TAX AVOIDANCE IN SINGAPORE

A Critical Analysis

This article posits that the reach of s 33 of the Income Tax Act[1] as an anti-avoidance provision is far too wide, thus attenuating its intended efficacy in *only* policing and counteracting illegal tax-avoidance schemes (and *not* legal tax-mitigation arrangements). In the light of s 33 of the Income Tax Act being modelled after both s 260 of the Australian Income Tax Assessment Act and s 99 of the New Zealand Income Tax Act 1976, three principles – namely, the predication principle, the tax-mitigation principle and the choice principle – that were developed and progressively refined by the courts in Australia and New Zealand, will be examined. The article comes to the conclusion that the three principles are of limited utility in defining the scope of s 33 clearly. The separate task of conducting a comprehensive exploration of the possible solutions to the problems as regards s 33 is, however, beyond the scope of this article and should instead be undertaken on another occasion, preferably with the aid of guidance from the local courts.

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I. Introduction

1 It is axiomatic that the imposition of general anti-avoidance regulations ("GAARs") dilutes the freedom[2] of taxpayers in arranging their affairs with the view to minimising their tax liability. In Singapore, the enactment of a GAAR (as embodied in s 33 of the Income Tax Act[3] ("ITA")) by the Legislature has signalled a conscious departure from the principles that tax laws should be applied literally and that taxpayers should be allowed to arrange their dealings "so as that the tax attaching under the appropriate Acts is less than it otherwise would be".[4] More

1 Cap 134, 2008 Rev Ed.
2 *IRC v Duke of Westminster* [1936] AC 1.
3 Cap 134, 2008 Rev Ed.
4 *IRC v Duke of Westminster* [1936] AC 1 at 19, *per* Lord Tomlin.

worryingly, the introduction of a GAAR has been accompanied by a disturbing problem – the ill-defined line between acceptable tax-avoidance and unacceptable tax-avoidance. Indeed, although the courts in various foreign jurisdictions have endeavoured to define this line, the end result leaves much room for uncertainty.

2 Returning to s 33 of the ITA,[5] it is imperative to note (as a preliminary observation) that during the second reading of the Income Tax (Amendment) Bill ("ITAB"),[6] the then Minister for Finance, Dr Richard Hu Tsu Tau ("Dr Richard Hu"), had remarked that "adequate safeguards" were embedded in the judicial interpretations of legislation having similar wordings;[7] in this regard, it should be noted that s 33 of the ITA is modelled upon the former s 260 of the Australian Income Tax Assessment Act ("ITAA (Australia)") and the former s 99 of the New Zealand Income Tax Act 1976 ("ITA 1976 (NZ)"). With the benefit of hindsight, however, it may be argued that Dr Richard Hu had painted too sanguine a picture by placing undue confidence in the efficacy of the judicial principles developed in Australia and New Zealand.

3 As regards the interpretation of s 33 of the ITA[8] in a *purposive* manner, s 9A of the Interpretation Act[9] empowers the Judiciary to consider the Minister's speech in Parliament. It is in this light that the author will, in this article, turn to the Australian and New Zealand case law for guidance in assessing the approach that the local courts *could* possibly undertake in interpreting s 33 of the ITA. Indeed, in view of the fact that there is to date *no* reported local case on s 33 of the ITA (although there is in fact one reported local case (*UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties*[10] ("*UOL Development*")) on s 33A of the Stamp Duties Act[11] ("SDA"), which constitutes the anti-avoidance provision in respect of stamp duty in Singapore), the precedents from Australia and New Zealand consequently become the principal source of guidance for the local courts.

4 In the author's view, although s 33 of the ITA[12] (on the face of it) appears deceptively simple, its application in practice may entail considerable problems. In this article, the author will attempt to highlight and explore some of these problems. In order to facilitate the

5 Cap 134, 2008 Rev Ed.
6 *Singapore Parliamentary Debates* (13 January 1988) vol 50 at col 355.
7 *Singapore Parliamentary Debates* (13 January 1988) vol 50 at col 366.
8 Cap 134, 2008 Rev Ed.
9 Cap 1, 2002 Rev Ed.
10 [2008] 1 SLR(R) 126.
11 Cap 312, 2006 Rev Ed.
12 Cap 134, 2008 Rev Ed.

discussion, it may be useful (and indeed necessary) to first set the backdrop by undertaking three tasks, which can be outlined as follows. First, the two primary approaches that have been adopted by various countries in dealing with tax-avoidance will be briefly reviewed. Second, the author will introduce the essence of the problem of GAARs in general and s 33 of the ITA in particular: that of the fuzzy line separating acceptable tax-avoidance on the one hand and unacceptable tax-avoidance on the other. Third, in the light of s 33 of the ITA being modelled after s 260 of the ITAA (Australia) and s 99 of the ITA 1976 (NZ), three principles – namely, the predication principle, the tax-mitigation principle and the choice principle – that were developed by the Australian and New Zealand courts, must be examined in some detail. It will be seen that the limited utility of the three principles in defining the scope of s 33 of the ITA forms the kernel of the whole edifice of potential problems surrounding its application. With that in mind, the third task will be rounded off with an analysis of two relatively recent Privy Council cases, both of which considered s 99 of the ITA 1976 (NZ).

II. The contrasting approaches to tax-avoidance

5 There are in the main two different approaches adopted by various jurisdictions to tackle tax-avoidance. The first is to pass a law (*ie*, a GAAR) against tax-avoidance. This approach of implementing a GAAR has in fact been adopted in most common law jurisdictions (with the notable exception of the UK); examples include Australia,[13] New Zealand,[14] Singapore,[15] Canada,[16] Hong Kong[17] and South Africa.[18]

6 The central problem with this approach is the nature and extent of the GAAR in question. Without a clear definition of tax-avoidance, the operation of a GAAR can be strikingly problematic. Indeed, such a definition is missing in s 33 of the ITA,[19] but this, in the author's view, comes as no surprise as it is notoriously difficult to define a term such as tax-avoidance. Turning to the foreign context, in particular Australia and New Zealand, it is notable that the judicial efforts to resolve the problem have in fact been far from successful – this point will be further developed in the later segments of this article.

13 Australian Income Tax Assessment Act s 260 was replaced by Pt IVA.
14 New Zealand Income Tax Act 1976 s 99 was replaced by ss BG1 and GB1 of the Income Tax Act 2004 (New Zealand).
15 Income Tax Act (Cap 134, 2008 Rev Ed) s 33.
16 Canadian Income Tax Act s 245.
17 Hong Kong Inland Revenue Ordinance ss 61 and 61A.
18 South African Income Tax Act 1962 s 103.
19 Cap 134, 2008 Rev Ed.

7 The second approach is to define the ambit of taxes as precisely as possible, and to rely on specific anti-avoidance provisions in order to alleviate the problem of tax-avoidance. This approach has been endorsed in the UK, where the general view is that GAARs are inherently ambiguous, to the extent that they violate the rule of law.[20] The UK, however, faces the (main) problem of *interpreting* its tax legislation when dealing with a situation where the taxpayer has conducted his dealings with the aim of reducing his tax liability.[21] Another problem, which the UK has to grapple with, is that specific anti-avoidance provisions are *reactive* rather than proactive in effect. Indeed, these provisions are generally enacted only *after* the tax authorities have discovered that certain practices have been blatantly and frequently exploited by existing taxpayers.

