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WHEN THE GENERAL MEETS THE SPECIFIC: RESOLVING THE PRIORITY PROBLEM BETWEEN INDIA'S GENERAL ANTI-AVOIDANCE RULES AND THE SPECIFIC ANTI-AVOIDANCE PROVISIONS IN CORPORATE REORGANISATIONS

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ABSTRACT

The introduction of the General Anti-Avoidance Rules in Chapter X-A of the Income-tax Act, 1961, with effect from the assessment year 2018-19, gave the Indian revenue a broad statutory power to disregard arrangements that lack commercial substance and that are entered into mainly to obtain a tax benefit. The Act, however, already contained a dense network of specific anti-avoidance provisions addressed to particular mischiefs, several of which bear directly upon corporate mergers, demergers and acquisitions. The statute does not say which of the two is to prevail where both might apply, and the resulting uncertainty falls with particular force on reorganisations, where transactions are large, planned years in advance, and acutely sensitive to fiscal risk. This paper examines the priority problem in the reorganisation context. It locates the problem in the legislative text, traces it through the judicial trajectory from McDowell to Vodafone and the displacement of that case law by the statutory rules, and contrasts the Indian silence with the accommodation reached in the United Kingdom, where the general anti-abuse rule is expressly subordinated to a double-reasonableness threshold and confined to abuse that the specific code does not already reach. The paper argues that the absence of a rule of priority is not a gap that interpretation can safely fill, and it proposes a statutory rule of specific-provision immunity, qualified by a narrow abuse exception, as the means of restoring the certainty on which the reorganisation of Indian business depends.

Keywords: *General Anti-Avoidance Rules; specific anti-avoidance provisions; mergers and acquisitions; corporate reorganisation; tax certainty; commercial substance; Income-tax Act 1961; GAAR*

I. Introduction

The reorganisation of a company is, for the fiscal system, an awkward event. In its commercial substance a merger or a demerger is not the realisation of an investment but the rearrangement of a continuing enterprise, and the law accordingly extends to it a measure of tax-neutrality, deferring rather than levying the charge that an ordinary transfer would attract. Yet the very features that make a reorganisation deserving of neutrality — its scale, its deliberate structuring, the freedom it allows in the choice of form — are the features that make it a natural vehicle for the avoidance of tax. The fiscal system must therefore hold two purposes in tension: it must not tax the genuine rearrangement as though it were a realisation, and it must not allow the apparatus of neutrality to be turned to the avoidance of a charge that ought to fall. The instruments by which the system pursues the second purpose are its anti-avoidance provisions, and it is the relationship among those instruments that this paper examines.[621]

The Income-tax Act, 1961, now pursues that purpose through two distinct kinds of provision. The first kind is specific: a rule directed at a named mischief, framed with a particular transaction in view, operating by a defined trigger and a defined consequence. The Act is rich in such rules, and several of them bear directly on reorganisations — the provisions denying the carry-forward of losses where the conditions of continuity are not met, the provisions deeming certain distributions to be dividends, the provisions taxing transfers between associated enterprises at arm's length, and others besides. The second kind is general: a rule directed at no named mischief but at avoidance as such, framed in deliberately broad terms, operating wherever an arrangement lacks commercial substance and has the obtaining of a tax benefit as its main purpose. This is the General Anti-Avoidance Rule, introduced as Chapter X-A and brought into force, after a long and contested gestation, with effect from the assessment year 2018-19.[622]

The difficulty this paper addresses arises at the point where the two kinds of provision meet. Where a reorganisation engages a specific provision — where, say, it fails a condition of loss carry-forward, or falls within the terms of a deeming provision — and where the same reorganisation might also be characterised as an arrangement lacking commercial substance and entered into mainly for a tax benefit, both kinds of provision are in play, and the statute does not say which is to govern. May the revenue, having a specific provision that addresses the transaction on defined terms, set that provision aside and proceed instead under the general rule, with its broader trigger and its more drastic consequence? Or does the existence of a specific provision, addressed to the very mischief in question, exclude the operation of the general rule, on the principle that the special governs the general? The Act gives no answer, and the silence is the subject of this paper.[623]

