Journal of Economics, Finance and Management Studies

ISSN (print): 2644-0490, ISSN (online): 2644-0504

Volume 08 Issue 02 February 2025

Article DOI: 10.47191/jefms/v8-i2-57, Impact Factor: 8.317

Page No: 1356-1379

# Assessing the Necessity of GAAR In Indonesia: A Comparative Evaluation of Global GAAR Frameworks and the Development of an Effective Statutory Model to Mitigate Tax Avoidance

**Alexander Ketut Wahyu Adiyanta**

National Graduate Institute for Policy Studies (GRIPS), Tokyo, Japan

**ABSTRACT:** This paper aims to identify the most appropriate General anti-avoidance rule (GAAR) to be adopted by Indonesia. It looks into the Indonesian legal framework, compares the GAARs in other countries, and discusses various jurisprudential decisions to measure the effectiveness of the GAARs of other jurisdictions. In doing so, this paper simultaneously contributes to academic literature and Indonesian taxation policy by offering technical recommendations to Indonesia's government to promote and support the fairness and integrity of its tax system and discourage the abuse of avoidance measures by its taxpayers. After a thorough review of Indonesia's tax laws and rules, it is shown that the current specific anti-avoidance rules (SAARs) and the limited application of the substance-over-form principle are inadequate in addressing the rampant use of tax avoidance practices of Indonesian taxpayers. To bridge this gap, a statutory GAAR primarily applicable to corporate taxpayers is proposed. The proposal adopts the pre-determination of whether a scheme falls within the purview of GAAR, a lower GAAR threshold for transactions involving corporate taxpayers, and the institution of an independent GAAR panel.

**KEYWORDS:** General Anti-Avoidance Rule (GAAR), Specific Anti-Avoidance Rules (SAARs), Tax Avoidance, Indonesia, Corporate Taxation

## I. INTRODUCTION

The implementation of a GAAR has been widely adopted by various jurisdictions as a mechanism to mitigate tax avoidance practices. As noted by the International Monetary Fund (IMF, 2016), numerous countries have enacted GAAR provisions, while others are in the process of considering their introduction or refining existing frameworks. Prominent jurisdictions that have incorporated GAAR into their tax systems include the United Kingdom, France, Germany, the Netherlands, Belgium, Canada, China, Singapore, Italy, South Africa, Kenya, and Australia. Furthermore, ongoing discussions in countries such as India and Poland highlight the continuing global interest in adopting such measures. Notably, Australia has recently revised its GAAR framework to address concerns related to base erosion and profit shifting (BEPS) activities.

The primary objective of GAAR, as articulated by the IMF (2016), is to eliminate undesirable tax avoidance strategies that, while technically legal, contravene the underlying intent of tax legislation. GAAR functions as a measure of last resort, providing tax authorities with the power to disregard or recharacterize transactions that are excessively artificial or structured solely to achieve a tax benefit. This regulatory tool enables authorities to counteract tax avoidance by either disallowing specific tax advantages or imposing an alternative, often higher, tax liability. In doing so, GAAR ensures that tax laws are applied in a manner consistent with their intended purpose, preventing taxpayers from exploiting legislative loopholes for undue financial gain.

Matsuda (2015) highlights that tax authorities employ a range of strategies to combat tax evasion and avoidance. To effectively address these challenges, authorities must implement both ex-ante and ex-post countermeasures. Ex-ante strategies, such as disclosure requirements, compel taxpayers to report specific tax avoidance arrangements to regulatory bodies at an early stage, thereby enabling proactive intervention. Conversely, ex-post measures, including anti-abuse rules, serve as a reactive approach to disallow tax benefits obtained through tax avoidance schemes. GAAR represents a key example of an ex-post countermeasure, as it provides tax authorities with the legal basis to challenge transactions that, despite adherence to statutory language, undermine the equitable application of tax laws. By integrating both preventive and corrective mechanisms, jurisdictions can establish a more robust and comprehensive framework for combating tax avoidance and ensuring tax compliance.Despite the advantages and disadvantages, the GAAR holds promise as an effective countermeasure against tax evasion practices that erode the revenue base. Proponents of GAAR in this case Ernst & Young (2013), underscore its merits, which include promoting tax equity, streamlining tax regulations, lessening the burden on judicial systems, and acting as a deterrent against tax avoidance. Conversely, Matsuda (2015) expresses reservations about potential misuse, overly broad applicability, potential constraints on everyday transactions, and related concerns. The uncertainties surrounding GAAR's impact on tax predictability are not without justification, and opinions on this matter remain divided. As a result, the balance between GAAR's benefits and drawbacks remains uncertain. Nevertheless, given the recent escalation in tax avoidance, the increasing complexity and sophistication of such schemes, and the limitations of tax authorities in curbing them effectively, the arguments favoring the adoption of GAAR have gained considerable traction.

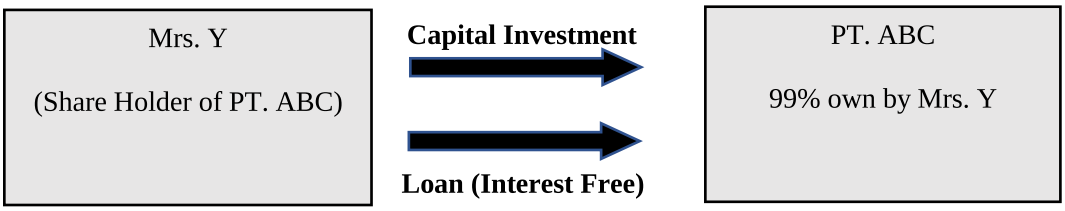
Focusing on Indonesia, the State of Tax Justice (2020) reported that tax evasion by taxpayers resulted in an estimated total loss of Rp. 68.7 trillion. Of this amount, corporate tax evasion accounted for approximately US$ 4.78 billion (Rp. 67.6 trillion), while individual taxpayers contributed to the remaining losses, totalling US$ 78.83 million (Rp. 1.1 trillion). Additionally, the International Monetary Fund (IMF) Country Report for Indonesia (2017, 2018) highlighted a persistent decline in Indonesia's tax-to-GDP ratio over recent years. This trend is further corroborated by data from the Organisation for Economic Co-operation and Development (OECD, 2022), which indicates that Indonesia's tax-to-GDP ratio decreased by 1.5 percentage points, from 11.6% in 2019 to 10.1% in 2020. Between 2007 and 2020, the ratio declined by 2.1 percentage points, from 12.2% to 10.1%, with the highest recorded ratio of 13.0% in 2008 and the lowest at 10.1% in 2020. These findings underscore the need for Indonesia to reinforce existing tax regulations to mitigate tax revenue losses. As emphasized by Besley and Persson (2014), one of the key factors contributing to low tax revenues in developing economies is the prevalence of tax avoidance schemes, which necessitate stronger regulatory frameworks to enhance tax compliance and revenue collection.

Bases on the data provided by the Ministry of Finance Indonesia in 2021, there has been a notable rise in the number of taxpayers in Indonesia who have reported consecutive losses over a span of five years. The figure increased from 5,199 taxpayers during the period of 2012 to 2015 to 9,496 taxpayers during the period of 2015 to 2019, interestingly, despite these reported losses, these taxpayers continue to operate, and in some cases, even expand their business activities. This is alleged that taxpayers utilized tax avoidance schemes such as transfer pricing and other schemes.

Indonesian tax regulations encompass specific anti- avoidance rules known as Specific Anti-Avoidance Rules (SAARs) in the form of thin capitalization, controlled foreign company (CFC) rule, arm's length rule, advance pricing agreement (APA), treaty shopping, and special purpose company (SPC) related transaction. These SAARs are designed to address specific tax avoidance issues and provide guidance on their treatment. However, there are instances where certain tax avoidance schemes fall outside the scope of these SAARs, rendering them ineffective in combating such practices. This gap in coverage necessitates the introduction of a GAAR to supplement the existing provisions. The primary function of GAAR is to tackle and neutralize the tax reduction effects resulting from tax avoidance schemes that are not adequately addressed by the existing SAARs. It serves as a comprehensive and overarching framework that can deal with those specific instances of tax avoidance which fall beyond the purview of the SAARs. By implementing GAAR, the Indonesian tax system could effectively counteract some of the loopholes and strategies employed by taxpayers engaged in tax avoidance activities that are not adequately addressed by the current provisions.

Here is one example case highlighting the limitations of current tax avoidance countermeasures in Indonesia pertaining to interest-free loans. In 2012, PT. ABC (a pseudonym) engaged in a dispute with the Directorate General of Taxes (DGT) concerning the fiscal adjustment of the taxable basis for Article 23 Income Tax Act (ITA) on interest-free loans from shareholders. Figure 1 shows the scheme of the transaction. In this case, the tax auditor applies interest charges on interest-free loans provided by shareholders at a reasonable interest rate, which is determined by the Indonesian Central Bank rate. The reason for this is that the loans from shareholders, who are related parties, did not meet the cumulative requirements mentioned in the Letter of the Director of DGT, specifically Number S-165/PJ.312/1992 dated 15 July 1992, which are : "a.) The loan originates from the funds owned by the shareholder who provides the loan itself and not from any other party, b.) The capital that should be contributed by the shareholder providing the loan to the borrowing company has been fully contributed c.) The shareholder providing the loan is not in a state of loss, d.) The borrowing company is currently experiencing financial difficulties for the continuity of its business."

**Figure 1.** ***Interest-free loan case***




*Note:* The figure is processed from Tax Court Verdict number PUT-42474/PP/M. XI/12/2012

In the case tax auditor argue that the taxpayer did not meet the first criteria which is “the loan originates from the funds owned by the shareholder who provides the loan itself and not from any other party”, thereby rendering the taxpayer ineligible to receive interest-free loans from shareholders. As a result, based on Article 18, paragraph (3) of the Income Tax Act (ITA), the auditor calculates the amount of interest that should be paid at a reasonable interest rate. As for what is meant by a reasonable interest rate is the interest rate that is determined in accordance with the principle of fairness and customary business or the arm's length principle.

In this particular case, PT. ABC is required to withhold taxes based on Article 23 of the ITA at the applicable reasonable rate (determined using the Indonesian Central Bank Rate). On the other hand, the shareholder, Mrs. Y is considered to have earned income (interest) from this transaction. Conversely, the taxpayers contest the tax authorities' viewpoint. They contend that shareholders provide interest-free loans due to the taxpayer's operational activities facing liquidity challenges. The Tax Court Panel of Judges, at the appeal level, ruled in favor of the taxpayer, granting their entire appeal, and denied the tax authorities’ claim[i1]. Furthermore, at the cassation appeal level, in line with Tax Court Judgment, the Supreme Court rejected the cassation appeal application submitted by the tax authority.

Upon thorough examination of the arguments presented by both parties by the Tax Court Panel of Judges, they argue that the tax auditor claim did not invalidate the facts and legal considerations presented during the trial. In this case, the taxpayer has clarified that there was no assessment of loan interest or any flow of loan interest payments to shareholders. Therefore, the corrections made by the Tax Authority cannot be upheld as they do not align with relevant laws and regulations. The Supreme Court also points out that the circulation letter of DGT Director Number S-165/PJ.312/1992 cannot be immediately applied to taxpayers since it lacks the necessary legal hierarchy to impose binding obligations based solely on the letter's designation.[2] This highlights the limitation of the current Indonesian directive on interest-free loans, and it suggests that Indonesia should regulate this scheme with a higher tax regulation that holds the same legal hierarchy as other regulations.

Additionally, the Supreme Court refers to the notes on the financial statements by an independent auditor on the taxpayer's bank debt to prove how worse the liquidity problem is faced by the taxpayer. These notes reveal that there were debts due for payment in 2008 and debts being submitted for restructuring, but as of December 31, 2008, the restructuring requests were still pending. The amount of these debts exceeded the profit in 2008, and the taxpayer faced losses in 2006 and 2007. As a result, the panel of judges concluded that the taxpayer was experiencing financial difficulties that endangered the continuity of their business, which is why the interest-free loan was allowed. In this case, there are no specific tax regulations explaining the criteria for determining financial difficulties. As a result, the decision will be based on the perspective of the tax auditor or The Tax Court Panel of Judges which will lead to a future dispute. On the other hand, Japan, they have an administrative ruling that regulates the criteria of the liquidity problem faced by a taxpayer in the interest-free loan scheme. The Japanese tax law permits the interest-free loan scheme when it arises because the receiving party would face bankruptcy without any financial help. In such cases, the judgment in these cases hinges on assessing the seriousness of the financial problem.

