Comparison of the Substantive Aspects of Impermissible Tax Arrangements in South Africa’s General Anti-Avoidance Rule and the Principal Purpose Test in the OECD Model (2017)

This article compares the substantive aspects of impermissible tax arrangements in the South African general anti-avoidance rule and the Principal Purpose Test set out in article 29 of the OECD Model (2017), with emphasis on an evaluation of the examples in the Commentary on Article 29 of the OECD Model (2017).

1. Introduction

In South Africa, legislative measures have been implemented to counter tax avoidance. These measures are referred to collectively as the general anti-avoidance rule (GAAR). The GAAR is currently set out in section 80A-L of the Income Tax Act 58 of 1962 (ITA). It is not a taxing measure nor does it relate to the taxes imposed by the ITA. Rather, it is a device that suppresses mischief that lies behind avoidance schemes, thereby protecting the charge to tax. The GAAR carries out this task by preventing the recognition of transactions, which have as their main or sole purpose the avoidance of tax that exhibit a list of various features, such as a lack of commercial substance or which results in an abuse or misuse of the provisions of the ITA.

Internationally, an important device that appears to have some similarity with the GAAR is the Principal Purpose Test (PPT) set out in article 29 of the OECD Model (2017). The PPT is intended to make treaty benefits unavailable for arrangements or transactions that have as their principal purpose the obtaining of such a benefit, which is not in line with the object and purpose of the relevant treaty provision.

The focus of this article is to ask the following question: How can South African courts apply the PPT, against the background of the examples set out in the Commentary on Article 29 of the OECD Model (2017) and the South African case law in its GAAR (also encompassing in its previous versions)?

2. The South African GAAR

2.1. Section 80A-G of the ITA

Section 80A-G of the ITA sets out South Africa’s GAAR. The relevant parts of the section read as follows:

- An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and:
  - (a) in the context of business
    - (i) ... or purpose of the relevant treaty provision.

2.2. Components of the GAAR

2.2.1. Opening comments

There is limited South African case law on section 80A of the ITA. However, there is a multiplicity of case law on the previous versions of the GAAR. The author, therefore, relies on the case law that dealt with substantively similar provisions.

2.2.2. Interpretation of the GAAR

There is limited South African case law on section 80A of the ITA. However, there is a multiplicity of case law on the previous versions of the GAAR. The author, therefore, relies on the case law that dealt with substantively similar provisions.

2.2.3. Interpretation of the GAAR

The South African courts have developed a “correct approach” to statutory interpretation, as decided by the Supreme Court of Appeal of South Africa (SCASA) in Natal Joint Municipal Pension Fund (2012), which requires the following to be taken into account in this respect:

- the text itself;
- the context;
- the context.

2. See the decision of the South African Appellate Division (AD) in ZA: AD, 11 Sept. 1975, Glen Anil Development Corporation Ltd v. Secretary for Inland Revenue, 1975 (4) SA 715 (A) 626.
4. Id., at art. 29.
5. OECD Model Tax Convention on Income and on Capital: Commentary on Article 29 of the OECD Model (2017), Treaties & Models IBFD.
2.2.3. What are impermissible tax avoidance arrangements?

A tax avoidance arrangement is defined widely in section 80L of the ITA as being:

any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof, and includes any of the foregoing involving the alienation of property.

An avoidance arrangement is an arrangement undertaken for a tax benefit. It should be noted that this applies to the steps in a single transaction. Although the overriding scheme might be for a commercial purpose, a single step in the transaction could be for a sole or main purpose of obtaining a tax benefit.

2.2.4. Is the sole or main purpose test subjective or objective?

It has been argued that the test to determine a taxpayer’s purpose requires an objective assessment to be undertaken in applying the test. This position can be seen from the wording of section 80A of the ITA in referring to the purpose of the arrangement, and not to the taxpayer that devised the arrangement. The removal of the subjective test is also supported by the same reasoning in the South African Revenue Service (SARS) draft comprehensive guide to the GAAR.

The apparent removal of the subjective test appears to position the new GAAR to circumvent the problem of obtaining a tax benefit. It should be noted that this applies to the steps in a single transaction. Although the overriding scheme might be for a commercial purpose, a single step in the transaction could be for a sole or main purpose of obtaining a tax benefit.

The Appellate Division (AD) in Secretary Gallagher (1978) stated that the test in section 103 of the ITA “is undoubtedly a subjective one”. The AD reasoned that the wording drew a clear distinction between purpose and effect, highlighting a subjective enquiry. The word “purpose” relates to the reason behind the transaction, while the word “effect” relates to what was achieved by the transaction.

It has been argued by Dachs (2013) that, when this situation is compared against the current GAAR in section 80A of the ITA, the provisions are similar, and should be interpreted in the same light. The GAAR refers to a sole or main purpose as well as the result of the arrangement, which can be contrasted to “effect”. In Newton (1958), the Privy Council (PC) following the decision of the High Court of Australia (HCA) stated that the effect of the transaction means the “end accomplished or achieved”, that is the “result of an action”.

Here, the author leans towards the approach by Dachs, as the wording of the new GAAR refers to the purpose of the transaction. However, in the author’s opinion, it is necessary not to forget that transactions are man-made, and a purpose can only exist in the mind of the taxpayer, which, therefore, should be the starting point. On analysis of section 80 of the ITA, it could also be argued that the section also calls for this. Section 80G of the ITA allows for the presumption of a transaction with a purpose of obtaining a tax benefit, unless the taxpayer can prove otherwise, reasonably considered in light of the relevant facts and circumstances. Accordingly, it can be argued that the subjective intention of the taxpayer could also fall into the circumstances that should be taken into account by a court in an analysis of the facts.

A court would have to undertake a test as to what was provided by the taxpayer against the facts in question. Such an action should not be taken as an objective test, as the taxpayer’s intention would remain the centre of the enquiry. The court would merely undertake an analysis to determine if there is any “impunity” behind the purpose. This action would require a taxpayer to state its intention, which would be evaluated against the facts of the case to determine if there is any inconsistency. In most cases, mere statements that were not reinforced by any evidence would be insufficient to discharge this onus, and sway the court.
Although the SARS’s draft comprehensive guide states that there has been a move to an objective test, in the SARS’s Revised Proposals on Tax Avoidance in South Africa and Section 103, it was stated that it was never the aim to remove completely the intention of the taxpayer from being taken into account. What this situation in effect reveals is that the position of the courts on previous versions of the GAAR is merely being confirmed, and that there has been no change in the way the purpose test is to be dealt with.20

2.2.5. What does sole or main purpose mean?

The meaning behind the term “a sole or main purpose” is not clear from the ITA, as it is undefined there. The word “main” indicates that, by implication, there is also a subsidiary part to the transaction. The question is how it should be determined as to what is the main or subsidiary purpose underlying that transaction. This question is important, as most transactions that are undertaken contain various commercial purposes and also result in a tax benefit.

In Lourens Estate (1966), the Appellate Division (AD) held that it is a purely quantitative measure of 50% or more. This approach was followed in King (1947), where the AD stated that “mainly” conveys the idea of dominance.

2.2.6. What is a tax benefit?

Tax is defined as a tax or a penalty imposed in terms of the ITA. A tax benefit is defined widely by the ITA to include any avoidance, postponement or reduction of any liability for tax. In King, the AD further stated that this must be taken to refer to the avoidance of anticipated liabilities for tax. In other words, it can only be a current or future benefit which the taxpayer must have anticipated. This state of affairs was confirmed by the Appellate Division in Smith (1964).

In order to determine the relevant situation, courts pose a question enquiring into the taxpayer’s notional state of affairs. This question asks whether a taxpayer would have obtained a tax benefit had the income accrued (or had not accrued in relation to expenses) to them had the transaction been structured differently.

The recent case of Sasol Oil (2018)27 dealt with the term “tax benefit”. The Sasol group had undergone a restructuring that resulted in back-to-back transactions for the supply of crude oil from a group company in the Isle of Man to a group company in London, which then went to a group company in South Africa. In an alternative argument, the SARS relied on the use of the previous GAAR (the transactions had taken place when it was still in effect) on the basis that the back-to-back transactions had been carried out with the sole or main purpose of obtaining a tax benefit. It was argued by the SARS that the tax benefit was that the residence-based taxation under the controlled foreign company (CFC) rules had been avoided.28 The CFC rules provided an exemption where a CFC purchased goods within its country of residence from unconnected persons.29 Accordingly, the oil should have been sold directly to Sasol in South Africa.

The old GAAR’s use of the term “a tax benefit” mirrors the definition of a tax benefit in the current GAAR, and, therefore, is insightful. In determining whether there was a tax benefit, the SCASA stated that it was necessary to ascertain: “what liability for tax Sasol Oil had avoided by entering into the impugned transactions”. In deciding this, the SCASA stated that, in order to obtain a tax benefit, being the avoidance of tax, it was necessary to have anticipated such liability, and avoided it through such transaction. In doing so, the SCASA asked the question of whether Sasol would have had a tax benefit had it not entered into the transactions. The SCASA found that the CFC exemption applied, as Sasol did not hold participation rights in the group company in the Isle of Man. Even if it had purchased the oil directly from it, tax would not be charged under the exemption in the CFC rules. In other words, a tax benefit is not a literal concept but a conceptual one. It requires the postulation of a scenario to be measured against the actual behaviour of the taxpayer.30 Pidduck (2020) has highlighted that, in determining whether a tax benefit was obtained, it is possible to consider arguments in relation not only to historical transactions of the entity, but also alternative transactions that would have taken place, i.e. what should have taken place.31

20. Van Schalkwyk & Geldenhuys, supra n. 13, at p. 79.
23. Sec. 1 ITA.
24. Id.
29. Id., at p. 178.
30. Sasol Oil (2018), supra n. 27.
31. Clegg, supra n. 9 and De Koker, supra n. 26.
### 2.2.7. When can a taxpayer be considered to misuse or abuse the ITA?

