

REFLECTIONS ON THE GAAR

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The poem “Tunisian Spring”, written by Mohammed Ibn Al-Dheeb Al-Ajani, contains the line “We are all Tunisians in the face of repressive elites”.

While on holiday, staying in a private apartment in Tunisia, Mr Al-Ajani recited his poem: a video of the recitation was, somehow or other, made and posted on You Tube.

When he returned from Tunisia to his home state of Qatar, he was arrested and charged: I am not entirely clear what the charge was, because reports vary; it was not poem writing, but it might have been insulting the Emir, or sedition. Whatever it was, he was sentenced to life imprisonment, which, last time I looked, he was still serving.

Now I do not know very much about the law of Qatar. I do not know whether what Mr Al-Ajani did could really be regarded as sedition.

But what I can do is imagine a State in which the law is that anyone who does something of which the ruler disapproves is guilty of a crime and can be sentenced to whatever punishment the ruler sees fit to impose, so long, of course, as, in his reasonable opinion, the punishment fits the crime.

Under this law, the thing which makes an act criminal (assuming it not to be criminal by virtue of some other law) is the disapproval of the ruler; and if an act is criminal by virtue of some other law, the feature which allows the imposition of a just and reasonable punishment rather than the penalty imposed by the other law is, again, the disapproval of the ruler.

While I am talking to you about the GAAR, I should like you to think a little bit about how happy you would be to live in a State which has a law like that?

THE PRESENT SITUATION

Tax law in the United Kingdom involves an interesting combination of, on the one hand, more or less universal conventions of statutory interpretation and, on the other, the common law method of problem solving and adjustment.

The genius of the common law is that, over time, it has responded to the changing conditions of society by evolving new solutions to continuing issues.

Historically, the process was one of evolution, not revolution, but the increasing pace of life has made the processes of the common law faster than they used to be; Courts now respond far more rapidly to change than in the past, with the result that adjustments in the law are more apparent than they used to be.

Tax is an area in which, over the last thirty or forty years, we have seen the process of adjustment very clearly at work, as the Courts have tried out different solutions to what, whether rightly or wrongly, has been called the problem of tax avoidance.

In this process we have seen a number of different formulations of an approach to tax avoidance.

Beginning with *Ramsay*¹, or perhaps a little before then, Courts held that circular self cancelling transactions did not work.

The rule that circular transactions did not work was then extended to linear transactions which were preordained; and this led to an idea that preordination was the essential feature which allowed tax avoidance schemes to be struck down.

However, while developing rules which appeared heavily fact dependent, Courts here had insisted that this was all a matter of statutory interpretation.

When that principle was examined again by a new generation of Law Lords in *MacNiven*², it was found that it would not stand up for a moment, and the rule evolved again, through *Arrowtown*³ and *Barclays Mercantile*⁴, to what seemed to be the present rule – that you apply the statute, construed purposively, to the facts, viewed realistically.

However, pausing in the story there, although the facts were to be viewed realistically, it was not permissible to ignore what had happened.

So far the story concludes – it is, of course, by no means finished yet – with the cases of *Mayes*⁵ and *Schofield*⁶.

In *Mayes*, the Court of Appeal accepted the rule that nothing could be ignored and upheld a tax avoidance scheme.

In *Schofield*, a differently composed Court of Appeal, clearly feeling that the law as expressed in *Mayes* might be seen as unsatisfactory in modern conditions, ignored both that decision and the facts and decided that the tax avoidance scheme in that case did not work.

To my way of thinking, the contrast between *Mayes* and *Schofield* leaves the law in a mess: yet another process of rapid evolution is occurring.

The question which then arises is why what happened in *Schofield* creates so much distaste in the judiciary that his case was decided against the taxpayer, while what happened in *Mayes* – a case which could, as it seems to me, have been decided against the taxpayer on exactly the same basis as *Schofield* was decided against the taxpayer – did not arouse the same degree of distaste.

And that is a question I do not feel able to answer.

The question is relevant because the law is unclear and, even without the GAAR, any tax adviser proposing a course of action needs to ask how a Court or Tribunal will react to it if it has to rule on it.

There can be no doubt that the identity of the judge is a large factor in determining how a case will be regarded and, indeed, decided, but it is clearly not the only determinant: I doubt if the difference between the judges in *Mayes* and in *Schofield* explains the different outcomes.

