HMRC'S GAAR GUIDANCE

(Approved by the Advisory Panel with effect from 15 April 2013)

PART A – Purpose and status of the guidance

PART B – Summary of what the GAAR is designed to achieve and how it operates to achieve it

PART C – Specific points

Part A – Purpose and status of this Guidance 3

Part B – Summary of what the GAAR is designed to achieve and how it operates to achieve it . 4

Part I – What the GAAR is designed to achieve 4

B1 Background to the introduction of the GAAR 4
B2 The fundamental approach of the GAAR 4
B3 The target of the GAAR 6
B4 What the GAAR is not targeted at 6
B5 International tax arrangements 7
B6 The GAAR and the rest of the tax rules 8
B7 The GAAR and other statutory anti-avoidance provisions 8
B8 The GAAR and HMRC's right to tackle tax avoidance using other provisions 8

Part II – How the GAAR is designed to operate 9

B9 Taxes to which the GAAR applies 9
B10 Tax arrangements 9
B11 How to identify "abusive" arrangements 10
B12 Taxpayer safeguards 10
B13 Counteraction and consequential adjustments 11
B14 Management of the GAAR by HMRC officials 12
B15 The GAAR and self-assessment 12
B16 The GAAR and penalties 12
B17 Clearances 13
B18 When the GAAR rules come into force 14

Part C – Specific points 15

C1 Key concepts 15
C2 Tax advantage 15
C3 Tax arrangements 16
C4 Arrangements 18
C5 Abusive 18
C6 Counteracting the tax advantage 28
C7 Consequential relieving adjustments 32
C8 Proceedings at a tribunal or in court 32
C9 Priority of the GAAR legislation 34
C10 Commencement of the GAAR legislation 34
C11 Disclosure of tax avoidance schemes ("DOTAS") 34
C12 Code of Practice on Taxation for Banks 35

Part A – Purpose and status of this Guidance

A1 This Guidance is published with two main objectives.

A2 The first is to give, in layperson's language, a broad summary of what the General Anti-Abuse Rule ("the GAAR") is designed to achieve, and how the GAAR operates so as to achieve it[1].

A3 The second is to be an aid to the interpretation and application of the GAAR, by discussing its purpose, considering particular features of the GAAR and, where appropriate, illustrating that discussion by means of examples.

A4 In this context it is important to note that this Guidance's function as an aid to the interpretation and application is explicitly recognised by the GAAR legislation. S208(2) of Finance Bill ("FB") 2013 requires any court or tribunal which is considering the application of the GAAR to take into account those parts of the Guidance which have been approved by the GAAR Advisory Panel. Parts A, B, C and D of the current Guidance have been approved by the Advisory Panel (which is a panel of individuals chosen for their relevant knowledge and experience all of whom are completely independent of HMRC).

A5 Part E of this Guidance deals with procedural aspects of the operation of the GAAR. Although that Part has been reviewed by the Advisory Panel it is not required to be approved by that Panel. As such, a court may, but is not required to, take it into account.

A6 This Guidance will be kept under review by HMRC and the Advisory Panel, and it will be updated periodically. When the Guidance is amended, the date of the amended Guidance will be clearly noted. Each edition of the Guidance will be accessible as a link on the HMRC website, to facilitate reference to the particular edition of the Guidance which is current at the time when an arrangement is entered into.

[1] The GAAR legislation itself is set out in Part 5 of FB 2013 and Schedule 40 to that Bill.

Part B – Summary of what the GAAR is designed to achieve and how it operates to achieve it

Part I – What the GAAR is designed to achieve

B1 Background to the introduction of the GAAR

B1.1 In December 2010 the Government asked Graham Aaronson QC to lead a study that would consider whether there should be a general anti-avoidance rule for the UK.

B1.2 Graham Aaronson assembled a Study Group of tax experts which published its Report on 21 November 2011 (http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf). This set out a recommendation to the Government for the introduction into the UK tax system of a narrowly focused general anti-abuse rule targeted at abusive tax avoidance schemes.

B1.3 In the 2012 Budget the Government announced that it accepted the broad recommendation of that Report.

B1.4 The GAAR in FB 2013 is largely based on the principles developed in the GAAR Study Group Report, but with some material differences reflecting the results of the formal consultation process.

B2 The fundamental approach of the GAAR

B2.1 The GAAR Study Group Report was based on the premise that the levying of tax is the principal mechanism by which the state pays for the services and facilities that it provides for its citizens, and that all taxpayers should pay their fair contribution. This same premise underlies the GAAR. It therefore rejects the approach taken by the Courts in a number of old cases to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might diverge from the real economic position.

B2.2 Amongst these Court decisions the following are routinely cited as providing legitimacy to even the most abusive tax avoidance schemes:

> "My Lords, the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing, he neither comes under liability nor incurs blame." [2]

> "Every man is entitled if he can to order his affairs so that the tax attracted under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax." [3]

> "No man in this country is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow – and quite rightly – to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue." [4]

B2.3 The last quote from the judgment of Lord Clyde in the Ayrshire Pullman case epitomises the approach which Parliament has rejected in enacting the GAAR legislation. Taxation is not to be treated as a game where taxpayers can indulge in any ingenious scheme in order to eliminate or reduce their tax liability.

B2.4 Accordingly, 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.

[2] Lord Sumner in *Fisher's Executors v CIR* [1926] AC395
[3] Lord Tomlin in *Duke of Westminster v CIR* [1936] AC1
[4] Lord Clyde in *Ayrshire Pullman v CIR* (1929) 14TC754

B3 The target of the GAAR

B3.1 The primary policy objective of the GAAR is to deter taxpayers from entering into abusive arrangements, and to deter would-be promoters from promoting such arrangements. There may be tax avoidance arrangements that are challenged by HMRC using other parts of the tax code, but if they are not abusive they are not within the scope of the GAAR.

B3.2 If a taxpayer is undeterred, and goes ahead with an abusive arrangement, then the GAAR operates so as to counteract the abusive tax advantage which he or she is trying to achieve. The counteraction that the GAAR permits will be a tax adjustment which is just and reasonable in all the circumstances. The appropriate tax adjustment is not necessarily the one that raises the most tax.

B4 What the GAAR is not targeted at

B4.1 Just as it is essential to understand what the GAAR is targeted at, so it is equally essential to understand what it is *not* targeted at.

B4.2 Underlying the GAAR legislation is the recognition that, under the UK's tax code, in many circumstances there are different courses of action that a taxpayer can quite properly choose between. The GAAR is carefully constructed to include a number of safeguards that ensure that any reasonable choice of a course of action is kept outside the target area of the GAAR.

