Tax research methodology for untested legislation: an exemplar for the tax scholar

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Abstract

Tax scholars using typical doctrinal and reform oriented methodologies often struggle to articulate the process undertaken in their research and at the same time, these methods often require an analysis of legislation that has already been the subject of judicial inquiry. However, this raises the challenge of what method to employ in the absence of such judicial inquiry. The tax environment has become so dynamic that law reform occurs rapidly and the law has to be researched, in the absence of case law post legislative amendment. This article provides tax scholars with a methodological approach described as a structured pre-emptive analysis that overcomes this problem (in other words an adaptation of typical doctrinal reform oriented approaches). Using an exemplar of an actual tax law problem, the paper demonstrates how to conduct rigorous research in the absence of case law dealing with legislation that is the subject of enquiry. The article makes two contributions. First, it gives transparency to the traditional doctrinal reform oriented methods primarily used in law. Second, it illustrates a method that can be used to overcome the absence of case law.

Keywords: methodology, tax, qualitative, reform oriented, doctrinal.

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1. Introduction

Research in the field of taxation has historically been underpinned by the more traditional forms of methodologies employed in legal research. These traditional methodologies often rely on case law where the legislation in question has already been the subject of judicial inquiry. Considering that tax is a form of law, we must also recognise that it has its own unique characteristics (Council of Australian Law Deans, 2005, p. 1).

One such unique characteristic is the ever-increasing pace at which tax reform occurs due to changes in the international tax environment. This tax reform is often stimulated by the increasingly innovative ways in which taxpayers attempt to reduce their tax burdens (SARS, 2005, p. 42). In response to these attempts, the speed and pace with which tax reform now occur means that tax scholars in law are confronted with additional challenges in their field, due to the exponential increase in data (statutes, journal articles, law reform reports, parliamentary material and policy documents). Similarly, the tax environment has become so dynamic that tax scholars need to find solutions to research problems in the absence of case law dealing with legislation that is the subject of enquiry. This raises the challenge of what research method to employ in the absence of such judicial inquiry.

Approaches evident in tax research need to adapt to this challenge. Where innovations in research methodologies gain traction, tax scholars are able to employ increasingly multifaceted and uniquely designed methodologies to seek deeper understanding (Mangioni and McKerchar, 2013, p. 176). The field of tax will be enriched by this diversity and innovation. However, scholars using typical doctrinal and reform oriented methodologies often struggle to articulate the existing processes undertaken in their research (Chynoweth, 2008, p.

1). In this regard, doctrinal and reform oriented tax scholars cannot afford to be 'left behind' in employing and articulating the innovative research methodologies applicable in their field.

In this context, this paper firstly aims to contribute to the documented research methodology in the field of tax research. This paper will provide tax scholars with the tools with which to articulate their methodological approach. At this point it is relevant to note that doctrinal reform oriented methodologies are essentially qualitative. A debate between qualitative and quantitative methodologies has not been included as part of this paper but it is recognised that there remains some scepticism towards the findings generated in qualitative studies. Therefore, no attempt has been made to address all these arguments. But in undertaking any qualitative research, it is crucial that the researcher address areas such as validity, robustness, reliability and the difficulties in replication of the studies (Mangioni and McKerchar, 2013, p. 177).

While there are diverse forms of doctrinal research, the aim is to report on doctrinal reform oriented research in tax, but not to provide an extensive report on the many variances that exist in this methodological approach. Rather, this paper makes use of an exemplar of one unique variant of this methodological approach, that the author refers to as a 'structured pre-emptive analysis'. This approach differs from typical case law commentary and analysis (traditionally used in doctrinal and reform oriented legal research) or case study designs (present in many other disciplines). The result is a blueprint for executing this type of research that has not existed in the past. This blueprint is summarised in Table 1 below.

Table 1. Building theory from a Structured Pre-emptive Analysis

Step	Research Activity	Purpose
In the beginning	Define the research problem Not a theory or hypothesis	Focuses the research activities Retains flexibility of theory created
Selecting jurisdictions	Specify jurisdictions used for the research Theoretical not random sampling	Focuses the research activities Focuses research to theoretically useful jurisdictions
Analysis of literature	Interpretation of doctrine from jurisdictions Comparison with similar literature Comparison with conflicting literature	Allows for identification of themes between jurisdictions and interpretation of statute conflicts. Speeds analysis and reveals possible theory Sharpens generalisability, raises theoretical level and improves construct definition Builds internal validity, raises theoretical level and confirms, extends or sharpens theory
Crafting the framework for application	Qualitative data collection across various selected jurisdictions using both deductive and inductive reasoning	Strengthens grounding of theory by facilitating triangulation and comparison
Selecting case law	Specify population of case law	Sharpens research external validity