Before *MacNiven*, Lord Templeman was the leader of the judicial anti-avoidance movement, and he made a distinction

between transactions which had real economic consequences and those which did not.

It is tempting to think that this kind of formulation could provide a sound basis for determining what will work and what won't; and it is worth noting that a reference to economics appears in the current draft of the GAAR.

However, more thought shows that the distinctions between real and unreal consequences and between economic and non-economic consequences are illusory: like fairness, it is all a matter of opinion; like memory, our conceptions of what is economic or fair are functions of the story we wish to tell ourselves about ourselves.

What Mr Schofield did, had, from my point of view, real economic consequences – consequences no less real than what Mr Mayes did and, indeed, in some ways more real: it was just like bed and breakfasting which Lord Templeman said was acceptable and worked – see *Ensign*⁷.

And it has to be said that there is no reference to economics in the judgments in *Mayes* or in *Schofield*.

So I doubt if references to reality or to economics are going to help provide any clarity here, any more than appeals to the supposed purpose of the legislation will do that.

Another point is that *Mayes* and *Schofield* were decided at different times and in different emotional climates.

When *Mayes* was decided, there was no general criticism of tax avoidance.

Schofield was argued when it was public knowledge that comedians had been taking the advice of accountants, and the general clamour was for tax to be payable by everyone and everything.

Ill-informed press reports should not affect judges but, like you and me, they are human and they are affected.

The law is without shape: it is a mess; and, on top of this blancmange, we are now, apparently unstopably, to have a GAAR.

Why the GAAR is the Wrong Response to the Situation

I have grave concerns about the form of GAAR which is presently before us: to my mind, it is an affront to the rule of law, a provision which we should, as a country, be ashamed to enact.

That statement comes from a whole mix of things, some of which I can, undoubtedly, call rational, but others of which I recognise as more emotional.

I am fully aware of the impact of the emotions on what I have just said.

But what I am completely unable to do is to say how I would think about the matter if I could remove all the emotional influences which affect my judgments.

Indeed, neuroscientists are able to demonstrate that without emotions, we are unable to reach decisions.

The point here is that a GAAR deals with a subject which brings forth an intensely emotional response to the question, “Is this abusive tax avoidance”?

In short, then, this legislation not only permits but encourages and requires an enquiry of the emotions and elevates our response into law.

The full title of the GAAR is the General Anti Abuse Rule, and the use of the word “abuse” rather than “avoidance” is meant to provide some reassurance that the rule will have a somewhat limited scope.

However, I doubt if that will turn out to be the case.

Moreover, the current draft of the GAAR is the wrong solution to a so called problem which should not exist: it treats the wrong problem.

Identifying the Correct Problem

Our tax code contains something over 13,000 pages of primary and secondary legislation.

The purpose of a code that long is to set out detailed rules for every situation of which the draftsman could think: if the

purpose is not to deal in detail with what might happen there is no need for such length.

Taxpayers then go through the rules and find things (some of which are described in the draft GAAR Guidance Part B) to do for which a certain outcome, favourable to the taxpayer, is prescribed by the details: that is what rules are for; there is no point in having rules unless they are to operate as rules.

On seeing what has happened, some observers claim that the outcome is unintended and offends some alleged spirit of the law, which is a fancy phrase meaning no more than that the observer, for no very well defined reason, does not like what the taxpayer has done.

That is exactly what is done in the GAAR Guidance Part B in relation, for example, to the shares as debt regime.

It is claimed that the ability to claim a debit on shares in certain circumstances was unforeseen and unintended.

It is, of course, possible that that is so.

But, on another view, the legislation expressly and deliberately left open the opportunity to create a debit.

The basis on which it can objectively be said that that was unforeseen and unintended is not wholly clear to me.

That is the so-called problem: some observers do not like what the detailed rules allow you to do.

To the observer who says “I do not like what the taxpayer has done”, the problem seems to be one of taxpayer behaviour, which needs to be swatted like an irritating fly.

But two issues arise here.

First, the very purpose of the tax legislation is to set reasonably defined boundaries: it is to say here there is tax, there there is not; here there is a relief, there not.

The chief function of a detailed tax code is to allow the taxpayer to do things which are outside the tax net: and we should all prefer that type of system to those in force in Tudor

times, when there was much more discretion given to the tax gatherer than has, in recent times, been commonly usual.

The other issue is that the problem may be caused by the tax code itself – may have arisen because nobody has given any thought to what we want our tax code as a whole to do, may have arisen because the tax code is doing the wrong things.

