

Section 80A(c)(ii) of the Income Tax Act and the interpretation of tax statutes in South Africa

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Abstract

Section 80A(c)(ii) of the Income Tax Act 58 of 1962, as amended (the Act), introduced a new concept to the South African income tax environment: misuse or abuse of the provisions of the Act, including Part IIA thereof. According to the Revised Proposals on Tax Avoidance and section 103 of the Income Tax Act 58 of 1962 (Revised Proposals) the rationale behind the insertion of section 80A(c)(ii) was to reinforce the modern approach to the interpretation of tax statutes "in order to find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act". The objective of this article is to examine the rationale behind section 80A(c)(ii) of the Act.

Key words

Constitution

GAAR

Misuse or abuse

Modern approach

Section 80A(c)(ii)

Section 245(4)

Spirit of the law

Statutory interpretation

Traditional approach

1 Introduction

The general anti-avoidance rule was enacted in section 103(1) of the Income Tax Act 58 of 1962, as amended (the Act). This section was repealed by section 36(1)(a) of the Revenue Laws Amendment Act 2006 and replaced by a new general anti-avoidance rule enacted in Part IIA of the Act. Part IIA contains sections 80A to 80L, which target impermissible tax avoidance arrangements. These provisions apply to any arrangement (or any steps therein or parts thereof) entered into on or after 2 November 2006.

Part IIA defines an "impermissible avoidance arrangement" as any avoidance arrangement described in section 80A. Section 80A has four requirements to determine whether an arrangement is an impermissible tax avoidance arrangement. In short, the four requirements are as follows:

- (1) An avoidance arrangement (as defined) is entered into or carried out.
- (2) It results in a tax benefit (as defined).

- (3) Any one of the following “tainted elements” is present:
- abnormality regarding means, manner, rights or obligations;
 - a lack of commercial substance (as defined) in whole or in part; and
 - misuse or abuse of the provisions of this Act (including Part IIA).
- (4) The sole or main purpose is to obtain a tax benefit.

The misuse or abuse requirement is contained in section 80A(c)(ii) of the Act. The concept of a misuse or abuse is new to the South African income tax environment. According to the Revised Proposals on Tax Avoidance and Section 103 of the Income Tax Act 58 of 1962 (Revised Proposals), the rationale behind the insertion of section 80A(c)(ii) was to reinforce the modern approach to the interpretation of tax statutes “in order to find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act” (SARS 2006:16). The quoted part of the rationale was borrowed from the judgment of the Supreme Court of Canada in *Canada Trustco Mortgage Company v Canada 2005 SCC 54* (at paragraph 54).

The Explanatory Memorandum to the Revenue Laws Amendment Bill of 2006 (Explanatory Memorandum) states that the legislature has relied on, *inter alia*, Canadian precedent in introducing the “misuse or abuse” concept. Section 80A(c)(ii) of the Act seems to have its roots in the Canadian general anti-avoidance rule, which is contained in section 245 of the Canadian Federal Income Tax Act (Canadian Act) (Cilliers 2008a:86; Clegg & Stretch 2007:26.3.5; De Koker 2007:19.7). The misuse or abuse concept appears in section 245(4) thereof, which provides a basis for distinguishing between legitimate tax planning and abusive tax avoidance (De Koker 2007:19.7). *Canada Trustco Mortgage Company v Canada 2005 SCC 54* (*supra*) is regarded as the leading case on section 245(4) of the Canadian Act (Meyerowitz, Emslie & Davis 2007:147).

2 Objective of the study

The objective of this article is to investigate the rationale behind section 80A(c)(ii) of the Act:

- The investigation commences with an analysis of the verb “reinforce”. This word expresses the action implied by the rationale. It could therefore be regarded as the “operative heart” thereof and is consequently of significance for the proposed investigation.
- The phrase “a modern approach to the interpretation of tax statutes” is then construed. It is established whether such an approach is already authoritative in South Africa. The ability of section 80A(c)(ii) to reinforce the modern approach to the interpretation of tax statutes is then evaluated. In order to assess the conclusion relating to this proposed ability of section 80A(c)(ii), the effect the misuse or abuse concept had on the approach to the interpretation of tax statutes in Canada is examined. Next, an assessment is made of whether section 80A(c)(ii) of the Act, a statutory provision to “reinforce” the modern approach, is necessary in the South African tax environment. To this end, the Constitution of the Republic of South Africa (Constitution) is considered because its enactment had authoritative implications for the approach to the interpretation of all statutes.

- The words “in order to find the meaning that harmonizes the object, spirit and purpose of the provisions of the Income Tax Act” is then examined, in an effort to establish whether these words add anything to the modern approach to the interpretation of tax statutes in South Africa.

3 Research method

The research method adopted consists of a literature review of section 80A(c)(ii) of the Act, the relevant provisions of the Constitution and the interpretation of tax statutes, together with court decisions, published articles and textbooks relating directly to the objective. Both South African and Canadian sources are referred to.

4 An analysis of the rationale behind section 80A(c)(ii)

The rationale behind the insertion of section 80A(c)(ii) of the Act, that is, to reinforce the modern approach to the interpretation of tax statutes in order to find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act, is analysed by examining the different elements thereof.

4.1 Reinforce

The New *Oxford dictionary of English* (2001:1565) explains the ordinary meaning of the word “reinforce” as follows:

“Reinforce □●v. 1. Strengthen or support, especially with additional personnel or material: ▪ strengthen (an existing feeling, idea, or habit).”

