

Special focus

The proposed GAAR



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The following provides a general guide to the proposed general anti-abuse rule, as set out in HMRC's consultation document dated 12 June 2012. Note that the GAAR applies in addition to other anti-avoidance rules. The GAAR will only apply where a tax advantage would arise as a result of applying provisions other than the GAAR.

Have you entered into an arrangement involving corporation tax, income tax, capital gains tax, inheritance tax, double tax treaties, SDLT, petroleum revenue tax or the proposed residential property annual charge? An arrangement is any agreement, understanding, scheme, transaction, or series of transactions (whether or not legally enforceable).

No →

↓ Yes

Would it be reasonable to conclude that the obtaining of a tax advantage was the main or one of the main purposes of the arrangement (the 'tax arrangement test')? This is a question of fact. HMRC considers that incidental steps taken to minimise a tax liability from an arrangement will not usually constitute a main purpose. Tax advantage includes:

Relief or increased relief from tax	Repayment or increased repayment of tax	Avoidance or reduction of charge to tax or an assessment to tax	Avoidance of a possible assessment to tax	A deferral of a payment of tax or an advancement of a repayment tax	Avoidance of an obligation to deduct or account for tax
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No →

The appropriate comparator or alternative tax position will depend on the facts, but will usually derive from the arrangements that would have occurred absent the relevant tax purpose (which may include no arrangement at all).

↓ Yes

An arrangement that fails the main purpose test is a 'tax arrangement'. Is that tax arrangement abusive? Tax transactions will be abusive if they are arrangements the entering into or carrying out of which cannot be reasonably regarded as a reasonable course of action having regard to all the circumstances. This is the so called 'double reasonableness test'.

<p>Circumstances include:</p> <ul style="list-style-type: none"> the relevant tax provisions, the substantive results of the arrangements, and any other arrangements of which the arrangements form part. 	<p>Relevant tax provisions include:</p> <ul style="list-style-type: none"> any principles on which they are based (whether express or implied), their policy objectives, and any shortcomings in them that the arrangements are intended to exploit. 	<p>Indications that an arrangement may be abusive (not intended to be exhaustive or limiting):</p> <ul style="list-style-type: none"> the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes, the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes, 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, the arrangements involve a transaction or agreement the consideration for which is an amount or value significantly different from market value or which otherwise contains non-commercial terms.
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No →

↓ Yes

Have the procedural requirements been satisfied? Draft legislation has not been provided for this aspects of the GAAR. The consultation document suggests that this may include written confirmation from a designated HMRC officer to the taxpayer that he or she considers that the GAAR may apply. The officer must give reasons. The taxpayer will be given an opportunity to submit written representations which HMRC must consider. If the designated officer still considers that the GAAR applies, reference must be made to the Advisory Panel who will give an opinion.

No →

The GAAR will (in the absence of transitional rules) apply only to arrangements entered into on or after 1 April 2013. The GAAR will not apply to tax advantages arising from arrangements fully completed by 1 April 2013. It is not clear how arrangements entered into but not completed before that date will be treated.

↓ Yes

The GAAR applies, how will the tax transaction be counteracted? The tax advantage is counteracted on a just and reasonable basis. The nature of what is just and reasonable will depend on the facts and the tax provisions being exploited. On appeal to a court or tribunal, it is for HMRC to show that the key requirements for the GAAR are satisfied and that the counteraction is just and reasonable. Both HMRC and the taxpayer may produce evidence (which includes guidance, statements or other material which is in the public domain at the time that the arrangements were entered into and any evidence of established practice at that time) to support its case. The court or tribunal must take into account HMRC's guidance about the GAAR that has been approved by the GAAR Advisory Panel and any opinion of the GAAR Advisory Panel about the arrangements.

The GAAR does not apply