This provision has been inspired by the Canadian misuse or abuse test, which is a twofold test. The first stage of the test is an objective analysis into the purpose of the provision that is supposedly being misused or abused by the taxpayer. The second stage is a factual determination of whether the transaction is consistent with such a purpose. If it is not consistent with such a purpose, it can be said that the transaction is misusing or abusing a particular section of the ITA.

It is not clear whether misuse and abuse are the same concept. The draft bill asked the question of whether the actions “would frustrate the purpose of any provision of this Act” (emphasis added). The move from the use of a single word to two words raises the question of whether this was intentional. However, it is unlikely that the words “misuse or abuse” are to be interpreted differently, as both terms denote a concept of wrongful use. Accordingly, it could be argued that the legislature used synonyms to promote clarity in the concept.

### 2.2.8. The commercial substance test

One of the second legs of the provision that must be met, as stated in section 2.2.7., is that the transaction must lack commercial substance, in whole or in part, taking into account the provisions of section 80C of the ITA. A lack of commercial substance is defined as a transaction that results in a significant tax benefit, but that does not have a significant effect on the business risks or net cash flows. First, what constitutes “significant” is not clear, as it is not defined in the ITA. It has been argued that the term should be taken to mean material and relevant in relation to the taxpayer’s financial affairs. Furthermore, the reference to the business risk criteria leads to difficulty, as, at times, it is often difficult to measure. This situation is even more so that many business-related transactions hedge business risk, which may limit or completely offset the risk.

The SARS’ draft comprehensive guide states that commercial substance is lacking generally where:


35. SARS, supra n. 10. See also De Koker, supra n. 26.

36. SARS, supra n. 10. See also De Koker, supra n. 26.

37. Z.A. Draft Revenue Laws Amendment Bill (2006), at 68.


40. Id.

41. L. Olivier, D.M. Davis & G. Urquhart, Juta’s Income Tax, 80C-2 (LexisNexis 2009). See also Clegg, supra n. 9, at sec. 26.3.5.

42. De Koker, supra n. 26, at ch. 19.39.


44. Section 80C of the ITA sets out the characteristics of transactions that lack commercial substance to aid in identifying them. In this context, section 80C(2)(a) of the ITA reads as follows:

(a) the legal substance or effect of the avoidance arrangement as a whole is inconsistent with, or differs significantly from, the legal form of its individual steps.

Section 80C(2)(a) uses the term “legal substance or effect”, which is not defined in the ITA. However, the SARS draft comprehensive guide states that the effect of this term should be taken as meaning “economic, commercial or practical effect”. Furthermore, it is not clear whether this position incorporates a legal substance-over-form doctrine. According to the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006, it expands the common law doctrine of substance over form.

It has been argued that this concept of substance over form should be interpreted in line with the legislation. Accordingly, the situation requires an analysis of whether the true intention of the parties is reflected in the agreement, and whether the taxpayer remained insulated from virtually all economic risk, while, at the same time, creating a carefully crafted impression to the contrary. Further factors listed in section 80C of the ITA regarding the GAAR are round trip financing, accommodating a tax-indifferent party, or elements that have the effect of offsetting or cancelling out each other.

### 2.3. The legal relationship between the GAAR and tax treaties

It can be questioned whether the GAAR can be used as a tool to deny treaty benefits. This issue was expressly addressed at a general level for the first time in the Commentaries on the OECD Model (2003). In particular, it was stated that tax treaties should not be viewed as excluding or restricting the use of anti-abuse provisions, as the latter determines what facts give rise to a tax liability
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that is not addressed in tax treaties and, therefore, are not affected.49

According to the Commentary on Article 1 of the OECD Model (2017), this reasoning remains being that domestic anti-abuse rules can be used to deny treaty benefits.50 This view is also supported by the Final Report on Action 6 of the OECD/G20 BEPS Project, in which it is stated that a GAAR could be applied where a person tries to circumvent the application of a tax treaty.51 The OECD Commentary on Article 1 (2017) goes on to state that there would be no conflict between a tax treaty and anti-abuse laws. First, a tax treaty may allow specifically the application of domestic law.52 Second, the application of many treaty provisions depends on domestic law, and, in that sense, domestic law affects how the treaty provisions are applied.53 Third, it is stated in the Commentary on Article 29 of the OECD Model (2017) that there is no conflict with the PPT, as this confirms the guiding principle.54 However, these remarks seem to be simplistic. It is possible that a conflict may arise between a domestic GAAR and the PPT, for example, in relation to wording or different policies in respect of tax avoidance that are tolerated. The author agrees with the opinion of Chand (2018) that, where conflicts do arise, a tax treaty should prevail in line with article 26 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”) (1969),55 which holds the state to account in application of the treaty in line with pacta sunt servanda.56 Furthermore, it can be questioned whether domestic law should be applied in a treaty context, as, in effect, it is a unilateral application of law, which may result in double taxation.57 However, it could be said that such an argument is broad, as tax treaties usually say very little about how tax law in a domestic context should be administered.

Another area for concern with states having the option to apply domestic law in an international context is that it could be regarded as giving a state an opportunity to select the provision that is the most favourable in that context, thereby giving states wide discretion. However, it would also be necessary to consider a specific country’s legislation. In Canada, for example, the definition of tax benefits under the GAAR expressly includes a reference to benefits that could be derived under a tax treaty.58

In the South African context, it could be argued that the broad definition of impermissible tax arrangements noted previously in this section is wide enough to allow the GAAR to apply to tax treaties.59 In this regard, it was concluded by the Davis Tax Committee Interim Report that the South African GAAR could apply to tax treaties, as the courts rely on the Commentaries on the OECD Model.60 In the case of Glen Anil (1975),61 it was stated that the GAAR is more of an administrative provision to protect the right to charge tax instead of being a measure to impose tax. Consequently, it can be argued that the imposition of the GAAR is not charging tax contrary to a tax treaty. According to Cilliers (2018), no conflict would arise to the extent that the invocation of the GAAR would not involve a deviation from the true facts of the case.62 The reasoning behind this is that the SARS has been given wide powers under section 80B of the ITA in relation to the GAAR, for example, to re-allocate amounts of gross income that otherwise could cause a party to not qualify as a recipient under a tax treaty.63

3. The PPT

3.1. Introductory remarks

Article 29(9) of the OECD Model (2017) makes provision for the PPT, in stating that:

Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining the benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting the benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.

3.2. The interpretation of tax treaties based on the OECD Model

International law provides guidance in determining the purpose of the provisions of the treaty, to be found in the Vienna Convention (1969), which applies to an international agreement between states that has the aim of regulating treaties entered into by states. Although South Africa is not a signatory to the Vienna Convention (1969), the SCASA has accepted that articles 31 to 33 reflect customary law, and are binding on South Africa.64

Section 3 of the Vienna Convention (1969) deals with the interpretation of treaties, in respect of which articles 31 and 32 are relevant. Article 31(1) of the Vienna Convention (1969) states that in interpreting a treaty, such an action must be done in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

49. Pidduck, supra n. 47.
53. Id. at para. 73.
57. Id. at p. 123
60. Id.
61. Glen Anil (1975), supra n. 2.
63. Id.
context and in the light of its object and purpose. Context includes a treaty’s preamble and annexes. It also includes any subsequent agreements and practices between the states. Once this has been undertaken, recourse may also be had to supplementary materials either to confirm the meaning arrived at or to assist in interpretation in cases of ambiguity. Some authors have argued that the Commentaries on the OECD Model should fall under context, but this view has been rejected by others. Although the Vienna Convention (1969) does not refer expressly to the OECD Commentaries as supplementary material, the OECD Commentaries would at the very least be relevant in respect of this article. Accordingly, the Commentaries on the OECD Model (2017) are used in this regard.

### 3.3. Was the transaction undertaken with a principal purpose of obtaining a treaty benefit?

#### 3.3.1. Opening comments

The first component makes it necessary to take all relevant factors into account, in terms of a reasonable consideration, to determine whether the obtaining of a benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.

### 3.3.2. What is meant by one of the principal purposes?

The Commentary on Article 29 of the OECD Model (2017) requires an objective analysis of the aims and objectives of all of the persons involved in putting a transaction into place or being a party to the transaction. The OECD Commentary on Article 29 (2017) further states that the effect of the transaction should not be used to determine its purpose, unless the transaction can only reasonably be explained by the benefit obtained.

Does this test require the undertaking of a subjective or an objective consideration in determining the principal purpose? At first glance, it appears that it is a subjective test. For instance, the Commentary on Article 29 of the OECD Model (2017) refers to the aims and objects of all of the persons involved in the transaction. It appears that other authors have endorsed such an approach.

