercial accommodation.

### 4.2 South Africa

Badenhorst (2016) indicated that the South African VAT legislation has a broad base with relative few exceptions and as a result the compliance to the VAT Act is relatively high. Evidence of this is found in a study commissioned by the Davis Tax Committee to the IMF (IMF 2016). This study indicated that the VAT gap in South Africa is very low (approximately 6 percent) in comparison to international standards. If referred to Figure 2 it is also evident that the potential revenue from VAT and the actual VAT collections in the manufacturing and the wholesale/retail/catering and accommodations sectors are very close to each other. Within the financial services sector the actual collection is even more than the potential collection. The VAT input claimed in the mining sector is high but that can most be probably ascribed to capital spending.

[26] The margin scheme in Division 75 of the GST Act enables developers to reduce their GST liability if they bring themselves within the provisions of the division to charge GST on the difference between the acquisition cost of the land and the selling price instead of on the total consideration.

**Figure 2: Potential VAT revenue vs. Actual VAT collection by sector, South Africa, 2012**




1. Agriculture, forestry and fishery
2. Mining and quarrying
3. Manufacturing
4. Electricity, gas and water
5. Construction
6. Wholesale and retail trade, catering and accommodations
7. Transport, storage and communications
8. Financial intermediation, insurance, real estate and business services
9. Community and social services

Badenhorst (2016) also attests that that there are very little if any VAT schemes making the rounds or agents selling to take advantage of loopholes in the VAT Act. In his experience businesses are generally very reluctant to consider or to implement any tax schemes, including VAT schemes.

Naturally there are tax agents who go around and do VAT reviews on a contingency basis, i.e. where there is a percentage fee on any savings they find. Badenhorst's examination of these reviews is that it focuses on input credits that are not claimed, where VAT was charged where it was not payable and of course where the agent attempts to calculate a favorable allocation base for partially taxable entities. These reviews and savings are usually within the

scope of the legislation, and do not set structures or create transactions to exploit loopholes. Any new structures and transactions with tax implications must normally be approved by the audit committee or risk committee, and will not normally be implemented for tax purposes.

Considering the VAT court decisions of the past few years, there are no 'schemes' that were attacked. The cases mostly dealt with the interpretation and application of the VAT Act. There were of course a number of criminal cases where people were prosecuted for outright fraud. However, this is criminal cases and does not involve schemes. Although there are an increase in the number of tax disputes these do not deal with tax schemes or saving structures that are opposed. It has more to do with SARS that has become more aggressive in its collection process and cases where taxpayers oppose the SARS interpretation of the VAT Act.

Since the inception of the VAT Act in 1991 to 2015 there were 72 court cases that dealt with VAT, and the number of court cases per year will be presented in Table 3.

**Table 3: Number of VAT cases at court, South Africa, 1991 to 2015**

| Year | Number of VAT cases |
|---|---|
| 2015 | 2 |
| 2014 | 1 |
| 2013 | 3 |
| 2012 | 5 |
| 2011 | 4 |
| 2010 | 2 |

| | |
|---|---|
| 2009 | 1 |
| 2008 | 1 |
| 2007 | 2 |
| 2006 | 1 |
| 2005 | 3 |
| 2004 | 1 |
| 2003 | 3 |
| 2002 | 2 |
| 2001 | 4 |
| 2000 | 6 |
| 1999 | 8 |
| 1998 | 2 |
| 1997 | 3 |
| 1996 | 6 |
| 1995 | 3 |
| 1994 | 3 |
| 1993 | 1 |
| 1992 | 0 |
| 1991 | 1 |
| Total | 72 |

Source:http://www.sars.gov.za/About/SATaxSystem/Pages/Tax-Statistics.aspx

From Table 3 it is evident that apart from 1996, 1999, 2000, 2001 and 2011, the number of court cases that deal with related issues is below 3. The average for the 25 years is 2.88 cases

per year which also indicates the occurrence of VAT related tax cases is not very high. If we take these court cases and classify them into:

1. Characterisation of VAT supply
2. Timing of the supply
3. Registration/Registration threshold
4. Output tax related matter
5. Claiming of input tax
6. Administrative matter