	Purposeful maximal sampling	Focuses research to theoretically useful case law – i.e. those that replicate or extend the theory by filling conceptual categories
	Multiple cases	Fosters divergent perspectives and strengthens grounding
Analysing data	Within case analysis	Gains familiarity with data and preliminary theory generation
	Cross case pattern analysis	Forces greater depth of analysis so see through multiple lenses
	Across jurisdictions	Forces greater depth of analysis and triangulation across cases and jurisdictions to sharpen theory generation
Shaping and sharpening theory	Iterative tabulation of evidence	Sharpens construct definition and validity
	Inductive and deductive logic applied across cases and literature – i.e. the search for the why and how behind relationships	Builds internal validity, confirms, extends and sharpens theory
In the end	Theoretical saturation of data	Ends process with improvement and stimulation of tax reform

(Source: Author's own)

The second contribution of this paper is the use of the exemplar. In the paper, an exemplar is used to illustrate 'how' the structured pre-emptive analysis for a specific research project was undertaken. The term 'structured pre-emptive analysis' was adopted by the author to describe the structured nature of the analysis (as illustrated in Table 1) and its pre-emptive nature, pre-empting judicial enquiry into specific legislation that is lacking in a jurisdiction, by applying the facts and decisions of judicial enquiry in jurisdictions with similar legislation, to pre-empt the testing of this untested legislation. This paper differs from the few available publications and directives that discuss doctrinal or reform orientated research, as many of these focus on the 'what' and attempt to define or describe the process (e.g. Chynoweth (2008, pp. 28-37); Council of Australian Law Deans (2005, pp. 1-7); Hutchinson and Duncan (2012, p. 84); Kuhn (1996, pp. 11-46)). Instead, this paper uses the exemplar to illustrate 'how' the structured pre-emptive analysis methodological approach was used to research a tax problem where tax reform had occurred but lacked judicial consideration.

The intention of this paper is not to focus on the results of the research in the exemplar per se, but on the techniques employed to perform the research. The article is presented in four parts. Following this introduction, part two provides a background to legal tax research and the type of research problems that may be suited to the structured pre-emptive analysis methodological approach. Similarly, the steps undertaken for a structured pre-emptive analysis are described, whilst using the exemplar to show 'how' this was performed. Concluding comments are made in part three.

2. Building theory from a structured pre-emptive analysis

Legal research and, by association, tax research is subtle and sophisticated and requires a unique blend of both deductive and inductive forms of legal reasoning (Council of Australian

Law Deans, 2005, p. 3). Historically, legal research was classified by some in three ways including doctrinal, theoretical and reform oriented (Pearce, Campbell and Harding, 1987, pp. 9.10-19.15). However, these three narrow categories of legal research cannot begin to describe the richness and diversity which may be used in legal and tax research. Langbroek, van den Bos, Simon Thomas, Milo and van Rossum (2017, p. 1) propose that traditional legal scholarship is often perceived to be about commenting on rules, case law and development in both national jurisdictions and the international domain. As part of these contributions to the field of law, scholars usually do not refer to any methodology or fail to articulate adequately the process undertaken (Hutchinson and Duncan, 2012, pp. 85-86; Langbroek, et al., 2017, p. 2; Oats, 2012, p. 1).

Where tax reform has occurred there is often an absence of case law necessary for some of the more typical forms of legal methodologies (i.e. typical case content analyses or commentaries in legal journals). Nevertheless, depth of meaning, interpretation and application in a practical context may still be required in order to achieve the research objectives (Lymer and Oats, 2009-2010, p. 242). In this instance, it is evident that an innovative research methodology is necessary to achieve the intended goals. A doctrinal reform oriented approach, using an innovative design has been employed (the exemplar) to achieve this depth of understanding in a practical context in order to address a research problem. The exemplar research methodology (structured pre-emptive analysis) will be of interest to researchers who are directed towards proposals for legislative amendment where the legislation has not yet been the subject of judicial inquiry.

The eight steps of the structured pre-emptive analysis were performed in three distinct phases. Phase 1 may be classified as doctrinal (Steps 1, 2, 3 and 4), while phase 2 (steps 5 and

6) may be more broadly classified as reform oriented (using a case law design). Phase 3 used the results from the first two phases to triangulate findings and propose amendment to the doctrine (steps 7 and 8). A detailed description of the individual steps is included below.