B4.3 To take an obvious example, a taxpayer deciding to carry on a trade can do so either as a sole trader or through a limited company whose shares he or she owns and where he or she works as an employee. Such a choice is completely outside the target area of the GAAR, and once such a company starts to earn profits a decision to accumulate most of the profits to be paid out in the future by way of dividend, rather than immediately paying a larger salary, is again something that should in any normal trading circumstances be outside the target area of the GAAR.

B4.4 Similarly, decisions to invest in an ISA in order to take advantage of the income tax relief which such investments carry, or to give away assets to a son or daughter without retaining a benefit in the gifted asset, with a view to reducing the amount of inheritance tax payable on the transferor's death, clearly fall outside the target area of the GAAR. Using statutory incentives and reliefs to support business activity and investment in a straightforward way (for example business property relief, EIS, capital allowances, patent box) are also not caught by the GAAR. However, experience has shown that incentives and reliefs can be abused. Where taxpayers set out to exploit some loophole in the tax laws e.g. by entering into contrived arrangements to obtain a relief but incurring no equivalent economic risk then they will bring themselves into the target area of the GAAR.

B5 International tax arrangements

B5.1 There is a network of treaties between States setting out rules that govern the taxation of investment and business activities involving more than one State. These treaties (which are typically based on an OECD Model Treaty) are usually referred to as "double tax treaties", and their purpose is to avoid subjecting such investments or activities to tax in more than one State and to prevent tax evasion. The United Kingdom has entered into over 100 such treaties, and they are given effect in domestic tax law.

B5.2 Many of the established rules of international taxation are set out in double taxation treaties. These cover, for example, the attribution of profits to branches or between group companies of multi-national enterprises, and the allocation of taxing rights to the different States where such enterprises operate. The mere fact that arrangements benefit from these rules does not mean that the arrangements amount to abuse, and so the GAAR cannot be applied to them. Accordingly, many cases of the sort which have generated a great deal of media and Parliamentary debate in the months leading up to the enactment of the GAAR cannot be dealt with by the GAAR[5].

B5.3 However, where there are abusive arrangements which try to exploit particular provisions in a double tax treaty, or the way in which such provisions interact with other provisions of UK tax law, then the GAAR can be applied to counteract the abusive arrangements.

[5] However, there is work underway in the OECD on the erosion of the tax base and on profit shifting.

B6 The GAAR and the rest of the tax rules

B6.1 It is important to appreciate that the GAAR is designed to counteract the tax advantage which the abusive arrangements would otherwise (i.e. in the absence of the GAAR) achieve. This means that it will usually be necessary to determine whether the arrangements would achieve their tax avoiding purpose under the rest of the tax code (i.e. the non-GAAR tax rules), before considering whether the arrangements are "abusive" within the meaning of the GAAR.

B6.2 However, there may be some arrangements which appear to be so blatantly abusive that it would be appropriate for HMRC to invoke the GAAR without first completing the exercise of determining whether the arrangements would achieve their intended tax result under the rest of the tax rules. It is therefore not possible for a taxpayer to object to the use of the GAAR simply because all other means available to HMRC to tackle what they consider an abusive arrangement have not been utilised.

B7 The GAAR and other statutory anti-avoidance provisions

B7.1 There are many statutory provisions relating to the taxes covered by the GAAR which set out specific anti-avoidance rules. Some of these are known as targeted anti-avoidance rules ("TAARs"), while others may take the form of less explicit anti-avoidance protection.

B7.2 In principle the GAAR operates independently of these other anti-avoidance rules, and it might well be used to counteract an abusive arrangement which was itself contrived to exploit a defect in the other anti-avoidance rules, whether a TAAR or otherwise.

B8 The GAAR and HMRC's right to tackle tax avoidance using other provisions

B8.1 As has been emphasised, the GAAR is designed to target and counteract only what it defines as "abusive" arrangements.

B8.2 It is important to note that in many cases the existing (non-GAAR) tax rules will be effective to defeat abusive tax arrangements, and so in such cases HMRC will not need to rely on the GAAR. However, there may be cases where abusive schemes would succeed in the absence of the GAAR, which is the very reason why the GAAR has been introduced.

B8.3 There may also be arrangements which cannot be described as abusive, but which nonetheless HMRC regards as seeking to achieve some tax advantage and as falling outside the range of acceptable tax planning. The fact that the GAAR would be inapplicable in those situations does not inhibit HMRC's right to challenge such cases, relying where appropriate on other parts of the tax code applied in accordance with the legal principles developed by the courts in recent years.

Part II – How the GAAR is designed to operate

B9 Taxes to which the GAAR applies

B9.1 The GAAR applies to:

- Income tax;
- Capital gains tax;
- Inheritance tax;
- Corporation tax;
- Any amount chargeable as if it were corporation tax, or treated as if it were corporation tax, such as a CFC charge, the bank levy, the oil supplementary charge and tonnage tax;
- Petroleum revenue tax;
- Stamp duty land tax; and
- The annual tax on enveloped dwellings.

B9.2 It is intended that the GAAR will be extended to cover National Insurance Contributions ("NICs"). This will be contained in separate legislation (as a result of the requirements of Parliamentary procedure); but the NICs provisions will follow the same principles and contain the same procedural safeguards as the GAAR which applies to the taxes listed above.

B10 Tax arrangements

B10.1 The GAAR applies to "tax arrangements" which are "abusive". In broad terms a tax arrangement is any arrangement which, viewed objectively, has the obtaining of a tax advantage as its main purpose or one of its main purposes. "Tax advantage" in this context is also broadly defined.

B10.2 The broad definitions of “arrangements” and “tax arrangements” set a low threshold for initially considering the possible application of the GAAR. A much higher threshold is then set by confining the application of the GAAR to tax arrangements which are “abusive”.

B11 How to identify “abusive” arrangements

B11.1 It is recognised that under the UK’s detailed tax rules taxpayers frequently have a choice as to the way in which transactions can be carried out, and that differing tax results arise depending on the choice that is made. The GAAR does not challenge such choices unless they are considered abusive. As a result in broad terms the GAAR only comes into operation when the course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable.

B12 Taxpayer safeguards

B12.1 To ensure that, in effect, the taxpayer is given the benefit of any reasonable doubt when determining whether arrangements are abusive, a number of safeguards are built into the GAAR rules. These include:

- Requiring HMRC to establish that the arrangements are abusive (so that it is not up to the taxpayer to show that the arrangements are non-abusive).
- Applying a ‘double reasonableness’ test. This requires HMRC to show that the arrangements “cannot reasonably be regarded as a reasonable course of action”. This recognises that there are some arrangements which some people would regard as a reasonable course of action while others would not. The ‘double reasonableness’ test sets a high threshold by asking whether it would be reasonable to hold the view that the arrangement was a reasonable course of action. The arrangement falls to be treated as abusive only if it would not be reasonable to hold such a view.
- Allowing the court or tribunal to take into account any relevant material as to the purpose of the legislation that it is suggested the taxpayer has abused, or as to the sort of transactions which had become established practice at the time when the arrangements were entered into.

