TAX CHAMBERS
15 OLD SQUARE

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

PRACTICAL ASPECTS OF APPLYING THE GAAR[1]

HARRIET BROWN

1. *A brief introduction: when the GAAR is potentially applicable*

1.1. The GAAR was introduced with effect from 17 July 2013. The first practicality will be determining when the GAAR applies. Even this, unfortunately, is not totally straightforward. This is discussed further below.

1.2. To understand when the GAAR is potentially applicable, it is first necessary to understand some of the terminology. Finance Act 2013 ("**FA 2013**"), section 207 explains:

> *(1) Arrangements are "**tax arrangements**" if, **having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements**.*
> *(2) Tax arrangements are "**abusive**" if they are **arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions**, having regard to all the circumstances including—*
> *(a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,*
> *(b) whether the means of achieving those results involves one or more contrived or abnormal steps, and*
> *(c) whether the arrangements are intended to exploit any shortcomings in those provisions.*
> *(3) Where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements.*
> *(4) Each of the following is an example of something which might indicate that tax arrangements are abusive—*
> *(a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,*
> *(b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes, and*

[1] DISCLAIMER:

Neither these notes nor the talk based on them constitute legal advice. They are simply an expression of the speaker's views, put forward for consideration and discussion. No action should be taken nor omitted in reliance on them but independent professional advice should be taken in every case. The speaker accepts no legal responsibility for them.

WARNING: The Speaker gives no licence to any person to record and / or reproduce in any format (including sound and / or visual recording)

(a) these Notes
(b) the Speaker's delivery of this talk or response to any question at this seminar
(c) any epitome or transcript based, in whole or in part, on any of the above.

Any such unlicensed recording or reproduction is a civil wrong and could well involve the commission of a criminal offence.

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

(c) the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid,
but in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.
(5) The fact that tax arrangements accord with established practice, and HMRC had, at the time the arrangements were entered into, indicated its acceptance of that practice, is an example of something which might indicate that the arrangements are not abusive.
(6) The examples given in subsections (4) and (5) are not exhaustive.

1.3. In relation to whether or not tax arrangements might be considered abusive it will also be necessary to consider the HMRC guidance. In considering whether or not arrangements may draw the attention of HMRC under the GAAR it will be necessary not only to consider the meaning of the legislation and the published guidance, but how this is likely to be interpreted by HMRC officers looking to use the GAAR. Obviously, this is not straightforward, and will vary from case to case, including in ways which may not be predictable (for example, it is not possible to know how an individual HMRC officer may interpret FA 2013 and the guidance). The way in which cases will be "funneled" into the GAAR procedure is discussed further below.

1.4. FA 2013, section 208 provides:

A "tax advantage" includes—
(a) relief or increased relief from tax,
(b) repayment or increased repayment of tax,
(c) avoidance or reduction of a charge to tax or an assessment to tax,
(d) avoidance of a possible assessment to tax,
(e) deferral of a payment of tax or advancement of a repayment of tax, and
(f) avoidance of an obligation to deduct or account for tax.

1.5. FA 2013, section 209 explains why it is necessary to know whether or not there are abusive tax arrangements. This provides:

(1) If there are tax arrangements that are abusive, ***the tax advantages that would (ignoring this Part) arise from the arrangements are to be counteracted by the making of adjustments****.*
(2) The ***adjustments required to be made to counteract the tax advantages are such as are just and reasonable****.*
(3) The ***adjustments may be made in respect of the tax in question or any other tax to which the general anti-abuse rule applies****.*
(4) The adjustments that may be made include those that impose or increase a liability to tax in any case where (ignoring this Part) there would be no liability or a smaller liability, and tax is to be charged in accordance with any such adjustment.
(5) Any adjustments required to be made under this section (whether by an officer of Revenue and Customs or the person to whom the tax advantage

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

> *would arise) may be made by way of an assessment, the modification of an assessment, amendment or disallowance of a claim, or otherwise.*
> *(6) But—*
> *(a)* ***no steps may be taken by an officer of Revenue and Customs by virtue of this section unless the procedural requirements of Schedule 43 have been complied with****, and*
> *(b) the power to make adjustments by virtue of this section is subject to any time limit imposed by or under any enactment other than this Part.*
> *(7) Any adjustments made under this section have effect for all purposes.*

1.6. Thus the key procedural requirements for making an adjustment are contained in FA 2013, Schedule 43. It is these provisions, and the HMRC guidance on them, which are discussed in detail in the rest of these Notes.