2.1 In the beginning

The initial step in the research process is determining the research question (Karlin, 2009, p. 4). Defining the research question or problem allows for the researcher to remain focused for the duration of the research (Karlin, 2009, p. 7). Without a clearly defined research focus it is easy to become overwhelmed by the volume of qualitative data available. However, in the structured pre-emptive analysis the research question may shift and evolve, similar to that which occurs in other methodological approaches. However, in building theory from a structured pre-emptive analysis the ideal situation would be to start from a position where there is no theory under consideration. Therefore, there would be no hypothesis to test. While it is admittedly difficult (or even impossible) to achieve a clean theoretical slate, it is important because predetermined theoretical perspectives or propositions may bias the findings generated. Therefore, the researcher should formulate the research problem and its related variables with some reference to existing literature. In doing so, the researcher should avoid thinking about relationships between the variables and theories as much as possible from the outset of the research project. The absence of a hypothesis or predetermined theories aids in retaining the flexibility of the research and its findings. In order to provide the context for how this approach was adopted the starting point for the exemplar problem is discussed in example 1 below.

Example 1 In the beginning: the exemplar

The exemplar problem emanated from South Africa but is applicable in many jurisdictions across the globe. In the South African context, the general anti-avoidance rule (GAAR) was amended, using lessons from other jurisdictions, due to the spectacular failures that had plagued the GAAR prior to its amendment (Olivier, 1996, p. 378; Pidduck, 2017, p. 69; SARS, 2005, p. 42).

Historically, commentary on the efficacy of newly introduced or amended legislation such as the South African GAAR occurs once it has come before the judiciary for consideration (Pidduck, 2017, p. 5). Thereafter commentators and scholars are able to identify areas of weakness or strength and propose subsequent amendment with relative ease, in comparison to untested legislation. Without the benefit of 'hindsight' for the South African GAAR, findings are often limited to a 'theoretical' analysis and limited real-world facts are used to determine its effectiveness in practice. This is not an uncommon phenomenon where tax legislation and policy is influenced by the international tax environment and global norms. Many countries keep abreast of these tax norms by borrowing aspects from other jurisdictions or through 'tax transplants'.

For purposes of the exemplar, the goal of the research was to compare the South African GAAR to international jurisdictions, from a practical perspective (using facts from cases), in order to identify any deficiencies that may impact its effectiveness and thereafter recommend amendment (Pidduck, 2017, p. 6).

In light of the above description of the research goals, it is evident that the efficacy of the legislation (South African GAAR) could not be studied with the use of 'hindsight', as the legislation has not yet been subjected to the rigours of the courts, despite being in effect for over a decade (Pidduck, 2017, p. 5).

This exemplar is just one example of the ever-changing tax landscape but forces one to reflect on the research implications of such tax reform in the absence of case law. Tax scholars should not be limited to research in those areas where judicial consideration has already occurred and should be able to research those areas where a pre-emptive form of research is required to test the efficacy of tax reform and propose further reform. It is submitted that

research in these areas of tax reform is critical for the development of a more coherent tax system.

2.2 Selecting jurisdictions

The next step of the research process for a structured pre-emptive analysis is the selection of a jurisdiction/s. This is a crucial aspect for consideration as the literature and case law will be derived from these jurisdictions. Once again, the selection of jurisdictions aids in focusing the research activities towards achieving the intended goals of the research. Similarly, the selection of jurisdictions helps to define the limits for application of the findings, whilst also controlling extraneous variation. At this point, the researcher would need to select jurisdictions that are directed towards answering the goals of the research. Therefore, purposeful or theoretical selection of jurisdictions may be preferable to random or statistical selections. Thus, the selection of jurisdictions should be theoretically useful in answering the research question.

Adequate selection of jurisdiction also improves the quality and validity of the research as a specific basis of selection is used to select the jurisdictions (bias in the selection of jurisdictions could lead to questionable findings). A brief description of the basis of selection for the jurisdictions as used in the exemplar is included in example 2 below.

Example 2 Selecting jurisdictions: the exemplar

South Africa was selected as the primary jurisdiction for study as the researcher was a resident in this jurisdiction, had in-depth knowledge of its tax legislation and had conducted research in relation to GAAR in South Africa (Pidduck, 2017, p. 7).

Canada and Australia were selected for comparison to South Africa as their legal systems and legislation also had their origins in English law. Further, both these jurisdictions were referred to in the Discussion Document released by the South African Revenue Service (SARS) in 2005, which led to the most recent amendments to the South African GAAR (Pidduck, 2017, p. 7; SARS, 2005, pp. 1-76).

Once the jurisdiction/s has/have been selected, the next step of the structured pre-emptive analysis is the analysis of the literature, which is discussed below.