- Requiring HMRC to obtain the opinion of an independent advisory panel as to whether an arrangement constituted a reasonable course of action, before they can proceed to apply the GAAR.

B12.2 These safeguards are dealt with in more detail in Part C of this Guidance. However it is appropriate to mention here that these safeguards (and particularly the 'double reasonableness' test) would prevent the GAAR operating in relation to arrangements entered into for the purpose of avoiding an inappropriate tax charge that would otherwise have been triggered by a more straightforward transaction. Tax charges of this sort (sometimes referred to as 'bear traps') can be encountered from time to time. For example where a taxpayer has to take what appear to be contrived steps in order to ensure that they are not taxed on more than the economic gain, such an arrangement would not generally be regarded as abusive.

B13 Counteraction and consequential adjustments

B13.1 If it is determined that an arrangement is abusive, then the GAAR provides that the tax advantage that the arrangement sets out to achieve will be counteracted. The GAAR provides that this will be done in such a way that is just and reasonable – a familiar and well understood term used quite widely in UK tax law.

B13.2 In most cases it will be a relatively straightforward exercise to decide what adjustments need to be made to achieve a just and reasonable result (e.g. increasing taxable income, or decreasing allowable deductions, by a clearly identifiable amount).

B13.3 There will be some cases, though, where the exercise is less straightforward. This would be the case, for example, where the taxpayer might have carried out any one of several alternative non-abusive transactions to achieve the same non-tax purpose if the abusive one had not been carried out. In this scenario the just and reasonable counteraction would be to select the transaction which a taxpayer would most likely carry out in such circumstances, and to adjust the tax consequences on the basis that this alternative transaction had been carried out. It is important to note that the most likely alternative transaction would not necessarily be the one which would result in the highest tax charge.

B13.4 When tax liabilities are adjusted to reflect the counteraction of the abusive transaction by the GAAR, it will be necessary to ensure that these adjustments do not involve any element of double taxation (whether in the hands of the taxpayer who carried out the abusive transaction, or when taking account of the tax liabilities of other persons). Specific provisions are included in the GAAR to eliminate any such double taxation by allowing consequential adjustments to other tax liabilities if a counteraction of a tax advantage under the GAAR requires this to prevent a double charge arising.

B14 Management of the GAAR by HMRC officials

B14.1 To ensure that HMRC invokes and applies the GAAR responsibly and consistently, the GAAR legislation requires counteraction of the abusive tax arrangement to be initiated by an official who has been specifically designated for this purpose by HMRC. HMRC officials may not in any circumstances commence counteraction under the GAAR without such prior consent, and a taxpayer is entitled to require evidence that such consent has been obtained. (Part E of this Guidance contains more detail). The procedure for applying the GAAR to any arrangement requires that the proposed application of the GAAR should be put before an advisory panel of independent experts who will give their opinion (or opinions if they are not unanimous) as to whether the arrangements in question constitute a reasonable course of action.

B15 The GAAR and self-assessment

B15.1 The GAAR forms part of the tax laws of each of the taxes to which it applies. Where those taxes operate on a basis of self-assessment, then taxpayers are required to take the provisions of the GAAR into account when completing their self-assessment returns.

B16 The GAAR and penalties

B16.1 The GAAR legislation does not include any specific provisions imposing, or dealing with, penalties.

B16.2 However, under the general principles of self-assessment, referred to in paragraph B15 above, a taxpayer has a duty to submit a correct tax return.

B16.3 Accordingly, if it would be reasonable for a taxpayer to believe that he or she has entered into an abusive arrangement that would be counteracted by the GAAR, then the self-assessment return must make an appropriate adjustment to reflect the fact that the GAAR would be applicable. Failure to do so could leave the taxpayer open to penalties for failing to take reasonable care in completing the tax return.

B16.4 In practical terms this means that it is possible for penalties to be imposed for breach of the self-assessment requirements in cases where a taxpayer has completed the self-assessment return on the basis that a tax-avoiding arrangement has succeeded in reducing the tax bill, when it should have been obvious that the arrangement was abusive and would be caught by the GAAR. Similar considerations apply to those taxes that do not operate on a self-assessment basis.

B16.5 A taxpayer who is uncertain whether an arrangement is within the scope of the GAAR may wish to make a 'white space disclosure' in the self-assessment return indicating the uncertainty.[6]

B17 Clearances

B17.1 The GAAR does not provide for a clearance system of its own.

B17.2 There are many provisions in the tax legislation applying to the taxes covered by the GAAR which do include provision for a taxpayer to apply for a clearance in respect of a particular transaction. That clearance, if given by HMRC, then has the effect of protecting the transaction from a particular tax consequence. Usually the statutory provisions concerned impose as a condition for granting a clearance the requirement that the transaction does not have tax avoidance as one of its main purposes (many different formulations of this requirement are used).

B17.3 Provided, of course, that all the relevant information was given to HMRC in the application for a clearance, the GAAR cannot be invoked to override the clearance in relation to the statutory provision for which the clearance was granted.

[6] See paragraph 18 of Statement of Practice SP1/06, dealing with such disclosure.

B17.4 It may well be the case also that (subject to the same proviso as to full disclosure) the granting of clearance signifies acceptance by HMRC that the transaction did not have the avoidance of tax as a material purpose; and in consequence the GAAR could not be used in relation to the same transaction even in the context of some other statutory provision not explicitly covered by the clearance.[7]

B17.5 However, there may be cases where the legislation providing for a clearance focuses on certain types of transaction, which may in fact form part of wider arrangements. In such circumstances HMRC would be free to consider invoking the GAAR in respect of other elements in the wider arrangement which it considers abusive if they were not themselves included as part of the subject matter of the clearance.[8]

B18 When the GAAR rules come into force

B18.1 The GAAR will have effect in relation to any arrangements which are entered into on or after the date on which Finance Bill 2013 is passed into law.

B18.2 There is a specific provision which enables reference to be made to transactions which were entered into before that date if, but only if, referring to those earlier arrangements would help show that the later arrangements were not abusive.

B18.3 Please see Part D for examples illustrating how the commencement rules will be applied in practice.

[7] For example s1044 CTA 2010 (purchase by unquoted trading company of own shares) where the clearance involves HMRC confirming that it is satisfied that the purchase of the shares does not form part of a scheme or arrangements the main purpose or one of the main purposes of which is the avoidance of tax

[8] For example s138 TCGA 1992, where the clearance only involves HMRC confirming that it is satisfied that the reconstruction will be effected for bona fide commercial reasons and not part of a scheme or of which a main purpose is avoidance of liability to **capital gains tax.**

Part C – Specific points

C1 Key concepts

C1.1 The GAAR operates for the purpose of counteracting tax advantages arising from tax arrangements that are abusive (s203(1)).