Reinforce, in essence, it is submitted, implies strengthening or supporting an existing concept or structure. Strengthening, it is submitted, is a much wider concept than supporting: it involves an increase of an existing concept or structure as opposed to the mere maintenance thereof.

If the purpose of section 80A(c)(ii) is to “reinforce” the modern approach to the interpretation of tax statutes, this implies that it will strengthen or support the modern approach. This begs the following question: Will section 80A(c)(ii) strengthen (increase) or merely support (maintain) the modern approach? The sections below attempt to answer this question.

The following issue, however, will first be addressed: What exactly does a modern approach to the interpretation of tax statutes mean? This concept is explained below by distinguishing the different approaches to the interpretation of tax statutes.

4.2 The modern approach to the interpretation of tax statutes

4.2.1 The modern approach

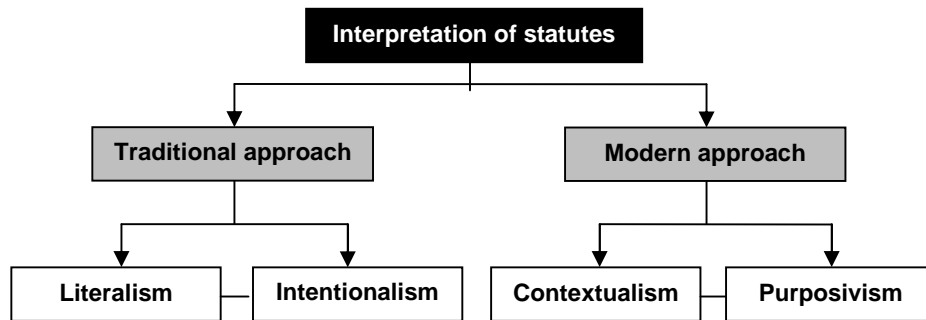
In common law tradition, there are two broad approaches to the interpretation of statutes (which includes tax statutes), namely the traditional and the modern approach. Each of these approaches consists of two general theories to interpretation, that is, literalism and intentionalism in the case of the traditional approach, and purposivism and contextualism in the case of the modern approach (Du Plessis 2002:93-98). These theories are not mutually exclusive because in many instances their application is intertwined.

According to literalism, the true meaning of a statutory provision is to be sought virtually exclusively in the very words used by the legislature (Devenish 1992:26). The words of the provision must be adhered to, regardless of manifestly unjust or even absurd consequences (Joubert & Faris 2001:282). Intentionalism (also referred to as the subjective theory) holds that the meaning of a statutory provision is governed by what the legislature intended as disclosed by the wording of the provision (Kellaway 1995:63). This implies that the real intention of the legislature, once discerned, should be given effect to (Du Plessis 2002:94).

Purposivism attributes meaning to a statutory provision in the light of the purpose it seeks to achieve (Joubert & Faris 2001:285). Legislative purpose is a more general and far more objective concept than that of legislative intent (Devenish 1992:35). Contextualism is often advanced as the interpretive twin of purposivism, the argument being that the purpose of a provision can only be ascertained by looking at it in context (Du Plessis 2002:97). The meaning of a provision is often said to be determinable by reading its words in context or reading the language in context or reading the provision itself in context (Joubert & Faris 2001:297).

The two broad approaches to the interpretation of statutes, in common law tradition, are summarised in figure 1:

Figure 1: The broad approaches to the interpretation of statutes



The word “reinforce”, as it is used in the rationale behind the insertion of section 80A(c)(ii) of the Act, it will be remembered, implies that an existing concept or structure is strengthened or supported. If the purpose of section 80A(c)(ii) was to “reinforce” the modern approach, this presupposes the following:

- A modern approach is already authoritative in South Africa.
- Section 80A(c)(ii) is capable of reinforcing the modern approach.

These two presumptions are evaluated below in order to establish their validity.

4.2.2 *Is the modern approach to the interpretation of tax statutes already authoritative in South Africa?*

The above query is resolved by examining the most recent tax decisions, handed down by the Appeal Court of South Africa, with regard to the interpretation of tax statutes.

4.2.2.1 **De Beers Marine (Pty) Ltd v CSARS**

In *De Beers Marine (Pty) Ltd v CSARS* [2002] 3 All SA 181 (A), Nienaber JA emphasised the cardinal importance of the context in which the words or phrases are used when

interpreting tax statutes. He stated, at paragraph 7, that the language of a provision must “take its colour, like a chameleon, from its setting and surrounds in the Act”. Nienaber JA thus prescribed a modern approach to the interpretation of tax statutes.

4.2.2.2 Standard General Insurance Company Ltd v CCE

In *Standard General Insurance Company Ltd v CCE* [2004] 2 All SA 376 (SCA), Nugent and Lewis JJA referenced the dictum of Schreiner JA in *Jaga v Dönges* N.O. 1950(4) SA 653, at page 662, and Nienaber JA in *De Beers Marine (Pty) Ltd v CSARS* (supra), at paragraph 7, as authority for the application of the modern approach to the interpretation of tax statutes. Instead of attempting to draw inferences about the drafter’s intention, from an uncertain premise, they found greater assistance in drawing their conclusion by considering the extent to which the meaning given to the words achieves or defeats the apparent scope and purpose of the legislation (at paragraph 25).