However, this is not so clear, as the Commentary on Article 29 of the OECD Model (2017) makes further references to an objective test that must be performed. Some authors have argued otherwise to the effect that this test is results based. When the wording used is considered, it refers to the purpose of the transaction and not to the taxpayer. This situation would seem to indicate that what the taxpayer intended is not the focus of the enquiry. It also has a requirement that it is “reasonable to conclude”. This situation would indicate that the test is an objective one.

It has also been argued that the use of the word “purpose” instead of “intention” indicates a results-based approach. In the New Zealand case of Plimmer (1957), the PC had to determine the meaning of the taxpayer’s “purpose for selling” certain property in regards to a domestic taxing provision. It was stated that, although it is not possible to have a purpose without an intention, indicating interconnectedness, the two terms are not synonymous. Accordingly, it could be said that the purpose of the transaction requires a more objective analysis.

The meaning behind the phrase “one of the principal purposes” should not be taken to entail that a dominant or sole purpose is required. Consequently, there may be multiple purposes behind a transaction or an arrangement. However, it has also been argued that, if one of the principal purposes is to obtain a treaty benefit, such a situation would satisfy the requirements of this article.

In determining what one of the principal purposes was, it is necessary to determine whether obtaining the benefit was a principal reason for entering into the arrangement and whether it justified entering into the transaction or arrangement. The use of the term “one of the principal purposes” has been critiqued as being grammatically incorrect, as it is impossible to have more than one principal purpose. This situation can be contrasted with that

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66. Id., at art. 31(3).
70. Id.
71. Id., at para. 178.
75. Zahra, supra n. 73; Gomes, supra n. 73; Duff, supra n. 73; and Elliffe, supra n. 73.
76. Zahra, supra n. 73; Gomes, supra n. 73; Duff, supra n. 73; and Elliffe, supra n. 73.
77. NZ, PC, 2 Dec. 1957; Plimmer v. Commissioner of Inland Revenue, NZ, PC, 2 Dec. 1957 [1958] NZLR 147. See also Elliffe, supra n. 73.
78. Lang, supra n. 72, at para. 997.
79. Zahra, supra n. 73.
81. Id., at para. 181. See also Zahra, supra n. 73.
of the South African GAAR, which refers to the main purpose, of which there can only be one. As a result, it could be argued that, as long as one of these purposes was to obtain a tax benefit, the PPT would be met. However, where an arrangement or transaction is inextricably linked to a commercial activity, without being driven by the considerations of obtaining a tax benefit, it is unlikely that this requirement would be met. This position seems to imply that, in applying the PPT, regard must be had to whether there is any commercial substance underlying the transaction.

3.3.3. Does the PPT implicitly imply a business reality test?

As the Commentary on Article 29 of the OECD Model (2017) states that a purpose can only be determined by having recourse to all of the circumstances surrounding an arrangement, it can be questioned whether there is an overall business reality test incorporated into the PPT as a relevant circumstance. The reference to the business reality test here can be taken to mean that the arrangement is similar to the commercial reality of the situation, and has commercial substance to it.

It is argued here that such a test is an aspect of the PPT. First, the Commentary on Article 29 of the OECD Model (2017) states that:

> where an arrangement is inextricably linked to a core commercial activity, and its form has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit.

In essence, the OECD Commentary on Article 29 (2017) appears to create a safe harbour. It does this by implying that as long as there is commercial substance, it can be assumed that the PPT has not been met. Second, this situation can be seen in the numerous examples found within the OECD Commentary on Article 29 (2017), which rely on whether there is any commercial substance behind the decision that was taken. In Example C of the OECD Commentary on Article 29 (2017), RCO is a company in State R, which is looking to expand its business operations and needs to choose between various countries. RCO clearly chooses to undertake operations in a State S as there is the benefit of the State R-State S Tax Treaty. However, the OECD Commentary on Article 29 (2017) says that the principal purpose here is actually the expansion of RCO and the location because of low manufacturing costs, i.e. a legitimate business purpose, and, therefore, the PPT is not met. Accordingly, in Example C, the economic substance is an important factor to be taken into consideration in determining whether or not the PPT has been met.

These examples are important, as there is no clear requirement of what would constitute a business purpose, which could result in further uncertainty when applying the PPT. As can be seen for this discussion, commercial reasons that drive the arrangement assist in making this determination.

It should be noted that there is clearly some literal divergence with regard to the wording of the Commentary on Article 29 of the OECD Model (2017) and article 29(9) of the OECD Model (2017) itself on this point. At first glance, it is not possible to find the words referencing a business reality test in article 29(9) of the OECD Model (2017). However, the OECD Commentary on Article 29 (2017) adds further clarification in this regard, which makes sense, as transactions that have no commercial substance are likely to have been undertaken for reasons of obtaining a tax benefit. However, it should also be noted that the terms are not synonymous, and it is possible to have both a principal purpose to obtain a tax benefit and commercial substance. For instance, the OECD Commentary on Article 29 (2017) refers to a company with a shareholding of 24%, which increases its shareholding to 25% to obtain a treaty benefit. The OECD Commentary on Article 29 (2017) states that this should be permitted, even though the action was done principally to obtain a treaty benefit, as it was a genuine transaction, i.e. it has substance to it. Accordingly, in the author’s view, this is only one factor to consider, albeit a major factor, in determining whether the PPT has been satisfied.

3.3.4. Arrangement or transaction?

The Commentary on Article 29 of the OECD Model (2017) gives meaning to these terms as including any agreement, understanding, scheme, transaction or series of transactions, whether or not they are legally enforceable. It could be asked what the difference is between an arrangement or a transaction. It appears that the answer can be found when analysing the OECD Commentary on Article 29 (2017). An arrangement is explained further with the use of an example in respect of where active steps are taken to obtain a tax benefit, such as ensuring that the meeting of directors takes place in a specific country to obtain residence there. Looking at the wording, it could be said that a transaction is a single action undertaken to obtain a tax benefit. This position can be seen from the definition first referring to a “transaction” followed by “a series of transactions”, which indicates that a transaction is a singular action. Consequently, it would appear that the words “arrangement” and “transaction” are not synonymous as the former incorporates the latter. UK case law has indicated that an arrangement connotes some degree of a clear-cut plan from the outset, in the sense of

84. Id., at para. 178.
85. Zahra, supra n. 73.
87. Id., at para. 182.
91. Id., at para. 182.
being preordained. However, it is argued here that a wide meaning should be given to this term, which would be in line with the approach of the provision that has a wide scope, as its aim is to cover all transactions, including new or innovative ones. Such an interpretation seems to be accepted in the South African context, as the term arrangement is defined in the ITA as including a transaction.

3.3.5. A wide net for obtaining a benefit

The phrase “that resulted directly or indirectly in that benefit” highlights that there must be a connection between the transaction or arrangement and the benefit. The phrase indirectly highlights that there is a wide net in capturing the benefit, which results to prevent a taxpayer obtaining a treaty benefit where means are employed that makes it appear as though the taxpayer has not obtained the tax benefit, but when, in reality, it has. Such a situation may take the form of company A moving loan repayments to a jurisdiction in which a tax treaty is in place that permits an exemption of withholding tax on interest payments. For instance, ACO in State A, which has a debtor in State C who needs to repay a loan, reconfigures loan repayments to the subsidiary BCO in State B as there is a State B-State C Tax Treaty that permits no withholding tax on interest repayments. ACO then obtains promissory notes from BCO, which would give ACO the opportunity to on sell such notes to avoid withholding tax on the interest payments. Furthermore, it could be argued that such an example takes business reality into consideration.

3.3.6. Entitlement to treaty benefits

The term benefit is referred to widely by the Commentary on Article 29 of the OECD Model (2017). Consequently, it includes all limitations (such as a tax reduction, exemption, deferral or refund) on taxation imposed under a tax treaty, the relief from double taxation, and the protection afforded to residents and nationals of a contracting state under the tax treaty or any other similar limitations. As the OECD Commentary on Article 29 (2017) does not expressly deal with this, it could be said that many countries without a domestic GAAR might attempt to argue that any reduction in tax constitutes a tax benefit. A question that can be raised is whether the provision of any article of a tax treaty would result in a tax benefit. Such a position arises, as the allocation of taxing rights necessarily prevents the imposition of double taxation, which could result in less tax being imposed on the taxpayer.

3.4. When would granting the benefits be in line with the object and purpose of the treaty provision?

3.4.1. Opening comments

The second question that must be asked when applying the PPT is whether the granting of the treaty benefits would be in line with the object and purpose of the treaty provision. Even if the party has undertaken the transaction with the principal purpose to obtain a treaty benefit, the party is entitled still to the benefit if such entitlement were in line with the object and purpose of the tax treaty.

3.4.2. Interpretation of the treaty provision

In determining the purpose of the provisions when applying the second component of the PPT, it is necessary to turn to interpretation. In determining the purpose of the provision, it is also necessary to have recourse not only to the article under consideration, but also to the entire treaty including its preamble. Such action must be carried out using the Vienna Convention (1969), as discussed in section 3.2.

It has been argued that the way that this provision is structured unnecessarily limits a purposive consideration of the treaty and its articles, which shows that this could not have been intended to provide a legal basis to deny treaty benefits. Rather, it only signals an overall approach that already exists in the Vienna Convention (1969) towards denying treaty benefits in all cases where their attainment is not in line with the object and purpose of the tax treaty in question. This argument is supported by the following reasoning. As the second test acts as an exception to the first, it is not possible to apply a purposive interpretation to the consideration of object and purpose in cases where the first component of the PPT has not been met. It would be necessary to fulfil the first requirement of the PPT before a purposive interpretation could be undertaken. Accordingly, this interpretation is illogical, and, therefore, a different meaning must attach to the provision.

