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GAARs and the Nexus between Statutory Interpretation and Legislative Drafting: Lessons for the U.S. from Canada

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Abstract: Rules targeting specific known schemes are not the only tools available in the battle against tax avoidance. Legal systems also use measures that apply generally. The U.S. for example has tended to rely heavily on general doctrines. One such doctrine which is discussed in part 2 of this chapter is the "economic substance" doctrine. Yet as Xiong and Evans recently pointed out "although such judicial doctrines can be used to deal with various aspects of complicated tax abuse judges tended sometimes to limit and sometimes to enlarge the scope of jurisprudential interpretation leading to substantial uncertainty and risk." One way to limit the discretionary power of judges and overcome the uncertainty apparent in their judgments is by formalizing the doctrines as the US has done by codifying the "economic substance" doctrine in 2010. As explained in part 2 of this chapter a limitation of the "economic substance" doctrine whether it is established judicially or codified by statute may be its focus on the taxpayer's intentions as the basis for attacking tax avoidance. Part 3 of this chapter goes on to explain that the U.S. could overcome this limitation by adopting a statutory General Anti-Abuse Rule ("GAAR"). GAARs also impose generally applicable limits on what constitutes acceptable (reasonable) tax arrangements. But they do so based on whether the arrangements are consistent with the legislature's intentions as they were conveyed in the tax provision which the taxpayer is relying on for achieving the tax advantage in question. As Canada's Federal Court of Appeal ("FCA") explained "by confining legitimate tax avoidance to schemes that are not inconsistent with the policy underlying the statutory provision invoked by the taxpayer GAAR effectively limits the scope of the principle in Commissioners of Inland Revenue v. Duke of Westminster... that '[e]very man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it would otherwise be'." Based on Canada's

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experience with the GAAR parts 4 and 5 identify and explain the nexus between statutory interpretation and legislative drafting and the implications of this nexus on the application of a GAAR in the U.S. should Congress choose to take this route. Part 4 identifies that while the Supreme Court of Canada ("SCC") has recognized the need to apply a purposive interpretation of Canada's GAAR in order to ascertain parliament's intentions in the relevant tax provision the court has also held that it will only give effect to those intentions which were clearly conveyed by the relevant provision and will not invent a legislative intention which parliament has failed to convey. Part 5 notes that such judicial restraint has also been taken by the U.S. Supreme Court and therefore a similar approach could be expected by the U.S. courts should Congress adopt a GAAR. Therefore it would be up to Congress as it is similarly up to Canada's Parliament to carefully and clearly draft its legislative intentions otherwise the effectiveness of a GAAR would be undermined.

Keywords: tax avoidance, GAAR, US, Canada

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1 Introduction

It is a well-established view that taxpayers ought to be "free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might diverge from the real economic position." (HMRC 2015, p.4). Well-known expressions of this view can be found in the U.K. House of Lords' decision in *Duke of Westminster v CIR* as well as in the U.S. Supreme Court's decision in *Gregory v Helvering*.

In its consideration of the problem of tax avoidance, Graham Aaronson's General Anti-Avoidance Rule ("GAAR") Study Group explained that "to those who hold this view the appropriate response is for Parliament to introduce specific rules to block such attempts."(Aaronson 2011, para 3.1). Such rules are commonly referred to as Specific Anti-Avoidance Rules ("SAARs"). While SAARs are commonly used around the world, they are problematic because they tend to produce overly complicated and technical tax rules, which can become burdensome on taxpayers. (Institute for Fiscal Studies 2009, para 2.9). They may also be counterproductive because "the more detailed the rules, the more opportunity there may be for those wishing to do so to find and exploit loopholes." (Institute 2009, para 2.1). Moreover, they merely provide a reactive response to known schemes, leaving tax authorities to play a "never-ending cat and mouse game" that involves "drafting a specific rule anytime a new avoidance arrangement is uncovered." (Silvani 2013, p. 5).

Rules targeting specific known schemes are not the only tools available in the battle against tax avoidance. Legal systems also use measures that apply generally. Such measures may be developed by the courts in the form of judicial doctrines.[1] The U.S., for example, has tended to rely heavily on such

1 Weeghel identifies some of the typical doctrines as follows: "sham, legally ineffective transactions, substance over form, abuse of law, fraus legis, or simply as the general anti-avoidance rule" (Weeghel, 2010, Vol. 95a at 22).

doctrines. One such doctrine, which is discussed in part 2 of this chapter, is the "economic substance" doctrine. Yet, as Xiong and Evans recently pointed out, "although such judicial doctrines can be used to deal with various aspects of complicated tax abuse, judges tended sometimes to limit and sometimes to enlarge the scope of jurisprudential interpretation, leading to substantial uncertainty and risk." (2014, p. 688). One way to limit the discretionary power of judges and overcome the uncertainty apparent in their judgments is by formalizing the doctrines, as the US has done by codifying the "economic substance" doctrine in 2010.

As explained in part 2 of this chapter, a limitation of the "economic substance" doctrine, whether it is established judicially or codified by statute, may be its focus on the taxpayer's intentions as the basis for attacking tax avoidance. Part 3 of this chapter goes on to explain that the U.S. could overcome this limitation by adopting a statutory GAAR. GAARs also impose generally applicable limits on what constitutes acceptable (reasonable) tax arrangements. But they do so based on whether the arrangements are consistent with the legislature's intentions, as they were conveyed in the tax provision which the taxpayer is relying on for achieving the tax advantage in question. As Canada's Federal Court of Appeal ("FCA") explained, "by confining legitimate tax avoidance to schemes that are not inconsistent with the policy underlying the statutory provision invoked by the taxpayer, GAAR effectively limits the scope of the principle in *Commissioners of Inland Revenue v. Duke of Westminster*… that '[e] very man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it would otherwise be'."(*Canada v. Imperial Oil Ltd*. 2004, para. 32).

