

Explanatory Note

Clauses 60 to 62 and Schedules: General Anti-Abuse Rule: Penalty

Summary

1. This measure introduces a new penalty for all cases successfully counteracted under the General Anti-Abuse Rule (GAAR). A penalty of 60% of the counteracted tax will be charged whenever a taxpayer submits to Her Majesty's Revenue and Customs (HMRC) a return, claim, or other document on the basis that a tax advantage arises from the tax arrangements where all or part of that tax advantage is later counteracted under the GAAR. The new penalty will apply to tax arrangements entered into on or after Royal Assent of this legislation.
2. This measure also introduces changes to the GAAR procedure. Firstly, the GAAR procedure will be amended so that a GAAR Advisory Panel opinion will enable counteraction of the equivalent arrangements by other users. The GAAR procedure will also be amended to enable a provisional counteraction under the GAAR. This will enable HMRC to counteract under the GAAR within assessing time limits, whilst preserving the safeguards for the taxpayer provided by schedule 43 or the new procedure for users of equivalent arrangements. These procedural changes will apply from Royal Assent of this legislation, without reference to when the tax arrangements in question were entered into.

Details of the clauses and schedules

Clause 60: The Penalty

3. Clause 60 (2) inserts new section 212A into FA13.
4. New subsection 212A(1) provides that a person will be liable to a penalty when they have given HMRC a 'tax document' and this document is submitted on the basis of a tax advantage that arises from tax arrangements but where all or part of the tax advantage is counteracted by the GAAR.
5. New subsection 212A (2) explains that the GAAR penalty will be charged at 60% of the "value of the counteracted advantage".
6. New subsection 212A (3) introduces Schedule 43B to Finance Act 2013.
7. New subsection 212A (4) defines 'tax document'.
8. Clause 60 (3) amends section 209 of FA13 by inserting subsections (8) to (12).
9. New subsections 209 (8) to (11) provide that the taxpayer cannot amend a tax document or make other adjustments to their tax affairs to take account of any adjustments required under

section 209 FA13 in respect of arrangements after those arrangements (or lead arrangements to which the taxpayer's arrangements are to be bound) are to be referred to the independent GAAR Advisory Panel until the date upon which HMRC decides whether to counteract the tax advantages arising to the taxpayer as a result of the use of the arrangements under GAAR. This gives effect to the intention that a taxpayer should only be able to make such amendments or adjustments to avoid a GAAR penalty prior to the time at which the arrangements are to be referred to the GAAR Panel.

10. Clause 60 (4) (5) and (6) amend Schedule 43 of FA13 so that a notice of proposed counteraction under Paragraph 3 of Schedule 43 explains the effect of the GAAR penalty and the opportunity to make adjustments prior to referral to the GAAR Advisory Panel.
11. Clause 60 (7) inserts new Schedule 43B into Finance Act 2013.

New Schedule 43B to Finance Act 2013: GAAR Penalty

12. Paragraph 2 defines the 'value of the counteracted advantage' for the purposes of calculating the amount of the GAAR penalty.
13. Paragraph 3 explains how the 'value of the counteracted advantage' is to be calculated where the tax advantage counteracted under the GAAR results in or from a loss.
14. Paragraph 4 provides a special rule for quantifying a counteracted tax advantage which comprises the deferral of tax.
15. Paragraph 5 sets out how a GAAR penalty is to be assessed. The GAAR penalty can be assessed once the tax advantage has been counteracted, and any necessary adjustments will be made to the amount of the penalty following any appeal against the counteraction (see also paragraph 9.)
16. Paragraph 6 explains that a GAAR penalty assessment will be revised where the "value of the counteracted advantage" has been over- or underestimated.
17. Paragraph 7 sets out how a GAAR penalty is to be revised where a consequential adjustment under section 210(7) of FA13 is made.
18. Paragraph 8 deals with situations where more than one penalty may arise in respect of the same amount and one of those penalties is a GAAR penalty.
19. Paragraph 9 provides that a person may appeal against HMRC's decision to issue a GAAR penalty. The person does not have to pay the penalty in order to make an appeal.
20. Subparagraph 10 provides that HMRC may reduce or cancel the GAAR penalty.
21. Clause 60 (8) to (12) make consequential amendments to other enactments to take account of the GAAR penalty.
22. Clause 60 (13) explains when the new penalty will take effect.

Clause 61: Provisional Counteractions

23. Clause 61 (2) inserts new sections 209A to 209D into FA13.
24. New section 209A (1) explains the circumstances in which HMRC may make a provisional counteraction.

