Tax Avoidance Rules in Scandinavian and Anglo-American Law

Bettina Banoun

The approaches taken in Scandinavian and Anglo-American jurisdictions may be divided into two groups. In one group, the courts have taken an active approach to combat tax avoidance. Attempts at tax avoidance have been deflected through the use of a liberal interpretational style or case law based anti-avoidance rules. These countries do not have a statutory general anti-avoidance provision. In the other group, the courts have adopted a passive approach to tax avoidance cases. This has led the legislator to enact a general anti-avoidance rule.

Typical representatives of the first group are Norwegian and American law. These two jurisdictions are characterised by a liberal tradition as regards statutory interpretation, where arguments based on economic effects and legislative purpose have carried great weight. The courts have been active in trying to curb tax avoidance attempts, and have in this context developed anti-avoidance doctrines: the business purpose-, step transactions-, substance over form- and economic sham-doctrines. In Norwegian law, the case law based anti-avoidance rule operates more or less to the same effect as the American business purpose- and step transactions-tests. Danish law has not gone as far in developing particular anti-avoidance doctrines, but Danish law – with the so-called Principle of Reality – still embodies similar characteristics as American and Norwegian law.[1] Neither the US, Norway nor Denmark have found it necessary to enact a general anti-avoidance rule.

In England, the House of Lords initially took a formalistic approach. Tax statutes were interpreted in strict accordance with the statutory text. For a long time House of Lords refrained from developing its own anti-avoidance tests, causing the legislature to respond through a number of particular anti-avoidance provisions. This strict approach was gradually modified in the late 1970´ies and early 1980'ies. With the *Ramsay* case the "purposive approach" and the step

1 It should be noted that there are no common understanding in Danish tax theory as regard the existence of the Principle of Reality.

transactions-doctrine were introduced.[2] In effect, this has caused English law to move from the second to the first group. Proposals for a general anti-avoidance rule have been made, without success.[3]

The main representatives of the second group are Australian, Canadian and Swedish law. Originally Australian and Canadian interpretative traditions were based on the strict English style. Australia enacted a general anti-avoidance provision in 1915. In Canada, the combination of a restrictive interpretative tradition and the absence of case law based anti-avoidance doctrines led to the enactment of a statutory clause in 1988. In Sweden, the passivity of the courts and the strict interpretational style led to the enactment of a general anti-avoidance rule in 1981.

The comparison reveals that there is a link between the interpretative style and the development of case law based doctrines. Swedish, Australian, Canadian and earlier English law indicate that a restrictive approach prevents the development of case law based anti-avoidance doctrines, while Norwegian, Danish, American and newer English law attest that a liberal interpretative tradition is a necessary pre-condition for the development of case law based anti-avoidance doctrines. The link between general traditions for construction and court based anti-avoidance doctrines is particularly evident from the English *Ramsay*-case in which the House of Lords both modified earlier interpretative style and introduced a step transactions-doctrine.

An inverse relationship appears to exist between the presences of case law based anti-avoidance rules and the presence of a statutory anti-avoidance clause. If the courts act on their own, there appears to be no need for a statutory general clause, while passivity of the parts of the courts has made it necessary to introduce a statutory clause. There seems to be a universal need for an anti-avoidance rule, but there appears to be scant need for both case law based and statutory anti-avoidance rules.

The Substance over Form-doctrine – a Critique

Previously, Norwegian law seemed to contain elements of a substance over form-doctrine. Earlier Supreme Court precedents often took refuge in what was called the *real* transaction and the tax statute at issue was applied to match this real transaction. In American law the substance over form- and the economic sham-doctrines have been used in the same way. In Danish law, the Principle of Reality in taxation has the same function.

At first glance, attempts to apply tax statutes to match the real transaction may seem intuitively attractive, since few judges of a realist persuasion will argue in favour of a formalistic interpretative style. However, a number of questions are normally left unanswered in substance over form-reasoning.

---

2 *Ramsay*, [1981] STC 1 74, [1982] AC 300.

3 See *Tax Law Review Committee*, Tax avoidance: A report by the Tax Law Review Committee, The institute for fiscal studies, 1997 and *Inland Revenue*, A General Anti-Avoidance Rule for Direct Taxes, A Consultative Document, 1998.

Firstly, the substance over form-principle begs the question: How is it possible to distinguish between the real transaction and its formal characteristics? Does the real transaction criterion refer only to economic consequences or other characteristics?