2.3 Analysis of literature

The analysis of the literature can be described as doctrinal in nature. Doctrinal research at its best has been described as that involving rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials (Council of Australian Law Deans, 2005, p. 3). Other commentators refer to doctrinal research as that which is concerned with the formulation of legal doctrines through the analyses of legal rules (Knight and Ruddock, 2008, p. 29). Doctrinal research methodology (also referred to as 'black-letter law') has been defined by Salter and Mason (2007, p. 113) as "a research methodology that concentrates on seeking to provide a detailed and highly technical commentary upon, and systematic exposition of, the content of legal doctrine". The analysis of literature (doctrinal research) as employed in the structured pre-emptive analysis facilitates a critical analyses of documentary data in order to reach conclusions regarding its interpretation and application.

As part of this doctrinal aspect of the structured pre-emptive analysis, the researcher will need to consider a broad range of literature. This essential feature requires the researcher to examine literature regarding the interpretation and application of the doctrine/statute for the selected jurisdictions. It is necessary to examine literature rigorously in order to ensure that interpretation and application of the relevant doctrines is understood. Therefore, literature that both supports and conflicts with the interpretation and application of the doctrines is necessary. The examination of both these forms of literature is important for many reasons. First, if conflicting literature is ignored, the confidence in the findings is reduced (challenging the reliability and validity of the research). Secondly, when both forms of literature are used, the researcher would need to use deeper insight in order to build internal validity, improve construct definition, and sharpen theory. During this analysis, the researcher would be able to identify themes across the literature and glean depth of meaning and interpretation of the statutes. The identification of themes at this point facilitates speedy analyses and comparison with the forthcoming steps in the research process and reveals possible theories.

However, the research of tax avoidance across multiple jurisdictions is a complex area of law (as researched in the exemplar). Similarly, the transactions addressed in its jurisprudence are often intricate and multifaceted. A certain degree of detail is necessary in considering the manner in which tax avoidance transactions are approached by the courts in order to successfully apply the doctrine in the latter steps of the research process. In this context, it is necessary to consider that not all taxing jurisdictions apply the same interpretative technique and any tax scholar would need to identify the method applicable to the jurisdictions selected. Without such an analysis of the interpretative principles applied to fiscal legislation, any study employing the structured pre-emptive analysis would not achieve its objectives, as the findings would not be related to the interpretational approach followed by the judiciary in practice. This

is critical in order to allow the researcher to apply the doctrine to the facts of cases from other jurisdictions (pre-emptive) in the forthcoming steps of the structured pre-emptive analysis.

In South Africa, the interpretative guidelines are referred to as the interpretation of statutes (De Koker and Williams, 2019, p. 1.17A). Interpretation is described as "the cornerstone on which the revenue authorities can assess and collect taxes and correspondingly, the foundation on which a taxpayer's rights are built" (Goldswain, 2008, p. 107). To this end, the correct interpretation of the legislation is critical in order to successfully apply the doctrine to the facts of practical cases. Consequently, the use of an appropriate method for interpreting the legislation is critical. The process undertaken for interpretation and development of a structured framework is necessary in order to ensure that it is consistently applied in the later steps of the research. This structure improves validity and replicability of the research.

In the exemplar, the rules for interpretation of tax avoidance legislation for all three jurisdictions were compared and contrasted. This allowed for the different interpretative contexts or conflicts in interpretation to be understood. As a result, there is improved understanding of the implications of interpretational differences between jurisdictions when conclusions between the jurisdictions are drawn. A brief description of the interpretation rules of South African legislation is described in example 3 below in order to illustrate how this was done in the exemplar.

Example 3 Interpretation of doctrines: the exemplar

In South Africa, the courts have explained that the 'golden rule' of interpreting fiscal legislation is to arrive at the intention of the legislature (*Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* (1975) (4) SA 715 (A); *Income Tax Case No 1396* (1984) 47 SATC 141). This interpretative approach to legislation is referred to as the 'purposive approach' (De Koker and Williams, 2019, p. 117A; Goldswain, 2008, p. 109). According to Goldswain (2008, p. 109), this must be done by having regard to the words used and giving them, unless specifically defined, their ordinary grammatical meaning. However, Goldswain (2008, p. 109) adds that if giving the words such a meaning would lead to absurdities or anomalies, which could not have been contemplated by the legislature, the legislature's intention must be considered of paramount importance in order to remain within the bounds of the South African Constitution (*Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* (1975) (4) SA 715 (A)). More recently, the courts clarified this position by stating that the interpretation should accord with that which promotes the general legislative purpose underlying a statutory provision (De Koker and Williams, 2019, p. 1.17A; *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) (4) SA 593 (SCA)). Therefore, the legislative purpose is the light that should guide statutory interpretation and the courts should give it effect within the constraints imposed by the language adopted by the legislature (*Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) (4) SA 593 (SCA)).