4.2.2.3 CSARS v Airworld CC and another

In *CSARS v Airworld CC and Another* [2008] 2 All SA 593 (SCA), Hurt AJA favoured a purposive construction to tax statutes. As authority for this view, he cited the dictum of Nugent and Lewis JJA in *Standard General Insurance Company Ltd v CCE* (supra) at paragraph 25. Hurt AJA required that the purpose of a provision be established and used “in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator’s intention” (at paragraph 25). He thus prescribed a modern approach to the interpretation of tax statutes.

4.2.2.4 Metropolitan Life Ltd v CSARS

In *Metropolitan Life Ltd v CSARS* [2008] 70 SATC 162, Davis J approved the dictum of Hurt AJA in *CSARS v Airworld CC and Another* (supra), at paragraph 25. He indicated, at page 170, that the Act and its amendments should be “interpreted purposively and holistically and that provisions should be given a clear meaning whenever plausible”. He thus approved the modern approach to the interpretation of tax statutes.

4.2.2.5 Summary

Recent tax decisions confirm the first presumption created by the rationale to the insertion of section 80A(c)(ii) of the Act – that is, a modern approach to the interpretation of tax statutes is already authoritative in South Africa. It is now necessary to establish whether the second presumption created by the rationale, that is, section 80A(c)(ii) is capable of reinforcing the modern approach, is valid.

4.2.3 Is section 80A(c)(ii) of the Act capable of reinforcing the modern approach?

In order to evaluate the ability of section 80A(c)(ii) to “reinforce” the modern approach, it will be necessary to construe the meaning of the phrase “a misuse or abuse of the provisions”. For it to “reinforce” the modern approach, it is submitted, the meaning of the phrase must prescribe such an approach. It will also be necessary to evaluate the scope of section 80A(c)(ii) in order to ascertain whether it is wide enough to “reinforce” the modern approach.

4.2.3.1 The meaning of the phrase “a misuse or abuse of the provisions”

The meaning of this phrase is first construed by confining references to South African authority. A contention regarding the meaning of the phrase is then furnished. The accuracy

of this contention is then tested against Canadian authority, the proposed root of section 80A(c)(ii) of the Act.

a South African authority

The Explanatory Memorandum is cryptic, giving no indication of the meaning of the phrase “a misuse or abuse of the provisions”. The *New Oxford dictionary of English* (2002:1185 & 8) explains the ordinary meaning of the words “misuse” and “abuse” as follows:

“misuse □●v. 1. Use (something) in the wrong way or for the wrong purpose.
2. Treat (someone or something) badly or unfairly.”

“abuse □●v. 1. Use (something) to bad effect or for a bad purpose; misuse.”

From the above, it would seem that ascertaining the purpose of a provision, and whether such purpose has been incorrectly used, might be inherently imbedded in the linguistic nature of the words “misuse” and “abuse”. Cilliers (2008a:87) indicates the following with regard to the meaning of the words “misuse” and “abuse”:

- It is doubtful whether the words “misuse” and “abuse” have materially different meanings.
- In using both the words “misuse” and “abuse”, the legislature probably acted *ex abundanti cautela*.
- This is a case in which one ought to disregard the presumption that each and every word in a statutory provision must be given an independent meaning and effect.
- The legislature did not wish to denote two distinct concepts, but tried instead to ensure that the concept being expressed would be clearly understood.

It is submitted that these two words could therefore be regarded as synonyms. This is also evident in the ordinary meaning of the word “abuse: it includes the word “misuse”. Both words, it is submitted, imply utilising a provision “wrongly” or for a “bad purpose”. Hence the misuse or abuse inquiry, it is submitted, involves establishing the purpose of a provision in order to ascertain whether such purpose has been contravened.

In order to uphold the contention regarding the meaning of the words “misuse” and “abuse”, it is necessary to ascertain how the Supreme Court of Canada establishes whether a misuse or abuse, in the context of section 245(4) of the Canadian Act, has occurred. Assessing the method whereby a misuse or abuse is determined, it is submitted, will reveal attributes of a “misuse or abuse”. This will allow inferences to be drawn about what is intended with the words “a misuse or abuse of the provisions”.

b Canadian authority

Canada Trustco Mortgage Company v Canada 2005 SCC 54 is regarded as the leading case relating to section 245(4) of the Canadian Act (Meyerowitz *et al.* 2007:147). From the SARS Discussion paper on tax avoidance and section 103 of the Income Tax Act (SARS Discussion Paper 2005) it is clear that the meaning of the words “misuse or abuse” in Canadian case law is exactly what was intended by the South African legislature with the phrase “a misuse or abuse of the provisions” (Olivier & Honiball 2008:405).

In *Canada Trustco Mortgage Company v Canada* (*supra*), the Supreme Court of Canada, at paragraph 55, required an examination of “the factual context of a case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue”. In essence, it is submitted, the Supreme Court indicated

that the words “misuse or abuse” imply “frustrating” or “defeating” the purpose of the provisions relied on by the taxpayer.

c Summary

A “misuse or abuse of the provisions” implies, it is submitted, violating the purpose of a provision. Such a construction, it is submitted, has a strong resemblance to the purposive theory of the modern approach to the interpretation of tax statutes: it implies assigning a meaning to a statutory provision in the light of the purpose that it seeks to achieve in order to ascertain whether such purpose has been violated.

