



**HMRC'S GAAR GUIDANCE**  
**(not subject to Advisory Panel approval)**

PART E – GAAR procedure

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## Part E – GAAR procedure

### E1 Application of the GAAR

E1.1 There are broadly two ways in which tax advantages can be counteracted under the GAAR, either through a self-assessment adjustment (or filing of accounts and payment of tax in the case of IHT) by the taxpayer or through counteraction by HMRC.

### E2 Counteraction by the taxpayer

E2.1 In making a self-assessment (or filing of accounts and payment of tax in the case of IHT), a taxpayer must adjust, on a just and reasonable basis, the tax advantages arising from any abusive tax arrangement that is relevant to that self-assessment (or filing of accounts and payment of tax).

E2.2 The taxpayer must do this despite the fact that the taxpayer has not received a notice from HMRC that they must apply the GAAR, and despite the fact that no opinion has been given by the Advisory Panel on the abusive tax arrangements the taxpayer has entered into.

E2.3 More detail on counteraction by self-assessment adjustment is contained in E5 below.

### E3 Counteraction by HMRC

E3.1 ***Process prior to application of the Schedule called General Anti-abuse Rule: Procedural Requirements (the “Procedural Schedule”)***

E3.1.1 To ensure uniformity of approach HMRC’s Anti-Avoidance Group will consider all arrangements where it appears that the GAAR may potentially apply before the issue is raised with taxpayers or agents. In addition cases will also be reviewed at a senior level, including by senior officers in the relevant business area and Anti-Avoidance Group, before a recommendation is made that HMRC should pursue any formal GAAR challenge.

## E3.2 ***Procedural Schedule***

E3.2.1 If HMRC wishes to go ahead and apply the GAAR, then HMRC must follow the requirements of the Procedural Schedule before it can give notice that tax advantages are to be counteracted under the GAAR.

E3.2.2 These requirements are a safeguard for the taxpayer. They involve both a designated officer and the Advisory Panel.

E3.2.3 The designated officer is an officer of HMRC who has been designated by the Commissioners for the purposes of the GAAR. He or she will be a senior officer in HMRC. Requiring the officer to be designated ensures consistency in the way that the GAAR is used by HMRC.

E3.2.4 As described further at E4 below, the Advisory Panel is appointed by the Commissioners and provides an independent view of tax arrangements.

E3.2.5 The detailed requirements of the Procedural Schedule are set out below and a summary diagram is set out at E3.10. More detail on how HMRC can counteract by adjustment is contained in E5 below.

## E3.3 ***Notice to taxpayer of proposed counteraction of tax advantage***

E3.3.1 If a designated officer considers:

- that a tax advantage has arisen to a taxpayer from tax arrangements that are abusive; and
- that the advantage ought to be counteracted,

the officer must give the taxpayer a written notice to that effect.

E3.3.2 The notice must:

- specify the arrangements and the tax advantage;
- explain why the officer considers that a tax advantage has arisen to the taxpayer from tax arrangements that are abusive;
- set out the counteraction that the officer considers ought to be taken including details of the adjustments required and how they have been calculated;
- inform the taxpayer of the period for making representations; and

- explain what will happen next if the taxpayer does, or does not, make representations.

E3.3.3 If a notice is given to the taxpayer, the taxpayer has 45 days beginning with the date on which the notice is given to send written representations in response to the notice to the designated officer. The legislation allows the designated officer to extend this time limit if the taxpayer needs additional time to prepare representations. Any request for an extension to this time limit must be made in writing by the taxpayer. In practice we would expect such occasions to be the exception as the arguments will have been the subject of previous correspondence in the period before the notice is issued. There is no prescribed form which the taxpayer's representations must take.

#### E3.4 ***Referral to the Advisory Panel***

E3.4.1 If no representations are made by the taxpayer, a designated officer must refer the matter to the Advisory Panel.

E3.4.2 If representations are made by the taxpayer, a designated officer must consider them and, if he or she still considers the tax advantage ought to be counteracted, refer the matter to the Advisory Panel.

E3.4.3 There is no prescribed time limit for a designated officer to refer matters to the Advisory Panel. However, where a taxpayer has made representations, the officer will aim to refer within the 45 day period beginning with the day on which representations are received by the officer.

E3.4.4 If the matter is referred to the Advisory Panel, the designated HMRC officer must provide certain information to the panel and the taxpayer at the same time as the referral.