1.7. Before doing so, however, I mention the commencement and transitional provisions contained in FA 2013. FA 2013, section 215 provides:

> *(1) The general anti-abuse rule has effect in relation to any* ***tax arrangements entered into on or after the day on which this Act is passed****.*
> *(2) Where the tax arrangements* ***form part of any other arrangements*** *entered into before that day* ***those other arrangements are to be ignored for the purposes of section 207(3), subject to subsection (3)****.*
> *(3)* ***Account is to be taken of those other arrangements for the purposes of section 207(3) if, as a result, the tax arrangements would not be abusive****.*

1.8. Thus there are a number of different practical situations in which the commencement and transitional provisions will be relevant:

1.8.1. where there are tax arrangements (for the meaning of this, see below) all of which were "entered into" (also mentioned briefly below) before the day on which FA 2013 was passed (17 July 2013);

1.8.2. where the tax arrangements are part of other arrangements and the other arrangements are entered into before 17 July 2013; and

1.8.3. where the tax arrangements are part of other arrangements and the other arrangements are entered into before 17 July 2013, but the effect of taking into account those other arrangements is that the tax arrangements (i.e. those entered into after 17 July 2013) would not be abusive.

1.9. In the first case, the position is clear. The GAAR will apply to tax arrangements which are entered into after 17 July 2013. In the second case, it appears to be the position that, in determining whether or not the tax arrangements will be caught by the GAAR, one cannot take into account the other arrangements, i.e. those entered into before 17 July 2013, will not be

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

"other arrangements" to which regard must be had in applying FA 2013, section 207.

1.10. Finally, there is the situation where the "other arrangements" will "help" the taxpayer. Where this is the case, the other arrangements must be taken into account. Consequently, therefore, whenever applying the transitional provisions it will in practice be necessary to consider the "other arrangements" in conjunction with the tax arrangements, at least to determine whether or not one needs to have regard to the other arrangements in determining whether or not the arrangements are abusive.

1.11. "Other arrangements" should, however, only ever assist the taxpayer, when being taken into account under the transitional provisions.

1.12. Finally (before considering FA 2013, Schedule 43), FA 2013, section 206 sets out the taxes to which the GAAR applies:

> *(3) The general anti-abuse rule applies to the following taxes—*
> *(a) income tax,*
> *(b) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,*
> *(c) capital gains tax,*
> *(d) petroleum revenue tax,*
> *(e) inheritance tax,*
> *(f) stamp duty land tax, and*
> *(g) annual tax on enveloped dwellings.*

1.13. Thus GAAR covers the majority of direct and indirect taxes, with the notable exception of VAT.

2. *How will the GAAR be applied: starting the procedure*

2.1. FA 2013, Schedule 43, paragraph 3 provides:

> *(1) If a designated HMRC officer considers—*
> *(a) that a tax advantage has arisen to a person ("the taxpayer") from tax arrangements that are abusive, and*
> *(b) that the advantage ought to be counteracted under section 209, the* ***officer must give the taxpayer a written notice to that effect****.*
> …

2.2. Paragraph 2 explains what is meant by "designated officer":

> *In this Schedule a "designated HMRC officer" means an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of the general anti-abuse rule.*

2.3. Paragraph 3 is dealt with in the GAAR Guidance, Part E (the "**Procedural Guidance**"). In paragraph E3.1.1 HMRC say:

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

> *To ensure uniformity of approach HMRC's Anti-Avoidance Group will consider all arrangements where it appears that the GAAR may potentially apply before the issue is raised with taxpayers or agents. In addition cases will also be reviewed at a senior level, including by senior officers in the relevant business area and Anti-Avoidance Group, before a recommendation is made that HMRC should pursue any formal GAAR challenge.*

2.4. Thus before HMRC pursue a challenge under the GAAR it appears to be the case that they have, through the GAAR Guidance, imposed a number of additional non-statutory procedural requirements upon themselves which they will have to go through before a notice can be issued under Schedule 43, paragraph 3. These are:

2.4.1. consideration of "suspect" arrangements by HMRC's anti-avoidance group; and

2.4.2. a second review "*at a senior level, including by senior officers in the relevant business area and Anti-Avoidance Group …*".

2.5. There is, unfortunately, no guidance on what this review will entail, or if there is a procedure which must be followed by the anti-avoidance group, or senior officers in the relevant business area, in order to ensure uniformity. In these circumstances it is not clear how, and if, uniformity will be achieved in the sorts of cases in which notices will be issued under paragraph 3.