8 In all of the above countries, the plethora of problems (as described above) is unfortunately still unresolved. Returning to Singapore, if the occasion does arise for the interpretation of s 33 of the ITA,[22] the local courts will be faced with (and hopefully assisted by) the line of cases interpreting s 260 of the ITAA (Australia) and s 99 of the ITA 1976 (NZ).

III. Acceptable tax-avoidance (tax-mitigation) and unacceptable tax-avoidance

9 As alluded to earlier,[23] the essential effect of a GAAR is arguably to defeat some forms of tax-avoidance that would have otherwise succeeded. The fundamental issue that therefore needs to be addressed is the ambit of the GAAR. Before examining certain principles (relating to the circumscription of the scope of the GAAR) in the following section, two preliminary points should first be highlighted.

10 First, it is necessary to distinguish between "tax-avoidance" and "tax-mitigation". Acts that constitute "tax-avoidance" are indubitably caught by GAARs. On the other hand, "tax-mitigation", a term coined by Lord Templeman,[24] covers acts which, even if effected primarily to reduce one's tax liability, are not caught by GAARs. Although the usage of the term "tax-mitigation" has been widely criticised, it will nevertheless be employed in this article, purely for the sake of

20 C Masters, "Is There a Need for a General Anti-Avoidance Rule in the United Kingdom?" [1994] BTR 647.

21 *W.T. Ramsay Ltd. v IRC* [1982] AC 300; *MacNiven v Westmoreland Investments* [2003] 1 AC 311; *Barclays Finance v Mawson* [2005] 1 AC 684.

22 Cap 134, 2008 Rev Ed.

23 See para 1 of this article.

24 *CIR v Challenge Corp Ltd* [1987] 1 AC 155 at 167–168.

convenience, *to cover acts that reduce or eliminate the tax liability but do not constitute tax-avoidance*.

11 Second, it is of cardinal importance to determine how wide the "choice principle" is. Tax legislation, in essence, offers a taxpayer several choices. If a taxpayer exercises his choice, albeit motivated primarily by tax reasons, it appears problematic to insist that his actions constitute tax-avoidance. However, if the choice principle is applied literally, the effectiveness of GAARs will be significantly diluted. Consequently, this question inevitably surfaces: which choices are allowed, and which are caught by GAARs?

IV. The three principles: "predication", "mitigation" and "choice"

12 As mentioned earlier,[25] the local courts can, in the interpretation of s 33 of the ITA,[26] have recourse to guidance in the form of the following three principles that originated in Australia and New Zealand. It is to this important area that the focus of the article now turns.

A. Predication principle

13 The "predication principle" involves a consideration of the particular transaction to determine whether the *objectively* ascertainable purpose of the transaction was to avoid tax. An inquiry into the *actual* motive of the participant(s) in the transaction is, however, *not* necessary.[27]

14 In *Newton v FCT*[28] ("*Newton*"), the Privy Council held that s 260 of the ITAA (Australia), the former incarnation of the Australian GAAR, applied to the series of transactions at hand. Section 260 of the ITAA (Australia) was expressed in remarkably wide terms as follows:

> (1) Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly –
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> (a) altering the incidence of any income tax;
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> (b) relieving any person from liability to pay any income tax or make any return;
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> (c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or

25 See paras 2 and 3 of this article.
26 Cap 134, 2008 Rev Ed.
27 *Newton v FCT* (1958) 98 CLR 1 at 8.
28 *Newton v FCT* (1958) 98 CLR 1 at 10.

(d) preventing the operation of this Act in any respect,

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

(2) This section does not apply to any contract, agreement or arrangement made or entered into after 27 May 1981.

15 In *Newton*, Lord Denning, in attempting to limit the scope of s 260 of the ITAA (Australia), stated that:[29] "In order to bring an arrangement within the section you must be able to predicate – by looking at the overt acts by which it was implemented – that it was implemented in that particular way so as to avoid tax. If you cannot so predicate but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing without necessarily being labelled as a means to avoid tax then the arrangement does not come within the section." This proposition became widely known as the predication principle.

16 There are two problems that one will encounter in applying the predication principle. The first relates to the meaning of the term "ordinary". As Lord Wilberforce pithily remarked, "the courts are now having to decide how 'ordinary' a transaction must be to escape".[30]

17 Second, the principle appears too loose in that there are surely some acts which cannot logically be treated as "tax-avoidance" even if *one of* the objectively ascertainable purposes of the transaction was to reduce the tax liability. It is submitted that these acts would probably be more appropriately encompassed by Lord Templeman's definition of "tax-mitigation".[31]

18 Notwithstanding the above problems, the predication principle has been followed in *Mobil Oil Australia v COT*[32] ("*Mobil*") and *Peate v COT*[33] ("*Peate*"). A careful review of both these decisions will, however, reveal that they are in fact not easily reconcilable. Indeed, an objectively ascertainable purpose of the mutually-cancelling payments in *Mobil* was arguably to avoid tax, but it was held that the transactions were "ordinary" and that, therefore, s 260 of the ITAA (Australia) did not apply. This should be contrasted with the setting up of a family company, which was held to be caught by s 260 of the ITAA (Australia) in *Peate*.

29 *Newton v FCT* (1958) 98 CLR 1 at 8.
30 *Mangin v IRC* [1971] AC 739 at 756.
31 *CIR v Challenge Corp Ltd* [1987] 1 AC 155 at 167–168. See para 25 of this article.
32 [1966] AC 275.
33 [1967] 1 AC 308.

19 The case of *Mangin v IRC*[34] ("*Mangin*"), which involved a New Zealand GAAR (s 108 of the Land and Income Tax Act 1954 ("LITA (NZ)")),[35] saw the Privy Council applying the predication principle and holding that the transactions in question constituted an illegal form of tax-avoidance. In this connection, the majority held that the transactions were not "ordinary", and were "implemented in that particular way so as to avoid tax". In the author's view, this case joins *Peate*[36] as another decision that is not neatly reconcilable with *Mobil*.[37]

20 In *Europa Oil (NZ) v CIR*[38] ("*Europa*"), Lord Diplock applied the predication principle and held that s 108 of the LITA (NZ) "does not strike down ordinary business or commercial transactions".[39] As it was succinctly put, an arrangement will be considered ordinary if its "main purpose" is the "achievement of some business or commercial object".[40] It is, at this juncture, apposite to note that s 33(3)(*b*) of the ITA[41] provides that the anti-avoidance provision as encompassed in s 33 of the ITA shall not apply to "any arrangement carried out for *bona fide commercial reasons* and had not as one of its main purposes the avoidance or reduction of tax" [emphasis added].

21 The fact that these cases are not easily reconcilable certainly engenders support for the view that the potential utility of the predication principle in defining the scope of s 33 of the ITA[42] has been considerably diluted. In *Europa*,[43] Lord Diplock held that the "main purpose" was the "commercial object" which was the supply of petrol. In *Newton*,[44] *Mangin*[45] and *Peate*[46] which all came before the Privy Council prior to *Europa*, there is great force in the argument that the "main purpose" in each of those cases was likewise the "commercial object": in *Newton* – to distribute the profits of the company; in *Mangin* – to supply wheat; and in *Peate* – the provision of medical services. Unfortunately for the taxpayers in all three cases, the Privy Council reached the opposite conclusion and decided that the respective GAARs could be properly invoked.

