

Seeking anti-avoidance measures of general nature and scope -GAAR and other rules: Do we need them, and what should they be like?

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1. Introduction

Taxation and avoidance are interconnected phenomena of all jurisdictions, and this relation is becoming increasingly a worldwide problem amidst the recent and long-lasting fiscal and economic crisis. The sophistication of tax avoidance schemes, the levels of taxpayers' aggressiveness and the measures governments take vary within countries. Besides, there are no universal standards on the concept of avoidance, which is in the core of the discussion regarding any tax avoidance technique¹.

Targeted anti-avoidance Rules (TAARs) are techniques that exist in any domestic tax legislation, although they have proven to promote creative compliance as advisers develop new types of tax planning to explore statutory loopholes, until new provisions come to curb them, and start the game all over again.

In this sense, for over a 100 year, several jurisdictions have enacted General Anti-Avoidance Rules (GAARs), with broad, uncertain and eventually retrospective effects. Most of all, this instrument is controversial as to the powers granted upon tax officials. Along the decades, the way GAARs were drafted have evolved as many pitfalls have been found in the case law. Despite many downsides, no country has given up on their GAARs.

¹ In order to avoid this conceptual dilemma and, at the same time, to prevent misinterpretations, the Report will use the definition based on concepts of the taxpayer's conducts, according to which tax avoidance stands for conducts that unsuccessfully achieve a tax minimisation and are not considered criminal offenses.

In the 2002 Oslo (Norway) IFA Conference, the report on the subject 'Form and substance in tax law'² concluded that countries would challenge tax avoidance schemes with or without a GAAR. In the absence of this rule, judge-made doctrines, such as fraud, sham or abuse, are often the way

Moreover, International Financial Institutions (IFIs), such as IMF and the World Bank have long advised countries to adopt effective tools to address tax avoidance, which include GAARs. And anti-avoidance measures are also in the core of OCDE's Base Erosion and Profits Shifting (BEPS) program.

GAARs are an issue both in developed countries as well as in developing economies³. The drafting designs differ but there is a high degree of coincidence among them, since they address similar issues and share common elements.

In some countries, GAARs apply to direct and to indirect taxes, to companies and/or individuals – a sole GAAR or different GAARs may apply depending on the kind of tax or the type of person or corporation. Although it might be very interesting to discuss GAARs with regard to any kind of taxes and personal target, the subject may better be restricted to income and, excluding inheritance and gift taxes, and indirect taxes, but should focus on both individuals and companies.

It is not possible to verify the necessity of a GAAR anywhere or to foresee any judicial outcomes in its operation. The 2018 Seoul General Congress will focus on countries that have General Anti-Avoidance Rules or doctrines.

2. Draft questionnaire

In order to research the different experience with GAAR-type measures, the Branch Reporters will be asked to answer a questionnaire related to their own jurisdictions

² Frederik Zimmer, 'IFA General Report: Form and Substance in Tax Law' in *Cahiers de Droit Fiscal International* (IFA, 2002, Vol.87A), 30-31.

³ Paulo Rosenblatt, 'General Anti-Avoidance Rules for Major Developing Countries (Kluwer Law International: The Netherlands, 2015).

regarding tax avoidance, existing GAARs or other similar rules, statutory design features, case law and impacts and perspectives on the international agenda.

The Branch Reporters are required to describe and to analyse their domestic legislation (constitutional background, statutory provisions and regulations), international treaties, tax authorities' positions and national case law.

Therefore, following the recommendations of the Korean Branch Reporters, the General Reporters raise the following preliminary questions, which shall be answered from the above perspectives:

1. Is sophisticated or aggressive tax avoidance, for which the core idea and structure is often devised with help of tax experts, considered a serious problem in the jurisdiction?
2. Is it a problem that calls for a legislative response?
3. Is there a GAAR-type rule in the jurisdiction? If not, would it be an adequate measure to address this problem? If anti-avoidance measures of general nature and scope, which enable the tax authorities or courts to better cope with sophisticated tax avoidance, are now permitted, are these measures not regarded as infringing upon taxpayers' certainty or predictability? Are these measures not viewed as being in conflict with other existing legal principles?
4. If a jurisdiction has recently introduced or plans to introduce in the near future such anti-avoidance measures of general nature and scope, are such measures applicable to the transactions that have already been entered into as of the time of introduction? What will be the legal ground for such application, which might be viewed as 'retrospective'?
5. How do the tax authorities challenge tax avoidance schemes? Are they allowed to re-characterize or recast the relevant transaction for tax purposes? If not, what is the legal or theoretical background for lack of such re-characterization? If such re-characterization or recasting is allowed, what is the legal or theoretical background for such re-characterization?
6. What is the line between an act of tax saving or minimisation recognised as legitimate for tax purposes and an act of tax avoidance that should be denied under

tax law? What characterises the conduct or facts subject to the operation of the GAAR? What kind of definition of scheme, arrangement or transaction are used? Are the criteria generally considered as sufficiently concrete to be practicable or too abstract or vague as to become a limitless charging provision? Do they use indeterminate expressions such as 'unacceptable', 'impermissible' or 'irresponsible'? Do they apply to a single step, or to steps or a combination of steps or transactions? In a series of transactions, are criteria such completion, pre-ordination, pre-planning required? Does the legislation provide for a list of indicia of tax avoidance?

7. How does the GAAR describe the tax benefit or advantage as a consequence of the tax avoidance scheme? Is it a general provision or a list of types of consequences or features that characterise a tax benefit or advantage?
8. Does the test consider the subjective motive or intent of the taxpayers? Or does it dictate other, more objective factors to be taken into account? Does it refer to the main, prevailing, principal or dominant purpose, or one of the main purposes? Which is more decisive, subjective motive or other objective circumstances? If the taxpayer has mixed motives, that is, he has some legitimate business purpose(s) along with tax avoidance intent, how does tax law treat this business purpose? Are there attributes such as the 'substantial' or 'relevant' purpose? Is the purpose limited to the taxpayer or does it apply to direct parties of the arrangement, including any person directly or indirectly involved with the scheme? Does it apply to each transaction individually (scheme or sub-schemes) or to the overall transaction?
9. Is the reasonable or reasonable expectation test a feature of the jurisdiction's GAAR? Is it used to characterise the scheme or transaction as tax avoidance, to qualify or quantify the tax benefit or advantage, or to identify the purpose?
10. Is there a 'form and substance' test? Is it based on the 'nature' of the act or arrangement? Are artificiality, complexity, abnormality, commerciality used to label the arrangements?
11. Does the GAAR-type rule refer to 'business purpose' in order to balance tax and non-tax purposes in a multi-purpose transaction or arrangement? Does it require a *bona fide* purpose?
12. In the event of conflict between the GAAR and ordinary provisions (including treaties), are there specific rules on which one should prevail? If a new measure has

recently been introduced, as a response to the recent anti-avoidance trend, how does this new provision interact with the old provisions that tackled specific types of tax avoidance? Should any type of tax saving or avoidance be fully re-evaluated under the new measure? Can such measures be generally applied when application of a tax treaty is at issue? Or is there other consideration needed in the context of treaty application?

13. Is there any provision in the GAAR that calls for a purposive approach (textual, contextual and purposive interpretation)? Is it based on an 'abuse of law' or 'fraude of law' concept?
14. Are these criteria merely 'procedural' in the sense that the judgment is deferred to a group of reliable experts? Are there any taxpayer's safeguards regarding the operation of the GAAR?
15. Has there recently been any remarkable change in legislation, tax administration, or court's case law, inspired by recent changes in economic or financial circumstances that led to the OECD's BEPS project?

More questions can be found and developed in the process of elaborating and better articulating the issues that this proposal has thus far raised. In answering those questions, this subject aims at identifying the current situation as to how many jurisdictions avail themselves of such anti-avoidance measures of general nature and scope and how effective they actually are in those jurisdictions, and, hopefully, obtaining some clues as to what an ideal GAAR should or should not be like.

3. Conclusion

GAAR is a will always be a relevant subject in tax matters. As tax avoidance is becoming a world issue and countries are increasingly starting to target it in tandem, following similar standards, it is high time to compare – with appropriate methodology – and evaluate different types of domestic rules, regarding design features and judicial outcomes, in order to find common elements that can be shared with other jurisdictions.