**Table 4: Distribution of VAT cases at court, South Africa, 1991 to 2015**

| Category | Number | Percentage |
|---|---|---|
| Characterisation of VAT supply | 16 | 22.22 |
| Timing of the supply | 0 | 0.00 |
| Registration/Registration threshold | 1 | 1.39 |
| Output tax related matter | 12 | 16.67 |
| Claiming of input VAT | 22 | 30.56 |
| Administrative matter | 21 | 29.17 |
| Total | 72 | 100.00 |

Source:http://www.sars.gov.za/About/SATaxSystem/Pages/Tax-Statistics.aspx

## 5. GST/VAT General Anti-Avoidance Approaches

This section compares the approach of the Australian legislature and courts to schemes intended to avoid a GST/VAT liability with that operating in South Africa. This first part of the section considers the Australian approach. It is followed by a discussion of the South African approach.

### 5.1 Australia

The legislature has granted the Commissioner of Taxation in Australia (the Commissioner) an important tool when dealing with GST schemes which are found to breach the provisions of Division 165 (General anti-avoidance rule) of *A New Tax System (Goods and Services Tax) Act* 1999 (the GST Act).[27] As mentioned previously, avoidance for purposes of this paper means a breach of the specific and general anti-avoidance rules enshrined in the Australian tax laws.

There are a number of preliminary factors or limitations that should be considered before we embark on a consideration of Division 165. First, if other parts of the GST Act nullify a scheme, Division 165 plays no role. It is only when a scheme is otherwise in compliance with the GST Act but some unintended GST benefit is obtained that Division 165 has any role to play.[28] By the same token if a scheme is found to be a sham the Commissioner will have no need to invoke Division 165.

Second, the Division is only directed at the taxpayer that is 'avoiding' the payment of GST and not third parties. There are provisions in the *Taxation Administration Act* 1953 which are directed at those entities that are described as promoters of avoidance schemes. This paper does not consider the role of promoters.

Third, this paper does not concern itself with the tools and methods adopted by the courts to interpret legislation other than to state that sections 15AA and 15AB *Acts Interpretation Act* 1901 require the courts to adopt a purposive approach in their interpretation of statutes and that there are no special rules of interpretation when regard is had to tax statutes.

Fourth, as there are many similarities between the general anti-avoidance provisions for income tax and GST, cases on the former are instructive when determining the ambit of the GST provisions.

The next part of this sub-section considers, in broad overview, the operation of Division 165.

[27] All references in this sub-section are to GST Act unless otherwise stated.
[28] See for example CM Black, "Tax avoidance scheme penalties and purpose" (2016) 31(1) *Australian Tax Forum* 1, 2.

**Operation of Division 165**

The Rules contained in Division 165 require the existence of four elements. They are:

1. A scheme which is broadly defined;[29]
2. A GST benefit obtained by the 'avoider.' Such a benefit can be constituted by either delaying payment of GST, or paying a smaller amount of GST than required; or obtaining a greater refund than the GST provides; or the acceleration of a refund.[30]
3. The drawing of an objective conclusion based on a valuation of various factors referred to in the GST Act that the sole or dominant purpose of that entity or another entity getting a GST benefit from the scheme; or the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly.[31] In an income tax context Brennan J noted thatt: In terms, s. 260 avoids as against the Commissioner any arrangement which has the effect of avoiding tax, whether or not tax avoidance is a purpose of the arrangement and irrespective of the means by which tax is avoided.[32]

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[29] A scheme is defined in section 165-10(2) as follows.

> A ***scheme*** is:
>
> (a) any arrangement, agreement, understanding, promise or undertaking:
>
> (i) whether it is express or implied; and
>
> (ii) whether or not it is, or is intended to be, enforceable by legal proceedings; or
>
> (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

[30] Section 165-10(1).

[31] Section 165-5 (10(c)). Dominant means the ruling, prevailing or most influential purpose: *Federal Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34; (1996) 186 CLR 404; (1996) 141 ALR 92; (1996) 71 ALJR 81 (3 December 1996), 416.

[32] *Federal Commissioner of Taxation v Gulland ("Three Doctors case")* [1985] HCA 83; (1985) 160 CLR 55 [2].

4. The Commissioner may, if it is reasonable to conclude that the GST benefit has been obtained, issue a declaration to set aside such benefit.

Points one, three and four above are considered below.