The problem may have arisen as a result of things done with the very best of intentions.

For example, much of the length of our legislation is attributable to provisions enacted as a response to suggestions made by special interest groups.

As a result, we have within our single code a host of sub codes which, inevitably, cause a loss of overall coherence.

The legislature should be thinking about the need for coherence, but it does not seem to have done that.

In other words, it is at least plausible that the problem is not taxpayer behaviour, but the tax legislator's behaviour.

In this country, we do not seem to have thought about what we want our tax system to do: we have just gone on happily adding to an overbearing tax code until it is near the point of collapsing under its own weight; last year's Finance Act, filled with miserable and unprincipled tinkering, is a paradigm of what is wrong; this year's Act is further proof that something is badly wrong with our thinking about tax.

We are in the most dire economic situation that any of us here have ever experienced.

I believe it to be worse in many ways (though not so far in its effect on the general population – at least nobody is yet actually starving) than the 1930s.

Advances in weaponry mean that the traditional means of solving economic problems of this kind are no longer sensibly available to us so, while the traditional solution remains a possibility, it is unlikely.

And the response of our government has been to introduce ARPT, a 15% rate of SDLT and a limit on the ability to save.

I am sure that will improve our economic performance no end.

I have no fundamental objection to a GAAR, so long as its terms comply with the requirements of the rule of law, and it is adequately linked to a rational system of taxation.

The chief requirement of the rule of law is that law should be relatively certain: absolute certainty is unachievable, but clarity and a high degree of certainty are not; the GAAR is not the right response to the present situation because it adds to rather than cures our existing ills.

A rational tax system is one which responds adequately to the concerns of those subject to it, while satisfying the needs of the State imposing it.

In order to see whether a tax system satisfies that requirement, we might ask a very large question. How would we design a tax system if we were starting today with a blank sheet of paper and no idea at all of the existing system?

I think we should want three things of the system.

First, it should be as nearly neutral in effect as it can possibly be, so that it does not require a decision, which ought to be taken on economic grounds alone, to be taken for tax reasons: for example, I should not have, or even wish, to acquire, to retain or to dispose of a particular asset because the tax system encourages me to do that.

Secondly, we should not ask the tax system to perform a social engineering function: tax systems quite often do that, but there are more honest ways of achieving government policy and it would be better to use those methods (whatever impact that might have on national accounts) rather than to use tax to distort life.

Thirdly, we should endeavour to ensure that those subject to it find the tax system to be acceptable.

The acceptability, to those subject to it, of a tax is a function

partly of its intelligibility, partly of the administrative burden which it imposes and partly of its rate.

Intelligibility of a tax is a function of simplicity: the simpler a tax system is, the more intelligible and, for that matter, the less administratively burdensome it will be.

Rate is a function of the amount of money which the system needs to collect and of the tax base, so the broader the base, the lower the rate can be.

The breadth of the base is a function of the basic charging provisions and of the reliefs given, so that the fewer reliefs, the broader the base.

Simplicity is a function of the breadth of the base, so that the broader the base, the simpler the tax.

The need for reliefs is a function of the tax rate, so the broader the base and the lower the tax rate, the fewer the necessary reliefs.

It follows that the fewer the reliefs, the greater the acceptability of the tax system.

That is because, if there are fewer reliefs, the base is broader, the tax is simpler and the rate lower than it would be with a greater number of reliefs.

Thus the removal of reliefs and the concomitant reduction in rate produce the three fundamental requirements for an acceptable tax system: intelligibility, ease of administration and a rate which people are willing to pay.

Acceptability, then, is achieved by simplicity: in order to achieve the third of the criteria which I set out for a good tax system, we need a simple system with a low rate and few reliefs.

Happily, a system in that form will also achieve the first two of my criteria: a low rate system will not force any particular economic decision, and a system which has few reliefs will not be trying to affect behaviour.

Moreover, simple tax systems with their broad base and few reliefs make avoidance very hard: it is, after all, usually

the manipulation of reliefs which is the tax avoider's weapon of choice.

A bad tax system creates the so-called problem of tax avoidance: a good tax system prevents it or, at any rate, by its fundamental design, limits the opportunities for avoidance.

Thus tax avoidance is not a problem of taxpayer behaviour, but a function of bad or, at any rate, inadequately thought through legislation: just as bad money drives out good, bad law drives out good.