The argument proceeds in five further parts. Part II sets out the two regimes and locates the priority problem in the legislative text. Part III explains why the problem presses with peculiar force in the reorganisation context. Part IV examines the interpretive resources that might be thought to resolve the problem — the special-over-general maxim, the legislative history, and the administrative guidance — and argues that none of them resolves it with the certainty the field requires. Part V draws on the comparative experience of the United Kingdom, whose general anti-abuse rule was framed with the priority problem expressly in view. Part VI sets out the reform this paper proposes — a statutory rule of specific-provision immunity, qualified by a narrow abuse exception — and answers the objections to it. A short conclusion follows.[624]

II. The Two Regimes and the Point of Conflict

A. The Specific Provisions

The specific anti-avoidance provisions bearing on reorganisations share a common structure: each identifies a transaction or a feature of a transaction that experience has shown to be a vehicle for avoidance, and each attaches to that transaction a defined consequence, leaving transactions outside its terms untouched. The provision governing the carry-forward of accumulated losses on an amalgamation is illustrative. It permits the successor to carry forward and set off the losses of its predecessor, but only upon conditions — that the

[621]For the characterisation of a reorganisation as the rearrangement of a continuing enterprise rather than the realisation of an investment, see generally the treatment of amalgamation in the principal commentaries on the Income-tax Act, 1961; the point is developed at length in the doctrinal literature on tax-neutrality in corporate restructuring.

[622]The Income-tax Act, 1961, Chapter X-A (ss. 95-102), inserted by the Finance Act, 2012, and brought into force with effect from 1 April 2017 (assessment year 2018-19) after successive deferrals. On the gestation of the provisions and the deferrals, see the reports of the Expert Committee on General Anti-Avoidance Rules (2012).

[623]The maxim generalia specialibus non derogant — that general provisions do not derogate from special ones — is the interpretive principle most obviously engaged by the priority problem; its application to the relationship between Chapter X-A and the specific provisions is, however, contested, for reasons developed in Part IV below.

[624]The structure of the argument follows the diagnostic-then-prescriptive method: the problem is located in the text (Part II), its incidence is shown (Part III), the inadequacy of interpretation to resolve it is demonstrated (Part IV), the comparative evidence is brought to bear (Part V), and the reform is proposed and defended (Part VI).

amalgamation be of a kind the provision specifies, that the business be carried on for a stated period, that a stated proportion of the assets be held — and it withdraws the benefit altogether where the conditions are not met. The provision is, in its negative aspect, an anti-avoidance rule: it exists to prevent the acquisition of a loss-making company for no purpose but the use of its losses, and it does so by conditioning the carry-forward on indicia of commercial continuity.[625]

What is to be observed of such a provision, for the purposes of this paper, is that it embodies a legislative judgment about where the line between the acceptable and the unacceptable is to be drawn. In framing the conditions, the legislature has decided that an amalgamation meeting them is to enjoy the carry-forward, and that one failing them is not; it has weighed the competing considerations and fixed the boundary. The taxpayer who orders an amalgamation to meet the conditions has done what the provision invites: it has brought its transaction within the terms on which the legislature has chosen to confer the benefit. The question that the priority problem raises is whether such a taxpayer, having satisfied the specific provision, is nonetheless exposed to the general rule — whether, that is, the legislative judgment embodied in the specific provision is final, or whether it may be displaced by the broader judgment that the general rule commits to the revenue and the courts.[626]

B. The General Rule

The General Anti-Avoidance Rule operates upon an altogether different principle. It does not identify a transaction; it identifies a quality — the quality of being an impermissible avoidance arrangement — and it attaches its consequences to any arrangement possessing that quality, whatever its form. An arrangement is impermissible, in the scheme of the Rule, if its main purpose is to obtain a tax benefit and if it bears one of the marks of artificiality the Rule enumerates: that it creates rights or obligations not ordinarily created between persons dealing at arm's length, that it results in the misuse or abuse of the provisions of the Act, that it lacks commercial substance, or that it is carried out in a manner not ordinarily employed for bona fide purposes. Where an arrangement is found to be impermissible, the consequences are sweeping: the revenue may disregard, combine or recharacterise any step, may treat the arrangement as if it had not been entered into, may reallocate income and expenditure, and may deny the tax benefit that the arrangement sought.[627]

