

What transactions are intended to fall within the scope of the GAAR?

This article was first published in Tax Journal (December 2011 editor Paul Stainforth)

Unfortunately the Aaronson Report does not give examples of arrangements that would be caught by the GAAR, perhaps because most aggressive tax planning has failed in the courts recently. Even where taxpayers have steered a course through the maze of anti-avoidance legislation, the courts have taken purposive approaches which deny the intended tax benefits.

An example is *Tower MCashback* where the Supreme Court viewed a circular arrangement as having no meaningful substance and denied relief. Other recent cases such as *Prizedome* and *DCC Holdings* involved the courts stretching a purposive approach to legislation to deny the hoped for results.

A recent example of scheme succeeding is "SHIPS 2" in *HMRC v Mayes*. The Court of Appeal held it effective, despite its highly artificial nature. They did so reluctantly, concluding that Parliament had to tackle such avoidance. The Report refers to SHIPS 2 and presumably the authors would see the GAAR applying to this case.

Some aggressive SDLT planning ideas are still marketed – I can see these would be affected by the GAAR were it to apply to them. But it will not, apparently because the SDLT rules already have their own specific GAAR (although this does not seem to deter those who market such schemes).

The complexity of the tax code means that taxpayers often have to structure to avoid anomalous results arising from ordinary commercial transactions. These arrangements may have no other purpose than to avoid tax – however the tax result they are trying to avoid is one that Parliament likely did not intend. Would the GAAR apply?

For example in corporate restructurings a company may need its banks to write off debt for the company to continue trading. Yet this is typically taxable for the company and the exemption for debt/equity swaps is often something lenders are unwilling to accept (for accounting reasons). The company has an impossible choice between doing nothing (and becoming) insolvent and writing off the debt (triggering tax the company cannot pay). Many businesses have squared this circle through various forms of tax planning. Would such arrangements be caught by the GAAR? It seems to me not. But the taxpayer would have to rely on HMRC or the Courts agreeing that this was a reasonable exercise of choices of conduct under tax legislation.

What about holding real estate in a Jersey SPV to avoid CGT on a future sale? Is the absence of a CGT charge on non-residents a reasonable choice of conduct? Hopefully, yes. Much of the real estate industry would regard it as such (even HMRC did it). But I suspect there are many who would see this as egregious.

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