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34 [1971] AC 739.
35 Land and Income Tax Act 1954 (New Zealand) s 108, which was later amended in 1974 and reproduced as s 99 of the Income Tax Act 1976 (New Zealand).
36 *Peate v COT* [1967] 1 AC 308.
37 *Mobil Oil Australia v COT* [1966] AC 275.
38 [1976] 1 NZLR 546.
39 [1976] 1 NZLR 546 at 556.
40 [1976] 1 NZLR 546 at 556.
41 Cap 134, 2008 Rev Ed.
42 Cap 134, 2008 Rev Ed.
43 *Europa Oil (NZ) v CIR* [1976] 1 NZLR 546.
44 *Newton v FCT* (1958) 98 CLR 1.
45 *Mangin v IRC* [1971] AC 739.
46 *Peate v COT* [1967] 1 AC 308.

22 In this regard, it appears that the judges in *Newton*,[47] *Mangin*[48] and *Peate*[49] were influenced by the fact that the commercial purposes in those cases could have been attained in a less convoluted manner and without implementing complicated dealings that ostensibly were engineered to reduce their tax liability. However, it is submitted that this reasoning is equally applicable to *Europa*,[50] where the petrol could have been simply purchased and sold without the taxpayer having to resort to acquiring a substantial portion of its profits through a subsidiary incorporated in a tax-haven country like the Bahamas.

23 A literal reading of s 33 of the ITA[51] does appear to lend support to the applicability of the predication principle.[52] However, in view of the significant problems[53] that bedevil the application of this principle, coupled with the fact that the cases applying the principle are not easily reconcilable, it is submitted that this principle will not provide adequate guidance to the local courts in the interpretation of s 33 of the ITA.

B. Tax-mitigation principle

24 This principle originated from the Privy Council decision of *CIR v Challenge Corp Ltd*[54] ("*Challenge*"), which involved a simple transaction whereby the taxpayer (Challenge Corporation) purchased a loss company (Perth) from the Merbank group of companies. In consideration for the acquisition of Perth, Challenge Corporation paid a fee (which comprised $10,000 coupled with half of the tax savings obtained by Challenge Corporation as a result of this arrangement) to the Merbank group. In other words, the calculation of the purchase price was premised on the tax savings obtained in the event Challenge Corporation could group its pre-tax income with the available tax losses of Perth pursuant to s 191 of the ITA 1976 (NZ). The majority, comprising Lord Keith, Lord Brightman, Lord Templeman and Lord Goff, held that the transaction was caught by s 99 of the ITA 1976 (NZ), the former New Zealand GAAR, which was as follows:

> (1) For the purposes of this section –
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> "Arrangement" means any contract, agreement, plan, or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect:

47 *Newton v FCT* (1958) 98 CLR 1.
48 *Mangin v IRC* [1971] AC 739.
49 *Peate v COT* [1967] 1 AC 308.
50 *Europa Oil (NZ) v CIR* [1976] 1 NZLR 546.
51 Cap 134, 2008 Rev Ed.
52 See para 20 of this article.
53 As described at paras 16 to 22 of this article.
54 [1987] AC 155.

"Liability" includes a potential or prospective liability in respect of future income:

"Tax avoidance" includes –

(a) Directly or indirectly altering the incidence of any income tax:

(b) Directly or indirectly relieving any person from liability to pay income tax:

(c) Directly or indirectly avoiding, reducing, or postponing any liability to income tax.

(2) Every arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes if and to the extent that, directly or indirectly, –

(a) Its purpose or effect is tax avoidance; or

(b) Where it has 2 or more purposes or effects, one of its purposes or effects (not being a merely incidental purpose or effect) is tax avoidance, whether or not any other or others of its purposes or effects relate to, or are referable to, ordinary business or family dealings, whether or not any person affected by that arrangement is a partly thereto.

(3) Where an arrangement is void in accordance with subsection (2) of this section, the assessable income … of any person affected by that arrangement shall be adjusted in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that person from or under that arrangement, and, without limiting the generality of the foregoing provisions of this subsection, the Commissioner may have regard to such income as, in his opinion, either –

(a) That person would have, or might be expected to have, or would in all likelihood have, derived if that arrangement had not been made or entered into; or

(b) That person would have derived if he had been entitled to the benefit of all income, or of such part thereof as the Commissioner considers proper, derived by any other person or persons as a result of that arrangement.

25 Lord Templeman, in attempting to draw the line between "acceptable tax-avoidance" and "unacceptable tax-avoidance", formulated the tax-mitigation principle. In this regard, "tax-avoidance" was defined as covering transactions where "the taxpayer reduces his liability to tax without involving him in the loss or expenditure which would entitle him to that reduction".[55] In contrast, "tax-mitigation" was

55 *CIR v Challenge Corp Ltd* [1987] AC 155 at 168.

defined as where a taxpayer "reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability".[56] Put simply, this test focuses on the *actual financial consequences* within the transaction – where the arrangement has resulted in the taxpayer suffering a loss or expenditure, as defined by Lord Templeman, it will *not* be caught by s 99 of the ITA 1976 (NZ).

26 It is arguable that in *Challenge*,[57] the taxpayer had as a matter of law reduced its assessable income and was thus entitled to a reduction in its tax liability. Indeed, the taxpayer had structured its purchase of the loss company so as to utilise the losses under s 191 of the ITA 1976 (NZ). In effect, the taxpayer had therefore successfully circumvented the specific anti-avoidance provision in s 191. Since the taxpayer had complied with the particular requirements of s 191, it had arguably incurred the requisite *expenditure* within the meaning of the tax-mitigation principle; the taxpayer, in saving taxes amounting to $2.85m, had paid the loss company $1.305m. It would therefore seem apparent that the transaction that was entered into by the taxpayer fell within the parameters of tax-mitigation as defined by Lord Templemen. Lord Templemen, however, did not share the same view. Indeed, according to Lord Templeman, the transaction constituted tax-avoidance, and not tax-mitigation:[58]

> Section 191 [ITA 1976 (NZ)] was intended to give effect to the reality of group profit and losses. When one member of a group makes a profit of $5.8m and another member of the group makes a loss of $5.8m then the reality is that the group has made neither a profit nor a loss and that the members of the group should not be liable to tax. Section 191 in these circumstances is not an instrument of tax avoidance. But in the present circumstances the reality is that the Challenge group never made a loss of $5.8m. A loss of $5.8m was made by Perth and that loss fell on Merbank before Challenge contracted to buy Perth [from Merbank]. Section 191 in these circumstances is an instrument of tax avoidance which falls foul of section 99 [ITA 1976 (NZ)].

