TREASURY, RISK AND FINANCE PROFESSIONALS

# The Association of Corporate Treasurers

## Comments in response to
## *A General Anti-Abuse Rule*
## HM Revenue and Customs,
June 2012

September 2012

## The Association of Corporate Treasurers (ACT)

The ACT is a professional body for those working in corporate treasury, risk and corporate finance. Further information is provided at the back of these comments and on our website www.treasurers.org.

Contact details are also at the back of these comments.

We canvas the opinion of our members through seminars and conferences, our monthly e-newsletter to members and others, *The Treasurer magazine*, topic-specific working groups and our Policy and Technical Committee.

## General

The ACT welcomes the opportunity to comment on this matter.

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The ACT is supportive of the principle of reducing abusive tax schemes however the Draft GAAR is too general in its scope. The wording lacks a proper primary filter and due to the subjective nature of the "abusive" test will cause considerable uncertainty among corporates as to what falls within scope. It would be a huge mistake to introduce something at this point in the economic cycle that chills growth and investments from not only indigenous firms but also foreign investment that could be undertaken in the UK. It is important that any GAAR introduced does not make the UK an unattractive location for foreign businesses to invest in and indeed the presentation of any eventual GAAR should be crafted so as not even to give the impression of being anti-business. The reputation of the UK as an attractive investment destination can be damaged by perceptions.

We have also provided specific comments on postponing the start day, the need for a clearance process and the Advisory Panel to be and be seen as independent.

**The main operative provisions**

Clause 2(1) of the Draft GAAR states "Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements." We understand the government has deliberately kept this definition broad and narrowed the application of the GAAR to abusive schemes.

The purpose test in the above definition of obtaining of a "tax advantage" is incredibly broad and will not filter out much.

Clause 3 of the Draft GAAR describes "tax advantage" as meaning:

a) Relief or increased relief from tax,
b) Repayment or increased repayment of tax,
c) Avoidance or a reduction of a charge to tax or an assessment to tax,
d) Avoidance of a possible assessment to tax,
e) A deferral of a payment of tax or an advancement of a repayment of tax, and
f) Avoidance of an obligation to deduct or account for tax.

This is an extremely easy threshold for HMRC. Corporates in general want to reduce the amount of tax they pay and in doing so they will fall within the definition of obtaining a "tax advantage". It could even be argued that the mere existence of a tax advisor for general tax advice or for a specific transaction would be perceived as the corporate attempting to obtain a "tax advantage" and thereby entering into a "tax arrangement".

Clause 2(2) to (5) describes tax arrangements as "abusive" if they are arrangements which cannot reasonably be regarded as a reasonable course of action, having regard to all the circumstances. The indicators of tax arrangements that might be abusive in clause (4) are not particularly helpful. For example the term "significantly (less/greater than/different)" needs to be defined.

A GAAR that is scoped too wide may also lead to corporates worrying about reputational risk. If a company takes precautionary measures this could be mistakenly construed that its previous structures were "abusive".

We believe the scope of "tax arrangements" and "tax advantage" are cast too wide and that the only true filter is the "abusive" test. However this test is highly subjective and will cause uncertainty around tax treatment. We are concerned that litigation will increase as a result. The Draft GAAR needs a proper primary filter and not simply the subjective "abusive" test. Some further refinements qualifying what is abusive, perhaps along the lines proposed in the Aaronson report are required.

**Guidance notes**

Whilst the initial study group report published in November 2011 proposed that the guidance notes should be included as a Schedule to the Finance Act, giving legislative authority, the Draft GAAR instead proposes that the guidance should merely be taken into account by the court or tribunal when considering any issues in connection with the GAAR.

We fail to see how corporates are expected to implement this legislation without clear detailed guidance issued well in advance.

**Commencement**
The government has proposed that GAAR should apply fully to tax advantages arising from arrangements entered into on or after 1 April 2013. This does not give corporates enough time to fully understand GAAR and assess its implications, particularly as the guidance notes haven't been issued to-date. As it is currently drafted corporates may innocently fall within the scope of GAAR and feel forced to restructure. This can take many months if not years, particularly for example if investments involve more than one party (e.g. joint venture or minority interest) where agreement between parties is required.