The contrast between the two regimes is now apparent. The specific provision operates by a defined trigger and a defined consequence, fixed by the legislature in advance; the general rule operates by a broad and evaluative trigger and an open-ended consequence, applied by the revenue and the courts after the event. The specific provision tells the taxpayer, before it acts, what it must do to obtain the benefit and what will follow if it does not; the general rule tells the taxpayer only that an arrangement whose main purpose is a tax benefit and which lacks commercial substance is at risk, leaving the application of those evaluative standards to a judgment made after the transaction is complete. The two regimes are not merely different in their terms; they are different in the kind of certainty they offer, the one offering the certainty of a rule and the other the contingency of a standard.[628]

[625]The Income-tax Act, 1961, s. 72A, governing the carry-forward and set-off of accumulated loss and unabsorbed depreciation on amalgamation and demerger, read with the conditions prescribed in s. 72A(2) and the rules made thereunder. The anti-avoidance character of the conditions is evident from their function of confining the benefit to amalgamations attended by commercial continuity.

[626]The proposition that a specific provision embodies a legislative judgment about the boundary of the acceptable, which the taxpayer is entitled to rely upon by ordering its affairs to fall within it, is the foundation of the case for specific-provision immunity developed in Part VI. The proposition is contested by those who read the general rule as a backstop reaching arrangements that satisfy the letter of the specific provision but defeat its purpose.

[627]The Income-tax Act, 1961, s. 96 (impermissible avoidance arrangement), s. 97 (lack of commercial substance), and s. 98 (consequences of an arrangement being declared an impermissible avoidance arrangement). The breadth of the consequences under s. 98 — disregarding, combining, recharacterising, and reallocating — is to be contrasted with the defined consequence of a specific provision.

[628]On the distinction between rules and standards, and the different kinds of certainty they afford, the jurisprudential literature is extensive; the distinction is invoked here not for its own sake but because the priority problem is, at

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C. The Statutory Silence

Had the legislature, in enacting Chapter X-A, addressed the relationship between the new general rule and the existing specific provisions, the priority problem would not arise; but it did not. The Chapter provides that its provisions shall apply notwithstanding anything to the contrary contained in the Act, language which, read literally, would subordinate every specific provision to the general rule; yet it also provides that the Chapter shall apply in addition to, or in lieu of, any other basis of determining tax liability, language which contemplates a coexistence rather than a subordination. The two indications pull in opposite directions, and neither is decisive. The drafting leaves it genuinely uncertain whether the general rule was intended to override the specific provisions, to yield to them, or to operate alongside them on terms the statute does not specify; and it is this uncertainty, written into the text itself, that the interpretive resources examined in Part IV are called upon, and fail, to resolve.[629]

III. Why the Problem Presses in the Reorganisation Context

The priority problem is general to the Act, but its incidence is not uniform, and it falls with peculiar weight on reorganisations. The reasons lie in the distinctive features of a reorganisation as a transaction. A reorganisation is, first, large: it involves the whole of an undertaking, often the whole of a company, and the tax at stake is correspondingly large, so that the consequences of an adverse application of the general rule are severe. It is, second, deliberately structured: a reorganisation is not an event that befalls a company but a transaction it designs, choosing among the available forms — amalgamation, demerger, slump sale, share acquisition — for reasons that include, and often are dominated by, their differing tax consequences. And it is, third, planned long in advance: a reorganisation is negotiated, documented and approved over months, sometimes years, and the parties commit to it, and incur its costs, on the strength of a view taken in advance of its tax consequences.[630]

Each of these features sharpens the priority problem. Because the transaction is large, the difference between the defined consequence of a specific provision and the open-ended consequence of the general rule is, in money, very great, and the uncertainty as to which will apply is correspondingly costly. Because the transaction is deliberately structured, and structured with tax consequences in view, it is exposed to the charge that its main purpose is the obtaining of a tax benefit — the very charge that triggers the general rule — even where the structure chosen is one the specific provisions expressly contemplate. And because the transaction is planned in advance, the parties must form a view of its tax consequences before they commit; yet the general rule, applied after the event upon evaluative standards, denies them the advance certainty that the planning requires. The reorganisation is thus the transaction most in need of the certainty that a rule of priority would supply, and most exposed to the uncertainty that the want of such a rule produces.[631]

The point may be put concretely. Suppose a company with accumulated losses is amalgamated into a profitable company, the amalgamation being so arranged as to satisfy every condition of the specific carry-forward provision. The parties have done what that provision invites: they have brought their transaction within the terms on which the legislature has chosen to permit the carry-

bottom, a question whether a standard may override a rule that the legislature has separately enacted.