27 With respect, it appears that Lord Templeman was assessing the concept of income and judging entitlements according to some extra-legal standard.[59] In the author's view, this makes the application of the tax-mitigation principle highly unpredictable, therefore diminishing the utility of this principle in defining the scope of s 99 of the ITA 1976 (NZ). Indeed, this principle was roundly rejected by Lord Hoffmann in

56 *CIR v Challenge Corp Ltd* [1987] AC 155 at 167.
57 *CIR v Challenge Corp Ltd* [1987] AC 155.
58 *CIR v Challenge Corp Ltd* [1987] AC 155 at 164.
59 Michael Littlewood, "The Privy Council and the Australian Anti-Avoidance Rules" (2007) British Tax Review 175 at 198.

O'Neil v CIR[60] ("*O'Neil*") where his Lordship observed with admirable acuity that the Privy Council was "… in complete agreement with the observation that the distinction between tax-mitigation and tax-avoidance is unhelpful: as the judge pithily said, it 'describes a conclusion rather than providing a sign post to it'".[61]

28 This principle *could possibly* be employed as a technique to control the scope of a literal interpretation of s 33 of the ITA.[62] However, the usefulness of this principle ends there. Its application has the potential effect of either upholding or striking down all transactions. This outcome is evidently dismal and unsatisfactory. It is, therefore, submitted that this principle provides limited guidance to the local courts in drawing the distinction between acceptable tax-avoidance and unacceptable tax-avoidance.

29 The limited utility of the tax-mitigation principle will become more apparent when two Privy Council cases are analysed later in this article. At this juncture, it is necessary to examine the third principle that is applicable in the interpretation of s 33 of the ITA.[63]

C. Choice principle

30 The choice principle, which emerged from *WP Keighery v EC of T*,[64] may confront the local courts when addressing the issue of whether an arrangement that qualifies under some other section of the ITA[65] is consequently beyond the reach of s 33 of the ITA. This issue can be generally described as follows:[66]

> Clearly the legislature could not have intended that [the GAAR] should override all other provisions of the Act so as to deprive the tax paying community of structural choices, economic incentives, exemptions, and allowances provided for by the Act itself … in many cases, but for the anticipated availability of the tax benefit, the taxpayer would never have entered into the … transaction … It is not the function of [the GAAR] to defeat other provisions of the Act or to achieve a result which is inconsistent with them.

31 Interestingly, the courts in Australia and New Zealand have embarked on different paths in resolving this issue. In Australia, the choice principle stated that s 260 of the ITAA (Australia) was

60 (2001) 20 NZTC 17,051.
61 (2001) 20 NZTC 17,051 at 17,057.
62 Cap 134, 2008 Rev Ed.
63 Cap 134, 2008 Rev Ed.
64 (1957) 100 CLR 66.
65 Cap 134, 2008 Rev Ed.
66 *CIR v Challenge Corp Ltd* [1986] 2 NZLR 513 at 548–549, *per* Richardson J.

inapplicable in situations where an arrangement was in line with some other provisions of their income tax legislation, since these provisions inherently held out a choice. The taxpayer, who arranged his dealings within the boundaries of these provisions, was allowed to escape from the operation of s 260 of the ITAA (Australia). Indeed, in the High Court of Australia decision of *Mullens Investment Pty Ltd v FCT*[67] ("*Mullens*"), Barwick CJ succinctly described the choice principle in the following manner:[68]

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

32 The application of the choice principle was extended in subsequent Australian cases, which included *Mullens*,[69] *Slutzkin v Federal Commissioner of Taxation*[70] and *Cridland v Federal Commissioner of Taxation*.[71] Not surprisingly, the choice principle diluted the intended effect of the predication test[72] considerably, and eventually led to the demise of s 260 of the ITAA (Australia) and the emergence of Part IVA of the ITAA (Australia).

33 Turning to the developments in New Zealand, the choice principle was rejected by the majority of the Privy Council in *Challenge*.[73] Lord Templeman (who was part of the majority) stated emphatically that: "Tax avoidance schemes largely depend on the exploitation of one or more exemptions or reliefs or provisions or principles of tax legislation. Section 99 would be useless if a mechanical and meticulous compliance with some other section of the Act were sufficient to oust s 99."[74] A strong dissenting judgment was, however, delivered by Lord Oliver who was of the view that the operation of s 99 of the ITA 1976 (NZ) was subject to the other provisions of the Act that authorise certain arrangements.[75]

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67 (1976) 76 ATC 4288.
68 (1976) 76 ATC 4288 at 4294.
69 (1976) 76 ATC 4288.
70 (1977) 140 CLR 314.
71 (1977) 140 CLR 330.
72 For which, see paras 13–15 of this article.
73 *CIR v Challenge Corp Ltd* [1987] AC 155.
74 *CIR v Challenge Corp Ltd* [1987] AC 155 at 165.
75 *CIR v Challenge Corp Ltd* [1987] AC 155 at 171.

34 As regards the latest developments on the local front, the choice principle has in fact been recently considered by the High Court in *UOL Development*[76] where Tan Lee Meng J made reference to the observations of Barwick CJ in *Mullens.*[77] In this connection, Tan J opined as follows:[78]

> The difficulty faced by UOLD in its attempt to rely on *Mullens* was that the '*actual transaction*' in the present case is, in truth, an *en bloc* sale of the Minbu properties and not, as UOLD had contended, 53 separate contracts with the registered proprietor or proprietors of each of the 53 units in the Minbu properties. [emphasis added]

35 It therefore follows that *if* the *actual transaction* in *UOL Development*[79] was in fact composed of 53 separate contracts between UOLD and each registered proprietor, and not an *en bloc* sale, the choice principle may at least have been available and applicable in that case. As it turned out, however, Tan J's view that the actual transaction was in fact an *en bloc* sale strangled the argument (as regards the choice principle) in its cradle.

36 It is the author's view that a GAAR inevitably removes *some* choices apparently available for the taxpayer as conferred by the tax statute. If not, there would be no room at all for the GAAR to apply. On the other hand, it would appear bizarre if the GAAR abrogates *all* choices available to the taxpayer. In the final analysis, the issue is which choice is eliminated by the GAAR and which is not? The Privy Council in *Challenge*[80] notably left this gripping issue unresolved.

37 Herein lies the heart of the difficulty potentially faced by the local courts. When should s 33 of the ITA[81] apply to an arrangement which the ITA fails to tax or taxes in a preferential manner? This difficulty has been acknowledged by the Tax Law Review Committee in the following terms:[82]

> Statutory [GAARs], like judicial anti-avoidance doctrines, are uncertain in their scope and application. The words of the statute do not say with precision and in what circumstances tax will be imposed. This is hardly surprising. If Parliament could adequately describe in advance the circumstances in which tax would be charged, it would legislate to that effect. A [GAAR] attempts to deal with those actions that legislators cannot anticipate. At the same time, Parliament

76 (*UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties* [2008] 1 SLR(R) 126. See para 3 of this article.
77 *Mullens v FCT* (1976) 76 ATC 4288. See para 31 of this article.
78 [2008] 1 SLR(R) 126 at [40].
79 [2008] 1 SLR(R) 126.
80 *CIR v Challenge Corp Ltd* [1987] AC 155.
81 Cap 134, 2008 Rev Ed.
82 Tax Law Review Committee, *Tax Avoidance* (London: Institute for Fiscal Studies, 1997) at p 32, paras 4.10 and 4.11.