2.6. Paragraph 3 continues:

> *(2) The notice must—*
> *(a) specify the arrangements and the tax advantage,*
> *(b) explain why the officer considers that a tax advantage has arisen to the taxpayer from tax arrangements that are abusive,*
> *(c) set out the counteraction that the officer considers ought to be taken,*
> *(d) inform the taxpayer of the period under paragraph 4 for making representations, and*
> *(e) explain the effect of paragraphs 5 and 6.*
> *(3) The notice may set out steps that the taxpayer may take to avoid the proposed counteraction.*

2.7. The Procedural Guidance does not appear to expand on this. If a notice is received under paragraph 3, it should be carefully examined in the context of the criteria to ensure that it meets them. If it does not, HMRC will need to be notified, and they can then decide if they wish to reissue the notice in the proper form. If notifying HMRC of the defective notice achieves nothing else, it should at least afford more time in which the taxpayer can take advice and gather relevant information.

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

3. *Making representations to the designated HMRC officer*

3.1. Schedule 43, paragraph 4 provides:

> *(1) If a notice is given to the taxpayer under paragraph 3, the taxpayer has 45 days beginning with the day on which the notice is given to send written representations in response to the notice to the designated HMRC officer.*
> *(2) The designated officer may, on a written request made by the taxpayer, extend the period during which representations may be made.*

3.2. The Procedural Guidance, paragraph E3.3.3 provides:

> *The legislation allows the designated officer to extend this time limit if the taxpayer needs additional time to prepare representations. Any request for an extension to this time limit must be made in writing by the taxpayer. In practice we would expect such occasions to be the exception as the arguments will have been the subject of previous correspondence in the period before the notice is issued. There is no prescribed form which the taxpayer's representation must take.*

3.3. While there is no statutory indication of the circumstances in which an extension will be granted, HMRC's position set out in the Procedural Guidance is not manifestly unreasonable. What is surprising about the Procedural Guidance is that "*the arguments will have been the subject of previous correspondence in the period before the notice is issued*". There is no indication in the legislation, or the Procedural Guidance, that previous interaction with the taxpayer or his representatives is something which will have occurred before a notice has been issued. It seems, however, that in practice HMRC does intend to engage with the taxpayer on the point of whether or not there have been abusive tax arrangements before issuing a notice. Where this is the case, advice should be taken at an early stage as to how to proceed.

3.4. Where this is the case, care should be taken. While it is in general a good idea to cooperate with HMRC, it is important for taxpayers to understand what information they must disclose to HMRC (dependent on the context, e.g. an enquiry, a discovery assessment etc), what information they do not have to disclose but would be wise to disclose (i.e. information the disclosure of which may assist in allaying concerns which HMRC have in relation to particular arrangements) and those which they may not want to disclose at an early stage (e.g. documents which are subject to legal advice privilege, litigation privilege or confidentiality, or documents which may not assist their case).

3.5. Clearly it would generally be sensible to take proper legal advice as soon as possible, especially in the case of something new like the GAAR procedure, where the way forward is not well established. Doing so can drastically reduce the time in which a resolution is achieved, and may result in a more

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

favourable position for the client.

3.6. In this respect, it is likely to be necessary to take further advice in relation to making representations. In most cases it is likely that a taxpayer will want to make representations. This should allow the taxpayer to put its position to HMRC itself. It also gives HMRC another opportunity to consider whether the arrangements which are being challenged really are abusive, and should be counteracted. In effect, therefore, this gives the taxpayer another opportunity to have his case considered, and at an early stage. It is possible that making representations could prevent the GAAR procedure being followed further (adding greater cost and time) in straightforward cases.

3.7. It is not clear what form HMRC's review will take. In the diagram provided by HMRC at paragraph 3.10 of the Procedural Guidance (attached to these notes as an appendix), it appears to be the case that the same "designated officer" who was initially involved in issuing the notice will be the HMRC officer to review the representations. If this is the case, it seems likely that it will reduce the prospects of succeeding at the first representations stage. This is clearly a factor which will need to be considered in deciding whether or not to make representations at this stage, or whether it would be preferable merely to make them to the advisory panel (see below).