**Scheme**

It is essential that a scheme be found to exist from which the GST benefit flows. As the High Court has noted in an income tax context:

> But the question in every case must be whether a tax benefit which the Commissioner has purported to cancel is in fact a tax benefit obtained in connection with a scheme and so susceptible to cancellation at the discretion of the Commissioner.[33]

The Commissioner is not limited to the choice of only one version when seeking to rely on a scheme. He may rely in the alternative on both a wider description of a scheme and also a narrower scheme as meeting the requirements of the legislation.

From the wide definition of scheme and having regard to the nature and purpose of GST an entity can get a GST benefit from a scheme having regard to part only of the scheme whereas in relation to Part IVA, the relevant benefit must arise by reference to the whole of the scheme.[34] Thistleton concurs with this view and states:

> Unlike the Pt IVA provisions, the GST benefit can arise from a single transaction which is part of the scheme. This reflects the nature of GST as being a transaction-based tax. This does not mean that part of the scheme is a scheme itself, but it appears that Div 165 can be applied to part of a scheme and not

[33] *Federal Commissioner of Taxation v Peabody* [1994] HCA 43 [24]. See also *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16.
[34] Philip Looney, *Keeping on the Right Side-Anti-avoidance, Taxpayer Alerts and Promoter Penalties* (Paper presented to the 2010 Taxation Institute of Australia GST Intensive Conference, Four Seasons Hotel, Sydney, 10 September 2010.).

> necessarily to the full scheme. The scheme can be found in individual steps or, more often, in a combination of steps.

In *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, the New Zealand Supreme Court held that:

> Parliament must have envisaged that the way a specific provision was deployed would, in some circumstances, cross the line and turn what might otherwise be a permissible arrangement into a tax avoidance arrangement ... Thus tax avoidance can be found in individual steps or, more often, in a combination of steps. Indeed, even if all the steps of an arrangement are unobjectionable in themselves, their combination may give rise to a tax avoidance arrangement ... [The GAAR's] function is to prevent uses of the specific provisions which fall outside their intended scope in the overall scheme of the Act. Such uses give rise to an impermissible tax advantage which the Commissioner may counteract.[35]

Prior to the enactment of the GST Act the High Court had noted that:

> But Pt IVA does not provide that a scheme includes part of a scheme and it is possible, despite the very wide definition of a scheme, to conceive of a set of circumstances which constitutes only part of a scheme and not a scheme in itself. That will occur where the circumstances are incapable of standing on their own without being "robbed of all practical meaning"[36]

The above judgment in *Peabody* has been put into question by a later decision of the High Court in *Hart* where the various judges, in delivering their judgments, suggested the definition of scheme was far broader than as described above. For example Gummow and Hayne JJ in their joint judgment said:

> [T]hat "scheme" is defined, in s 177A (1), in terms that may not always permit the precise identification of what are said to be all of the integers of a particular "scheme". So much follows from the inclusion, within the statutory meaning, not only of arrangements that are not and are not intended to be enforceable by legal proceedings, but also of "any scheme, plan, proposal, action, course of action or course of conduct". This definition is very broad. It encompasses not only a series of steps which

[35] Cyrus Thistleton, Division 165 in Perspective, (2016) 19(4) *The Tax Specialist.*
[36] Ibid [28].

> together can be said to constitute a "scheme" or a "plan" but also (by its reference to "action" in the singular) the taking of but one step.[37]

The forgoing supports the views of Looney and Thistleton above.

**The objective test**

The factors a court must consider in determining whether the purpose or effect test is met are:

> (a) the manner in which the scheme was entered into or carried out;
>
> (b) the form and substance of the scheme, including:
>
> (i) the legal rights and obligations involved in the scheme; and
>
> (ii) the economic and commercial substance of the scheme;
>
> (c) the purpose or object of this Act, the *Customs Act 1901* (so far as it is relevant to this Act) and any relevant provision of this Act or that Act (whether the purpose or object is stated expressly or not);
>
> (d) the timing of the scheme;
>
> (e) the period over which the scheme was entered into and carried out;
>
> (f) the effect that this Act would have in relation to the scheme apart from this Division;
>
> (g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme;

[37] *Commissioner of Taxation v Hart* [2004] HCA 26 [43].