It seems to me, therefore, that the case for a simple low rate system is unanswerable.

Systems like that are quite often called flat tax systems, but that title mis-describes them. The important thing about a tax system is not that it is at a flat rate, but that it is simple, which means that the way in which it defines what is taxable is easy to understand and straightforward to grasp.

A simple tax system can easily accommodate two rates of tax – one for those earning up to a certain level and another for those earning at a higher level, if that is thought to be a social or political necessity; and the broadening of the base would allow low earners to be taken out of the charge to tax, because it automatically collects in more revenue than a narrow base.

I might add that, if fairness is regarded as an essential element, and if fairness is taken to mean that “the rich must pay more” – the fiscal slogan which is the equivalent of the supermarket “Now costs less” – a two rate tax system with limited reliefs achieves that.

I do not quite understand why the public and many of our politicians seem to believe or are encouraged by some to believe that our existing system does not provide for the rich to pay more, though I note that there are very few people who consider themselves to be rich, that being a comparative term.

However, no matter how the concept of being rich is defined, our tax system provides rather well – perhaps too well – for

the rich to pay more, but it does not measure up to the criteria for a desirable tax system: it does not meet any of those criteria; it is verbose, parts of it are unintelligible to the point at which its complexity can literally make me weep, and most of it seems to me to be unnecessary.

It is so complicated that HMRC are not able adequately to police it, and the response has been to put an increasing burden on taxpayers to police themselves, which, of itself, makes the tax system less acceptable to those subject to it.

On top of that, it is full of reliefs which are an attempt to distort human behaviour (how many of us regret that, in one way or another, we were effectively compelled to do something because of the fiscal incentives attached to it rather than because of its innate good sense) and which narrow the base, something made necessary because the tax is charged at relatively high rates.

Indeed, it is the reliefs which usually lead to the sort of tax avoidance schemes to which so many now object on the basis that this infringes some spirit of the law.

The question is whether the GAAR is an adult response to the situation.

The GAAR is going to be added to everything that we already have; and, by recommending or supporting the addition of a GAAR, those suggesting it somehow seem to accept that we have a wonderful tax system, which needs to be protected by the fence of the GAAR.

So let me ask whether the addition of a GAAR is going to make our tax system more acceptable? Is it really going to stop riots in the streets as its author and chief proponent has claimed? Is it going to make our system work better?

There is a Japanese epigram:

“The sign on the fence says

Do not pluck these blooms,

But it is useless against the wind

Which cannot read”

The spirit of the law is like the wind: it cannot read and it cannot be read; it certainly cannot be read when the code in question does not have a coherent common thread running through it, and the addition of a GAAR to our over-complicated system is more likely to increase fraud than it is likely to improve tax collection.

On top of that, the current GAAR as enacted seems to me to be open to some fundamental objections.

It is, however, commendably short and there is something to be said for brevity: indeed, those of us who have done any work with the Australian GAAR in Part IVA of their legislation will be grateful for the fact that this legislation, albeit still missing some parts, is quite short.

Nonetheless, brevity may bring with it an undesirable lack of clarity.

In order to fall within this provision, there must be, first, “tax arrangements” which are, secondly, “abusive”.

The Double Reasonableness Test

The requirement that the tax arrangements be “abusive” is advertised as a limitation on the operation of the provision: the taxpayer is not caught just because he does something mainly to obtain a tax advantage.

In this respect, the draft resembles the sort of GAAR – which can be found in some Commonwealth jurisdictions – which includes what is called a “safe harbour”.

But there are differences between that type of model and what we have here.

The chief difference is that most GAARs provide that whether an arrangement is done mainly for tax purposes is to be determined by reference to a list of factors.

Most GAARs apply if, by reference to the listed factors, it *would* be (note, not *could* be) objectively concluded that tax avoidance was a main purpose of what was done.

In determining whether that sort of GAAR is to apply or not, the strain is taken by the listed factors.

In this case, however, subsection (1) of section 207 of the Finance Act 2013 provides that the determination that something has been done to obtain a tax advantage is to be made by reference to only one test: is it reasonable, in all the circumstances, to conclude that obtaining a tax advantage was a main purpose of the arrangement?

This requirement of reasonableness is, of course, meant to be a safeguard.

But I find the test rather elusive: reasonable to whom and by what standard? Not, I rather think, to the man on the bus or by his standard.

