

GAAR Advisory Panel

Procedures for dealing with referred cases

11 September 2020

1. Introduction

The purpose of this paper is to provide background and guidance to HMRC, taxpayers and enablers of defeated tax avoidance arrangements (“enablers”) on procedures for dealing with cases referred to the GAAR Advisory Panel (“the Panel”). It deals with cases where a single taxpayer is referred to the Panel under Schedule 43 to the Finance Act 2013 (“Schedule 43”), with generic referrals under Schedule 43B FA 2013 (“Schedule 43B”) and with referrals of enablers under Schedule 16 to the Finance (No.2) Act 2017 (“Schedule 16”).

A generic referral may be made by HMRC to the Panel where several taxpayers have used substantially the same arrangements and HMRC have encountered difficulties in bringing a suitable lead case to the Panel. The main differences between a referral under Schedule 43 and a generic referral under Schedule 43B are as follows:-

- The generic referral will cover a number of taxpayers rather than only one taxpayer
- There is no provision for the case sub-panel to receive taxpayer representations
- The case sub-panel has no power to request further information from either HMRC or taxpayers.

The main differences between a referral under Schedule 43 and a referral of enablers under Schedule 16 are as follows:-

- The enabler referral may involve more than one enabler
- The case sub-panel will receive a referral statement similar to the general statement which it receives on a generic referral under Schedule 43B, but each enabler of the relevant arrangements nevertheless has the right to make representations.

2. Case management

2.1 No hearings of cases

The case sub-panel will not hold hearings of cases referred to the Panel. All decisions and opinions will be based on written submissions from the parties.

2.2 Provision of secretariat by HMRC

The Panel has no budget and its secretariat is provided by HMRC.

Where a case is referred to the Panel, this will be because there is a dispute between the taxpayer/enabler and HMRC. HMRC will therefore have a dual role in any case referred to the Panel, as secretariat and as a protagonist in the case. The secretariat for

cases will be provided by the Tax Strategy and Professionalism Team within HMRC, not by the Counter-Avoidance Directorate, and the Counter-Avoidance Directorate will have no access to that part of the Panel's eRoom dealing with cases. In addition, the Panel has appointed one of its number to act as case secretary in order to ensure consistency of procedure and to perform certain functions that it would not be appropriate for a member of HMRC to perform.

The Tax Strategy and Professionalism Team's role as secretariat in cases will be purely administrative. The secretariat will in particular act as a point of contact between the Panel, the taxpayer/enabler and the part of HMRC handling the case ensuring that information is received by the Panel from both the taxpayer/enabler and HMRC, ensuring that information from the Panel is received by the taxpayer/enabler and HMRC and ensuring the eRoom through which the Panel receives and shares information is kept up to date.

If further information is required from HMRC or the taxpayer/enabler on a referral under Schedule 43 or Schedule 16, the sub-panel will use its powers under paragraph 10(2) Schedule 43 or paragraph 33(2) Schedule 16 to request the further information. The Panel has no power to request further information where there is a generic referral.

The Panel has no budget to meet external research costs.

2.3 Extension of time for taxpayer/enabler representations

Where a referral is made to the Panel under Schedule 43, the Panel may, on a written request of the taxpayer, under paragraph 9(2) Schedule 43 extend the normal 21 day period for making representations. Similarly, where a referral is made to the Panel under Schedule 16, the Panel may, on a written request of an enabler, extend the normal 21 day period for making representations. The Panel is likely to look sympathetically at a request to extend these time limits but an extension is not automatic.

2.4 Submission of cases

To help ensure the case sub-panel has the information in the form and level of detail needed to give an opinion within the intended timetable, both HMRC and taxpayers/enablers should make their representations following a standard format and avoiding voluminous documentation. Guidance is set out in sections 3 and 4 below.