References to the real transaction should be regarded as a short form reference to the conclusion that the economic consequences determine the outcome in the case at issue. Even if substance over form should be seen as a reference to the fact that economic consequences should have priority over legal form there are grounds for criticism against the doctrine. Such a principle would be too expansive and it has never been part of any country's tax law. Ordinarily taxation depends on legal forms and not on economic outcomes. Whether the legal form or the economic outcome should be decisive, will partly have to depend on the correct interpretation of the tax provision at issue and partly on the circumstances of the case. A perusal of court precedents reveals that economic outcomes sometimes trump legal forms, while at other times not. An old tax saying – "substance controls over form, except, of course, in those cases in which form controls" – shows the emptiness in a substance over form-doctrine.[4] As soon as it is recognized that neither economic outcomes nor legal forms will by themselves hold the answer, the substance over form-principle ceases to guide the practical application of the law. Beyond any indication that economic outcomes should be accorded considerable weight, a substance over form-principle offers scant direction for the solution of individual cases. A substance over form-principle is in itself devoid of any prescription as to how a conflict between form and reality should be resolved. The determinant – the criterion – for the application of the principle remains lacking. As held by Learned Hand in the American *Gilbert*-case: [5]

> "… whether the transaction has 'substantive economic reality' or 'is in reality what it appears to be in form', or is a 'sham' or a 'masquerade', or 'depends upon the substance of the transaction': all of these appear to me to leave the test undefined, because they do not state the facts which are to be determinative."

References to the real transaction can often be considered as an attempt by the court to cloak its own policy considerations. In fact, the mere reference to the reality of any given case, will often create an impression that the interpretation is simple and automatic even when there is no basis for such an impression. References to the reality appear artificial.

The concepts of expansive and/or narrow construction of tax provisions appear more guiding from an analytical point of view. Rather than to hold that there is no real sale e.g., the court should explain why a tax provision is not to be interpreted so that the circumstances of the present case qualify. Reference is made to House of Lords judgment in *MacNiven*:[6]

---

4 McMahon, *Random Thoughts on Applying Judicial Doctrines to Interpret the Internal Revenue Code*, Southern Methodist University School of Law, Vol 54 (2001) at 195.

5 *Gilbert* v *Commissioner of Internal Revenue*, 248 F (2d) 399 (1957).

6 *MacNiven*, [2001] STC 237.

> "But in saying that they did not constitute a 'real' disposal giving rise to a 'real' loss, one is rejecting the juristic categorisation as not being necessary determinative for the purposes of the statutory concepts of 'disposal' and loss as properly interpreted."

The Content of an Anti-avoidance Rule

The various anti-avoidance rules and doctrines – whether case law based or statutory – in Anglo-American and Scandinavian law have several features in common. Firstly, a type of business purpose-test has evolved. Secondly, there is normally a criterion that the tax benefit at issue is in disharmony with the congressional intent, represents a "misuse" or "abuse" or would be disloyal in regard to the tax provisions. Normally, statutory anti-avoidance rules also use a transaction- and a tax benefit-criterion.

The Description of the Relevant Transaction

Various anti-avoidance rules deploy a number of designations such as transactions, actions, relationships, and arrangements etc. to formulate the so-called transaction requirement.

A transaction may be widely or narrowly defined. All anti-avoidance rules appear to adopt a broad perspective, which seems well considered. Since the anti-avoidance rule is to operate on a general basis, any attempt to restrict its application to any given number of actions or transactions is bound to be ill founded. Attempts at tax avoidance are normally intended to avoid particular tax provisions aimed at particular legal arrangements. The previous Australian provision in Income Tax Assessment Act 1936 section 260 was applicable for "[e]very contract, agreement, or arrangement made or entered into, orally or in writing". In the present provision, Part IVA, the term "scheme" is employed, and this term is through the statutory definition expansively defined to include "any agreement, arrangement, understanding, promise or undertaking". The provision makes clear that implied schemes, as well as schemes not intended "to be enforceable, by legal proceedings" are also to be included. Further, "any scheme, plan, proposal, action, course of action or course of conduct" are included. Unilateral actions are also specifically mentioned. The Canadian general clause in Income Tax Act section 245 defines "transactions" to include "an arrangement or event". The Inland Revenue's proposal defined "transaction" to include "any act or course of conduct".

Some anti-avoidance cases involve only one single transaction. Others involve a series of transactions. In *Peabody* the Australian High Court in a dicta emphasised that part of a transaction may constitute the subject of inquiry, but that a limit may have to be drawn to prevent separate examination circumstances that are "incapable of standing on their own without being "robbed of all practical meaning".[7]

7 *Peabody*, (1993) 25 ATR 32.