(h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a ***connected entity*** ) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;

(i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;

(j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length;

(k) the circumstances surrounding the scheme;

(l) any other relevant circumstances.[38]

An in-depth consideration of these factors is not undertaken in this paper.[39]

Some of these factors may point in one direction and others in a different direction. It is the evaluation of all these factors that ultimately determines whether there is a finding that the necessary purpose or effect is present.[40] Form and substance are probably the most important factor to be considered although in appropriate circumstances other factors may take precedence. Further the fact that there is a rational commercial decision as to why a particular transaction is structured in a particular way does not mean that the anti-avoidance provisions may not also be found to operate. As the High Court unanimously noted:

> A particular course of action may be, to use a phrase found in the Full Court judgments, both "tax driven" and bear the character of a rational commercial decision. The presence of the latter

[38] Section 165-15(1).
[39] The issues that should be considered when dealing with each factor in making this determination are considered in *VCE and Commissioner of Taxation* [2006] AATA 821; and Cyrus Thistleton, Division 165 in Perspective, (2016) 19(4) *The Tax Specialist.* Thistleton is a member of the Australian Taxation Office.
[40] *Re Mary Genevieve Peabody v Commissioner of Taxation* [1993] FCA 74 [46] per Hill J.

> characteristic does not determine the answer to the question whether, within the meaning of Pt IVA, a person entered into or carried out a "scheme" for the "dominant purpose" 162.of enabling the taxpayer to obtain a "tax benefit".[41]

The GST Act contains two significant qualifications which are considered below.

**The qualifications**

The first is that:

> A GST benefit that the avoider gets or got from a scheme is not taken, for the purposes of paragraph [165-5](1)(b), to be attributable to a choice, election, application or agreement of a kind referred to in that paragraph if:
>
> (a) the scheme, or part of the scheme, was entered into or carried out for the sole or dominant purpose of creating a circumstance or state of affairs; and
>
> (b) the existence of the circumstance or state of affairs is necessary to enable the choice, election, application or agreement to be made.[42]

This was included in the legislation to ensure that the exercise of an explicit choice, or other alternative, under the relevant laws would not trigger the operation of the anti-avoidance provisions. Prior to the inclusion of this provision into the GST Act the issue of the right of taxpayers to make such choices under the GST Act was considered by the High Court in *Unit Trend*.[43] Broadly the facts were the following:

- The taxpayer was the representative member of a GST Group;

[41] *Federal Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34; (1996) 186 CLR 404; (1996) 141 ALR 92; (1996) 71 ALJR 81, 416.
[42] Section 165-5(3).
[43] *Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16* .

- Another member had commenced development of 3 residential towers on land acquired by it;
- This company sold 2 of the partially completed towers to different members of the group as going concerns;
- These latter entities then completed the works and sold the units by means of the margin scheme to end consumers utilising the uplift in value from the going concern transactions as reflecting the acquisition cost and as such paid a lower GST rate than would have been the case if the original cost of land was taken into account in working out the margin on which GST was calculated.[44]

The High Court unanimously held that the GST benefit obtained was not occasioned by any choices the taxpayer had made. The court stated:

> But the GST benefit in question was not attributable to those choices. The GST benefit got from the scheme reflected the amount agreed to be paid to Simnat as the consideration for the transfer of Towers II and III, which in turn reflected the increase in the value of the properties by reason of the work done upon them. That GST benefit was not something to which Unit Trend was entitled as a matter of the exercise of any statutory choice. It was what the majority in the Full Court characterised as "a commercial election or choice" involved in the transfer of the properties to Blesford and Mooreville in accordance with the scheme *after* the substantial increase in the value of the properties. This brought about the uplift in the intermediate cost base from which the GST benefit was got.[45]

The High Court then made reference to the subsequent insertion into the GST Act of section 165-5(3) and said:

> The insertion of s 165-5(3) in Div 165 cannot be regarded as an acknowledgement by the Parliament that, without it, Div 165 would not have encompassed a situation such as that of present concern. Section 165-5(3) ensures the application of Div 165 to the case where the scheme was entered into for

[44] The margin scheme in Division 75 of the GST ACT enables developers to reduce their GST liability if they bring themselves within the provisions of the division to charge GST on the difference between the acquisition cost of the land and the selling price instead of on the total consideration.
[45] Ibid [58].