The GAAR contains no way of measuring what is reasonable and what not reasonable: it may be doubted if the word “reasonable” adds clarity to the test; it may obscure.

Because that is so, the question of whether a course of action is abusive or not is likely to play a large measure in the determination of whether something has been done for a tax avoidance purpose: if what has been done is found to be an abuse of the tax system, it is likely to be reasonable to conclude that it was done mainly to obtain a tax advantage.

At any rate, psychology plays a large part in law and, psychologically, if something bears the hallmark of being an abuse, it is unlikely to be thought reasonable to do it.

The problem of reasonableness arises again in what has become known as the double reasonableness test in the determination of whether something is abusive or not: s.207(2) provides that arrangements are abusive if they cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances.

Although the requirement of double reasonableness is meant to be a safeguard (you must go through two gates to

catch the errant taxpayer), it is to be observed that, according to Schedule 43 paragraph 11, the GAAR Advisory Panel is only to give an opinion on the second element of the double reasonableness test: it is to say only whether the matter it is considering was a reasonable course of action; it is to express no view as to whether what has happened can or cannot reasonably be regarded as reasonable.

Presumably, that is because if the Panel is of the view that what happened is reasonable, it becomes impossible to say that it cannot reasonably be regarded as reasonable.

But what happens if the Panel thinks that what was done was unreasonable?

Does it follow from that that it cannot reasonably be thought to be reasonable?

If so, there is not really a double reasonableness test at all, and I suspect that this much vaunted protection is a chimera demonstrated to be such by the wording of Schedule 43 paragraph 11.

And, in any event, the question of 'reasonable to whom' arises. What is reasonable to a businessman may well not be reasonable to a revenue official.

A judge is, no doubt, expected to sit neutral between the two sides, but how does he determine what is reasonable and what not?

That the burden of establishing that the GAAR applies is on HMRC ought, in theory, to help the taxpayer here, but experience suggests that, in practice, where the burden lies may not matter very much.

The circumstances which are to be taken into account in determining whether there is or is not abuse include whether the results are consistent with any principles, express or implied, on which the relevant tax provisions are based and their policy objective, whether the transaction includes contrived or

abnormal steps and whether the arrangements in question are intended to exploit any shortcomings in the legislation.

All these concepts are highly subjective and, to my way of thinking, unacceptably uncertain in a system which is supposedly based on the rule of law.

On top of these circumstances, the indications of abuse in s.207(4) are to be taken into account to show that something might be (not is) an abuse.

One of these indications is that the arrangements result in an amount of income for tax purposes that is significantly less than the amount for economic purposes.

There is no definition of economic purposes, and there is no provision anywhere in our tax code that taxes by reference to an economic outcome (save, perhaps, for those provisions which tax returns, which are economically equivalent to interest, as interest).

It follows that anything that is done which, when the detailed rules and the legislation are applied to it, produces a profit less than the economic profit, will bear the hallmark of being abusive; and, assuming there to have been a tax advantage, the apparently unlimited power of counteracting tax advantages contained in subsection (4) will then arise.

Let me pause here to consider how the proposed GAAR will apply to a case like *Mayer*.

What happened in that case was, undoubtedly, a tax arrangement: it was clearly done to get some kind of benefit relating to tax.

I am not clear why it was abusive.

If the purpose of the legislation was to tax the profits and losses over the life of the policy (as the guidance says it was) regardless of to whom they arose, it can hardly be an indication of abuse that Mr Mayer's loss did not economically fall on him.

Is this, then, an example of a shortcoming in the legislation?

If so, how can that be, if what happened is in accordance with the legislation?

The answer may be that this is abusive because it involves contrived or abnormal steps. But then the issue is why what happened in *Mayer* is contrived or abnormal?

Is it just because it achieved a tax benefit?

These are difficult questions.

The Definition of Tax Advantage

I also have considerable difficulty with the definition, in s.208, of “tax advantage”.

It is said that this definition, which appears in familiar guise, requires a comparison to be made between what actually happened and some hypothetical transaction.

While case law establishes that requirement in relation to paragraph (c) – the avoidance or reduction of a charge to tax, it is far less clear that a comparison is required in relation to other aspects of the definition.

This is new legislation: if the intention is that the determination of whether there is a tax advantage is always to be made by making a comparison, it should say so, not leave the question to some inspired reading of the statute.

I cannot see any excuse whatever for leaving the definition of tax advantage vague, but I reserve my strongest criticism of the GAAR for the power of counter-action.

