



The Law Society

# **The General Anti-Abuse Rule**

Response of the Law Society of England and Wales

September 2012



## **Introduction**

The Law Society is the representative body for over 145,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others.

We are pleased to have the opportunity to respond to the Consultation Document on a General Anti-abuse Rule published on 12 June 2012.

This response has been prepared on behalf of the Law Society by the members of the Tax Law Committee. The Committee is made up of senior and specialists tax lawyers from across the country.

## **Uncertain scope of the GAAR**

We have no objection to the introduction of a GAAR which counteracts highly abusive, contrived and artificial arrangements having no commercial purpose other than tax avoidance. This is the kind of GAAR recommended by the Study Group and accepted, in principle, by the Government. However, for the reasons set out in these representations, we are very concerned that the GAAR proposed in the Consultation Document is not restricted to these kinds of arrangements. As a result, it risks introducing considerable uncertainty into UK tax law and adversely affecting the attractiveness of the UK as a place in which to do business.

## **Scope of taxes and duties covered by the GAAR**

We do not object to the extension of the GAAR, contrary to the advice of the Study Group, to IHT and SDLT.

However, in relation to IHT, we believe that clause 2(4)(d) of the GAAR will often be inappropriate. Family gifts, transfers into family trusts and transactions at an undervalue are perfectly normal transactions which are not in any way abusive. They fall within clause 2(4)(d), because they are not commercial transactions between parties acting at arm's length. This is true of other personal taxes (e.g. CGT). We believe that the legislation (preferably and, if not, the guidance) should make it absolutely clear that normal transactions which are not in the commercial sphere should not be regarded as falling within the scope of the GAAR simply by reason of the fact that they do not take place on commercial terms.

In relation to SDLT, we do think that there is a strong case for the repeal of section 75A FA 2003 if and when a GAAR is introduced, irrespective of the approach to other TAARs.

## **“Main purpose” test**

The “main purpose” test in clause 2(1) of the GAAR would be a useful filter if effect were given by the courts to the definition of “tax avoidance” adopted in *CIR v Challenge Corpn Ltd* [1986] STC 548, per Lord Templeman at pp 554-555, and *IRC v Willoughby* [1997] STC 995, per Lord Nolan at pp 1003-1004. According to these cases, tax mitigation (or normal tax planning) involves the taxpayer taking a course of action (e.g. reducing his taxable income or increasing his allowable expenditure) which accords with the purpose and spirit of the legislation. This may be in response to a fiscally attractive option expressly made available by the legislation (e.g. taking out an ISA) or it may involve a course of action implicitly envisaged by the legislation (e.g. two spouses taking advantage of the principle of independent taxation by equalising their savings). By contrast, tax avoidance involves the taxpayer taking a course of action “designed to conflict with or defeat the evident intention of Parliament”. The same is true of the EU law concept of “abuse of law” (see *Halifax plc v C&E* [2006] STC 919).

However, the majority of decided cases involving main purpose tests disregard the requirement for the taxpayer to have embarked on a course of action designed to frustrate the will of Parliament. They simply ask, following the approach to the term “tax avoidance” (and the wider term “tax advantage”) taken by the courts in the cases concerning transactions in securities, whether one of the taxpayer's main purposes was to “improve his position vis-à-vis the Revenue” (*IRC v Trustees of the Sema Group Pension Scheme* [2003] STC 95). It is irrelevant that the actual transaction carried out by the taxpayer (which is more tax advantageous than the hypothetical comparator transaction) may itself be wholly commercial and fully accord with the purpose of the legislation. All that matters is whether the improvement in the taxpayer's position vis-à-vis the Revenue is a main purpose of the transaction, or,

alternatively, mere “icing on the cake”. There was no suggestion in *Sema* that the carrying out by the pension scheme of a transaction giving rise to repayable tax credits conflicted with or defeated the evident intention of Parliament or that Parliament would have restricted the availability of repayable tax credits to pension schemes and charities if it had thought about it. All that mattered was (i) that the share sales in question carried repayable tax credits which were not carried by their comparator transaction, and (ii) that those sales were motivated by the desire to obtain the tax credits. The tax credits were not, therefore, merely an incidental benefit of a wholly commercial transaction.