This author disagrees with this reasoning. Although it is true that the second component is an exception to the first component, it does not state that no other purposive interpretation should take place unless the requirements of article 29 of the OECD Model (2017) are met. The provision does not state that the purpose of an article may not be taken into consideration when analysing a treaty provision. It should be regarded as a separate enquiry in determining whether to grant treaty benefits. The Commentary on Article 29 of the OECD Model (2017) seems to call for such a limited application of this article and its overlap with other articles, which can be seen from it stating that the OECD Commentary on Article 29 (2017) should not be used to interpret the other provisions found in article 29 of the OECD Model (2017). In other words,
the Vienna Convention (1969) would still apply to all provisions, including that of article 29(9) of the OECD Model (2017).104

The argument of Lang (2020) also seems to imply that there are not two components to the PPT, but, rather, only one, as the question of whether granting the treaty benefit would be in line with the object and purpose of the tax treaty in question does not add anything because such a principle is already in existence throughout the entire tax treaty.105 The author does agree that article 29(9) of the OECD Model (2017) does not provide any new information, but, rather, solidifies it as a legally enforceable article providing clarity and unity in an approach against the misuse of tax treaties. Furthermore, such a question is specifically incorporated into the wording of the PPT, and, therefore, should be asked always during its application. Lastly, the Commentary on Article 29 of the OECD Model (2017) itself recognizes two components to the PPT:

Where this is the case… the last part of the paragraph [of the Principal Purpose Test] allows the person to whom the benefit would otherwise be denied the possibility of establishing that obtaining the benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this convention [emphasis added].106

It is also argued here that the inclusion of the second component of the PPT not only acts as a signal, but also adds further legitimacy to its invocation, which is necessary, as its invocation will likely be an area ripe with dispute between taxpayers and tax authorities. It realizes this situation by providing a clear authority with the denial of benefits. It also somewhat limits the extent of the tax authorities by being drafted in such a way that a process must be followed before a benefit can be denied. meaning that the purpose is considered only in respect of those schemes that have the principal purpose of obtaining a tax benefit.107 Such an approach as argued here would reconcile the Vienna Convention (1969) and the preamble statements with article 29(9) of the OECD Model (2017) without ignoring the express inclusion of an article into a tax treaty and the OECD Commentary on Article 29 (2017), which refers to specific article objects and purposes.108

There have also been debates between various authors as to whether the purpose of the overall tax treaty can be considered or whether only that selected provision within the treaty can be considered to determine the purpose. Danon (2020) has argued that, on an analysis of the PPT, the object and purpose of the treaty provision should solely be taken into account.109 The reasoning here is that proper respect should be given to the wording of the PPT, which refers to the object and purpose of the treaty provision.110 This position is a clear departure from section 31(1) of the Vienna Convention (1969), which requires the provision to be interpreted in the context of its object and purpose.111 The preamble states that context includes the preamble and its annexes. Danon does acknowledge that some of the OECD examples seem to create further confusion as two of the examples, Examples E and J112 rely on the object and purpose of the specific treaty provision, while the others refer to the object and purpose of the overall tax treaty.113

Chand and Elliffe (2020),114 Duff (2018)115 and De Broe and Gommers (2020)116 have argued that it is necessary to have recourse as well as to the overall purpose of the tax treaty. However, it is difficult to determine the purpose of a treaty provision in isolation from the overall context and purpose of the tax treaty in question as a whole.117 Instead, it is necessary to interpret the reference to the particular object and purpose of the treaty provision as being purposively ambiguous to avoid such a result.118 Furthermore, merely relying on the purpose of a specific provision in isolation from the overall purpose of a tax treaty can result in the use of simplistic arguments to obtain a treaty benefit. For instance, in the Canadian case of *Alta Energy* (2020),119 the Canada-Luxembourg Income and Capital Tax Treaty (1999)20 prevented Canada from taxing a gain realized by the taxpayer derived from a transaction involving the disposition of shares. This situation was attacked by the Canadian tax authorities as an avoidance arrangement. In having to interpret the purpose of the relevant provision of the Canada-Luxembourg Income and Capital Tax Treaty (1999), the Canadian Federal Court of Appeal (CFCA) refused to give weight to the Commentaries on the OECD Model, but, instead, relied on the literal meaning of the treaty words, which resulted in the CFCA finding in favour of the taxpayer.121 In the author’s opinion, such an approach should be questioned, as it may result in an overly simplistic reading of a provision. This approach can be compared to the South African context with reference to the case of *Bosch*,122 discussed in section 2.2.2. In the author’s view, such a literal approach should be avoided, and the provision should be interpreted fully, with, for example, reference to its context and information

105 Lang, supra n. 102.
107 Id.
109 See also Danon, supra n. 104, at sec. 3.3.4.
110 Danon, supra n. 104, at sec. 4.3.2. See also Zahra, supra n. 73, at sec. 3.3.2.
111 Id.
113 Lang, supra n. 102.
115 Id.
117 See also Danon, supra n. 104, at sec. 3.3.4.
118 Danon, supra n. 104, at sec. 4.3.2. See also Zahra, supra n. 73, at sec. 3.3.2.
121 Duff, supra n. 73, at p. 58.
122 De Broe & Gommers, supra n. 72, at sec. 3.3.3.
123 Zahra, supra n. 73, at sec. 3.3.2.
124 Id.
127 Alta Energy (2020), supra n. 119.
128 Bosch (2014), supra n. 7.
available to the drafters. However, the author acknowledges that it may be difficult to determine the purpose of certain provisions at times, particularly with regard to the question of what evidence would be acceptable and provide sufficient guidance.

4. The OECD’s Examples

4.1. Background and overview

The Commentary on Article 29(9) of the OECD Model (2017) contains examples that are intended to illustrate the application of the concept of “principal purpose”. In particular, the OECD Commentary on Article 29(9) (2017) contains 13 examples – Examples A to M. These are based on the examples in the Final Report on Action 6 of the OECD/G20 BEPS Project, with the exception of Examples K, L and M, which appear to be additions to the OECD Commentary on Article 29(9) (2017). The OECD Commentary on Article 29(9) (2017) states that the examples are purely illustrative, and should not be taken as providing conditions or requirements that must be met. Rather, each case must be dealt with according to the specific set of facts. However, in the author’s opinion, the examples are important, as they put the theoretical concepts into practice. Accordingly, it is very likely that the examples will carry much weight.

The author has selected three examples – Examples E, G and K – to highlight how the South African GAAR could influence the interpretation of the PPT. These examples are considered in sections 4.2. to 4.4.

4.2. Example E: Manipulation of shareholdings to obtain treaty benefits

4.2.1. Opening comments

In Example E in the Commentary on Article 29 of the OECD Model (2017), RCO in State R had held 24% of the shares in SCO in State S. However, given the new State R-State S Tax Treaty, RCO increased its shareholding in SCO to 25%, which, on investigation into the facts and circumstances, reveals that this action was undertaken primarily to obtain the benefits of the lower rate of tax provided for in the equivalent of article 10(2)(a) of the OECD Model in the State R-State S Tax Treaty, which reads:

2) ... dividends paid by a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:
   a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 25 per cent of the capital of the company paying the dividends throughout a 365 day period...

Accordingly, as the principal purpose requirement has been met, the OECD Commentary on Article 29 (2017) goes on to state that the benefit of article 10(2)(a) of the OECD Model should be available, as this would be in line with the object and purpose of that article. This position arises, as article 10(2)(a) of the OECD Model adopts an arbitrary threshold of 25%, and the shareholding was genuinely increased to realize this end. Along the same lines, although not addressed in the State R-State S Tax Treaty, it could also be stated that, if the company then chose to sell the shares back exactly 365 days after obtaining them, this action would not change the outcome, as this is exactly what the provision provides for.

4.2.2. Analysis of Example E

Example E is one of only two examples that refers to a specific provision in a tax treaty, and then goes on to discuss the purpose of the provision. Starting at the first step of the application to the PPT, it is necessary to establish one of the principal purposes. The Commentary on Article 29 of the OECD Model (2017) refers to this as having been undertaken to obtain “primarily” the benefits of the reduced rate of the article. Quite clearly, “primarily” is a higher standard than “principal”, as the former refers to an overall purpose. This position seems to give rise to confusion with regard to the application of such a test, and whether a principal purpose, in fact, does require a primary purpose, as discussed in section 3.3.2. Chand has argued that, the “principal” should be interpreted in a similar light. However, here Chand (2018) argues that, even if there are multiple principal purposes, one of which is to obtain a treaty benefit, the test should not be met where the principal purpose to obtain a treaty benefit is outweighed by other purposes that do not aim to obtain a treaty benefit, i.e. the enquiry should relate to a dominant or main purpose and not one principal purpose. Chand’s argument relies on the OECD Commentary on Article 29 (2017), where it is stated that:

Where an arrangement is inextricably linked to a core commercial activity, and its form has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit.

