Undue influence

PETER VAINES considers the operation of the general anti-abuse rule and asks whether the criticism of it is justified.

The general anti-abuse rule (GAAR) is now the law of the land and forms part of the legislative framework in which we must operate as taxpayers and advisers. Whether or not we agree with it is neither here nor there. FA 2013, Part 5 sets out all the rules and we have some detailed guidance issued by HMRC and the GAAR Advisory Panel (including numerous examples covering all the relevant taxes). The GAAR has come in for some serious criticism, but is it fair?

A critical view

Can the legislation be criticised? Well, perhaps only in the most professional sense that we may have preferred the drafting to have been a bit clearer. However, lawyers always complain about the clarity or otherwise of legislation so why should this be any different? Whether it will achieve the objectives for which it was designed is another matter – and we will be able to make a judgment about that in due course.

However, there is a philosophical conundrum. In essence, the published reasoning behind the GAAR is that some people do things to reduce their tax liability. These things are perfectly legal in the sense that they are in accordance with the law, but they should not be allowed to benefit from the tax advantages because the course of action is contrary to the will of parliament.

However, the will of parliament is found from the words of the legislation. It is therefore odd to argue that a course of action is in accordance with the legislation, and thus by definition in accordance with the will of parliament, but at the same time that it is contrary to that will.

KEY POINTS

- Detailed guidance on the general anti abuse rule has been issued by HMRC and the GAAR Advisory Panel.
- Is not the will of parliament to be found in the legislation it enacts?
- Does HMRC's GAAR guidance reflect the will of parliament or the department's interpretation of this?
- FA 2013, s 211 confirms that courts must have regard to the views of HMRC.
- HMRC are entitled to disregard the views of the GAAR Advisory Panel.

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The will of parliament?

A critic might say that this is not about whether the legislation represents the will of parliament; it is more about what HMRC thinks the will of parliament ought to have been. In this sense one could therefore regard the GAAR as a constitutional outrage because it places the view of HMRC above that of parliament.

However that is not really the case. All that is happening here is that HMRC have said (perhaps unwisely) that the law should be interpreted according to their view, even if that is contrary to the will of parliament. This is not perhaps a view likely to attract much support, but they are (I suppose) free to say what they like. On reflection, however, HMRC is a public body so perhaps they are not.

So, can the HMRC guidance be criticised? That seems both wrong and unjustified. The department is perfectly entitled to publish its understanding of the legislation and this is generally something to be welcomed. We may not agree with all the views expressed, but it surely should be acknowledged as a good thing for such guidance to be published. Of course, the guidance will not be comprehensive and there will always be areas of serious uncertainty – but it is only guidance and we should be grateful for it.

So what?

So what is the problem? If the legislation cannot be criticised and the guidance is to be welcomed what is there not to like? I would suggest that the problem is that the guidance is not just guidance – it is quasi-legislation because the views published by HMRC have a degree of legal force.

A taxpayer can look at the legislation, form his own view and take that view to the courts for adjudication. That is how

FA 2013, S 211

Proceedings before a court or tribunal

(1) In proceedings before a court or tribunal in connection with the general anti-abuse rule, HMRC must show:
  (a) that there are tax arrangements that are abusive; and
  (b) that the adjustments made to counteract the tax advantages arising from the arrangements are just and reasonable.

(2) In determining any issue in connection with the general anti-abuse rule, a court or tribunal must take into account:
  (a) HMRC's guidance about the general anti-abuse rule that was approved by the GAAR Advisory Panel at the time the tax arrangements were entered into; and
  (b) any opinion of the GAAR Advisory Panel about the arrangements (see paragraph 11 of Schedule 43).

(3) In determining any issue in connection with the general anti-abuse rule, a court or tribunal may take into account:
  (a) guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into; and
  (b) evidence of established practice at that time.

our system works – and it has done so for centuries. Our courts are famously admired for their fairness and impartiality and this is something citizens are entitled to rely on. Indeed, the HM Courts website explains that is it vitally important for the judiciary to be free of external pressures and influence so that the public can have confidence that their cases will be decided fairly and in accordance with the law.

Unfortunately, when the taxpayer gets to court on a GAAR matter, he will find that, when determining the issue, the court *must* have regard to the views of HMRC. This is one of the specific requirements of ***FA 2013, s 211***. If the guidance was as clear and certain as the legislation, that might not be too bad – but it is not. In many areas, it is vague and uncertain and, in effect, this enables HMRC to say that the law means what they say it means. At that point, the taxpayer really does not have any genuine opportunity to argue.

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This is what everybody finds so offensive – and what is wrong with the GAAR. Take away the right for HMRC to influence the courts – something that surely must be repugnant to anybody interested in the rule of law – and allow the courts the freedom to follow the normal legal process. If that were to be done, the offensive nature of the GAAR would be largely, if not completely, resolved.

For the owner of the opposing team to referee the match may be acceptable in North Korea – but this approach commands rather less support in the UK. Indeed, in almost every other branch of the law it would be condemned as an abuse. The irony of anti-abuse legislation being intrinsically abusive would be amusing if it were not so serious.

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It would be disingenuous to suggest that the guidance is not that of HMRC, but of the GAAR Advisory Panel. However, the panel is of course established by HMRC. The position is made worse by the fact that, whatever the views of the Advisory Panel, HMRC are entirely free to disregard them and carry on regardless. This "heads we win, tails you lose" concept robs the panel of any real authority – despite the highly distinguished practitioners who will serve on it.

It may be too much to hope that HMRC will surrender a power that enables them to say "do what we say (whatever the law is) or there will be serious consequences." However, I believe that such a change would transform the reputation of HMRC and restore the integrity of our tax system. ■

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