A review of cases that have gone to the GAAR panel: what can we learn?

Management of taxes



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A brief review of cases that have gone to the GAAR panel since its inception, the common themes that they highlight and what we can learn from them.

Key Points

What is the issue?

The purpose of the General Anti Abuse Rule is to act as an overarching deterrent to any scheme looking to exploit loopholes and implement planning at odds with the spirit of the legislation.

What does it mean for me?

Of the 19 published opinions we have seen, at least 80% relate to some form of contrived employment scheme.

What can I take away?

It might be useful to taxpayers and their advisers to have a broader range of opinions from the GAAR Advisory Panel to help them to understand how and when the GAAR will apply.

The UK General Anti Abuse Rule (GAAR) was introduced in April 2013 (and applies to arrangements entered into on or after 17 July 2013) in order to remove any tax advantages gained by an action that is deemed to be *abusive*.

Note that there are separate Scottish and Welsh GAAR regimes that apply to taxes devolved in Scotland and Wales. These GAARs are **not** the same as the UK GAAR and are beyond the scope of this review. Care is needed when dealing with transactions involving both devolved and reserved taxes or transactions that span more than one jurisdiction.

The UK-wide GAAR applies where tax arrangements are abusive with reference to the well-known ‘double reasonableness test’ which is set out in the GAAR legislation; i.e. any arrangements that ‘cannot reasonably be regarded as a reasonable course of action, having regard to all the circumstances’.

When applying the ‘double reasonableness’ test, regard must be had as to whether the substantive results of the arrangement are consistent with the principles underlying the legislative provisions or if the arrangements are intended to exploit any shortcomings in those provisions. It is also important to identify whether there are any contrived or abnormal steps contributing to achieving the desired results.

The GAAR covers income tax, capital gains tax, inheritance tax, corporation tax, petroleum revenue tax, stamp duty land tax, annual tax on enveloped dwellings, diverted profits tax, apprenticeship levy and NICs, so there is no escaping its long reach. However, it does not apply to VAT.

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GAAR Advisory Panel

The GAAR Advisory Panel was established to review and approve HMRC's guidance on the GAAR and to provide opinions pertaining to the reasonableness of tax arrangements on cases referred to it, where HMRC considers that the GAAR may apply. Specific cases may be referred to the Panel or a generic referral may be made in respect of a set of tax arrangements. The Chair of the Advisory Panel appoints a sub-panel of three members of the Panel to consider any specific reference and to produce an opinion.

If the GAAR applies (and the burden of proof is on HMRC to show that arrangements are abusive), then HMRC can make a just and reasonable tax adjustment to counteract the abusive tax advantage (and recoup any lost revenue) that the taxpayer is seeking to obtain.

HMRC guidance

HMRC has devoted significant resources over the years to producing comprehensive guidance on the application of the GAAR. The guidance is updated as and when necessary, with the latest update being issued in July 2021 to incorporate the changes made by Finance Act 2021 bringing the taxation of partnerships within the regime.

The HMRC guidance gives numerous examples of scenarios where the taxpayer is entirely at liberty to exercise their freedom to pursue a commercial or personal choice without contravening the GAAR, making it clear that ordinary routine planning is not caught by the rule.

Panel opinions

Although there are specific rules relating to provisional and protective notices, broadly HMRC may not counteract tax advantages under the GAAR unless those arrangements (or their equivalent) have first been referred to the Advisory Panel for its opinion. In determining any issue in connection with the GAAR, a tribunal or court must take into account the opinion of the Panel, although it does not need to follow the opinon.

Any issued GAAR opinion will state the outcome that:

1. entering into the arrangements was a reasonable course of action;

2. it was not a reasonable course of action; or

3. it is not possible to reach a view on the information supplied to the Panel.

If the members of any sub-panel cannot agree, they may produce individual opinions. To date, a single opinion has always been issued.

The GAAR Advisory Panel opinions are published in redacted and anonymised form. The HMRC Guidance does make it clear that it may not always be possible to publish specific opinions if taxpayer confidentiality is put at risk by doing so. Clearly, one cannot know what has not been published (and so for the purposes of this article there are potentially inherent limitations to what we can learn from the operation of the GAAR). However, it should be noted that on 1 April 2019 in a Parliamentary written answer, Financial Secretary Mel Stride said: 'HMRC is actively using the GAAR [and] to date, all cases referred to the GAAR Advisory Panel have resulted in a Panel opinion in HMRC's favour.'