The High Court concluded that the tax authority should have the authority to narrow the scope of the search as the inquiry proceeds:

> "If, within a wider scheme which has been identified, the Commissioner seeks also to rely upon a narrower scheme as meeting the requirements of Pt IVA, then in our view there is no reason why the Commissioner should not be permitted to do so, provided it causes no undue embarrassment or surprise to the other side."

In Norwegian law, the Supreme Court in the *Harnoll*-case held that the anti-avoidance principle could not be used on part of a contract as long as the contract itself had a non-tax value.[8] This reasoning is open to criticism; if particular contract provisions create tax benefits that are in disharmony with the tax legislation, such provisions should be subjected to inquiry for the same reasons as the transaction as a whole.

It is not unusual for a tax avoidance arrangement to form part of an otherwise commercially motivated transaction. In the case of linear transactions, the series of transaction as a whole can have a non-tax purpose or effect, while there may be steps inserted in the series of transactions to create a tax benefit. In such cases the inserted steps have been reviewed separately. In the Canadian provision, it is explicitly held that a transaction that is part of a series of transactions can be censored under the anti-avoidance provision provided that the transaction at issue lacks non-tax purpose and the combined effect of the series of transactions is to create a tax benefit. In section 248 (10) a series of transactions is defined as all "related transactions or events completed in contemplation of the series". In England the House of Lords has made clear that the *Ramsay*-principle is applicable to linear transactions even if the transactions were intended to achieve a legitimate commercial end.[9] In Norwegian law the anti-avoidance rule has on several occasions been applied to discreet steps in a series of transactions.

In the case of circular transactions, the series of transactions as a whole will often constitute the subject of inquiry. There are several examples in both Anglo-American and Scandinavian law that the anti-avoidance rule has been applied to the transaction series' combined result.

The Time Examination

The issue arises as to what point in time is relevant to the so-called business purpose-test. The issue is whether preceding and ante ceding circumstances in addition to circumstances at the time of the transaction should be relevant when determining the purpose or effect of the transaction.

Normally, the circumstances at the time of the transaction will be decisive. However, depending on the particular circumstances of each case, preceding and ante ceding circumstances should be allowed taken into consideration. It may be argued that subsequent developments should only be included in the assessment to the extent that such subsequent developments illuminate the non-tax value of

8 *Harnoll*, Rt. 1976 at 1317.

9 *Furniss* v *Dawson*, [1984] 1 AC 474, [1984] STC 153.

the transaction at the time of the transaction itself. It should not be sufficient that the taxpayer (often upon advice from her tax attorney) takes new actions to add to the transaction sufficient non-tax value. In Norwegian law, there are cases where the court's emphasis on subsequent developments may be criticised.[10]

Both Tax and Non-tax Elements Should be Relevant

Anti-avoidance rules normally emphasise either that transactions are intended to achieve particular *tax benefits* or that the transactions lack *business* purpose or effects.

In American law, a pre-condition for the application of the business purpose test is that the transaction does not have a business purpose. The lack of business purpose was also emphasised as an element in the English *Ramsay*-principle. The Canadian anti-avoidance clause exempts from its own scope transactions arranged primarily for "bona fide purposes other than to obtain the tax benefit". The Norwegian Supreme Court has sometimes emphasised the transaction's lack of *non-tax* value.

The statutory rules and proposals in Australia, England, Sweden and Norway have all adopted as a criterion for the use of the anti-avoidance rule that the transaction is sufficiently influenced by *tax considerations*. The Australian provision uses in its Part IVA as a criterion for taxation that the taxpayer carried out the scheme "for the purpose of enabling the relevant taxpayer to obtain a tax benefit". The English proposals used terms such as "tax avoidance … purpose". The Swedish rule contain a condition that for the use of the anti-avoidance rule tax purpose must be the main *reason* for the transaction. *Tax* effects were the criterion used in the Norwegian statutory proposal.[11] The Norwegian Supreme Court has on occasions emphasised the transaction's tax purpose or effect.

Reference to tax features or non-tax features is two sides to the same coin. The absence as well as the presence of tax effects or purposes comes into play when anti-avoidance rules weigh the taxable and non-taxable elements in a particular case.

Both Purpose and Effects Should be Taken into Consideration

The different rules departing from tax considerations variously emphasise non-taxable *purpose* or *effects*. The previous Australian provision in section 260 encompassed all arrangements producing tax benefits as the "purpose or effect". The present Australian Part IVA emphasises the "purpose" to obtain a tax benefit. According to statutory guidelines, it should be given weight to "the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme". Hence, tax effects are of relevance. The Swedish clause employs the criterion that a tax advantage is the *cause* for the transaction.

---

10 *Skau & Gundersen*, Rt. 1995 at 638, and *Zenith*, Rt. 1997 at 1580.