E3.4.5 The officer must provide the Advisory Panel with:

- a copy of the initial notice sent to the taxpayer;
- a copy of any representations made by the taxpayer;
- any comments that the officer has on any such representations; and
- a copy of the notice sent to the taxpayer by the officer on referral of the matter to the Advisory Panel.

E3.4.6 The officer must provide the taxpayer with a notice which:

- specifies that the matter is being referred;
- contains a copy of any comments made by the officer on any representations made by the taxpayer; and
- informs the taxpayer he has a further chance to make representations to the Advisory Panel.

E3.5 ***Further chance to make representations to Advisory Panel***

E3.5.1 Once a matter has been referred to the Advisory Panel, a taxpayer may send the panel (copied to the designated officer) written representations about the proposed counteraction or about any comments which have been provided to the panel by the designated officer. The taxpayer has 21 days to do this. The legislation allows the Advisory Panel to extend this time limit if the taxpayer needs additional time to prepare representations. Again, any such request by the taxpayer must be made in writing.

E3.5.2 If the representations are not the first representations sent by the taxpayer in relation to the matter, then HMRC cannot make comments on the further representations.

E3.5.3 If these representations are the first representations which have been sent by the taxpayer in relation to the matter, the designated officer may provide the Advisory Panel with comments (copied to the taxpayer) on these representations. There is no prescribed time limit. However, the officer will seek to provide comments within the 45 day period beginning with the day on which the taxpayer representations are received by the officer.

E3.5.4 If the designated officer were not given this opportunity to provide further comments, then a taxpayer could avoid making representations when the taxpayer received the first notice from a designated officer that the officer considers that the GAAR applies, and instead the taxpayer could wait until a matter was referred to the Advisory Panel in order to make representations. There would then be no opportunity for HMRC to respond to these representations. The taxpayer would be put in an advantageous position by delaying making representations.

E3.5.5 The Procedural Schedule will work best if HMRC and the taxpayer disclose their views about the proposed counteraction as quickly as possible and are able to respond to each other's views.

E3.6 ***Decision of Advisory Panel***

E3.6.1 If the Advisory Panel receives a referral, the Chair of the panel must select a sub-panel of three members (one of whom may be the Chair) to consider the referral.

E3.6.2 The sub-panel can invite HMRC or the taxpayer to provide further information within a specified period. There is no statutory obligation on the taxpayer or the designated officer to supply this information, although it will help the sub-panel members to reach a better informed opinion if information is supplied.

E3.6.3 Any further information supplied by the designated officer must be copied to the taxpayer, and any information supplied by the taxpayer must be copied to the designated officer.

E3.6.4 The sub-panel must produce an opinion or opinions on the tax arrangements and give a copy of the opinion(s) to the designated officer and taxpayer. Each opinion must state:

- whether or not the entering into and carrying out of the tax arrangements was a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including those listed in the legislation and taking account of the abusiveness indicators;
- or that it is not possible, on the information available, to reach a view on that matter; and
- reasons for that opinion.

E3.6.5 Each opinion is to be given on the assumption that the arrangements under consideration are "tax arrangements" as defined in the legislation. In other words, the panel does not opine on whether there is a tax advantage or whether obtaining a tax advantage was one of the main purposes of the arrangements. However, this does not preclude the taxpayer from arguing before a court or tribunal that the GAAR does not apply because the arrangements are not "tax arrangements".

E3.6.6 There is no prescribed time limit within which the sub-panel must produce its opinion(s). However, it is expected that the sub-panel will take up to approximately 60 days to provide its opinion(s) from when it receives a referral, but this time may increase, depending on whether the taxpayer uses the further opportunity to make representations after the matter has been referred to the sub-panel, and whether the sub-panel has invited the taxpayer or designated officer to supply further information.

E3.7 ***Notice of final decision after considering opinions of Advisory Panel***

E3.7.1 A designated officer, having considered the opinions of the sub-panel, must give the taxpayer a written notice setting out whether the tax advantages arising from the arrangements are to be counteracted. If they are to be counteracted, the notice:

- must set out the adjustments required to give effect to the counteraction; and
- if relevant, must set out any steps that the taxpayer is required to take to give effect to the counteraction.

E3.7.2 Whilst HMRC is not precluded from continuing a case in the light of an opinion from the Panel that the arrangements are 'reasonable', HMRC would nonetheless need to give very careful consideration to its reasons for continuing and ensure that there is robust governance around the decision-making process.