> complicates matters further because it views some types of tax saving benevolently or even encourages certain action that has the effect of reducing tax liabilities. Where and how is the line to be drawn?

38 In this regard, the New Zealand Court of Appeal[83] has formulated a "scheme and purpose approach" where the application of the GAAR is dependent on a holistic interpretation of the relevant provisions, and whether it is consistent with the scheme and purpose of the Income Tax Act. This approach has in fact been approved of by the Privy Council in both *O'Neil*[84] and *Peterson v CIR*[85] ("*Peterson*").

39 It is, however, pertinent to note that the drawback to the "scheme and purpose approach" is that it is difficult to discern any coherent policy in a specific provision, regime or indeed the Income Tax Act as a whole. This problem is exacerbated where different tax regimes are applied to a complex set of composite commercial arrangements. Here, it is impossible to presume that all the tax policies are effortlessly discernible. It is therefore submitted that this approach is of limited use to the local courts in tackling the choice principle.

40 Another approach that may be worth considering involves subjecting the application of the choice principle to the rule of construction expressed in the maxim "*generalia specialibus non derogant*". In essence, this approach proposes that a GAAR is a *general* provision, which, if in conflict with a *specific* provision, cannot be seen as derogating from the *specific* provision.[86] This technique of restricting the choice principle is, however, hampered by the difficulty in distinguishing between a specific and general provision. In the light of this obstacle, Hill J in *Davies v FCT* suggested that, in the ultimate analysis, the Act has to be construed "as a whole to determine where the incidence of tax was intended to fall".[87] This, however, appears to be extremely similar to the "scheme and purpose approach", which as argued earlier, is not entirely useful in applying the choice principle.

V. Analysis of case law – Privy Council

41 Before examining two relatively recent Privy Council cases (both of which dealt with s 99 of the ITA 1976 (NZ)), it may be helpful (and indeed necessary) to set the context with a brief review of a few earlier decisions. It will be seen that the techniques developed by the courts in interpreting a GAAR (be it s 260 of the ITAA (Australia) or

83 *CIR v Challenge Corp Ltd* [1986] 2 NZLR 513.
84 [2001] UKPC 17.
85 [2001] UKHL 6.
86 *FCT v Gulland* (1985) 160 CLR 55 at 66 and 81.
87 [1989] 20 ATR 548 at 579.

s 99 of the ITA 1976 (NZ)) have been unsatisfactory in terms of providing *clear guidance as to the dividing line between tax-avoidance and tax-mitigation*.

42 Let us commence by reviewing the then position in Australia. *Newton*[88] was a landmark case where the term "avoid" was discussed in relation to tax-avoidance (it is notable that the term "avoid" is similarly used in s 33(1)(*c*) of the ITA).[89] Lord Denning recognised that extending the scope of the GAAR (s 260 of the ITAA (Australia)) to encompass *any* act intended to reduce tax payable would be palpably undesirable, and, hence, a distinction between tax-avoidance (caught by s 260 of the ITAA (Australia)) and ordinary transactions (not caught by s 260 of the ITAA (Australia)) was drawn.[90]

43 Meanwhile, in New Zealand, the terms "avoid" and "evade" were effaced from and the phrase "altering the incidence" of tax (this phrase is similarly found in s 33(1)(*a*) of the ITA)[91] inserted into s 108 of the LITA (NZ)[92]. In *Mangin*,[93] Lord Donovan held that, notwithstanding the amendments, the principle developed in *Newton*[94] continued to apply to s 108 of the LITA (NZ), with the result being that the distinction between tax-avoidance and ordinary transactions remained.

44 To excise the above distinction, the New Zealand Legislature introduced the term "tax-avoidance" and expressly included "ordinary dealings" within its scope by inserting a new paragraph into s 99(2) of the ITA 1976 (NZ). In doing so, it appears that the Legislature had intended that "tax-avoidance" covered any act which had the effect of reducing the tax payable. However, the Privy Council in *Challenge* limited s 99 of the ITA 1976 (NZ) by introducing the general distinction between "tax-avoidance" (caught by the GAAR) and "tax-mitigation" (not caught by the GAAR).[95]

45 This brings us neatly to the final two New Zealand tax cases heard by the Privy Council, *O'Neil*[96] and *Peterson*,[97] both of which interpreted s 99 of the ITA 1976 (NZ), and certainly merit a detailed examination in this article. Before turning to *O'Neil* and *Peterson*, two

88 *Newton v FCT* [1958] AC 450.
89 Cap 134, 2008 Rev Ed.
90 [1958] AC 450 at 466. See further paras 13–16 of this article.
91 Cap 134, 2008 Rev Ed.
92 Land and Income Tax Act 1954 (New Zealand) s 108, which was later amended in 1974 and reproduced as s 99 of the Income Tax Act 1976 (New Zealand).
93 *Mangin v IRC* [1971] AC 739.
94 [1958] AC 450.
95 *CIR v Challenge Corp Ltd* [1987] AC 155 at 167–168.
96 *O'Neil v CIR* [2001] UKPC 17.
97 *Peterson v CIR* [2005] UKPC 5.

preliminary points should first be noted. First, the distinction between "tax-avoidance" and "tax-mitigation" was jettisoned in *O'Neil*, but was subsequently reinstated in *Peterson*. Second, notwithstanding the reinstatement of this distinction, *Peterson* was not decided unanimously.

A. O'Neil[98]

46 The taxpayers ("T") in this case owned two profitable companies ("PC"). T sold their shares in PC to another company ("R"), and retained the option of buying back their shares for a nominal amount. The purchase price for the shares was not paid initially.

47 T continued running PC as usual. PC paid their profits to R twice a year; these payments were labelled as "administration charges" and PC sought to deduct them against their profits with a view to claiming zero tax payable. On the other hand, the "administration charges" were assessable income to R but because R was part of a group of companies, of which some incurred losses, R could enjoy group relief, and hence paid no tax.

48 R retained a service fee, and paid the rest of PC's profits to T as part payment for the shares. T argued that their receipts from the sale of their shares were on capital account and hence not taxable, since there was no capital gains tax in New Zealand. Not surprisingly, the Commissioner invoked s 99 of the ITA 1976 (NZ) and the Privy Council unanimously found in favour of the Commissioner.

49 Lord Hoffmann remarked that Lord Templeman's distinction between "tax-avoidance" and "tax-mitigation" was "unhelpful".[99] In that light, Lord Hoffmann imported the distinction between "legal concepts" and "commercial concepts", which his Lordship had previously introduced in the House of Lords decision of *MacNiven v Westmoreland Investments*.[100] In doing so, Lord Hoffmann apparently regarded s 99 of the ITA 1976 (NZ) as similar to the UK *Ramsay* principle,[101] the scope of which is dependent on the distinction between "legal concepts" and "commercial concepts".[102] In the author's opinion, Lord Hoffmann's approach is questionable since s 99 of the ITA 1976 (NZ) (as a GAAR) was intended to have a wider effect. If the scope of s 99 of the ITA 1976 (NZ) were the same as that of the *Ramsay* principle, the former would have no effect at all.