The principles of the purposive approach to interpreting fiscal legislation outlined above, do not take cognisance of the *contra fiscum* rule, which states that where the law is ambiguous, the fiscal legislation must be interpreted in a manner that favours the taxpayer. However, in commenting on this rule, Goldswain (2008, p. 116) notes that the *contra fiscum* rule still remains a part of the South African common law and it complements the principles underpinning the Constitution (Republic of South Africa, 1996, pp. 1-178) by ensuring that inequitable decisions do not result from inadequate interpretation of fiscal legislation. In South Africa, the *contra fiscum* rule has traditionally been viewed as applicable in instances where ambiguity in the wording of fiscal legislation exists. However, the purposive approach described above is more appropriate in addressing the type of research described in this study so that the underlying intention of the section is considered, as opposed to the wording of the legislation in isolation (Goldswain 2008, p.116; *Commissioner for South African Revenue Service v Airworld CC and another* (2008) 2 All SA 593 (SCA)); *Commissioner for Inland Revenue v Delfos* (1933) 6 SATC 92 (A); *Kommissaris van die Suid-Afrikaanse Inkomsdienste v Botha* (2000) 62 SATC 264 (O) and *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* (1975) (4) SA 715 (A)).

In addition to the jurisdictional principles related to interpretation of the legislation, it is also relevant to consider the principles relevant to the specific doctrine in question as it may add an extra dimension to interpretation. For example, the interpretation of anti-avoidance legislation adds an additional consideration in that it must be interpreted widely to 'suppress the mischief' and advance the remedy of the revenue authority, but must also not stretch the meaning beyond what the language permits (*Commissioner of Taxes v Ferera* (1976) 2 All SA 552 (RA)). For each aspect of the doctrine that requires interpretation, the researcher would be required to describe and document how it was interpreted. This can be a time-consuming process but the improved rigour required is necessary to improve the quality of the findings of the study as a whole. A brief description of the documented steps applied in the exemplar (the South African GAAR) is provided in example 4 below:

Example 4 Interpretation of the GAAR: the exemplar

Where a word, sentence or piece of legislation has already come before the courts (in a similar context and with a similar intention) the interpretation applied by the courts is used. This method is applied where the word, sentence, or piece of legislation has been interpreted by the courts using the purposive approach (i.e. where the intention of the legislator has been considered) (Pidduck, 2017, p. 53). Alternatively, where the word, sentence or piece of legislation was not previously interpreted by the courts, the ordinary grammatical meaning of the word is used in conjunction with the purpose of the legislation (i.e. using the purposive approach). This method essentially makes an effort to determine what the courts would conclude when applying this word, sentence or piece of legislation (Pidduck, 2017, p. 53).

Once the doctrinal phase aspect of the research is complete, a structure is required to apply the doctrine in question to the facts of the cases. The next step of the structured pre-

emptive analysis is the constructing of a framework for the application of the legislation to practical facts.

2.4 Crafting the legislative framework for application

The analysis of literature provides the researcher with rich data with which to develop a framework for applying the legislation to a set of facts. During this step, the researcher is required to employ both deductive and inductive reasoning to develop a comprehensive framework to apply the doctrine to the facts of cases. The use of this structured framework strengthens the grounding of theory by facilitating triangulation and comparison once it has been applied across the facts of multiple cases. An extract of the framework used in the exemplar is provided in example 5 below.

Example 5 Extract of the framework: the exemplar

2 - Does the transaction/operation/scheme result in a tax benefit?

The definition of tax in section 80L is applied to the cases.

- Has the tax benefit arisen because the taxpayer has effectively stepped out of the way of, escaped or prevented an anticipated liability? (*Smith v Commissioner for Inland Revenue* (1964) 26 SATC 1 (A); *Commissioner for Inland Revenue v King* (1947) 2 SA 196 (A))
- Would a tax liability have existed but for this transaction (the 'but for' test)? (*Income Tax Case No 1625* (1996) 59 SATC 383; *Smith v Commissioner for Inland Revenue* (1964) 26 SATC 1 (A) and *Commissioner for Inland Revenue v Louw* (1983) 45 SATC 113 (A))

Source adapted: Pidduck (2017, p. 102)

Once the framework for applying the doctrine in question has been developed, the next step is to select the foreign cases to which the framework should be applied.