11 Ot. prp. nr. 16 (1991-1992).

In the Norwegian statutory proposal *effects* were chosen. In Norwegian case law, both the transaction's tax *purposes* and *effects* have been highlighted in the case law. However, in some cases there are statements that may indicate that the tax *purpose* is irrelevant. However, such reasoning should rather be interpreted as references to the fact that tax purposes and effects are irrelevant until the tax saving aspects of a particular transaction reaches a certain level (the threshold), where the tax characteristics become dominant.

There is scant difference between tax effects and tax purpose. If a condition for tax avoidance review is that a transaction has tax effects, this must logically mean that such tax effects are temporary. This is because the tax authorities and the courts – not the taxpayer – determine the final tax effects from any given transaction. If a transaction is set aside, the transaction is then unable to achieve the tax effects contemplated. The temporary effect of the transaction is only the tax benefit the transaction has temporarily produced.

There is no reason to require that the transaction at issue should necessarily have produced a tax benefit if it had not been set aside. In the English case *McGuckian* the *Ramsay*-principle was applicable even if the tax authorities had not exhausted their legal authority to refuse the tax benefit through the application of a particular anti-avoidance clause.[12]

In relation to the rules departing from non-tax circumstances, one may ask whether the non-tax purpose, the effects or both are of relevance. In Anglo-American law the *purpose* has normally been emphasised. A purpose test was used to justify that the presence of some enduring consequences should not prevent anti-avoidance review. In the English case, *Furniss* v *Dawson*, it was stressed that lack of business *purpose*, "not no-business effect" was decisive.[13] However, this finding should not entail that effects are irrelevant. In *Willoughby* the House of Lords emphasised that effects is of importance. It was noted that a characteristic particular to tax avoidance cases is that the taxpayer reduces the taxable income or achieves a tax deduction without reducing the income or incurring an expense:[14]

> "The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability."

The statutory guidelines included in Australian Part IVA demonstrate that the arrangement's non-tax effects should carry relevance for the application of anti-avoidance rule. Emphasis shall be placed on (i) the manner in which the scheme was entered into or carried out, (ii) the form and substance of the scheme, (iii) the time period during which the scheme was carried out (v - vii) the change in the financial position and other consequences from the scheme, (viii) the nature of the connection between the parties involved. The Australian judgment *Spotless* may be criticised for lack of emphasis on non-tax effects.[15] The High

12 *McGuckian*, [1997] STC 908.

13 *Furniss* v *Dawson*, [1984] 1 AC 474, [1984] STC 153.

14 *Willoughby*, [1997] STC 995.

15 *Spotless*, (1996) 34 ATR 183.

Court did not pay any consideration to the effect that the taxpayer by investing in a low tax jurisdiction had to accept lower interest rate than what would have been achievable in Australia. In Norwegian law it has been recognised that the effects are of central importance. In several decisions, the non-tax purpose of a transaction has also been emphasised alongside the effects.

Objective as well as Subjective Circumstances may be Relevant

None of the anti-avoidance rules in Anglo-American or Scandinavian law have required proof of subjective intent to avoid tax. All anti-avoidance rules accept that objective features are the main determinant. The issue is whether subjective intent may be emphasised alongside objective features, or whether only objective features are of relevance.

In Australian law, the High Court has emphasised that objective criteria are decisive.[16] As regards the case law based anti-avoidance rule in Norwegian law, the Supreme Court has mainly focused on objective features. In Canadian law and Swedish law, it has been debated whether the test is of a subjective or objective nature.

Theoretically, it is feasible that two persons arrange the same tax scheme, and that the first person has a tax avoidance motive, while the second person has undertaken the same arrangement by coincidence, or allegedly supported by a business motive not in conformity with the transaction's objective characteristics. Whether a transaction is taxable or not should depend on characteristics particular to the transaction, and not be tied to subjective attitudes particular to each taxpayer. It may be argued that the tax authorities should anchor its examination in an objective review of the non-tax value of the transaction. Anti-avoidance rules should not amount to a kind of morally founded taxation by the courts depending on a particular taxpayer's subjective or disloyal attitude. Any evaluation depending on the taxpayer's subjective intentions will create unnecessary complications for the evaluation of evidence. The main rule must be that the subjective motives of the taxpayer cannot be a condition for review. The tendency to emphasise objective factors particular to the transaction examined pushes anti-avoidance review closer to general principles of statutory construction

However, in most cases taxpayer's intent, the purpose for the transaction and the effects of the transaction all point in the same direction. Even if it remains unnecessary to examine the taxpayer's subjective intent, pieces of evidence on the taxpayer's subjective intent may still be of relevance. In the majority of the cases there will be a relationship between subjective motives and objective transactional effects.