Based on Canada's experience with the GAAR, parts 4 and 5 identify and explain the nexus between statutory interpretation and legislative drafting, and the implications of this nexus on the application of a GAAR in the U.S., should Congress choose to take this route. Part 4 identifies that while the Supreme Court of Canada ("SCC") has recognized the need to apply a purposive interpretation of Canada's GAAR in order to ascertain parliament's intentions in the relevant tax provision, the court has also held that it will only give effect to those intentions which were clearly conveyed by the relevant provision, and will not invent a legislative intention which parliament has failed to convey. Part 5 notes that such judicial restraint has also been taken by the U.S. Supreme Court, and therefore a similar approach could be expected by the U.S. courts should Congress adopt a GAAR. Therefore, it would be up to Congress, as it is similarly up to Canada's Parliament, to carefully and clearly draft its legislative intentions, otherwise the effectiveness of a GAAR would be undermined.

2 Combating tax avoidance: the US experience with the economic substance doctrine

2.1 The Origins of Anti-Tax Avoidance Doctrine: Gregory v. Helvering (1935)

The evolution of anti-tax avoidance doctrine in the US begins with the seminal case of *Gregory v. Helvering*, decided by the US Supreme Court in 1935. Evelyn Gregory was the owner of all the shares of a company called United Mortgage Company ("United"). United Mortgage in turn owned 1,000 shares of stock of a company called Monitor Securities Corporation ("Monitor"). Mrs. Gregory wanted to sell the Monitor shares and to obtain the cash in her own hands, but having United sell the shares and distribute the cash or having United distribute the shares for her to sell would both have resulted in a dividend taxed at high rates with no offset for her basis. Instead, on 18 September 1928 Mrs. Gregory created Averill Corp and three days later United transferred the 1000 shares in Monitor to Averill. On 24 September Mrs. Gregory dissolved Averill and distributed the 1000 shares in Monitor to herself (a taxable liquidation resulting in a capital gain), and on the same day sold the shares for $133,333.33. She claimed there was a cost basis of $57,325.45, and she should be taxed on a net capital gain on $76,007.88.

On her 1928 federal income tax return, Gregory treated the transfer of Monitor shares to Averill as a tax-free corporate reorganization, under Revenue Act of 1928 section 112. The Commissioner of Internal Revenue argued that in economic substance there was no business reorganization, and that the sole purpose of the transaction was to enable Mrs. Gregory to pay tax on the value of the Monitor shares at the favorable capital gains rate with an offset for her basis, rather than at the higher rate that would have applied to the entire amount had United distributed Monitor shares worth $133,333.33 to her as a dividend.

In the ensuing litigation, the Board of Tax Appeals (a predecessor to today's United States Tax Court) ruled in favor of the taxpayer. See *Gregory v. Commissioner*, 27 B.T.A. 223 (1932). On appeal, the United States Court of Appeals for the Second Circuit reversed. In his opinion, Learned Hand J used the following frequently quoted words:

> "[A] transaction … does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.

> [...]
>
> Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition....[T]he meaning of a sentence may be more than that of the separate words, ... and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.
>
> [...]
>
> The purpose of the section is plain enough: men engaged in enterprises ... might wish to consolidate... their holdings. ... But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand.... To dodge the shareholders' taxes is not one of the transactions contemplated as corporate "reorganizations."

The Supreme Court affirmed. It held that although the letter of the law might arguably have been complied with, the intention of the Act was not to allow reorganizations merely for the purpose of tax avoidance. In the course of its judgment, the Court said the following:

> "It is earnestly contended on behalf of the taxpayer that since every element required by [the statute] is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected within the meaning of [the statute], the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his [or her] taxes, or altogether avoid them, by means which the law permits, cannot be doubted. [...] But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below [i. e., the reasoning of the Court of Appeals] in justification of a negative answer leaves little to be said.
>
> When [the statute] speaks of a transfer of assets by one corporation to another, it means a transfer made "in pursuance of a plan of reorganization" [...] of corporate business; and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here. Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose-a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. When that limited function had been exercised, it immediately was put to death.

> In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of [the statute], was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. [... T]he transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

As Assaf Likhovski has shown, *Gregory* needs to be understood against its historical background (Likhovski 2004). The election of Franklin Delano Roosevelt in 1932 was followed by sharp increases in the tax rates on the rich, especially in 1935–36, and by hearings that exposed massive tax avoidance by rich individuals like former Secretary of the Treasury Andrew Mellon. Thus, it is not surprising that Judge Hand ruled in favor of the government or that the Supreme Court affirmed.

The Gregory decision set the background for all that followed. It should be noted, however, that there was a subtle shift in emphasis between Judge Hand's opinion and the Supreme Court one. While Hand emphasized that what Mrs. Gregory had done was not what Congress intended, The Supreme Court, while repeating Hand's formulation, also emphasized the taxpayer's lack of business purpose, and it was the latter formulation that eventually led to the development and ultimate codification of the "economic substance" doctrine in 2010.