C2 Tax advantage

C2.1 The expression “tax advantage” is defined (in s205) to include

- relief or increased relief from tax;
- repayment or increased repayment of tax;
- avoidance or a reduction of a charge to tax or an assessment to tax;
- avoidance of a possible assessment to tax;
- a deferral of a payment of tax or an advancement of a repayment of tax; and
- avoidance of an obligation to deduct or account for tax.

C2.2 This definition of “tax advantage” is inclusive (i.e. it is not necessarily exhaustive) and is intended to have a very wide meaning. It is intended to cover any form of tax benefit, for example: increasing deductions or losses; decreasing income or gains; obtaining timing advantages; obtaining or increasing repayments of tax; or ensuring that a potential tax charge does not arise or is reduced.

C2.3 It is clear that “tax” is limited to the taxes to which the GAAR applies.

C2.4 As well as being relevant to whether arrangements are tax arrangements (see paragraph C3 below) the concept of tax advantage also plays a part in counteraction. The GAAR provides that it is the tax advantages arising from abusive tax arrangements that are to be counteracted on a just and reasonable basis.

C2.5 The concept of a "tax advantage" is common in UK tax legislation. The language suggests that in ascertaining whether an advantage arises the actual tax position should be compared with another tax position. The appropriate comparator or alternative tax position will depend on the facts, but will usually derive from the arrangements that would have occurred absent the abusive tax purpose (which may include no arrangement at all). In situations where there is more than one alternative arrangement that might have been adopted if the taxpayer had not adopted an abusive arrangement then the appropriate comparator would be the transaction that the taxpayer would most likely have carried out[9]. This might not be the arrangement that would give rise to the greatest tax liability.

C3 Tax arrangements

C3.1 The GAAR applies to abusive tax arrangements. Determining whether "tax arrangements" exist is therefore the first significant step in deciding whether the GAAR applies.

C3.2 Tax arrangements are defined in s204(1), which focuses on whether 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.

C3.3 The expression "reasonable to conclude" shows that this is an objective test, which is to be applied by taking into account all the relevant circumstances and asking whether, in the light of those circumstances, a reasonable conclusion would be that obtaining a tax advantage was the main purpose, or one of the main purposes, of the arrangements. It is neither necessary nor appropriate to enquire whether any particular person (e.g. the taxpayer himself, or a promoter of the arrangements, if there was one) actually had that intention. In practice, though, it would be very rare to find a situation where objectively the obtaining of a tax advantage appeared to be one of the main purposes of an arrangement although, subjectively, the participators did not in fact have any such aim.

[9] This follows the approach adopted by Lord Hoffman in the Hong Kong case *Commissioner of Inland Revenue v Tai Hing Cotton Mill* (CACV 343/2005): "[The Commissioner] would not be entitled, as the more alarmist submissions of counsel for the taxpayer suggested, to make an assessment on the hypothesis that the taxpayer had entered into an alternative transaction which attracted the highest rate of tax. That would not be a reasonable exercise of power. But she may adopt the hypothesis which the evidence suggests was most likely to have been the transaction if the taxpayer had not been able to secure the tax benefit."

C3.4 The GAAR legislation does not define what is meant by “the main purpose” or “one of the main purposes”. These expressions are to be given their normal meaning as ordinary English words. They have to be applied objectively, having regard to the full context and facts.

C3.5 It will usually be clear whether trying to obtain a tax advantage is “the main purpose” of a particular arrangement. Such would be the case, for example, where the arrangement would not have been carried out at all were it not for the opportunity to obtain the tax advantage; or where any non-tax objective was secondary to the benefit of obtaining the tax advantage.

C3.6 Determining whether obtaining a tax advantage is “one of the main purposes” can be more difficult. In this context, what this test is seeking to establish is whether a transaction which would otherwise have occurred has been reshaped, or has been entered into under different terms and conditions, in order to change significantly the tax result that would otherwise have arisen, and where the desired tax result is itself a substantial objective. The reshaping or difference in terms and conditions may be obvious and contrived; but this would not necessarily be the case and quite subtle changes may be involved (for example, in an appropriate context, simply changing the accounting date of a company in order take advantage of transitional rules introducing new provisions).

C3.7 It is important to note that the fact that tax advice has been obtained is not, of itself, an indication that the obtaining of a tax advantage is a main benefit of the arrangement. Where large sums are involved many taxpayers will routinely seek professional advice, including tax advice.

C3.8 It is apparent, therefore, that the definition of “tax arrangements” is widely drawn and deliberately sets a low threshold. Accordingly, it is likely that many transactions that would achieve some tax advantage will fall within this definition.

C3.9 However, this does not mean that all those transactions would fall to be counteracted by the GAAR. The main filter, which separates transactions that are liable to counteraction by the GAAR, is in the requirement that the tax arrangement must be shown to be abusive. This sets a much higher test, and is dealt with in paragraph C5 below.

C4 Arrangements

C4.1 “Arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable). This definition of “arrangements” is based on definitions commonly used in anti-avoidance legislation.

C4.2 The GAAR deliberately uses the expression “arrangements” rather than “transaction”. This is because “arrangements” is a more appropriate expression to cover the elements that are currently found in abusive schemes. For example, it is questionable whether converting a company from a limited liability company to an unlimited liability company, or vice versa, is aptly described as a “transaction” whereas it would fall within “arrangement”.

C4.3 The definition of arrangements is important to the consideration of the purpose test determining whether there is a tax arrangement. Arrangements can be viewed both narrowly and widely, so the GAAR can be applied to an arrangement that is part of a wider arrangement or to the wider arrangement as a whole. This prevents the weighting of purposes from being manipulated, such as by combining a tax scheme with a commercial transaction.

C4.4 However, when considering a tax arrangement which is part of a wider arrangement, then in determining whether that part is abusive, regard must also be had to the wider arrangement of which it is part.

C5 Abusive

C5.1 Determining whether tax arrangements are abusive is the core of the GAAR legislation.

C5.2 There are a number of elements to this test, each of which will be discussed below.

C5.3 To make the discussion easier to follow it may be helpful to set out the statutory language. The text is contained in s204(2)-(6) FB 2013 which is as follows:

> (2) Tax arrangements are “abusive” if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including—-

(a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,
(b) whether the means of achieving those results involves one or more contrived or abnormal steps, and
(c) whether the arrangements are intended to exploit any shortcomings in those provisions.

(3) Where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements.

(4) Each of the following is an example of something which might indicate that tax arrangements are abusive—-
(a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,
(b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes, and
(c) the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid,
but in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.