In relation to the step transactions-doctrine, the taxpayer's subjective planning or preordination will be of more direct relevance, cf. below.

16 *Peabody* (1993) 25 ATR 32 *and Spotless* (1996) 34 ATR 183.

Determination of the Transaction's Tax Elements

It may be discussed whether the achievement of *any* tax benefit should make a transaction open to review. Any tax benefit like a tax deduction, a tax postponement, the achievement of a lower tax rate, etc. should be open to review. The opposite rule could make the application of the anti-avoidance rule dependent on ill-considered distinctions between various types of avoidance. Such a limitation would mean that the avoidance attempts would shift from transactions falling under the scope of the rule to transactions falling outside the rule. Most anti-avoidance rules encompass all types of tax benefits.

In Australian law (Part IVA, p. 177C) all amounts not being included in the assessable income and all extra deductions, loss or foreign tax credit are listed as tax benefits. In Canadian law s. 245 (1) tax benefits include "a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act". In Norwegian law the anti-avoidance rule has been applied in connection with a variety of tax provisions. The Supreme Court has on several occasions made clear that the anti-avoidance rule has general application.

Because the anti-avoidance rule compares the transaction's tax benefits and non-tax value, the size of the tax benefit becomes important. How large is the tax saving attempted through the tax avoidance scheme? If the tax benefit is limited, even a minimal non-tax value may cause the anti-avoidance rule to be inapplicable. The question may be asked whether the anti-avoidance rules only are applicable as towards tax benefits of a certain magnitude. Neither Australian, English, Danish or Norwegian statutory rules or proposals nor English, American or Norwegian case law based principles have required that the size of the tax benefit be of a certain magnitude. In Canada the original proposal required a significant tax benefit. On recommendation by the House of Commons Finance Committee this qualification was deleted. All versions of the Swedish rule have a *de minimis* requirement. In the first two versions a *non-insignificant* tax benefit was required. In 1995 this requirement was altered so that the anti-avoidance rule is only applicable in case of a *significant* tax benefit.

Determination of the Transaction's Non-tax Value

In American law the term business purpose is employed as the key condition. The Canadian statutory anti-avoidance rule is phrased wider to avoid sole dependence on commercial factors. The provisions employ the formulation "bona fide purposes other than to obtain the tax benefit". In Norwegian case law reference is also made to non-tax factors.

The transaction's business purpose or effect will make up the most important reason not to apply the anti-avoidance rule. By "business" reference is made to commercial, ownership, organisational, corporate, market-relevant, public law and similar factors. Non-tax value is a wider term than commercial or business value. The non-tax terminology may also draw personal and family features into the inquiry. The scope for anti-avoidance rules is more limited if any type of

non-tax features, and not only commercial elements, may be sufficient to prevent review under the anti-avoidance rule. It should depend on an evaluation of the specific circumstances of each case what weight should be accorded to such other factors than commercial elements.

The Determination of the Threshold – the Balance Between Tax Factors and Non-tax Factors

The precise description of the threshold for review varies among the various countries. Any comparison of the description of this threshold must take into consideration whether the anti-avoidance rule departs from tax elements or non-tax elements.

Rules departing mainly from tax purpose or effects have posited requirements variously as to whether a transaction mainly, predominantly, dominantly or decisively is motivated by tax considerations. In Australian law, the taxpayers' intention to achieve a tax benefit must be "dominant". In *Spotless* the dominance criterion was explained as being the "ruling, prevailing or most influential purpose".[17] In the English proposals a condition for application of the anti-avoidance rule was that a transaction as a minimum had to avoid a tax obligation as "one of its main purposes".[18] If only one single transaction in a series of transactions constituted the scope of inquiry, the TLRC (Tax Law Review Committee) required that the avoidance purpose was its "sole" end, while Inland Revenue wished to maintain as the criterion that the tax benefit be one of the main purposes. In Swedish law the initial requirement that the tax benefit was the "decisive" reason for a transaction was first traded for a requirement that the tax benefit should be the "main" reason, and thereafter to be the "predominant" reason. In Norwegian case law a number of descriptions of the relevant threshold has been offered. Those decisions departing from the tax effects have used descriptions such as "wholly", "solely" or "mainly" motivated by tax effects.

The descriptions of the threshold have also varied among rules departing from a non-tax reason. The Canadian clause is the provision that by its text contains the widest scope for review. This provision exempts from anti-avoidance review only those transactions that "primarily" have non-tax purposes. In Norwegian law, the descriptions departing from non-tax effects have required that the transaction "does not have" or "lacks a certain" non-tax effect.

