

A step closer to a UK General Anti-Avoidance Rule?



Shortly after coming to power in May 2010, the UK Coalition Government appointed Graham Aaronson QC as head of a committee of tax experts charged with considering whether the UK should adopt a general anti-avoidance rule, or GAAR. This committee has now reported, concluding that a GAAR should be adopted and proposing a draft.

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The proposed UK GAAR is very different from many others around the world. In particular, its scope is intended to be limited, so it would only catch schemes that are truly objectionable (which it calls "abnormal arrangements achieving abusive tax results"). Probably the key limitation is that the proposed GAAR could only apply where a scheme could not reasonably be regarded as a reasonable exercise of choices of conduct afforded by tax law.

The idea is that the GAAR would sit above existing UK statute and case law. It should not affect existing principles of legislative interpretation developed over the years by the courts. Instead, if a scheme had passed the test of effectiveness on general principles (ie it delivered the intended tax result when the law is applied to it in accordance with the principles of construction established in case law), the scheme would then also have to be tested against the GAAR.

The key benefits are seen as follows:

- It would provide a deterrent against the most aggressive forms of tax planning, and so level the playing field as between businesses (and advisers) who are prepared to engage in very aggressive planning and those which are not.
- The desire of judges to defeat tax schemes has led in a number of cases to decisions which are difficult to justify on legal grounds, in a graphic illustration of the old adage that "hard cases make bad law". With a GAAR sitting behind the general law, judges should not need to be tempted to stretch or even break existing threads of legal reasoning in order to find against an aggressive scheme, since the GAAR should do the job for them.
- Future legislation should be able to be made simpler, as it should need less of the specific anti-avoidance rules which have contributed so much to the complexity of the UK tax system.

The proposed GAAR has a number of safeguards. Most unusual is the suggestion that an Advisory Panel should be formed with a majority of non-HMRC members, which after receiving representations from HMRC and taxpayers would offer a view as to whether it was reasonable for HMRC to invoke the GAAR in any particular case. Given the drafting of the GAAR itself, a court would be expected to find for the taxpayer in any case where the Advisory Panel did not support the use of the GAAR.

Initially it is proposed that the GAAR should apply only to the main direct taxes – income tax, capital gains tax, corporation tax and petroleum revenue tax, along with national insurance. It is envisaged that it would later be extended to other taxes, in particularly stamp duty land tax. However VAT is expected to remain outside the GAAR since it is derived from European law and accordingly has its own anti-abuse rules.

No clearance system is proposed, although where existing statutory clearance procedures are in place it would be possible to add to the wider clearance application a request for confirmation that the GAAR would not be invoked. GAAR specific clearances are not considered necessary due to the very limited scope of the proposed rules.

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There is no guarantee that the committee's recommendations will be accepted by the government, and if they are not the idea will presumably die. The government has indicated it will respond to the report in the March 2012 Budget (which would suggest that any implementing legislation will be no earlier than 2013). Given the current public sentiment against tax avoidance and the probable publicity around the announcement that Graham Aaronson's committee has recommended the introduction of a GAAR, it would seem likely that there will be considerable political pressure to proceed.

How to find out more

If you have any questions or would like to know more about how these issues may be relevant to you, please contact Simon Yates or your usual contact in the Travers Smith Tax Department.

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