98 [2001] UKPC 17.
99 [2001] UKPC 17 at [9].
100 *MacNiven v Westmoreland Investments* [2003] 1 AC 311.
101 *WT Ramsay Ltd v IRC* [1982] AC 300; *Furniss v Dawson* [1984] AC 474.
102 [2001] UKPC 17 at [10].

B. Peterson[103]

50 This case concerned two film production companies ("PC") which formed a syndicate of individuals, including the taxpayer ("T"). The syndicate invested money in the production of two films. In this connection, the agreement was that PC would sell the films to the syndicate for a price to be pre-paid. This price comprised the actual budget ("x") for the films and an additional amount ("y"), which afforded T a tax benefit, as "y" could be deducted from T's taxable income. It is apposite to note that "y" was a sum greater than "x".

51 The syndicate resorted to the consumption of internal funds in order to provide "x", and incurred a non-recourse loan to supply "y". This loan was to be repaid only from the income generated by the films. Upon receiving "x+y", PC paid "y" to the lender. The syndicate, however, remained liable to repay the loan. PC then used "x" to produce the films.

52 The tax savings claimed by T (through a deduction of the total price over two years) exceeded "x+y". The films turned out to be a major financial debacle, but the effect of the above scheme was that T made a cash profit.

53 The Commissioner invoked s 99 of the ITA 1976 (NZ), and argued that T's claim for deduction was restricted to "x" and not "x+y". The Privy Council split three to two in favour of T. Both the majority and minority resurrected the distinction between "tax-avoidance" and "tax-mitigation". Notably, Lord Hoffmann's distinction between "commercial and legal concepts" in *O'Neil*[104] was not applied. Lord Millett (for the majority) also replaced the terms "tax-mitigation" and "tax-avoidance" with two new terms – "acceptable tax advantage" and "unacceptable tax advantage" respectively.

54 Turning to the facts of the case, Lord Millett held that the syndicate had "suffered the economic burden of paying the full amount of" the actual budget and the additional payment.[105] Section 99 of the ITA 1976 (NZ) would only apply if T had reduced his income tax liability without incurring the expenditure that created the tax deduction. In Lord Millett's view, the fact that more than half of the total price was funded by a non-recourse loan did not mean that T had not suffered the economic cost of paying the agreed upon price for the two films. The fact that PC made a secret profit due to the circular funding was also irrelevant. The minority, on the other hand, held that

103 *Peterson v CIR* [2005] UKPC 5.
104 *O'Neil v CIR* [2001] UKPC 17.
105 [2005] UKPC 5 at [44].

T did not bear the "economic burden" of repaying the loan, and, hence, s 99 of the ITA 1976 (NZ) applied.

55 Both the majority and minority were, however, in agreement on a number of points. First, s 99 of the ITA 1976 (NZ) cannot be read literally. Second, taxpayers are entitled to structure their affairs to take advantage of structural choices and economic incentives contained in the ITA 1976 (NZ). It is apparent that both the majority and minority had applied the same test. Indeed, both distinguished between "tax-avoidance" and "tax-mitigation", and analysed whether the taxpayer had suffered the requisite "economic burden". However, they reached diametrically opposite conclusions. This aptly illustrates the unsatisfactory nature of the current test to determine whether tax-avoidance has occurred and consequently plants a giant question mark over the internal consistency and clarity of the principles involved.

56 On the facts, it is submitted that the purpose of the scheme was to provide the individuals with an opportunity for tax reduction through the financing of the films. The aim was not to finance the films in a tax-efficient way. Further, the loan was a non-recourse one, and therefore, in the event the income generated from the films was insufficient, T was never liable to repay the loan using his own funds.

57 As evidenced by the above examination of the two Privy Council cases, the scope of the GAAR is unfortunately still highly unsettled. In particular, the fundamental issue of the meaning of "tax-avoidance" remains unresolved. Indeed, an application of the same legal test in a case can lead to vastly different results, as can be seen from the difference in opinion of the majority and minority in many of the Privy Council decisions.

58 It is of course common in other areas of the law to find cases where the judges disagree with one another as to the outcome. However, there is a general consensus as to whether the case at hand is a marginal one, and, hence, it would be possible to distinguish between two closely related ideas such as misfeasance and nonfeasance in tort law.

59 In respect of tax-avoidance cases, however, the judges, when drawing the distinction between tax-avoidance and tax-mitigation, appear to reach their conclusions with aplomb, even when they arrive at markedly divergent outcomes. In their judgments, all the cases do not appear marginal. Indeed, in *Challenge*, Lord Templeman was convinced that "a clearer case … cannot be imagined",[106] although Lord Oliver, who dissented strongly, plainly did not share the same view. Similarly, in *Peterson*, both the majority and minority insisted that the case at hand

106 *CIR v Challenge Corp Ltd* [1987] AC 155 at 164.

was not a borderline one. The majority considered it clear that s 99 of the ITA 1976 (NZ) was not applicable. The minority, in contrast, were in no doubt that it was, as can be seen from their confident remark that "a clearer case [for the application of s 99 of the ITA 1976 (NZ)] can hardly be imagined".[107]

60 The above analysis of the cases aptly illustrates the difficulty in determining where exactly the line between tax-avoidance and tax-mitigation is. Consequently, there is much indeterminacy in the legal scope and operation of the blemished rules. Further, there is at present great *uncertainty as to the manner and circumstances that warrant the application of the GAAR*. It is, therefore, the author's view that the principles developed by the courts in this regard have been far from satisfactory.

VI. A critique of s 33 of the ITA

61 Having set the backdrop,[108] we will now turn to a critical evaluation of the current anti-avoidance provision in Singapore, s 33 of the ITA,[109] which reads as follows:

> Comptroller may disregard certain transactions and dispositions
>
> 33.–(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly –
>
> (a) to *alter the incidence of any tax* which is payable by or which would otherwise have been payable by any person;
>
> (b) to *relieve any person from any liability to pay tax or to make a return* under this Act; or
>
> (c) to *reduce or avoid any liability* imposed or which would otherwise have been imposed on any person by this Act,
>
> the Comptroller *may*, without prejudice to such validity as it may have in any other respect or for any other purpose, *disregard or vary* the arrangement and *make such adjustments as he considers appropriate*, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to *counteract any tax advantage* obtained or obtainable by that person from or under that arrangement.
>
> (2) In this section, "arrangement" means any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.

107 *Peterson v CIR* [2005] UKPC 5 at [96].
108 See para 4 of this article.
109 Cap 134, 2008 Rev Ed.