(5) The fact that tax arrangements accord with established practice, and HMRC had, at the time the arrangements were entered into, indicated its acceptance of that practice, is an example of something which might indicate that the arrangements are not abusive.

(6) The examples given in subsections (4) and (5) are not exhaustive."

C5.4 There are a number of key elements in this provision –

- The concept of *a reasonable course of action in relation to the relevant tax provisions;*
- Comparing the substantive results of the arrangements with the *principles on which the relevant tax provisions are based*, and with *the policy objectives of those provisions;*
- Seeing whether there are *contrived or abnormal steps;*
- Seeing whether the arrangements are intended *to exploit any shortcomings* in the relevant provisions; and
- The 'double reasonableness' test – whether the arrangements *cannot reasonably be regarded as a reasonable course of action……*

C5.5 There are other supplementary elements that need to be taken into account –

- Certain indicators of abusive tax arrangements; and
- Certain indicators of non-abusive tax arrangements.

C5.6 ***A reasonable course of action in relation to the relevant tax provisions***

C5.6.1 The basic test focuses on the nature of the taxpayer's choice of course of action as seen in the context of the tax rules that are engaged by that course of action. The term "relevant tax provisions" is not separately defined, and is a wide expression that encompasses any tax law (both primary and secondary legislation) that is relevant to determining the tax consequences of the tax arrangements under consideration. It therefore includes, but is not necessarily limited to, the tax law that applies (or fails to apply) in order to produce the relevant tax advantage.

C5.6.2 This test recognises that some parts of the tax legislation reflect a clear policy of providing tax relief or other specified outcomes for certain courses of action (e.g. to invest in plant and machinery or into a pensions scheme or farming land). So reasonable steps taken to achieve the outcomes envisaged by those rules, or to prevent benefits under those rules from being inappropriately denied, will be a reasonable course of action in relation to those rules.

C5.6.3 In many other cases the legislative rules plainly contemplate that the taxpayer will exercise a range of different commercial or personal choices. As an example, a commercial airline wishing to replace its fleet of aircraft may purchase new aircraft outright, or lease them from an aircraft leasing company, or enter into a finance sale and leaseback; and if the decision is to purchase the aircraft outright, then it might do so by raising capital for that purpose through a share issue, or borrowing funds specifically for that purpose, or using its existing funds which would represent a mix of share capital, loan capital and accumulated reserves. Each of these choices would involve different tax consequences, and it is entirely reasonable for the company concerned to take these potential tax consequences into account in deciding what particular course of action it will take.

C5.6.4 To take an everyday example in the context of personal taxation, a hairdresser may consider setting up a salon as a sole trader, or doing so in partnership with other hairdressers, or becoming an employee of some unconnected company, or setting up a company to run the salon and working as an employee or director of that company. Each of these choices would involve different tax consequences, and again it is entirely reasonable for that individual to take these tax consequences into account when deciding which course of action to take.

C5.6.5 This may be contrasted with a situation where a company has incurred losses and wants to 'sell' those losses to some unconnected company that has substantial taxable profits. There are specific provisions in the corporation tax rules that were introduced in order to prevent companies setting off losses against taxable profits if those losses originated in an unconnected company. If the companies concerned enter into complex transactions designed for the specific purpose of getting around these legislative rules, then it is not possible to regard those transactions as a reasonable course of action in relation to the relevant tax provisions, as they were specifically designed to frustrate the effect of those provisions.

C5.6.6 Similarly the inheritance tax legislation confers certain exemptions where trusts are set up by foreign domiciliaries. In recent years UK domiciliaries have attempted to take advantage of such exemptions by buying interests in such trusts. There have been a series of legislative measures since 2005 to stop this. If individuals still find ways round the already complex legislation then again it is not possible to regard those transactions as a reasonable course of action.

C5.6.7 This highlights the need to keep in mind the premise underlying the GAAR, which rejects the proposition that taxpayers have unlimited freedom to use their ingenuity to reduce their tax bills by any lawful means (this is discussed in Part B of this Guidance).

C5.7 *Comparing the substantive results of arrangements with the principles on which the relevant tax provisions are based, and with the policy objectives of those provisions*

C5.7.1 Interrelated with the concept of a reasonable course of action in relation to the relevant tax provisions is the requirement to consider the principles on which the relevant tax provisions are based and the policy objectives of those provisions.

C5.7.2 These expressions have been used because our Courts have laid down the principle that the "intention of Parliament" has to be found in the words used in the legislation, with limited right to consider other material. Accordingly, by referring to the "principles on which the provisions are based" and the "policy objectives" of those provisions, the GAAR requires consideration not only of the express terms of the legislation but also any underlying assumptions or broader policy objectives relating to the particular rules.

C5.7.3 In most cases the relevant principles and policy objectives will be apparent from the legislative provisions concerned, read together if necessary with non-legislative material (such as Parliamentary debates or press releases). In this context it should be noted that the range of material that can be taken into account is widened by s208(3) FB2013 to include material which would not otherwise be permissible under the normal rules of evidence.

C5.7.4 Sometimes it may be hard to discern what were the original underlying policy principles and objectives of particular tax rules. However, later amendments to the legislation (for example specific anti-avoidance rules) might make it possible to see what type of arrangements were intended to be, for example, excluded from certain tax benefits. Once this later legislation is introduced arrangements entered into afterwards that attempt to circumvent the legislation would be regarded as being inconsistent with the principles and policy objectives of the provisions.

C5.7.5 In a capital gains tax context, for example, the original legislation did not prevent taxpayers from "washing out" gains by using settlor interested trusts in a number of ways. For example second homes could be transferred into trust without capital gains tax.[10] The trustees acquired the house at the settlor's original cost but then allowed a beneficiary to occupy the house as his or her main residence. The trustees then transferred the house back out to the settlor, the trustees claimed main residence relief on the disposal and the settlor would acquire the house back at the rebased market value free of capital gains tax. Legislation was passed in 2003 to stop this scheme in relation to settlor-interested trusts, and hence an attempt to circumvent such legislation would be regarded as within the target of the GAAR.

[10] By claiming hold over relief under s260 TCGA 1992

C5.7.6 Where the principles and policy objectives are discernible, then these will usually be particularly important matters to take into account in considering whether the arrangements can be regarded as a reasonable course of action in relation to the relevant tax provisions.

C5.7.7 However, there may be legislative provisions where the principles and policy are not clearly discernible, or may not be fully developed, for example in a case where the drafter had simply not considered the possibility of certain participants in a particular type of transaction being resident outside the United Kingdom.[11]

C5.7.8 In such cases the main focus of the enquiry as to whether the arrangement was a reasonable course of action in relation to the relevant tax provisions will move to the considerations set out in ss204(2)(b) and (c) FB2013.