Likewise, in certain cases in Indonesia, taxpayers may encounter liquidity problems that are not overly serious. Consequently, the Indonesian tax directive might permit the use of interest-free loan schemes without categorizing them as interest income. However, in scenarios where the liquidity problems faced by the taxpayers are not too severe, the GAAR could be applicable for this case. GAAR serves to fill in the gaps where the relevant directive in Indonesia does not address such schemes relating to less critical liquidity problems. By doing so, GAAR helps prevent potential abuse of the system and ensures fair tax treatment in such cases.

---

[1] See Indonesian Tax Court Verdict number PUT-42474/PP/M. XI/12/2012

[2] See Indonesian Supreme Court Verdict number PUT-908/B/PK/PJK/2014

Furthermore, if a more comprehensive anti-avoidance rule were in place, it could have been possible to counteract this tax avoidance scheme. In this scheme company A provides a loan to company B, which is interest-free, and both companies are related entities. The tax effect of this interest-free loan is to transfer income from company A to company B, as company A forgoes the interest that would normally be accrued under a typical third-party loan. While an interest-free loan may be justifiable for legitimate reasons. However, if it is not properly regulated, it can lead to income shifting from company A to company B with the primarily purpose is tax avoidance. This income shift becomes particularly effective for tax avoidance when company A is profitable while company B is facing financial losses.

Although Indonesia has directives that can address interest-free loans and potentially neutralize their tax effects, there are interest-free loans that can still exploit tax deductions without being covered by these directives. For instance, in Japan, the Corporate Income Tax Act (CITA) Article 132 provides a form of semi-comprehensive GAAR, but it only applies to cases where interest-free loans are made by family corporations. These are transactions entered into by a corporation that is an affiliated family corporation whose shares are mostly held by the corporation that is subject to Article 132 of CIT because it unduly reduces the amount of tax payable by the corporation. In response, the tax authority can recharacterize these transactions as if they were conducted by independent corporations. Then, the tax due is calculated based on this recharacterized transaction. However, the GAAR provides the tax authority with the ability to apply similar recharacterization rules to transactions involving a corporation and its affiliate corporation, which may not fall under the family corporation category. Additionally, GAAR allows the tax authority to deny tax benefits, such as special credits, preferential treatment, or other advantages sought after by taxpayers, if these benefits are primarily aimed at tax avoidance and would not be accessible without resorting to such avoidance strategies. In essence, GAAR helps prevent taxpayers from exploiting loopholes and manipulating transactions solely for tax benefits.

### 1.1. Research Question

This paper aims to answer the following research questions:

1. How effective are Indonesia's anti-avoidance laws in stopping sophisticated tax planning?
2. In what cases has GAAR applied in other countries?
3. How GAAR could be applied to those cases where the tax authority loses?
4. What structure should an Indonesian GAAR possess by comparing it with the GAAR structures of other countries?

### 1.2. Methodology

To answer those questions, this research will be conducted using qualitative methodology, more precisely by doing a critical literature review of existing tax provisions on tax avoidance countermeasures in Indonesia, shedding light on the effectiveness and limitations of GAAR by referring to judicial cases on them and looking for several options to complement the limitations of GAAR or other measures. Furthermore, this research will also discuss the structures, effectiveness, and limitations of GAAR in other countries. The final objective is to design a proposal for introducing GAAR and its possible structure in Indonesia.

## II. LITERATURE REVIEW

### 2.1 Tax planning and tax avoidance

Tax planning is a crucial aspect of corporate financial management, aimed at enhancing the efficiency of cash expenditure on tax payments (Spitz, 1983). Companies undertake tax planning in order to achieve savings in their tax liabilities. In fact, tax planning is often synonymous with tax management, as it forms an integral part of a company's overall strategy to optimize its tax payments (Rahayu, 2013). By engaging in effective tax planning, companies can streamline their tax obligations and allocate their financial resources more efficiently.

Tax planning by companies has the potential to result in either tax avoidance or tax evasion. According to Frank et al. (2009), tax aggressiveness refers to the management's efforts to minimize taxable income using a variety of tax planning activities, which may range from legal to illegal practices in the gray area. In addition, Atwood et al. (2012) define tax evasion as the disparity between the unmanaged tax amount (tax payments based on statutory rates) and the managed tax amount (actual tax paid). This discrepancy reflects the managers' aggressiveness in adopting strategies to reduce tax obligations.

Lanis and Richardson (2012) argue that tax avoidance, tax aggressiveness, and tax management all refer to the same concept. Tax avoidance can be seen as a continuum, encompassing various degrees of adherence to tax regulations, ranging from not violating the rules to tax aggressiveness, tax non-compliance, and tax evasion (Hanlon and Hetzman, 2010). Combining insights from these scholarly works, it can be concluded that tax avoidance involves efforts to minimize corporate tax payments using different levels of aggressiveness, which can be classified as legal or illegal tax avoidance strategies.

According to Rohatgi (2002), tax avoidance can be categorized into two types: acceptable tax avoidance and unacceptable tax avoidance. Additionally, Rahayu (2013) outlines the characteristics of transactions that fall under unacceptable tax avoidance, including: (1) lacking a legitimate business purpose, (2) being solely aimed at tax avoidance, (3) deviating from the legislative intent, and (4) involving contrived transactions to generate artificial costs or losses. On the other hand, permissible tax avoidance encompasses transactions that have legitimate business purposes, are not solely driven by tax avoidance motives, align with legislative intent, and do not involve contrived maneuvers. In contrast to tax avoidance, which operates within the boundaries of tax regulations, tax evasion involves illicit manipulation to minimize tax obligations and is subject to criminal penalties (Rahayu, 2013). Tax evasion entails intentionally violating tax provisions to unlawfully reduce the tax burden.

### 2.2 Existing tax provisions on tax avoidance countermeasures in Indonesia.

Indonesian tax laws have not stipulated a statutory definition of tax avoidance, while in practice, broad definitions of tax avoidance are commonly used. Current tax avoidance countermeasures only adopt the substance over form rule and SAAR in the form of thin capitalization, controlled foreign company (CFC) rule, arm's length rule, advance pricing agreement (APA), treaty shopping, and special purpose company (SPC) related transaction. According to the OECD, SAARs are relatively less likely to create tax uncertainty, given the limited scope of their application. However, under certain conditions, SAAR can also lead taxpayers to involve aggressive tax planning.

The adoption of substance over form principle in Indonesian tax law was influenced by United States tax law in late 1983. Four aspects are particularly relevant to the application of the principle are:

1. Article 2 paragraph (6) of Indonesian ITA provides that the personal residence or domicile is determined by the DGT based on factual reality to eliminate migrations of taxpayer's domicile is which based on a mere formality.
2. Article 4 Paragraph (1) of Indonesian ITA defines that taxable income encompasses income in any form or name. This inclusive definition implies that taxes can be levied on any economic profit received or earned by a taxpayer, whether for immediate consumption or for the accumulation of wealth. The provision operates under the assumption that the realization or acquisition of an economic gain serves as the most suitable criterion for determining the taxpayer's fair contribution to government funds. In essence, this provision aims to ensure that individuals contribute to public funds in proportion to the economic benefits they derive;
3. Article 5, paragraph (1) of the Indonesian ITA addresses the force of attraction rule, specifically designed to counteract taxpayers' manipulative business practices aimed at circumventing the concept of Permanent Establishment (PE). This provision aims to prevent the shifting of income sources from Indonesia, where the PE is established, to the taxpayer's country of residence. By implementing the force of attraction rule, the Indonesian tax authority aims to ensure that the taxable income generated within the country is appropriately recognized and subjected to taxation, discouraging any artificial schemes that attempt to evade tax obligations by altering the source of income; and
4. Article 28 of Indonesian General Provisions and Procedures of Taxation Act stated, tax records and bookkeeping must adhere to Indonesian accounting standards unless otherwise specified by tax regulations. These standards prioritize the substance over form principle, emphasizing the importance of accurately reflecting the economic substance of transactions rather than solely relying on their legal or formal aspects. This requirement ensures that financial records and reporting align with the underlying economic reality, enabling a more accurate assessment of taxable income and facilitating transparency and consistency in tax compliance. By incorporating the substance over form principle into tax record-keeping, the Indonesian tax system aims to enhance the accuracy and reliability of financial information for tax purposes.

### 2.3. SAARs in Indonesia

Indonesian tax legislation incorporates several Specific Anti-Avoidance Rules (SAARs) to address various forms of tax avoidance. These rules encompass provisions such as transfer pricing regulations, thin capitalization rules, anti-tax have measures, the concept of beneficial ownership, and controlled-foreign-corporations (CFC) regulations. Additionally, the tax law allows for the application of the substance over form principle in certain scenarios, promoting purposive taxation through an interpretation of tax laws that aligns with their intended purpose. It is important to note that Indonesian tax laws do not include a specific provision that can be classified as a GAAR. The implementation of these SAARs serves to ensure that taxpayers fulfill their tax obligations in a manner consistent with the intended spirit of the law, providing further clarity and guidance in combating tax avoidance practices in Indonesia. Further explanations of Indonesian SAARs are as follows:

**2.3.1. Transfer pricing rule.** Under the Article 18, paragraph (3) of the Indonesian Income Tax Act, the government, specifically the Director of the Directorate General of Taxes (DGT), possesses the authority to reallocate income and expenses, as well as reclassify debt as equity, for taxpayers engaged in transactions with related parties. This provision aims to determine the taxable income based on the arm's-length principle and sound business practices, treating the transaction as if it were unaffected by the special relationship between the parties involved. In this context, several transfer pricing methods are available for both taxpayers and the tax authority, including "the comparable uncontrolled price method, resale price method, cost-plus method, profit-split method, and transactional net margin method. However, it is important to note that the current scope of the rule is limited to transactions between related parties.

**2.3.2. Thin capitalization rule.** Article 18 paragraph (1) of Indonesian ITA authorizes the Minister of Finance to determine ratio between debt and equity for tax purposes. When debt to equity ratio exceeds the arm's-length ratio, tax authority may determine the existence of hidden capital. Furthermore, the directive of this regulation can be found in the MoF Regulation number 169/PMK. 010/2015 concerning Determining the Amount of Comparison Between Debt and Company's Equity for Income Tax Calculation Purposes. Tax havens and controlled-foreign-corporations rule.

**2.3.3. Tax havens and controlled-foreign-corporations rule.** Controlled-Foreign-Corporation (CFC) refers to a foreign company, often located in tax haven countries, that is frequently utilized as a tax avoidance strategy by delaying the declaration of dividends to Indonesian taxpayers who hold shares in the company. The Indonesian tax legislation governing CFCs is outlined in Article 18, paragraphs (2), (3b), and (3c) of the ITA. These provisions grant authority to the Minister of Finance to determine the timing of dividends received by domestic taxpayers from their equity investments in foreign business entities. Furthermore, when taxpayers engage in share or asset transactions through a specially established party or entity, commonly referred to as a special purpose company, in countries that offer tax protection (tax haven countries), they may be considered the actual participants in the transaction, provided they have a special relationship with the other party or entity involved and there are pricing irregularities.

**2.3.4. Beneficial ownership rule.** The implementation of the beneficial ownership rule plays a vital role in combating tax avoidance schemes such as treaty shopping. These provisions are outlined in Article 26, paragraph (1a) of the Indonesian ITA, which clarifies that for foreign taxpayers who are not engaged in business activities or do not have a permanent establishment in Indonesia, the resident state for tax purposes is determined based on the country of residence or domicile of the foreign taxpayer who truly receives the economic benefits of the income (referred to as the beneficial owner or actual owner). By emphasizing the concept of beneficial ownership, the Indonesian tax legislation aims to ensure that tax benefits and treaty provisions are availed only by those who genuinely have the right to such benefits, discouraging abusive practices and ensuring a fair and equitable distribution of tax liabilities.

