

The UK's New General Anti-Abuse Rule (GAAR)

9 July 2013

INTRODUCTION

The UK is introducing a General Anti-Abuse Rule (GAAR). This follows the Government's stated intention in 2010 to legislate for a general measure to prevent abuse of the tax code through tax schemes or avoidance arrangements. Following several rounds of consultation, the GAAR will come into force when the Finance Bill 2013 receives Royal Assent, which is expected in mid-July 2013.

The intention of the GAAR is to augment the existing provisions and any targeted anti-avoidance rules (often referred to as TAARs) in order to allow the UK tax authorities to counter perceived abusive arrangements by invoking the GAAR rather than seeking resolution through the courts.

A SHIFTING LANDSCAPE

A tax payer's right to arrange his affairs in a tax-efficient manner has been keenly debated in tax cases down the years. Important principles have been established in cases such as the Duke of Westminster, Ramsay and Furniss v Dawson where a taxpayer's actions have fallen on either side of the dividing line in what was considered legitimate.

Tax statutes have become increasingly complex and lengthy and have been accompanied by a growing body of case law. In recent years, the courts have increasingly adopted a purposive interpretation of legislation in imposing the will of Parliament, as opposed to a more literal approach adopted previously. The GAAR draws upon such a purposive approach and accordingly it has been widely drafted.

KEY DEFINITIONS OF THE GAAR

In line with existing anti-avoidance measures, the GAAR seeks to counter tax-motivated arrangements where "obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements".

A tax advantage is one which reduces or avoids a tax liability through any means (including for example, claiming excessive tax relief, increasing tax repayments or obtaining timing advantages).

"The main purpose, or one of the main purposes" is given its everyday meaning. It may be evident if obtaining a tax

advantage was "the main purpose" of an arrangement, but it may be more difficult to determine whether a tax advantage was "one of the main purposes". To determine the latter, it would be necessary to review all the circumstances and if the arrangements were changed with a resultant tax advantage, which may otherwise not have been the case had the arrangements not been altered, the GAAR may then apply.

Tax arrangements are considered "abusive" if they do not pass the so-called double reasonableness test. As drafted, arrangements fall foul of the new rules where they "cannot reasonably be regarded as a reasonable course of action." This double reasonableness test has been hotly debated during the consultation period. A reasonable course of action is viewed by reference to the relevant tax provisions and (if present) the intended policy effect of those provisions. The second leg of this test is whether it is reasonable to view the arrangements as a reasonable course of action, that is to say, the courts are obliged to consider a range of reasonable views as to whether a tax payer pursued a reasonable course of action.

WHAT TAXES DOES THE GAAR APPLY TO?

- The GAAR applies to:
- income tax
- capital gains tax
- inheritance tax
- corporation tax (or related charges)
- petroleum revenue tax
- stamp duty land tax, and
- the (new) annual tax on enveloped dwellings.
- Separate measures will implement a GAAR for national insurance contributions.

HOW WILL THE GAAR OPERATE IN PRACTICE?

The key features of the GAAR are set out below:

The burden of proof that a taxpayer has entered into abusive arrangements will be with HM Revenue & Customs (HMRC).

The courts can take into account any relevant material in applying the GAAR. There is a broad carve-out from the GAAR in so far as a transaction/ arrangement may be established practice at the time it was entered into.

HMRC are required to consult a newly-appointed Advisory Panel as to whether the GAAR should apply. The Panel will consist of experienced tax professionals and will provide views on whether a course of action was reasonable (a so-called single reasonableness test). It should be noted, however, that HMRC are not bound by the views of the Advisory Panel since the Panel is not sitting in a judicial capacity.

There will not be a pre-transaction clearance procedure which would allow taxpayers to determine whether the GAAR applies to their circumstances.

- If the GAAR is invoked successfully, a taxpayer's liabilities will be adjusted on a just and reasonable basis.
- While there are no penalties associated with application of the GAAR, if the GAAR is invoked and a taxpayer is not considered to have taken due care with their tax affairs (e.g. self assessment), then penalties may be applied under the relevant regime.

CONCLUSION

HMRC have published guidance as to how they expect the GAAR to apply to specific taxes in specific circumstances. What is clear is that HMRC expect the GAAR will have effect in circumstances which are similar to those where a taxpayer entered into abusive or artificial arrangements which HMRC successfully challenged through the courts. It is also clear that HMRC do not regard the GAAR as applying to sensible and acceptable tax planning. In addition, the GAAR shall not apply to international arrangements (and double tax treaty claims).

Taxpayers and tax professionals alike have expressed reservations as the GAAR legislation is widely drafted. Over time it may be invoked in circumstances which are currently perceived to be outside of its ambit and currently considered acceptable tax planning, and that this lingering uncertainty is unwelcome. Taxpayers should consider the merits of making additional disclosures about specific arrangements if they are in doubt about the application of the GAAR since this could at least reduce the risk of a discovery assessment and penalties.

In summary, the GAAR is intended as an additional deterrent to taxpayers entering into specific arrangements as it provides an additional weapon in HMRC's armoury to counter what it considers abusive tax avoidance. While the GAAR guidance is helpful, until the new legislation is tested in the courts, its scope and exact application remain uncertain.

The information contained in this document is for information only. It is not a substitute for taking professional advice. In no event will Dixon Wilson accept liability to any person for any decision made or action taken in reliance on information contained in this document or from any linked website.

This firm is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Institute of Chartered Accountants in England and Wales. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

The services described in this document may include investment services of this kind.

Dixon Wilson
22 Chancery Lane
London
WC2A 1LS

T: +44 (0)20 7680 8100
F: +44 (0)20 7680 8101
DX: 51 LDE

www.dixonwilson.co.uk
[dw@dixonwilson.co.uk](mailto:dixonwilson@dixonwilson.co.uk)