4. *Referral to the advisory panel*

4.1. FA 2013, Schedule 43, paragraph 5 provides:

> *If no representations are made in accordance with paragraph 4, a designated HMRC officer must refer the matter to the GAAR Advisory Panel.*

4.2. The Procedural Guidance does not further expand on this.

4.3. FA 2013, Schedule 43, paragraph 6 discusses the position where representations have been made:

> *(1) If representations are made in accordance with paragraph 4, a designated HMRC officer must consider them.*
> *(2) If, after considering them, the designated HMRC officer considers that the tax advantage ought to be counteracted under section 209, the officer must refer the matter to the GAAR Advisory Panel.*

4.4. This raises an interesting question as to what will be the position if a representation is made that no tax advantage has, or could arise. This is, again, discussed further, below in the wider context of tax arrangements considered to be abusive and in which there is no clear tax advantage.

4.5. The Procedural Guidance says (at paragraph E3.4.3):

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

> *There is no prescribed time limit for a designated officer to refer matters to the Advisory Panel. However, where a taxpayer has made representations, the officer will aim to refer within the 45 day period beginning with the day on which representations are received by the officer.*
>
> *If the matter is referred to the Advisory Panel, the designated HMRC officer must provide certain information to the panel and the taxpayer at the same time as the referral.*

4.6. This is obviously not ideal from the taxpayer's perspective, as it gives no clear statutory right to have the matter dealt with, at this stage, timeously. FA 2013, Schedule 43, paragraph 7 sets out what HMRC must provide to the advisory panel:

> *If the matter is referred to the GAAR Advisory Panel, the designated HMRC officer must at the same time provide it with—*
> *(a) a copy of the notice given to the taxpayer under paragraph 3,*
> *(b) a copy of any representations made in accordance with paragraph 4 and any comments that the officer has on those representations, and*
> *(c) a copy of the notice given to the taxpayer under paragraph 8.*

4.7. Similarly, paragraph 8 explains what HMRC must provide to the taxpayer when a referral is made to the advisory panel:

> *If the matter is referred to the GAAR Advisory Panel, the designated HMRC officer must at the same time give the taxpayer a notice which—*
> *(a) specifies that the matter is being referred,*
> *(b) is accompanied by a copy of any comments provided to the GAAR Advisory Panel under paragraph 7(b), and*
> *(c) informs the taxpayer of the period under paragraph 9 for making representations, and of the requirement under that paragraph to send any representations to the officer.*

4.8. Paragraph 9 provides a second opportunity for the taxpayer to make representations, this time to the advisory panel:

> *(1) The taxpayer has 21 days beginning with the day on which a notice is given under paragraph 8 to send the GAAR Advisory Panel written representations about—*
> *(a) the notice given to the taxpayer under paragraph 3, or*
> *(b) any comments provided under paragraph 7(b).*
> *(2) The GAAR Advisory Panel may, on a written request made by the taxpayer, extend the period during which representations may be made.*
> *(3) The taxpayer must send a copy of any representations to the designated HMRC officer at the same time as the representations are sent to the GAAR Advisory Panel.*
> *(4) If no representations were made in accordance with paragraph 4, the designated HMRC officer—*

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

> *(a) may provide the GAAR Advisory Panel with comments on any representations made under this paragraph, and*
> *(b) if comments are provided, must at the same time send a copy of them to the taxpayer.*

4.9. In this respect, the Procedural Guidance provides:

> *If the representations are not the first representations sent by the taxpayer in relation to the matter, then HMRC cannot make comments on the further representations.*
>
> *If these representations are the first representations which have been sent by the taxpayer in relation to the matter, the designated officer may provide the Advisory Panel with comments (copied to the taxpayer) on these representations. There is no prescribed time limit. However, the officer will seek to provide comments within the 45 day period beginning with the day on which the taxpayer representations are received by the officer.*
>
> *The Procedural Schedule will work best if HMRC and the taxpayer disclose their views about the proposed counteraction as quickly as possible and are able to respond to each other's views.*

4.10. Again, there appears to be no statutory guarantee that a matter will be dealt with timeously. This is of particular concern where what is in question is essentially correspondence between the advisory panel and HMRC. It is not clear how the advisory panel will be aware that HMRC wish to make representations, or if the taxpayer will be informed of a decision not to make representations. The taxpayer could be left in a situation where he is unaware what the delay is, i.e. whether HMRC wishes to make representations, and has not done so yet, or simply does not wish to make representations, and the delay is with the advisory panel. None of this gives the necessary certainty and timely management of a taxpayers affairs which should be the aim of any legislation dealing with procedure.