3. Guidance to HMRC on submission of cases

Schedule 43 referrals

HMRC's notice under paragraph 3 Schedule 43 is copied to the sub-panel and will form the basis for the sub-panel's understanding of HMRC's case. Best practice is that it should include all the matters referred to below. To the extent not covered in HMRC's paragraph 3 Schedule 43 notice, any comments provided by HMRC to the Panel under paragraph 7(b) Schedule 43 or paragraph 9(4) Schedule 43 should cover these matters:-

- Statement of facts, including any relevant background information and details and timing of the steps in the relevant arrangements. The sub-panel may assume that the steps are on arm's length terms or on an arm's length basis unless HMRC indicates otherwise or this is clearly not the case. While the sub-panel is required to assume for the purpose of its opinion(s) that the arrangements are tax arrangements (paragraph 11(4) Schedule 43), the statement of facts should nevertheless explain why HMRC considers that the arrangements are tax arrangements since this may be relevant to the reasonableness of the arrangements
- HMRC's view of the substantive results/economic effect of the transactions
- HMRC's view of the prescribed taxes to which the arrangements relate, the tax effects of the arrangements and technical arguments relied on. This should include details of the tax advantage that HMRC considers has arisen from the arrangements in question and should explain how HMRC considers that the arrangements achieve that advantage. It should set out details of the legislative provisions which HMRC considers to be relevant and should summarise what HMRC has understood from the taxpayer are the tax effects of the steps that it has taken
- HMRC's view of the principles and policy objectives behind the relevant tax provisions. Where the relevant legislation has been amended, the policy on each relevant change should be included. Copies of any policy statements relied on to establish the principles and policy behind legislation should be annexed
- HMRC's view as to whether the arrangements accord with established practice, including evidence of established practice, if relevant, and what HMRC has understood from the taxpayer the taxpayer regards as established practice
- The established practice checklist confirmation referred to below
- Reasons why the tax planning is considered not to be reasonable, including whether particular steps are alleged to be contrived or abnormal and whether shortcomings in legislation are being exploited

Excessive evidence supporting factual statements should be avoided.

HMRC's notice or comments should confirm that HMRC has been through a checklist in relation to "established practice". A relevant HMRC policy specialist should confirm that HMRC has, so far as practical, checked in relation to each piece of legislation relied on by HMRC and by the taxpayer

- Hansard
- Notes on Clauses
- Published consultative documents, technical notes and response documents
- Published statements of practice and extra-statutory concessions
- HMRC's Manuals at the material time and any unpublished internal guidance

- Any formal or informal clearances, confirmations or guidance given by technical specialists to taxpayers
- Where HMRC has had a change of view, whether and where the changed view was published before the arrangements were entered into

Where it has not been possible to check these items, HMRC's confirmation will state this.

HMRC's notice or comments should include relevant extracts, redacted where necessary as a result of taxpayer confidentiality, of any items relevant to established practice (other than unpublished internal guidance). In the case of a change of view HMRC should provide a copy of the published change.

If there are any gaps in the information provided by HMRC which the sub-panel considers should be remedied in order to enable it to deal properly with a case, the sub-panel may use its powers under paragraph 10(2) Schedule 43 to request further information. If the taxpayer alleges that similar arrangements have been accepted for other taxpayers, the sub-panel may also need to request further information from HMRC under paragraph 10(2) in order to deal with this allegation.

Schedule 43B Generic referrals and Schedule 16 Enabler referrals

Where a generic referral is made, HMRC will provide the Panel with a general statement of the material characteristics of the specified arrangements and a declaration that the general statement is applicable to all arrangements covered by the generic reference and omits nothing material. Where an enabler referral is made, HMRC will similarly provide the Panel with a general statement (the "referral statement") of the material characteristics of the arrangements in question and a declaration that the referral statement omits nothing material.

Paragraph 4(2) Schedule 43B and paragraph 27(2) Schedule 16 require the general statement to

- contain a factual description of the tax arrangements
- set out HMRC's view as to whether the tax arrangements accorded with established practice when the arrangements were entered into
- explain why HMRC considers that the tax advantage arising from the tax arrangements arises from tax arrangements that are abusive
- set out any matters HMRC is aware of which suggest that any view of HMRC set out in the general statement is not correct; and
- set out any other matters HMRC considers are required for the exercise of the Panel's functions under Schedule 43B or Schedule 16.