2.2 The Development of the Judicial Economic Substance Doctrine, 1935–1978

In the years following Gregory, the Supreme Court decided a series of economic substance cases. In most of them, it followed *Gregory* in ruling that a transaction lacked economic substance if the taxpayer could not establish a non-tax business purpose [cites]. A good example is *Knetsch* (1960), in which the taxpayer borrowed at 3.5 % to invest in an annuity paying 2.5 %, because he could deduct the interest on the loan at a tax rate of over 90 %, converting a before tax loss to an after-tax profit.

The "modern" economic substance doctrine is based on the Supreme Court's opinion in *Frank Lyon* (1978), in which the Court stated that:

> [W]here, as here, there is a genuine multiple-party transaction *with economic substance* which is compelled or encouraged by *business* or *regulatory realities*, is imbued with *tax-independent considerations*, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties. (Frank Lyon 1978, pp. 581–4)

As many critics have pointed out, the Court got its economics wrong (Wolfman 1981). But more importantly, there is no reference at all to Congressional intent, which was the basis of the decision in *Gregory*. The entire emphasis shifts to the taxpayer's purpose.

This led to the development of the economic substance doctrine in the Courts of Appeal, which defined it as having two prongs: Whether the taxpayer intended the transaction to be profitable before tax (the subjective prong), and whether there was in fact a reasonable chance of making a profit (the objective prong). In some Circuits, the doctrine was applied in the conjunctive form (the taxpayer had to satisfy both prongs), while in others it was applied in disjunctive form (satisfying either prong was sufficient) (Keinan 2006). Notably, neither prong depended on Congressional purpose.

2.3 The First Tax Shelter Wave, 1970–1986

Between 1970 and 1986, a series of "tax shelters" were developed by promoters and marketed to tens of thousands of taxpayers that had income that was not subject to withholding tax, such as physicians, dentists and lawyers. The typical "first wave" shelter involved a leveraged investment in property such as real estate, livestock, or films that was subject to favorable depreciation rules. Under the Supreme Court's decisions in *Crane* (1952) and *Tufts* (1983), the taxpayer could include borrowed amounts in its basis even if the loan was non-recourse, and even if the amount borrowed ultimately exceeded the value of the property. Taxpayers received both interest and depreciation deductions in the early years of the investment, which they could use to shelter their other income, while any gain came much later in the form of lower taxed capital gains.

The IRS tried to combat the shelters using economic substance, but with a few exceptions (e. g., *Estate of Franklin*) it was not very successful. In addition, there were too many shelter cases, which overwhelmed the Tax Court. Eventually, Congress took a successive series of steps that gradually eliminated the benefits of this type of shelter: the recapture provisions (IRC 1245), the at-risk rule (IRC 465), and especially the passive activities loss rule (IRC 469) of 1986, which led to massive contraction of the tax shelter industry.[2] In addition, the

2 The shelters were built on the ability to borrow, acquire property with the borrowed funds, obtain interest and depreciation deductions, and later sell the property with a lower capital gains rate. The provisions mentioned eliminated the capital gains treatment, excluded losses due to borrowing when the taxpayer was not at risk, and segregated passive losses from active income.

rate reduction from 50 % to 28 % and the elimination of the ordinary income/capital gains differential in the Tax Reform Act of 1986 helped reduce the motivation for tax avoidance.

2.4 The Second Tax Shelter Wave, 1993–2006

By 1991, however, the ordinary income and capital gains rate began to diverge, and the Clinton tax hike (1993) and Congress cutting the capital gains rate (1997) created the background for the second tax shelter wave.

Unlike the first wave, which was mass marketed to individual taxpayers, the second tax shelter wave was aimed at corporate and a few high net worth individual taxpayers. Moreover, while the tax shelters in the 1970s and 1980s were devised by small promoters, most of the tax shelters of the 1990s cycle were devised or at least promoted by the major accounting firms, all of which participated in helping their clients to engage in tax shelters.

The IRS initially responded to this tax shelter activity by requiring registration of the tax shelters under IRC 6111, listing some tax shelters under IRC 6112, and requiring disclosure of certain transactions under IRC 6011. Each of these provisions sought to increase transparency as to the identification of transactions that the IRS might seek to challenge. For example, under IRC 6111, some transactions that met certain tax-advantaged criteria had to be "registered" through the use of disclosure forms filed with the IRS. IRC 6112, the "list maintenance" provision, required advisors on specified types of transactions to maintain lists of the transactions and those who engaged in them, available for possible inspection by the IRS.

At the same time, the IRS began to litigate against specific tax shelters in the courts, using the economic substance doctrine. However, before 2003 the IRS's litigation record was mixed: It won the *ACM, Winn-Dixie, ASA* and *Saba* cases but lost *Northern Indiana Public Service Co., Boca, Compaq, IES* and *UPS*.[3] As a result, the staff of the Joint Committee on Taxation in its February 2003

3 Northern Indiana Public Service Co. v. Commissioner, 115 F.3d 506 (7th Cir. 1997); ACM Partnership v. Commissioner, 157 F.3d 231 (3rd Cir. 1998); ASA Investerings Partnership v. Commissioner, 201 F.3d 505 (D.C. Cir. 2000); Saba Partnership v. Commissioner, 273 F.3d 1135 (D.C. Cir. 2001); Boca Investerings v. Commissioner, 167 F. Supp. 2d 298 (D.D.C. 2001); Winn-Dixie Stores, Inc. v. Commissioner, 254 F.3d 1313 (11th Cir. 2001); IES Industries, Inc. v. United States, 253 F.3d 350 (8th Cir. 2001); Compaq Computer Corp. v. Commissioner, 277 F.3d 778 (5th Cir. 2001); United Parcel Service v. Commissioner, 254 F.3d 1014 (11th Cir. 2001). See also Gitlitz v. Comm'r, 531 U.S. 206 (2001), in which the Supreme Court endorsed a literal approach to the Code similar to the technical arguments underlying tax shelters.

report on tax shelters engaged in by Enron Corporation before its bankruptcy was of the opinion that many of the Enron tax shelters would have been upheld by a court if the issue was litigated. (Joint Committee on Taxation 2003).

