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HMRC has published an unusual piece of guidance: its first guidance approved by an independent panel. It covers the new general anti-abuse rule, which is intended to enter into force on Royal Assent to the 2013 Finance Bill.

What's the GAAR about?

The purpose of the GAAR is to deter taxpayers from entering into abusive arrangements, and to deter would-be promoters from promoting such arrangements. Where the GAAR applies, arrangements which would otherwise achieve a tax advantage will be overruled and a 'just and reasonable' adjustment applied. This GAAR thus targets so-called egregious schemes, but does not apply to more general planning, including planning which HMRC might wish to challenge under existing law and legal construction.

The GAAR is broadly drafted. It may apply where saving UK tax is one of the main purposes of the arrangements. However, simply taking tax advice is not sufficient to engage the GAAR. The impact of the GAAR is then narrowed by: putting the burden of proof onto HMRC to demonstrate that it applies; the application of the 'double reasonableness' test; and the opinion of the advisory panel both expressed in the guidance and given specifically in relation to a particular transaction.

What does the guidance say?

The new guidance is substantially different from the original draft produced last December. It comprises five parts – four of which have been approved by the advisory panel. Parts A–C outline the GAAR and how it operates. Part D is 136 pages, covering 33 examples and four commencement examples. Part E covers procedural aspects of the GAAR and has not been approved by the advisory panel (although the panel has reviewed it).

Guidance approved by the GAAR advisory panel has a special status: it must be taken into account by a tribunal or court when considering whether or not to apply the GAAR. However, this does not mean that the tribunal is bound by it. The advisory panel is not a judicial body but 'a panel of individuals chosen for their relevant knowledge and experience'. Of course, we should expect that cases where the guidance is overruled by the tribunal will be rare – but the point about the status of the panel is important.

Alas poor Duke ...

The guidance highlights that, with the enactment of the GAAR, new limits are placed on the 'taxpayer choice' rule outlined in cases such as the *Duke of Westminster* and *Ayrshire Pullman*. It notes: 'it is essential to appreciate that, so far as the operation of the GAAR is concerned, parliament has decisively rejected this approach, and has imposed an overriding statutory limit on the extent to which taxpayers can go in trying to reduce their tax bill. That limit is reached

when the arrangements put in place by the taxpayer to achieve that purpose go beyond anything which could reasonably be regarded as a reasonable course of action.' Choice thus remains – but it must be reasonable. The challenge for taxpayers will thus be to work out whether a favourable tax result could be a reasonable choice.

Where's the boundary?

Tax advisers have for many years been accustomed simply to construe the law to determine its principles. Only where unclear, is it acceptable to consider a limited amount of additional materials under the *Pepper v Hart* rule. However, the GAAR provides that all sorts of material of varying weight must be considered to ascertain the legislative principles and their policy objectives. Even allowing for this wider range of material, some policy principles will still be unclear. The focus then moves to consider whether there are contrived or abnormal steps, or whether the planning is intended to exploit shortcomings in the law. Finally, the taxpayer may be able to show that the planning accorded with established practice, or had been accepted by HMRC.

When does it start?

The GAAR applies to arrangements entered into from Royal Assent to the Finance Bill – which will be by 18 July. Arrangements that straddle the commencement date could be affected by the GAAR – but only if whatever occurs after that date is abusive. The guidance illustrates how this might be applied in practice.

The advisory panel changes

Having completed its review of this guidance, the interim advisory panel chaired by Graham Aaronson QC has ended its term. HMRC has announced that Patrick Mears, formerly head of tax at Allen & Overy, is the new chair of the advisory panel. No doubt his first task will be to put together a panel to act in the future. The guidance will be updated periodically and additionally the new panel will need to give opinions on cases referred to it by HMRC, before HMRC may apply the GAAR in a particular case.

It's a kinda magic ...

... but not for much longer. Magic tax schemes are about to end. Tax advisers need to read the main body of the guidance. It's easy to read and sets out the key factors to consider when giving tax advice. The examples are more complicated but hopefully will help advisers understand how to approach the boundary of the GAAR.

Bill Dodwell was a member of the GAAR interim advisory panel. The guidance is available on HMRC's website and via www.lexisurl.com/GAARGuidance.