The Power of Counter-Action

That power seems to me so wide that, once it has arisen, tax can be imposed on an economic profit contrary to the whole tenor of the Yellow Book or the Red Book or whichever colour book you happen to use.

The point that that is the case is reinforced by the requirement, in s.207(2)(c), to take account, in determining

whether arrangements are abusive, of any intention to exploit shortcomings in the legislation.

That seems to me to be a further indication that the power to counteract tax advantages is to be exercisable so as to enable the correction of shortcomings in the legislation.

Indeed, if the intention is that the power to counteract tax advantages is to be limited, so that it only allows tax to be imposed according to the detailed rules in the Yellow Book, it has to be asked why taking advantage of a legislative shortcoming, or the taxation of a profit less than the economic profit, are hallmarks of abuse.

If the only counteracting power is to tax in accordance with the rules, it cannot sensibly be said to be abusive to produce a profit which, although less than the economic profit, accords with the rules of computation, even if it takes advantage of a legislative shortcoming.

It, accordingly, seems to me clear that the intention of the legislation is – and I have been told with some pride by those in charge of the proposed legislation that this is indeed the case – that the power of counteraction can be used to change the law.

That raises the question of whether it is right to include in our legislation a provision which allows the law to be changed for a particular taxpayer in a particular set of circumstances.

The answer is “No”.

An interesting comparison may be made here between the wide form of GAAR which we now have and the GAAR which exists in, say, Germany.

In translation, s.42 of the German code provides that:
“The tax law cannot be circumvented by an abuse of structure offered by the law. In the event of abuse, tax is due as if a legal structure had been used which is appropriate to the economic substance of the transaction.”

That form of GAAR is clearly significantly more limited than

our GAAR.

As it starts by saying that tax law cannot be circumvented by an abuse, it plainly contemplates that what is done is something that, according to existing tax law, should not work.

A GAAR like that reinforces but does not change the tax code.

Our GAAR goes wider than that: it does not merely reinforce the existing tax law; it is intended to supplement it.

Indeed, the more the provisions are analysed the more apparent it becomes that they are intended to supplement and change tax law rather than just to reinforce it.

The point is this: according to *Ramsay* and other more recent authorities, tax law is to be interpreted purposively.

The GAAR is intended to operate only after every other relevant principle of tax law has been applied.

It must follow that the GAAR can only apply to situations not caught by our existing code interpreted purposively.

Unless that is the case, the GAAR can never apply: if something is caught by our tax law, it is caught anyway; the GAAR can then only apply to catch what is not caught.

It can, accordingly, only be a law-making provision, which applies one off basis by one off basis – a provision of a kind not attractive to me, even if dignified by the pretence that it prevents abuse.

A true analysis shows that it is intended to allow something which works as a matter of purposively construed law to be characterised as an abuse which does not work: it is not an abuse prevention measure but an abuse creation measure.

Analysed that way – the way I have been told, by those supposed to know, is correct – the provision is ugly and troubling.

The question which then arises is whether the requirement to have regard, in determining whether something is abusive, to all the circumstances, including the relevant tax provisions,

should limit concerns about the width of the indications of abuse and of the provision itself.

However, the scope for elasticity in determining whether there are any “shortcomings” in the relevant tax provisions increases, rather than reduces any concern that this GAAR floats like a butterfly above the wording of the legislation and, in a very large way, gives a discretion as to what tax is to be paid, so that it might well sting like a bee.

Indeed, since the GAAR applies to IHT, the case of a gift made for ordinary estate planning purposes needs to be considered.

I should hope that a gift by a parent to a teenage child (made outright rather than to a trust) would not be attackable under the GAAR.

However, the form of the gift suggests that it was made to avoid both an immediate and a later charge to IHT.

Thus the only reason why a gift like that is not caught by the GAAR is that it is a reasonable thing to do.

But why is it reasonable?

If it can be, as it was suggested a few months ago that it was, that to make gifts to charity – genuine gifts to genuine charities – was unacceptable avoidance, there can be no absolute reason why a straightforward gift to a child should not be caught by this rule.

But if there is no absolute rule, what is it that makes a gift to a child a reasonable thing to do?

I should be grateful if someone could explain that to me by reference to objective criteria and without reference to subjective likes and dislikes.