Since the GAAR was first introduced, we have seen a total of 19 published opinion notices. In 2020/21, we saw just two published opinions compared with six in 2019/20 and four in 2018/19. It is clear that the GAAR is not a 'high volume' operation. However, according to the HMRC 2020/21 Annual Report, since the introduction of the GAAR HMRC has issued over 3,700 GAAR opinion notices applying opinions of the Advisory Panel. It would therefore be wrong to infer that the GAAR has been applied in just 19 cases. This demonstrates that HMRC has typically sought to apply the GAAR to marketed schemes.

Covid undoubtedly will have had an impact over the last couple of years and, of course, the appetite for tax risk is significantly lower than it ever has been, but is the usefulness of the GAAR dwindling and if so why?

Cases to date

Of the 19 published opinions we have seen, at least 80% relate to some form of contrived employment scheme. To provide a taster, a recent GAAR opinion, published in July 2021, examined a convoluted scheme around employee reward arrangements. The Panel concluded that it didn't believe Parliament intended loans to a person from a trust made out of funds deriving economic value earned by that person's activities as a director, to escape Income Tax (Earnings and Pensions) Act 2003 Part 7A – a result that would come as no real surprise to an experienced tax

practitioner. Employment schemes have occupied an overwhelming majority of time incurred by the GAAR Panel.

What does this repetitive pattern of referrals with predictable outcomes tell us about how HMRC is using the GAAR Panel (except that maybe the Panel themselves are growing tired of the lack of variety)?

In a statement on Employee Reward Arrangements (published on 14 July 2021), the Panel states:

> ‘A high proportion of the cases referred to the Panel have involved arrangements for the tax-free extraction of cash/value by an owner/director from their owner managed company. In each case, the relevant sub-Panel has come to the conclusion that the arrangements were contrived and not consistent with the principles of the legislation. We do not regard the arrangements in this case as exceptional and it should come as no surprise that we reach a similar conclusion to that reached in the earlier cases.’

It is certainly curious as to why so many similar schemes are going to the GAAR Panel, when one might consider that the outcome should be obvious with reference to a clear legal technical argument. In the realms of ‘employment tax avoidance’ cases, there is potentially a public policy argument underpinning the referrals. The legislation in this area is so complex and judicial outcomes unpredictable, with stakes so high (the risk that millions of moderately paid NHS workers or teachers are being sold schemes to take them out of the tax net) that a GAAR referral represents a reliable channel for counteraction for HMRC and additional security should the matter go to tribunal.

An interesting statement was made in the latest GAAR opinion notice issued 11 February 2022 at para 9.8:

> ‘We are not concerned with the detailed technical provisions of the legislation – that is for HMRC and the taxpayer to consider and debate. What the Panel is concerned with is the principles underlying the legislation. It seems to us that the principles are all about imposing tax on value passing to a director from the company; the policy is that such value should be taxed. In this case we believe that [X] has received value from the company by way of the reduction in the balance of his overdrawn loan account. Accordingly, we consider that the policy behind Part 7A ITEPA 2003 is therefore in point.’

But what about for the taxpayer? Is this pattern of repetitive referrals a satisfactory use of the Panel's time and expertise? We can see clearly that employment schemes don't work but wouldn't it be helpful if we had more breadth of opinions in order that we could see a range of scenarios where the GAAR will bite? Given that any penalty for contravention is up to 60% for tax arrangements entered into on or after 15 September 2016 – what about taxpayers looking to exit film schemes – where might the parameters of the GAAR apply in such scenarios? The limited application so far certainly makes it more worrying for the taxpayer embroiled in schemes unclear as to how it will affect any outcome.

When the GAAR was first introduced, we all expected more variety in the cases that might come before it. During a speech at Oxford University, Patrick Mears, first Chair of the GAAR Advisory Panel, stated that he did not expect the Advisory Panel to give any opinions in the first 18 to 24 months while they bedded in and concentrated on the Guidance but specifically said except for stamp duty land tax matters, about which it may have to opine sooner. We are yet to see anything looking at stamp duty land tax. Arguably, the Supreme Court decision in *Project Blue* [2018] UKSC 30 mitigated the risk originally presented by stamp duty land tax avoidance schemes.

Conclusion

If the GAAR discourages the introduction of endless complex and lengthy anti-avoidance legislation, then has to be a good thing. The Panel are an esteemed group of experts in their field and any opinion they offer will be considered and of great interest. But there is little for taxpayers or the profession to take away going forward if each opinion is largely the same as the previous one.

The GAAR is a part of the general UK tax system and, as such, a taxpayer should take the GAAR into account when considering any form of tax planning, as well as filing his tax return (which is not a straightforward task for taxpayers or their advisers).

Given this, it might be useful to taxpayers and their advisers to have a broader range of opinions from the GAAR Advisory Panel to help them to understand how and when it will apply. Given that it is understood to be a key weapon in the armoury to fight tax avoidance, perhaps it is not used enough.