C5.8 ***Whether the means of achieving the results involves one or more contrived or abnormal steps***

C5.8.1 It is often the case that perceived loopholes in tax legislation are very narrow, and that to squeeze through them requires the adoption of some step or feature that would not otherwise have been taken. For example, in order to exploit some loophole in the tax rules a group structure may be temporarily broken by transferring 26% of shares in a particular company to some unconnected company, or a property may be temporarily transferred to a foreign nominee.

C5.8.2 These are simple examples, and of course in practice the contrived or abnormal steps may take any number of forms. The words “contrived” and “abnormal” are not defined, and therefore will be applied in their normal sense.

C5.9 ***Arrangements intended to exploit any shortcomings in the relevant tax provisions***

C5.9.1 Directing attention to the consideration of whether arrangements are intended to exploit any shortcomings in the relevant tax provisions is based on the recognition that the drafting of particular tax rules may lead to unanticipated consequences. This may be because the tax rules have a defect that was not apparent to the drafter, or the drafter may not have contemplated that a particular type of transaction could be carried out (whether to come within the rules or to keep outside them).

[11] The *Mayes* case discussed in the GAAR Study Group Report is a recent example of this.

C5.9.2 An example of this sort of situation arises where a new tax regime is introduced for certain types of transaction, and the transitional rules which have the general purpose of ensuring a coherent transition from the previous regime to the new regime inadvertently leave open the possibility of realising an economic profit without suffering a tax charge or creating a tax loss without realising any economic loss.

C5.10 ***The 'double reasonableness' test – whether the arrangements "cannot reasonably be regarded as a reasonable course of action"***

C5.10.1 The double reasonableness test ("cannot reasonably be regarded") is the crux of the GAAR test. It does not ask whether entering into or carrying out the arrangements was a reasonable course of action in relation to the relevant tax provisions. Instead it asks whether there can be a reasonably held view that entering into or carrying out the tax arrangements in question was a reasonable course of action.

C5.10.2 Applying this in the context of an appeal to a tribunal or court, the test does not require the judge to give a view on whether the tax arrangements were a reasonable course of action. Instead the judge is required to consider the range of reasonable views that could be held in relation to the arrangements. This means that the arrangement would not be regarded as abusive, and hence the GAAR will not apply, if the judge considers in all the circumstances that the arrangements could reasonably be regarded as a reasonable course of action, even if the particular judge does not himself or herself regard it as a reasonable course of action.

C5.10.3 In other words, in respect of any particular arrangement there might be a range of views as to whether it was a reasonable course of action: it is possible that there could be a reasonably held view that the tax arrangements were a reasonable course of action, and also a reasonably held view that the arrangement is not a reasonable course of action. In such circumstances the tax arrangements will not be abusive for the purposes of the GAAR.

C5.10.4 It is important to note, however, that some person's view that the tax arrangements are a reasonable course of action (whether the view of a QC, an accountant, solicitor or anyone else) will not inevitably lead to the conclusion that the arrangement is not abusive. It will be necessary to test that view to see whether that view itself can be regarded as reasonable, having regard to the purposes of the GAAR legislation and the factors that it requires to be taken into consideration.

C5.10.5 The reason for this is the recognition that some individuals may hold extreme views. These views may, for example, be based on the proposition that all taxation is state-sponsored theft, or that the Government cannot be trusted to spend citizens' money sensibly. Such views, even if held by individuals who would otherwise be regarded as reasonable, cannot be regarded as reasonable for the purposes of the GAAR. This is because the GAAR is based on the premise that taxation is the principal means by which the necessary functions of the state are funded.

C5.10.6 There are less obviously extreme views – which may be commonly held – that nonetheless cannot be regarded as reasonable for the purposes of the GAAR. Perhaps the clearest example is the view that it is the function of HMRC and the Parliamentary drafter to get the legislation right, and that if they fail to do so there is nothing wrong with individuals or companies exploiting defects in the drafting[12]. However, this is wholly inconsistent with one of the basic purposes of the GAAR, namely to deter or counteract the deliberate exploitation of shortcomings in the legislation. Accordingly, even if such views are held by someone who would ordinarily be regarded as reasonable, and indeed may be eminent in a field of work (such as accountancy or the legal professions), those views themselves would not fall to be regarded as reasonable for the purposes of the GAAR.

C5.11 ***Certain indicators of abusive tax arrangements***

C5.11.1 S204(4) FB 2013 sets out some examples of factors which might indicate that tax arrangements are abusive, while expressly noting that this would be so only if it were reasonable to assume that this was not in fact the anticipated result of the relevant tax provisions when they were enacted.

[12] Reflecting the dicta of Lord Cairns in *Partington v Attorney-General* (1869) L.R. 4 E. & I. App. 100 – "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute."

C5.11.2 The examples are:

- Arrangements resulting in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes;
- Arrangements resulting in deductions or losses of an amount for tax purposes significantly greater than the amount for economic purposes; and
- Arrangements resulting in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid.

C5.11.3 As just noted, it is explicitly provided that such features will not be indicators of abuse if it would be reasonable to assume that they were anticipated (or indeed intended) when the relevant tax provisions were enacted. For example the capital allowance legislation may deliberately allow a taxpayer to claim a deduction for tax purposes in relation to capital expenditure on plant or equipment that is, in a particular period, substantially greater than the depreciation on those assets which is recognised for accounting purposes for that period. This result would clearly have been intended when the legislation was enacted.

C5.11.4 It is important to note that these examples are not exhaustive, and their relevance will differ in the case of the various taxes covered by the GAAR.

C5.12 ***Indicators of non-abusive tax arrangements***

C5.12.1 S204(5) FB 2013 sets out an important possible indicator that arrangements are not abusive. This is where the arrangements accord with established practice, and HMRC had at the time when the arrangements were entered into indicated its acceptance of that practice.

C5.12.2 There are two elements to this. The first is to consider whether the arrangements "accord with established practice". This calls for a consideration of the arrangements and a consideration of the "established practice".

C5.12.3 Taking the "established practice" first, this is not defined in the legislation, and therefore has its ordinary meaning. Established practice may be demonstrated by reference to published material (whether from HMRC, or text books or articles in journals) or by other evidence of what had become a common practice by the relevant time (i.e. when the arrangements were entered into).

C5.12.4 It is then necessary to consider whether the arrangements actually carried out were the same as those identified as established practice, or whether there were any significant differences between the actual arrangement in question and those that were commonly carried out. If, for example, the particular difference between the actual arrangement and the 'normal' arrangement was the introduction of some feature which was designed to achieve a particular tax advantage, then demonstrating what the established practice was would not necessarily protect the arrangement in question from being abusive.