> the purpose of generating the statutory choice relied upon by the avoider. Section 165-5(1)(b) may apply without the need to invoke s 165-5(3) where the statutory choice arises as a step in a scheme. There may be cases where the avoider has not manipulated circumstances to confect the occasion for the making of a statutory choice, but nevertheless the GST benefit can be seen to be not attributable to that choice. Having regard to the Tribunal's findings as to the terms of the scheme here in question, this is such a case. On those findings, which were not challenged on the appeal to the Full Court or in this Court, it is clear that s 165-5(3) was not necessary to bring this GST benefit within Div 165.[46]

The effect of this judgment, as Thistleton notes, is that:

> if the taxpayer creates circumstances and a state of artificial affairs, which ultimately provides the GST benefit, then the scheme is not taken, for the purposes of Div 165, to be attributable to a choice, election, application or agreement of a kind referred to in that provision.[47]

The second qualification provides that:

> An entity can get a GST benefit from a scheme even if the entity or entities that entered into or carried out the scheme, or a part of the scheme, could not have engaged economically in any activities:
>
> (a) of the kind to which this Act applies; and
>
> (b) that would produce an effect equivalent (except in terms of this Act) to the effect of the scheme or part of the scheme; other than the activities involved in entering into or carrying out the scheme or part of the scheme.[48]

The qualification arises because of the terms of section 165-10(1) which requires a comparison to be drawn between the effect of the scheme and what otherwise could have been expected to have occurred but for the scheme. This is generally referred to as a 'counter factual.' The qualification has the effect that even if the taxpayer could not have entered into

[46] Ibid [67].
[47] Cyrus Thistleton, Division 165 in Perspective, (2016) 19(4) *The Tax Specialist.*
[48] Section 165-10(3).

another transaction other than the scheme the provisions of the division are capable of operation.

**The Commissioner's Determination**

Once the Commissioner had found all the factors that bring Division 165 into play he/she may issue a determination to negate the GST benefit the avoider gets or got from the scheme.[49] If this occurs and the Commissioner considers that another entity (the loser**)** gets or got a GST disadvantage from the scheme; and the Commissioner considers that it is fair and reasonable that the loser's GST disadvantage be negated or reduced, he/she may

> make a declaration (under this section) stating either or both of the following:
>
> (a) the amount that is (and has been at all times) the loser's * net amount for a specified tax period that has ended;
>
> (b) the amount that is (and has been at all times) the amount of GST on a specified * taxable importation that was made (or is stated in the declaration to have been made) by the loser.[50]

**Cases on Division 165**

There have been three cases where Division 165 of the GST Act has been in issue. The primary case is that of *Unit Trend*[51] mentioned above. The second is *VCE*[52] and the third was *McDonald's*.[53]

[49] Section 165-40.
[50] Section 165-45(3).
[51] *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16.
[52] *VCE and Commissioner of Taxation* [2006] AATA 821.
[53] *McDonald's Australia Ltd v Commissioner of Taxation* [2008] FCA 37.

*Unit Trend* has previously been considered. In *VCE* associated entities sought to take advantage of timing differences having regard to the manner in which they accounted for GST. The Vendor of the land was registered on a cash basis which meant that it only accounted for GST on monies actually received. The purchaser was registered on an accruals basis with the result it could claim input tax credits on the total consideration. The terms of the agreement were that the purchaser would pay a small deposit and the balance was payable many years in the future. The vendor paid nominal GST to the Commissioner on the receipt of the deposit and the purchaser claimed the total GST component of the consideration. The AAT found there had been a breach of the Division 165 and upheld the Commissioner's determination.

In *McDonald's* the Commissioner had inter alia made a declaration under section 165-40 to set aside a GST benefit and issued an amended assessment in terms of that determination. The taxpayer challenged this decision in the federal court. The taxpayer applied for summary judgment contended that on the facts contended for by the Commissioner as to the nature of the scheme and alleged GST benefit obtained he had no reasonable prospect of succeeding. This application was rejected. Gyles J., in dismissing the application for summary judgment, noted that:

> Section 14ZZO of the Administration Act provides that the applicant has the burden of proving that the declaration should not have been made or should have been made differently. An application for summary judgment by a party which bears the burden of proof can be properly described as ambitious, particularly where the proceeding is at an early stage – no evidence has been filed, there has been no discovery, no subpoenas have been issued and where there are no formal pleadings. It must also be

borne in mind that the Commissioner has no first hand knowledge of the underlying facts and circumstances.[54]