The question may be asked what description of the threshold is most adequate. It should be emphasised that the threshold, regardless of the terms chosen to describe it, should be flexible. It is difficult to measure a transaction's purpose or effects. For this reason, the threshold must depend on what kind of non-tax features that may come into play. Substantive, commercial ends carry greater weight than formal corporate law effects. The threshold may vary according to the type of transaction. Artificial, atypical transactions are probably

17 *Spotless* (1996) 34 ATR 183.

18 *See* note 3.

more easily reached by anti-avoidance rules than more ordinary transactions. Even with these qualifications in place, an adequate description of the relevant threshold is difficult.

The requirement as regards predominance, primarily or mainly, which is used in the Canadian, English, Swedish and the Norwegian statutory rules or proposals seem ill-suited as a general description of the relevant threshold. These terms could lay the field too open for anti-avoidance review regardless of whether tax or non-tax features are used as the point of departure. It would be too strict to refuse a tax benefit for a transaction which is almost 49% motivated by other factors than the tax effects/purpose. In particular, such a rule would be too strict if the rule, like in the Canadian provision, were described as a rule embodying exemptions only for those transactions that are primarily arranged for non-tax purposes. Literal interpretation of the provision could indicate that non-tax circumstances must amount to 51% to qualify as a bona fida transaction. Such a requirement would at best amount to a misleading description about the scope of the anti-avoidance rule, and at worst, provide such liberal authority to review that the anti-avoidance rule could cause social losses by inhibiting business transactions. Several formulations of the thresholds produce a misleading impression that the anti-avoidance rule is more easily applied than what follows from that country's case law. On the other hand, the Norwegian Supreme Court's description – requiring only "a certain" non-tax effect to protect a transaction from review – gives the impression that the authority to review in Norwegian law is more limited than the rule has actually been practiced. When looking to the results of court decisions in the various countries, one would see that the courts' attitudes to anti-avoidance review are more important to the outcomes than the statute's or the courts' description of the threshold for such review.

Additional Requirements for the Application of the Step Transactions-Doctrine

Apart from the requirement that the inserted steps in a series of transactions must lack business purpose/effect, an additional requirement is often employed. The entire series of transactions must have been subject to overall planning or preordination and each link in the series must have been implemented relatively speedily.

The question of predetermination came at a head in the English case *Craven* v *White*.[19] Taxpayer A had been negotiating with C1 and C2. A made an agreement to sell to B three weeks before B sold to C1. The majority found it impossible to consider A's sale to B and B's subsequent sale to C1 as a composite transaction due to the fact that the transfer to C1 was not preordained at the time of the sale to B. The TLRC and Inland Revenue's proposals for a statutory anti-avoidance rule recommended a change: There should not be a requirement for step transactions that the subsequent transaction was predetermined/established in detail as long as the general nature of the

19 *Craven* v *White*, [1989] AC 398, [1988] STC 476.

subsequent step was planned or envisaged and its implementation was expected at the time of the first step. The existence of some alternations as regards the execution of the subsequent transaction should not prevent taxation of the series of transactions as a unity as long as the nature of the subsequent transaction remained as planned. In Norwegian law, *Gokstad,* as well as a dicta in *Phønix*, shows that uncertainties as regards the timing of the subsequent transaction will not prevent the use of the anti-avoidance rule.[20] In *Gokstad* it was sufficient to apply the step transaction-test that at the time of the first transfer there was great likelihood that a subsequent transaction would take place and that such a transaction in fact took place. Norwegian case law seems to be in conformity with the English law proposals and the minority view in *Craven* v *White*.

No Separate Condition as Regards Artificiality or Detours

The question could be asked whether complexity and artificiality are common characteristics for tax avoidance transactions.

In Danish law, artificiality has been considered a central element in the doctrine of reality. The presence of *complex artificial structures* has been highlighted as a typical characteristic of tax avoidance attempts in English law. In connection with the enactment of the Canadian general clause, it was considered whether it should be a pre-condition that a transaction was artificial, but this condition was rejected. In Norwegian law, artificiality is neither seen as necessary nor sufficient reason to set a transaction aside. A number of tax avoidance transactions have been set aside even though the transactions have appeared quite standard from a private law perspective. On its own, artificiality does not seem an operative criterion and therefore not suitable as a condition. However, artificiality may be a factor to be taken into account when determining a transaction's non-tax value.

A related issue is whether it is a typical characteristic that the taxpayer has made a detour to achieve his tax benefits. In the first version of the Swedish clause a condition was whether the transaction at issue appeared as a detour relative to a more direct transaction. In linear transactions detour considerations – e.g. inserted steps without non-tax value – are normally at the core of the court's reasoning. Norwegian law does not require a detour as condition for review. Such a requirement could limit the ambit of an anti-avoidance rule.