In November 2003, the Permanent Subcommittee on Investigations of the U.S. Senate held widely publicized hearings on individual tax shelters. All of the Big Four announced that they were discontinuing their tax shelter activities. Some individuals associated with the tax shelter activities of the late 1990s faced criminal charges related to a variety of tax shelter activities. The IRS also promulgated new ethics rules that prevented law firms from giving opinions on tax shelters unless they independently verified the business purpose of each transaction, thereby making the lawyers into an independent supervisor of the shelters.[4]

From 2003 onward, the IRS began winning a series of tax shelter cases with increasing momentum, using economic substance.[5] This eventually led former Assistant Secretary of the Treasury for Tax Policy Pamela Olson to declare in 2006 that "the tax shelter war is over and the IRS has won." One should note, in fact, that most tax shelters were settled under a series of IRS initiatives without penalties, so that the taxpayers did not lose (they just paid the tax they would have paid absent the shelter, plus interest at a lower rate than what they could earn in the interim). And in the case of some shelters, the taxpayers also got to keep some of the tax benefits.

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4 The IRS first changed the regulations to limit the defenses available to taxpayers facing the accuracy-related penalty for certain returns filed after December 31, 2002. Treas. Reg. 1.6664-4 (d) (2002). Second, the IRS changed the standards governing written opinions under Circular 230, the ethical standards governing practice before the IRS, effective December 20, 2004. Circular 230, 31 CFR 10.35(e)(2) (2004). In 2007, the IRS finalized regulations relating to the disclosure and registration of "reportable transactions" (which include listed transactions like COBRA, transactions entered into under conditions of confidentiality, transactions involving refundable or contingent fees, certain transactions involving significant losses, and other transactions of interest). 72 Fed. Reg. 43,157 (Aug. 3, 2007). In addition, Congress amended the tax return preparer penalty rules under IRC 6694 to raise the standard all return preparers must meet to "more likely than not," and a similar standard has been adopted under Circular 230. IRC 6694 (2007); Circ. 230, sec. 10.34 (2007).

5 Boca Investerings v. Commissioner, 314 F.3d 625 (D.C. Cir. 2003); Long Term Capital Holdings v. United States, 330 F. Supp. 2d 122 (D. Conn. 2004), aff'd, 150 Fed. App. 40 (2d Cir. 2005); Dow Chemical Co. v. United States, 435 F.3d 594 (6th Cir. 2006) (reversing district court judgment); Black & Decker Corp. v. United States, 436 F.3d 431 (4th Cir. 2006); Coltec Industries, Inc. v. United States, 454 F.3d 1340 (Fed. Cir. 2006) (reversing district court finding); TIFD III-E Inc. (Castle Harbor) v. United States, 459 F.3d 220 (2d Cir. 2006); cf. also Times Mirror v. Comm'r, 125 T.C. 110 (2005); Merrill Lynch & Co. v. Comm'r, 386 F.3d 464 (2d Cir. 2004).

2.5 Codification and its Critics, 2006–2010

In 2010, Congress codified the economic substance doctrine as Internal Revenue Code section 7701(o). The main change in the codified version was that it mandated following the conjunctive version of the doctrine in all the Circuits, and imposed stiff penalties for transactions lacking economic substance.

However, many critics remain skeptical of codification, which has not yet been tested in the courts (Wolfman 2004). The main concern is that the codified version, even more than the judicial version, provides a road map to successful avoidance. What is needed is (a) a credible taxpayer bolstered by contemporaneous documentation to satisfy the subjective prong, and (b) a reasonable chance of making a profit built into the transaction. A good example of a transaction that managed to pass muster under this test is the Caterpillar restructuring, which was never challenged by the IRS although it was clearly tax motivated [cite PSI report].

As many critics (e. g., Leandra Lederman) have pointed out, the basic problem with economic substance is the focus on the taxpayer's motivation, which goes all the way back to the Supreme Court's opinion in *Gregory* (Lederman 2010, p. 389). If the focus were instead on Congressional motivation, it is hard to see how transactions like the tax shelter upheld by the Courts of Appeal in *Compaq* and *IES* could survive an IRS challenge.

2.6 A Third Tax Shelter Wave, 2010-?

While it is too early to say with confidence, there may be a third tax shelter wave going on at present. A good indicator is the rise of so-called inversion transactions that exploit loopholes in IRC section 7874 to enable US corporations to become subsidiaries of foreign corporations and thereafter distribute their earnings out of the US as deductible interest or royalties. These transactions are clearly tax motivated but dressed up to appear as if they had a business purpose, thereby satisfying economic substance. We expect Congress will have to act again soon if the corporate tax base is to be preserved.[6]

6 While it is true that U.S. tax law has recently been tilted toward defending the competitiveness of US based MNEs, including provisions like check the box and the CFC to CFC payment rule that openly try to help multinationals shift income from high to low tax jurisdictions abroad, this attitude should not preclude the U.S. From adopting a GAAR. The provisions relied upon by most U.S. Multinationals are part of the tax law and represent the intent of Congress, and therefore relying on them is appropriate and would not be affected by the GAAR. What Caterpillar did was however abusive and not in accordance with Congressional intent, which is

3 GAARs: an analysis based on the legislature's intentions

By now, numerous countries have already adopted statutory GAARs (Ernst and Young 2013, p. 3). As suggested by Aaronson's GAAR Study Group, a GAAR can be justified on the basis that "levying of tax is the principal means by which the state pays for the services and facilities which it provides for its citizens," (Aaronson 2011, para. 3.3) and thus it is "reasonable to *impose some limit* on the ability of taxpayers to escape their share of the tax burden by looking for loopholes or weaknesses in the tax rules, and then constructing elaborate schemes designed to exploit them. To be consistent with the rule of law *this limit* should be imposed by legislation."(Aaronson 2011, para. 3.4).