2.5 Selecting case law

Similar to the selection of jurisdictions, the selection of cases to which the framework will be applied, is a critical step in a structured pre-emptive analysis. If a suitable method for the selection of cases is not used it will introduce unnecessary bias and subjectivity and could negatively influence the findings of the research. Both the jurisdiction and the case law sample selection criteria aid in focusing the research activities towards achieving its goals. Similarly, the selection of the jurisdictions helps to define the limits for application of the findings, whilst also controlling unnecessary variation. Once the jurisdictions have been defined, the researcher would need to select cases that are directed towards the goals of the research. Therefore, purposeful or theoretical selection of cases may be preferable to other sampling techniques. Once again, while there are many sampling options available to a researcher, the most appropriate defensible method should be used for purposes of achieving the objectives of the research and the use of predefined objective criteria is necessary to eliminate bias in the selection of cases. This improves the quality and validity of the research (bias in the selection of the cases could lead to questionable findings).

Purposeful maximal sampling was used for purposes of the exemplar and is a method where a sample is selected that shows different perspectives of a problem that is chosen in order to meet the requirements needed to answer the research problem (Creswell, 2007, p. 75). For the purposes of the exemplar both purposeful maximal sampling in conjunction with cases that are considered critical were used to select the cases. The selection of the jurisdictions and cases in this manner facilitated triangulation and comparison between cases, as well as strengthening the grounding of theory from the research. Similarly, the selection of multiple cases in this manner fostered divergent perspectives for theoretically useful case law that could

replicate and extend theory across multiple contexts and conceptual categories. A brief description of the selection of cases for the exemplar is provided in example 6 below:

Example 6 Selecting case law: the exemplar

In the exemplar, the case law consisted of independent databases in each of the jurisdictions. These databases were considered impartial primary sources and consisted of the Westlaw AU database in Australia and the Canadian Legal Information Institute (CanLII) database in Canada). These databases contained the actual record of the judgments and include all the most relevant case law on the GAARs in Australia and Canada, thus eliminating bias in determining which cases should be available for selection. Historically, both Canada and Australia had a robust judicial inquiry of their respective GAARs and this allowed for an adequate number of cases. However, the large number of cases available in each jurisdiction necessitated the selection of critical cases using various qualitative criteria (i.e. judicial precedence, income tax, dates of transactions etc.). Applying the above qualitative elimination criteria facilitated the selection of cases that could be considered critical for comparative purposes.

The use of multiple cases in the exemplar allowed for themes to be identified that often featured across more than one case (increasing the ability to identify themes that could be considered symptomatic more generally). Once the cases have been selected, the next step of the structured pre-emptive analysis is the analysis of data. The analysis of data is discussed in brief below.

2.6 Analysing data

The application of the untested doctrine (the South African GAAR in the case of the exemplar) and analysis of emerging data is at the heart of building theory in a structured pre-emptive analysis. As part of this process, a researcher would first need to apply the framework (refer 2.4 above) to the facts of the cases selected (refer 2.5 above). This approach should be undertaken methodically for each case and allows conclusions to be drawn from a practical context using actual facts individually. It further facilitates the identification of nuances that are only identified when practical application occurs. This is particularly relevant where case law has not yet been provided by the judiciary.

At this point, it is necessary to emphasise the need to limit any bias that may occur when applying the legislation to the cases selected for use. Consistency in application of the doctrine by means of the framework is critical. In addition, consistent application of the framework facilitates a repeat of the process by other researchers and increases the external validity of the findings, as suggested by McKerchar (2004, p. 10). The objective is to allow other researchers to review the data objectively and reach the same conclusions (McKerchar, 2004, p. 10).

Once each aspect of the framework is applied to the differing components of each case, conclusions could be drawn on the efficacy of each of the aspects of the untested doctrine (the South African GAAR in the exemplar). A brief description of one finding arising from the analysis of data from the exemplar is provided in example 7 below:

Example 7 Analysing data: the exemplar

The South African GAAR may be considered more prescriptive than many of its international counterparts. One such aspect is the 'indicators of a lack of commercial substance' that may be present in a transaction. In this aspect of the South African GAAR, consideration must be afforded to the risks associated with the transaction. However, where parties to the transaction have a relationship which impacts upon how transactions are concluded, it adds an additional dimension to how the doctrine may be interpreted. For example, where a husband and wife transact there are often instances where no security is given for a loan. This has an impact upon the risks related to each of the taxpayers and therefore impacts upon the consideration of the 'lack of commercial substance' aspect of the South African GAAR, which is not catered for in the design of the doctrine.