> (3) This section *shall not apply to* –
>
> (a) any arrangement made or entered into before 29th January 1988; or
>
> (b) any arrangement carried out for *bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.*
>
> [emphasis added]

62 Notwithstanding the simplicity in the manner s 33 of the ITA[110] had been drafted, there were, at the second reading of the ITAB[111] in Parliament, concerns raised and ventilated in opposition to the insertion of s 33. Indeed, a major concern in respect of the application of s 33 is its potential uncertainty and width.[112] Further, the Comptroller has been vested with notably wide powers of reconstruction so as to counteract *any* tax advantage obtained or obtainable under the arrangement.[113]

63 In the hope of alleviating the above concerns, Dr Richard Hu delivered the following incisive remarks in Parliament. First, s 33 "empowers the Comptroller to disregard and make adjustments to certain arrangements which are carried out for the purpose of tax avoidance and not principally for bona fide commercial reasons".[114] Second, some of the factors that the Comptroller of Income Tax may have regard to in his assessment of the applicability of s 33 to a particular transaction were discussed as follows:

> In assessing whether a particular scheme would fall under the ambit of section 33, the Inland Revenue Department would, among other things, look for the presence of artificiality, the interposing of various intermediaries or transactions to reduce or avoid tax and transfer pricing. It should be stressed that *the aim is to reduce blatant or contrived tax avoidance arrangements and is not intended to affect normal commercial transactions.* I would also like to clarify that companies and individuals granted tax exemptions and concessions under specific incentive schemes would not be affected by the new section 33. They will continue to enjoy the tax concessions. [emphasis added]

64 It bears emphasising that there is to date no reported local case on s 33 of the ITA.[115] It is noted, however, that guidance can be sought

110 Cap 134, 2008 Rev Ed.
111 *Singapore Parliamentary Debates* (13 January 1988) vol 50 at col 355.
112 *Singapore Parliamentary Debates* (13 January 1988) vol 50 at col 362.
113 Income Tax Act (Cap 134, 2008 Rev Ed) s 33(1).
114 *Singapore Parliamentary Debates* (13 January 1988) vol 50 at col 358.
115 Cap 134, 2008 Rev Ed.

from the High Court decision of *UOL Development*[116] which dealt with, *inter alia*, the application of s 33A of the SDA[117] (the anti-avoidance provision in respect of stamp duty). Section 33A of the SDA is similarly worded (in all material aspects) to s 33 of the ITA and reads as follows:

> (1) Where the Commissioner is satisfied that the purpose or effect of any arrangement is, directly or indirectly –
>
> (a) to alter the incidence of any duty which is payable or which would otherwise have been payable by any person;
>
> (b) to relieve any person from any liability to pay duty; or
>
> (c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,
>
> the Commissioner may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the amount of duty payable, or the imposition of liability to duty, so as to counteract any reduction in or avoidance of duty payable by that person from or under that arrangement.
>
> (2) In this section, "arrangement" means any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.
>
> (3) This section shall not apply to –
>
> (a) any arrangement made or entered into before 1st September 1999; or
>
> (b) any arrangement carried out for bona fide commercial reasons and had not as one of its main purpose the avoidance or reduction of duty.

65 For the purposes of this article, there were a couple of penetrating points made in *UOL Development* worth highlighting here. First, Tan J, in his consideration of the applicability of s 33A of the SDA,[118] referred[119] to the following observations made by Dr Richard Hu at the second reading of the ITAB:[120]

> Tax avoidance schemes are *purely tax-driven with little or no commercial value* or rationale. This is unlike tax planning where the transactions or schemes have *some commercial basis, and where the*

116 *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties* [2008] 1 SLR(R) 126.

117 Cap 312, 2006 Rev Ed.

118 Cap 312, 2006 Rev Ed.

119 *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties* [2008] 1 SLR(R) 126 at [38].

120 *Singapore Parliamentary Debates, Official Report* (18 August 1999) vol 70 at col 2155.

> *issue is structuring the most tax-efficient arrangement in accordance with the relevant tax laws*. Generally, tax planning, if carried out within the confines of existing laws, would not be caught under section 33A. In assessing whether a particular scheme or arrangement would fall under the ambit of section 33A of the Act, the Inland Revenue Authority would amongst other things look at the presence of *artificiality or contrived* transactions to reduce or avoid tax liabilities but which have *little or no commercial basis*. [emphasis added]

66 Second, in response to the argument advanced by the plaintiff (who appealed against the assessment of stamp duty by the Commissioner of Stamp Duties) that "if s 33A was read too widely, the tax incentives or relief afforded by other provisions of the Act would be nullified",[121] Tan J remarked as follows:[122]

> The answer to this line of argument is that s 33A(3)(*b*) specifically provides that the section shall not apply to any arrangement that has been carried out for *bona fide* commercial reasons and does not have the avoidance or reduction of stamp duty as one of its main purposes. In the present case, the plan for 53 separate contracts was mooted for the sole purpose of lessening the stamp duty payable on the *en bloc* sale. There was never any intention to create rights and obligations for the parties concerned other than those envisaged in the invitation to tender. The plan for 53 separate contracts had no sound commercial basis and was so contrived that it was clearly intended to reduce or avoid tax liabilities. Section 33A of the Act thus provides another justification for the position adopted by the Commissioner in the present case.

67 Returning to s 33 of the ITA,[123] it appears that s 33(3)(*b*) of the ITA (which is in all material aspects similar to s 33A(3)(*b*) of the SDA)[124] may provide some form of reassurance to a taxpayer that the section is not as wide as it appears to be. Indeed, s 33(3)(*b*) of the ITA clearly envisions a situation where a taxpayer, who has (in the view of the Comptroller) fallen foul of s 33(1) of the ITA, can avail himself of the defence that the arrangement which he had entered into was carried out for *bona fide commercial reasons and* that it had *not as one of its main purposes the avoidance or reduction of tax*. It does not, however, follow that the application of s 33 of the ITA has been made any clearer or more well defined as a result. Indeed, Nabil Orow in "Structured

121 *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties* [2008] 1 SLR(R) 126 at [41].

122 *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties* [2008] 1 SLR(R) 126 at [41].

123 Cap 134, 2008 Rev Ed.

124 Cap 312, 2006 Rev Ed.

Finance and the Operation of General Anti Avoidance Rules" observed that:[125]

> The notion of *purpose* is open-textured and requires a distinction to be made where there is no conceptual or real difference. Revenue authorities, courts and taxpayers are required to distinguish between tax avoidance purposes on the one hand and non-tax or commercial purposes on the other. *Many courts across the common law world have recognised that such a distinction is fanciful and leaves much scope for indeterminacy in legal scope and practical operation of the tainted rules.*
>
> Further, general anti-avoidance rules often operate where a certain purpose threshold is reached. It is submitted that *the concept used to prescribe and define such a threshold, normally dominant or prevailing, is itself open textured and leaves much scope for impression and subjective judgment*.
>
> [emphasis added]

68 The author respectfully aligns himself with the illuminating views of Nabil Orow. Leaving aside the difficulty in applying the literal words such as "*bona fide* commercial purpose", it is noted (as a further observation) that s 33 of the ITA[126] empowers the Comptroller to strike down a tax-avoidance scheme that had as *one of its main purposes* the reduction or avoidance of tax. This is, to the author's mind, a proposition that is difficult to accept. Where a taxpayer devises an arrangement that is of commercial substance and has a *bona fide* commercial purpose underlying it (*ie*, is not contrived or artificial), the fact that *one of the* said taxpayer's *main purposes* in entering into that arrangement was to avoid or reduce tax ought *not* to expose him to the possibility of s 33 of the ITA being invoked against him with the result that the Comptroller may strike down the entire arrangement.