The So-called Abuse Test

Transactions fashioned in a way directly encouraged by tax law fall clearly outside the scope of the anti-avoidance rule. To distinguish between unacceptable avoidance and acceptable tax planning most anti-avoidance rules use an additional requirement to the business purpose/effect-test. This criterion is often described as a requirement that the actions be disloyal, constitute abuse,

20 *Gokstad*, Rt. 1994 at 499 and *Phønix*, Rt. 1993 at 173.

be contrary to the purpose of the tax law, amounts to avoidance or a requirement that the transaction does not qualify under a choice offered by the statute.

In the Canadian provision in section 245 there is both a requirement that there is an "avoidance transaction" and a requirement on "misuse" and "abuse". In the Swedish general clause there is a requirement that the transaction subject to the review is contrary to the foundations of the tax law. In *MacNiven* the House of Lords held that the Ramsay-principle could not be used in all cases; it was restricted to cases relating to so-called "commercial concepts".[21] An interpretation of the tax statute at issue will therefore determine the scope of operation for the *Ramsay*-principle. In the English statutory proposals exceptions from the anti-avoidance rules were included in order to protect acceptable tax planning. TLRC wanted the exemption to be tied to whether any course of conduct had been "encouraged by legislation", whether the transaction fell "within an exception to, or an exclusion from, other anti-avoidance provisions" or whether the transaction could be said to "not conflict with or defeat the purpose of the legislation". The Inland Revenue expressed that the decisive factor should be whether the pattern of conduct was contrary to the purpose of the tax legislation. The fact that the purpose was to "take advantage of a relief or allowance provided by the tax legislation", or whether a transaction is "specifically excepted from an anti-avoidance provision" should only be an "indication, but not a conclusive indication" that the tax planning at issue was acceptable.

In American law, no explicit abuse requirement has been formulated. However, the purpose of the tax law is key to the application of the case law based anti-avoidance doctrines. Hence, it seems unnecessary to look into abuse as a separate issue. Neither did the earlier Australian provision in section 260 contain an abuse requirement. A choice-principle was construed to be part of the anti-avoidance rule. In the present rule in Part IVA, p. 177C (2) review under the anti-avoidance rule shall not take place in case of an exercise of an "option expressly provided for by this Act". High Court's result in *Spotless* may be criticised for not letting the taxpayer benefit from the option provided for by the Act. In Norwegian case law the Supreme Court has regarded disloyalty and conflict with statutory purpose as relevant criteria.

There is a connection between the requirement as regards non-tax value and whether achievement of a transaction's tax benefit amounts to abuse. It is difficult to conduct a separate discussion of the abuse requirement without looking to the non-tax value test. Lack of commercial value will often be the very reason why a tax benefit flowing from a transaction is considered as an abuse. As already mentioned, a typical characteristic of tax avoidance attempts is that the taxpayer unilaterally reduces her tax obligations without incurring the economic consequences required by the legislator. The less commercial value the greater requirement that the transaction be loyal as towards the tax rules. The greater the commercial value the greater proof of abuse before anti-avoidance review can take place. The abuse requirement establishes a separate protection for taxpayer. Even if a transaction lacks commercial value, the transaction may produce tax benefits (more or less consciously) foreseen by the law (and the

21 *MacNiven* (2001) STC 237.

legislator). In other words, the abuse requirement takes care of the fact that some tax benefits created by transactions with little commercial value, should be accepted for tax purposes.

It is the tax consequence flowing from the transaction at issue that must be measured against the abuse requirement. In the Canadian general clause, it is emphasised as decisive whether the transaction results in a misuse/abuse of the Act. TLRC proposed an exemption from anti-avoidance review for transactions to be considered as encouraged by the law and for transactions, which do not conflict or defeat the purpose of the law. In Swedish law, the statutory text provides that "taxation based on the actions" must be contrary to the statutory purpose. This means that the comparison must be tied to existing tax law. In the Norwegian case law the Supreme Court has found that the "tax result by following the form" had to be contrary to the tax law purpose.[22] Even if a transaction serves as a mean to avoid a tax provision, it cannot be a sensible requirement that the corporate transaction as such is disloyal. The tax result does not restrict a taxpayer's choice of actions. The tax provisions are qualifying norms and not in themselves prohibitions or orders. It is e.g. difficult to find that it should be an abuse to trade shares, reorganise companies etc. It is the tax benefit, not the transaction itself, which must amount to abuse. The decisive factor is whether a transaction is disloyal against the tax rules, constitutes abuse of such rules, is contrary to the purpose of such rules, amounts to avoidance of such rules or is in accordance with a choice provided by these rules. Attempts at defining avoidance demonstrate that the structure and the purpose of the existing tax law are the central elements. Transactions creating tax benefits in full harmony with the tax laws are not candidates for review under the anti-avoidance rule.