C5.12.5 The second limb of the established practice protection is that HMRC had, at the time the arrangements were entered into, indicated its acceptance of the practice. This requires careful consideration.

C5.12.6 First, the way in which HMRC may have indicated its acceptance of the practice could affect the weight given to the acceptance. For example considerable weight would be given to a clear statement made by HMRC in its published tax bulletins, or its internal manuals, or in correspondence with some representative body (such as the Law Society or the Chartered Institute of Taxation). Lesser weight would be given to a reference to the practice in correspondence with, say, an accountancy firm which did not involve the particular taxpayer but to which that taxpayer had gained access.

C5.12.7 Secondly, the nature of HMRC's acceptance may be relevant. For example, the acceptance may take the form of a statement to the effect that HMRC considers that certain practices fall within the intended scope of particular legislative provisions; in which case such statement would carry considerable weight in showing that the arrangements were not abusive. By contrast, however, the statement might indicate no more than a grudging acceptance that the tax rules as drafted could not prevent arrangements of that sort achieving their tax objective, even though in HMRC's opinion such arrangements were contrived and were not in accordance with the underlying policy of the legislation. In such a case HMRC's acceptance would carry little or no weight, in determining whether the arrangement in question was abusive.

C5.12.8 It may also be the case that HMRC's acceptance of a particular arrangement is subsequently withdrawn, as a result of further advice or consideration. In such cases the earlier acceptance will become less relevant in respect of arrangements entered into after HMRC's new position is publicly known.

C6 Counteracting the tax advantage

C6.1 Ss206 and 207 FB 2013 set out the rules that apply in counteracting abusive tax arrangements.

C6.2 ***Sequence of steps leading to counteraction***

C6.2.1 In broad terms, counteraction by the GAAR comes into operation when each of the following questions is answered 'yes' in sequence:

- Is there an arrangement which gives rise to a tax advantage?
- Does the tax advantage relate to one of the taxes to which the GAAR applies?
- Is it reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangement?
- Is the arrangement abusive?

C6.3 ***What counteraction is intended to achieve***

C6.3.1 The statutory test requires adjustments to be made in order to counteract the tax advantage in a way that is "just and reasonable". "Just and reasonable" are not defined, and therefore the words have their ordinary meaning.

C6.3.2 The main, and obvious, purpose of the counteraction is to deny to the taxpayer who would have achieved an abusive tax advantage the benefit of that advantage.

C6.3.3 Determining exactly what the advantage is will in many cases be straightforward. For example, if the arrangement is designed to achieve a tax loss or deductible expense which does not reflect any economic loss or expense, then that loss or expense will simply be ignored.

C6.3.4 There will, however, be many cases where the position is less straightforward, for example where the taxpayer carries out a transaction which has real economic consequences and purpose, but does so by including steps or features in the arrangement which are designed to decrease the amounts of income chargeable to tax or increase allowable expenditure to be set against taxable income.

C6.3.5 In such case, making a just and reasonable counteraction involves considering what transaction would have been carried out in order to achieve the same commercial purpose, but without including the steps or features which make the arrangement abusive. The approach to be applied in such cases is to identify the transaction which, in all the circumstances, would most likely have been carried out in order to achieve those objectives.

C6.3.6 Three specific points need to be noted:

- First, this test needs to be carried out on an objective basis. In other words, it is not appropriate to ask what this particular taxpayer would subjectively have done if he or she wished to achieve the same commercial objective without the abusive features. This is because a subjective enquiry of that sort could lead to answers such as he or she would not have carried out any transaction at all because it was the tax advantage that he or she was really after. The enquiry therefore needs to be on an objective basis, and asks what in all the circumstances would have been the most likely transaction to have been carried out by *a taxpayer* who wished to achieve the commercial objective without seeking to achieve the abusive tax advantage.

- Secondly, it follows from the previous paragraph that the non-abusive transaction taken as the benchmark for counteraction will not necessarily be the transaction which gives rise to the greatest amount of tax liability. As stated, the objective is to identify a transaction which would have been the most likely one carried out.

  For simplicity the discussion above refers to cases where the arrangement had a "commercial" objective. The same approach would apply in non-commercial contexts (e.g. transfers of assets to other members of a family). In such cases the comparator transaction would be one which achieves the same (non-commercial) purpose. In the context of gifts, the appropriate counteraction may be particularly difficult because it could impact on the donee. It is unlikely that the appropriate counteraction would be to assume the gift had not taken place at all; it is more likely that the appropriate counteraction would assume that the gift has taken place but without the abusive features that the taxpayer claims avoid tax. The examples in Part D give some indication of the approach to be taken here.

- Thirdly, some abusive arrangements are in effect totally circular. In such cases counteraction is likely to take the form of simply ignoring the entire arrangement.

C6.4 ***The form of the counteraction***

C6.4.1 S206(5) FB 2013 provides for the counteraction to be in whatever form is appropriate (making or modifying assessments, amending or disallowing claims, "or otherwise").

C6.5 ***Procedural safeguards for counteraction***

C6.5.1 S206(6) FB 2013 provides that no steps may be taken in relation to counteraction unless certain procedural requirements (set out in Sch 41 FB 2013) have been complied with.

C6.5.2 Part E of this Guidance deals with these procedural requirements in more detail. However, there are two important points which should be noted here.

C6.5.3 The first is that any step towards counteraction needs to be taken by "a designated HMRC officer", who will be a senior official of HMRC specifically authorised by the Commissioners to deal with cases where the GAAR may be applied. This is to ensure that the GAAR is applied responsibly and uniformly, irrespective of the type of taxpayer or where the taxpayer's affairs are dealt with.[13]

C6.5.4 The second is a requirement that before HMRC can proceed to counteraction the case has to be submitted for consideration by the Advisory Panel. In practice the case will be presented to a 3-person sub-panel of the Advisory Panel, all of whom will be independent of HMRC and at least one of whom is likely to have special expertise in relation to the tax provisions concerned and knowledge of normal courses of action taken by taxpayers in relation to those provisions.

C6.5.5 The sub-panel will consider each case on the basis of written summaries of HMRC's views and (where given) the taxpayer's response.

[13] Part E contains more detail on HMRC procedure.

C6.5.6 What is particularly important to note, however, is that the role of the sub-panel is to express a view (or, if it is not unanimous, then views) as to whether the tax arrangement "is a reasonable course of action" in relation to the relevant tax provisions, having regard to all the circumstances (para 11(3) Sch 41 FB 2013).

C6.5.7 This is, in effect, a 'single reasonableness test' in contrast to the 'double reasonableness test' that has to be applied in determining whether the tax arrangement is abusive.

C6.5.8 Giving the sub-panel this different test is deliberate, and is for two reasons. First, it differentiates the role of the sub-panel from that of the tribunal or court. The sub-panel is not acting in a judicial capacity; rather, it is expressing its own view (or, in the event of non-unanimity, the views of each individual member) as to the reasonableness of the course of action.

