ACCA

The UK General Anti-Abuse Rule

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Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of consistent global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We work to open up the profession to people of all backgrounds and remove artificial barriers to entry, ensuring that our qualifications and their delivery meet the diverse needs of trainee professionals and their employers.

We support our 162,000 members and 426,000 students in 173 countries, helping them to develop successful careers in accounting and business, with the skills needed by employers. We work through a network of over 89 offices and centres and more than 8,500 Approved Employers worldwide, who provide high standards of employee learning and development.

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This article considers tax avoidance and the possible effects of the UK General Anti-Abuse Rule (GAAR), which came into effect in July 2013.

FOR FURTHER INFORMATION

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The UK General Anti-Abuse Rule

Tax avoidance is now a massive issue for politicians and the public. Almost overnight the UK has become a nation apparently obsessed with whether businesses are paying enough tax. Some commentators are suggesting that paying tax is a moral issue. Even pensioners at supermarket checkouts can be heard discussing tax avoidance.

It is wrong to try to ascribe a moral value system to the calculation of a tax base. Morality cannot be measured in this context and businesses cannot know with certainty which side of that line they stand. The tax system is, and should be, based on certainty and obligation, and introducing the concept of morality simply clouds the issue.

Whether or not businesses in the UK are paying enough tax is not something that should be subject to moral pressures but should be determined by the law. The risk is that the General Anti-Abuse Rule (GAAR), which came into effect in July 2013, is perceived as a panacea for concerns over the level of tax receipts.

ACCA's view is that the government's aim of tackling tax abuse is absolutely right and well founded. Its approach of prevention, early detection and effective counteraction to tax abuse is sensible and appropriate.

Nonetheless, there should be no misconceptions about the GAAR. It is not going to bring an end to those tax planning processes that are well within the law. The GAAR is not, in ACCA's opinion, going to provide a major tax windfall for the government, nor is the GAAR necessary. There is a wealth of anti-abuse legislation in place already that is more than capable of dealing with tax evasion. In addition, there is new legislation in the pipeline that will address the activities of promoters of avoidance schemes.

If government and Parliament want UK businesses to pay more tax than they currently pay, the tax system needs wholesale change on a global basis. The government therefore needs to work with the OECD and others to look at transfer pricing and income shifting. The GAAR is fiddling at the edges of the problem.

In the course of ACCA's testimony before the House of Lords Economic Affairs Committee on this issue in January 2013, the low number of convictions in other markets under GAAR was cited as evidence of the success of such a scheme. Perhaps the GAAR was a deterrent, peers surmised. ACCA is not convinced. It may be that the GAAR is activated so rarely because it is rarely triggered, and this is because the jurisdictions concerned have a general anti-avoidance rule with a much higher bar for what constitutes abuse than is the case in the UK.

The GAAR runs the risk, if portrayed as the flag-ship anti-tax-avoidance initiative, of deterring investment by businesses that look to reinvest any savings they have made from financial planning initiatives back into their businesses, in research and development or job creation. Deterring abusive tax planning is one thing, deterrence of reinvestment by small and growing businesses is another.

Mission creep is always a longer-term concern when governments introduce any anti-avoidance measure and it is hard to see that the GAAR will be any different. ACCA has already warned that the growing numbers of people who self-assess will, at the very least, need to understand their GAAR to ensure they do not breach it when completing their tax returns. They, and the many families who now have to complete self-assessment tax returns, will need to carry out such significant due diligence in respect of their financial affairs that the GAAR risks becoming an administrative burden on non-corporate tax payers.

If the GAAR is seen as affecting anything other than very limited types of transactions it risks dissuading multinational companies from making otherwise beneficial and much-needed investments in the UK. It may serve domestically, and to appease the domestic audience of public opinion, to use a GAAR as a warning to companies that do not pay 'enough' tax that the UK is tough on tax planning, but it could have a detrimental effect overseas by portraying the UK as an economy that is not business friendly.

REWIND TO THE UK GAAR HISTORY

Looking back quickly to the way the current situation arose, it may explain why the UK GAAR is focused on the abuse rather than on the general end of avoidance. It was largely determined that the UK would have a GAAR when the Study Group led by Graham Aaronson reported back on 11 November 2011. The Group said, broadly, that the UK should consider a GAAR that focused only on the 'abusive; end of tax planning.