4.2.3.2 The scope of section 80A(c)(ii) of the Act

Section 80A(c)(ii) is an element of the South African general anti-avoidance rule, which is contained in section 80A of the Act. Inherent in a general anti-avoidance rule, is that it should be of a wide scope in order to effectively challenge impermissible avoidance arrangements. This characteristic, it is submitted, is transmitted to the provisions (elements) that shape the rule.

In addition, section 80A(c)(ii) is crucial to the operation of section 80A since it applies both to situations “in the context of business” and situations “in a context other than business”. Cilliers (2008a:85-86) therefore indicates that section 80A(c)(ii) can be described as: “the heart of section 80A”.

Section 80A(c)(ii) of the Act can be utilised against any avoidance arrangement presumed by SARS to directly or indirectly misuse or abuse any of the provisions of the Act, including Part IIA (Meyerowitz *et al.* 2007:160; Davis *et al.* 2007:80G-1; Cilliers 2008b:104-105). This could have the following implications for taxpayers and tax officers in South Africa:

- In order to evade section 80A(c)(ii), taxpayers could be required to adhere to a purposive theory when construing the provisions they rely upon.
- Similarly, when contemplating the application of section 80A(c)(ii), tax officers could be obliged to base “misuse or abuse” allegations on a purposive theory.

The scope of section 80A(c)(ii) of the Act, it is submitted, is therefore sufficiently wide to reinforce the modern approach to the interpretation of tax statutes in South Africa.

4.2.3.3 Summary

Section 80A(c)(ii), it is submitted, based solely upon the proposed meaning of the phrase “a misuse or abuse of the provisions” and the scope of its application, is capable of reinforcing the modern approach to the interpretation of tax statutes. The second presumption created by the rationale behind the insertion of section 80A(c)(ii) is therefore valid.

Since section 80A(c)(ii) seemingly originates from section 245(4) of the Canadian Act, it is useful to establish the effect of the misuse or abuse concept on the interpretation of tax statutes in Canada. This will provide an indication of the capability of the concept, of influencing the approach to the interpretation of tax statutes, in the Canadian tax jurisprudence, which could then, it is submitted, serve as an estimate of its ability in South Africa. The exercise will thus either support or oppose the conclusion drawn in this section regarding the ability of section 80A(c)(ii) to reinforce the modern approach, and hence also the conclusion with regard to the second presumption.

4.2.4 *The effect of section 245(4) on the approach to the interpretation of tax statutes in Canada*

This analysis is conducted (chronologically) in two parts. The first part determines the approach applied to the interpretation of tax statutes in Canada before the application of section 245(4). The second part determines the approach employed since the application of section 245(4). This will aid in isolating the effect of the misuse or abuse concept on the approach to the interpretation of tax statutes in Canada.

4.2.4.1 **Pre-application of section 245(4) of the Canadian Act**

a Partington v The Attorney General

Conventionally, Canadian courts applied the traditional approach by interpreting tax statutes literally (Li & Picollo 2007:4). The dictum of Lord Cairns in *Partington v The Attorney General* [1869] 21 LR 370, at page 375, was accordingly adopted: “If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be.”

b Stubar Investments Ltd v The Queen

In the late 1970s, Canadian courts started to move away from the traditional approach. The move gained momentum with the rise of the “modern rule” to the interpretation of tax statutes (Li & Picollo 2007:4). This rule was formulated in *Stubar Investments Ltd v The Queen* [1984] 1 SCR 536, at page 578: “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.” The modern rule thus requires an examination of the meaning of the words used in the statute, the context of the provision within the statute, the scheme and object of the statute and the legislative intent.

c Antosko v The Queen

In the early 1990s, the “modern rule” continued to be cited, but its impact was significantly reduced by the Supreme Court of Canada in *Antosko v The Queen* [1994] 2 CTC 25, 94 DTC 6314 (SCC) which revived the literal theory to the interpretation of tax statutes (Li & Picollo 2007:6). At paragraph 29, the court stated the following: “While it is true that the courts must view discrete sections of the Income Tax Act in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed ...”

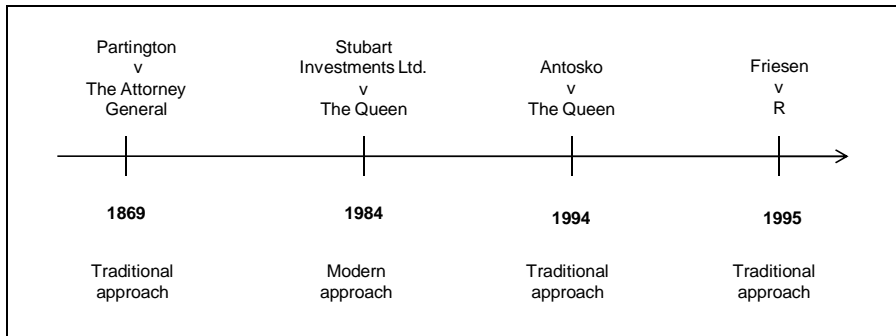
d Friesen v R

In *Friesen v R* [1995] 2 CTC 369, 95 DTC 5551 (SCC), the Supreme Court of Canada confirmed its move away from the modern approach when it stated the following at paragraph 17: “When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.” The Supreme Court thus prescribed ambiguity as a prerequisite for applying a purposive theory to the interpretation of tax statutes.

e Summary

The approach to the interpretation of tax statutes by the Canadian courts, before the application of section 245(4), varied between the traditional approach and the modern approach, with the former prevailing in the mid 1990s. This finding is summarised in figure 2.