As Weeghel explained, "[a]lthough the precise features of GAARs differ, the common elements required for their application seem to be (a) a transaction or set of transactions that is solely or predominantly aimed at tax avoidance, and (b) if given effect the object and purpose of the applicable tax law would be violated."(Weeghel 2010, n. 12 at p. 22). Focusing on the second element, note that for a tax arrangement to be acceptable (reasonable) it must be consistent with the legislative intent which underlies the tax provision being relied on for the tax advantage in question. An "abuse"[7] of that legislative intent would constitute tax avoidance, notwithstanding that the arrangement is otherwise in compliance with a literal interpretation of the tax provision. (*Canada Trustco*, n. 31, paras. 13, 16, 49).

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why it is currently under criminal investigation for tax fraud. The codification of the economic substance doctrine was adopted on a bipartisan basis and there is no reason why a GAAR that is narrowly drafted to apply only to transactions that are truly abusive and inconsistent with Congressional intent cannot receive similar bipartisan support.

7 In Canada Trustco Mortgage Co. v. Canada 2005, para. 45, the SCC elaborated as follows on the type of circumstances in which an arrangement could amount to an 'abuse':

> This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the Income Tax Act in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.

The UK's GAAR, for example, states that a "tax arrangement"[8] must not be "abusive". Tax arrangements are "abusive" if:

> they are arrangements the entering into or carrying out of which *cannot reasonably be regarded as a reasonable course of action* in relation to the relevant tax provisions, having regard to all the circumstances including –
> (a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,
> (b) whether the means of achieving those results involves one or more contrived or abnormal steps, and
> (c) whether the arrangements are intended to exploit any shortcomings in those provisions.

(Finance Act 2013, S. 207(2)).

Where, but for the application of the GAAR, the abusive tax arrangement would result in a "tax advantage",[9] that advantage is "to be counteracted by the making of adjustments," (subject to the Act's specified conditions and limitations (e. g. the adjustment would have to be "just and reasonable.") (Finance Act 2013, S.209(1)).

Similarly in Canada, a transaction (or a series of transactions) is an "avoidance transaction" where, but for the GAAR in s.245 of the Income Tax Act ("ITA"), it "would result, directly or indirectly, in a tax benefit." (Income Tax Act 1985, S.245(3)(a),) If the Minister of National Revenue ("Minister") alleges that a transaction is an "avoidance transaction", the burden is on the taxpayer to prove otherwise on the basis that the transaction can "reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit." (Income Tax Act 1985 S.245(3)(a)). If the taxpayer fails to prove that the transaction is not an "avoidance transaction" then the Minister has the burden of proving, on a balance of probabilities, that the avoidance transaction would result in an "abuse and misuse" (either directly or indirectly) of a provision in any of the instruments specified in s.245(4), which includes the

8 "Arrangements are 'tax arrangements' if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements" (S.207(1), Finance Act 2013) The arrangement could be in the form of "any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)." (S.214, Finance Act 2013)

9 "A 'tax advantage' includes: (a) relief or increased relief from tax, (b) repayment or increased repayment of tax, (c) avoidance or reduction of a charge to tax or an assessment to tax, (d) avoidance of a possible assessment to tax, (e) deferral of a payment of tax or advancement of a repayment of tax, and (f) avoidance of an obligation to deduct or account for tax." (S.208, Finance Act 2013)

ITA. If the Minister fails in this task, the taxpayer would not be denied the tax benefit even though the transaction was an “avoidance transaction” (*Lipson* 2009, n. 31, para 26). But if the Minister proves that the avoidance transaction *abused* the relevant provision, then the taxpayer can be denied the tax benefits from the transaction. The Minister’s determination of the denied tax benefits must be “*reasonable in the circumstances*” (Income Tax Act 1985, S.245(2),(5)).

Seen from a US perspective, a statutory GAAR could supplement existing tools (for combating tax avoidance) by enabling the IRS to deny tax benefits arising from arrangements that are inconsistent with Congressional intention, rather than having to base their challenge on the taxpayer’s intentions.

4 Statutory interpretation in a GAAR analysis: lessons from Canada

As the SCC explained in *Canada Trustco*, determining whether an avoidance transaction abused the statutory provision (being relied on for a tax advantage) involves a two-part inquiry: “The first step is to determine the *object, spirit or purpose of the provisions* of the *Income Tax Act* that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids. The second step is to examine 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.” (*Canada Trustco* 2005, n.31, para 55). Subsequently, in *Copthorne Holding Ltd. v. Canada*, the SCC further clarified this task of interpretation in the GAAR analysis:

> The object, spirit or purpose can be identified by applying the same interpretive approach employed by this Court in all questions of statutory interpretation—a “unified textual, contextual and purposive approach” (Trustco, at para. 47; Lipson v. Canada, 2009 SCC 1 (CanLII), [2009] 1 S.C.R. 3, at para. 26). While the approach is the same as in all statutory interpretation, the analysis seeks to determine a different aspect of the statute than in other cases. *In a traditional statutory interpretation approach* the court applies the textual, contextual and purposive analysis *to determine what the words of the statute mean*. *In a GAAR analysis* the textual, contextual and purposive analysis is employed *to determine the object, spirit or purpose of a provision*. Here the meaning of the words of the statute may be clear enough. *The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves*. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do. (3 SCR 721, 2011 SCC 63 (CanLII), para. 70).