E3.8 ***What effect does the counteraction notice have?***

E3.8.1 The notice given by the designated officer which sets out the adjustments required to give effect to a counteraction is declaratory only. It does not effect the counteraction, and the notice itself does not carry an appeal right. Instead, the issue of the notice allows steps to be taken by an HMRC officer to counteract the tax advantages arising from abusive tax arrangements.

E3.8.2 Once a notice setting out the adjustments is given, the adjustments will be effected within the administrative and assessment procedures of the relevant tax (whether corporation tax, income tax, IHT etc).



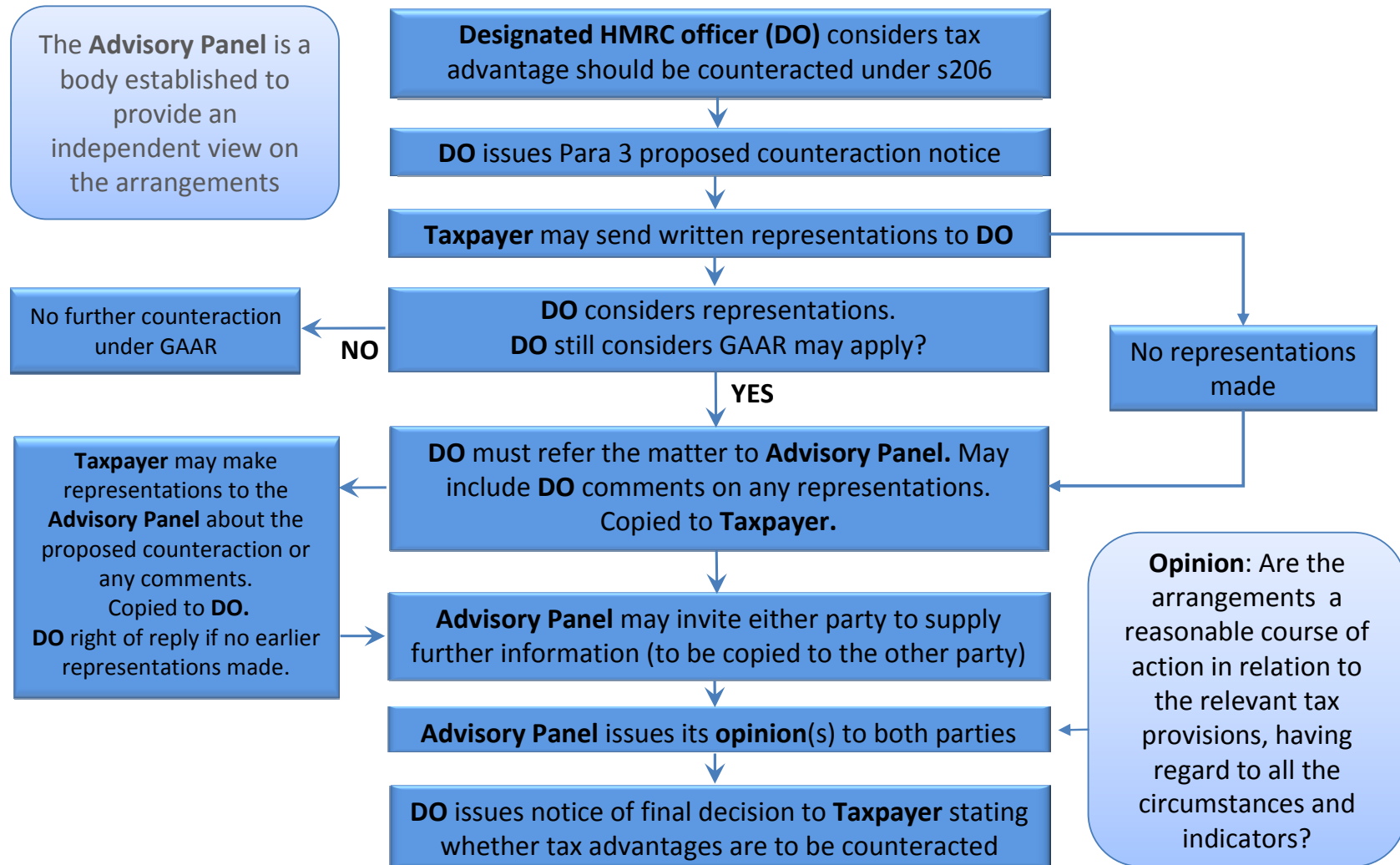
E3.8.3 In terms of the steps set out in the counteraction notice that the taxpayer might be required to take to give effect to the counteraction, one example would be if losses which a taxpayer company has surrendered are reduced due to counteraction. The taxpayer could be required under para 75 Sch 18 FA 1998 to withdraw an original surrender consent, or replace it with a new one, as appropriate.