The general statement will form the basis of the sub-panel's understanding of both HMRC's and (in the case of a generic referral) the taxpayers' cases. Best practice is that the general statement should cover the matters referred to below:-

- The factual description should include any relevant background information and details and timing of the steps in the relevant arrangements. The sub-panel may assume that the steps are on arm's length terms or on an arm's length basis unless HMRC indicates

otherwise or this is clearly not the case. While the sub-panel is required to assume for the purpose of its opinion(s) that the arrangements are tax arrangements (paragraph 6(6) Schedule 43B and paragraph 34(5) Schedule 16), the factual description should nevertheless explain why HMRC considers that the arrangements are tax arrangements since this may be relevant to the reasonableness of the arrangements. If HMRC is aware the taxpayers/enablers dispute HMRC's view of the facts, any matters HMRC is aware of which may suggest that its view is not correct should be set out

- HMRC's view of the substantive results/economic effect of the transactions. If HMRC is aware that its view is disputed by the taxpayers/enablers, any matters HMRC is aware of which may suggest that its view is not correct should be set out
- HMRC's view of the prescribed taxes to which the arrangements relate, the tax effects of the arrangements and technical arguments relied on. This should include details of the tax advantage that HMRC considers has arisen from the arrangements in question and should explain how HMRC considers that the arrangements achieve that advantage. It should set out details of the legislative provisions which HMRC considers to be relevant and should summarise what HMRC has understood from the taxpayers/enablers are the tax effects of the steps that they have taken. If HMRC is aware that its view is disputed by the taxpayers/enablers, any matters HMRC is aware of which may suggest that its view is not correct should be set out
- HMRC's view of the principles and policy objectives behind the relevant tax provisions. Where the relevant legislation has been amended, the policy on each relevant change should be included. Copies of any policy statements relied on to establish the principles and policy behind legislation should be annexed. If HMRC is aware that its view is disputed by the taxpayers/enablers, any matters HMRC is aware of which may suggest that its view is not correct should be set out
- HMRC's view as to whether the arrangements accord with established practice, including evidence of established practice, if relevant and what HMRC has understood from the taxpayers/enablers the taxpayers/enablers regard as established practice
- An established practice checklist confirmation in the form referred to above
- The general statement should include relevant extracts, redacted where necessary as a result of taxpayer confidentiality, of any items relevant to established practice (other than unpublished internal guidance). In the case of a change of view HMRC should provide a copy of the published change
- Reasons why the tax planning is considered not to be reasonable, including whether particular steps are alleged to be contrived or abnormal and whether shortcomings in legislation are being exploited. Any matters HMRC is aware of which may suggest that its view is not correct should be set out

In the case of an enabler referral, to the extent not covered in HMRC's general statement, any comments provided by HMRC to the Panel under paragraph 30(c) Schedule 16 or paragraph 32(4) Schedule 16 should cover these matters.

Excessive evidence supporting factual statements should be avoided.

HMRC have indicated in paragraph E3.8.2 of their published guidance on the GAAR and in the section headed "Referral to GAAR Advisory Panel under the enablers legislation" of their published guidance on the enabler legislation that they will take account of this guidance.

4. Guidance to taxpayers/enablers on submission of cases

The taxpayer's representations under paragraph 4 Schedule 43 and enabler's representations under paragraph 28 Schedule 16 are copied to the sub-panel and will form the basis of the sub-panel's understanding of the taxpayer's or enabler's case. Best practice is that they should include all the matters referred to below. To the extent not covered in these representations, the taxpayer's or enabler's representations under paragraph 9(1) Schedule 43 or paragraph 32 Schedule 16 should cover these matters:-