25. New section 209A (2) sets out the action HMRC may take to give effect to the provisional counteraction notice.
26. New section 209A (3) states the information which must be included in a provisional counteraction notice. New subsection 209A (3) (b) explains that a provisional counteraction notice may be made whether the tax advantage is to be counteracted under Schedule 43 to FA13 or new Schedule 43A to Finance Act 2013.
27. New section 209A (4) explains that adjustments to give effect to a provisional counteraction may be made in the same way as a GAAR counteraction.
28. New section 209B (2) sets out the action that must be taken by HMRC within the period specified in new section 209B (5) where the taxpayer appeals the adjustments made as a result of the provisional counteraction. This section also explains that the adjustments will be treated as cancelled where HMRC does not take any of the actions specified in this section within the time period referred to above.
29. New section 209B (2)(b) explains that if HMRC withdraws the provisional counteraction adjustments, the adjustments can be maintained on the basis that another tax provision applies. New section 209B (6) explains that HMRC may only take action under s209B (2) (b) where it has the authority to do so.
30. New section 209B(2) (c) (ii) explains that where a designated HMRC officer gives the taxpayer a notice of proposed GAAR counteraction under Paragraph 3 of Schedule 43 FA13 or a notice of binding under Schedule 43A, the adjustments specified in the notice may be the same or lesser amounts than the provisional counteraction adjustments.
31. New section 209B (3) explains that where lesser adjustments are specified in the notice of proposed GAAR counteraction under new section 209B (2) (c) (ii), the provisional counteraction adjustments are to be treated as amended in the same way.
32. New section 209B (4) provides the definition of "lesser adjustments".
33. New section 209B (5) sets out the period during which HMRC must take the action specified in new section 209B (2).
34. New section 209C (2) explains how adjustments are to be treated where a designated officer has issued a notice of proposed GAAR counteraction following a provisional counteraction, and the designated officer decides not to counteract the tax advantage under the GAAR. If HMRC withdraws the provisional GAAR adjustments, the adjustments can be maintained on the basis that another tax provision applies.
35. New section 209C (3) explains that HMRC may only take action under new section 209C (2) where it has the authority to do so.
36. New section 209C (4) explains how adjustments are to be treated where a taxpayer is given a notice under paragraph 12 of schedule 43 FA13 following the GAAR Advisory Panel opinion in circumstances where a provisional counteraction was made, and the designated officer decides not to counteract the tax advantage under the GAAR. If HMRC withdraws the provisional GAAR adjustments, the adjustments can be maintained on the basis that another tax provision applies.
37. New section 209C (5) explains that HMRC may only tax action under new section 209C (3)

where it has the authority to do so.

38. New section 209C (6) explains that a cancellation under new section 209C (4) takes effect from the date that the taxpayer is given a notice of final decision following the GAAR Advisory Panel.
39. New section 209C (7) explains how the tax advantage is to be counteracted where a provisional counteraction is made and a notice of final decision following the GAAR Advisory Panel later confirms that a tax advantage is to be counteracted.
40. New section 209D explains how a taxpayer may appeal a provisional counteraction.
41. New section 209D (2) explains that where a taxpayer appeals against adjustments made to give effect to a provisional counteraction, no action is to be taken in respect of the appeal until the action outlined at new section 209B (2) (b) or 209C (2) is taken, or a notice of counteraction under GAAR is given under paragraph 12 schedule 43 FA 13 (or paragraph 3 new Schedule 43A) is made by the designated HMRC officer.
42. New section 209D (3) explains that adjustments made to give effect to a provisional counteraction may only be made where the officer of HMRC considers that the tax arrangements are abusive, and the adjustments are made on a just and reasonable basis.
43. New section 209D (4) and (5) set out the conditions for appealing adjustments made to give effect to a provisional counteraction.

Clause 62: Binding of arrangements

44. Clauses 62 (2) and (3) apply section 209(6) (a) and 211 (2) (b) FA13 respectively to include a reference to the new Schedule 43A to FA 2013.
45. Clause 62 (4) inserts new Schedule 43A to FA 2013.

New Schedule 43A to FA 2013: Binding of arrangements

46. Paragraph 1 sets out when "equivalent arrangements" may be bound to lead arrangements and explains that HMRC must issue a notice of binding in doing so. HMRC may issue a notice of binding regardless of whether or not the "lead arrangements" have already been referred to the GAAR Advisory Panel. Subparagraph 5 sets out what the notice of binding must contain.
47. Paragraph 2 explains that a taxpayer who has received a notice of binding may make representations to HMRC during the 30-day period following HMRC's notification of the GAAR opinion notice(s) under paragraph 11(2) of Schedule 43 FA13 and explains the grounds on which representations may be made.
48. Paragraph 3 provides that HMRC may counteract a tax advantage of a taxpayer who has received notice of binding based upon the opinion of the GAAR Advisory Panel in respect of the lead arrangements.
49. Paragraph 4 defines "equivalent arrangements".
50. Paragraph 5 explains that any notice under Schedule 1 made by the HMRC designated officer may be made on the basis that a tax advantage does arise or may have arisen.
51. Paragraph 6 defines "designated officer".

Background note

52. The GAAR penalty has been introduced to increase the deterrent effect of the GAAR, discouraging the minority of persistent tax avoiders who remain undeterred from engaging in abusive tax avoidance. This penalty will ensure that there is an effective disincentive to entering into abusive tax avoidance, and that those who do engage in abusive tax avoidance are subject to an appropriate downside.
53. The procedural changes to the GAAR in Schedule 43A FA13 have been introduced to ensure that the GAAR procedure works efficiently in respect of marketed tax avoidance schemes. This draft does not yet include a provision to deal with circumstances where the lead case corrects their tax affairs prior to referral to the GAAR Advisory Panel, and no suitable lead case can be identified from amongst taxpayers who have received a notice of binding. This provision, along with other elements throughout the draft, will continue to be developed as part of the consultation on the draft legislation.
54. The procedural changes in new Section 209A FA 13 enable HMRC to provisionally counteract under GAAR whilst maintaining the procedural safeguards in schedule 43 and new Schedule 43A for taxpayers.
55. If you have any questions about this change, or comments on the legislation, please contact Ellen Roberts on 03000 594918 (email: ellen.roberts@hmrc.gov.uk)