[629]The Income-tax Act, 1961, s. 95, providing that an arrangement may be declared an impermissible avoidance arrangement and the consequences determined under Chapter X-A 'notwithstanding anything contained in the Act'; contrasted with the provision that the Chapter may apply 'in addition to or in lieu of' any other basis. The tension between the two formulations is the textual root of the priority problem.

[630]The features of a reorganisation as a large, deliberately structured, and long-planned transaction are drawn from the practitioner literature on the conduct of mergers and acquisitions in India; the sensitivity of such transactions to fiscal uncertainty is a recurrent theme of that literature.

[631]The argument that the general rule's after-the-event application upon evaluative standards denies the advance certainty that the planning of a reorganisation requires is central to the case for reform; it is the reorganisation's dependence on advance certainty that makes the priority problem, for this class of transaction, not a theoretical nicety but a practical impediment.

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forward. Yet the revenue, observing that the amalgamation yields a tax benefit and was structured with that benefit in view, might characterise it as an impermissible avoidance arrangement and deny the carry-forward under the general rule, notwithstanding the satisfaction of the specific provision. Whether it may do so is precisely the priority problem; and the parties, who must decide whether to proceed with the amalgamation, can obtain no certain answer from the statute. The example is not fanciful: it is the paradigm case of the reorganisation in which the two regimes collide, and it is replicated, with variations, across the range of reorganisation transactions.[632]

IV. Why Interpretation Does Not Resolve the Problem

It might be supposed that the priority problem, though unaddressed by the text, is nonetheless soluble by the ordinary resources of interpretation: by the maxim that the special governs the general, by the legislative history of Chapter X-A, or by the administrative guidance the revenue has issued. This Part examines each in turn and concludes that none resolves the problem with the certainty the reorganisation context requires.[633]

A. The Special-Over-General Maxim

The maxim generalia specialibus non derogant — that a general provision does not derogate from a special one — appears, at first sight, to resolve the problem in favour of the specific provisions: the carry-forward provision being special and the general rule general, the former should govern. But the maxim is a guide to legislative intention, not a rule of law that overrides it, and it yields where the legislature has indicated a contrary intention. The general rule's own language — that it applies notwithstanding anything to the contrary in the Act — is, on its face, just such a contrary indication, an express statement that the general rule is to prevail over provisions that would otherwise govern. The maxim and the non-obstante clause point in opposite directions, and the maxim cannot be invoked to defeat a non-obstante clause that the legislature has deliberately enacted. The maxim, therefore, does not resolve the problem; it merely restates it, for the question whether the special governs the general is precisely the question the non-obstante clause reopens.[634]

B. The Legislative History

The legislative history of Chapter X-A might be thought to supply the intention the text leaves obscure. The Expert Committee that reported on the draft rules recommended that the general rule should not be invoked where a specific anti-avoidance provision applied, and the Government, in accepting parts of the Committee's report, indicated a measure of agreement with that approach. But the recommendation was not carried into the statute, and a recommendation not enacted is a frail foundation for a rule of priority on which large transactions must depend. The history shows that the priority problem was foreseen and that a solution was proposed; it does not show that the solution was adopted, and the gap between the proposal and the enactment is itself a source of uncertainty rather than a resolution of it. A taxpayer cannot safely order a reorganisation on the strength of a committee recommendation that the legislature declined to enact.[635]

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[632]The example of the loss-company amalgamation satisfying the specific provision yet exposed to the general rule is the paradigm of the priority problem in the reorganisation context; the carry-forward provision (s. 72A) and the general rule (Chapter X-A) are the two regimes whose collision the example exhibits.

[633]The three interpretive resources examined — the special-over-general maxim, the legislative history, and the administrative guidance — are those most likely to be invoked in argument; the conclusion that none resolves the problem with adequate certainty founds the case that the resolution must be legislative rather than interpretive.