- Statement of facts (where these differ from HMRC's), including whether the taxpayer/enabler agrees with HMRC's view that particular steps are not on arm's length terms or on an arm's length basis and (if relevant) the taxpayer's/enabler's understanding of the accounting treatment of the arrangements for the taxpayer and any group of which it forms part. This statement should set out whether the taxpayer or enabler accepts that the arrangements are tax arrangements and, in particular, set out any commercial or other reasons for the steps in the arrangements. The sub-panel's opinion(s) must assume that the arrangements are tax arrangements (paragraph 11(4) Schedule 43 and paragraph 34(5) Schedule 16) but this information will nevertheless be relevant to the reasonableness of the arrangements
- The taxpayer's/enabler's view of the substantive results/economic effect of the transactions
- The taxpayer's/enabler's view of their tax effects and technical arguments relied on. If the taxpayer/enabler considers that there are relevant legislative provisions beyond those identified by HMRC in their notice and comments, they should be identified
- If the taxpayer/enabler disagrees with HMRC's view of the principles and policy behind the relevant tax legislation, this should be stated. Copies of any policy statements relied on to establish the principles and policy behind legislation should be annexed
- The taxpayer's/enabler's view as to whether the arrangements accord with established practice, including evidence of established practice, if relevant
- Reasons why the tax planning is considered to be reasonable. If the taxpayer/enabler disagrees with HMRC's view that particular steps are contrived or abnormal or that shortcomings in legislation are being exploited this should be stated

If the taxpayer's/enabler's representations do not indicate disagreement with any matter stated in HMRC's notice or comments, the sub-panel may assume that the matter is correct. Failure to address any matter that ought to be addressed in the taxpayer's/enabler's representations may therefore potentially prejudice the taxpayer's/enabler's case.

If there are any gaps in the information provided by the taxpayer/enabler which the sub-panel considers should be remedied in order to enable it to deal properly with a case, the sub-panel may use its powers under paragraph 10(2) Schedule 43 or paragraph 33(2) Schedule 16 to request further information.

The taxpayer has no right to make representations *to the case sub-panel* where a generic referral is made. Following the giving of the case sub-panel's opinion(s), the affected taxpayers will be given by HMRC a copy of the opinion(s) and given the opportunity to make representations *to HMRC* that any matter stated in the general statement is materially inaccurate in relation to their specified arrangements. HMRC will take these representations into account in deciding whether to counteract the taxpayer's tax arrangements.

5. Handling of case by sub-panel

5.1 Chair of sub-panel

The Chair may be a member of any sub-panel and may (but does not have to) chair a sub-panel of which he is a member. If the Chair is not a member of a sub-panel, the sub-panel should appoint a chair in consultation with the Chair; that chair will normally be an experienced member of the Panel. If the Chair has a conflict of interest, the members of the sub-panel will need to agree amongst themselves who should chair the sub-panel.

5.2 Requesting further information

The sub-panel will seek to agree as soon as possible whether any further information is required from any of the parties. Any request for further information is required to explain that the relevant party must copy any information provided to the other party (paragraph 10(3) Schedule 43) or, in the case of an enabler referral, to HMRC where the further information is requested from an enabler and each enabler where the further information is requested from HMRC (paragraph 33(3) Schedule 16). 30 days should normally be the maximum period allowed for the provision of further information, although a different period might be allowed if appropriate. The sub-panel would not expect to extend this period except in exceptional circumstances as the taxpayer and HMRC should by this stage be familiar with the case and each other's arguments insofar as they relate to the GAAR.

Schedule 43B contains no counterpart to paragraph 10(2) Schedule 43. The sub-panel will therefore not seek further information from either HMRC or the taxpayers on a generic referral. The case sub-panel will reach its opinion on the basis of the matters set out in the general statement and its own experience. It will have to make whatever assumptions or draw whatever inferences it considers appropriate and in an extreme

case may have to state that it is not possible on the information available to it to reach a view on the reasonableness of the tax arrangements.