Accordingly, we do not regard the “main purpose” test in clause 2(1) of the GAAR as a useful filter, because it will not filter out of the GAAR either tax mitigation transactions or tax planning transactions, unless (as a matter of fact) the improvement in the taxpayer’s position is merely incidental. In our view, there should be two elements to the filter: (i) the purpose of the statute, and (ii) the taxpayer’s subjective purpose. This could be achieved by amending the final words of clause 2(1) to read:

“... the obtaining of a tax advantage which is inconsistent with the principles on which the relevant tax provisions are based and their policy objectives was the main purpose, or one of the main purposes, of the arrangements”.

We do not agree that, as proposed in the current version of clause 2(1), the subjective “main purpose” test should be applied objectively. As is the case with most TAARs, the test should not only be a subjective test but it should also be applied subjectively.

If the test was applied subjectively, we would agree that there would be no need for a specific exclusion for arrangements without tax intent.

#### **“Double reasonableness” test: non-abusive tax mitigation v abusive avoidance**

We do not agree that the “double reasonableness” test in clause 2(2) operates, as intended, to counteract only artificial and abusive schemes.

As mentioned above, clause 2(1) (as currently drafted) operates to filter out of the GAAR only tax mitigation transactions where the improvement in the taxpayer’s position is merely incidental. All other tax planning is potentially within the GAAR. The intention is that clause 2(2) should filter out of the GAAR so much of this remaining tax mitigation and tax planning as is not abusive. The line between non-abusive tax mitigation or planning and abusive tax avoidance is drawn by asking whether the arrangement is a reasonable course of action. In our view, this method of drawing the line will give rise to substantial uncertainty and subjectivity. A reasonableness test purports to be an objective test but will, in practice, be a subjective test, because it will inevitably be approached from an individual social, moral or ethical perspective. Some commentators have called it a “smell test”. No taxpayer will ever be completely confident of being able to convince the court that a course of action which is designed to improve his tax position is a reasonable course of action, even if it does not contain any element of artificiality or exploit the legislation in a way not intended by Parliament. If so, the line will be drawn such that:

- the scope of non-abusive tax mitigation is highly uncertain; and
- the scope of non-abusive tax planning is very narrow indeed or non-existent.

That is not what the Study Group recommended, nor is it what the Government said that it intended in accepting the recommendation. In effect, what is being sold as a general anti-abuse rule will be a general anti-avoidance rule.

In our view, therefore, it is essential that the line between non-abusive tax mitigation or planning and abusive tax avoidance should be drawn by more objective and principled factors than the concept of reasonableness or at least that there should be a more objective and principled filter before the reasonableness test is reached. We believe that the GAAR should only apply to tax avoidance schemes which are artificial and contrived. The illustrative GAAR in the Study Group Report used emotive drafting which at least gave the feel of its being targeted exclusively at artificial or contrived schemes and distinguished the GAAR from other avoidance rules. While we agree that the current drafting is simpler and easier to follow, that effect – that the GAAR is a special rule and to be interpreted differently – has been lost.

We acknowledge that the illustrative GAAR did have at its core a reasonableness test. However, for the reasons we have already stated (uncertainty, subjectivity), we believe that a reasonableness test should be rejected or should, at least, be subordinate to a more objective and principled filter. Instead, the touchstone on which the applicability of the GAAR is tested should be artificiality. A tax motivated transaction which does not involve any artificial or contrived steps should be regarded as non-abusive and, therefore, outside the GAAR. This is a more objective test which would substantially reduce the uncertainty to which the GAAR will otherwise give rise. It would catch all of the schemes in Annex B.

The restriction of the GAAR to avoidance schemes that are contrived and artificial could be expressed in a new clause 1(2), so that all normal tax planning and non-abusive tax avoidance arrangements are immediately filtered out. The new clause should define the scope of the GAAR (and reinforce the purpose set out in clause 1(1)) by reference to these concepts. It would have the incidental effect of causing the operative provisions of the GAAR to be interpreted in a manner which is consistent with it.

An illustration of what we have in mind as a more objective and principled filter is:

“1(2) Notwithstanding any other provisions of this Part, this Part only applies to arrangements which:

- are designed to conflict with, or defeat, the evident purpose of any provision of any of the enactments relating to the taxes mentioned in section 1(4); and
- comprise one or more elements which are artificial or contrived.”

