

A General Anti-Abuse Rule

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The consultation document 'A General Anti-Abuse Rule' has been published by HM Treasury. This document sets out the detail of how the Government proposes to introduce the general anti-abuse rule (GAAR) announced in this year's Budget.

Background

The idea of a GAAR was first raised by this government in the June 2010 Budget immediately after the election. This was not the first time the concept of a UK GAAR had been raised, and a GAAR was consulted on by the Labour Government in the 1990s, having first been suggested in the 1997 Budget and a consultation having been commenced in 1998. In the end no legislation was produced, and this is instructive context setting against which to measure the new proposals.

Since the first announcements under the present Government, Graham Aaronson QC produced a report in November setting out proposals for how a GAAR could work and be integrated (interestingly Graham Aaronson QC was president of the Tax Law Review Committee when it produced its 1997 report 'Tax Avoidance' investigating the possible introduction of a GAAR).

Why now?

The political momentum behind the introduction of a GAAR has gathered pace, in an environment where there is seemingly ever more focus on taxpayers paying their 'fair share' – even if there is little agreement or understanding of precisely what that means. How, therefore, should a GAAR be drafted?

It should be noted, that while the UK does not have a statutory GAAR, for many years now courts have sought, where possible, to apply a purposive interpretation to tax statutes to deny tax advantages in circumstances where to allow them could be considered abusive. Courts are not immune to public and political opinion and in recent years have sought to apply the Ramsey doctrine in ever wider circumstances. This has led to considerable uncertainty for both taxpayers and HRMC as to where the line is drawn between legitimate tax planning and illegitimate tax abuse. Further to the extent that what constitutes abuse can be discerned, whether that abuse can be counteracted under the Ramsey doctrine will depend on the drafting of the particular statute under consideration. If the GAAR can correct this confusion and inconsistency of approach, without infringing on legitimate tax planning, then it may be welcomed by both HRMC and taxpayers alike. Indeed, in February the CBI said that it backed the introduction of a GAAR, and there can be no doubt that if a GAAR can introduce greater certainty within the UK tax system without being cast too wide, then it is to be welcome.

As announced, the proposed GAAR closely follows that suggested by Graham Aaronson QC in his 2011 report, but with some notable differences.

The Tests

The GAAR is intended as a targeted rule, rather than a broad spectrum one and is intended to catch "artificial and abusive arrangements", rather than "the centre ground of tax planning".

To achieve this targeted approach, the GAAR co-opts the existing test of whether the "obtaining of a tax advantage was the main purpose, or one of the main purposes" of an arrangement. While this is set up as a filter, any business or individual who does not consider the incidence of taxation in making arrangements is likely to be overlooking a fundamental consideration. Indeed, this is a problem frequently encountered some current anti-avoidance rules, where taking tax advice can mean that tax avoidance is treated as being a main element of planning.

To further target the GAAR, arrangements will need to be considered as abusive. To determine what is abusive a "double reasonableness" test is proposed, so that arrangements are abusive if they "cannot reasonably be regarded as a reasonable course of action". The proposed indicia of such arrangements can be summarised as ones where the tax effect of an arrangement is out of proportion to the economic purposes, so including for example schemes such as that recently examined in the Eclipse 35 case.

The Sanction

Where an abusive arrangement is identified, it will be counteracted on a 'just and reasonable' basis. On the basis that anything other than just and reasonable action must necessarily be unjust and unreasonable, this would seem to be impossible to object to. However, such a test can only be applied subjectively and therefore gives no certainty as to what an outcome may be.

The taxes included

The GAAR will apply to income tax, corporation tax, capital gains tax, petroleum revenue tax, national insurance contributions, the bank levy, inheritance tax, stamp duty land tax as well as the new taxes for high value residential property.

The Framework

For the GAAR to be invoked, the burden is on HMRC to demonstrate to a Tribunal that the arrangements are abusive and the counteraction just and reasonable. However, the GAAR also incorporates the Advisory Panel proposed by Aaronson, which will issue opinions on whether the GAAR should be applied in a particular case. However, the opinions issued by the Advisory Panel will not be binding.

Regrettably, it seems no account has been taken of suggestions for a pre-transaction clearance procedure, which would do much to mitigate the uncertainty which ironically may be exacerbated, at least initially, by a GAAR. If this is simply because there is insufficient HMRC manpower to operate such a procedure, this is a great shame, and hopefully during consultation this can be taken on board.

The key role of guidance

It is the role of guidance and non-statutory material that distinguishes the GAAR from the approach taken by conventional targeted anti-avoidance legislation. In determining whether or not an arrangement is abusive in the context of existing legislation, a Court or Tribunal will have to have regard to:

- (i) the principles on which that legislation is based (whether express or implied);
- (ii) the policy objectives of that legislation; and
- (iii) any shortcomings in them that the legislation is intended to exploit.

By forcing a purposive interpretation of tax legislation on Courts and Tribunals in all circumstances would seem to be an attempt to incorporate in statute HMRC's previously expressed view of tax avoidance being "a situation where less tax is paid than Parliament intended" thus incorporated by reference to express principles and policy objectives, or "[a situation where] more tax would have been paid, if Parliament turned its mind to the specific issue in question" which is presumably to be incorporated by reference to implied principles.

This also addresses what HMRC might regard as the flaw in the Ramsey doctrine, in that a purposive interpretation cannot be applied to recharacterise an arrangement in circumstances where the legislation is sufficiently prescriptive and thereby ensures a consistency of approach across all legislation.

The Consultation reaffirms the importance of guidance in determining the scope of a GAAR, but does not take the step proposed by Aaronson of making that guidance binding. It has also rejected publishing the opinions issued by the Advisory Panel, preferring to retain taxpayer confidentiality as sacrosanct.

So where are we now

While the consultation sketches the skeletal outline of a GAAR and its operation, it leaves rather more questions unanswered than answered. In particular:

- (i) How can taxpayers rely on guidance which is non binding – and how can certainty be introduced in such shifting sands?
- (ii) How is the GAAR to interact with the existing, and significant, range of anti-avoidance provisions in the UK tax code, both practically and conceptually – are they to be phased out, and if so when?
- (iii) How is the GAAR to achieve taxpayer confidence? As the CBI support indicated, a GAAR may well be a good thing if properly drafted. In this respect while clear and comprehensive guidance will undoubtedly be helpful, it is regrettable that the Government has proposed that this should be prepared by HMRC and not supported the Aaronson Report's proposal for the Advisory Panel itself to produce guidance, independently from taxpayers and HRMC. This may well serve to undermine taxpayer confidence in the GAAR and lead to it being treated as a sword for HRMC to attack legitimate tax planning, rather than simply the shield against tax abuse proposed by Aaronson.

Summary

In constructing a GAAR the difficult task is not to ensure that it will catch "morally repugnant" tax avoidance, but to ensure that legitimate commercial arrangements are not caught and that taxpayers and HMRC alike will be able to determine where the line is drawn. However, as proposed, it seems that it will be many years before a comprehensive body of guidance and judicial decisions emerge and this certainty is achieved. This is regrettable as the main purpose of a GAAR should be to increase certainty for Parliament, HMRC and taxpayers alike. On the basis of the Consultation document, it seems unlikely that this will be achieved and an opportunity will have been missed. The consultation closes on 14 September, and it is to be hoped that every opportunity will be taken by taxpayers and professionals to participate and ensure the GAAR is made as workable, effective and helpful and it should be.

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