While the GAAR requires the courts to go "behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer," (*Pièces automobiles Lecavalier Inc. v. The Queen*, para 21). that "object, spirit or purpose" must be clearly conveyed by the legislation. The courts will not invent a legislative purpose which was not clearly conveyed in the tax provision that the taxpayer relied on for claiming a tax advantage. As the SCC explained (*Canada Trustco*, 2005, n.31, paras. 40–42):

> 40 There is but one principle of interpretation: to determine the intent of the legislator having regard to the text, its context, and other indicators of legislative purpose. The policy analysis proposed as a second step by the Federal Court of Appeal in *OSFC* is properly incorporated into a unified, textual, contextual, and purposive approach to interpreting the specific provisions that give rise to the tax benefit.
>
> 41 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 roles of reviewing judges. The *Income Tax Act* is a compendium of highly detailed and often complex provisions. To send the courts 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. Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretative norms was Parliament's intent.
>
> 42 Second, to search for an overriding policy of the *Income Tax Act* that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimization schemes while prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts overrode the provisions of the *Income Tax Act* without any basis in a textual, contextual and purposive interpretation of those provisions.

Accordingly, in determining whether the avoidance transaction in question had to have real economic substance in the *Canada Trustco* case, the SCC construed the *object, spirit or purpose* of a provision which was relied on by the taxpayer, and restrained itself from inventing and imputing some underlying legislative rational that was not actually conveyed by Parliament within that provision. The court explained its analysis as follows:

57 Courts have to be careful not to conclude too hastily that simply because a non-tax purpose is not evident, the avoidance transaction is the result of abusive tax avoidance. Although the Explanatory Notes make reference to the expression “economic substance”, s.245(4) does not consider a transaction to result in abusive tax avoidance merely because an economic or commercial purpose is not evident. As previously stated, the GAAR was not intended to outlaw all tax benefits; Parliament intended for many to endure. The central inquiry is focussed on whether the transaction was consistent with the purpose of the provisions of the Income Tax Act that are relied upon by the taxpayer, when those provisions are properly interpreted in light of their context. Abusive tax avoidance will be established if the transactions frustrate or defeat those purposes.

58 Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose. When properly interpreted, the statutory provisions at issue in a given case may dictate that a particular tax benefit may apply only to transactions with a certain economic, commercial, family or other non-tax purpose. The absence of such considerations may then become a relevant factor towards the inference that the transactions abused the provisions at issue, but there is no golden rule in this respect.

59 Similarly, courts have on occasion discussed transactions in terms of their “lack of substance” or requiring “recharacterization”. However, such terms have no meaning in isolation from the proper interpretation of specific provisions of the Income Tax Act. The analysis under s. 245(4) requires a close examination of the facts in order to determine whether allowing a tax benefit would be within the object, spirit or purpose of the provisions relied upon by the taxpayer, when those provisions are interpreted textually, contextually and purposively. Only after first, properly construing the provisions to determine their scope and second, examining all of the relevant facts, can a proper conclusion regarding abusive tax avoidance under s. 245(4) be reached.

60 A transaction may be considered to be “artificial” or to “lack substance” with respect to specific provisions of the Income Tax Act, if allowing a tax benefit would not be consistent with the object, spirit or purpose of those provisions. We should reject any analysis under s. 245(4) that depends entirely on “substance” viewed in isolation from the proper interpretation of specific provisions of the Income Tax Act or the relevant factual context of a case. However, abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions.

61 A proper approach to the wording of the provisions of the Income Tax Act together with the relevant factual context of a given case achieve balance between the need to address abusive tax avoidance while preserving certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly. Parliament intends taxpayers to take full advantage of the provisions of the Act

that confer tax benefits. Parliament did not intend the GAAR to undermine this basic tenet of tax law.

62 The GAAR may be applied to deny a tax benefit only after it is determined that it was not reasonable to consider the tax benefit to be within the object, spirit or purpose of the provisions relied upon by the taxpayer. The negative language in which s. 245(4) is cast indicates that the starting point for the analysis is the assumption that a tax benefit that would be conferred by the plain words of the Act is not abusive. This means that a finding of abuse is only warranted where the opposite conclusion—that the avoidance transaction was consistent with the object, spirit or purpose of the provisions of the Act that are relied on by the taxpayer—cannot be reasonably entertained. In other words, the abusive nature of the transaction must be clear. The GAAR will not apply to deny a tax benefit where it may reasonably be considered that the transactions were carried out in a manner consistent with the object, spirit or purpose of the provisions of the Act, as interpreted textually, contextually and purposively.

5 The constitutional validity of a GAAR

When drafting a GAAR, consideration should also be given to ensure compliance with domestic constitutional requirements. GAARs are particularly at risk of being challenged on the basis of constitutional validity because, by their nature, they are conveyed using vaguely phrased standards so as to flexibly apply generally. Vagueness, however, may come into conflict with constitutionally protected rights and freedoms. There are examples of both successful and unsuccessful constitutional challenges of GAARs.

