

Tax Controversy and Dispute Resolution Alert

Preventing – Managing – Resolving Tax Audits and Disputes Worldwide

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*General anti-avoidance rules:
What are the key elements to a
balanced approach?*

*A Tax Controversy and
Dispute Resolution
Network Publication*

More and more countries, such as the UK and India, are considering the enactment of a General Anti-Avoidance Rule (GAAR). A GAAR is typically a statutory rule that empowers a revenue authority to deny taxpayers the benefit of an arrangement that they have entered into for an impermissible tax-related purpose. This broad definition only scratches the surface -- there can be many permutations with respect to a GAAR's operating provisions. As a result, this recent movement for some countries to explore the enactment of a GAAR is generating a growing interest by stakeholders with respect to a GAAR's design and administration. Specifically, stakeholders want to know how existing GAARs operate, as well as how a GAAR could be designed and administered using a 'balanced approach,' i.e., one that yields an effective yet fair result while reducing upfront taxpayer uncertainty.

This Alert summarises the main features for the GAARs of 17 countries, illustrating the diversity of anti-avoidance regimes currently existing around the world (see table at the end.) It also describes some broad design elements that move toward a balanced approach, the potential negative impacts if a poor design is implemented, as well as competing policy interests. This Alert does not, however, advocate the introduction of a GAAR. Whether a GAAR should be enacted must be determined with reference to the individual circumstances of each country.



Is there a 'model GAAR'?

There is no widespread system of GAARs throughout the world with only certain jurisdictions (including Australia) implementing a GAAR within its tax code. The presence of a GAAR statute is not the international norm and there is no universally accepted GAAR best practice model. Moreover, no uniform GAAR model exists, although there are several recurring design features that may be considered leading practices described below.

What are the basic design features of a fair and effective GAAR?

The cornerstone element of a GAAR is the focus on tax avoidance. When a transaction arises where the GAAR is at issue, its application should be limited to clear tax avoidance behaviour and should not inhibit the ability of taxpayers to organise their affairs in a normal commercial or family manner. In order to do this, a GAAR should embody the following principles and characteristics:

- *certainty of application* - a GAAR should have a clearly stated policy intention based on applications of principles and law
- *extensive guidance and consultation* - extensive and detailed guidance of the GAAR and GAAR related issues should be available for taxpayers. This would include relevant examples of taxpayer behaviour of interest to the revenue authorities, formulated in close consultation with industry and professional bodies
- *fairness, due process, checks and balances* - a GAAR should be applied transparently, independently and objectively based on a review of available documentation, where internal and judicial review processes are available
- *evidence based analysis* - a GAAR should involve an evidence based analysis of whether the taxpayer has an impermissible tax-related purpose in obtaining a tax benefit
- *independent panel* - a GAAR should be accompanied by an independent panel which serves a consultative function to the revenue authority to review the various applications of the GAAR and help ensure a common standard in the application of the GAAR
- *misuse and abuse provision* - a GAAR should contain a misuse and abuse provision along the lines of the Canadian and South African GAARs (referred to in further detail below) which confine the operation of a GAAR to arrangements which produce tax results that are not consistent with the object, spirit or purpose of a particular tax provision. The burden of proving that there has been misuse and abuse should lay with the revenue authority while

the burden of proof generally in relation to the operation of the GAAR should, for the reasons detailed below, lay with taxpayers

- *safe harbour provisions* - a GAAR should, by law or administrative guidance, contain specific and detailed safe harbour provisions detailing the circumstances in which the GAAR will not be invoked
- *treaty override provisions* - a GAAR should provide guidance as to whether the application of domestic tax rules or a treaty will take precedence, in applying the GAAR to taxpayers' affairs. For example, in Australia, GAAR overrides double tax agreements but in India it is proposed that the GAAR will not override treaties
- *advance clearance* - a system should be in place whereby taxpayers have the opportunity to apply for 'clearance' or a 'ruling' that the GAAR does not apply in their factual circumstances, so as to provide administrative certainty for taxpayers. In Australia, this approach is accomplished through a system of Private Binding Rulings that taxpayers can apply for, and which binds the revenue authority such that no additional tax, penalties and interest can be levied on the taxpayer even if the revenue authority changes its view on the ruling.

