

GAAR Update

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30 January, 2018

What this talk will cover:

1. Reminder of the GAAR
2. The new GAAR penalty regime
3. Provisional counteraction notices
4. Binding and pooling notices
5. Penalties for enablers of tax avoidance

GAAR Reminder

- Began 17 July 2013
- Aaronson Report: “a shield and not a sword”
- Intended to counteract tax arrangements that are “abusive”
- “Abusive” = cannot reasonably be regarded as a reasonable course of action – does this just mean “unreasonable”?
- Is it even needed post *UBS* [2016] and *Rangers* [2017]?

The new GAAR penalty regime

- Aaronson Report was against a penalty and warned of HMRC “mission creep”
- Arrangements entered into before 15/9/16 could only attract a “normal” penalty for a careless or deliberately inaccurate tax return - in practice unlikely
- Since 15/9/16 a specific penalty applies when HMRC issue a notice of final decision and then make the necessary adjustments
- It is 60% of the counteracted advantage ie the amount of tax that has become due as a result
- “Closed period” – taxpayer receiving proposed counteraction notice from HMRC is locked out from conceding once the case is being referred to the GAAR panel
- IFS Report no 13: FN and GAAR penalties makes the financial risk of challenge so great that even taxpayers with strong cases may not be prepared to risk going to court – gives HMRC a quasi-judicial role

The new GAAR penalty regime cont'd

- Other penalties can also apply as well eg for careless error under Sch 24 FA 2007
- Total penalty not normally to exceed 100% of the tax
- Sch 24 penalty previously v unlikely if relied on counsel's advice
- But new para 3A Sch 24 prevents reliance on tax avoidance advice and presumes carelessness
- So in practice now looking at basic GAAR penalty of 60% plus 30% careless penalty for a counteracted scheme
- We have gone from no penalty for a counteracted scheme to 90% in just 4 years – Aaronson's fears of weaponisation confirmed

Provisional counteraction notices

- Further mission creep
- Before 15/9/16 referral to GAAR panel and receipt of its opinion was required before a final counteraction notice could be issued for each particular taxpayer
- This drawn out process risked expiry of normal assessing time limits
- Provisional notice can now be given if HMRC reasonably believe that a counteraction notice may be needed
- Resulting adjustments treated as valid even though formal GAAR procedures not completed and become final unless taxpayer appeals

Provisional notices cont'd

- If taxpayer appeals against the adjustments then they are cancelled automatically after 12 months unless HMRC take one of the following actions within that 12 months:
- Gives notice cancelling the adjustments;
- Withdraws the counteraction notice but not the adjustments;
- Gives Notice not to refer the matter to the GAAR panel but does not withdraw the adjustments; or
- Gives Notice of final decision after a GAAR panel opinion on either the taxpayer's own arrangements or on pooled or bound cases or on a generic referral of pooled cases.

Pooling and Binding Notices

- Pooling notices are used to place taxpayers with schemes similar to a scheme that has already been referred to the GAAR panel into a pool with the “lead” arrangement
- If a “pooled” scheme has already been counteracted and HMRC discover other users of the same scheme then they can issue a binding notice to those users which applies the same counteraction to them
- Purpose is to avoid the need to refer each individual case to the GAAR Panel
- If the lead case settles then HMRC will either select a new one from the pool or make a “generic referral” of the cases still in the pool to the GAAR Panel

Penalties for Enablers

- Schedule 16 F(No2)A 2017: the basic concepts
- Abusive tax arrangements
- Those arrangements are defeated
- Persons who enabled those arrangements
- Amount of penalty
- Legally privileged communications
- Publication of names
- Human Rights?