5.3 Timetable for sub-panel's consideration of case

There is no set time limit by which the Panel must produce its opinion(s). Draft indicative timetables are attached in the Appendix. These indicate in particular that on a Schedule 43 referral where the taxpayer has made representations to HMRC in response to HMRC's notice initiating the GAAR procedure the sub-panel will normally aim to finalise its opinion(s) by the date 60 days from the later of the expiry of the 21 day period for the taxpayer to make further representations (or any extension of it) and the date for the provision of the last piece of any further information that the sub-panel requests. The complexity of the case and the volume of information provided to the sub-panel will affect the timetable. The Panel's case load, need to appoint a sub-panel member and holiday periods or any periods of non-availability of members of the sub-panel while a case is being decided could also extend the timetable. The chair of a sub-panel will produce an illustrative timetable for considering the case. This illustrative timetable will be shared with the parties (or, in the case of a generic referral, HMRC only) once it is reasonably clear when the opinion is likely to be issued (and ahead of the likely date for the issue of any errors opinion) and updated as necessary as the case progresses.

6. Opinions of sub-panel

Opinions of the sub-panel will usually include the following:-

- a. Reminder of what the sub-panel's opinion notice is to cover
- b. Terms used in the opinion and parties to arrangements/enablers
- c. Outline of the arrangements
- d. Facts assumed by sub-panel, including alternative versions of facts if it is not possible to reconcile HMRC's and the taxpayer/enabler's versions of the facts
- e. Substantive results of the arrangements
- f. The tax advantage
- g. Tax results argued for by taxpayer/enabler
- h. Principles of the relevant legislation and its policy objectives
- i. Does what was done involve contrived or abnormal steps (section 207(2)(b) FA 2013/paragraph 3(3)(b) Schedule 16)? (it is appropriate to consider this before looking at consistency with principles/policy, even though the legislative order would suggest that j. is considered before i., since something which is contrived may not be consistent with principles/policy)
- j. Is what was done consistent with the principles on which the relevant legislation is based and the policy objectives of that legislation (section 207(2)(a) FA 2013/paragraph 3(3)(a) Schedule 16)?
- k. Is there a shortcoming in the relevant legislation which was being exploited (section 207(2)(c) FA 2013/paragraph 3(3)(c) Schedule 16)?
- l. Does the planning result in:-
 - (i) an amount of income, profits or gains for tax purposes which is significantly less than the amount for economic purposes, or

- (ii) deductions or losses for tax purposes which are significantly greater than the amount for economic purposes, or
 - (iii) a claim for the repayment or crediting of tax which has not been and is unlikely to be paid
- and, if so, is it reasonable to assume that such a result was not the intended result when the relevant tax provisions were enacted (section 207(4) FA 2013/ paragraph 3(5) Schedule 16)?
- m. Was what was done consistent with established practice and had HMRC indicated its acceptance of that practice (section 207(5) /paragraph 3(6) Schedule 16)?
 - n. Discussion
 - o. Conclusion on whether entering into and carrying out the tax arrangements in question was a reasonable course of action in relation to the relevant provisions (paragraph 11(3) Schedule 43 and 34(3) Schedule 16).

On a generic referral, the taxpayers' case and arguments will be derived from what is stated in the general statement.

Opinion notices should be provided to the parties in draft (or, in the case of a generic referral, HMRC only) to enable any typographical and obvious errors to be corrected before finalisation.

7. Redacting opinions for publication

HMRC's GAAR Guidance states that in most cases shortly after each opinion is given an anonymised version of the opinion will be published by HMRC (paragraph E4.2.8 HMRC GAAR Guidance and in the section headed "Opinion of GAAR Advisory Panel and opinion notices" of the HMRC Enabler Guidance). The anonymised version will set out key words at the beginning to facilitate searching. HMRC will produce the anonymised version, and the sub-panel that has considered the case will confirm in advance of publication that the anonymised version fairly reflects its opinion. The taxpayer/enabler (except in the case of a generic referral) will also need to be given an opportunity to comment on the way anonymisation has been carried out. An opinion on a generic referral may contain less that is confidential than an opinion under Schedule 43 or an enabler referral so that little or no anonymisation may be required for such opinions.