We would add that artificiality is the cornerstone of the EU law concept of “abuse of law” (see, again, *Halifax plc v C&E* [2006] STC 919) and that Jamaica’s GAAR is based on “artificial or fictitious” transactions (see *Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica Ltd (in voluntary liquidation)* [2012] UKPC 9). Artificiality is a concept which is tested on an objective basis (unlike, in this context, the concept of reasonableness). This can be seen from the approach of the Privy Council to that concept at paras 22 and 23 of their judgment in *Cigarette Company of Jamaica*.

It may be objected that new clause 1(2) would filter out of the GAAR an avoidance scheme which is consistent with the purpose of the relevant tax regime or provision solely because that regime or provision is highly prescriptive and mechanistic and has no evident purpose other than to raise tax. Nevertheless, we remain of the view that the GAAR should not be used to counteract arrangements that achieve a tax saving which is not inconsistent with Parliament’s intention. The answer to legislation which is highly prescriptive and mechanistic and has no evident purpose is to not cure it by the introduction of a GAAR but to improve the drafting so that the purpose of the legislation is clear.

Finally, we believe that it should be made clear (at the very least in the GAAR guidance) that structuring a transaction to avoid a pitfall in the legislation would not be counteracted by the GAAR. For instance, in *HMRC v Anson* [2011] STC 2126, the taxpayer was liable to US tax on the profits of an LLC on a “transparency” basis, and to UK tax on remittances of those profits on the basis that the LLC was “opaque”, without any double tax relief. If the taxpayer had structured his investment in the LLC in such a way as to avoid this injustice, the GAAR should not have applied (if it had then been in force).

### **No repeal of TAARs**

We are most disappointed at the lack of any commitment, if the GAAR is introduced, to reducing the number of TAARs scattered across UK tax law. The Study Group considered a reduction in the need for TAARs, and the resultant simplification of UK tax law, as a clear advantage of a GAAR. However, the Consultation Document says that the need for TAARs is likely to remain, though the need for some TAARs may be obviated. If the GAAR is additional to all existing anti-avoidance tools, it will inevitably increase costs for both taxpayers and HMRC.

Take, for instance, TCGA 1992 s.16A. If the GAAR is introduced in its present form, TCGA 1992 s.16A will no longer be required to perform the function of disallowing capital losses arising from tax arrangements which are unreasonable. Instead, the GAAR will perform that function. All that TCGA 1992 s.16A will be left doing is disallowing losses arising from tax arrangements which are

reasonable. What rational objective of tax policy is achieved by disallowing a loss which accords with the purpose of the legislation and arises from a reasonable course of action merely because it was important to the taxpayer to obtain it?

For instance, a taxpayer has two entirely bona fide investments. One stands at a gain and the other at a loss of the same amount. Both gain and loss result from normal, bona fide market movements. For commercial reasons, the taxpayer decides to sell the gain asset. However, because he is flat economically and does not, therefore, wish to pay tax, he reluctantly decides also to sell the loss asset. Obtaining the loss for CGT purposes is the sole purpose of selling the loss asset. The GAAR will not apply, as the sale of the loss asset is manifestly reasonable. But, TCGA 1992 s.16A will apply, because the taxpayer's sole purpose is to obtain the loss. It may be that, by concession, HMRC would not apply TCGA 1992 s.16A in this case. However, that is not the point. Taxpayers should not have to rely on concessions. This example of course exposes a defect in the existing law and is not, therefore, intended to make a point solely related to the introduction of the GAAR. However, the introduction of the GAAR permits the defect in the existing law to be rectified (by repealing TAARs for which the GAAR is a satisfactory substitute).

This example illustrates the fundamental point we have already made, namely that no GAAR or TAAR should apply to an arrangement, unless two conditions are satisfied: (i) the arrangement is inconsistent with the evident purpose of the legislation, and (ii) obtaining a tax advantage was one of the taxpayer's main purposes. Adding the further condition that the tax advantage must arise from an unreasonable course of action would be an additional improvement to this kind of anti-avoidance provision. However, it inevitably leads to the conclusion that the introduction of a GAAR should result in a significant reduction in the need for TAARs.