Chand relies on other examples in support of this interpretation, such as Example C. In Example C, RCO has three potential countries to invest in so as to be able to expand its business. All of the countries offer the same opportunities, but RCO chooses State S, as there is a State R-State S Tax Treaty. The OECD Commentary on Article 29 (2017) states that, although the investment in State R was made in light of treaty benefits, the decision to invest was driven by the principal purpose of wanting to invest and expand the business. In these circumstances, the

127. Id.
129. Id.
132. Id. See also Comes, supra n. 73 at p. 80, who agrees with Chand, supra n. 131.
134. Id. at Example C.
135. Id.
purpose to obtain a treaty benefit has been outweighed by the other purposes, i.e. to expand the business.

However, a blind eye cannot be turned to the Commentary on Article 29 of the OECD Model (2017), which clearly states the purpose need not be dominant, but would be fulfilled if at least one of the principal purposes were to obtain a tax benefit.\textsuperscript{136} Furthermore, what is interesting in Example E, which may give rise to further uncertainty, is its application of the second component of the PPT, even though there was no principal purpose to obtain a treaty benefit. Here, the OECD Commentary on Article 29 (2017) states that the purpose of a tax treaty is to encourage cross-border investment, and that such a decision would be in line with the object and purpose of the treaty.\textsuperscript{137}

However, Example E does seem to indicate the type of enquiry envisaged here is an objective one. This situation can be seen in the Commentary on Article 29 of the OECD Model (2017), which expressly states that the primary purpose is obtained from an examination of the facts and circumstances that further highlights an objective test.\textsuperscript{138}

In analysing the application of the second component of the test, the author does intend to go into great detail, as this would be an interpretative exercise that requires further research and consideration. It has been argued that this can be taken to mean that, where the wording operates so mechanically, it is of little use to have recourse to the purpose beyond the literal wording. However, instead, it would be necessary to amend the wording of the provision to change the outcome.\textsuperscript{139} The author agrees with this argument to an extent, but highlights the fact that the purpose of even a mechanical provision can be determined in certain circumstances. In this case, it would only be possible to rely on the wording of the Commentary on Article 29 of the OECD Model (2017), which states that the rationale behind this provision is to not only encourage cross-border investment, but is also to lessen the cascading of corporate income tax from the dividends flowing through multiple cross-border corporations.\textsuperscript{140} On a par with the article being imposed mechanistically, another questionable aspect is the use of OECD Commentary on Article 29 (2017), referring to the threshold as arbitrary, as generally a shareholding of 20% to 25% signifies effective control in modern investment scenarios.

Example E has been criticized. Zahra (2019) raises the question of what can be considered to be “genuine”.\textsuperscript{141} This situation relates to whether it will still be considered genuine if the taxpayer raised the shareholding follow-

\textsuperscript{136} Id.
\textsuperscript{137} Id. at Example E.
\textsuperscript{138} Id. at para. 181.
\textsuperscript{139} B. Kuźniacki, The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application, 10 World Tax J. 2, sec. 2.4.3.2. (2018), Journal Articles & Opinion Pieces IBFD.
\textsuperscript{140} Para. 10 OECD Model: Commentary on Article 10 (2017). See also P.A. (Peter) Harris, Article 10: Dividends – Global Tax Treaty Commentaries sec. 3.1.3.3, Global Topics IBFD.
\textsuperscript{141} Zahra, supra n. 73, at sec. 3.3.2.2.
available? Clearly, and in agreement with the finding in Example E, RCO would not have undertaken such an increase in the relevant shareholding. This action was carried out purely to obtain the benefits offered by the equivalent of article 10 of the OECD Model. The author would emphasize that, although the result is the same in Example E, it is necessary to analyse the similarities or differences between both tests on how that conclusion was reached. As has been stated in section 3.3.2., it is not fully clear whether one of the principal purposes requires a single dominant purpose, as argued by Chand,145 or whether multiple principal purposes can exist. It can be assumed that, due to the ambiguity which position should be followed, the South African position with regard to the GAAR would have an influence on a South African court if they were presented with the matter.

Such an approach would not be unique according to the international sphere. Article 23(6) of the United Kingdom–United States Income Tax Treaty (2001)146 contains a limitation on benefits (LoB) clause, which also has a PPT, where it is stated that:

A resident of a Contracting State shall nevertheless be granted benefits of this Convention with respect to such item if the competent authority of the other Contracting State determines that the establishment, acquisition or maintenance of such resident and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention [emphasis added].

In the Technical Explanation to the United Kingdom–United States Income Tax Treaty (2001),147 it is stated that it has been agreed expressly between the contracting states that the term “principal” in the United States domestic law and the term “main” in the United Kingdom’s domestic law are synonymous. Interestingly, it appears that the further six examples listed by the Commentary on Article 29 of the OECD Model (2017), which deal with conduit examples, drew these examples word for word from the Technical Explanation to the United Kingdom–United States Income Tax Treaty (2001). It also appears that there is some overlap with the facts in the examples that have been used to explain the PPT examples.148 This situation could give such an interpretation greater force for regarding the term “principal” as requiring a dominant purpose. In any event, it could also support the interpretation of a South African court to view the terms “one of the principal purposes” and “main as synonymous when applying the PPT. Furthermore, Canadian courts have interpreted the word “principal” in a similar light. Here, with regard to the phrase “principal activity” under the Canadian Excise Tax Act,151 the court held that the word “principal” should also be taken to mean “first in rank or importance” or “main or leading”.152

In the author’s opinion, such an approach would avoid the difficulty of having an extremely low threshold, which would be met in most instances. It would also not be difficult to imagine that in most business transactions, the existence of a tax treaty or tax benefit would be an important consideration before entering into such a transaction.

4.2.3.2. Is the enquiry into the taxpayer’s intention dealt with objectively or subjectively under the PPT and the South African GAAR?

As stated in section 4.2.2., it appears that only objective reasoning was used when this test was applied. No statements or opinions of the taxpayer are mentioned. Rather, the reasoning relied on an analysis of the “facts and circumstances”. It appears that the facts and circumstances relied on here would constitute the fact that on a tax treaty coming into force, the taxpayer increased the shareholding from 24% to 25%.

As argued in section 2.2.5., the GAAR has not changed from its previous position. That is, it is a subjective enquiry that takes the taxpayer’s ipse dixit into account, which is then evaluated against the surrounding circumstances to determine whether it is a correct reflection of the taxpayer’s purpose. The first question to ask is how does this situation compare to the PPT? Again, as argued in section 3.3.2., the following two different approaches have been adopted by authors in interpreting the test: (i) a results-based approach; and (ii) a subjective test. It is important to determine an answer, as it could influence the outcome of a case due to the weight given to certain factors.

In light of South Africa’s prior case law, it is in the author’s view the courts would interpret the PPT in line with the GAAR. First, it is impossible to imagine a purpose that is purely independent of an intention. This position has been echoed by the PC in Plimmer153 which would then seem to agree with this approach. Second, in relation to the wording “reasonable to conclude” in the PPT, it has been stated in relation to the South African GAAR that such wording indicates that all circumstances should be taken into account. This approach would reconcile that of the Commentary on Article 29 of the OECD Model (2017), in referring to the aims and objectives of the taxpayers involved. Such an approach of taking all relevant factors into account is further supported by the OECD Commentary on Article 29 (2017), when it states that the ipse dixit of the taxpayer should not automatically be accepted without weighing all of the evidence.154 This state of affairs would also indicate an approach, whereby the taxpayer’s intention may be heard, but it cannot merely be

147. Chand, supra n. 131.
149. Department of the Treasury Technical Explanation of the Convention between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, art. 29 (5 May 2003), Treaties & Models IBFD.
152. See the decision of the Tax Court of Canada (TCC) in CA: TCC, 4 Sept. 2003, The Colleges of Applied Arts and Technology Pension Plan v. The Queen, 2003 TCC 618.
153. Plimmer (1957), supra n. 77.
accepted. It would need to be corroborated with the existing circumstances. Such approaches have also been taken by the Canadian courts, which have stated that “purpose” is a question of fact to be determined having regard to all of the factors.155

Most importantly, the author notes that the Commentary on Article 29 of the OECD Model (2017) states that:

[i]t should not be lightly assumed, however, that obtaining a benefit under a tax treaty was one of the principal purposes of an arrangement or transaction and merely reviewing the effects of an arrangement will not usually enable a conclusion to be drawn about its purposes.156

This situation appears to be similar to the reasoning taken by the South African courts in Gallagher,157 where the Appellate Division (AD) distinguished between the purpose and the effect of a transaction.

Accordingly, the author submits that, if a court were to apply the PPT in the light of what has been said in the immediately preceding paragraphs, a similar approach to the GAAR would be taken. In other words, subjective considerations would be corroborated against objective factors, which would differ from the approach as taken in Example E.

The benefits of retaining a subjective test have further been argued by Van Weeghel to protect the taxpayer’s interests in the context of legal certainty.158 This state of affairs could have arisen, as determining the principal purpose is not always easy, and could give rise to uncertainty. Retaining the test here would have the benefit of giving the taxpayer extra protection against tax authorities. It would also pave the way in determining whether such a transaction would be in line with the object and purpose of a tax treaty, as transactions that are undertaken in bad faith would not pass this component of the PPT.159

It should also be noted that the understanding of intention may vary between various jurisdictions. In the case of Pick ‘n Pay Employee Share Purchase Trust (1992),160 the SCASA had to determine whether the profit in question was of a capital or income nature, and, in doing so, consider whether it was the intention of the taxpayer to conduct a business and, therefore, undertake a scheme of profit making.161 In deciding this question, the SCASA stated that intention is not to be confused with contemplation. Rather, what is important was the taxpayer’s object, aim and actual purpose. Accordingly, one should not focus on motive in deciding the outcome of the case.