Do existing GAARs have any commonality?

Most GAARs around the world have some common design features which require some combination of the following:

- identification of a *scheme* (for example in Australia) or *arrangement* (for example in China, Ireland, South Africa and New Zealand)
- quantification of a *tax benefit* (for example in Australia, Canada, Hong Kong and South Africa) or *tax advantage* (for example in Ireland) associated with that arrangement
- some form of purpose test. Examples include the identification of a *sole purpose* (in Brazil), *dominant purpose* (in Australia) or *main purpose* (in South Africa) of obtaining a tax benefit associated with that arrangement. The recent report by Graham Aaronson QC (Aaronson report) illustrates this concept: "[t]here are many variants in the language, but the underlying concept is the same: if one of the objects of the arrangement is to achieve a tax advantage, then for that very reason the tax advantage should be denied."

However, there are also a number of variations in GAARs around the world, highlighting the point that there is no universal GAAR rule. These differences include the following:

- *misuse or abuse provision* - under some GAARs, this provision is present which requires an arrangement to produce tax results that are not consistent with, or otherwise defeat, the object, spirit or purpose of a particular tax provision or treaty before GAAR can be applied. The Canadian, South African and the proposed Indian GAARs have such a provision. As such, they introduce a purposive approach to the application of a GAAR.
- *tainted elements provision* - under some GAARs, an arrangement must have a so-called "tainted element" before GAAR can be applied. For example, in the South African GAAR and the proposed Indian GAAR, the provision can only be applied if the arrangement can be characterised as having one of the following: (i) no bona fide business purpose other than obtaining the tax benefit, (ii) a lack of commercial substance, and (iii) the creation of rights or obligations not normally created between arm's length parties. Similarly, the German GAAR requires the legal arrangement adopted by the taxpayer to be inappropriate for its economic use, while the Chinese GAAR requires the arrangement to be without a reasonable commercial purpose.
- *recharacterisation versus cancellation of the tax benefit* – a number of GAARs (including the Australian GAAR) when applied, operate to cancel the tax benefit associated with impugned arrangements. Other GAARs (including the Canadian, Chinese, German, Irish and South African GAARs) recharacterise the legal arrangement entered into by the taxpayers and tax accordingly. The main difference being that the recharacterisation approach has the effect of altering the legal arrangements entered into by taxpayers, while the alternate approach merely cancels the tax benefit obtained by the taxpayer. The New Zealand GAAR permits cancellation of the tax benefit or recharacterisation.

Is recharacterisation the preferred approach? Consider that Australia chose to move away from this approach to a cancellation of tax benefit approach in the current GAAR provisions in 1981. The change was an attempt to eliminate uncertainty under the predecessor provisions as to whether the scheme, when applied, would make the scheme wholly void or only partially void as against the taxpayer.

What alternatives are used by other countries?

Many jurisdictions do not have a GAAR and deal with the issue of taxpayers entering into arrangements for impermissible tax-related purposes by other means. We explore some of these alternatives below:

- The UK has traditionally relied on a combination approach. First, they have statutory Targeted Anti-Avoidance Rules (TAARs) enacted from time to time to prevent specific types of arrangements as they manifest themselves. This is coupled with judicially developed doctrines of statutory interpretation to

permit Courts to look at the purpose of the provisions. This approach has recently been critiqued by the Aaronson report which recommended the introduction of a narrower GAAR. The report cites the following concerns:

- the plethora of TAARs has made the UK tax code long and complex
- there is considerable uncertainty for taxpayers in arranging their affairs as a result of courts constantly "stretch[ing] the interpretation" of tax provisions in order to catch arrangements deemed impermissible. The Aaronson report observes that this causes considerable uncertainty which "spreads from the highly abusive cases into the centre ground of responsible tax planning."

The publication of a new Consultation Document by the UK Government is imminent.