In Poland, for example, the Polish Constitutional Court found that article 24b § 1 of the Tax Ordinance Act ("TOA"), which set out a GAAR, was unconstitutional. It was found to be "in breach of article 2 (the principle of the rule of law) in conjunction with article 217 (the principle of legislative base for tax liability) of the Polish Constitution, and therefore declared it to be null and void. In consequence of this judgment, GAAR was repealed from the TOA." (Kuźniacki 2012, p. 151).

In Canada, term "abuse" in s.245(4) of the ITA was challenged as being unconstitutionally vague, but this was rejected by the FCA in *Kaulius v. Canada*. The court held as follows (2003 FCA 371 (CanLII), para 31):

> As stated in *Ontario v. Canadian Pacific Ltd*., 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, the question is whether a law provides the basis for legal debate and coherent judicial interpretation. If judicial interpretation is possible, an impugned law is not vague… In the case of section 245, the Tax Court and this Court have, on several occasions, had occasion to interpret the section and apply it. Indeed, on the facts in *OSFC* which are, for practical purposes, the same facts applicable to this case, the Court was able to interpret

subsection 245(4) and apply it. Subsection 245(4), having been interpreted and applied on numerous occasions by the Courts, is capable of supporting legal debate and coherent judicial interpretation. It is therefore not unconstitutionally vague.

6 Applying the lessons to the U.S.

As Aviv Pichhadze and Amir Pichhadze have observed, the SCC's approach in *Canada Trustco* is consistent with a similar trend taken by the top courts in the U.K. and the U.S. (Pichhadze & Pichhadze 2007). For example, in *Gitlitz v. Commissioner of Internal Revenue* it was suggested that without judicial intervention the transaction would produce a "double windfall" for shareholders; "they would be exempted from paying taxes on the full amount of the discharge of indebtedness, and they would be able to increase basis and deduct their previously suspended losses." (*Gitlitz v. C.I.R.* 2001, p. 701–02). Yet the Supreme Court of the United States held that "because the Code's plain text permits the taxpayer here to receive these benefits, we need not address this policy concern." Postlewaite has suggested that the reason for this trend in statutory interpretation is the courts' "fear of usurping the role of the legislative branch." (Postlewaite 2005, p. 147).

Shortly after *Gitlintz*, the Courts of Appeal in the U.S. reaffirmed this approach of judicial restraint. In *Coggin Automotive Corp. v. C.I.R.*, for example, the US Court of Appeals for the Eleventh Circuit noted that "perhaps the tax court is straining to extend its interpretation of the legislative histories of Section 1373 and Section 1363(d) in order to close what it perceives to be a loophole in the case of holding companies that own no inventory yet elect S corporation status." Yet, as the court went on to explain (*Coggin Auto. Corp.*, p. 1332):

> In *Gitlitz v. Com'r*, 531 U.S. 206, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001), in a case dealing with a potential double windfall to S corporation shareholders due to a discharge of indebtedness, the Supreme Court held that "[b]ecause the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern." *Id.* at 710. "[T]he result is required by statute." *Id.* at n. 10. If "this is an inequity in the United States Tax Code ... only Congress or the Secretary (as the holder of delegated authority from Congress) has the authority to ameliorate" it. *Hillman v. Internal Revenue Service*, 250 F.3d 228, 234 (4th Cir.2001); *see also Brown Group, Inc. v. Com'r*, 77 F.3d 217, 222 (8th Cir.1996)(where the Eighth Circuit reversed the tax court's use of the aggregate method of partnership taxation to close what it perceived to be a loophole in the Internal Revenue Code in that "such a tax loophole is not ours to close but must rather be closed or cured by Congress.").

Following the *Gitlitz* case, Lipton commented that "the Supreme Court's decision in *Gitlitz* shows tax advisors that they do not need to shy away from taking a position that is clearly mandated by the Code, even if the result is unduly beneficial to the taxpayer. Put simply, Congress makes the law, and the Supreme Court said that when Congress has spoken clearly, taxpayers can rely on what Congress has said." (Lipton 2001, p. 138). More recently, however, Lipton revisited this issue, raising concern that, notwithstanding *Gitlitz*, lower courts have been aggressively applying the economic substance doctrine in order to disallow tax benefits which appear to be "too good to be true", even where the transaction had a real business purpose. (Lipton 2014, p. 82, 96). In effect, as Lipton explains, "the judicial doctrines have been expanded into what appears to be a new provision in the Code – Section 'I Don't Like it'."(Lipton 2014, p. 83). Lipton rightly cautions that this is a very worrisome development which undermines certainty in tax planning; certainty "which usually can be found by applying the rules in the Code and the Regulations." Lipton goes on to conclude as follows (Lipton 2014, p. 96):

> The courts appear to be intent on reaching what they view is the 'right' result, even if the literal provisions of the Code do not help them. The economic substance doctrine is the crutch they have used to assist them in their analysis.
>
> What makes this approach even more interesting is that the one court that matters the most—the Supreme Court—has previously taken a more stringent approach in applying the literal words of the Code. The most recent example of this was *Gitlitz*, 531 U.S. 206, 87 AFTR2d 2001–417 (2001), in which the interaction of the rules for computing the basis of stock in an S corporation, when combined with the exclusion of COD income for an S corporation, resulted in a large tax benefit—a basis increase with no income! The IRS argued that this result was contrary to Congress's intent (which it clearly was), but the Court had no problem dismissing that argument. According to the Court: 'Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern.'
>
> The approach taken by the Supreme Court in *Gitlitz* does not appear to be matched by the language applied today in the lower courts, which seem focused on whether or not a result is 'fair' (in the court' opinion) and consistent with the way that Congress intended the law to operate (or, more often, would have intended if Congress actually had thought about the issue). The problem with the lower courts' approach, however, is that any certainty that is generated by a Code-based system is effectively eliminated by the courts' substitution of their own views of how the law should operate in place of what the statute literally says. Cases with identical facts can lead to wildy different results – witness the STARS decisions.