4.11. In relation to the final paragraph above, each case should be considered on its own facts. In some circumstances, taxpayers may do better to reserve their position, though this is likely not to be the majority of cases.

4.12. In relation to the lack of statutory time limits the Procedural Guidance says (at paragraphs E3.9.1):

> *Although the Procedural Schedule sets out time limits within which a taxpayer must carry out various obligations, there are no statutory time limits for HMRC or the sub-panel. However, various avenues exist already in law which may assist a taxpayer who considers that HMRC is taking too long to carry out its obligations.*

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

4.13. The Procedural Guidance then goes on to give an example, in a corporation tax context, of applying for a closure notice where HMRC where the GAAR procedure has not been followed in a reasonable amount of time. While this would be a possibility for the taxpayer (and there is something to be said for keeping things simple and not introducing a separate procedure specifically for the GAAR) application for a closure notice may well be a time consuming and costly procedure, and one without any guarantee of success.

4.14. There is also the possibility of a notice being given under FA 2013, Schedule 43, paragraph 3 outside of the enquiry procedure (as this appears to be possible under the legislation), in which circumstances the method of a closure notice would not be available.

5. *How the advisory panel gives its opinion*

5.1. FA 2013, Schedule 43, paragraph 10 provides:

> *(1) If the matter is referred to the GAAR Advisory Panel, the Chair must arrange for a sub-panel consisting of 3 members of the GAAR Advisory Panel (one of whom may be the Chair) to consider it.*
> *(2) The sub-panel may invite the taxpayer or the designated HMRC officer (or both) to supply the sub-panel with further information within a period specified in the invitation.*
> *(3) Invitations must explain the effect of sub-paragraph (4) or (5) (as appropriate).*
> *(4) If the taxpayer supplies information to the sub-panel under this paragraph, the taxpayer must at the same time send a copy of the information to the designated HMRC officer.*
> *(5) If the designated HMRC officer supplies information to the sub-panel under this paragraph, the officer must at the same time send a copy of the information to the taxpayer.*

5.2. If invited to supply further information, the taxpayer would be wise to ensure that he is properly advised before providing such further information.

5.3. FA 2013, Schedule 43, paragraph 11 provides:

> *(1) Where the matter is referred to the GAAR Advisory Panel, the sub-panel must produce—*
> *(a) one opinion notice stating the joint opinion of all the members of the sub-panel, or*
> *(b) two or three opinion notices which taken together state the opinions of all the members.*
> *(2) The sub-panel must give a copy of the opinion notice or notices to—*
> *(a) the designated HMRC officer, and*
> *(b) the taxpayer.*

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

> *(3) An opinion notice is a notice which states that in the opinion of the members of the sub-panel, or one or more of those members—*
> *(a) the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the relevant tax provisions—*
> *(i) having regard to all the circumstances (including the matters mentioned in subsections (2)(a) to (c) and (3) of section 207), and*
> *(ii) taking account of subsections (4) to (6) of that section, or*
> *(b) the entering into or carrying out of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions having regard to those circumstances and taking account of those subsections, or*
> *(c) it is not possible, on the information available, to reach a view on that matter,*
> *and the reasons for that opinion.*
> *(4) For the purposes of the giving of an opinion under this paragraph, the arrangements are to be assumed to be tax arrangements.*
> *(5) In this Part, a reference to any opinion of the GAAR Advisory Panel about any tax arrangements is a reference to the contents of any opinion notice about the arrangements.*

5.4. The Procedural Guidance explains HMRC's understanding of the advisory panel's role in paragraph E4.2.1 et seq:

> *The first function is to provide reasoned opinion(s) to HMRC and the taxpayer on the relevant tax arrangements (as set out in the Procedural Schedule).*
>
> *The Chair will select three panel members with expertise relevant to the particular tax arrangements to form a sub-panel to provide the opinion(s). The sub-panel can produce one joint reasoned opinion, or, if the three members cannot agree, it can provide two or three different reasoned opinions.*
>
> *The opinions are given on whether or not the entering into and carrying out of the relevant tax arrangements is a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances, including those circumstances listed in the definition of abusive in the GAAR.*
>
> *The opinions are to be given on the basis that each of the examples in the legislation of what might indicate that tax arrangements are, or are not, abusive is also an indicator that the tax arrangements are, or are not, a reasonable course of action (an abusive indicator will indicate that tax arrangements are not a reasonable course of action). The examples of what is, or is not, reasonable are not exhaustive. They are just examples.*
>
> *Essentially the sub-panel is answering a "single reasonableness" question: in the view of the sub-panel members is the arrangement a reasonable course of action? This is different to the "double reasonableness" question which must*

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

> *be taken into account when deciding whether tax arrangements are abusive. This is on the basis that the panel members are particularly well placed to form a view on this question, and also to differentiate their role from that of the courts and tribunal.*

5.5. There should be no reason to need to differentiate between the function of the advisory panel and the courts and tribunals in this context: the statutory jurisdiction of each should adequately do this. It is, however, helpful to have some understanding of how the advisory panel's function is viewed by HMRC.

