Comment

Views on topical issues

Who will guard the guardians?

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Under the new general anti-abuse rule (GAAR), the advisory panel will play a vital role, but significant concerns remain as to how the panel will operate in practice, and how its independence will be ensured.

In the brave new world of the GAAR, the GAAR advisory panel ('the panel') will have two key functions:

- first, to review, consider and approve (as appropriate) the GAAR guidance, which is to be drafted by HMRC; and
- second, to give opinions in particular cases referred to the panel as to whether the arrangements in question are 'abusive', or instead constitute 'reasonable' tax planning ('a reasonable course of action in relation to the relevant tax provisions').

Both the guidance (approved by the panel) and any opinions given by the panel *must* be taken into account by a tribunal when considering the application of the GAAR, although neither will be binding on the tribunal.

Filling in the blanks

In carrying out both of these functions, the panel will perform the crucial role of giving substance to the concept of 'reasonable' tax planning. In the absence of this, in the author's view, a judge applying the GAAR would be required to answer a question of a starkly political or moral, as opposed to legal, nature.

The panel will thus be responsible for mapping out 'the large centre ground of responsible tax planning' (Graham Aaronson QC's report, para 5.1), and represents the key structural safeguard to prevent the application of the GAAR from becoming simply a matter of HMRC's discretion.

The panel members are, in effect, the 'guardians of the GAAR'. As such, it is intended that the panel will include tax experts with a wide range of commercial experience.

The formation of the panel is well under way. Patrick Mears (formerly of Allen & Overy) was announced as chairman on 15 April, and the deadline for applications to be appointed as a panel member closed on 10 June. It is intended that eight panel members will be appointed from the first pool of applicants.

Initial concerns

Unfortunately, regardless of the quality of the panel members, a number of concerns remain. First, it is disappointing that under the GAAR the role of the panel, in relation to the guidance, will be restricted to approving a document that is drafted by HMRC. Graham Aaronson QC's report recommended that the panel should be responsible for drafting the guidance, in order to minimise the extent of HMRC's discretion. While such a recommendation may have proved administratively difficult, this was seen as an important price to pay for keeping the guidance impartial and fair. It remains to be seen what impact, if any, the panel will actually have on the content of the guidance.

Second, it is unclear how the panel will be able to give an informed opinion, in lots of cases, as to whether particular arrangements constitute reasonable tax planning. Many tax disputes turn upon difficult questions of fact, and it is often possible to characterise the same arrangements in very different ways (e.g. the same structure might be seen as 'thoroughly commercial' or 'wholly tax driven', depending upon the viewpoint of the person considering it). In such cases the correct characterisation can often only be arrived at by a tribunal after oral submissions, and hearing the evidence of live witnesses that is tested under cross-examination. It is difficult to see how a sub-panel of three panel members, with only the assistance of the relevant documents and the written submissions of the parties, will be able to come to a fully-informed view as to whether or not such arrangements are 'abusive'.

A more fundamental problem

The principal concern about the panel, though, is the extent of its independence. To perform its functions properly it is vital that the panel both is, and is seen to be, independent of HMRC. Helpfully in this regard, HMRC confirmed on 7 November 2012 that there will be no HMRC representatives on the panel. Unfortunately, this does not go nearly far enough. The GAAR guidance and the panel terms of reference (published by HMRC) make it clear that:

- the panel will be established, appointed, funded by and accountable to HMRC;
- the chairman of the panel can be removed by HMRC; and
- the operating procedures of the panel are to be laid down by HMRC.

The panel, therefore, will be an unelected body, within the executive control of HMRC, that will significantly shape the UK taxation regime without any form of direct parliamentary scrutiny. This is a cause for concern from a constitutional perspective, as well as from the standpoint of taxpayers: the necessary safeguards to ensure the independence of the panel are simply not in place.

It is to be hoped that parliament will (now or in the future) address these fundamental concerns, and legislate to provide an independent framework for the operation of the panel. In the likely event that this does not occur, at least in the short term, it is necessary for HMRC to make the procedures of the panel open and transparent, and for the panel to be allowed to operate entirely independently of interference from HMRC.

What is a business?

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The term business is not defined for capital gains tax or inheritance tax legislation, but we have two recent tribunal cases to help our understanding.

By an interesting coincidence, two of the tribunal cases published last month dealt with the same point – the meaning of a business for tax purposes. In *Elizabeth Moyne Ramsay v HMRC* [2013] UKUT 0226 (TCC), the Upper Tribunal looked at whether the letting of residential accommodation was a business for the purposes of the capital gains tax relief in TCGA 1992 s 162 where a business is transferred to a company in exchange for shares. In *Trustees of David Zetland Settlement v HMRC* [2013] UKFTT

284 (TC) TC02690, the First-tier Tribunal considered whether the letting of a commercial property was a business for the purposes of business property relief in IHTA 1984 s 105(3).

Some may argue that a business for capital gains tax purposes is not the same thing as a business for inheritance tax purposes but there seem to be few grounds to make any serious distinction. Neither TCGA 1992 nor IHTA 1984 defines 'business' and the view of Judge Berner in the Upper Tribunal was that 'business' should take its unvarnished ordinary meaning.

Ramsay: 'business' for CGT purposes

In *Ramsay*, the activity carried on by the taxpayer was the letting of five flats. Mrs Ramsay provided extensive services to the occupants but HMRC considered the activities to be just the normal incidents of ownership of an investment property. The First-tier Tribunal shared that view and concluded that Mrs Ramsay merely had an investment and her activities did not amount to a business. However, the Upper Tribunal did not agree. It said there was no reason why activities ordinarily associated with management of an investment property should not be regarded as referable to a business. In the view of the Upper Tribunal, Mrs Ramsay's activities represented a serious undertaking earnestly pursued; it was conducted on sound and recognised business principles and her activities were of a kind which are commonly made by those who seek to profit by them. Accordingly, it was a business for capital gains tax purposes.

HMRC has for years been opposed to the idea that letting property can be a business for capital gains tax purposes, and I guess an appeal can be expected.

Zetland: 'business' for IHT BPR purposes

In *Zetland*, the activity was the letting of an office building and the question was whether the Trustees were carrying on a business for the purposes of inheritance tax business property relief. Section 105(3) provides that this relief applies unless the business 'consists wholly or mainly of one or more of the following, that is to say dealing in securities, stocks or shares, land or buildings or making of holding investments'.

The trustees provided an impressive list of services to the tenants, indeed rather more than had been undertaken by Mrs Ramsay. There were a number of full time and part time staff including a general handyman, a property manager, an in house solicitor and two secretaries. There were internet services, cleaning services and 24 hour security as well as a café, a gym and hair salon – although the latter were not operated by the trustees. HMRC again argued that the trustees activities were nothing more than the normal incidents of investing in property and concluded that the trustees activities were wholly or mainly the making or holding of investments.

The First-tier Tribunal agreed with HMRC and concluded that business property relief was not available. Interestingly, they said that the services provided by the trustees were insufficient 'to rebut the mainly investments argument' which had been advanced by HMRC. It is not clear why the argument advanced by HMRC was to be preferred unless and until it was rebutted by the taxpayer and maybe we shall hear more of this approach in due course.

In the meantime, some clarity is urgently required. It does nothing for the coherence of the tax code for the same term (indeed the same concept) to have different meanings for capital gains tax and inheritance tax purposes.