Notwithstanding the criticisms that some have expressed towards the SCC's approach in the *Canada Trustco* case, these developments in the US support the SCC's restrained approach to statutory interpretation in order to preserve a "balance between the need to address abusive tax avoidance while preserving certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly."(*Canada Trustco* 2005, n.31, para. 61).

Yet, even in the U.S., Lipson's alarm should not be over-exaggerated. One can take some comfort, for example, by the recent decision of the U.S. Court of Appeals for the Third Circuit in *Ball ex rel. Ball v. C.I.R.* In this case, "the Tax Court noted that any conclusion other than a holding that 'unrecognized gain from a Qsub election does not constitute an item of income or tax-exempt income under § 1366(a)(1)(A),' would lead to 'absurd results' and 'open the door to a myriad of abusive transactions'." (*Ball* 2014, p. 562). Yet, as the Court of Appeal held (*Ball* 2014, p. 562):

> The Supreme Court in *Gitlitz*, however, refused to address this policy argument when the text of the Code was clear. *Gitlitz*, 531 U.S. at 220, 121 S.Ct. 701 ("Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern."). Although statutory text cannot be read in a way that creates an absurdity, the payment of some taxes and not others is not an absurdity, but rather a policy choice rightly left to Congress. *Id*. Indeed, Congress, subsequent to *Gitlitz*, made changes to the statute at issue in that case to prevent further uses of the tax code loophole.

It can therefore be expected that, should the U.S. Congress decide to also adopt a statutory GAAR, the U.S. courts would (or at least should) exercise judicial restraint in their statutory interpretation similar to the SCC's approach in *Canada Trustco*. This leaves us with an issue that is accentuated by the use of a GAAR. As Arnold pointed out, "very few statutory provisions explicitly refer to economic substance; therefore, economic substance is unlikely to be an important factor in the application of the GAAR if the Supreme Court's approach is adhered to strictly by the lower courts." (Arnold 2007, p. 4).

Accordingly, if the Canadian Parliament intends to require economic substance for the purposes of any particular tax provision, it should clearly convey that intention. That also applies to any other legislative intentions throughout the ITA.

This would similarly apply to the intentions of the U.S. Congress in the tax Code, should Congress choose to apply a GAAR. "A GAAR will not operate properly unless the underlying law is based on a clearly stated principle, because without such a principle or objective it is impossible to decide whether there has been abuse of the legislation." (Freedman 2014, p. 168). In this sense, Freedman is correct in suggesting that GAARs could actually improve the underlying tax legislation.

Moreover, the U.S. Congress would need to carefully draft the GAAR in order to avoid conflict with constitutionally protected rights and freedoms, similar to the allegations made in Poland and Canada. A GAAR could, for example, be challenged for being unconstitutionally vague on due process grounds. "The concept of unconstitutional vagueness means no prohibition can stand or penalty attach where an individual could not reasonably understand his contemplated conduct is proscribed… Any statute, including a rule or regulation of an administrative agency, which forbids an act in terms so vague persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law… This principle requires the statute provide explicit standards to prevent arbitrary and discriminatory enforcement." (*Stastny* 1982, pgs. 505–06).

In the context of tax legislation, the Court of Appeal for the Sixth District similarly explained that: "An enactment may be declared unconstitutionally vague under the due process clauses of the United States Constitution and the California Constitution… 'if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits [or] if it authorizes or even encourages arbitrary and discriminatory enforcement.' A tax law in particular 'must prescribe a standard sufficiently definite to be understandable to the average person who desires to comply with it.'" (*Patel* 2002, p. 486).

> "The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment… Specifically, vagueness in statutes with criminal penalties is tolerated less than vagueness in those with civil penalties because of the severity of the potential consequences of the imprecision."(*Shew* 2014, pgs. 253–54). "Where economic or commercial interests are involved, a lesser standard is utilized for determining vagueness." (Singer and Singer, 2002 §21:16).

While a GAAR could be challenged on constitutional grounds, doing so would expectedly be an uphill battle. "Laws are entitled to a 'strong presumption of constitutionality,' and any party challenging the constitutionality of a law 'bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.'" (*Buckley* 2005, p. 815.). Moreover, it should be noted that "the void-for-vagueness doctrine 'does not require statutes to be drafted with scientific precision.' Rather, 'it permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional.' The bar is not a high one, and a 'civil statute that is not concerned with the First Amendment is only unconstitutionally vague if it is 'so vague and indefinite as really to be no rule [or standard] at all' or if it is 'substantially incomprehensible.'" (Buckley, pgs. 815–6). In tax legislation, some degree of vagueness is to be expected and would be tolerated. As the Supreme Court of California explained (*Evangelatos* 1988, pgs. 592–3):

> Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. So long as a

> statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct – like the initiative measure at issue here – a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that 'the law is impermissibly vague *in all of its applications*.'

When applying the 'void for vagueness' doctrine, the US Supreme Court cautioned that "the fact that Congress might, without difficulty, have chosen '(c) learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague."

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