Figure 2: Approach to the interpretation of tax statutes in Canada before the application of section 245(4)



4.2.4.2 Postapplication of section 245(4) of the Canadian Act

a OSFC Holdings Ltd v The Queen

OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA) was the first case in which the Federal Court of Appeal was able to analyse section 245 of the Canadian Act. In applying this section, the court revived the application of the modern approach to the interpretation of tax statutes when it stated the following, at paragraph 65: “Determining whether a particular provision of the Act has been misused, or whether the Act read as a whole has been abused, requires an examination of the purpose (‘object and spirit’) of the particular provision or scheme of provisions. It is not sufficient merely to rely on the technical language of the particular provision or scheme of provisions to determine whether there has been a misuse of the Act or an abuse of the Act read as a whole.”

b Canada Trustco Mortgage Company v Canada

In *Canada Trustco Mortgage Company v Canada (supra)*, the Supreme Court of Canada confirmed the modern approach to the interpretation of tax statutes when it stated the following, at paragraph 47: “The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act.”

c Mathew v Canada

In *Mathew v Canada 2005 SCC 55*, the Supreme Court of Canada continued to apply the modern approach. At paragraph 43 it stated the following: “While it is useful to consider the three elements of statutory interpretation separately to ensure each has received its due, they inevitably intertwine. For example, statutory context involves consideration of the purposes and policy of the provisions examined. And while factors indicating legislative purpose are usefully examined individually, legislative purpose is at the same time the ultimate issue ...”

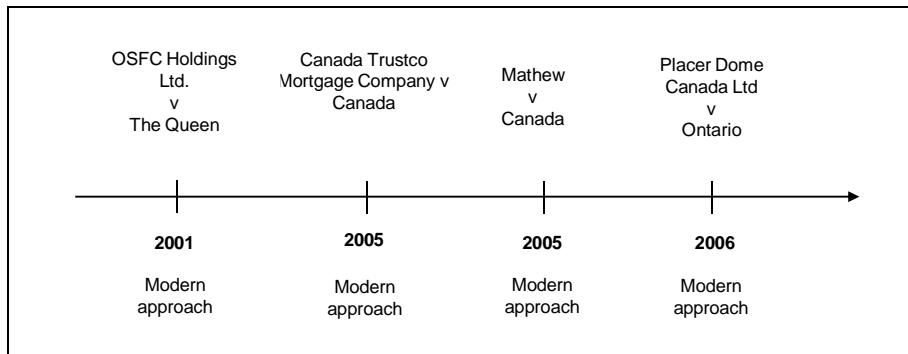
d Placer Dome Canada Ltd v Ontario

Although the “modern rule” to the interpretation of tax statutes was restated as the “textual, contextual and purposive” approach, it was unclear whether this approach would apply outside the context of section 245 (Li & Picollo 2007:12). In *Placer Dome Canada Ltd v Ontario 2006 SCC 20*, the Supreme Court of Canada made it clear that the “textual, contextual and purposive” approach was not confined to section 245 context, and applied to tax statutes in general. Li and Picollo (2007:43) comment that this came naturally because section 245 is potentially applicable to many provisions of the Act and it would have been rather odd to switch the interpretative approach, depending on whether or not section 245 is invoked.

e Summary

Since the application of section 245(4), the Canadian courts have favoured a modern approach to the interpretation of tax statutes. See figure 3.

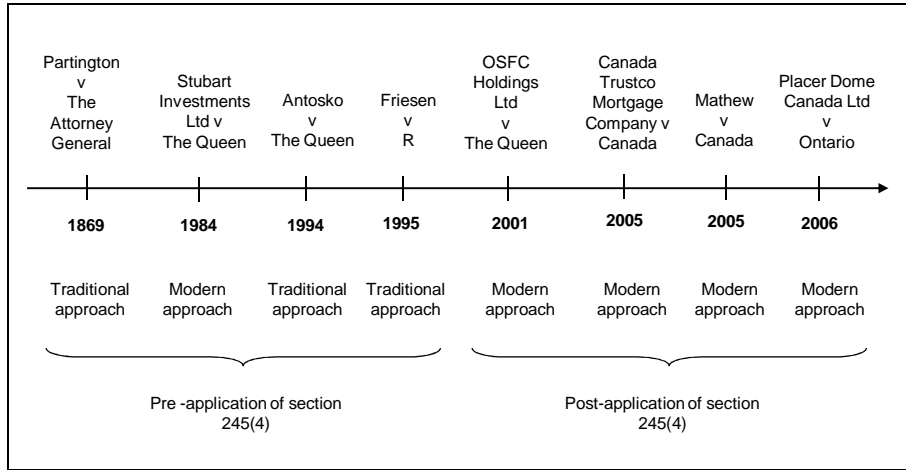
Figure 3: Approach to the interpretation of tax statutes in Canada since the application of section 245(4)



4.2.4.3 Summary

Section 245(4) of the Canadian Act sparked a revival of the modern approach to the interpretation of tax statutes in Canada. It obliged the Canadian court to convert from interpreting tax statutes literally (traditional approach) to interpreting tax statutes in contextually and purposively (modern approach). See figure 4.

Figure 4: Approach to the interpretation of tax statutes by the Canadian courts



In Canada, section 245(4) acts as a legislative authority to enforce the modern approach to the interpretation of tax statutes (Li & Picollo 2007:43). Since the misuse or abuse concept is able to enforce the modern approach in Canada, it is submitted, it could well have the ability to (merely) “reinforce” such an approach in South Africa.