**2.3.5. Government Regulation No. 55 of 2022 (GR 55/2022).** On December 20, 2022, the government issued GR 55/2022 with the primary purpose of effecting regulatory adjustments in the realm of the Income Tax Act (ITA). The core objective of GR 55/2022 revolves around providing taxpayers with a framework of legal certainty, streamlining tax administration procedures, ensuring convenience, and promoting fairness in the taxation system. Furthermore, the regulation seeks to facilitate the implementation of international taxation agreements while upholding principles of good governance. Notably, GR 55/2022 delves into the elaboration of anti-tax avoidance rules, as originally expounded in the elucidation of the Income Tax Act. The amendments introduced to Article 18 of the Income Tax Act pertaining to Anti-Tax Avoidance Rules are delineated in the Harmonization of Tax Regulations (HPP Law).

GR 55/2022 describes the SAARs under Article 32C letter (t) to letter (aa) thereof, to wit:

1. The limit on the amount of loan fees that can be charged for tax calculation purposes (Art. 18 [1], ITA).
2. Determination of when dividends are received by domestic taxpayers for equity participation in foreign entities other than business entities that sell their shares on the stock exchange (Art. 18 [2], ITA);
3. The application of the principles of fairness and customary business in the framework of calculating the amount of Taxable Income for taxpayers who have a special relationship with other Taxpayers as referred to in (Art. 18 [3], ITA)
4. Implementation of the transaction price formation agreement between parties that have a special relationship as referred to in (Art. 18 [3a], ITA);
5. Determination of the party that actually purchases company shares or assets through another party or an entity set up for this purpose (special purpose company) as referred to in (Article 18 [3b], ITA) Stipulation of sale on the transfer of shares of entities established or domiciled in Indonesia or permanent establishments in Indonesia as referred to in (Art. 18 [3c], ITA);

6. Re-determination of the amount of income earned by domestic individual taxpayers from employers who have special relationships with other companies that are not established and domiciled in Indonesia as referred to in (Art. 18 [3d], ITA); and
7. Criteria for the special relationship as referred to in (Art. 18 [3a], ITA).

**Table 1. The regulatory scheme for the Anti-Tax Avoidance Rules in GR -55/2022**

| GR 55/2022Anti-tax avoidance rules | Scope |
|---|---|
| Scope of anti-avoidance rules (Article 32) | a. When is dividend obtained (Article 34)<br>b. Determination of taxpayers as buyers of company assets (article 38)<br>c. Sale of shell company shares (Article 39)<br>d. Deemed Salary (Article 40)<br>e. Benchmarking Ratio (Article 42)<br>f. Thin Capitalization (Article 42)<br>g. Hybrid mismatch (Article 43) |
| Affiliate Translations (Article 33) | a. Affiliate based transactions - Arm's length Principle (ALP) (Article 35)<br>b. DGT's authority on ALP (Article 36)<br>c. Implementing rules ALP through Finance Minister Regulations (Article 37) |
| Advance Pricing Agreement (Article 45, 46, and 47) | a. Regulate the APA procedure. |

Based on the description above, the current Indonesian tax avoidance rule exhibits certain limitations that impede its effectiveness in addressing the issue of tax evasion. This inadequacy arises from the absence of an article specifically dedicated to the GAAR within the existing provisions of ITA. Presently, the countermeasures employed in Indonesia rely solely on the implementation of a Specific Anti Avoidance Rule (SAAR), which possesses the capacity to be applied solely to particular transactions. However, it is imperative to establish comprehensive regulations that encompass all forms of tax avoidance, rather than confining their applicability to specific transactions. Consequently, circumstances may arise where certain transactions fall beyond the purview of the specialized regulations for tax avoidance prevention, thereby necessitating the utilization of the general regulations to address such situations effectively.

In addition, Waincymer (1997) emphasizes that if a transaction falls within the specific rules, it is no longer necessary to review it in GAAR. If, on the other hand, a transaction is legally declared legal and permitted by specific rules, then it should not need to be examined under GAAR rules. Furthermore, Arnold (1997) reveals that in choosing whether the rules for transactions prioritize GAAR or SAAR, there is no standard rule for using which rule comes first. In some cases, GAAR should override specific rules because otherwise, taxpayers will be able to manipulate technical provisions to obtain tax benefits. However, not in all cases general rules precede specific rules (SAAR). For example, it would be unfair to apply the GAAR to cases where the taxpayer intends to obtain tax incentives that are specifically described in the law. Therefore, the court must decide in each case whether the GAAR or other provisions should be applied.

### 2.3 GAAR and its Structural Framework

The GAAR is a legislative provision intended to address and counteract tax avoidance schemes. It constitutes a comprehensive framework that grants tax authorities the authority to disregard transactions or arrangements primarily undertaken to evade tax liabilities. In general, according to Matsuda (2015), the structure of GAAR encompasses several essential elements, which are outlined as follows:

1. **Lack of economic substance.** The tax authority has the sovereignty to deny transactions that are lack of economic substance and the main purpose of it is to get tax benefit.
2. **Abuse the relevance tax provision.** This typical structure of GAAR is commonly found in EU member country which is called Euro-GAAR. It is judicially developed under European Court of Justise (ECJ).
3. **Certain level of thresholds.** The presence of a threshold is a characteristic commonly found in the GAAR framework, acting as a determining factor to ascertain whether a particular scheme falls within the scope of GAAR. This threshold can be established based on various factors, such as the number of transactions involved, or the specific type of scheme employed by the taxpayer.

4. **Penalty.** Penalties for tax avoidance can vary across different countries, with some jurisdictions imposing higher penalties compared to others. These penalty structures reflect the severity of tax avoidance and aim to deter individuals and businesses from engaging in such practices by imposing significant financial consequences.
5. **Panel of GAAR.** Certain countries have established dedicated GAAR panels to review transactions that potentially fall under the scope of the GAAR, while other jurisdictions do not have such specialized panels. These panels are responsible for examining complex or contentious cases involving potential tax avoidance and providing expert opinions on whether the GAAR should be applied to those transactions.
6. **The Scope.** The scope of GAAR varies across different countries, with some jurisdictions implementing GAAR solely for corporate transactions, while others extend its scope to cover individual transactions as well. Canada is an example of a country where GAAR is applicable to both corporate and individual taxpayers.

**2.4 The structures, effectiveness, and limitations of GAAR in other countries.**

According to Matsuda (2015), tax authorities employ various strategies to combat tax evasion. However, to effectively address tax avoidance, tax authorities must implement both ex-ante and ex-post countermeasures. Ex-ante countermeasures refer to measures that are effective in the early stages of the battle against tax evasion, while ex-post countermeasures are effective in the later stages of the conflict. One commonly used ex-ante defense against tax avoidance is a set of disclosure requirements that mandate the reporting of specific types of tax avoidance schemes to the tax authorities. On the other hand, one of the popular ex-post responses involves implementing anti-abuse rules that prevent the granting of tax benefits or tax relief in cases of tax avoidance schemes. The GAAR is an example of an ex-post countermeasure.

Despite having both advantages and disadvantages, the GAAR holds potential as a viable countermeasure against tax evasion practices that undermine the revenue base. Advocates of GAAR typically emphasize its benefits, such as enhancing tax equity, alleviating the burden on judicial systems, simplifying tax regulations, and acting as a deterrent against tax avoidance. Conversely, opponents of GAAR raise concerns regarding potential abuse, excessive scope, constraints on everyday transactions, and other related issues. The apprehensions regarding GAAR's impact on tax predictability are not unfounded, and opinions on this matter remain divided. Consequently, it is uncertain whether the merits of GAAR outweigh its drawbacks. However, in recent times, particularly in response to the escalating surge in tax avoidance, the escalating complexity and sophistication of such schemes, and the tax authority's limited effectiveness in deterring them, the arguments in favor of adopting GAAR have gained substantial traction (Matsuda, 2015). Several goals will be achieved by the government by implementing GAAR (Ernst & Young, 2013):

1. Codify or compile court decisions related to tax avoidance or abuse.
2. Targeting transactions that may comply with the technical interpretation of a law but produce tax benefits that the government deems to be inconsistent with the spirit of the law.
3. Defining what constitutes an artificial scheme, transaction, or arrangement that is engineered to obtain tax benefits.
4. Applying some type of substance or objective test as a filter to determine whether a transaction is legitimate.
5. Providing the tax authority with an authority mechanism to ignore a transaction or remove tax benefits that have been claimed by the taxpayer.
6. Allows the imposition of special judgments, fines, and interest when violations are proven.

In this research the main focus is to conduct a cross-country comparative analysis of countermeasures, focusing on their categorization, setup, and functions. By examining both similarities and differences among these countermeasures, valuable insights can be gained regarding potential options that may serve as suitable candidates for Indonesia's new countermeasures. Furthermore, this analysis can provide valuable guidance on restructuring existing countermeasures within Indonesia to enhance their effectiveness in combatting tax base erosion. The findings of this study will contribute to the development of improved strategies and measures to address the challenges associated with tax base erosion in Indonesia.

Regarding the aforementioned classification or issue of countermeasures against tax avoidance, the focus of the analysis will be specifically narrowed to comprehensive anti-avoidance rules, namely GAAR and their equivalent provisions, in major jurisdictions. The objective is to examine the rationales behind the adoption of GAAR in these jurisdictions, as well as their structural features and criteria for applicability. A comparative analysis of GAAR across different jurisdictions will be conducted to highlight similarities and differences in their structures and functions, thereby shedding light on the advantages and disadvantages of GAAR and revealing global trends in its implementation. Furthermore, it will be particularly valuable to investigate the measures implemented in these countries to strike a balance between establishing effective GAAR frameworks and minimizing potential drawbacks.

**Assessing the Necessity of GAAR In Indonesia: A Comparative Evaluation of Global GAAR Frameworks and the Development of an Effective Statutory Model to Mitigate Tax Avoidance**

In this research, the writer has carefully selected a particular country for several compelling reasons. Firstly, Australia, Canada, and South Africa possess a statutory GAAR that incorporates the crucial element of the lack of economic substance doctrine. Conversely, the EU GAAR stands out as a remarkable instance of legislative compression, primarily due to its correlation with the Abuse of Law doctrine. Consequently, the United Kingdom and Belgium serve as excellent representatives of this GAAR structure. These two primary GAAR structures are being analyzed with the aim of designing a well-suited GAAR framework for Indonesia.

## III. COMPARATIVE ANALYSIS

### 3.1.1 GAAR in Australia

Australia's forerunner statutory GAAR was stipulated in Section 260 of the Income Tax Assessment Act (ITAA) 1936. The section's reach was exceedingly broad, and its precedents went back at least to 1915 and probably to 1895 (Sayed and Benjamin, 2023). Section 260 "provided the Commissioner of Taxation with wide powers to disregard or recharacterize transactions that had been entered into for tax avoidance purposes. The courts applied the section strictly, and there were several limitations on its use." However, with the introduction of Part IVA in the ITAA in 1981, "the scope of GAAR provisions was significantly expanded. Part IVA sets out a comprehensive scheme that targets tax avoidance arrangements." The section provides "the Commissioner with the power to cancel tax benefits if the arrangement was entered into for the sole or dominant purpose of obtaining the tax benefit. The test for determining the dominant purpose is subjective, and the courts have adopted a case-by-case approach in interpreting the provisions dealt with anti-avoidance rules." Section 260 states:

> "Every contract, agreement or arrangement writing, whether before or after the commencement as it has or purports to have the effect of:
>
> a. Altering the incidence of any income;
>
> b. Relieving any person from liability to pay any income tax or any return;
>
> c. Defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
>
> d. Preventing the operation of this Act,
>
> be absolutely void as against the Commissioner, proceeding under this Act but without may have in any other respect or for any other purpose."

