

---

The real problem with the GAAR is that there is no consensus about what represents an abusive arrangement. The numerous examples provided by HMRC's recent guidance do not take us much further.

The draft legislation for the GAAR has now been published and will come into force at Royal Assent. HMRC has also issued extensive guidance which has been approved by the GAAR advisory panel. However, I am not at all sure about all this.

We know what the GAAR is for; it is to combat egregious abuse. I do not want egregious abuse any more than anybody else but I am quite a fan of the rule of law. I find it worrying that the guidance note explains that citizens are not permitted to arrange their affairs by any lawful means – but only in a manner in which HMRC approves. Does nobody feel uneasy about this?

We have an extremely extensive tax code which sets out the conditions when you have to pay tax. What is now sought by the State is a special rule to charge people to tax when the law says they are not liable.

Imagine you are playing cricket. The captain of the opposing side tells you that if any of your batsmen hit the ball in the air and are caught, they will be out. Fine – that is one of the rules of the game. However, he goes on to tell you that when one of your batsmen hits the ball to a place where there isn't a fielder, he will still be out because had the opposing captain put a fielder in the right place, he would have caught it. This rule, however, does not apply to his own batsmen. Would this be outrageously (or perhaps egregiously) unfair? Discuss.

But this is not a game; this is the State taking away your property. You can only stop them if you can show that what you are doing is reasonable – indeed, 'doubly' reasonable.

There are lots of people who behave unreasonably who do not risk the confiscation of their property. There are also lots of people who deliberately break the law. Whilst the intention to combat aggressive tax avoidance is both clear and laudable, it seems somehow perverse that so much energy should be directed to frustrate those who go to great lengths actually to comply with the law.

The real problem is that there is no consensus about what represents an abusive arrangement. HMRC explains in the guidance that there will be no challenge or allegation of abuse in situations where the law deliberately sets precise rules or boundaries. It says that:

'If the statute specifies a particular period or set of conditions quite precisely, then taxpayers are entitled to assume that they are on the right side of the line if they have satisfied the statutory condition and there is no contrivance about what they have done.'

On first reading, that looks entirely reasonable, but actually what it means is that you are only protected if you satisfy the statutory conditions by accident. If you deliberately arrange things so that you satisfy the statutory conditions, then you must have contrived to do so – and that is objectionable as an abuse.

**It is no good saying that we all know abuse when we see it. We all know an elephant when we see one; but what if it is something else ... like a Trojan horse?**

The numerous examples provided by the guidance note do not take us much further. They set out a series of tax planning arrangements (designated as reasonable or unreasonable) but there is really no intrinsic difference between them. They all have the same characteristics and could all be regarded as abusive by anybody who wished to take that view.

HMRC does not have a complete discretion, of course, because the taxpayer can always appeal to the court (although at a cost which may exceed the tax at stake), but the whole thing is completely uncertain because what may be reasonable to one person may be unreasonable (or doubly unreasonable) to another.

The difficulty, as always, is to know where the line is to be drawn. It is no good saying that we all know abuse when we see it. We all know an elephant when we see one; but what if it is something else, a big wooden thing with four legs, head and a tail – like a Trojan horse?

HMRC's guidance on the GAAR is available from HMRC's website and via [www.lexisurl.com/GAARguidance](http://www.lexisurl.com/GAARguidance).

**Peter Vaines, Partner**

This article was first published in Tax Journal on 17 May 2013.