Section 80A(c)(ii) of the Act, it is submitted, could therefore be regarded as a legislative authority to “reinforce” the modern approach to the interpretation of tax statutes in South Africa. This furnishes additional support for the contention raised in the previous section regarding the ability of section 80A(c)(ii), and hence also the validity of the second presumption created by the rationale.

As it was established that a modern approach to the interpretation of tax statutes is already authoritative, this begs the following question: Does there not already exist a legislative authority for applying the modern approach to the interpretation of tax statutes? In other words, is section 80A(c)(ii) of the Act, a legislative authority to “reinforce” the modern approach, necessary in South Africa?

4.2.5 Is a legislative authority to reinforce the modern approach necessary in South Africa?

This investigation was conducted by referencing the definition section, which interprets various terminologies of the Act, and the Constitution of the Republic of South Africa, which has authoritative implications for the interpretation of all statutes.

4.2.5.1 The definition section of the Act

The modern approach to the interpretation of tax statutes, it is submitted, is inherently embedded in the Act. This is because the definition section of the Act (section 1) contains the following proviso: “unless the context otherwise indicates”.

The “context” of a statute refers not only to the language of the rest of the statute, but also to the “matter of the statute, its apparent scope and purpose, and, within limits, its background”. This principle was laid down by Schreiner JA in *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another 1950(4) SA 653 at page 662*.



Regard should therefore be given to the context in which a provision of the Act appears. It is therefore submitted that the proviso to the definition section is a codification of the modern approach to the interpretation of tax statutes.

Regardless of the above, it is doubtful whether the proviso to the definition section of the Act can serve as a legislative authority for applying the modern approach to the interpretation of tax statutes. The reason for this is its confined scope – the definition section applies only to certain terms of the Act.

4.2.5.2 The Constitution

The Constitution of the Republic of South Africa was promulgated in 1993 and enacted in 1996. Sections 1, 2 and 8 of the Constitution of the Republic of South Africa, 1996, indicate that the Constitution is superior to all other legislation. With regard to constitutional and statutory interpretation, section 39(1) and (2) states the following:

“39. Interpretation of Bill of Rights.

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Section 39(1) of the Constitution gives specific instructions on how to interpret the Bill of Rights. Section 39(2) deals with the interpretation of any other legislation. These sections command a similar interpretative approach to both the Constitution and statutes. Thus, in effect, constitutional interpretation determines and shapes statutory interpretation (Du Plessis 2002:133).

Goldswain (2008:115) indicates that section 39(1) and 39(2) oblige the judiciary, when interpreting statutes to, *inter alia*, promote the protection of the liberty of persons, their property and the enforcement of the principles of human dignity, equality and fairness. These qualities, he notes, are central to the purposive theory to the interpretation of statutes.

Goldswain (2008:119) concludes that if the judiciary interprets a provision without attempting to establish the intention or purpose of the legislature, such an omission would constitute grounds for a constitutional challenge to the decision. He then reiterates that the purposive theory to the interpretation of tax statutes incorporates the essential values underpinning the Constitution. Goldswain, it is submitted, thus indicates that the Constitution requires a modern approach to the interpretation of statutes.

De Ville adopts a similar view (2000:62). He indicates that the Constitution requires statutes to be interpreted by following a broad contextual approach. The context in which the statute is interpreted should include the constitutional values, the statute’s background and purpose (viewed in the light of the aims of the Constitution), other statutes as well as the social, political and economic context and (where relevant) comparative and international law.

Table 1 indicates that a modern approach to the interpretation of statutes was authoritative in the period prior to and following the enactment of the Constitution. The Constitution, it is submitted, would therefore “reinforce” the modern approach to the interpretation of statutes. Although the cases referred to in table 1 do not relate to tax statutes, due allowance should be given to the dictum of Botha JA in *Glen Anil Development Corporation Ltd v SIR 1975 (4) SA 715 (A)* at page 727: “there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation”. It is therefore questionable whether section 80A(c)(ii), a provision subordinate to the Constitution, which is presumed to “reinforce” the modern approach to the interpretation of tax statutes, is necessary in South Africa.

Table 1: The interpretation of statutes pre- and post--Constitution

Year	Case	Relevant passage	Approach
Pre-Constitution			
1962	Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd 1962 1 SA 458 (A)	Wessels AJA at page 476: “In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the ‘matter of the statute’, its apparent scope and purpose, and, within limits, its background.”	Modern approach
1964	Rossouw v Sachs 1964 (2) SA 551	Ogilvie Thompson AJ at pages 563 to 564: “I accordingly conclude that in interpreting sec. 17 this Court should accord preference neither to the ‘strict construction’ ... nor to the ‘strained construction’ ..., but that it should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and object.”	Modern approach
1965	SIR v Sturrock Sugar Farm (Pty) Ltd 1965 (1) SA 897 (A)	Ogilvie Thompson AJ at page 903: “Even where the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction.”	Modern approach
1980	SIR v Brey 1980 1 SA 472 (A)	Rumpff CJ at page 478: “For purposes of ascertaining the meaning of words in a legal document like a contract, a will or a statute, a Court never looks at the words in stark isolation. It looks at the words in their setting, at the context in which the words are used and at the purpose for which the words are intended.”	Modern approach
1986	University of Cape Town v Cape Bar Council 1986 (4) 903	Rabie CJ at page 914: “I am of the opinion that the words ..., clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.”	Modern approach