[634]On the principle that the maxim generalia specialibus non derogant yields to a contrary legislative intention, and on the effect of a non-obstante clause in displacing provisions that would otherwise govern, see the general authorities on statutory interpretation; the collision between the maxim and the non-obstante clause in s. 95 is the reason the maxim cannot resolve the priority problem.

[635]The Report of the Expert Committee on General Anti-Avoidance Rules (2012) recommended that the general rule not be invoked where a specific anti-avoidance rule applied; the recommendation was not carried into Chapter X-A as enacted. The gap between the recommendation and the enactment is a source of uncertainty, for an unenacted recommendation cannot found a rule of priority on which transactions may safely depend.

C. The Administrative Guidance

The revenue has issued guidance, in the form of answers to frequently asked questions, addressing among other matters the relationship between the general rule and the specific provisions; and the guidance indicates that where a specific provision adequately addresses an arrangement, the general rule will not ordinarily be invoked. The guidance is welcome so far as it goes, but it cannot resolve the problem, for two reasons. First, it is administrative and not legislative: it expresses the view the revenue presently takes, but it does not bind the revenue in law, still less the courts, and a view administratively expressed may be administratively withdrawn. Second, it is qualified: the guidance reserves the general rule for cases where the specific provision does not adequately address the arrangement, and the question whether a specific provision adequately addresses a given arrangement is itself an evaluative question, the answer to which is as uncertain as the priority problem the guidance was meant to resolve. The guidance, in short, relocates the uncertainty rather than removing it.[636]

The conclusion of this Part is that the priority problem is not soluble by interpretation. The maxim restates the problem, the legislative history reveals a solution proposed but not enacted, and the administrative guidance relocates the uncertainty into a fresh evaluative question. None of the three supplies the advance, reliable, legally binding answer that the planning of a reorganisation requires. If the problem is to be solved, it must be solved by the legislature; and the shape of the legislative solution is the subject of the remaining Parts.[637]

V. The Comparative Lesson: The United Kingdom

The priority problem is not peculiar to India. Every system that adds a general anti-avoidance rule to a body of specific provisions must confront the relationship between the two, and the manner in which other systems have confronted it is instructive. The experience of the United Kingdom is especially so, for the United Kingdom enacted its general anti-abuse rule in 2013, with the priority problem expressly in view, and framed the rule so as to address it.[638]

Two features of the United Kingdom rule are relevant. The first is the threshold of abuse. The rule does not apply to every arrangement whose purpose is a tax advantage; it applies only to arrangements that are abusive, and abuse is defined by a demanding test — whether the arrangement can reasonably be regarded as a reasonable course of action, having regard to the policy of the provisions in question. This double-reasonableness test sets the threshold high: an arrangement is not abusive merely because it reduces tax, nor even because it does so deliberately, but only where it cannot reasonably be regarded as a reasonable exercise of the choices the legislation affords. The effect is to confine the rule to the genuinely abusive case and to leave the ordinary structuring of transactions, including the structuring of reorganisations, outside its reach.[639]

The second relevant feature is the rule's relationship to the policy of the specific provisions. The United Kingdom rule directs attention, in determining whether an arrangement is abusive, to whether the arrangement accords with or defeats the policy of the provisions it relies upon. An arrangement

[636] Central Board of Direct Taxes, Circular No. 7 of 2017 (clarifications on implementation of GAAR provisions), addressing inter alia the relationship between the general rule and specific anti-avoidance provisions. Administrative guidance does not bind the courts and may be withdrawn; and its reservation of the general rule for cases the specific provision does not 'adequately' address reintroduces the evaluative uncertainty it was meant to dispel.

[637] The conclusion that the priority problem is soluble only by legislation, and not by interpretation, is the pivot of the paper: it turns the inquiry from what the law is to what the law should be, and it justifies the comparative and reform analysis that follows.

[638] The United Kingdom's general anti-abuse rule was enacted in Part 5 of the Finance Act 2013, following the report of the study group chaired by Graham Aaronson QC (2011), which recommended a narrowly targeted rule rather than a broad one. The rule was framed with the relationship to the specific code expressly in view.