Section 260 of the Australian ITAA "deals with GAAR by examining the purpose behind transactions, rendering those performed with the intention to evade taxes as non-compliant. To address its broad scope, the courts established three tests: the predication test, the choice principle (Westminster principle), and the antecedent transaction doctrine." According to Sayed and Benjamin (2023), the predication test, established in the Newton v. Federal Commissioner of Taxation case, focuses on the objective purpose of the transaction rather than the subjective motive of tax avoidance. It determines whether the transaction was implemented in a specific way to evade tax or if it was a common business practice. If it is the latter, the section does not apply. Conversely, the choice principle, introduced in Australia through the WP Keighery Pty. Ltd v. Federal Commissioner of Taxation case[3], states that if the taxpayer has two explicit choices under the Act and they choose an option solely for tax purposes, it does not violate Section 260. The courts preferred the choice principle as it considers the participant's subjective motive and aligns with commercial reasoning. In a relevant case, a taxpayer sold a company with substantial accumulated profits to achieve a non-taxable gain, while liquidating the company would have incurred taxable profits. The tax authorities argued that this transaction fell under section 260, but the court disagreed, upholding the taxpayer's right to choose the option resulting in a non-taxable gain. The court emphasized that the taxpayer's fundamental right to make a choice should be respected and that section 260 should not infringe upon that right.

The Slutzkin v. Federal Commissioner of Taxation case[4] gave the choice concept further legal legitimacy in Australia. In this instance, the taxpayer created a trust and transferred his shares to it in an effort to reduce his tax liabilities. The taxpayer was allowed to choose the transaction's structure, according to the court, as long as it was not fraudulent or commercially insignificant arrangement. The choice principle's importance in the analysis of GAAR rules in the Australian context was further supported by this judgement.

3 WP Keighery Pty. Ltd v. Federal Commissioner of Taxation, 1957

4 slutzkin v. Federal Commissioner of Taxation, (1978)7 A.T.R. 166 (H.C.A.).

The choice principle was further developed and utilized in the Australian setting in the Cridland v. Commissioner of Taxation case[5]. In this particular case, the taxpayer created trust and transferred shares to it in order to avoid paying dividend taxes. According to the tax authorities, this constituted a tax evasion scheme that was subject to GAAR regulations. The taxpayers had legitimately used their authority to select and transfer the shares to the trust, the court held, and tax concerns were not the only factor in this choice. Section 260 was therefore judged to not apply to this arrangement. The choice principle is crucial in assessing the legality of tax systems in Australia, as this case highlighted.

The Australian courts developed an innovative approach known as the antecedent transaction doctrine in the case of Mullens v. Federal Commissioner of Taxation[6.] This doctrine was created to rein in the overuse of the choice principle and guarantee that GAARs could be used when the taxpayer had just one option available. According to this principle, the court may look beyond the current transaction and consider the antecedent transactions to establish if the tax outcome was intended if a series of transactions are carried out in such a way as to obtain a specific tax effect. This enables the court to disregard the taxpayer's decisions in specific transactions and consider the series of transactions as a whole rather than each individual one in order to assess if the overall objective was tax avoidance.

The three tests drastically reduced Section 260 of the ITAA's effectiveness, and Part IVA was enacted to address those issues. The existence of a scheme, the taxpayer receiving certain benefits from the scheme, and the scheme being entered into with the primary intent of earning a tax benefit compose the three fundamental requirements. According to Section 177D of the ITAA, the dominant purpose test is an objective conclusion that can be drawn from eight exhaustive considerations.

Several considerations come into play when assessing the legitimacy of a scheme under Part IVA. These factors encompass the implementation method, the actual structure and essence of the scheme, the timing of its execution, the anticipated outcome if Part IVA did not exist, any impact on the financial position of the taxpayer or other individuals involved, as well as the nature of relationships between the scheme's parties. Part IVA was introduced with the intent of applying the predication test, aiming to curb artificial or contrived transactions carried out solely for the purpose of gaining tax advantages.

The Australian High Court presented guidance on the applicability of Part IVA in the matter of Federal Commissioner of Taxation v. Spotless Services Ltd.[7] The case included Spotless Services Ltd., which devised a plan to lease back its company at a significantly reduced rent after selling it to a newly formed subsidiary for a high price, generating an enormous tax benefit. The Court determined that the scheme lacked business reality and was entered into primarily for the purpose of receiving a tax benefit. The Court additionally dismissed the claim that the agreement was just a regular business transaction with tax implications. The case established the rule that, even when conducted in a legally sound manner, Part IVA nonetheless applies to schemes that lack commercial reality.

Indonesia can learn valuable lessons from Australia's GAAR to enhance its own tax system and combat tax avoidance more effectively. Firstly, adopting a clear legal framework, similar to Australia, would provide a well-defined structure that specifies the objectives and scope of anti-avoidance measures. This would ensure that the regulations are comprehensive and guide the application of the rules. Furthermore, Indonesia can benefit from implementing objective criteria, like Australia's predication test, to assess the purpose and substance of transactions. By focusing on objective tests rather than subjective motivations, Indonesia can create a more robust system to effectively identify and prevent tax avoidance.

It is crucial for Indonesia to develop a comprehensive approach that takes into account the economic substance of transactions, similar to Australia's GAAR. This holistic analysis should consider factors such as implementation methods, the form and substance of schemes, timing, expected outcomes, financial impact, and the relationships between the parties involved. By considering these factors, Indonesia can better determine if a transaction is driven by genuine commercial considerations or if it is a tax avoidance scheme.

### 3.1.2 GAAR in Canada

The Canadian GAAR is outlined in Section 245 of the Canadian Income Tax Act (ITA). This GAAR was implemented in reaction to the Stubart Investments Ltd. v. The Queen case8, in which the court upheld the Duke of Westminster principle. The court's endorsement of this principle motivated Parliament to furnish the judiciary with a statutory mechanism to combat tax avoidance. The provisions of the GAAR are encapsulated in Section 245(2) of Canadian ITA, which is stated as follows:

"(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is

5 Cridland v. Commissioner of Taxation, 1977 140 C.L.R. 330 (H.C.A.).

6 Mullens v. Federal Commissioner of Taxation, (1976) 6 A.T.R. 504, 135 C.L.R. 290 (H.C.A.)

7 Federal Commissioner of Taxation v. Spotless Services Ltd, (1996) 96 A.T.C. 520.

8 CA: SCC, 7 June 1984, 16623, Stubart Investments Ltd v. The Queen, [1984] 1 SCR 536.

reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction."

Moreover, Section 245(4) provides an additional requirement for the application of the GAAR, to wit:

"(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction (a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of (i) this Act, (ii) the Income Tax Regulations, (iii) the Income Tax Application Rules, (iv) a tax treaty, or (v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or (b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole."

In order for the GAAR to apply, therefore, the following elements must be met—that "there should be (1) a tax benefit, (2) an avoidance transaction; and (3) it would be reasonable to conclude that the transaction would, if not for the GAAR provision, result in a misuse of the provisions of the Income Tax Act or other relevant laws such as tax treaties or an abuse of the provisions of these provisions read as a whole."

A tax benefit is defined in Section 245(1) as: "a reduction, avoidance or deferral of tax or other amount payable under the ITA, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under the ITA but for a tax treaty or an increase in a refund of tax or other amount under the ITA as a result of a tax treaty. Furthermore, an avoidance transaction is defined in Section 245(3) as any transaction, or part of a series of transactions, that would result, but for this Section, in a tax benefit either directly or indirectly, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit."

In 2005, the Canadian GAAR underwent retroactive amendments. These amendments had the effect of expanding the reach of the GAAR beyond the confines of the ITA (Titus, 2019). Additionally, according to Titus (2019), the amendments altered the operation of the misuse and abuse provision by eliminating its role as an exclusion and instead reinstating it as an additional requirement for the application of the GAAR. The sequential application of these elements in invoking the GAAR was outlined in the case of Canada Trustco Mortgage Co. v. Canada.[9] According to the court's ruling, the first step is to ascertain whether a tax benefit, as defined by the legislation, has arisen from the transaction or series of transactions. Subsequently, it is necessary to establish the presence of an avoidance transaction, as defined by the relevant provisions. Finally, a determination must be made as to whether the avoidance transaction constitutes abusive tax avoidance, wherein the transaction or series of transactions deviates from the intended object, spirit, and purpose of the legislative provisions utilized by the taxpayer.

In numerous instances, taxpayers readily acknowledge the presence of a tax benefit and an avoidance transaction, placing the litigation's emphasis on whether the individual transactions, which may form a series, constitute a misuse or abuse of the legal provisions. When interpreting this provision Duff and Alarie (2018) observe that recent judgments display a greater inclination to employ the GAAR in addressing unintended legislative gaps. The courts now appear to utilize Over the course of three decades since the enactment of Section in Canada, a substantial body of jurisprudence has emerged regarding the GAAR. The Canadian courts employ a comparative analysis to determine the presence of a tax benefit, considering whether a comparable transaction could have reasonably taken place in the absence of the tax benefit. When assessing the existence of an avoidance transaction, Arnold (1995) explains that the key consideration is whether there is a non-tax purpose. Additionally, according to Arnold (1995), to evade the application of the GAAR, such non-tax purpose must pertain to every step within the series of transactions. The Canadian ITA provides a definition of a series of transactions in Section 248(10), stating that "any related transactions or events completed in contemplation of the series are deemed to be included within the series for the purposes of the Act". In the Canada Trustco case, the court determined that this statutory definition broadened the common law understanding of a series, allowing events occurring both before and after the initially identified transaction to be included. However, there remains uncertainty regarding the precise scope of Section 248(10), particularly in interpreting the term in contemplation of.

the misuse and abuse provision as a means to identify instances where the transaction violates a broader policy objective.

This approach is evident in various cases such as Canada v. Global Equity Fund Ltd., Ontario Ltd. v. Canada[10], Triad Gestco Ltd. v. Canada, and Barrasso v. The Queen[11], wherein the provisions of the Income Tax Act (ITA) concerning the recognition of a

9 Canada Trustco (30290), at para. 26.

10 CA: FCA, 15 Oct. 2012, Ontario Ltd v. Canada, 2012 FCA 259.

11 CA: TCC, 20 May 2014, Barrasso v. The Queen, 2014 TCC 156.

loss were employed to offset capital gains, despite the loss being merely superficial. The taxpayers engineered a loss by paying a dividend that diminished the value of the high-cost-based share before selling it at a reduced value. Subsequently, the fabricated loss was utilized to offset unrelated capital gains. The courts determined that an abusive transaction was present because the ITA provisions employed by the taxpayers necessitated a reduction in economic power, which was found to be lacking in the aforementioned cases. Furthermore, in the case of Global Equity Fund Ltd, the court concluded that the series of transactions lacked an air of economic or business reality. Beswick and Nijhawan (2018) suggest that although the relevant ITA provisions did not explicitly incorporate an economic consequence, the courts likely inferred this element due to the objectionable nature of the transactions.

The Canadian GAAR may find it appealing for Indonesia due to its relative simplicity. The GAAR in Canada entails a three-step process: firstly, determining the existence of a tax benefit; secondly, identifying an avoidance arrangement; and finally, considering whether there is a misuse or abuse of the ITA or other applicable laws, including tax treaties. Indonesia may also find the GAAR attractive due to its inclusive definition of a tax benefit. It could be informative for Indonesia to observe how the Canadian definition encompasses various scenarios in which a tax benefit may arise. Moreover, Indonesia may also gain insights from the Canadian GAAR's capability to apply to each individual step within a series of transactions, rather than solely focusing on the entire series.

However, the Canadian GAAR is not without its concerns. Arnold (2004) argues that the provision regarding misuse and abuse is overly broad and lacks clear definition, thereby hindering its effectiveness. Insufficient guidance is provided to ascertain the presence of misuse or abuse in a given scenario. Additionally, Indonesia should take note of the uncertainty surrounding the extent to which the Canadian GAAR should consider the concepts of artificiality and economic substance. This issue is further complicated by the fact that although the explanatory notes accompanying the GAAR acknowledge that Section 245(4) is intended to apply to transactions demonstrating real economic substance, the actual GAAR itself does not explicitly reference this term. Furthermore, the Supreme Court of Canada has adopted a restrictive stance when incorporating the notion of economic substance into the analysis of the GAAR.