In order to emphasise that the opinion reflects the approach of the whole Panel the anonymised version of an opinion will not name the sub-panel members who considered the case.

APPENDIX

PRO FORMA TIMETABLES

REFERRAL UNDER SCHEDULE 43

NO PARAGRAPH 9(4) COMMENTS AND NO PARAGRAPH 10(2) REQUEST FOR FURTHER INFORMATION

Day 1 Case referred to Panel

Between day 1 and day 21

- Panel members notify Secretariat of any potential conflicts of interest
- Chair selects members of sub-panel (having ascertained availability of Panel members to sit on case. If an additional Panel member needs to be appointed for case, appointment procedure begins. This may well delay all subsequent steps. *All subsequent dates assume that there is no need to appoint an additional member*

Day 21 Last day for taxpayer to make paragraph 9 Schedule 43 representations (unless deadline extended)

Between day 21 and day 81

- Opinion(s) sent to parties to check no typographical or obvious errors

By day 81 Opinion(s) finalized. Under paragraph 11(2) Schedule 43 copy of opinion(s) sent to designated HMRC officer and taxpayer

After day 81

- Publication by HMRC of anonymised version of the opinion(s)

REFERRAL UNDER SCHEDULE 43

PARAGRAPH 9(4) COMMENTS WITH NO PARAGRAPH 10(2) REQUEST FOR FURTHER INFORMATION

Day 1 Case referred to Panel

Between day 1 and day 21

- Panel members notify Secretariat of any potential conflicts of interest
- Chair selects members of sub-panel having ascertained availability of Panel members to sit on case. If an additional Panel member needs to be appointed for case, appointment procedure begins. This may well delay all subsequent steps. *All subsequent dates assume that there is no need to appoint an additional member*

Day 21 Last day for taxpayer to make paragraph 9 Schedule 43 representations (unless deadline extended)

By day 66? (no formal timetable specified in legislation although HMRC has said it will seek to respond within 45 days – para E3.12.3 GAAR Guidance) HMRC give comments under paragraph 9(4) Schedule 43 where taxpayer did not make representations under paragraph 4 Schedule 43

Between day 66 and day 126

- Opinion(s) sent to parties to check no typographical or obvious errors

By day 126 Opinion(s) finalised. Under paragraph 11(2) Schedule 43 copy of opinion(s) sent to designated HMRC officer and taxpayer

After day 126

- Publication by HMRC of anonymised version of the opinion(s)

GENERIC REFERRAL

Day 1 Case referred to Panel

Between day 1 and day 69

- Panel members notify Secretariat of any potential conflicts of interest
- Chair selects members of sub-panel having ascertained availability of Panel members to sit on case. If an additional Panel member needs to be appointed for case, appointment procedure begins. This may well delay all subsequent steps. *All subsequent dates assume that there is no need to appoint an additional member*
- Opinion(s) sent to HMRC to check no typographical or obvious errors

By day 69 Opinion(s) finalized. Under paragraph 7(3) Schedule 43B copy of opinion(s) sent to designated HMRC officer

After day 69

- Publication by HMRC of version of the opinion(s) (anonymised if necessary).

ENABLER REFERRAL

NO PARAGRAPH 32(4) COMMENTS AND NO PARAGRAPH 33(2) REQUEST FOR FURTHER INFORMATION

Day 1 Case referred to Panel

Between day 1 and day 21

- Panel members notify Secretariat of any potential conflicts of interest
- Chair selects members of sub-panel having ascertained availability of Panel members to sit on case. If an additional Panel member needs to be appointed for case, appointment procedure begins. This may well delay all subsequent steps. *All subsequent dates assume that there is no need to appoint an additional member*

Day 21 Last day for enabler to make paragraph 32 Schedule 16 representations (unless deadline extended)

Between day 21 and day 81

- Opinion(s) sent to parties to check no typographical or obvious errors

By day 81 Opinion(s) finalized. Under paragraph 34(2) Schedule 16 copy of opinion(s) sent to designated HMRC officer

After day 81

- Publication by HMRC of anonymised version of the opinion(s)