Not all complicated corporate structures are tax driven. There may be valid business reasons which corporates find difficult to articulate. The organisation structure and legal entity structure of a project is often determined by "considerations" such as levels of managerial responsibilities, impact on incentive schemes operational for both staff and management etc. It is wholly unclear what level of evidence need be produced (or should be asked for by HMRC) as to the reasons for using a particular structure. This is further complicated if the structure has been in place for many years such that records are not on file.

An extension of the commencement date of between 15 months to two years is essential and only after guidance notes are published. At a minimum we ask that grandfathering rules apply to tax arrangements already entered into.

**Clearance**
As noted above certain aspects of the Draft GAAR are very subjective and will result in considerable uncertainty for corporates. It is essential that clearances are given and that they are determinative otherwise uncertainty will not be removed sufficiently to start a project. The rapid availability of clearances is fundamental if the level of commercial undertakings is to be increased at a rate at which the government in power is expecting. The chilling effect of uncertainty cannot be underestimated. If there is uncertainty then projects will be delayed or not brought into the UK jurisdiction.

A customer relationship manager (CRM) is available for large businesses and wealthy individuals to discuss commercial arrangements and for HMRC to confirm "where appropriate that it does not regard particular arrangements as tax avoidance." This is helpful but even so does not provide the full certainty of a binding clearance decision. Small to mid size corporates and overseas investors do not have the benefit of a CRM and highlights the need for a clearance mechanism. HMRC has traditionally resisted calls for a clearance process on the grounds of costs and the resources needed. We believe that companies would accept paying a clearance fee to defray the costs. A fee would also act to discourage companies from seeking unnecessary clearances on uncontentious arrangements and thereby minimise the HMRC workload.

Whilst clearances would be preferential, if they are not forthcoming then the Draft GAAR legislation needs to be redrafted in such a way that corporates are able to self assess or for their advisors to provide meaningful opinions.

**The Advisory Panel**
The government proposes that an Advisory Panel would provide a way of helping taxpayers and HMRC identify the borderline of where the GAAR applies. It is difficult to provide detailed comment on the Advisory Panel without seeing the full details referred to in paragraph 6.4 of the consultation document (to be published later in the year). Whilst we agree that "HMRC has an important role to play in bringing its knowledge and

experience of developing and applying tax law" their attendance on the Advisory Panel should be non-voting and a right to speak such that HMRC doesn't have excessive sway. The Advisory Panel needs to be and be seen as independent and have credible non-HMRC tax expertise. The governance arrangements for the Panel will need careful attention.

We welcome the output from the Advisory Panel in the form of published opinions and guidance notes however we would draw your attention to the point that the application of GAAR is so subjective it is highly probably that a different panel would arrive at a different decision when faced with the same set of circumstances. Hence it is important that the Advisory Panel state in their published opinions both the key facts which have influenced their decision together with the key ratio of law in readily understood language.

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## The Association of Corporate Treasurers

The Association of Corporate Treasurers (ACT) is the leading professional body for international treasury providing the widest scope of benchmark qualifications for those working in treasury, risk and corporate finance. Membership is by examination. We define standards, promote best practice and support continuing professional development. We are the professional voice of corporate treasury, representing our members.

Our 4,300 members work widely in companies of all sizes through industry, commerce and professional service firms.

For further information visit www.treasurers.org

Guidelines about our approach to policy and technical matters are available at http://www.treasurers.org/technical/manifesto.


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| Contacts:<br>Michelle Price, Associate Policy & Technical Director<br>(020 7847 2578; mprice@treasurers.org)<br>John Grout, Policy & Technical Director<br>(020 7847 2575; jgrout@treasurers.org)<br>Martin O'Donovan, Deputy Policy & Technical Director<br>(020 7847 2577; modonovan@treasurers.org) | The Association of Corporate Treasurers<br>51 Moorgate<br>London EC2R 6BH, UK<br><br>Telephone: 020 7847 2540<br>Fax: 020 7374 8744<br>Website: http://www.treasurers.org |