6. *Process after the advisory panel opinion*

6.1. The advisory panel will come to an opinion in the manner set out above. Both the HMRC designated officer and the taxpayer will receive notice of the opinion, or opinions of the advisory panel. When this has been received, HMRC must then follow the procedure set out in FA 2013, Schedule 43, paragraph 12:

> *(1) A designated HMRC officer who has received a notice or notices under paragraph 11 must, having considered any opinion of the GAAR Advisory Panel about the tax arrangements, give the taxpayer a written notice setting out whether the tax advantage arising from the arrangements is to be counteracted under the general anti-abuse rule.*
> *(2) If the notice states that a tax advantage is to be counteracted, it must also set out—*
> *(a) the adjustments required to give effect to the counteraction, and*
> *(b) if relevant, any steps that the taxpayer is required to take to give effect to it.*

6.2. The Procedural Guidance also confirms that the advisory panel may give an opinion that it does not have enough information to give an opinion. It then continues, in paragraph E4.2.8:

> *It is expected that in most cases, shortly after each opinion is given, an anonymised version of the opinion will be published by HMRC. HMRC will give very careful consideration to the form in which opinions are published to ensure that taxpayer confidentiality is protected; and it may be necessary to withhold publication in some instances if it is not possible to publish the opinion in a form that ensures that taxpayer confidentiality is not breached*

6.3. This forms no part of the statutory framework. Finally, in paragraph E4.2.9, the Procedural Guidance says:

> *The Advisory Panel does not perform a judicial function and the Advisory Panel process does not involve formal hearings where cases will be presented*

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

> *and heard. The Advisory Panel delivers an opinion, not a judicial decision. The opinions are not binding on HMRC or the taxpayer*

6.4. It remains to be seen whether or not HMRC will take any notice of the non-binding opinion of the advisory panel, or will chose rather to rely on their own views.

7. *Process in the tribunal*

FA 2013, section 211 provides:

> *(1) In proceedings before a court or tribunal in connection with the general anti-abuse rule, HMRC must show—*
> *(a) that there are tax arrangements that are abusive, and*
> *(b) that the adjustments made to counteract the tax advantages arising from the arrangements are just and reasonable.*
> *(2) In determining any issue in connection with the general anti-abuse rule, a court or tribunal must take into account—*
> *(a) HMRC's guidance about the general anti-abuse rule that was approved by the GAAR Advisory Panel at the time the tax arrangements were entered into, and*
> *(b) any opinion of the GAAR Advisory Panel about the arrangements (see paragraph 11 of Schedule 43).*
> *(3) In determining any issue in connection with the general anti-abuse rule, a court or tribunal may take into account—*
> *(a) guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into, and*
> *(b) evidence of established practice at that time.*

8. *Interaction of the GAAR with other tax provisions*

8.1. The GAAR is intended to "dovetail" with existing tax provisions. This should mean that existing time limits etc, will still continue to apply in the context of the GAAR. HMRC recognize this in the Procedural Guidance. Paragraph E6.1 says:

> *The GAAR (other than the provisions relating to consequential adjustments) fits within all the normal administration machinery relevant for each tax to which it applies. This means that normal time limits will apply, the normal assessment methods will be used and the normal appeal routes will flow from these assessment methods*

8.2. This is correct, save that before a court or tribunal, FA 2013, section 211 will apply, meaning that considerations which are not normally applicable are likely to be considered.

9. *Conclusions*

Harriet Brown
Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

9.1. The GAAR procedure, notwithstanding the Procedural Guidance, does have some lacunas and it is not clear-cut how it will be implemented in practice. Given that this is the case, it cannot be overstated how important it is that any taxpayer subject to the procedure takes advice at the earliest possibility and that such a taxpayer complies with any time limits.

9.2. While there are undoubtedly likely to be many, many cases on the substantive aspects of the GAAR, there are also likely to be a large number of cases in relation to the procedure.