### **Double tax agreements**

We agree that, by virtue of clause 6(4)(b), the GAAR is capable of counteracting UK tax advantages obtained under abusive schemes which exploit double tax agreements (*Padmore v IRC (No 2)* [2001] STC 280). However, it is for the Government to ensure that the GAAR will not apply in any case in which its application would put the Government in breach of its treaty obligations. Even if the Government is correct to say that no treaty obligation is breached by a domestic provision which counteracts tax advantages arising from a course of action designed to conflict with the purpose of the relevant legislation, it does not in our view follow, essentially for the reasons set out above, that the GAAR will not breach treaty obligations. This is because there is a real possibility that the GAAR (without the improvements suggested above) will apply in cases where the tax advantage arises from a course of action which conforms with the statutory purpose.

For instance, suppose that a UK investor wishes, for entirely bona fide reasons, to make an investment in a treaty country. From a commercial perspective, a local company would be the most obvious and straightforward choice of vehicle for the investment. However, the local law does provide for an alternative vehicle which is normally used in other contexts but could be shoehorned into a commercial investment. There are no treaty benefits for an investment made through a company. However, because of fiscal transparency, there are substantial treaty benefits for an investment made through the alternative vehicle. So, the UK investor chooses the alternative vehicle. This course of action does not conflict with the relevant UK statutory purpose (choice of the primary investment vehicle, as distinct from a conduit vehicle, is generally recognised by UK tax law as a matter for the taxpayer) or with the purpose of the treaty, which for whatever reason has consciously decided to grant treaty benefits to transparent vehicles but not to opaque vehicles. However, because the concept of reasonableness is so subjective and uncertain, there is no guarantee that the GAAR would not apply in these circumstances. If it did, the UK would be in breach of its treaty obligations.

Accordingly, in view of the uncertain scope of the GAAR, we are concerned that the GAAR is capable of counteracting inoffensive cross-border arrangements and that this will deter taxpayers from making proper use of double tax agreements. That could adversely affect both inward investment into, and outward investment from, the UK.

### **Method of counteraction**

We strongly prefer the method of counteraction proposed in the Study Group Report, namely:

- if the arrangement has no commercial purpose whatsoever, the taxpayer is taxed as if the arrangement had not been entered into;
- if the arrangement has a commercial purpose, the taxpayer is taxed as if he had carried out the transaction (the corresponding non-abusive transaction) that he was most likely to have carried out absent his tax avoidance purpose;
- if it is not possible to determine what would be the corresponding non-abusive transaction, the taxpayer is taxed on a just and reasonable basis.

If IHT is included in the GAAR, it may be necessary to make it clear that the only appropriate method of counteraction is adjustment on a just and reasonable basis.

### **Commencement**

We would suggest that the application of the GAAR should be restricted to tax advantages arising from taxable events on or after 1 April 2013 pursuant to arrangements entered into on or after 5 December 2012 (the date of the Autumn Statement), when we assume that an announcement on the GAAR will be made. If that is not acceptable, we would suggest Budget Day 2012 (when the Government accepted in principle the recommendations of the Study Group), rather than 5 December 2012.

If IHT is included in the GAAR, we do not think that a tax advantage arising on a person's death should be counteracted by the GAAR if the death is the only element of the relevant arrangement to occur on or after 1 April 2013.

### **Onus on HMRC**

We agree that the onus of proving that the tax arrangements are abusive must be on HMRC.

### **Taking account of the GAAR guidance and opinions of the Advisory Panel**

We believe that, as proposed, the GAAR should state expressly that a court or tribunal must take account of the GAAR guidance and of any opinion of the Panel. The legislation cannot, of course, say what weight should be given to these matters. That is for the court or tribunal. It may reject them entirely.

### **Self-assessment and administrative rules**

We believe that the GAAR should operate by counteraction notice initiated by HMRC (as in the case of the transactions in securities legislation), rather than by self-assessment. This fits far more naturally with the structure and purpose of the GAAR. It is counter-intuitive for a taxpayer to embark on a course of action designed to avoid tax only to conclude that it was unreasonable for him to do this and that he should counteract his own avoidance. Furthermore, a GAAR which operates by counteraction notice is consistent with the burden of proof being on HMRC. A GAAR which operates by self-assessment is not.