- The United States also does not have a GAAR and has traditionally relied on judicially developed doctrines of statutory interpretation to prevent certain types of arrangements. In 2011, the judicially developed economic substance doctrine, under which certain types of tax benefits are disallowed if the impugned transaction lacks economic substance or lacks a business purpose, was codified in legislation.
- In Poland, the GAAR was struck down as unconstitutional by the Constitutional Tribunal in 2004 on the grounds that a rule that sanctioned taxpayers for entering into an arrangement not prohibited by law infringed the constitutionally guaranteed right of the rule of law. This has led to the Polish Revenue Authorities having to rely on a much watered down substance over form provision which it must refer to a court for determination.

So does it matter whether a jurisdiction has a statutory GAAR or a judicial GAAR? No one model is clearly superior to the other. In fact, while many jurisdictions now have a statutory GAAR, the policy behind much of these statutory GAARs has been influenced by the judicial precedent. It appears that both are equally capable of resulting in taxpayer uncertainty. For judicial GAARs, this uncertainty often arises because the formation of the GAAR is so dependent on the views of individual judges and it is subject to relatively easy reformulation by higher courts.

In contrast, statutory GAARs may appear to be theoretically much clearer because of their written and prescriptive nature, however, they often provide no more clarity than a judicial GAAR due to the inherent 'catch all' objective with which the provision is drafted. Inevitably, the statute is again interpreted by the courts and this can often result in unforeseen complexities or unintended consequences which creates taxpayer uncertainty. However, a perceived advantage of a statutory GAAR is that elected lawmakers, not judges, determine the policy intent of the GAAR.

For some countries, court decisions can affect how lawmakers address the issue of whether to enact a statutory GAAR. In India, the recent *Vodafone* decision by the Supreme Court held that the revenue authority was not entitled to tax a capital gain from the sale of a foreign company's shares outside of India, in a transaction involving an indirect transfer of an underlying Indian company. This decision appears to have hastened the moves by the Indian Government for the introduction of a GAAR.

What are some key administration elements?

The various administration features of GAARs are a central part of its functioning. As with other features, there are a number of variations around the world:

- *penalties* – the revenue authorities of some jurisdictions have the ability to impose administrative penalties for the shortfall amount associated with an arrangement to which the GAAR is applied. The level of this penalty varies in each jurisdiction. For example, in Australia, a penalty of 50% may be imposed and in New Zealand the application of the GAAR may result in a 100% penalty. Should penalties be levied? The Aaronson report explicitly considered the issue of penalties and despite noting its significant deterrent effect recommended against its introduction in the UK. The report cites this because "such provisions would be seen as presenting an irresistible temptation to HMRC to wield the GAAR as a weapon rather than to use it, as intended, as a shield."
- *advisory GAAR panel* – the revenue authorities of some jurisdictions are required to refer an arrangement to which they wish to apply the GAAR, to an administrative review committee which looks at the arrangement and provides views on the applicability of GAAR. In Australia and Canada, the GAAR panel has no statutory basis, its role is consultative and its overarching purpose is to ensure a common standard for the application of GAAR by the revenue authority. Advisory panels in Australia and Canada are not subject to judicial review. The Aaronson report characterises an advisory GAAR panel along with publication of anonymised digests of its advice on the GAAR, as a central safeguard in the introduction of a GAAR.

The Australian GAAR panel has a mixed composition comprised of "business and professional people chosen for their ability to provide expert and informed advice, with the other members of the Panel being senior [revenue authority] officers." The Canadian panel is comprised of senior officers from the Canadian Revenue Authority, the Department of Justice and the Department of Finance.

- *burden of proof* – a general feature of most GAARs is that taxpayers have the burden of proving or demonstrating that the GAAR should not apply to the

arrangement, or is otherwise excessive. There are some exceptions to this including the Canadian GAAR where although the taxpayer bears the burden of proving that there has not been an avoidance transaction to which the GAAR should apply, the revenue authority then bears the burden of proving the specific misuse and abuse limb of the GAAR. This requires the revenue authority to demonstrate that the arrangement gives rise to some misuse or abuse of a tax provision. Similarly, the South African GAAR places the burden of proof on the revenue authority to demonstrate the specific test which requires that the transaction contain a 'tainted element' (referred to above).

As a general observation, a wholesale shift in the burden of proof to the revenue authorities would be problematic. It would be inconsistent with the principle in most tax codes that taxpayers are responsible to assess their own tax debts or refunds with the revenue authority performing a review function (commonly referred to as self-assessment).