The Canadian general clause prescribes that separate provisions of the Act as well as the tax Act read as a whole may frame the inquiry. One reason why the law as a whole is included, is that for those cases where the taxpayer has managed to avoid the tax law altogether, it appears less than natural to tie her conduct to any particular provision. In the first version of the Swedish clause the subject of inquiry was the provision at issue as well as those provisions that would have been applicable if the action at issue was made subject of taxation. Any evaluation based on an action's relationship to the Act as a whole was not included. In the later versions it was determined that the relevant basis for comparison was the statutory purpose as made evident from the general design of the tax law and those tax provisions directly applicable or those tax provisions avoided through the taxpayers' conduct.

The Effects of Anti-avoidance Review

What are the effects of anti-avoidance rules? It has been discussed whether anti-avoidance rules can be taken as valid legal authority to collect the taxes flowing from an alternative transaction which the taxpayer on the balance of probabilities would or could have executed, such transactions which a commercially rational

22 *Asea Brown Boveri*, Rt. 1999 at 946.

actor would have chosen, or such taxation which would have resulted if the transactions reviewed had not been executed. The authority to review will be too wide if the tax authorities could base its assessment on any alternative transaction that the taxpayer could have executed in place of the transaction reviewed. On the other hand, the authority to review will be too narrow if the exercise depended on an exact determination of what alternative course of action the taxpayer would have chosen. It should turn on the specific tax provision at issue as well as the further circumstances of each case whether the tax should be collected based on a normal transaction or based on a cancellation of the transaction reviewed. In Canadian law section 245, second paragraph contains authority to "determining the tax consequences … as is reasonable in the circumstances in order to deny a tax benefit". The fifth paragraph provides a non-exhaustive list of examples as to how such taxation may be conducted. This provision holds as the alternative a) to disallow any deduction that would result from the avoidance transaction, b) to reallocate any deduction, income or loss to another taxpayer, c) to recharacterise any amount, or d) to ignore other tax effects. In Australian law, it was considered as a weakness of the earlier section 260 that the only effect was cancellation of the transaction reviewed without any authority to reconstruct the transaction for tax purposes. There were several cases where a need for a reclassification was obvious. Part IVA vests authority to impose tax and cancel tax deductions. The definition of tax benefits is construed as a comparison between what might have been taxed/deducted in the relevant tax year for the taxpayer in question in lieu of the transaction reviewed.

In English case law a series of transactions has been ignored or taxed as a unity. The English statutory proposals were that the effect of an anti-avoidance review should be that a taxpayer was to be taxed as if she had conducted a normal transaction. Such a normal transaction was defined as the transaction that would have been used to achieve the commercial end at issue, provided that tax avoidance had not been an independent consideration. TLRC emphasised then in the case of two alternative normal transactions, the normal transaction causing the lowest tax amount were to be chosen, while the Inland Revenue suggested that the taxpayer in such a situation should be able to choose what transaction were to be considered as the normal transaction. In case no normal transaction could be identified, the taxation was to be based on there being no transaction. TLRC suggested that the authority to ignore the transaction should depend on the avoidance transaction being without any tax purpose, while the Inland Revenue would not impose such an absolute requirement. Inland Revenue rather suggested that "enduring legal consequences" should be recognised for tax purposes except if such recognition "would be to admit the efficacy of the transaction for the purposes of tax avoidance". In Swedish law transactions may be ignored and a certain degree of reclassification has been effected.

In Norwegian law the Supreme Court has recognised that the use of the anti-avoidance rule implies that a transaction is accorded other tax consequences than would normally flow from the application of the tax laws. Many anti-avoidance cases may be considered either as an expansive or restrict application of the tax rules. Sometimes, anti-avoidance rules review has caused transactions to be ignored or re-classified.

The effects of anti-avoidance review are tied to the abuse-requirement. The judge cannot discuss in isolation whether a criterion for anti-avoidance review is fulfilled on a general basis, and then turn to determine more freely what effects the anti-avoidance review should produce. The question of anti-avoidance review must be tied to a particular tax provision/tax effect, i.e. as an examination of whether any particular tax benefit is to be refused. When the court decides in a case that the effects from following the legal form were disloyal, the implicit question should be whether it would be more in accordance with the tax statute to use the anti-avoidance review rule than to accept the normal tax consequences of the taxpayer's legal form.