69 Section 33 of the ITA[127] should therefore only apply to disregard a transaction that was actuated for the *sole* purpose of reducing or avoiding tax; such a transaction would obviously be *devoid of any commercial substance*. This view is fortified by the discerning observations made by Dr Richard Hu in passing the Bills that introduced s 33 of the ITA[128] and s 33A of the SDA.[129] Further, it bears emphasising that an exercise in drawing the line between a *main* purpose and an *incidental* one (which is a task made necessary pursuant to s 33(3)(*b*) of the ITA) is highly subjective and ensues in much

125 N Orow, "Structured Finance and the Operation of General Anti Avoidance Rules" [2004] BTR 410.
126 Cap 134, 2008 Rev Ed.
127 Cap 134, 2008 Rev Ed.
128 Cap 134, 2008 Rev Ed. See para 63 of this article.
129 Cap 312, 2006 Rev Ed. See para 65 of this article.

uncertainty as to the circumstances and manner that *could* trigger the operation of s 33 of the ITA. This outcome is patently undesirable.

70 Indeed, one would be hard pressed to find any *tax-avoidance* (or *tax-mitigation*) scheme that had *not* as one of its *main* purposes the reduction of avoidance of tax. At this juncture, it would be opportune to refer to some perceptive observations made by Nabil Orow as follows:[130]

> It is necessary to remember that whilst the primary function of taxation has traditionally been to raise revenue for the state, in recent times taxation has evolved into a primary instrument for social and economic control and engineering. In truth, revenue legislation is a mix of fiscal, social and economic policy objectives. Policy objectives may translate into a range of measures (including expenditures, incentives and penalties) that are designed to encourage or discourage certain economic behaviour.
>
> If such policy objectives are to be achieved, then such measures must succeed in influencing taxpayer behaviour. In other words, *the success or otherwise of such policy objectives is predicated upon taxpayers engaging in conduct for the dominant or sole purpose of obtaining the subject fiscal advantages*.
>
> Further, taxation legislation contains a range of alternatives and choices that can fundamentally and significantly affect the nature and extent of liability to taxation. For example, capital can be raised by a range of instruments which include debt, equity or some form of a hybrid instrument designed to cater for the respective needs and wants of the fund raising enterprise and the target investors. Alternatively, where the object of capital raising is to acquire wasting assets, the enterprise may enter into a finance lease arrangement or dispose of and lease existing assets (sale and leaseback). Other examples include choices between alternative vehicles (company, trust or partnership) to raise funds, carry out investment or conduct business operations.
>
> *Where a general anti-avoidance rule, whether in a statutory or common law form, is given a carte blanche operation to deny all taxation advantages that derive from transactions actuated by a proscribed tax avoidance purpose, then such a rule would operate to frustrate rather than give effect to legislative intention and policy*. It would operate to impose liability to taxation where none should and does appropriately lie. *Further, to the extent that tax avoidance undermines the integrity, equity and efficiency of the taxation system, a general indiscriminate rule would have the same consequences*.
>
> [emphasis added]

130 N Orow, "Structured Finance and the Operation of General Anti Avoidance Rules" [2004] BTR 410 at 415–416.

71 Moving away (temporarily) from s 33 of the ITA[131] and turning to GAARs in general, it is the author's view that although GAARs have been said to be "very useful [remedies] for countering tax avoidance, although not universal [cures]",[132] the major problem with them is undoubtedly the ill-defined line between acceptable tax-avoidance and unacceptable tax-avoidance. Although the task of attempting to define this line has indeed been performed in numerous cases (as discussed above) by the courts in foreign jurisdictions, the results *have been unpredictable and consequently leave much scope for uncertainty*. This is indeed the crux of the problem that was explored in the earlier portions of this article.

72 Having analysed the Australian and New Zealand case law earlier, it is the author's view that the "safeguards"[133] mentioned by Dr Richard Hu provide inadequate assistance in the interpretation of s 33 of the ITA.[134] Indeed, the judicial principles developed in Australia and New Zealand have failed to clearly define the line between "acceptable tax-avoidance" and "unacceptable tax-avoidance".

73 How enforceable s 33 of the ITA[135] is remains to be seen. Its potential ambit is far too wide and open-ended, thus causing it to be ineffective as an anti-avoidance provision. Indeed, it is hardly surprising that a tax-avoidance case on s 33 of the ITA has yet to come before the local courts. That said, a detailed examination of the possible solutions to the problems precipitated by the application of s 33 of the ITA is necessary but beyond the scope of this article and, hence, should be undertaken on a separate occasion, preferably with the aid of guidance from the local courts.

VII. Concluding observations

74 Having regard to the above discussion, it is the author's view that s 33 of the ITA[136] is ineffective in curbing "unacceptable tax-avoidance" for two main reasons. First, the *potential* scope of s 33 of the ITA is too wide and open-ended, culminating in a situation where the line between "acceptable tax-avoidance" and "unacceptable tax-avoidance" is markedly blurred. There is no doubt that an open-ended provision such as s 33 of the ITA relies heavily on the judicial process to define the boundary between "acceptable tax-avoidance" and

131 Cap 134, 2008 Rev Ed.
132 Inland Revenue, *A General Anti-Avoidance Rule for Direct Taxes: Consultative Document* (London: Inland Revenue, 1998) at para 4.3.
133 See para 2 of this article.
134 Cap 134, 2008 Rev Ed.
135 Cap 134, 2008 Rev Ed.
136 Cap 134, 2008 Rev Ed.

"unacceptable tax-avoidance". Indeed, Parliament could have been more precise in its legislative intent as regards the delineation of the extent and scope of anti-avoidance, but it has apparently chosen to leave it to the courts to develop a suitable interpretation on the statutory language of s 33 of the ITA with the aim that the boundaries be held reasonably and fairly between taxpayers and tax-authorities. In this regard, the analysis undertaken in this article shows that the courts in Australia and New Zealand have generally struggled to perform the task of defining the line between tax-avoidance and tax-mitigation. Turning to the local context and s 33 of the ITA, it bears reiterating the author's view that where a taxpayer devises a transaction that is of commercial substance and is infused with a *bona fide* commercial purpose, the fact that *one of the* said taxpayer's *main purposes* in entering into that transaction was to avoid or reduce his tax liability ought *not* to attract the possibility of s 33 of the ITA being applied.[137]

75 The second reason, which flows from the first, relates to the usefulness of the precedents established by the courts in Australia and New Zealand. In this regard, the relevant case law has been extensively discussed earlier, and it is submitted that the predication, tax-mitigation and choice principles merely serve as tools of limited utility in assisting the courts to draw that elusive line between "acceptable tax-avoidance" and "unacceptable tax-avoidance".

76 In conclusion, an assiduous study of the available case law reveals acute *uncertainty* as regards the circumstances that will potentially warrant the invocation of s 33 of the ITA[138] in practice. This is, in the author's view, an unsatisfactory state of the current law on anti-avoidance in Singapore. In the premises, a reform of s 33 of the ITA with a view to defining its scope more clearly is therefore much desired in order for it to become practically usable and more in line with the commercial reality that a tax-mitigation arrangement *imbued with commercial substance* (as opposed to a tax-avoidance scheme infused with little or no commercial purpose) is legal.

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137 See paras 68 and 69 of this article.
138 Cap 134, 2008 Rev Ed.