If a counteraction notice regime would cause some aspect of self-assessment to be lost which the Government is particularly keen to retain, we would urge you to consider the possibility of a counteraction notice regime which incorporates that aspect, with any suitable modifications. If the issue is simply that HMRC wants to be put on notice of transactions to which the GAAR might apply, the DOTAS regime should provide that.

We would expect the administrative rules for the GAAR to be similar to those which apply to the transactions in securities legislation.

## **The Advisory Panel**

### *Function of the Panel*

We agree that the key function of the Advisory Panel will be to provide opinions to HMRC and the taxpayer on the potential application of the GAAR to any particular arrangement. This will involve its members bringing their tax and industry experience to bear on the question of the reasonableness of the taxpayer's action, not in deciding the case. It does not have a judicial function but will be more in the nature of an expert witness, albeit a neutral one.

### *Constitution of the Panel, eligibility for membership and conflicts of interest*

We do not believe that HMRC should be represented on the Panel. As a matter of basic fairness, no person should be both judge and jury in his own cause. This will not deprive the Panel of HMRC's experience in avoidance, as that experience will be made available to the Panel through HMRC's statement of case. Likewise, the chairman of the Panel should be wholly independent of HMRC and should have sole control of the membership of the Panel.

We believe that, if there is an HMRC member on the Panel, he will have a conflict of interest and will, therefore, be likely to agree with the referring HMRC officer that the arrangement is abusive. To counter-balance that possibility, we believe that it is most important that any member of the Panel who finds himself in a minority should be entitled to issue a dissenting opinion.

Indeed, no member (HMRC or otherwise) should have a conflict of interest. Accordingly, no individual should act if he is conflicted out by reason of past involvement in the taxpayer's affairs and should arguably not act if his firm has merely advised on similar arrangements in the past. Strict eligibility rules will be required to prevent bias and the appearance of bias.

We agree that, if possible, at least one member of the Panel (or one non-HMRC member if there are HMRC members) should have relevant commercial experience. However, it is more important that that each member has tax experience, otherwise he or she will not be able to make a full contribution to the opinion.

We agree that Panel members will need to be subject to confidentiality obligations but we do not believe that they should be made subject to any greater level of confidentiality (including under CRCA 2005 s.18) than if they were members of the FTT hearing a tax case on the same matter. Subjecting them to a greater level of confidentiality risks reducing the pool of available people. This pool may already be reduced by individuals being conflicted out by reason of past involvement in the taxpayer's affairs (see above) or fears that they could be conflicted out of acting for or against taxpayers in the future.

### *Procedure leading up to a reference to the Panel*

We imagine that, in most cases, the possibility of the GAAR applying will be raised by HMRC (alongside its other technical or avoidance arguments) during the course of an enquiry or discovery proceedings. The applicability of the GAAR will be fully debated at the same time as the other technical and avoidance arguments are debated and, if a settlement cannot be achieved, both parties will prepare for litigation. It will only be at the end of that process that a designated HMRC officer will formally approve the use by HMRC of the GAAR and the taxpayer will be informed of that decision. In such a case, we can see that the 4 stages set out on page 28 of the Consultation Document could occur reasonably rapidly. Nevertheless, we still believe that, however well-forewarned a taxpayer may be, he should be given adequate time to prepare the written response which HMRC will send on his behalf to the Panel.

If, however, the designated HMRC officer formally approves the use by HMRC of the GAAR before the conclusion of an enquiry or discovery proceedings, it would be most unfair to put a tight time limit on the taxpayer's provision of his written response for the Panel, as he will not at that stage fully understand the case that he is facing.

As noted above, in our view, the GAAR should operate by counteraction notice and not by self-assessment. If so, we would suggest that the service by HMRC of a GAAR counteraction notice

should trigger an automatic reference to the Panel, but subject always to safeguards to allow the taxpayer adequate time to prepare his written response for the Panel.

#### *Procedure after reference to Panel*

If further information comes to light after the Panel has given its opinion, we do not believe that HMRC should have the right to refer the matter back to the Panel. As the Consultation Document points out, there should not be any risk of the Panel becoming an open-ended process without resolution. If further evidence comes to light, either party can present it to the tribunal on appeal.