However, in the New Zealand case of Plimmer, the PC stated that:

A man’s purpose is usually, and more naturally, understood as the object which he has in view or in mind, but in ordinary language purpose connotes something added to intention and the two words are not ordinarily regarded as synonymous.162

Consequently, purpose, object, aim and intention appear to be distinct contrary to what has been alluded to in Pick ‘n Pay Employee Share Purchase Trust.163 This highlights that the flow of information in determining what factors are to be considered relevant when determining the subjective intention of individuals may differ between jurisdictions when dealing with the purpose under the relevant tax treaty, as these may each be influenced by their own domestic law.

4.2.3.3. How might a court interpret the burden of proof of the PPT?

Although this area is not the main focus of this article, how the burden of proof may influence the interpretation of the PPT is discussed briefly, as this is relevant to determining the intention of the taxpayer, as has been discussed in relation to Example E (see section 4.2.3.2.). It appears that the burden of proof under the PPT only requires that it is:

reasonable to conclude having regard to all the relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction [emphasis added].

This position would seem to highlight that a less stringent burden of proof is required, as opposed to the South African legislation, where this must be proved on a balance of probabilities.164 In the author’s opinion, the South African courts would require a balance of probabilities instead of requiring a reasonable belief. This circumstance would derive from the low threshold of mere reasonableness behind the test, as well as that it would seem to provide the SARS with a less stringent burden than what taxpayers would ordinarily experience. At the crux of all of this is the South African Constitution, which is there to safeguard taxpayers’ rights, thereby potentially opening up arguments that a lower burden than a balance of probabilities in civil trials could infringe constitutional rights.165

What this situation means in effect is that a court may require more evidence to prove that the elements have been met, being that the principal purpose of the transaction was to obtain a treaty benefit. Such a state of affairs would be beneficial, as it would ensure a more certain outcome because further proof would have to be furnished than would ordinarily be the case. It would also prevent the tax authorities from unnecessarily challenging transac-


158. Van Weeghel, supra n. 72.

159. Id.


162. Plimmer (1957), supra n. 77.


164. V. Aprielisart, Interpretation Issue of the Principal Purpose Test, 3 Indon. Tax. 2, p. 16 (2020). See also SARS, supra n. 10, at p. 19.

165. For instance, article 34 of the South African Constitution, which states that everyone has the right to have access to courts to a fair public hearing.
tions, unless there is more convincing evidence or factors that would indicate a principal purpose to obtain a treaty benefit.

4.2.3.4. Misuse and abuse and the PPT?
As stated in section 4.2.2., in Example E, the second component of the PPT applies. The question then becomes how might this enquiry interact with the GAAR?

Again, as stated in section 2.2.7., there is a “misuse or abuse” test. His requires in effect an analysis into the object and purpose of the provision followed by a factual analysis as to whether the actions of the taxpayer would be consistent with that situation. In effect, this circumstance requires the same approach as the PPT when determining whether the granting of the treaty benefit would be in line with the object and purpose of the treaty provision. Although, as stated in section 3.4.2., there are varying views on when determining the purpose of the provision, recourse should be made not only to the article in consideration, but also to the entire tax treaty including its preamble. Accordingly, it is submitted that a South African court would undertake an interpretative approach in the two-step manner as required by the misuse and abuse test to determine the object and purpose of a particular provision. This position would also be in line with the “correct” interpretation approach as reaffirmed by the court in Bosch,166 which required the court to look at the context of the document that would include the document as a whole. Such an approach is also reaffirmed by the SARS’ draft comprehensive guide, where it is stated that:

The introduction of the misuse or abuse concept is intended to reinforce the emerging trend in South Africa (which mirrors similar trends in other jurisdictions) towards a contextual... approach to tax statutes [emphasis added].167

The use of the Vienna Convention (1969) in interpreting tax treaties has been affirmed by the SCASA in Krok (2015).168 As a result, the Vienna Convention (1969), as discussed in section 3.2., would play an important role, as it too requires a document to be considered in totality, which includes its preamble and context.

4.2.3.5. Shareholding thresholds in the South African context
In South Africa, there are various legislative provisions that provide tax incentives. For instance, certain benefits are available to companies who establish headquarters companies in South Africa.169 In order to qualify as a headquarters company, defined requirements must be met. One of these is that the company has 80% or more of the cost of the total assets of the company attributable to any interest in equity shares in any foreign company in which that company holds at least 10% of the equity shares and voting rights.170 The SARS’ interpretation note states that this was implemented to promote international investment, so that corporations would establish headquarters companies in South Africa.171 It could also be argued that the numbers found within the provision are also arbitrary, as it is a simple threshold. It can then be questioned whether the same reasoning would be applied by the South African courts. As it is assumed that the tax treaty in question has already stated the purpose and, as there are similar provisions in South African law, it is likely that similar reasoning would be applied as stated by the Commentary on Article 29 of the OECD Model (2017).

As discussed in section 4.2.1., the Commentary on Article 29 of the OECD Model (2017) relied on the increase of shareholding being genuine, which has been criticized by some of the authors.172 It can be questioned how this would be dealt with in South African law. The author is of the same view as the OECD Commentary on Article 29 (2017). If the taxpayer undertook a non-genuine increase, being where the substance of the transaction did not reflect the reality of the transaction, the courts would not enforce such a transaction. This attitude would constitute a misuse or abuse of the provision. It is not difficult to see how a sham would not be in line with the object or purpose of any legislative provision. It would also lack commercial substance, which is discussed in relation to Example G (see section 4.3.).

Lastly, on a more general level, the SARS has expressed the view that it is legitimate tax planning to make use of certain tax incentives, as long as taxpayers do this without attempting to exploit the provision.173 This stance further reinforces the similarity between the approach adopted between South Africa and the treaty context when a favourable tax treatment is bilaterally agreed on between contracting states to incentivize taxpayers to behave in a certain way.

4.3. Example G: Revealing the concepts of a tax benefit and a business reality test

4.3.1. Opening comments
In Example G,174 TCO is a publicly traded company that is a resident in State T. TCO, directly or indirectly, owns subsidiaries in other countries, many of which carry on the business of TCO in their local markets. In particular, TCO owns the shares of five different companies in a single region, each of them being in neighbouring states. In order to provide group services to these companies, such as accounting, legal advice and human resources, TCO is considering establishing a regional group company. After considering various jurisdictions, TCO chooses to establish the group company in State R for a variety of reasons, such as a sophisticated banking industry, skilled labour forces, a business-friendly environment and a treaty

166. Bosch (2014), supra n. 7.
167. SARS, supra n. 10, at p. 44.
168. Krok (2015), supra n. 64.
169. See, for example, section 10(1)(k)(i) ITA, which allows certain dividend exemptions.
170. Sec. 9E(2)(b) ITA.
171. Z.A: SARS Interpretation Note 87, Head Quarter Companies (Issue 3) (2020).
172. Zahra, supra n. 73, at p. 618.
173. See, for example, Sasol Oils (2018), supra n. 27.
network that results in low withholding tax rates for the companies within that region. Accordingly, it could be said that the treaty network that TCO has chosen is the most beneficial compared to the other options. The commentary states that the benefits should not be denied in this instance. The reasoning for this situation is that reliance should not be placed on the effect of the State R-State T Tax Treaty, being the benefit of a reduced withholding tax on future payments with the subsidiaries, to deny a treaty benefit. The Commentary on Article 29 of the OECD Model (2017) concludes by stating that, on considering the substantive economic functions, use of real assets, the assumption of real risks and that the business is carried on by RCO through its own personnel located in State R, it would be unreasonable to deny the benefits of the State R-State T Tax Treaty, unless other facts would indicate that RCO has been established for other tax purposes. Interestingly, these phrases that relate to real risks, real assets and economic functions appear to be a reference to transfer pricing terminology.

4.3.2. Analysis of Example G

4.3.2.1. Initial remarks

The reasoning of the OECD raises questions with regard to clarity. The factors relied on by the Commentary on Article 29 of the OECD Model (2017) seem to indicate that the location was chosen for real economic reasons such as the workforce, infrastructure, business friendly environment, banking industry and its treaty network. However, at no point in the explanation of the reasoning that the decision to grant treaty benefits was reached was any reference made to whether the transaction was undertaken with one of the principal purposes to obtain treaty benefits. It could be said that this was a missed opportunity to highlight how the test would interact with multiple different purposes. No reference is made to the second component of the PPT either, making it unclear whether this was also applied.

Other questions remain with regard to Example G. Specifically, these questions are whether Example G highlights the application of the business reality test and whether, in fact, there was a treaty benefit that was obtained by the party.

4.3.2.2. The reliance on the business reality test

The factors that resulted in this conclusion can be deduced easily. These factors were the commercial reasons which led to the creation of RCO in State R as well as the real economic activity, real risk, the use of real assets and the use of RCO’s own personnel. In essence, it appears that the business reality test had a major role to play here. In other words, there was real substance to the transaction with commercial reasons.