continued

Post-Constitution			
Year	Case	Relevant passage	Approach
1995	S v Makwanyane 1995 6 BCLR 665 (CC)	Chaskalson P at paragraph 10: "I need say no more in this judgment than that section 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part."	Modern approach
1997	Fundtrust (Pty) Ltd (In liquidation) v Van Deventer 1997 (1) SA 710 (A)	Hefer JA at pages 726 to 727: "But judicial interpretation cannot be undertaken ... by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. The task of the interpreter is, after all to ascertain the meaning of a word or expression in the particular context of the statute in which it appears."	Modern approach
1999	ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd 1999 3 SA 924 (SCA)	Marais JA at paragraph 29: "One is thrown back upon the ordinary meaning of the words used with due regard to their context, the apparent purpose of the provision in which they are found and, of course, to their setting in, and the object of, the statute as a whole."	Modern approach
1999	Minister of Land Affairs and Another v Slamdien and Others 1999 (4) BCLR 413 (LCC)	Dodson J at paragraph 13: "Even though the law of statutory interpretation has not wholeheartedly adopted a purposive approach, it seems to me that where one is dealing with a statute which the Constitution specifically requires to be enacted in order to give content to the right concerned, it would be absurd to adopt a different approach to the statute's inter-pretation."	Modern approach
2000	Stopforth v Minister of Justice and Others; Veenendal v Minister of Justice and Others 2000 1 SA 113 (SCA)	Olivier JA at paragraph 21: "(i) look at the preamble of the Act or at other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."	Modern approach

4.2.5.3 Summary

The Constitution, it is submitted, provides a sovereign authority, because it is superior to all other legislation, for the application of the modern approach to the interpretation of all statutes. If section 80A(c)(ii) of the Act were to "reinforce" the case for applying a modern approach to the interpretation of tax statutes it would be redundant in the light of the sovereign authority of the Constitution. Nevertheless, there exists a presumption towards some valid rationale for the insertion of section 80A(c)(ii). This raises the following question: Could the phrase "to find the meaning that harmonizes the wording, object, spirit and purpose of the Act" add something to the modern approach?

4.3 To find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Act

4.3.1 General

Section 80A(c)(ii) is required to reinforce the modern approach in order to harmonise the wording, object, spirit and purpose of the provisions of the Act. The terms “object”, and “purpose” are analogous to the purposive theory of the modern approach to the interpretation of tax statutes. Reference to the “spirit” of a provision, however, deviates from it. Could this oblige the South African courts to look for some inner and spiritual meaning in the legislation that would not become apparent in a normal contextual and/or purposive approach to the interpretation of tax statutes?

It will be remembered that when the word “reinforce” was construed it appeared as if it prescribed a strengthening of an existing concept or structure, or the mere support of such concept or structure. The issue to be addressed here is to determine whether reference to the “spirit” of a provision “strengthens” the modern approach or merely “supports” the modern approach to the interpretation of tax statutes in South Africa.

Owing to the fact that the phrase “to find the meaning that harmonizes the wording, object, spirit and purpose” was borrowed from the judgment of the Supreme Court of Canada in *Canada Trustco Mortgage Company v Canada (supra)*, the Canadian position with regard to the “spirit” of a provision is determined. The South African position is then examined to establish exactly where our law stands in this regard. The position in both jurisdictions is thereafter compared in order to identify any differences.

The above exercise, it is submitted, will reveal the presumed effect of the word “spirit” on the approach to the interpretation of tax statutes in South Africa. For instance, if it is found that reference to the “spirit” of a provision requires the Canadian courts to look for some spiritual meaning beyond that obtainable from a normal purposive theory to the interpretation of tax statutes, and it is found that such an approach is not operative in South Africa, this could imply that section 80A(c)(ii) strengthens (as opposed to merely supporting) the modern approach to the interpretation of tax statutes in South Africa.

4.3.2 The Canadian position

In *Canada Trustco Mortgage Company v Canada (supra)*, at paragraph 41, the Supreme Court of Canada indicated that reference to the “spirit” of a provision does not require the court to establish some “overriding policy” of the Act, beyond that which can be discerned from its individual provisions, given a proper textual, contextual and purposive interpretation.

In his analysis of the phrase “to find the meaning that harmonizes the wording, object, spirit and purpose of the provision”, Cilliers (2008b:108) indicates that the reference to a so-called “spirit” behind the legislation is not what was intended. He states that the word “spirit” has no sinister meaning – it should simply be read *eiusdem generis* with “object” and “purpose”.

It is submitted, that the reference to the word “spirit”, as it appears in the cited *dictum*, is synonymous with “object” and “purpose”. Authority for this view is also found in the judgment of *OSFC Holdings Ltd v The Queen (supra)*, where the court, at paragraph 66, referred to the terms “purposive”, “object”, “spirit” and “scheme” collectively as “policy”.

Hence in the Canadian tax jurisprudence, the impression is created that these terms may indeed all be regarded as synonyms.

4.3.3 The South African position

A recognised principle in South Africa regarding the interpretation of all statutes, is that the spirit of the law cannot operate beyond the limits of its language. This principle was laid down by Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at page 544. It implies that a court cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he or she may think to be the policy or object of the particular measure (*Dadoo Ltd v Krugersdorp Municipal Council* [supra] at page 543).