E3.9 ***What can a taxpayer do if the taxpayer considers that HMRC is taking too long to carry out its obligations under the Procedural Schedule?***

E3.9.1 Although the Procedural Schedule sets out time limits within which a taxpayer must carry out various obligations, there are no statutory time limits for HMRC or the sub-panel. However, various avenues exist already in law which may assist a taxpayer who considers that HMRC is taking too long to carry out its obligations.

E3.9.2 For example, in the context of corporation tax, under para 33 Sch 18 FA 1998 a company may apply to the tribunal for a direction that an officer of Revenue and Customs gives a closure notice within a specified period. The tribunal must give a direction unless satisfied that an officer has reasonable grounds for not giving a closure notice within a specified period. Similar taxpayer rights exist in the context of income tax and capital gains tax at ss28A(4) to 28A(6) of TMA 1970.

## Advisory Panel Process



## **E4 The Advisory Panel**

### **E4.1 *Composition and overview of function***

- E4.1.1 The Advisory Panel is a committee established by the Commissioners for the purposes of the GAAR.
- E4.1.2 Each of the Advisory Panel members is appointed by the Commissioners. The “Chair” is appointed by the Commissioners to chair the Advisory Panel. During the period of his or her appointment, the Chair will advise the Commissioners on all Advisory Panel appointments.
- E4.1.3 The Advisory Panel represents a spread of interests including business, tax advisers and wider taxpayer interests. The panel provides a view which is independent from HMRC, and no HMRC officer is a member of the panel.
- E4.1.4 The purpose of the Advisory Panel is to bring an independent and non-HMRC perspective to the application of the GAAR. Where tax arrangements are carried out in a business context, it will also bring a commercial perspective to the application of the GAAR. This is to provide a safeguard for taxpayers.
- E4.1.5 The Advisory Panel has two specific functions: to provide opinion(s) on cases referred to it and to approve HMRC’s guidance on the GAAR which is presented to it by HMRC.

### **E4.2 *Opinions***

- E4.2.1 The first function is to provide reasoned opinion(s) to HMRC and the taxpayer on the relevant tax arrangements (as set out in the Procedural Schedule).
- E4.2.2 The Chair will select three panel members with expertise relevant to the particular tax arrangements to form a sub-panel to provide the opinion(s). The sub-panel can produce one joint reasoned opinion, or, if the three members cannot agree, it can provide two or three different reasoned opinions.

- E4.2.3 The opinions are given on whether or not the entering into and carrying out of the relevant tax arrangements is a *reasonable course of action* in relation to the relevant tax provisions, having regard to all the circumstances, including those circumstances listed in the definition of “abusive” in the GAAR.
- E4.2.4 The opinions are to be given on the basis that each of the examples in the legislation of what might indicate that tax arrangements are, or are not, “abusive” is also an indicator that the tax arrangements are, or are not, a *reasonable course of action* (an abusive indicator will indicate that tax arrangements are not a reasonable course of action). The examples of what is, or is not, reasonable are not exhaustive. They are just examples.
- E4.2.5 Essentially, the sub-panel is answering a “single reasonableness” question: in the view of the sub-panel members, is the arrangement a reasonable course of action? This is different to the “double reasonableness” question which must be taken into account when deciding whether tax arrangements are abusive. This is on the basis that the panel members are particularly well-placed to form a view on this question, and also to differentiate their role from that of the courts and tribunals.
- E4.2.6 If the sub-panel has not been provided with sufficient information to reach a view on whether tax arrangements are a reasonable course of action, then it is possible for the sub-panel to give an opinion that it is not possible to reach a view on that matter.
- E4.2.7 The opinions of the sub-panel must be taken into account by the court or tribunal in determining any issue in connection with the GAAR and the relevant tax arrangements. See E8 below for further information on how this works.
- E4.2.8 It is expected that in most cases, shortly after each opinion is given, an anonymised version of the opinion will be published by HMRC. HMRC will give very careful consideration to the form in which opinions are published to ensure that taxpayer confidentiality is protected; and it may be necessary to withhold publication in some instances if it is not possible to publish the opinion in a form that ensures that taxpayer confidentiality is not breached.

E4.2.9 The Advisory Panel does not perform a judicial function and the Advisory Panel process does not involve formal hearings where cases will be presented and heard. The Advisory Panel delivers an opinion, not a judicial decision. The opinions are not binding on HMRC or the taxpayer.