C6.5.9 Secondly, the purpose of obtaining the sub-panel's opinion (or opinions) is to enable the designated officer of HMRC to decide whether it would be appropriate to seek to apply the GAAR to the arrangement concerned. Given that the sub-panel should include individuals with experience or expertise in the particular field of the transaction in question, such opinion or opinions will be a valuable input.

C6.5.10 If the sub-panel is unanimous in its opinion that the arrangement is not a reasonable course of action, the designated officer is likely to proceed under the GAAR.

C6.5.11 If the sub-panel, or if it is not unanimous any member of it, considers that the arrangement is a reasonable course of action, then HMRC would need cogent reasons for continuing the process of counteracting the tax advantage. Such reasons could, for example, include the belief that a member or members of the panel had taken a mistaken view of the facts, or a wrong interpretation of the non-GAAR statutory provisions, or had reached an erroneous view of established practice. While this is likely to be an infrequent occurrence, it is important to recognise that the Advisory Panel (and the relevant sub-panel) is not exercising any sort of judicial role, so that HMRC remains free to proceed if it considers that there are cogent reasons for doing so.

C7 Consequential relieving adjustments

C7.1 S207 FB 2013 provides for consequential relieving adjustments where counteraction of the abusive tax advantage has been made.

C7.2 The purpose of this is to ensure that counteracting the abusive tax advantage does not give rise to any element of double taxation, whether on the same taxpayer or when taking other taxpayers into account. For example, the abusive tax arrangement may have been designed to shift profits from a higher rate individual taxpayer to a company, which would be taxed at a substantially lower rate. The counteraction in such case would involve treating the amount of profit as if it had been earned by the individual, who would be assessed accordingly. But as the company would have made its self-assessment return on the basis that it earned the profits, then its liability to tax would need to be reduced by the appropriate amount.

C7.3 Procedurally the relieving adjustment can take whatever form is appropriate to achieve a just and reasonable result. A person who considers that a consequential adjustment should be available has to make a formal claim, and must do so within 12 months of the date on which the counteraction becomes final (which is the stage reached when the adjustments giving effect to the counteraction can no longer be varied on appeal or otherwise). Provided that the claim for the consequential relieving adjustment is made within that 12 month time limit, all other statutory time limits are set aside.

C7.4 It needs to be emphasised that consequential relieving adjustments are designed to ensure relief from double taxation. It is explicitly provided that no such adjustment can be made in order to increase any person's liability to tax.

C8 Proceedings at a tribunal or in court

C8.1 The GAAR legislation includes a number of procedural innovations. These are set out in s208 FB2013.

C8.2 First, unlike the general position in tax cases, it is HMRC that is required to demonstrate that the GAAR applies, and not for the taxpayer to show that it does not apply. Specifically, HMRC must show that:

- there are tax arrangements;
- the tax arrangements are abusive; and
- the counteraction proposed by HMRC is just and reasonable.

C8.3 Secondly, it is explicitly provided that the tribunal or court must take into account the Parts of this Guidance which have been approved by the GAAR Advisory Panel at the time when the arrangements were entered into.

C8.4 Thirdly, the tribunal or court must also take into account the opinion, or opinions, of the GAAR Advisory Panel (in practice, the sub-panel) given to the HMRC designated officer, discussed in paragraph C6.5 above.

C8.5 Additionally, a tribunal or court may take into account all relevant material, whether or not such material would be admissible in court proceedings under the normal rules of evidence. Such material would cover anything relevant that was in the public domain at the time the arrangements were entered into. There is no limit to the nature of this material, provided only that it is relevant. Accordingly it may be official (e.g. HMRC, ministerial or Parliamentary) or non-official (e.g. text books, articles in professional journals, correspondence with representative bodies of the various professions etc.). It is important to note, however, that unlike the approved Guidance and the opinions of the Advisory Panel this sort of material is only material that the tribunal or court may take it into account. And it would be for the tribunal or court itself to decide what weight, if any, should in fact be given to such material.

C8.6 It is also provided that the tribunal or court may take into account evidence of established practice at the time when the arrangement was entered into. This ties in with s204(5) FB2013, which provides that the fact that the tax arrangements accorded with established practice accepted by HMRC may be an indication that the arrangement was not abusive. This is discussed in paragraph C5.12 above.

C9 Priority of the GAAR legislation

C9.1 S209 FB 2013 provides that the GAAR takes priority over any other part of the legislation applying to the taxes covered by the GAAR. This is so even if the other legislation expressly states that it takes priority over anything else.

C9.2 The reason for this is self-explanatory.

C10 Commencement of the GAAR legislation

C10.1 The GAAR applies to all tax arrangements entered into on or after the day on which the Finance Act 2013 is passed, which is the day on which the FB 2013 receives Royal Assent.

C10.2 It does not apply to any tax arrangements entered into before this date.

C10.3 As discussed above, "arrangements" is given a very broad meaning, so that it can include a transaction or transactions which form part of a larger arrangement.

C10.4 Plainly, if the larger arrangement began to be carried out before the date when the Finance Act 2013 is passed, then the GAAR cannot be applied to that larger arrangement.

C10.5 Specific provisions in s212 FB 2013 deal with the case where there is a 'larger' arrangement which started before the date when Royal Assent is given, but within that larger arrangement there are transactions which were entered into after that date and which HMRC consider to be an abusive arrangement when viewed in isolation.

C10.6 In such a case, no account may be taken of the wider arrangement in determining the position in regard to the narrower arrangement, subject to a safeguard in favour of the taxpayer. The safeguard is that account is to be taken of the wider arrangement if doing so would show that the narrower arrangement was not abusive.

C11 Disclosure of tax avoidance schemes ("DOTAS")

C11.1 The GAAR legislation makes no reference to the DOTAS rules. These rules, which require the early notification of tax avoidance schemes to HMRC by users and promoters of those schemes, have a different function from the GAAR, and have no relevance to the operation of the GAAR.

C12 Code of Practice on Taxation for Banks

C12.1 As discussed extensively above, the GAAR has effect in relation to abusive tax arrangements. Plainly, a bank which has adopted the Code of Practice on Taxation for Banks should not be involved in any such arrangements.

C12.2 However, there may be transactions which are not 'abusive' so as to come within the scope of the GAAR, but which do fall within the scope of the Code. Accordingly, the fact that HMRC does not invoke the GAAR in respect of any particular transaction does not necessarily mean that the transaction would be regarded by HMRC as acceptable within the Code.

C12.3 Following the introduction of the GAAR, HMRC will continue its practice, when approached by a bank under the Code, to give its view as to whether a transaction complies with the Code.