The example above highlights that differences and consistencies may arise due to the interpretation of the doctrine in a practical context (i.e. where relationships between taxpayers exist that may not have been considered by the legislature). Therefore, it is evident that while theoretical discourses on the legislation (refer analysis performed in 2.3) do add value, greater depth in understanding is created when it is applied in a practical context to much smaller themes (e.g. impact of relationships between taxpayers in considering lack of commercial substance). This depth of analysis allows the researcher to identify unique considerations (or differences) that arise due to the application of the doctrine to the practical cases that were not perhaps identified in the pure doctrinal component of the analysis of literature, and affects the efficacy of the doctrine in practice.

Findings can then be further extended when each case is analysed in its entirety. At this stage, the researcher would need to analyse the data to identify recurring themes in each jurisdiction for comparison with the untested doctrine. This process allows for the unique

patterns and themes of each case to emerge before the researcher extends the patterns across cases. In addition to this, it provides the researcher with a rich familiarity with each case, which in turn accelerates the cross-case analysis. There is a coding process employed for this aspect of the analysis. First, each case should be analysed separately and thereafter analyses across all the cases is required. This coding allowed themes across all the cases to be considered, compared, and grouped and relationships analysed. When a pattern or theme from one case is corroborated by evidence from another, the finding is stronger and better grounded. However, where evidence conflicts the researcher may reconcile these differences through deeper probing of the meaning of these differences. The objective is to force the researcher to delve beyond initial impressions through a structured, diverse lens.

While it may be argued that an analysis of this nature can be made by applying the legislation to one case in each jurisdiction, it is relevant to note that for this context (tax avoidance cases relevant to the South African GAAR), the analyses across multiple cases resulted in greater depth, as each case often included vastly different practical considerations. Therefore, larger studies may yield a more comprehensive consideration of the doctrine across a variety of practical contexts through multiple lenses. This is particularly relevant for the study undertaken by the author for the South African GAAR. The reason for this is that the GAAR is intended to operate on the basis of 'conceptual principles', as opposed to specifically designed transactions, targeted by other fiscal legislation or specific anti-avoidance rules (Pidduck, 2017, p. 2; SARS, 2005, p. 38). Therefore, the variety of practical considerations may often be wider than those attributed to a specific piece of legislation.

Should a researcher wish to employ the methodological approach described in this exemplar, an evaluation should be performed in order to determine whether single or multiple

cases should be used in the study. In the exemplar, a single case would have been of little value in achieving the overall research objectives. Analyses of the cases across jurisdictions forced greater depth of analyses and facilitated triangulation across cases and jurisdictions to sharpen the theory generated. Should only one case in each jurisdiction have been used in the study in question, the author identified that it would have had the following impact on the outcomes of the study:

- Conclusions that could be made about the efficacy of the rule would be limited, as the facts of the case analysed might have highlighted only certain aspects for consideration, which in turn would lead to other aspects not being identified or considered (Pidduck, 2017, p. 49).

- The limited facts used for analysis would reduce the scope of the study so that the reform proposals resulting from the study could be effective to cases where similar facts existed. Therefore, if amendments were to be proposed on a limited number of cases, it may effectively introduce the risk of converting the GAAR into a specific anti-avoidance rule that only caters to the facts of the one case selected for use in the study (Pidduck, 2017, p. 49).

- Amendments proposed would specifically cater for a transaction with certain facts and not for cases with other facts (Pidduck, 2017, p. 49).

Once data from the cases are individually collated, they may then be compared to the judicial outcomes of the cases when they were presented before the courts in their own respective jurisdictions. McKerchar (2004, p. 10), argues that there is value in the determining the differences in the outcomes of the cases, compared with their original judgment. This

rigorous cross case pattern analysis strengthens the internal validity of the study as suggested by McKerchar (2004, p. 10). The value of this structured analysis was two-fold. Firstly, the cross case pattern analysis allows the researcher to identify aspects of the doctrine containing both strengths (which should be retained in the proposals for amendment) and weaknesses (which should be addressed by any proposals for improvement). Secondly, a greater number of proposals for amendment were identified, as different facts from each case highlighted additional areas of strengths and weaknesses in the relevant doctrine. In addition to these benefits, any proposals for amendment were also made by considering the impact of such proposals on all the cases selected, adding strength to proposals for amendment to the doctrine (Pidduck, 2017, p. 49).