#### E4.3 ***GAAR guidance***

E4.3.1 The other function of the Advisory Panel is to approve the GAAR guidance drafted by HMRC. As noted in Part A, in practice this means that Parts A to D of the guidance will be reviewed by the Advisory Panel and, where necessary, updated by HMRC to reflect recommendations made to them, before final approval. Each approval by the Advisory Panel lasts until a subsequent approval is given.

E4.3.2 A court or tribunal must take into account when considering any issue in relation to the GAAR the guidance that was approved at the time the tax arrangements were entered into.

E4.3.3 A digest of anonymised key principles emerging from the Advisory Panel opinions will be published annually. This will be incorporated into the GAAR guidance.

### E5 **Counteracting tax advantages**

#### E5.1 ***Just and reasonable adjustments***

E5.1.1 If there are tax arrangements that are abusive, the tax advantages that would arise from the arrangements are to be counteracted by the making of adjustments.

E5.1.2 The adjustments required to be made to counteract the tax advantages are whatever adjustments are just and reasonable. Determination of these adjustments will involve consideration as to whether there is an appropriate comparator transaction. Part A to C of the guidance at paragraph C2 discusses comparator transactions in the context of concluding whether or not there is a “tax advantage.” The comparator transaction used to identify the tax advantage should follow through to the assessment of the adjustments that would be just and reasonable in the circumstances.

E5.1.3 Such adjustments may be made by way of an assessment, the modification of an assessment, amendment or disallowance of a claim or otherwise. Adjustments occur within the relevant tax (whether corporation tax, income tax, IHT etc). The relevant tax assessment provisions are then triggered under the legislation for each relevant tax. The adjustments may be made in respect of the tax in question or any other tax.

## E5.2 ***Relationship between the GAAR and priority rules***

E5.2.1 Tax legislation contains various priority rules which say that particular tax provisions have effect to the exclusion of, or otherwise in priority to, anything else.

E5.2.2 One example of such a rule is s464 CTA 2009 which says that the amounts which are brought into account in accordance with the loan relationship rules in Part 5 of CTA 2009 in respect of any particular matter are the only amounts which may be brought into account for corporation tax purposes in respect of that matter.

E5.2.3 Any such priority rule is subject to the provisions of the GAAR itself. This means that counteraction under the GAAR cannot be excluded by other priority rules within the tax legislation.

## E6 **Administration of the GAAR for different taxes**

E6.1 The GAAR (other than the provisions relating to consequential adjustments) fits within all the normal administration machinery relevant for each tax to which it applies. This means that normal time limits will apply, the normal assessment methods will be used and the normal appeal routes will flow from these assessment methods.

E6.2 The fact that normal time limits will apply to adjustments under the GAAR is made expressly clear in the legislation which says that the power to make adjustments is subject to any time limits in other legislation.

E6.3 Paragraphs E6.5 to E6.11 below set out a summary overview of how the GAAR will fit within the different tax administration rules.

## E6.4 ***Penalties***

E6.4.1 There is no specific penalty regime for the GAAR. However, the normal penalties for inaccurate documents (including returns), which are set out in Sch 24 FA 2007, will potentially apply in relation to the GAAR.

E6.4.2 As with all other tax legislation, a successful HMRC challenge under the GAAR does not, of itself, indicate that the document was inaccurate and penalties are due. In order to give rise to a penalty the inaccuracy must be careless or deliberate.

## E6.5 ***Self-assessment for capital gains tax, income tax and corporation tax***

E6.5.1 Taxpayers must consider the GAAR whenever they complete a self-assessment return, or make a claim within Sch 1A TMA 1970. They must counteract tax advantages arising from abusive tax arrangements by making just and reasonable adjustments to the return or claim.

E6.5.2 Following completion of the procedural requirements, HMRC can counteract by adjustment. This can be done in various ways, for example, by amending a return following closure of an enquiry, or making a discovery assessment, or a determination where no return is delivered. HMRC can also amend or disallow a claim via the closure notice process in Sch 1A TMA 1970. All the normal time limits and restrictions on such assessing methods will apply.

E6.5.3 Where an enquiry into a self-assessment return is completed the HMRC enquiry officer must issue a closure notice which

- informs the taxpayer that the enquiry is completed
- states his conclusions, and
- where appropriate, makes any amendment of the return that is needed to give effect to those conclusions.

Detailed guidance of the basis on which a closure notice is to be issued is provided in the Enquiry Manual.