From an administrative standpoint, Indonesia should take note of the fact that the implementation of Section 245 in Canada was accompanied by the issuance of a document by the Canadian Revenue Authority, providing taxpayers with a guide on the application of the Canadian GAAR. Such an approach could prove beneficial for Indonesia, as it would provide taxpayers and investors in Indonesia with an understanding of the approach adopted by the Indonesian revenue authority towards the GAAR. The issuance of a guidance document by the Indonesian revenue authority would assist in ensuring clarity in the interpretation and application of the GAAR.

Furthermore, Indonesia may find interest in the existence of the GAAR Committee operating in Canada. This committee comprises representatives from the Canadian Revenue Authority, the Department of Finance, and the Department of Justice. The primary objective of the GAAR Committee is to ensure consistent and uniform application of the GAAR across Canada. Establishing a similar committee within the Indonesian revenue authority, potentially including representatives from other governmental organizations, legal practitioners, and academics, would contribute to enhancing certainty in the application of the GAAR in Indonesia.

**3.1.3 GAAR in South Africa**

South Africa has undergone various iterations of the GAAR. The initial GAAR was incorporated into Section 90 of the Income Tax Act 1941, which was subsequently replaced by Section 103(1) in the Income Act 1962. Following amendments, Section 103(1) was eventually substituted by the current GAAR outlined in Sections 80A-L, introduced in 2006. The replacement of the earlier GAARs was prompted by their widely acknowledged ineffectiveness.

South Africa’s current GAAR looks markedly different from the old Section 103(1) and is similar to the Canadian GAAR. The operative section of South Africa’s GAAR is found in Section 80A and reads as follows:

> “80A. Impermissible tax avoidance arrangements. An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and
>
> (a) in the context of business: (i) it was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit; or (ii) it lacks commercial substance, in whole or in part, taking into account the provisions of Section 80C.
>
> (b) in a context other than business, it was entered into or carried out by means or in a manner which would not normally be employed for a bona fide purpose, other than obtaining a tax benefit; or
>
> (c) in any context: (i) it has created rights or obligations that would not normally be created between persons dealing at

arm's length; or (ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this part)."

"In order for the current GAAR to apply in South Africa, the following elements must be present:

– an arrangement.

– that results in a tax benefit and there is therefore an avoidance arrangement.

– the sole or main purpose of which is to obtain a tax benefit; and

– one of the following tainted elements is present: (i) abnormality with respect to the means, manner, rights or obligations under the arrangement concluded in a business context; (ii) an absence of commercial substance (either in whole or in part); (iii) the creation of rights and obligations in any context that would not normally be created between parties transacting at arm's length; or (iv) a misuse or abuse of the provisions of the ITA."

The current GAAR in South Africa is characterized by its extensive nature, particularly in its thorough discussion of tainted elements. Notably, in terms of ascertaining purpose, Section 80G stands out by "stipulating that upon identifying a tax benefit, there exists a rebuttable presumption that the arrangement's sole or primary purpose is to obtain said tax benefit." Purpose continues to hold a central role in the application of the present South African GAAR, as successfully rebutting this presumption would render the GAAR inapplicable, even if the other elements are satisfied. Similarly, the abnormality requirement remains significant within the current GAAR, akin to its role in the previous GAAR under Section 103(1). "An arrangement would evade the application of the current GAAR if it is deemed normal in nature."

The current GAAR in South Africa raises concerns regarding the application of two key elements of the abnormality requirement: the commercial substance element and the misuse and abuse provision. The commercial substance provision, as outlined in Section 80C (1), states that "an arrangement lacks commercial substance if it results in a significant tax benefit for one party without significantly affecting the net cash flows or business risks of the other party. However, in this Section introduces broad and ambiguous concepts to the South African GAAR." Additionally, Kujinga as cited by Titus (2019) observes that while Section 80C provides indicators of a lack of commercial substance, uncertainties remain regarding how to conduct the required comparison specified in Section 80C (1). Kujinga as cited by Titus (2019) argues that South African courts could draw guidance from the economic substance doctrine in the United States to identify cases lacking commercial substance. By adopting this approach, Kujinga as cited in Titus (2019) suggests that South African courts may find that arrangements consistent with a statutory purpose would possess commercial substance, while arrangements that lack economic justification beyond the tax benefits would often lack commercial substance.

The current GAAR has also introduced the misuse and abuse element, inspired by a similar provision in the Canadian ITA (Titus, 2019). Broomberg as cited in Titus (2019) raises a concern in the way that the misuse and abuse element in the South African GAAR is used as a catch-all provision. As a result of this provision, he argues, the South African GAAR has no limitation. This would likely mean that the courts will interpret the GAAR restrictively in order to impose the necessary limitation to the GAAR's application in South Africa. A further implication of the misuse and abuse provision is that it introduces an untenable degree of uncertainty to the application of the GAAR.

The current GAAR in South Africa does not explicitly address artifice, as the country already possesses a well-established body of case law on substance over form. The concept of artifice is typically encompassed within the substance over form doctrine. Therefore, it is unnecessary to incorporate the substance over form test within the GAAR legislation. In South Africa, the court follows a two-step approach, wherein it first applies the substance over form test before invoking the GAAR. In other words, the court must initially ascertain the genuineness of the transaction and ensure that it is appropriately labeled based on its true nature. Only after satisfying this requirement will the court proceed to consider the provisions of the GAAR and whether the transaction fulfills its criteria. If the court determines that the transaction's form lacks authenticity or that its labeling does not correspond to its underlying substance, the court will give effect to the true agreement between the parties. As a result, the tax consequences will be applied to the actual agreement, thereby eliminating the tax advantage, and obviating the need to apply the GAAR.

In this particular case, Erf 3183/1 Ladysmith (Pty) Ltd. v. Commissioner for Inland Revenue[12], the involved parties introduced a tax-exempt entity (a pension fund) between the primary lease and the sublease in order to prevent the taxpayer, acting as the main landlord, from accruing income, while still enabling the subtenant to claim deductions on leasehold improvements. The court observed that the agreements exhibited a conspicuous lack of realism, as they were all executed simultaneously, and their interdependence was evident. As a result, certain obligations in one contract were nullified in another. Considering this

12 SA: SCA, 28 Mar. 1996, 527/94IH, Erf 3183/1 Ladysmith (Pty) Ltd v. Commissioner for Inland Revenue, 1996 (3) SA 942 (SCA).

perspective, it became apparent that it was never the intention of the parties for the pension fund to undertake the improvements. Consequently, the court disregarded the role of the pension fund, leading to the recognition of income by the taxpayer as stipulated by the relevant legislative provision. This outcome was attained once the court gave effect to the true intent of the parties.

Conversely, if the court determines that the agreement accurately reflects its underlying substance, it will proceed to assess the agreement in light of the GAAR. This process was exemplified in the case of the Commissioner for Inland Revenue v. Conhage (Pty) Ltd.[13] In this particular case, the parties engaged in a sale and leaseback arrangement. The commissioner contended that the true agreement between the parties entailed the taxpayer borrowing the purchase price of the assets sold, thereby disqualifying the taxpayer from claiming a deduction for the rental payments under the sale and leaseback agreement. However, the court dismissed the commissioner's arguments, asserting that the sale and leaseback agreement accurately reflected the genuine intention of the parties, without any evidence of deception or subterfuge on their part. Subsequently, the court proceeded to examine whether the prevailing GAAR should be applied to the facts at hand. Ultimately, the court determined that not all of the requirements stipulated by the GAAR were satisfied. Consequently, the taxpayer was permitted to claim the deduction.

The advantage of the aforementioned jurisprudential approach lies in the existence of a discernible line of cases addressing subterfuge and artificiality, as well as another line of cases pertaining to "true" GAAR situations. However, it should be noted that the current South African GAAR has not yet been tested in a local court, leaving several questions unanswered regarding its interpretation and application (Alfon Titus, 2019).

Indonesia may find the South African GAAR appealing for several reasons. Firstly, Indonesia may find instructive the shift in the South African GAAR from a subjective purpose, supported by objective facts, to an objective purpose. Indonesia should consider the negative implications that the subjective inquiry into determining purpose had on the previous South African GAAR, which ultimately led to the adoption of a GAAR devoid of subjective intent. Indonesia may face similar challenges to those encountered under South Africa's previous GAAR.

Regarding the burden of proof for demonstrating purpose, Indonesia should consider of the South African provision on rebuttable presumption of intention under Section 80G of the current GAAR. Implementing a similar provision in an Indonesian GAAR could help address capacity concerns and provide clarity in its application. Indonesia's capacity issues could also be mitigated by adopting administrative measures similar to South Africa, such as an advanced tax rulings system and notice procedures.

Secondly, Indonesia may consider emulating the South African GAAR's use of objective elements, such as round-trip financing and tax-indifferent parties, to determine the permissibility of avoidance arrangements. However, if Indonesia adopts this practice, it should be mindful of the uncertainties arising from Section 80C in the South African ITA. In particular, Indonesia should consider legislating the connection between the general test for commercial substance under Section 80C (1) and the objective factors listed under Section 80C (2).

Furthermore, Indonesia should carefully deliberate whether to include the misuse and abuse element in its own GAAR. While it is an international best practice to incorporate such a provision, Indonesia should be aware of the concerns raised by commentators regarding its application. Of particular concern is the lack of a necessary limit to the application of the GAAR and its potential impact on the interpretation of the GAAR by Indonesian courts. Indonesia should also assess the implications of this provision on its courts' approach to statutory interpretation, considering whether the purposive approach required by the provision aligns with the current literal approach followed by Indonesian courts.

**Table 2. General Characteristics of Statutory GAAR In Australia, Canada, And South Africa.**

| No. | Aspect | Implementation in Each Country | | |
|---|---|---|---|---|
| | | Australia | Canada | South Africa |
| 1 | Main feature and applicable Criteria. | The predication test, the choice principle (Westminster principle), and the antecedent transaction doctrine. | The operation of the misuse and abuse provision.<br>Three-step process: (1). Determining the existence of a tax benefit.<br>(2). Identifying an avoidance | The commercial substance element and the misuse and abuse provision test. |

13 SA: SCA, 17 Sept. 1999, 606/97, Commissioner for Inland Revenue v. Conhage (Pty) Ltd., 1999 (4) SA 1149 (SCA).

| | | | | |
|---|---|---|---|---|
| | | | arrangement; and<br>(3). Considering whether there is misuse or abuse of the ITA or other applicable laws, including tax treaties. | |
| 2 | Scope | Corporate | Corporate and Individual taxpayers | Corporate |
| 3 | Threshold of applications | Not applied. | Yes | Not applied |
| 4. | Tax authority's capability to deny the tax benefits. | Yes, through the Commissioner's determination. | Yes. The Tax Authority deny the tax benefits of certain arrangements. | Yes. Through the Commissioner's determination. |
| 5 | Penalty | Yes. Taxpayers and promoters' administrative penalty. | Yes. Taxpayers and promoters' penalty. | Not applied |
| 6 | GAAR Committee/Panel | Yes. Clear role and operation of GAAR Panel. | Yes, but not formally. | Not applied |
| 7 | Administration directive. | Yes. Through practice statement (private ruling, class ruling, and product ruling). | Yes. Explanation and examples of the application | Yes. Provides guidance on the application and interpretation of the rule. |
| 8 | Override tax treaty provision | Not applied | Yes, start from 2004. | Not applied |

*Note:* The table is processed from the literature review.

#### 3.1.4 European Union (EU) GAAR

The implementation of the Anti-Tax Avoidance Directive (ATAD) serves as a significant development in this regard, requiring Member States to incorporate it into their national legislation by January 1, 2019. Within the ATAD, Article 6 introduces a GAAR, marking the latest inclusion of such a provision in EU Directives. Prior instances of GAARs can be observed in directives such as the Fiscal Merger Directive, the Parent Subsidiary Directive, the proposed Common Consolidated Corporate Base Directive, and the proposed Common Corporate Tax Base Directive.[14]

The scope of the ATAD surpasses previously enacted directives, exhibiting a considerably broader application. While it may initially appear limited to taxpayers subject to corporate tax in one or more Member States, the ATAD does not provide precise definitions for terms such as taxpayer or corporate tax. Consequently, individual Member States must interpret these provisions within the context of their national legislation. Moreover, the expansive reach of the ATAD is further demonstrated by its applicability to situations involving third countries. The ATAD does not restrict its application solely to domestic law, suggesting that the directive could encompass scenarios where a Member State imposes corporate tax obligations on an entity.