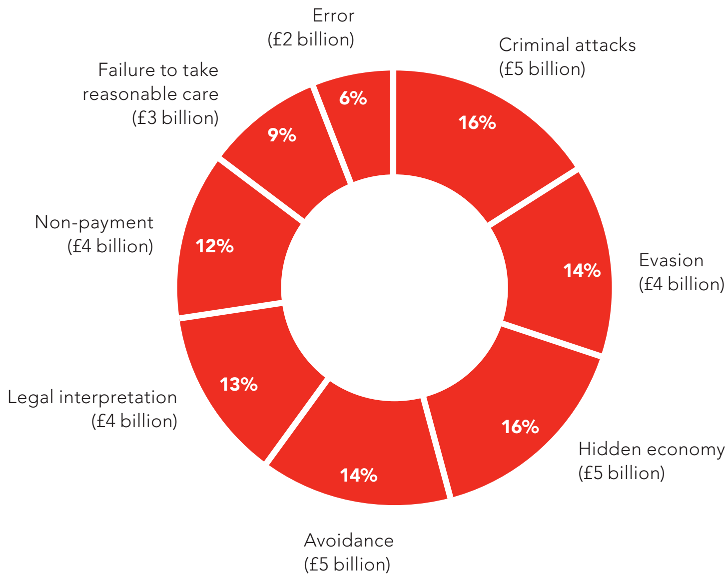
The Study Group proposed that the range of targeted anti-avoidance rules (TAARs) that currently exists in the UK could be repealed where appropriate by the Office of Tax Simplification (OTS). This does not, however, seem to be likely any time soon as the UK tax authority, HMRC, seems quite keen to retain the TAARs, as far as possible, in addition to the GAAR, as well as something called DOTAS – disclosure of tax avoidance schemes. So as ACCA has often pointed out to Parliamentary committees, the UK continues to operate a 'belt and braces' approach, that is, there is a tendency to impose more regulation than is needed to achieve the purpose of the exercise.

Even then, it must be said that the UK tax landscape is a lot less onerous and problematic than that in much of the rest of the developed world and emerging economies. This is partly because of the possibilities that exist for businesses to engage with the tax authorities. There is really open and generally meaningful dialogue between businesses and those authorities, in which all parties seek collectively to make the tax system work effectively.

THE TAX GAP

In order to get some idea of the likely target for the GAAR it is worth trying to set out the nature and size of the tax loss that the government is trying to ensure it collects. Looking at the most recent HMRC work in this area it can be seen that tax avoidance seems to account for about £5bn of the total tax gap of £32bn. In fact, the target of the GAAR, at the abusive end, is perhaps less than this.

Tax gap for 2010/11 by behaviour



Source: HMRC publication, 18 October 2012.

THE ADVISORY PANEL

The Study Group also recommended that an advisory panel should be set up. Firstly, it would set out the 'GAAR envelope', ie what is likely to be caught and what is not. The guidance does try to steer the GAAR's impact to the abusive end of tax planning but owing to the diversity of composition of the group members who contributed to the guidance it has still left matters slightly 'woolly'. It gives the impression of not being entirely clear whether 'less-than-abusive' planning may be caught and it certainly seems from some of the text of the guidance that a committee was involved.

The second aspect of the advisory panel's work, or rather that of one of its sub-groups, is to provide specific guidance on whether a tax arrangement is within or outside the GAAR. Yet even then this is only guidance and the panel says on this point:

'Whilst HMRC is not precluded from continuing a case in the light of an opinion from the Panel that the arrangements are 'reasonable', HMRC would nonetheless need to give very careful consideration to its reasons for continuing and ensure that there is robust governance around the decision-making process.'

It remains to be seen how this is applied in the real world and how many cases HMRC actually pursues under the GAAR.

CONCLUSION

Legislators, looking in to the future, have a decision to make over the GAAR. Will it do more than crack down on a narrow set of transactions and tax practices, or will it creep into other areas of what are currently perfectly legitimate tax planning initiatives, in a drive to make tax a moral football, damaging the UK's reputation as being business friendly? Or will it stick to what it is apparently intended to be – something very limited in scope.

A phased introduction on a tax-by-tax basis would have been ideal. This way, the implementation of a clearance procedure could have been resourced and a view taken as to whether it was working – or overworking and acting as a deterrent to growth and investment.

India has delayed introducing a GAAR till later this decade, although its impact may still be retrospective to 2010. It would have been wise for the UK to have deferred, at the very least, and ideally not to have taken this measure forward at all.

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