It can be asked whether the existence of business reality is sufficient to cancel out the principal purpose? In this context, it has been argued by Chand that this is the case and that the first component of the PPT has not been satisfied in Example G, given the existence of these factors. In arriving at this conclusion, Chand relies only on the conclusion reached in the Commentary on Article 29 of the OECD Model (2017), which is that treaty benefits should not be denied. As stated in section 4.3.2.1., the OECD Commentary on Article 29 (2017) is unclear, as it merely arrives at a conclusion without expanding on which component of the test was not fulfilled.

It has been argued in section 4.2.2. that the term “one of the principal purposes” should be taken to require a main purpose. Taking this interpretation into account, it would seem to be possible that in Example G, the existence of “business reality” outweighs a consideration of the tax treaty network. However, the author would like to add that he does not find this reasoning in the Commentary on Article 29 of the OECD Model (2017) convincing due to the decision clearly resting on the tax treaty in existence. Rather, the OECD Commentary on Article 29 (2017) should have stated that the principal purpose included treaty benefits, but that the OECD Model (2017) nonetheless applies, as it is in line with its object and purpose to stimulate real cross-border economic investment.

However, the inconsistency that such reasoning has with article 29(3) of the OECD Model (2017) raises further concerns. This article reads:

provides treaty benefits to certain income derived by a person that is not a qualified person if the person is engaged in the active conduct of a business in its State of residence and the income emanates from, or is incidental to that business. The active conduct of a business is stated to exclude expressly operating as a holding company that provides overall administration or supervision of a group of companies, the provision of group financing and the making and management of investments. It can then be questioned why Example G grants the benefit of the OECD Model, which would conflict with conducting active business.

It could be argued that as the provision is in a different sub-article, it is irrelevant. This position is not the case because, as argued in section 3.4.2., it is necessary to consider the context of the tax treaty in question when interpreting it. However, it should be noted that article 29(3) of the OECD Model (2017) is optional.

The author also questions whether transfer pricing factors can be relied on when applying the business reality test. As noted in section 4.3.1., this state of affairs can be deduced...
from the clear reference to transfer pricing terms. The OECD Transfer Pricing Guidelines (2017)\textsuperscript{183} rely on substance with regard to intercompany transactions in stating that:

Where there are material differences between contractual terms and the conduct of the associated enterprises in their relations with one another, the functions they actually perform, the assets they actually use, and the risks they actually assume, considered in the context of the contractual terms, should ultimately determine the factual substance and accurately delineate the actual transaction.\textsuperscript{184}

The benefit of relying on the OECD Transfer Pricing Guidelines would be that the “business reality test” would be given additional meaning. Take for example the term “risk”. This term is discussed at length, with methods of determining and delimiting risks in relation to the OECD Transfer Pricing Guidelines. It, therefore, contains more guidance that may limit the discretion of the tax authorities of the states.\textsuperscript{185} However, the author notes that reliance on such an approach is not expressly prescribed by the OECD when applying the PPT, and, therefore, if they are applied, this should be done with caution.

4.3.2.3. Treaty benefit

The next question to be discussed with regard to Example G is what treaty benefit was obtained? In other words, whether the same benefit or reduction in taxes would have been available under the domestic rules or another applicable treaty provision\textsuperscript{286}. In this respect, the Commentary on Article 29 of the OECD Model (2017) is not clear, as no mention is made of an express benefit being received by RCO. It has been argued that it is rational to assume that the benefit being received was the restriction of the other state’s domestic laws on withholding tax under various intra-group payments, under the various treaty provisions. For instance, assume that the source state has domestic withholding tax of 20% on profits: a taxpayer could contend that article 7 places a restriction on taxing the profits, until a permanent establishment has been established therein.\textsuperscript{186} However, in the author’s view, it is still unclear as to what is the anticipated tax liability that is avoided in establishing the companies in the treaty jurisdiction.

4.3.3. Comparison with the South African GAAR

4.3.3.1. Initial remarks

The author now compares the concepts of a tax benefit and a business reality test as found in Example G of the Commentary on Article 29 of the OECD Model (2017) with the South African GAAR.

4.3.3.2. Tax benefit

As argued in section 3.3.6., there is a lack of detail in the Commentary on Article 29 of the OECD Model (2017) with regard to what could constitute a tax benefit. As such, this situation could lead states to argue that any reduction in tax would constitute a benefit, especially if they do not have a domestic GAAR themselves.

From the South African perspective, it could be said that the question that should be asked is whether the taxpayer anticipated a liability that was avoided by the transaction in question. This question then led on to an investigation into a notional state of affairs by asking whether the same benefit or reduction in taxes would have been available under the domestic rules or another applicable treaty provision, had the arrangement or transaction not been undertaken in the way it was.\textsuperscript{188} The reasoning behind this interpretation is that the definition of a tax benefit also contains the phrase “under a covered tax agreement”, which would have emphasized that it is necessary to consider what the benefit would be under the domestic law, had there been no agreement.\textsuperscript{189}

The next question to ask is whether a benefit would be recognized under the GAAR, according to this fact set. First, it can be questioned what anticipated tax liability was being avoided by establishing the companies in the way set out in Example G. As the taxpayer has established the companies in these jurisdictions, it could be argued that no anticipated tax liability is being avoided. Instead, the taxpayer is subjecting itself to further taxation, albeit in a lower taxing jurisdiction than others.

For the sake of this argument, even if there was an anticipated tax liability that was avoided, it would be necessary to undertake an analysis of the taxpayer’s notional state of affairs. Accordingly, it would be necessary to question whether the taxpayer would still have received a reduction in tax under the tax treaty in question had the arrangement or transactions been structured differently. Given the circumstances of Example G, the author’s opinion is that the taxpayer did not receive a benefit. The reasoning for this interpretation is that, assuming that the amounts were paid to the taxpayer by way of a dividend, what would be the alternative? Should the taxpayer decline the dividend or refuse a rights issue? It is also a constraining factor in arguing that the headquarters company should not have been incorporated in the other country, as this would remove the need to rely on the tax treaty in the first place. How the taxpayer could have structured this arrangement differently is not clear. In other words, there does not appear to be any clearly available benefit. This state of affairs highlights the issue that, at times, it is often difficult to postulate the future behaviour of taxpayers.

What this situation may indicate to a South African court is that the Commentary on Article 29(9) of the OECD Model (2017) should be understood with caution. More-

\textsuperscript{183} OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD 2017), Primary Sources IBFD.

\textsuperscript{184} Id. at para. 1.46.

\textsuperscript{185} Id. and see also, for example, D, para. 1.2.1.

\textsuperscript{186} Duff, supra n. 73, at p. 32.

\textsuperscript{187} Chand, supra n. 131, at p. 33.

\textsuperscript{188} Duff, supra n. 73, at p. 32. See also Lang, supra n. 72.

\textsuperscript{189} Duff, supra n. 73, at p. 32.
over, the concept of a tax benefit should not be applied too generally to a given set of facts.

### 4.3.3.3. The business reality test

The commercial reality tests in the South African GAAR are discussed in section 2.2.7. It has also been argued that Example G highlights the component of the PPT that appears to incorporate a business reality test. From the Commentary on Article 29 of the OECD Model (2017), there appear to be valid commercial reasons for the operations set out in Example G with real cash flows and risks. In other words, there is commercial substance and no offsetting, roundtrip financing or accommodating a tax-in-different party.

However, the question then becomes how this compares with the South African GAAR. A major problem with the incorporation of a business reality test in terms of the Commentary on Article 29 of the OECD Model (2017) is that there is no clear guidance regarding its application, thereby making it unclear what such a position exactly entails and what tests can be employed to reveal its existence. For instance, it has been argued that reducing the amount of tax is a business purpose in itself, as this would increase turnover.\(^{190}\) This situation highlights the vagueness in the test’s application. It, therefore, appears that, should, in theory, the SARS apply this rule, the SARS would have a free range of factors to consider without any limitations to argue what would constitute business reality.\(^ {191}\)

It can also be questioned where the issue of business reality is important. Is it in the first enquiry into whether the taxpayer had a principal purpose to obtain a treaty benefit, or is it in the enquiry relating to whether to grant the treaty benefit despite the existence of a principal purpose to obtain a tax benefit, or is it relevant to both? Within the formulation of the commercial substance test as set out in the South African GAAR, this does not assume that there was no sole or main purpose to obtain a tax benefit where there is commercial substance. Rather, the commercial substance justifies the existence of the sole or main purpose to obtain a tax benefit by preventing the successful application of the GAAR by the SARS.

It is likely that, in applying the test, a South African court would be influenced by the application of the GAAR’s commercial substance test in the following two aspects.

First, it seems to be more plausible to consider the business reality test in determining whether to grant the treaty benefit despite the existence of a principal purpose to obtain a treaty benefit. Such reasoning would be in line with the layout of the commercial substance test in the GAAR and makes more sense than to cancel out the existence of a clear principal purpose to obtain a treaty benefit. In the author’s view, a South African court would follow such reasoning.

Second, the indicators in the commercial substance test of the South African GAAR could be used to determine whether there is business reality in the transaction. The reasoning behind this view is that, although the business reality test is somewhat undefined, both tests take into consideration whether there is commercial substance to the transaction that matches the reality of the situation. This position can be seen from the GAAR’s commercial substance test, which has been discussed already in section 2.2.8. With reference to Example G, an overlap can be found in the reliance on the use of transfer pricing terminology discussed in section 4.3.2.2., which emphasizes factors that would affect the cash flow and risks of the business that are already incorporated into the GAAR. The use of the further factors in the GAAR would assist in determining whether the business reality test had been met, and would restrict the tax authorities in having unlimited discretion in its application.