"Article 6 of the ATAD provides as follows:

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law."

14 Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2016) 683 final, EU Law IBFD [hereinafter CCCTB Proposal (2016/683).

> "In terms of this provision, the revenue authority of a Member State may ignore a legal structure or arrangement if the following elements are present:
> a. an arrangement (or series of arrangements);
> b. which was (or were) put in place for the main purpose, or one of the main purposes, of obtaining a tax advantage.
> c. which has the effect of defeating the object or purpose of the applicable tax law; and
> d. is (or are) not genuine having regard to all the relevant facts and circumstances.
> An arrangement shall be considered non-genuine to the extent that the arrangement has not been put in place for valid commercial reasons that reflect economic reality."

The language used in the GAAR of the ATAD draws extensively from the GAAR present in the Parent-Subsidiary Directive. Consequently, it is worth exploring the extent to which the interpretations of similar phrases under the Parent-Subsidiary Directive would be applied by the European Court of Justice (ECJ) to the ATAD GAAR. However, it should be noted that the scope of the ATAD is broader than that of the Parent-Subsidiary Directive, which may present obstacles to such transposition. The observations by Moreno as cited in Titus (2019) on the proposed form of the ATAD highlight that the GAAR encompassed various elements from different anti-abuse traditions across Member States. Given that the ATAD continues to incorporate this diverse range of elements, Moreno's (as cited in Titus, 2019) commentary remains relevant in the current context.

Furthermore, G. Cooper as cited in Titus (2019), examination of the ATAD reveals the presence of the concept of purpose encompassing three distinct connotations. Firstly, purpose is described as a subjective state of mind, involving the main purpose or one of the main purposes. Secondly, purpose is connected to the notion of artifice, reflected in the term non-genuine arrangement. Lastly, purpose is associated with legislative intent, where an arrangement defeats the object or purpose of the applicable tax law. The inclusion of this variety of anti-avoidance doctrines in the provision seems to have political motivation, aiming to ensure the comfort and acceptance of Member States with the directive. However, when it comes to the application of these different intents, De Broe and Beckers (2017) argue that if the subjective and legislative intent tests are properly implemented, the genuine nature test contributes little value to the overall assessment.[15]

In terms of determining whether a tax advantage defeats the purpose of the applicable law, De Broe and Beckers (2017) supposed that the responsibility for making such determinations may lie with either the ECJ or a national court. The ECJ would exercise this authority when examining whether an arrangement contravenes the intended object or purpose of a provision within EU law. On the other hand, a national court would be responsible for reaching a decision in cases where the abuse pertains to a domestic corporate tax regulation.

From an Indonesian standpoint, the ATAD presents an intriguing feature with its amalgamation and formalization of various anti-avoidance doctrines. This suggests that the ATAD does not overly rely on the subjective purpose test alone. Additionally, Indonesia may find the concise nature of the test itself appealing, particularly considering that certain legislative GAARs can be extensive and intricate in their formulation.

Indonesia finds the ATAD intriguing due to the blending and formalization of various anti-avoidance doctrines. Unlike relying solely on the subjective purpose test, the ATAD incorporates a wider range of considerations. Another appealing aspect for Indonesia is the concise nature of the test, which contrasts with the lengthy and complex formulations often seen in other legislative GAARs. It is possible that considering the wider scope of words used in the ATAD, an abuse of law may be found to be evident even in the presence of some form of economic substance. This raises the question as to how much economic substance would be required to meet the economic reality test under the ATAD.

#### 3.1.5 United Kingdom (UK) GAAR

The implementation of the UK general anti-abuse rule was preceded by an extensive consultation process, focusing on determining the necessity of such a rule in the UK context and identifying the most appropriate type of GAAR. The historical context of this development can be divided into two distinct periods: the judicial period and the subsequent period of acknowledgment that a GAAR was essential in the contemporary landscape. During the judicial period, the consideration of a GAAR did not arise until 1998. This period primarily relied on the Ramsay approach16, which emerged as a response to the unintended consequences stemming from Lord Tomlin's argument in the landmark case of IRC v Duke of Westminster[17].

15 L. de Broe & D. Beckers, The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive, 26 EC Tax Review 3, p. 141 (2017).

16 Derived from WT Ramsay Ltd v IRC; Eilbeck v Rawling [1981] 1 All ER 865 HL.

17 Inland Revenue Commissioners v Duke of Westminster (1936)

The response to Lord Tomlin's submission led to the widespread adoption of tax avoidance schemes facilitated by promoters. These schemes encompassed composite transactions that comprised a series of seemingly independent transactions, yet their true purpose was to circumvent tax liabilities through mutual cancellation. Taxpayers contended that the Duke of Westminster case established a precedent wherein the courts were obligated to recognize the autonomy of each transaction within the composite structure, effectively disregarding the overall fiscal implications. In essence, the legal stance maintained that the transactions were distinct, while the underlying substance revealed their interconnectedness and nullifying effect. Lord Tomlin's statement, as mentioned earlier, seemed to prioritize the legal separation of transactions within a series, disregarding their substantive interrelation.

The Ramsay approach, which resisted this tendency, maintained that self-cancelling transactions might be ignored for tax purposes provided there was proof that they were preordained to happen in a certain order. The Ramsay method changed throughout time to apply purposive legislative interpretation to composite transactions rather than to the individual transactions that make up the composite transaction. Therefore, a GAAR in the UK was unnecessary because to a court anti-avoidance provision. The Ramsay method was not the only anti-avoidance strategy used in the UK; it was more of a broad one. A network of particular anti-avoidance rules (SAARs) was also utilized.

The UK has not been lacking in robust countermeasures against tax avoidance. Notably, it introduced the Disclosure of Tax Avoidance Schemes (DOTAS) rules through Sections 309-319 of the Finance Act 2004. These rules compel both taxpayers and promoters involved in tax avoidance schemes exhibiting specific hallmarks to disclose such arrangements to HM Revenue & Customs (HMRC). Failure to meet this obligation results in penalties (Matsuda 2015). DOTAS covers a broad spectrum of taxes, including income tax, corporation tax (CIT), capital gains tax, stamp duty tax, inheritance tax, national insurance contributions, and value-added tax (VAT). Additionally, the UK tax regime incorporates several other targeted anti-avoidance rules (TAARS) and specific anti-avoidance rules (SAARS), some of which function as miniature GAAR aimed at nullifying the intended tax impact of certain types of tax avoidance schemes. The efficacy of these countermeasures is beyond question, as they have significantly contributed to the UK government's ability to safeguard its tax base against erosion caused by various tax avoidance schemes.

However, despite the existence of these countermeasures, their comprehensiveness has been questioned due to their limited capacity to effectively address the increasing number and complexity of tax avoidance schemes. Consequently, the proposition of introducing a GAAR has gained momentum. The initial GAAR draft was put forth by the Inland Revenue Office in 1998, following a recommendation by the Tax Law Review Committee. However, this proposal failed to materialize due to identified issues that the Tax Law Review Committee deemed detrimental to its adoption. Notably, significant concern revolved around the lack of a reliable clearing system that could offer preapproval or confirmation of GAAR non-application. The absence of such a system impeded arguments in favor of GAAR implementation. Nevertheless, a breakthrough occurred in 2008 when the Exchequer Secretary to the Treasury issued a report titled "Tax Policy Making: A New Approach" (hereinafter referred to as the "2008 GAAR Report").

Following the aforementioned consultation process, the UK GAAR was introduced in 2013 by the UK government. Part 5 of the Finance Act 2013 (UK) provides specifics on the program. S206(1)'s statement that this Part has effect for the purpose of counteracting abusive tax arrangements emphasizes that the GAAR targets abusive tax avoidance rather than tax avoidance. The general anti-abuse rule is the collective name for the rules of this Part, according to Section 206(2), which follows the same general theme.

According to Section 207(1), “tax arrangements are those that can be stated to have a sole or primary objective of gaining a tax advantage. The UK GAAR needs more and is not solely focused on an objective sole or one of the primary goals to get a tax advantage. This is consistent with its intended singular focus on dishonest tax evasion.” The following is how Section 207(2) defines abusive tax arrangements as follows:

> “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.”

This section encompasses the double reasonableness test, which incorporates the notion of a reasonable course of action in relation to the relevant tax provisions. The indicators specified under S2017(2)(a)-(c) guide the examination of whether an arrangement is abusive, with particular attention to identifying non-compliance with policy objectives, contrived or abnormal steps taken, or exploitation of weaknesses in the tax provisions. These indicators of abuse align more closely with the characteristics of abusive tax avoidance, demonstrating that the GAAR is not exclusively grounded in what is deemed responsible tax planning, as suggested in the Report. Section 207(4) refers to the provisions quoted below as "indicating the abusive nature of an arrangement:

(a) The arrangements result in an amount of income, profits or gain for tax purposes that is significantly less than the amount for economic purposes.
(b) The arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes.
(c) The arrangements result in a claim for the payment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid.
but in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted."

In light of the intricate composite arrangements observed in the UK, the GAAR in the UK acknowledges the possibility that an arrangement may either constitute a component of a composite, multi-step arrangement or encompass the broader arrangement itself. According to Section 207(3), if a specific targeted arrangement is part of a larger multi-step arrangement, due consideration must be given to those additional arrangements before the targeted arrangement can be subject to scrutiny for GAAR purposes. In line with other GAARs, the GAAR in S207(1) requires the existence of a tax advantage. Under Section 208, "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."

Sections 209–215 contains supporting provisions such as provisions for the counteraction of the tax advantages, interpretation of terms in the GAAR and other provisions that are beyond the scope of this Article.

Indonesia may find the UK GAAR particularly intriguing, owing to its comprehensive and clearly defined legislation. The UK GAAR offers specific guidelines, definitions, and criteria, which significantly simplifies understanding of what qualifies as abusive tax avoidance for both taxpayers and tax authorities. Moreover, the adoption of a double reasonableness test, found in the UK GAAR's approach, would ensure that tax authorities assess both the artificiality of arrangements, and the reasonableness of the tax advantage sought. This balanced approach effectively deters abusive practices while still accommodating legitimate tax planning. Furthermore, the UK GAAR's inclusion of an independent panel to oversee GAAR decisions enhances the process's credibility and transparency, effectively mitigating the risk of potential misuse for political or arbitrary purposes.

#### 3.1.6 Belgium GAAR

In an act dated 29 March 2012, the Belgian legislature introduced a new GAAR into the Income Tax Code of 1992 (ITC92). The previous iteration of the GAAR had been rendered largely ineffective due to the stringent judicial decisions of the Supreme Court. These decisions allowed "for the recharacterization of a legal act, suspected of being tax abusive, as another type of legal act only if the legal consequences of both acts were comparable. In practice, demonstrating comparability was an arduous task for the tax administration." The newly implemented GAAR aimed to address these shortcomings by providing a stronger and more efficient mechanism to combat tax abuse. Its underlying justification drew inspiration from the case law of the European Court of Justice, particularly in the context of defining tax abuse in matters relating to Value-Added Tax (VAT), including the significant Halifax ruling).[18]

The implementation of the new GAAR took effect from the assessment year 2013, encompassing a range of legal acts conducted during the taxable period, with the latest end date being 6 April 2012, and linked to the assessment year 2012 (referred to as the cut-off period). A crucial issue emerged regarding the applicability of this more robust GAAR to a series of

18 Halifax plc & Ors v C & E Commrs (Case C-255/02)

legal acts when not all of the acts occurred during or after the aforementioned cut-off period. It is worth noting that numerous tax planning schemes were devised many years prior, but their benefits would occasionally be realized or monetized subsequent to the commencement of the new GAAR.

The tax administration contended that if a tax scheme consisted of "a sequence of legal acts, it would be sufficient for the GAAR to be applicable if at least one legal act transpired during or after the cut-off period." In other words, according to the tax administration's perspective, a tax planning scheme established in the 1990s, resulting in a tangible advantage in 2014 (requiring a legal act such as a capital decrease, for example), could potentially fall within the scope of the new GAAR. It is evident that this interpretation undermines "the explicit intention of the legislator to preserve legal certainty when introducing the new GAAR", as indicated on page 111 of the preparatory works.