Penalties for Enablers

- “Abusive tax arrangements”: largely tracks the GAAR definition in section 207 FA 2013
- BUT for penalty purposes the definition has been extended to include “intended” results of the arrangements whether they succeed or not
- HMRC say this is to cover where the arrangements could have been counteracted under the GAAR but have been defeated under other provisions
- Penalty cannot be charged unless there is a GAAR Panel opinion in relation to the arrangements
- Applies only to arrangements and enabling activity entered into after Royal Assent
- Problem: position of enabler will in practice be considered many years after arrangements entered into

Penalties for Enablers

- “The arrangements are treated as “defeated” if either
- Condition A = person enters into abusive arrangements and gives HMRC a document in respect of which counteraction has become final, or
- Condition B = when an assessment otherwise counteracts the advantage and has become final

Persons Who “Enable”

- 5 types of “Enabler” [para 7 Sch 16]
- *Designers* – advisers who suggest arrangements or an alteration to them [para 8(3)]
- Advice put forward for consideration but which recommends against does not “suggest” [para 8(5)]
- Advice includes an opinion
- HMRC’s examples

Persons Who “Enable”

- *Managers* – to any extent responsible for organisation or management and knew or could reasonably be expected to know they were “abusive”
- *Marketers* – either (1) make available for implementation by the taxpayer a proposal subsequently implemented by the arrangements or, (2) communicate information to taxpayer or another about a proposal with a view to taxpayer entering into the arrangements that are subsequently implemented
- Worrying HMRC example – counsel named in marketing literature without giving consent? Does the exclusion apply if the legal advice is given before implementation?

Persons Who “Enable”

- *Participant enablers* – persons who enter in the arrangements to help taxpayer achieve the tax advantage – trustees and SPVs are at risk here
- *Financial enablers* – providing a loan, issuing shares or financial products to allow the tax arrangements to work as intended
- Banks at risk here if their staff know or could reasonably have been expected to know the loan was being used for abusive tax arrangements
- Will the ‘could reasonably have been expected to know’ condition lead to Nelsonian blind eyes?
- Para 5.51 of Banking Code Guidance helpful here?

Amount of Penalty

- Equal to total amount of all consideration received or receivable by the enabler or paid to another person for the enabler's services, net of VAT.
- No deduction for fees paid to sub-contractor enablers so HMRC can levy penalties on gross amount of cascaded consideration
- HMRC examples
- HMRC draft guidance: “Consideration is not separately defined and takes its ordinary meaning. It includes such things as fees, commissions, bonuses or anything else of value that has been received, or is receivable, by the enabler for enabling the defeated tax arrangements. “
- Restructure promoter's reward arrangements? Some thoughts.

Assessment of Penalty

- A penalty cannot be assessed unless:
 - (1) the arrangements have been “defeated”, and
 - (2) only if a GAAR panel opinion has been obtained, and
 - (3) HMRC are not out of time to assess the penalty
- Time limit is generally within 12 months of the ‘defeat’ of a user
- Multi-user schemes: HMRC may not assess penalty until either more than 50% of users have been “defeated” or enabler requests earlier penalty assessment

Referral to GAAR Panel

- Requirement for a GAAR Panel opinion before penalty can be charged
- Where a GAAR Panel opinion has already been obtained on the defeated arrangements themselves no need for another referral before charging a penalty
- But where no GAAR Panel opinion was obtained for the defeated arrangements then in order to charge an enabler penalty HMRC must refer the arrangements to the GAAR Panel under para 26 Sch 16
- So a “Working Wheels” type of scheme would need the latter type of referral in order to engage an enabler penalty

Legal professional privilege

- Lawyer who is alleged by HMRC to be an “enabler” may wish to produce his advice to show he did not fall within one of the categories of enabler
- If client will not waive LPP over the advice then the lawyer can instead make a declaration in a form to be prescribed by regulations
- Declaration treated as conclusive unless shown to be incorrect
- HMRC’s example

Publication of enabler's name

- Either 50 or more other enabler penalties have been incurred OR total penalty or penalties incurred is/are more than £25,000.

Human Rights Act?

- These are penalty proceedings and so are “criminal” for convention purposes so HRA fully engaged eg article 6 right to a fair trial
- But within margin of appreciation for states to levy penalties for ‘abusive’ behaviour in relation to tax?
- So as long as there is due process and appeal rights in relation to levying the penalties then would-be enablers will probably find little if any traction under the HRA

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