- E6.5.4 In cases where the GAAR is being considered the officer may conclude from his enquiry that in respect of certain arrangements either:
- a technical argument may apply (for example where the relevant law has been misconstrued) and the return should be amended accordingly; or
  - a tax advantage has been obtained as a result of abusive arrangements to which the GAAR should apply, and the return should be amended to give effect to the counteraction.

E6.5.5 In more complex cases the closure notice and conclusions may have to reflect a number of matters or alternatives which have been the subject of the enquiry. Indeed, there may be cases where a TAAR may apply to reduce (but not eliminate) a tax advantage and HMRC would seek to apply the GAAR to counteract the remaining tax advantage. If so, since a closure notice can state alternative conclusions from an enquiry but the officer cannot make alternative amendments, he will amend the return so as to give effect to HMRC's preferred position.

E6.5.6 All the normal appeal rights will flow from these assessment methods.

#### E6.6 ***Tax deductible at source***

E6.6.1 PAYE is dealt with specifically below. Apart from PAYE, there are many other situations where tax is payable by deduction. Some examples of legislation requiring deduction of tax, or amounts in respect of tax, are:

- Part 15 Income Tax Act 2007 (yearly interest etc);
- Construction industry scheme legislation (Chapter 3 of Part 3 of FA 2004); and
- Real estate investment trust ("REIT") regulations.

E6.6.2 In each case where there is an obligation to deduct tax in the legislation, the GAAR should be applied when the tax is deducted, when returns in respect of those deductions are made and when the deducted tax (or amounts in respect of tax) is paid to HMRC.



E6.6.3 Following completion of the procedural requirements, HMRC is also able to counteract by making adjustments in respect of tax payable by deduction. Examples of such adjustments are:

- directing that income is income from which amounts should have been deducted under Part 15 of ITA 2007;
- directing that income is a “contract payment” for the purposes of the construction industry scheme legislation in Chapter 3 Part 3 of FA 2004; or
- directing that income is a REIT distribution.

## E6.7 **PAYE**

E6.7.1 PAYE is a collection mechanism which allows HMRC to collect income tax at source from relevant payments. S683 ITEPA 2003 and the Income Tax (PAYE) Regulations 2003 (the “PAYE regulations”) set out what is described as “PAYE income” and the employer’s obligations in respect of PAYE income.

E6.7.2 Employers must apply the GAAR when making payments of PAYE income. This obligation also extends to filing the end of year return and to providing information in respect of expenses and benefits. The PAYE Regulations set out the due dates for returning information and payments.

E6.7.3 The PAYE Regulations also make provision for recovery of underpaid tax by making determinations in respect of unpaid tax. Following completion of the procedural requirements, HMRC can make such a determination in relation to the GAAR. The time limits set out in s34 and s36 TMA 1970 apply.

E6.7.4 The normal determination appeal rights apply in relation to GAAR determinations, just as the right of appeal applies to any other PAYE determination.

## E6.8 **Petroleum Revenue Tax**

E6.8.1 Following completion of the procedural requirements, an adjustment under the GAAR to counteract a tax advantage may be made by increasing an assessment, reducing a loss determination or by an adjustment of a claim.

- E6.8.2 If the adjustment is made through an assessment or loss determination then this will be via the provisions in para 12 Sch 2 OTA 1975.
- E6.8.3 If the adjustment is made through a claim then this will either be via a decision on a claim or the variation of a claim decision. See paras 3 and 9 respectively of Sch 5 OTA 1975 (and as applied to claims under Schs 6, 7 and 8 OTA 1975).
- E6.8.4 The appeal process follows the normal rules. If the adjustment is by way of assessment or loss determination then an appeal must be made within 30 days following the making of the assessment (see para 14 Sch 2 OTA 1975).
- E6.8.5 If the adjustment is by way of a claim decision then para 5 Sch 5 OTA allows an appeal period of 3 years from the making of the claim. If the adjustment is by way of variation of a claim decision then the time limit for appeal is 30 days following the notice of variation (see para 9(3) Sch 5 OTA 1975).
- E6.9 ***Inheritance tax***
- E6.9.1 Taxpayers must consider the GAAR whenever they complete and deliver an account under s216 IHTA 1984 or corrective account under s217 IHTA 1984. They should counteract tax advantages arising from abusive tax arrangements by making the appropriate adjustments to their account and, where there is inheritance tax to pay on delivery of an account, that payment should reflect counteraction.
- E6.9.2 Following completion of the procedural requirements, HMRC can counteract by making just and reasonable adjustments. Where the appropriate adjustments cannot be agreed through correspondence, HMRC will determine the matter by issuing a notice under s221 IHTA 1984.
- E6.9.3 All the normal time limits and restrictions on recovering tax underpaid in respect of a chargeable transfer will apply.
- E6.9.4 The normal appeal rights in respect of a determination under s221 IHTA 1984 will apply.