It should also not be forgotten that the commercial substance test also has its limits. It has been stated by Kujinga (2017) that the commercial substance as found in the South African GAAR is based on the economic substance test as found in the United States.\(^ {192}\) With regard to the economic substance test, the courts have had contradictory views in respect of its application in recent years.\(^ {193}\) Accordingly, the application of the commercial substance test under the GAAR could raise concerns of uncertainty as it is possible to question whether there are enough elements to satisfy a court that there is commercial substance to a transaction. A better approach would be to apply the test as mechanically as possible instead of weighing up various factors and, therefore, to determine solely whether there has been an effect on the net cash flows and risks of the business.\(^ {194}\)

An additional question could be raised as to what would happen with instances in which a business or commercial purpose cannot be sought? Take for example pensions or some transactions involving capital gains. This distinction is recognized by the South African GAAR, as section 80A(b) of the ITA provides for an additional test where it is stated that an arrangement is impermissible where:

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191. It can be said that section 80C(2) of the ITA does not limit the SARS to the various factors found there, as “[f]or purposes of this Part, characteristics of an avoidance arrangement that are indicative of a lack of commercial substance include but are not limited to”.


193. Id. See also the decision of the US Supreme Court (USSC) in US: USSC, 17 Apr. 1991, Cottage Savings Association v. Commissioner, 499 US 554 (1991) and that of the United States Court of Appeals (USCA) in US: USCA 28 Dec. 2001, Compaq Computers Corporation v. Commissioner of Inland Revenue, 2001 USCA 5 507, where it has been argued that the courts, in these cases, should have applied the economic substance test but did not.

194. B. Kujinga, The Economic Substance Doctrine Against Abusive Tax Shelters in the United States: Lessons for South Africa, 27 S. Afr. Mercantile L. J. 2, p. 245 (2015), available at https://repository.up.ac.za/bitstream/handle/2263/49800/Kujinga_Economic_2015.pdf?sequence=1 (accessed 25 Apr. 2022). However, the author here does acknowledge that the mechanical application of a test has its own deficiencies, for example, in not being able to adapt to the circumstances of a transaction.
in a context other than business, it was entered into or carried out by means or in a manner which would not normally be employed for a bona fide purpose, other than obtaining a tax benefit [emphasis added].

This context raises the question of the place of the business reality test where such transactions have taken place. Although the business reality test has only been used in examples relating to commercial transactions, it could be argued that it would not encompass non-commercial transactions.\(^{195}\) However, it seems as though there is some overlap between non-business transactions insofar as they pertain to the substance of the transaction that matches the reality of the situation, i.e. it could be said that this would not be for a bona fide purpose in respect of non-business transactions.

Another issue is that, although the business reality test may not apply to non-business transactions, this situation is not terminal, as there are still existing elements, such as the determination of a purpose, which would have to be fulfilled, and do not make the PPT inapplicable. In other words, the business reality test only assists in determining whether to grant treaty benefits.

### 4.4. Example K: The meaning behind an arrangement or transaction?

#### 4.4.1. Opening comments

The author intends to keep his examination as brief as possible with regard to Example K, as the focus is only on the element of an arrangement. RCO is a resident in State R, and is a wholly owned subsidiary of an institutional investor fund, which is resident in State T. RCO manages a diverse investment portfolio, and was established to generate an investment return by operating as a platform for a regional investment for the fund in State R. Although one of the factors for establishing this arrangement was to obtain the benefits of a treaty network, there were other commercial purposes, which highlight economic substance. RCO invests in State S, which results in a reduction in withholding tax due to the treaty benefits available under the State R-State S Tax Treaty, which also appears to be undertaken for valid commercial reasons with substance. The Commentary on Article 29 of the OECD Model (2017) concludes that in the absence of other factors which show that the “investment is part of an arrangement or relates to another transaction undertaken for a principal purpose of obtaining the benefit” [emphasis added], it would be unreasonable to deny treaty benefits.

### 4.4.2. Analysis: The separation of steps within a transaction

Example K highlights the separation of the steps within a transaction by referring to the investment not forming part of an arrangement or a transaction undertaken to obtain a treaty benefit.\(^ {196}\)

#### 4.4.3. Comparison with the South African GAAR: Can the context under a scheme or arrangement be considered?

It has already been argued in section 3.3.4. that the definition of an arrangement found under the PPT in the Commentary on Article 29 of the OECD Model (2017) and the South African GAAR are similar. What the author highlights here is the possible uncertainty with regard to the application of the arrangement component. Australia and Canada have enacted provisions with common elements that allow the tax authorities to attack a step within an arrangement.\(^ {197}\) However, in these jurisdictions, divergent decisions have been made, leading to uncertainty. In the Australian case of Peabody (1994),\(^ {198}\) in considering a scheme, the HCA stated that a step may only be considered on its own without being robbed of practical meaning, and, if it can be considered as being a scheme on its own.\(^ {199}\) Although, the reasoning was also due to the enabling provision not expressly making reference to a step within the definition of a “scheme”.\(^ {200}\) A similar approach was also undertaken in the Australian case of Hart (2002), which was overturned on appeal with a statement to the effect that a step within a scheme can be considered.\(^ {201}\) In Canada, there were also decisions that involved uncertainty with regards to whether a single step in an arrangement can be considered where it was initially stated that a step cannot be isolated and have a separate purpose, while the Supreme Court of Canada (SCC) stated that it can, as long as it is considered in the context of a series of which it is part and the overall result achieved.\(^ {202}\)

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195. In this regard, paragraph 177 of the OECD Model: Commentary on Article 29 (2017) clearly states "one transaction alone may result in a benefit, or it may operate in conjunction with a more elaborate series of transactions that together result in the benefit".

196. With regard to Canada, see Canada Trustco Mortgage Co (2005), supra n. 34, at 435.


198. See, for example. Canada Trustco Mortgage Co (2005), supra n. 34, at 42. See also J. Cassidy, Peabody v. FCT and Part IVA, Revenue L. J., pp. 200 and 208 (1995).

199. Id.


201. See, for example. Canada Trustco Mortgage Co (2005), supra n. 34, at 42.

In South Africa, the GAAR clearly states that a step within an arrangement can be considered.\textsuperscript{204} The draft guidance to the South African GAAR states that the inclusion of the provison is to overcome the situation where the GAAR did not apply, as the taxpayer could demonstrate the overall purpose of the arrangement was not to obtain a tax benefit.\textsuperscript{205}

In the author’s opinion, the pure isolation of a step is not sustainable, and instead it must be considered within the context of the series of which it is part and the overall result which is achieved to ensure that all of the relevant factors are considered in the application of the test.\textsuperscript{206} In the case of Hicklin (1980),\textsuperscript{207} while the Appellate Division (AD) found that a single agreement in a composite transaction constituted a scheme, the AD looked at various other components of the composite transaction and considered the agreement. In this context, it should also be remembered that the presumption of a purpose found within the South African GAAR\textsuperscript{208} requires all of the relevant facts and circumstances to be taken into account, even though the purpose of one step may be different from the purpose of the transaction as a whole. Accordingly, it is submitted that, as there are potentially differing interpretations in various jurisdictions and despite the fact that the Commentary on Article 29 of the OECD Model (2017) is not entirely clear on how to apply the definition of an arrangement, a court would do so with the GAAR, and would consider any steps in light of the transaction as a whole.

5. Conclusions

In the author’s view, where there is ambiguity in the international context in relation to the PPT, domestic law remains an important tool in giving meaning to the terms involved. As the author has argued in this article, there are various areas in which the South African GAAR could influence the interpretation of the PPT, with the focus on the examples to be found in the Commentary on Article 29 of the OECD Model (2017). Accordingly, it has been argued that a South African court could be influenced by the South African GAAR and law when applying the PPT, in relation to the following seven issues:

(1) One of the principal purposes: it has been argued that a South African court would follow the approach to be found in the GAAR, which could be regarded as the equivalent of requiring a main or sole purpose. The reasoning for this position focused on the lack of clarity within the PPT, particularly with regard to the explanation in respect of Example E and the references underlying the Commentary on Article 29 of the OECD Model (2017), which would seem to indicate that a primary or dominant purpose is that what is required.

\footnotesize{\textsuperscript{204} Section 80H of the ITA states that: “The Commissioner may apply the provisions of this Part to steps in or parts of an arrangement.”
\textsuperscript{205} SARS, supra n. 10, at p. 15.
\textsuperscript{206} See, for example, Canada Trustco Mortgage Co (2005), supra n. 34, at 42.
\textsuperscript{207} Hicklin (1980), supra n. 26, at 308.
\textsuperscript{208} Sec. 80G ITA.
\textsuperscript{209} Gallagher (1978), supra n. 11.
\textsuperscript{210} Bosch (2014), supra n. 7.
\textsuperscript{211} Supra, n. 205.
\textsuperscript{212} Supra, n. 200.}
(7) The burden of proof: finally in this article, it is argued that the PPT appears to be a much less stringent burden, as it need only be reasonable to conclude to bring about its application. It is submitted that, in the author’s view, South African courts would apply domestic law, which would require this state of affairs to be proven on a balance of probabilities, as otherwise such a situation could result in injustice for the taxpayer.