The tax administration tried to defend this interpretation before the Supreme Court after it had first been rejected by the Court of Appeal of Ghent. The case which the tax administration brought before the Supreme Court concerned a legal structure which the taxpayer set up in 1986 and from which he had subsequently exited in 2012 realising substantial tax-exempt income. According to Eubelius (2023), the structure allowed "the taxpayer to cash in on retained earnings (not distributed since 1986) of a professional cooperative company (for pharmacists) upon exit, benefitting from a specific exemption on a deemed dividend distribution. As the last act of the scheme (i.e. exit) took place in 2012 (which was during the cut-off period), the tax administration tried to invoke the new GAAR to tackle the entire structure and to tax the dividend as director's remuneration."

Nevertheless, the Supreme Court has recently ruled in favour of the taxpayer, "a decision that is justified and significant. In this pivotal case, the Court affirmed that the new GAAR solely applies to a collection of legal acts if all of the legal acts were executed during or subsequent to the cut-off period. It is crucial to recognize that the provision within the act introducing the GAAR, which specifies its temporal application, should be regarded as a legally binding deviation from the general legal principle that a new act not only pertains to legal acts and facts transpiring after its enactment, but also to acts or facts that occurred prior but continue to have legal consequences and effects subsequent to its implementation, unless such application would unduly undermine definitively acquired rights."

This ruling establishes an important safeguard for historical tax planning schemes devised prior to the cut-off period, on the condition that the individual acts enabling the benefits to be realized subsequent to the cut-off period cannot be considered as abusive when analysed in isolation. Consequently, numerous historical instances of internal capital gains, which were realized through contributions of shares from operational companies into new holding structures before 2012, and subsequently monetized through capital decreases after 2012, can be deemed as secure.

One such case made its way to the Supreme Court, involving an international structure established in 2010 to capitalize on the Belgian notional interest deduction (Eubelius, 2023). At that time, the deduction offered an attractive interest rate, and its basis was the adjusted equity rather than a mere incremental portion, as it is currently. According to (Eubelius, 2023), the structure involved two foreign companies that established a Belgian special purpose vehicle with a capital of EUR 350 million, which was immediately loaned to a Dutch financing subsidiary of the group. This capital generated a significant notional interest deduction, offsetting the interest income from the loan granted to the Dutch subsidiary. The tax administration argued that the Belgian company was artificially interposed within the international structure and that the income derived from the loan should be deemed an abnormal or gratuitous advantage, ineligible for offsetting through the notional interest deduction. However, the Court of Appeal of Antwerp rejected this line of reasoning.

Subsequently, "the tax administration lodged a petition with the Supreme Court, contending that the Court of Appeal had violated both the general EU law principle prohibiting abuse of rights and the SAAR" outlined in Article 6 of the ATAD. Nevertheless, the Supreme Court dismissed this argument, highlighting two key points. "First, it emphasized that the general EU law principle of abuse of rights is only applicable if a taxpayer invokes an advantage under EU law, rendering it inapplicable in a purely national context, as in the present case where the notional interest deduction did not stem from any EU law provision. Second, concerning the SAAR, the Court emphasized that Member States were required to transpose it into national legislation by 31 December 2018 and apply it from 1 January 2019 onwards. Since the legal structure in question was established in 2010, and the dispute pertained to the assessment year 2015 before the ATAD deadline for implementation and before the entry into force of Article 6, Article 6 cannot be invoked to counter the scheme."

Prior to this ruling, the Belgian Constitutional Court had already issued a similar ruling regarding the abuse of law doctrine and the SAAR under the ATAD (Eubelius, 2023). According to Eubelius (2023), the case in question involved earlier tax planning schemes established in the late 1980s to benefit from advantageous lump sum tax credits available under specific double taxation treaties concluded by Belgium (with Italy and South Korea). The Court of Appeal of Liège contemplated whether it should interpret Belgian provisions relating to tax deductibility of expenses and/or the tax credits in accordance with the aforementioned EU law principle or the SAAR. The Constitutional Court concluded that the EU law principle did not apply to purely domestic tax law provisions, and the SAAR was not applicable in a timely manner.

Belgium's GAAR demonstrates several effective features that can greatly benefit Indonesia's tax system. Firstly, its broad scope empowers tax authorities to target a wide range of abusive arrangements specifically designed to avoid taxes. Adopting a similar approach would enable Indonesia to address various tax avoidance schemes comprehensively. Secondly, Belgium's GAAR prioritizes the substance-over-form principle, allowing tax authorities to examine the true economic purpose of transactions beyond their formal appearances. Embracing this principle would help Indonesia curb artificial and contrived transactions, promoting fairness and equity in taxation. Additionally, Belgium's GAAR incorporates safeguards to protect genuine commercial transactions from undue tax implications. Indonesia can learn from this approach and implement provisions to shield legitimate business activities, fostering a conducive environment for economic growth. By incorporating these effective elements, Indonesia can fortify its tax framework and combat tax avoidance more effectively, ultimately contributing to a fair and robust tax system.

**Table 3. General Characteristics of Statutory GAAR In UK And Belgium**

| **Aspect** | **Implementation in Each Country** | |
|---|---|---|
| | **UK** | **Belgium** |
| 1. Main feature and applicable Criteria | The double reasonableness test, which incorporates the notion of a reasonable course of action in relation to the relevant tax provisions. The indicators specified under S2017(2)(a)-(c) guide "the examination of whether an arrangement is abusive, with particular attention to identifying non-compliance with policy objectives, contrived or abnormal steps taken, or exploitation of weaknesses in the tax provisions." | The abuse of law doctrine. Broad scope empowers tax authorities to target a wide range of abusive arrangements specifically designed to avoid taxes. Incorporates safeguards to protect genuine commercial transactions from undue tax implications. |
| 2. Scope | Corporate | Corporate |
| 3. Threshold of applications | Yes. | Yes . |
| 4. Tax authority's capability to deny the tax benefits | Yes. Through the Advisory Panel examines the arrangement and determines whether it falls within the scope of the GAAR. | Yes. The Belgian Tax Authorities to disregard the abusive acts performed and tax the recharacterized transaction as if the abuse had not occurred. |
| 5. Penalty | Yes, taxpayers and promoters' penalty for promoting such arrangement. | Yes. |
| 6. GAAR Committee/Panel | Yes, clear role and operation of Independent advisory GAAR Panel. | Yes. Clear role and operation of ruling Commission. |
| 7. Administration directive | Yes. provides guidance on the application and interpretation of the rule. | Yes. provides guidance on the application and interpretation of the rule. |
| 8. Override tax treaty provision | Yes. The Directive does not go beyond what is necessary in order to achieve that objective. It is important to appreciate that the GAAR is designed to counteract the tax advantage which the abusive arrangements would otherwise (that is, in the absence of the GAAR) achieve. | Not applied |

*Note:* The table is processed from the literature review.

## IV. RESULT AND DISCUSSION

Following a rigorous literature review of the existing tax provisions on tax avoidance countermeasures in Indonesia, this research has revealed that the current SAARs and limited application of the substance over form principle are inadequate to comprehensively address improper tax avoidance practices in the country. To bridge this gap, the introduction of a statutory GAAR is proposed, which would effectively tackle newly emerging tax avoidance schemes and reinforce the significance of the substance over form principle in Indonesian tax law. This finding is consistent with previous research by Suryani and Devos (2016), which advocating for the adoption of GAAR in Indonesia. Furthermore, they suggested that the implementation of such a GAAR should be carefully drafted, incorporating essential principles, while the accompanying regulations should provide comprehensive guidance without expanding the scope of the GAAR unnecessarily. In line with the findings of Wijaya and Kusumaningtyas (2020), which highlighted the challenges in properly applying SAAR and the substance over form principle, the adoption of GAAR is deemed necessary. The introduction of a statutory GAAR is anticipated to address the limitations faced by regulators, particularly concerning unknown and future tax avoidance schemes.

### 4.1. Design proposal for introducing GAAR and its possible structure in Indonesia.

Since GAAR is a powerful tool that could be applied based on comprehensive criteria, so it is important to take measures to enhance its predictability and transparency. Such measures include a GAAR panel, issue directives, and other measures. It is also more realistic to lower the hurdle for its adoption. it is important to structure an Indonesian GAAR in such a way that is does not cause overkill. Drawing insights from the key features observed in the statutory GAARs implemented in countries such as Canada, Australia, South Africa, and various European Union (EU), UK, and Belgium, it should be possible to propose a policy framework for a statutory GAAR that could be deemed appropriate for adoption within Indonesian tax legislation. The suggested policy design of the statutory GAAR in Indonesian tax law encompasses the following elements:

**4.1.1. Main features and applicable criteria.** The Canadian GAAR's apparent simplicity makes it an attractive model for Indonesia. In Canada, the GAAR involves a concise three-step procedure: firstly, the assessment of a tax benefit's presence; secondly, the recognition of an arrangement designed to avoid taxes; and finally, the evaluation of potential misuse or abuse of the ITA or other relevant legislations, encompassing tax treaties. Consequently, the proposed GAAR for Indonesia should incorporate these fundamental elements: the determination of a tax benefit's existence, identification of avoidance arrangements, and consideration of potential misuse or abuse of the ITA and other relevant laws, including tax treaties.

**4.1.2. Threshold for application.** The presence of a threshold is a characteristic commonly found in the GAAR framework, acting as a determining factor to ascertain whether a particular scheme falls within the scope of GAAR. This threshold can be established based on various factors, such as the number of transactions involved, or the specific type of scheme employed by the taxpayer. Notably, countries like Canada and Belgium serve as examples of jurisdictions that incorporate specific threshold levels for the application of GAAR to individual taxpayer schemes. The proposed GAAR should include a threshold for its application, taking into account materiality and operational efficiency. This threshold could be based on factors such as the number of transactions or the type of scheme employed by the taxpayer.

**4.1.3. Authority to deny tax benefits.** All the sample countries that analyzed in this study have this sovereignty on their tax authority, which is a crucial component of GAAR. Therefore, the proposed GAAR should grant the Director of DGT the authority to deny certain tax benefits arising from illegitimate business schemes or transactions. This authority should be exercised based on sound business principles, enabling the reconstruction, determination, elimination, and recharacterization of transactions.

**4.1.4. Substantial administrative penalties.** Penalties for tax avoidance can vary across different countries, with some jurisdictions imposing higher penalties compared to others. For instance, in the UK, penalties can reach up to 60% of the tax amount that was avoided. Meanwhile, in Australia, penalty rates for tax avoidance schemes can range from 25% to 75% of the tax shortfall resulting from the scheme. These penalty structures reflect the severity of tax avoidance and aim to deter individuals and businesses from engaging in such practices by imposing significant financial consequences. The purpose of Indonesian GAAR should levy a higher substantial administrative penalty on taxpayers. This penalty rate surpasses the current general tax avoidance penalty, which stands at 2% per month but not exceeding 24 months, equating to 48%. However, it should remain lower than the penalty for tax evasion, which entails 200% of the evaded tax amount. The optimal penalty rate should ideally fall within the range of 50% to 60% of the shortfall from the avoidance scheme. The implementation of such heightened administrative penalties under the Indonesian GAAR is crucial to act as a significant deterrent, effectively influencing taxpayers' behavior and discouraging participation in tax avoidance practices.

**4.1.5. GAAR committee/panel.** Certain countries have established dedicated GAAR panels to review transactions that potentially fall under the scope of the GAAR, while other jurisdictions do not have such specialized panels. Australia and the

United Kingdom serve as examples of countries that have established GAAR panels. These panels are responsible for examining complex or contentious cases involving potential tax avoidance and providing expert opinions on whether the GAAR should be applied to those transactions. The Committee should play directive and consultative roles for relevant decision making (prior to a decision to exercise) under statutory GAAR.

**4.1.6. Administrative directives.** From an administrative standpoint, Indonesia should take note of the fact that the implementation of Section 245 in Canada was accompanied by the issuance of a document by the Canadian Revenue Authority, providing taxpayers with a guide on the application of the Canadian GAAR. Such an approach could prove beneficial for Indonesia, as it would provide taxpayers and investors in Indonesia with an understanding of the approach adopted by the Indonesian revenue authority towards the GAAR. The issuance of a guidance document by the Indonesian revenue authority would assist in ensuring clarity in the interpretation and application of the GAAR. The Indonesian GAAR should empower the Director of DGT to issue administrative directives, ensuring due process and consistent application of the provisions.