[639] The Finance Act 2013, s. 207, defining abusive tax arrangements by reference to whether the entering into or carrying out of the arrangements can reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions — the so-called double-reasonableness test. The high threshold confines the rule to the genuinely abusive case.

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that obtains a tax advantage in a manner consistent with the policy of the provision conferring it is not abusive; an arrangement that exploits a shortcoming in the provision, or contrives a result the provision did not intend, may be. The effect is to integrate the general rule with the specific provisions rather than to set it above them: the general rule does not override the specific provision but polices its boundary, reaching only those arrangements that defeat the very policy the specific provision embodies. A taxpayer who orders a reorganisation in a manner consistent with the policy of the specific provisions it relies upon is, by that fact, outside the general rule.[640]

The contrast with the Indian position is sharp. In India the general rule is framed in broad terms, its threshold is the obtaining of a tax benefit as a main purpose rather than abuse in any demanding sense, and its relationship to the specific provisions is left unstated. In the United Kingdom the rule is framed narrowly, its threshold is abuse tested by double reasonableness, and its relationship to the specific provisions is built into the definition of abuse. The United Kingdom has, in short, solved by the design of the rule the problem that India has left to interpretation; and the solution it has reached — confining the general rule to arrangements that defeat the policy of the specific provisions — is one that India might adapt to its own statute. The lesson is not that the Indian rule should be replaced wholesale by the United Kingdom rule, for the two systems differ in much; it is that the accommodation of the general and the specific is attainable by legislative design, and that a model for the accommodation lies ready to hand.[641]

VI. The Proposed Reform

The reform this paper proposes follows from the diagnosis. The priority problem is a problem of legislative silence; interpretation cannot fill the silence with the certainty the reorganisation context requires; the silence must therefore be filled by the legislature; and the United Kingdom experience shows the filling to be attainable by design. The proposal is for a statutory rule of priority, inserted into Chapter X-A, in the following terms. Where a specific provision of the Act addresses an arrangement and the arrangement satisfies the conditions of that provision, the general rule shall not apply to deny the consequences the specific provision confers, except where the arrangement, though satisfying the letter of the specific provision, defeats its policy in a manner that cannot reasonably be regarded as a reasonable exercise of the choices the provision affords. The rule has two limbs, and each requires explanation.[642]

The first limb is the immunity. Where an arrangement satisfies a specific provision, the general rule is excluded. This gives effect to the legislative judgment embodied in the specific provision: the legislature, in framing the conditions of the provision, has fixed the boundary of the acceptable for the class of transactions the provision governs, and the taxpayer who brings its transaction within those conditions is entitled to the consequences the provision confers. The immunity restores to the specific provisions their character as reliable rules, on which a taxpayer planning a reorganisation may depend; it removes the spectre of the general rule overriding a provision the taxpayer has satisfied; and it confines the general rule to the field for which it is genuinely

[640]The integration of the general anti-abuse rule with the policy of the specific provisions, such that the rule polices the boundary of the specific provision rather than overriding it, is a structural feature of the United Kingdom model and the feature most worthy of adoption; it reaches only arrangements that defeat the policy the specific provision embodies.

[641]The lesson drawn from the comparison is not wholesale replacement but the more limited proposition that the accommodation of the general and the specific is attainable by legislative design; the United Kingdom model supplies a template for the abuse exception proposed in Part VI.

[642]The proposed rule of specific-provision immunity, qualified by a narrow policy-defeating exception modelled on the United Kingdom double-reasonableness test, is the central contribution of the paper; its two limbs — the immunity and the exception — are explained in the paragraphs that follow.

needed — the field of arrangements that no specific provision addresses.[643]

The second limb is the exception. The immunity is not absolute: it yields where the arrangement, though satisfying the letter of the specific provision, defeats its policy in a manner that cannot reasonably be regarded as reasonable. This guards against the misuse of the immunity as a shelter for arrangements that contrive to meet the letter of a provision while subverting its purpose. The exception is framed narrowly, on the model of the United Kingdom double-reasonableness test, so that it reaches only the genuinely abusive case and does not reintroduce, by the back door, the very uncertainty the immunity was meant to remove. An arrangement that satisfies a specific provision in a manner consistent with its policy enjoys the immunity; only an arrangement that satisfies the letter while defeating the policy, and does so in a manner no reasonable person could regard as reasonable, falls within the exception and is exposed to the general rule.[644]