4.3.4 A comparison between the Canadian and South African position

The position in South Africa and Canada, with regard to the “spirit” of a provision in the context of the interpretation of statutes, is compared in order to identify any discrepancies. This is accomplished by comparing the relevant section in *Canada Trustco Mortgage Company v Canada* (supra) with that of its peer in *Dadoo Ltd v Krugersdorp Municipal Council* (supra). Both these cases could be regarded as pioneers, in their respective jurisdictions, in the interpretation of statutes (Li & Picollo 2007:1; Cilliers 2006:183).

Table 2: Comparison between Canada Trustco Mortgage Company v Canada (supra) and Dadoo Ltd v Krugersdorp Municipal Council (supra)

<i>Canada Trustco Mortgage Company v Canada (supra)</i>	<i>Dadoo Ltd v Krugersdorp Municipal Council (supra)</i>
“The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the role of reviewing judges. The Income Tax Act is a compendium of highly detailed and often complex provisions. To send the court on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the Income Tax Act would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped ... ” (at paragraph 41–42).	“Now it has already been pointed out that in interpreting a statute a court is entitled to have regard not only to the words used by the Legislature but also to its object and policy. But clearly more than that is embraced in these two <i>leges</i> . Indeed, at first sight it would almost appear as if it were intended to lay down that a court may construe a statute so extensively as to declare invalid an act which, though it did not contravene the prohibition of the law, nevertheless did violence to its spirit and intent. If that were the correct meaning of these two <i>leges</i> it would in effect enable a court of justice to legislate by supplying what is conceived to be omissions of the Legislature. Such an authority, however, has never, so far as I know, been claimed by the courts of this country ... ” (at page 558).

There seems to be conformity between the approach in Canada and that in South Africa with regard to the role of reviewing judges: a judge’s role is to interpret, not to legislate (see table 1). It is thus impermissible in both jurisdictions for a judge to search for an “overarching policy” (in the Canadian jurisdiction) or the “spirit” (in the South African jurisdiction) of a provision when interpreting statutes.

4.3.5 Summary

Section 80A(c)(ii) of the Act, it is submitted, will not require the court to look for some inner and spiritual meaning in the legislation that would not become apparent in a normal contextual and/or purposive approach to the interpretation of tax statutes. Section 80A(c)(ii), it is submitted, will thus not “strengthen”, but merely “support” the modern approach to the interpretation of tax statutes in South Africa.

5 Conclusion

The word “reinforce” was construed as a “strengthening” or the “support” of an existing concept or structure (with the latter being a much more confined action than the former). This implies that section 80A(c)(ii) could serve by strengthening or supporting the modern approach to the interpretation of tax statutes. A modern approach was construed as a purposive theory (seeking the purpose of a provision) and/or contextual theory (reading a provision in its context) to the interpretation of tax statutes.

The rationale behind the insertion of section 80A(c)(ii) created the following two presumptions:

- (1) The word “reinforce” presupposes that a modern approach to the interpretation of tax statutes is already authoritative.
- (2) The rationale as a whole presupposes that section 80A(c)(ii) is capable of reinforcing the modern approach to the interpretation of tax statutes.

The first presumption was confirmed by recent decisions of the Supreme Court in South Africa – a modern approach to the interpretation of tax statutes has been consistently applied since 2002. The second presumption was established by examining the meaning of “a misuse or abuse of the provisions” and the scope of section 80A(c)(ii).

A “misuse or abuse of the provisions”, it was found, implies utilising a provision “wrongly” or for a “bad purpose”, that is, it requires establishing whether the purpose of a provision has been contravened. Such a construction was supported by existing Canadian precedent with regard to abusive tax avoidance. The proposed meaning of the phrase “a misuse or abuse of the provisions”, it was argued, has strong characteristics of a purposive theory to statutory interpretation. Section 80A(c)(ii) was also found to have a wide scope and able to influence both taxpayers and tax officers when construing statutes. It was therefore argued that section 80A(c)(ii) is capable of reinforcing the modern approach to the interpretation of tax statutes in South Africa.

Section 245(4) of the Canadian Act obliged the Canadian court to convert from interpreting tax statutes literally (the traditional approach) to interpreting them contextually and purposively (the modern approach). The misuse or abuse concept therefore had the effect of enforcing the modern approach to the interpretation of tax statutes in Canada. This furnished additional support for the contention that section 80A(c)(ii) is able to reinforce the modern approach. Hence the conclusion drawn with regard to the second presumption was upheld.

The rationale behind the insertion of section 80A(c)(ii) of the Act, however, was found to be redundant in the light of the Constitution, which provides a sovereign authority for the application of the modern approach. The proviso to the definition section of the Act also confirmed the modern approach.

The phrase “in order to find the meaning that harmonizes the object, spirit or purpose of the provisions of the Act” was consequently examined in order to establish whether it could “strengthen” (as opposed to merely “supporting”) the modern approach to the interpretation of tax statutes and thus salvage section 80A(c)(ii) from redundancy. The position in South Africa and Canada regarding the “spirit” of a provision, however, was found to be in conformity – the court is not obliged to look for some inner and spiritual meaning in the legislation that would not become apparent in a normal contextual and/or purposive theory to the interpretation of tax statutes.

Section 80A(c)(ii), it is submitted, seems to be a redundant provision, that is, an uncalled for provision in the South African tax environment. It could merely serve as a needless reminder to the South African courts to apply the modern approach when interpreting tax statutes.

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