**4.1.7. Non-conflict with tax treaties.** The UK stands out as a prime example of a country with a well-structured GAAR directive. The key principle guiding such directives is to strike a balance by not exceeding what is necessary to achieve their objectives. Specifically, the purpose of a GAAR is to neutralize any tax advantage gained from abusive arrangements, which would otherwise be exploited in the absence of such measures. The Indonesian GAAR does not need to specify its applicability to tax treaties. A carefully applied GAAR does not conflict with tax treaties and should form part of the domestic tax laws.

**Implementation and Administration**

The implementation and administration of proposed statutory GAAR is undoubtedly the most essential aspect of its overall policy designs. To ensure transparency and consistency in applying the provision, the Director of the DGT should provide comprehensive administrative directives, incorporating a clear due process. Moreover, this approach aims to enhance taxpayer confidence while minimizing the potential risks of abuse. To achieve a balanced approach, it is advisable to lower the threshold for the adoption of the Indonesian GAAR. This ensures that the policy does not lead to excessive measures. In this regard, the tax authority should consider various administrative aspects while shaping the policy, including the following:

1. The extensive administrative directives should provide practical guidelines for operating the provision including a brief explanation of the provision and examples/case studies to illustrate the approach that the Tax Authority will take in certain situations or proposed transactions (including examples of where the provision does not apply). The directives should be in the form of the Director of DGT Regulation, which serve as the main practical guidelines for taxpayers and tax officers in implementing the provision.
2. Restrict the scope of transactions to which GAAR is applicable. This involves specifically identifying and defining transactions that fall within the purview of GAAR, such as disputes involving a certain threshold of tax amount.
3. Streamline the establishment of a GAAR panel consisting of high-ranking tax officials and tax law experts. This panel would review cases where the tax authority intends to apply GAAR.
   The panel would comprise a mix of tax accountants, retired judges, and other non-tax officials, with the retired judge serving as the chairperson. In case of a 50-50 split decision within the panel, the chairperson would have the final authority to determine whether the case falls within the ambit of GAAR. Periodic training and a conducive workshopping environment for various levels of Tax Authorities to ensure that each Tax Authority is kept abreast of the latest tax avoidance issues. Moreover, the workshopping in the GAAR Committee meeting should enable each Tax Authority to identify new and emerging tax avoidance schemes in their own jurisdictions in a timely manner.
4. Limit the application of GAAR to corporate transactions only. By focusing on corporate transactions, GAAR can be more effectively tailored to address tax avoidance practices within the corporate sector. This one of the effective ways to lower the hurdle of GAAR application.
5. It is important to ensure that the scope of GAAR is broad enough to encompass various forms of tax avoidance by corporate taxpayers. Therefore, Indonesia's GAAR should be applicable to transactions where the primary purpose is tax avoidance, lack of economic substance, or constitutes an abuse of law. Furthermore, to increase the effectiveness of GAAR, the adoption of the disclosure rule should be considered after GAAR is introduced.

The most appropriate adoption of the proposed Indonesian statutory GAAR should be in Article 18 Paragraph (5) of the Indonesian Income Tax Act (ITA) regarding specific measures against tax avoidance. The Administrative Directives could place in Article 32 of Government Regulation No. 55 of 2022 (GR 55/2022) concerning regulatory adjustments in Income Tax Act.

This study acknowledges certain limitations that should be taken into account. The first limitation is the constrained number of sample tax court cases, which was influenced by time restrictions during the research period. In future studies, it would be beneficial to include a broader range of tax avoidance schemes to effectively demonstrate the limitations of the current tax avoidance countermeasures in Indonesia. Additionally, while this study analyzed five countries with a statutory GAAR, expanding the sample to include more countries would contribute to a more comprehensive understanding of the structure and effectiveness of GAAR worldwide. By addressing these limitations, future research can yield more robust and informative insights into the challenges and potential enhancements of tax avoidance countermeasures in diverse jurisdictions.

## CONCLUSION

This study has critically examined Indonesia's existing tax avoidance countermeasures and demonstrated the inadequacy of SAARs and the limited application of the substance-over-form principle in addressing evolving tax avoidance schemes. Through a comparative analysis of international GAAR frameworks, this research has highlighted the necessity of introducing a statutory GAAR tailored to the Indonesian tax system. The findings align with prior studies (Suryani & Devos, 2016; Wijaya & Kusumaningtyas, 2020), which emphasize that a well-structured GAAR can enhance regulatory efficiency and deter aggressive tax planning. The proposed GAAR framework for Indonesia integrates key elements observed in jurisdictions such as Canada, Australia, and the UK. These include a clear threshold for application, the authority to deny tax benefits, substantial administrative penalties, the establishment of a GAAR panel, and the issuance of administrative directives to ensure transparency.

Furthermore, this research underscores the importance of a balanced approach in designing Indonesia’s GAAR. The framework should prevent excessive regulatory overreach while ensuring that tax authorities can effectively counteract artificial tax avoidance schemes. The incorporation of economic substance tests and guidance documents will enhance legal certainty and taxpayer compliance.While this study provides a foundation for developing an Indonesian GAAR, it acknowledges certain limitations, including the constrained number of analyzed tax court cases and the limited jurisdictional scope. Future research should expand the dataset of tax avoidance schemes and incorporate additional case studies from other jurisdictions to further refine Indonesia’s tax policy framework.

In conclusion, the introduction of a statutory GAAR in Indonesia represents a necessary step toward strengthening the country’s tax enforcement mechanisms. By drawing on best practices from global GAAR implementations and tailoring them to Indonesia’s legal and economic context, policymakers can develop a robust anti-avoidance measure that ensures tax fairness and economic sustainability.

## ACKNOWLEDGMENT

I express my heartfelt gratitude, to my Lord Jesus Christ, for blessing me with a vibrant and fulfilling life filled with immense love, good health, and happiness.

I extend my highest appreciation to my advisor, Professor Matsuda Naoki, for providing invaluable guidance and constructive feedback on this policy paper. Additionally, I am grateful to him for generously lending me his book "Tax Strategy Vs. Countermeasure," which has been a rich source of insight into my research. I would like to convey my deepest thanks to GRIPS President, Professor Hiroko Ota, for being a role model of leadership and delivering an engaging lecture on current Japanese fiscal and economic reform. I am also thankful to our program director, Professor Dainn Wie, and our associate program director, Professor Kurosawa Masako whose academic enthusiasm has been truly inspiring. My sincere appreciation goes to Professor Matt Wickens from the Center for Professional Communication for offering valuable suggestions during the writing of this paper. I am grateful to both our current and former program coordinators, Ms. Izumi Miki and Ms. Natsuki Ganaha, for their unwavering support, which has made my study in Japan more manageable. Furthermore, I would like to acknowledge and extend my deepest gratitude to the Government of Japan, World Bank Group, Indonesia’s Directorate General of Tax, and Japan’s National Tax Agency for their efforts in strengthening the course.

Finally, I am indebted to my beloved family members, especially my wife, Jennifer Deujeu, and my son Darren, who have been a constant source of encouragement, unwavering prayers, love, and support in helping me pursue my dreams.

## REFERENCES

1) Alfon Titus (2019). Designing a General Anti-Avoidance Rule for the East African Community – A Comparative Analysis. World Tax Journal, Vol. 11, Issue 2, pp. 261-301, 2019.
2) B.J. Arnold (1995). The Canadian General Anti-Avoidance Rule. British Tax Review 6, p. 548.
3) Atwood, T. J., Drake, M. S., and Myers, L. A. (2010). Book-Tax Conformity, Earnings Persistence, and The Association between Earnings and Cash Flows. Journal of Accounting and Economics, 50 (1),111–125.

4) Atwood, T. J., Drake, M. S., and Myers, L. A. (2012). Home Country Tax System Characteristics and Corporate Tax Avoidance: International Evidence. The Accounting Review (American Accounting Association), 87 (6), 1831-1860.
5) B. Bawono Kristiaji & Denny Vissaro (2017). Measuring BEPS and its Countermeasures in Indonesia: A Preliminary Research Guide. DDTC Working Paper.
6) Beer, S., Mooij, R., & Liu, L. (2019). International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots. Journal of Economic Surveys, 34(3). https://doi.org/10.1111/joes.12305.
7) Besley, T., & Persson, T. (2014). Why do developing countries tax so little? Journal of Economic Perspectives, 28(4), 99–120. https://doi.org/ 10.1257/jep.28.4.99
8) Beswick, B., and Nijhawan, A., Canada in: Anti-avoidance Measures of General Nature and Scope - GAAR and Other Rules 222. Vol 103A (IFA Cahiers, 2018).
9) CIAT (2021, September 20). General anti-avoidance or abuse clause (GAAR): Its Genesis and evolution in tax law and legal certainty. CIAT. https://www.ciat.org/ciatblog-general-anti-avoidance-or-abuse-clause-gaar-its-genesis-and-evolution-in-tax-law-legal-certainty/?lang=en
10) Cowx, M., & Kerr, J. N. (2019). The General Anti-Avoidance Rule. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.3485084.
11) D.G. Duff & B. Alarie (2018). Legislated Interpretation and Tax Avoidance in Canadian Income Tax Law, in Legislating Statutory Interpretation: Perspectives from the Common Law World. University of British Columbia.
12) Ernst & Young. (2013). GAAR Rising Mapping Tax Enforcement's Evolution. www.ey.com/tax ED 0614.
13) Hashimy, S. Q., & Benjamin, M. S. (2023). A Tale of Two Tax Systems: A Comparative Analysis of General Anti- Avoidance Rules Provisions in India and. ResearchGate. https://doi.org/10.48165/tlr.2023.3.1.6
14) Home. Eubelius. (2023, May 12). https://www.eubelius.com/en/news/belgiums-highest-courts-clarify-certain-aspects-of-the-national-and-european-anti-abuse-rules.
15) International Monetary Fund (2016). Introducing a General Anti-Avoidance Rule (GAAR): Ensuring That a GAAR Achieves Its Purpose. IMF Publication.
16) International Monetary Fund (2018b). Indonesia: Selected Issues; Country Report No. 18/33; December 21, 2017 (Vol. 18). Washington D.C. IMF Publication.
17) J. Li & T. Hwong (2013), GAAR in Action: An Empirical Exploration of Tax Court of Canada Decisions (1997- 2009) and Judicial Decision Making. Canadian Tax Journal.
18) Matsuda, N. (2015). Tax Strategy Vs. Countermeasures. Xlibris Corporation.
19) Niken Evi Suryani & Ken Devos (2016). The Proposed Design of an Indonesian General Anti-Avoidance Rules. The Australian National University.
20) Öner, C. (2020, March 1). Comparative Analysis of the General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Effective Tool to Tackle Tax Avoidance? https://kluwerlawonline.com/journalarticle/EC+Tax+Review/29.1/ECTA2020005.
21) Rosid, A., & daholi, tengku. (2018). Tax Design and Administration in a Post-BEPS Era: Key Reform Measures in Indonesia. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.3328604
22) Satyadini, A. E. (2015). Empirical Approach of Tax Avoidance Risk Assessment. National Graduate Institute for Policy Studies.
23) Sayed, Q.H. and Benjamin M.S.(2023). A Tale of Tax Systems: A Comparative Analysis of General Anti-Avoidance Rules Provisions in India and Australia. Trinity Law Review.
24) Waerzeggers, C. and Hillier, C., 2016, "Introducing a general anti-avoidance rule (GAAR)—Ensuring that a GAAR achieves its purpose," Tax Law IMF Technical Note 2016/1, IMF Legal Department
25) Wijaya, S., & Kusumaningtyas, D. S. (2020). Analyzing and formulating a statutory general anti-avoidance rule (GAAR) in Indonesia. Jurnal Ilmiah Akuntansi Dan Bisnis, 15(1), 35. https://doi.org/10.24843/jiab.2020.v15.i01.p04.