

## The Association of Corporate Treasurers

Comments in response to  
***GAAR consultation draft***  
**HM Revenue & Customs,**  
December 2012

February 2013

### 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](http://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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As stated in our response to HMRC's earlier GAAR consultation (September 2012), the ACT is supportive of the principle of reducing abusive tax schemes, and recognises that the proposals issued in December 2012 provide more certainty than the previous proposals. In particular we welcome the provision of the examples in HMRC's guidance Part B which will assist taxpayers to identify the type of transactions that would be targeted by the GAAR.

## Specific Comments

The main concern of our membership is to have certainty over the tax of financial transactions – which often involve a number of different tax jurisdictions. Modern funding arrangements are often complex due to the multifaceted nature of financial markets, and the tax interpretation is not straightforward. The ACT therefore prefers legislation to be as precise as possible, and for any errors or weaknesses in drafting to be corrected by amending the legislation rather than a procedure such as the GAAR.

Nevertheless many transactions will remain that could be vulnerable to challenge by the GAAR if the taxpayer and HMRC take a different view as to the meaning of “abusive”. This is especially the case because the draft legislation states in section 2(6) that the examples in subsections (4) and (5) of section 2 are not exhaustive.

The ACT would therefore welcome the publication of further examples as HMRC’s practice over application of the GAAR develops, so as to provide more certainty over a wider range of transactions and circumstances. We perceive the examples which have been provided to-date are at the extreme ends of the spectrum and are either clearly “abusive” or “not abusive.” These do not assist the corporate in determining what is “abusive” for transactions and arrangements that fall into the “grey area” in between.

Additionally further clarification is needed on whether a tax arrangement exploits “shortcomings” or not. One of the tests of whether an arrangement is abusive is whether its effect is "consistent with any principles on which [the tax provisions] are based and the policy objectives of those provisions". One of the others is whether the arrangements exploit "shortcomings" in the provisions. Both of these tests assume that the tax provisions under consideration have principles and purpose behind them, and that those principles and purposes can be discerned by the taxpayer. The guidance notes acknowledge this, and say that all legislation has purpose.

However, in the field of financial instruments in particular, the legislation is very complex and convoluted. It frequently gives results which are seemingly arbitrary, and which bear little resemblance to the economics of the situation. In those circumstances, it is impossible to identify any purpose underlying the detailed rules. Consequently, where a complex transaction is taxed based on the letter of the law, it is not possible to determine whether that literal reading of the rules conforms to the purpose of the law, or is contrary to that purpose and/or a "shortcoming". Examples include classes of derivatives over shares and classes of derivatives over land. Both classes have rules which determine whether the income from the assets is taxed or capital gains tax applies. These rules are not related to the economics of the transactions and different rules apply to the two classes of assets even though they are conceptually doing the same thing.

As noted in our previous representations, the ACT would have preferred an advance clearance procedure to be made available, as this is available in other jurisdictions with which our members conduct transactions, e.g. the US.

Uncertainty of scope and the inability to clarify any ambiguity through a pre-clearance process does not make the UK an attractive location for both indigenous and foreign businesses to invest in. We reiterate our previous comment that the reputation of the UK as an attractive investment destination can be damaged by perceptions.

We support the appointment of an Advisory Panel but we have concerns as to the independence of the proposed Advisory Panel, as the members will be appointed by the Commissioners. We also have concerns that no time limits will be applied to the Advisory Panel's decisions. We recommend that these matters should be kept under review and that further representations should be invited once the Panel has come into operation.

## 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 4,500 members work widely in companies of all sizes through industry, commerce and professional service firms.

For further information visit [www.treasurers.org](http://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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