#### *No reason to believe references to the Panel will be quick or cheap*

As a general point, we do not believe that references to the Panel will be quick or cheap. No taxpayer will wish to release his written response for the Panel until he is satisfied that it covers every point and fully explains every argument. We cannot see that it will be materially different from the statement of case that he will provide (if matters go further) to the tribunal. Accordingly, the time involved and cost incurred will, in principle, be no different from that involved or incurred in preparing for an appeal to a tribunal. However, if there is an appeal to a tribunal, the work done in preparing for the reference to the Panel may reduce the work needed in preparing for the appeal, as it will cover much the same ground.

#### *Publication of opinions*

It will be vital to taxpayers to understand how the GAAR will be operated in practice. The opinions of the Panel will be an important element in building up a body of practice. For this reason, we think that it is most important that the Panel should publish its opinions in full, but, if necessary, in an anonymized form (as happened for a time with decisions of the Special Commissioners). Publication could be based, with suitable modifications, on the example of private letter rulings in the US. It would be most unfair if HMRC, being a party to every dispute, had access to every opinion of the Panel, whilst taxpayers generally were denied such access. It is not good enough to offer a periodic digest of key principles, as it will not redress the basic unfairness inherent in the system.

### **The GAAR guidance**

In our view, the GAAR guidance must be totally independent and of the highest quality. If all of the drafting and revising of the guidance is initiated by HMRC, it cannot truly be described as totally independent, even if all of the drafting and the revising is subject to Panel approval. This gives the Panel an important, but nevertheless passive, role. It must have a more active role in initiating change to the guidance. This may mean that it needs a secretariat, perhaps staffed by secondees from accounting and law firms, in a similar manner to the Office of Tax Simplification. Any guidance should be the subject of a public consultation before it is finalised.

Our greatest concern is that, if all of the initiative lies with HMRC, the guidance will consist of a white list of wholly innocuous tax mitigation transactions which are “icing on the cake” and are, therefore, filtered out of the GAAR by clause 2(1) and a black list of wholly artificial and egregious transactions which clearly constitute abusive tax avoidance. In our view, the guidance must contain both a comprehensive technical discussion of whether (and, if so, why):

- a transaction which improves the taxpayer’s position and is not designed to conflict with the purpose or spirit of the legislation (whether with or without artificial elements) could ever be considered unreasonable and, therefore, abusive; and
- a transaction which improves the taxpayer’s position and is designed to conflict with the purpose or spirit of the legislation (whether with or without artificial elements) could ever be reasonable and, therefore, non-abusive,

and sufficient examples of such transactions to put real flesh on the bones of the technical discussion. If it does not, we fear that the guidance will fail in its objective of reducing the uncertainty surrounding the scope and application of the GAAR and, accordingly, of giving taxpayers confidence that they can safely proceed with their commercial transactions.



## **Clearances**

We are disappointed that there will be no clearance system for transactions potentially within the GAAR. In practice, we can envisage a two-tier system developing, under which large businesses get informal comfort from their CRMs that the GAAR will not apply but all other taxpayers are left in the dark. If this did happen, it would be most unfair, in particular, to small and medium-sized businesses which would be at a competitive disadvantage to large businesses in the same industry. Equal treatment of different classes of taxpayers is vital.

If it is not possible to offer a permanent system of clearances, we would suggest, in the interests of fairness to smaller taxpayers, that clearances on transactions not obviously covered by the GAAR guidance should be provided for a limited period, say, 3 years from Royal Assent.

## **The TIA assessment**

The entire TIA assessment is predicated on the assumption that the GAAR will only apply to artificial and abusive schemes. However, as explained above, we do not believe that the double reasonableness test will draw the line between non-abusive tax mitigation or planning and abusive avoidance arrangements in such a way that the category of abusive avoidance arrangements is confined to a narrow range of artificial arrangements. The effect is that taxpayers will have to obtain and consider advice on the potential application of the GAAR in a wide range of transactions. This is why we have suggested that the line should be drawn by reference to artificiality, rather than reasonableness. For this reason, we fear that the TIA assessment will prove to have been substantially misleading. In particular, the adverse effects on the macro-economy will be significantly greater (as normal commercial transactions become mired in dispute or taxpayers abandon their plans for commercial transactions that they would otherwise have carried out). The anticipated compliance costs incurred by taxpayers will also be significantly higher.

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