## 5.2 South Africa

Within the South African VAT environment Section 73 is the general anti-avoidance provision and although very similar it is wider in ambit than section 103 of the Income Tax Act 58 of 1962.[55] [56] This provision enables SARS to determine a VAT liability in respect of qualifying schemes and this will be the case where all the following requirements are present—

- there must be a 'scheme' (this includes any transaction, operation, scheme or understanding, whether enforceable or not, including all steps and transactions by which it is carried into effect);
- the scheme must have been entered into or carried out and it must have had the effect of granting a tax benefit to any person;
- when regard is had to the substance of the scheme—
  - it must have been 'entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of a tax benefit'; or
  - it must have 'created rights or obligations which would not normally be created between persons dealing at arm's length';

[55] Deloitte VAT Handbook C Beneke , Deloitte & Touche 2012

[56] VAT in South Africa AP de Koker BCom (Cape Town) December 2011

- it was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.

A 'tax benefit' for these purposes includes—

- any reduction in the liability of any person to pay VAT; or
- any increase in the entitlement of any vendor to a refund of VAT; or
- any reduction in the consideration payable by any person in respect of any supply of goods or services; or
- any other avoidance or postponement of liability for the payment of any tax, duty or levy imposed by the VAT Act or by any other law administered by the Commissioner. [57]

When all four elements listed above are present SARS shall determine the liability for any VAT and the amount thereof, as if the scheme 'had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such tax benefit'. Therefore, if the scheme is not abnormal, section 73 cannot be applied, even if the outcome of the scheme is the provision of a tax benefit which was the vendor's main objective. Likewise , if a tax benefit is not the vendor's sole or main objective section 73 cannot be applied even if the scheme has the effect of providing a tax benefit and is abnormal, since tax avoidance which one of the essential requirements is not present.[58]

A scrutiny of how the South African courts have interpreted section 73 in practice revealed the following:

[57] Section 73 of the VAT Act.

[58] VAT in South Africa AP de Koker (Cape Town) December 2011

In the case of *Amor van Zyl Trust v Kommissaris van Binnelandse Inkomste* it was determined that section 73 is not a tax-levying provision, but that SARS was nevertheless entitled to issue an assessment to recover any tax payable in consequence of the application of section 73 in terms of section 31(1)(b).[59] This principle was also presented in in ITC 1686 (62 SATC 433).[60]

The court in *Mpande Foodliner CC v Commissioner for SARS and Others* (63 SATC 46) also had to consider, inter alia, whether the vendor in that case had entered into a tax avoidance scheme.

"*The applicant was a general dealer that was also running a school feeding scheme for the Mpumalanga Provincial Government. It had been requested by the Provincial Government to take over the running of the scheme, when a related company Tiventonke (Pty) Ltd (T), which had previously been running the scheme, went into liquidation. The applicant's owner (Mr. Mpande) had been T's managing director, and the applicant itself was one of a number of shareholders in T. In order to recover VAT owed by T, SARS issued a notice under Section 47 on the Mpumalanga Provincial Government, ordering the latter to pay over to SARS monies owed to the applicant. When challenged by the applicant, SARS contended, inter alia, that the transfer of the running of the school feeding scheme from T to the applicant was part of a tax avoidance scheme. On review, the court held that the impression formed by SARS, namely that the transfer of the running of the school feeding scheme to the applicant was part of a tax avoidance scheme, was entirely erroneous and clearly an unreasonable assumption on SARS' part."*

[59] 1995 (4) SA 1007, 58 SATC 77.
[60] 1994 ITC 1686, 62 SATC 433

The court concluded that the sole or main objective in transferring the scheme was so as to ensure its continuation; that the transfer itself was conducted at arm's length; and that there was nothing abnormal in the manner in which it was transferred (via a cession) [61].

In Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging and Others (63 SATC 393), the court held that SARS has no obligation to provide a taxpayer a hearing prior to determining the existence of a tax avoidance scheme[62].

With regard to the test to determine whether a relevant transaction had been entered into 'in a manner which would not normally be employed for bona fide business purposes', the court in ITC 1686 (62 SATC 433) held that in this case the means used to effect the transaction had to be tested against those normally used by buyers and sellers of immovable property. Evidence had been led by SARS that the means adopted by the taxpayer were not those normally used for bona fide business purposes and the court accordingly held that the requirements of Section 73 as to abnormality of means had been satisfied[63].