If the answer is that the legislation implicitly invites the making of gifts, the question which arises is why the Dawson family were not accepting a statutory invitation in *Furniss v Dawson*⁸? It turned out that they had gone to the wrong party, no doubt misreading the invitation, and the reality is that, as

the fuss over charitable donations shows, views of what a statute is inviting you to do can differ.

I doubt if there really is a rational distinction between the apparent invitations in the IHT code and the then form of CGT code.

Does everything, then, depend on how many people like a particular course of action? Is something reasonable and non-abusive just because everybody does it? And who is everybody?

This provision differs in its operation from the way GAARs in other countries work: most GAARs operate by reference to the determination, in accordance with a list of specified indicators, of whether something was done mainly for a tax avoidance purpose.

If it is objectively determined that it was, the power of counteraction then arises.

That power is to treat the taxpayer either as if he had not undertaken the offensive transaction, or in such other way as is just and reasonable.

That sort of power allows the taxing authority to tax the subject on the basis of a set of assumed facts, but the authority must then tax in accordance with the detailed rules set out in the relevant tax code, applying those rules to the assumed facts.

Conversely, this GAAR is lacking the list of specified indicators and is intended to operate chiefly by reference to whether what is done is an abuse.

That has been advertised as a narrowing of the scope of the GAAR: it is what is said to make the GAAR acceptable.

However, the definitions used in relation to the concept of abuse are so broad and so ill connected to our existing code that it will, or at least is likely to, broaden rather than to limit the scope of the GAAR – and that is especially so, given that HMRC guidance is to be taken into account in determining what is an abuse.

Moreover, this GAAR does not just allow HMRC to tax in accordance with existing rules on the basis of assumed facts: it allows the tax authority to make up the law.

The supposed justification for a power of this width is that it will permit those exercising it to fulfil the true (albeit unexpressed) will of Parliament.

I have no doubt that is an invention.

In cases where purposive construction does not yield the supposedly correct answer, it is inevitable that Parliament has not expressed a will at all, has not considered what the answer in the case should be.

The exercise of the power of counter-action in that sort of case involves guessing at what Parliament would have wanted if it had thought about the matter, when it didn't.

It is not to fulfil an unexpressed will of the legislature, but to do what the power-holder wants.

It is, moreover, my experience of dealing with GAARs in other countries that, no matter how dressed up they are, they always give a degree of discretion to the person charged with deciding whether the GAAR is to apply or not.

In the end, where there is a GAAR, an arrangement, which may be regarded as mitigating tax, works if the person deciding the matter finds it, by reference to unstated criteria outside the wording of the legislation, acceptable, and does not work if he or she finds it unacceptable.

Where you have a system which is based on clear principles, the giving of a discretion in that form may – just may – be acceptable, because whether something accords with what the draftsman intended or not is fairly easy to see.

At any rate, where there are clear principles, it is fairly easy to tell whether an arrangement contradicts what was intended: for example, in a system which just taxes profits, there are only two ways of trying to reduce your tax bill: you can reduce receipts or increase expenses to un-commercial levels.

Both methods of “avoidance” are relatively easy to detect and neither works or should work.

But with our system, there is no clear principle.

This GAAR, with its broad and undefined conceptions, comes dangerously close to reducing our 13,000 pages of legislation, the only justification for which is that they contain rules which people can follow to determine what their tax liability is, to a discretion.

And the question that I now want to ask is this: as a matter of principle – not as a matter of degree, but as a matter of principle – how does a GAAR which has that effect differ from the law in the country which makes something a criminal offence if the ruler disapproves of it?

And do not tell me that the safeguards of the Advisory Panel and of an appeal to the Courts makes this law different from that law: experience, not all of it bitter, has taught me that that is not so.

And how can anybody be happy to live in a country which introduces a law like that?

Endnotes

- 1 *Ramsay (W.T.) Ltd v. IRC* [1982] AC 300
- 2 *MacNiven v. Westmoreland Investments Ltd* [2003] 1 AC 311
- 3 *Collector of Stamp Revenue v. Arrowtown Assets Ltd* [2003] HKCFA 46
- 4 *Barclays Mercantile Business Finance Ltd v. Mawson* [2005]
- 5 *Mayes v. HMRC* [2011] STC 1269
- 6 *Schofield v. HMRC* [2011] UKFTT 199 (TC)
- 7 *Ensign Tankers (Leasing) Ltd v. Stokes* [1992] 1 AC 653
- 8 *Furniss v. Dawson* [1984] AC 474