Three objections to the proposal may be anticipated and answered. The first is that the immunity would emasculate the general rule, depriving the revenue of a power the legislature deliberately conferred. The answer is that the immunity leaves the general rule its proper field — arrangements no specific provision addresses — and confines it only where a specific provision already embodies a legislative judgment; far from emasculating the rule, the immunity rationalises it, directing it to the gaps the specific provisions leave rather than allowing it to override the provisions themselves. The second objection is that the exception, by reintroducing an evaluative test, reintroduces the uncertainty the immunity removes. The answer is that the exception's threshold is far higher than the general rule's: the general rule applies to any arrangement whose main purpose is a tax benefit and which lacks commercial substance, while the exception applies only to an arrangement that defeats the policy of a specific provision in a manner no reasonable person could regard as reasonable. The residual uncertainty is confined to the genuinely abusive case, which no taxpayer ordering a bona fide reorganisation need fear.[645]

The third objection is that the reform is unnecessary, the administrative guidance having already indicated that the general rule will not be invoked where a specific provision applies. The answer has been given in Part IV: the guidance is administrative, not legislative; it does not bind the courts; it may be withdrawn; and its own qualification — that the general rule is reserved for cases the specific provision does not adequately address — reintroduces an evaluative uncertainty. A reform that placed the priority rule in the statute would give it the binding force, the permanence, and the precision that the guidance lacks. The objection, in truth, concedes the substance of the reform while disputing its necessity; but the necessity follows from the inadequacy of the guidance, which the objection does not meet. The reform is necessary precisely because the guidance, welcome as it is, cannot do the work that only legislation can do.[646]

VII. Conclusion

The taxation of corporate reorganisations in India is governed by two kinds of anti-avoidance provision whose relationship the statute has left unsettled. The specific provisions embody legislative judgments about the boundary of the acceptable, fixed in advance and relied upon by those who plan reorganisations; the general rule, introduced later and framed broadly, threatens

[643]The immunity limb gives effect to the proposition, advanced in Part II, that a specific provision embodies a legislative judgment about the boundary of the acceptable; by restoring the specific provisions' character as reliable rules, it supplies the advance certainty that the planning of a reorganisation requires.

[644]The exception limb, framed narrowly on the model of the United Kingdom test, guards against the misuse of the immunity to shelter arrangements that meet the letter of a provision while subverting its policy; its narrow framing prevents the reintroduction of the uncertainty the immunity removes.

[645]The first two objections — emasculation of the general rule and reintroduction of uncertainty through the exception — are answered by the structure of the proposal: the immunity confines the general rule to the gaps the specific provisions leave, and the exception's high threshold confines residual uncertainty to the genuinely abusive case.

[646]The third objection, that the administrative guidance makes the reform unnecessary, concedes the substance of the reform while disputing its necessity; the necessity follows from the guidance's want of binding force, permanence, and precision, which only legislation can supply.

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to override those judgments by an evaluative standard applied after the event. The statute does not say which is to prevail, and the resources of interpretation cannot supply the answer with the certainty that large, deliberately structured, long-planned transactions require. The comparative experience of the United Kingdom shows that the relationship can be settled by legislative design, by confining the general rule to arrangements that defeat the policy of the specific provisions. This paper has proposed that India adopt a like solution: a statutory rule of specific-provision immunity, qualified by a narrow abuse exception, that would restore to the specific provisions their character as reliable rules while preserving the general rule for the field it was genuinely meant to occupy. The reform is modest in its means and considerable in its effect, for it would replace an uncertainty that deters and distorts the reorganisation of Indian business with a certainty on which that reorganisation could safely proceed. In a fiscal system that aspires to facilitate rather than to obstruct the efficient allocation of capital, the settlement of the priority problem is not a technical refinement but a measure of real and practical consequence.[647]

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[647] The conclusion gathers the argument: the statutory silence, the inadequacy of interpretation, the comparative solution, and the proposed reform; it rests the case for reform on the replacement of a deterring and distorting uncertainty with a certainty on which the reorganisation of business may safely proceed.

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