The taxpayer in *Weybro Boerdery BBK v Kommissaris van Binnelandse Inkomste* (62 SATC 464 sought to claim a notional input tax deduction in respect of an inflated purchase price. The taxpayer had purported to acquire property for R16,350,000, whereas its market value at the time of the purchase was substantially less than the stated purchase price. The reason the stated purchase price was substantially more than the current market price was that the purchase price was only to be paid 25 years later. A promissory note was issued for the sum of R16,350,000 payable 25 years hence. The court had no hesitation in holding that the

[61] Mpande Foodliner CC v C:SARS and Others 2000 (4) SA 1048 (T), 63 SATC 46.
[62]Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging and Others 63 SATC 393.
[63]ITC 1686 62 SATC 433.

transaction fell foul of section 73 on the basis that the use of a promissory note in these circumstances was not a normal method of acquiring property.[64]

Similarly in ITC 1828 (70 SATC) the taxpayer acquired second hand goods at a grossly inflated price in order to benefit from the notional input tax credit and it was held that the taxpayer had failed to discharge the onus of showing that the Commissioner wrongly concluded that this was a scheme to obtain a tax benefit within the meaning of section 73.[65]
In ITC 1806 (68 SATC) a vendor had fraudulently zero-rated its sales, claimed a refund and deregistered. SARS then unsuccessfully attempted to apply the anti-avoidance provisions in order to attach the funds of a related company.[66]

### 5.3 Comparison of Australia and South Africa

Subject to the qualifications set out below and from a perusal of the cases where the anti-avoidance provisions have been utilised by the revenue authorities in each country it would appear that the courts would in the majority of cases reach the same decision.
The first qualification is that the test in the South Africa legislation that:

- when regard is had to the substance of the scheme—
  - it must have been 'entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of a tax benefit'; or
  - it must have 'created rights or obligations which would not normally be created between persons dealing at arm's length';

[64] *Weybro Boerdery BBK v Kommissaris van Binnelandse Inkomste* 62 SATC 464.

[65] ITC 1828 70 SATC

[66] ITC 1806 (68 SATC)

prima facie would not be met in circumstances analogous to those that occurred on the facts of *Spotless* where the scheme was a genuine business transaction carried out at arm's length yet on the wording of the Australian legislation there was a an objective dominant purpose in avoiding tax tested objectively by reference to the eight factors mentioned in the legislation. From the wording of the South Africa legislation it would appear that the avoidance provision may not operate even though a tax benefit was obtained for the reasons that:

- It was genuine arm's length business transaction;
- It was a bona fide commercial transaction; and (possibly more importantly)
- The transaction was not entered into solely or mainly to obtain the tax benefit.

It is suggested the reference to main purpose would be given an equivalent meaning to the word 'dominant' in Australia as meaning "the ruling, prevailing or most influential purpose."[67] In *Spotless* the taxpayer deposited funds overseas to achieve the best after tax return. If it had deposited the monies in Australia it would have received a higher rate of interest but tax would have reduced that return to a lesser amount than achieved overseas due to the favourable tax treatment of the interest derived on the deposit. As the majority in the High Court noted:

> A particular course of action may be, to use a phrase found in the Full Court judgments, both "tax driven" and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question whether, within the meaning of Pt IVA, a person entered into or carried out a "scheme" for the "dominant purpose" of enabling the taxpayer to obtain a "tax benefit".

It is submitted that it is only because of the objective enquiry that must be held in Australia that a dominant purpose was found. It must, as the High Court noted, be a dominant purpose within the meaning of the Part IVA (the anti-avoidance provisions). It is arguable; it is put, no

[67] See above n 30.

higher, that in South Africa without an equivalent objective test a dominant purpose to obtain a VAT benefit may not be found.

Further if a taxpayer arranges its affairs so as to have a particular structure so as to take advantage of a particular choice given in the South Africa VAT legislation avoidance may not be found to be present. In this regard it is noted the High Court in Australia found avoidance in the *Unit Trend* case even though, at face value, the taxpayer availed itself of choices available to it. Of course the distinguishing feature of *Unit Trend* is that the court found that the gain was not derived from making choices but rather from a contrived and artificial series of transactions that gave rise to the GST benefit. Possibly a South Africa court may come to a similar conclusion with such an exaggerated set of facts.

Save for the forgoing it seems both the Australian and South Africa courts have similar views and approaches to avoidance even though the legislation is drafted in different terms.