2.7 Shaping and sharpening theory

Once the analyses of literature (refer 2.3 above) and data (refer 2.6 above) are completed, tentative themes, concepts and relationships begin to emerge. Owing to the qualitative nature of the research and depth and breadth of the preceding components of the research, a substantial body of information and detail precedes this step. The next step of this iterative process is to compare systematically both the literature and data to yield a valid theory. Both inductive and deductive logic should be applied across cases and the literature to search for understanding of "how" and "why" the emergent relationships hold and how this can be used to propose reform to the doctrine. This occurs by accumulating the literature and data in single, well-defined constructs where a researcher may rely on tables to summarise and tabulate evidence during this process.

At this point, the researcher is able to identify and analyse any convergences between the literature and data in order to triangulate and strengthen the validity of the research findings

while confirming, extending and sharpening theory. Additional value is gleaned where the researcher is able to identify divergences between the literature and the case data. This approach may be contrasted with other traditional forms of doctrinal research where there may be limited practical findings from case data.

The objective of this step is to identify and propose aspects of the doctrine for amendment. Therefore, the shaping and sharpening of the theory generated from the literature and case data in this step can be described as reform-oriented. Reform oriented research is that which "intensively evaluates the adequacy of existing rules and that recommends changes to any rules found wanting" (Hutchinson and Duncan, 2012, p. 101; Pearce, et al., 1987, pp. 9.10-19.15). In the exemplar, it is evident that the objectives of the study do in fact aim to make recommendations for amendment to the doctrine in question (the South African GAAR). It is therefore evident that this reform-oriented research approach is aptly suited to aid in achieving the research objectives.

In commenting on reform-oriented research, McKerchar (2008, p. 19) is of the opinion that it is "designed to accomplish change in the law, and theoretical research is that which fosters a more complete understanding of the conceptual bases of legal principles." Alley and Bentley (2008, p. 129) are of the opinion that reform proposals rely on making connections across comparative and international legal concepts and "are also finely nuanced as they require critical understanding of context across diverse jurisdictions and simultaneous appreciation of the implications of developments in the different international fields to take advantage of what is possible". In this context, it is evident that the doctrinal component of the research forms the foundation for the ability of the researcher to have a good understanding of the contexts across

the diverse jurisdictions and obtain an appreciation of the implications thereof. This understanding and context facilities a rigorous reform oriented research component.

2.8 In the end

The final step in the structured pre-emptive analysis is the formulation of tax reform proposals for the doctrine in question. One of the strengths of building theory and proposing tax reform from a structured pre-emptive analysis is the likelihood of generating novel reform proposals. However, throughout the process ancillary benefits are also evident in the development of the framework (refer 2.4) as both the revenue authority and taxpayers may be able to apply the framework to specific facts in order to determine how the doctrine may be applied to the facts in practice. Concluding comments are made in part three below.

3. Concluding comments

Tax is a field straddling many disciplines and the speed at which tax reform occurs globally has resulted in unique opportunities where scholars may contribute to both national and global tax systems. Tax researchers using innovative methodologies from different disciplines all have a role to play in the field of tax. These tax researchers should be encouraged to use and develop their methodological approaches in order to answer research problems that will contribute to the body of knowledge. No discipline can afford to be 'left behind', as competition for funding and publication is accelerating.

Innovation in tax research facilitates greater depth in understanding and creates opportunities for greater insight and therein lies the impetus for this paper. This paper makes two important contributions. First, it gives transparency to the traditional doctrinal reform oriented methods primarily used in law. Second, it illustrates a method that can be used to overcome the absence of case law dealing with legislation that is the subject of enquiry.

While there is support in the literature for methodological innovations in tax research, they often do not describe the process in sufficient detail. In this paper, the author used two forms of qualitative methodological approaches in a sequential manner to construct a deeper understanding of the research problem in the pursuit of a real solution to a practical problem. This paper made use of an exemplar of one unique variant of this methodological approach, described as a 'structured pre-emptive analysis' to illustrate how this approach has been successfully undertaken. In analysing the qualitative data and applying it to practical cases, the author has endeavoured to develop a systematic, rigorous and transparent tool for legislative reform proposals in the qualitative paradigm. However, at the same time this methodological approach provides additional tools to policy makers who may test legislative reforms in a practical context. Similarly, this methodological approach may provide taxpayers with the tools (framework) to apply untested legislative reforms to their own practical contexts.

It is submitted that there is no single methodological approach for qualitative studies but the approach described in this paper presents an alternative approach to practical problems that other researchers may consider adopting or adapting further. Undoubtedly the identification of themes and the triangulation process has involved some subjectivity on the part of the researcher but the sequential phased approach and design options displayed herein do go some way to counteracting this weakness. As innovation in methodological approaches gains more traction, it is hoped that this paper may stimulate further innovation and development of methodological approaches in tax.

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