## E6.10 ***SDLT***

- E6.10.1 Taxpayers must consider the GAAR when determining whether they are liable to pay SDLT on their acquisition of land and whether they are required to submit a land transaction return under s76 FA 2003. Taxpayers must make an adjustment to their return to counteract tax advantages arising from abusive tax arrangements. Such an adjustment could result in a return being required where otherwise no return would need to be submitted.
- E6.10.2 Following completion of the procedural requirements, HMRC can counteract tax advantages by adjustment. This can be done in various ways. For example, by amending a return following the closure of an enquiry, or by making a discovery assessment or a determination where no return is delivered.
- E6.10.3 The procedures and time limits relating to SDLT enquiries and assessments are set out in Sch 10 FA 2003.
- E6.10.4 The normal SDLT appeal rights will apply to any SDLT adjustments made by HMRC under the GAAR.

## E6.11 ***Annual Tax on Enveloped Dwellings***

- E6.11.1 Taxpayers must consider the GAAR when determining whether they are within the scope of the annual tax on enveloped dwellings on their ownership of a particular dwelling and whether that ownership is relieved as a result of one of the statutory reliefs provided. If they are within the scope of the tax, but claiming a relief, they must submit a 'nil' return; if within the scope of the tax and required to pay one of the banded rates they must submit a 'charge return'. Taxpayers must make an adjustment to their return to counteract tax advantages arising from abusive tax arrangements. Such an adjustment could result in a taxpayer needing to make a charge return rather than a nil return or no return at all.

E6.11.2 Following completion of the procedural requirements, HMRC can counteract tax advantages by adjustment. This can be done in various ways. For example, by amending a return following the closure of an enquiry, or by making a discovery assessment or a determination where no return is delivered.

E6.11.3 The procedures and time limits relating to annual tax on enveloped dwellings enquiries and assessments will be set out in FA 2013.

E6.11.4 The normal rights of appeal will apply to any adjustments made by HMRC under the GAAR.

## **E7 Consequential adjustments**

E7.1 Consequential adjustments sit outside the usual tax administration processes. Consequential adjustments can only be relieving adjustments. They cannot increase the liability of a taxpayer.

E7.2 Consequential adjustments are intended to ensure that overall there is no excessive taxation. For example, if counteraction involved acceleration of a tax charge, then double taxation would result if tax was later charged again in respect of the same amount.

E7.3 In some cases, a taxpayer not subject to the counteraction but connected to the transaction, may claim a consequential adjustment made to their tax liability.

E7.4 Consequential adjustments can be claimed within 12 months of GAAR counteraction becoming final. GAAR counteraction becoming final means that the adjustments made to effect the counteraction, and any amounts arising as a result of those adjustments, can no longer be varied, whether on appeal or otherwise.

E7.5 Where counteraction has been by self-assessment, a consequential adjustment claim is only possible where HMRC has been notified of the counteraction by the taxpayer.

- E7.6 On a claim being made, HMRC will make just and reasonable consequential adjustments (if any). The methods of making a claim will depend on the tax in question:
- if the claim relates to income tax, capital gains tax or corporation tax, Sch 1A TMA 1970 applies;
  - if the claim relates to PRT Sch 1A TMA 1970 applies;
  - if the claim relates to IHT it must be made in writing to HMRC and s221 IHTA applies as if the claim were a claim under that Act; and
  - if the claim relates to SDLT or the annual tax on enveloped dwellings, Sch 11A FA 2003 applies.

E7.7 All of the claim methods described above provide an appeal right for taxpayers where they believe just and reasonable consequential adjustments have not been made.

## **E8 Proceedings before a court or tribunal in connection with the GAAR**

### **E8.1 *Burden of proof***

E8.1.1 In proceedings before a court or tribunal in connection with the GAAR, the burden of proof is on HMRC to show that:

- there are tax arrangements that are abusive; and
- the counteraction of the tax advantages arising from the arrangements is just and reasonable.

E8.1.2 This is different to most tax appeals (apart from some penalty appeals) where the burden of proof in an appeal is on the appellant.

E8.1.3 The standard of proof in all proceedings before a court or tribunal in connection with the GAAR is the civil standard of proof (the balance of probabilities).

E8.2 ***What must be taken into account***

E8.2.1 In determining any issue in connection with the GAAR, a court or tribunal must take into account:

- HMRC's guidance about the GAAR that was approved by the Advisory Panel at the time the tax arrangements were entered into; and
- any opinion of the Advisory Panel about the arrangements.

E8.2.2 This means that the court or tribunal must consider such guidance or opinion carefully and give it due weight.

E8.2.3 The approved GAAR guidance and opinions of the Advisory Panel "must" be taken into account, which contrasts with other matters specified in the GAAR (such as material in the public domain) which "may" be taken into account by the court or tribunal (see E8.5 below).

E8.3 ***HMRC's guidance approved by the Advisory Panel***

E8.3.1 The Advisory Panel is not a statutory body but is established and appointed by the Commissioners in order to carry out the functions specified in the legislation, and certain other functions set out in the Panel's terms of reference.

E8.3.2 The process by which the Advisory Panel approves HMRC's draft guidance which is presented to it is set out in these terms of reference, rather than in the legislation.

E8.3.3 If an approval is given in accordance with this process, it results in the part of HMRC's guidance which has been presented to the Advisory Panel being approved by the Advisory Panel for the purposes of the GAAR legislation.

E8.3.4 An approval by the Advisory Panel of HMRC's guidance lasts until a later version of the guidance is approved. It is the guidance in point when the relevant arrangements are entered into which must be taken into account.

E8.4 ***Any opinion of the Advisory Panel about the arrangements***

E8.4.1 If tax arrangements are referred to the Advisory Panel by the designated officer, then the Chair of the panel must select three members of the Advisory Panel to consider it. This sub-panel must give the designated officer and taxpayer either one, two or three opinion notices. The opinion reached in each of these notices may be different from the opinion reached in the other notices, and each opinion may be reached for different reasons.

E8.4.2 The court or tribunal must take into account all of the opinion notices issued in relation to particular tax arrangements entered by a taxpayer. This allows for members of the sub-panel to reach dissenting views, and for those dissenting views to be taken into account.

E8.4.3 The opinions given by the members of the sub-panel are opinions on whether the entering into and carrying out of the relevant tax arrangements is a reasonable course of action in relation to the relevant tax provisions having regard to all the circumstances, including those circumstances listed in the GAAR legislation, and the indicators listed in the GAAR legislation. Those opinions will be based on the panel members' own views of the taxpayer's course of action.

E8.4.4 As noted at E4.2 above, this is a different question to the question considered later by the court or tribunal in determining whether tax arrangements are abusive. The court or tribunal has to determine whether the entering into or carrying out of the tax arrangements can reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions having regard to all the circumstances and the indicators listed in the legislation.

E8.5 ***What may be taken into account***

E8.5.1 In determining any issue in connection with the GAAR, a court or tribunal may take into account:

- guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into; and
- evidence of established practice at that time.

- E8.5.2 This provision gives the court or tribunal the power to take matters into account if it wishes, even if it would not otherwise be admissible as evidence. It does not oblige or force the court or tribunal to take these matters into account.
- E8.5.3 The reference to statements of Ministers means that a court or tribunal may take into account not only statements made by Ministers in debate in Parliament, but also Ministerial statements made when a tax avoidance scheme was closed down that were in the public domain at the time the relevant tax arrangements were entered into.
- E8.6 ***What about the exclusionary rule?***
- E8.6.1 There is a general case law rule that references to parliamentary material as an aid to statutory construction are not permissible as evidence. This is known as the exclusionary rule.
- E8.6.2 There are some exceptions to the exclusionary rule. These include the rule formulated by Lord Browne-Wilkinson in *Pepper v Hart* [1992] STC 898 which says that the exclusionary rule can be relaxed where the legislation is ambiguous, obscure and certain other conditions apply.
- E8.6.3 Arguably, the exclusionary rule (as amended by *Pepper v Hart*), could prevent parliamentary material being used to prove facts such as what the principles or policy objectives of relevant tax provisions are. It is put beyond doubt that parliamentary material can be used to prove such facts, because a court or tribunal can take into account any statements or other material of a Minister.
- E8.6.4 In addition, the exclusionary rule (as amended by *Pepper v Hart*) could prevent parliamentary material being used to demonstrate the meaning of the GAAR legislation itself and its statutory construction. It is made clear that parliamentary material can be used to demonstrate this meaning.