What is the impact on taxpayers and advisers?

Generally speaking, should a GAAR permissibly impact the behaviour of taxpayers and their advisers? The Aaronson report persuasively critiques the view that a taxpayer should be "entitled to use his wiles and skill without limit in order to secure a lower tax charge." The report goes on to state that it is the responsibility of Parliament "to introduce specific rules to block such attempts" arguing that this leads to "a sort of fiscal chess game, but with an ever increasing number of moves and pieces."

The poor design of a GAAR is likely to have adverse consequences. A GAAR has the theoretical advantage of drawing a line in the sand to guide taxpayers between what is acceptable or impermissible tax behaviour. However, this advantage is entirely reversed if the GAAR is ambiguous in design or administration, creating uncertainty for taxpayers.

By its very nature, a GAAR may also have negative effects for taxpayers. GAARs are generally worded. Although they may help address tax avoidance that is unanticipated by revenue authorities, that same generality can lead to undesirable outcomes. GAARs can also be used by revenue authorities and governments, particularly in constrained fiscal environments, to seek restriction of what would ordinarily be considered legitimate commercial activity, having the potential to cause significant stifling of economic activity.

Given that the burden of proof is usually on the taxpayer to defend against a GAAR attack, having a GAAR may also impose a significant and arguably onerous compliance burden on taxpayers. That is, as a GAAR requires an objective enquiry of a taxpayer's purpose, the importance of mastering facts and evidence becomes paramount.

Further, the potential application of the GAAR is often a relevant factor in the administration of other provisions of a tax code affecting advisors. In Australia, the application of Part IVA is a relevant factor in the application of the Promoter Penalties rules which make it an offence to promote tax avoidance and evasion schemes punishable by a maximum of the greater of: AUD 2.75 million or twice the consideration received by the promoter in respect of the scheme. Similarly, in the United States, which does not have a GAAR but relies on judicially developed economic substance doctrine, the application of that doctrine is relevant to the tax shelter rules that have been introduced in the tax code to prevent advisers organising or selling an interest in a potentially abusive tax shelter.

What are the competing policy interests?

Debates about whether a GAAR should be enacted usually focus on competing policy interests. The need for integrity in the tax system can be compared to the legitimate interests of taxpayers to organise their affairs in a normal commercial or family manner and the associated economic benefits that arise from that. Which should bear greater weight?

In considering these competing policy concerns the most important factor should be the attractiveness of the jurisdiction to do business. The Aaronson report considered that the most effective way in which to achieve this was through a narrow GAAR which it was argued would ensure "a more level playing field for business: enterprises which conduct responsible tax planning would no longer have their competitiveness undermined by others which seek to reduce their tax burden by contrived and artificial schemes."

GAARs may have some shortcomings in that the generality of the rules may potentially be used by revenue authorities to restrict ordinary commercial arrangements. They may also place a significant compliance burden on taxpayers to demonstrate that they did not have an illegitimate purpose. Such shortcomings can be limited if the GAAR adopts the basic design features referred to above which include: Certainty of application, extensive guidance and consultation, fairness, due process and checks and balances, evidence based analysis, an independent GAAR panel, a misuse and abuse provision, safe harbour and treaty override provisions.

Further, the safeguards suggested by the Aaronson report, which largely resemble some of the safeguard provisions which are found in the Canadian and South African GAARs, should also be adopted including:

- an explicit protection for reasonable tax planning
- an explicit protection for arrangements which are entered into without any intent to reduce tax

- placing upon the revenue authority the burden of proving that an arrangement is not reasonable tax planning

The inclusion of such safeguards, particularly a form of misuse or abuse provision would limit the opportunities for a GAAR being used to restrict ordinary commercial arrangements, and ensure that the compliance burden on taxpayers engaging in reasonable tax planning is not onerous. The inclusion of such safeguards would also help to ensure that the existing GAARs, such as the Australian GAAR function, operate in the manner originally intended:

"... to strike down blatant, artificial or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their tax affairs."

Actions to think about

Multinational enterprises want greater certainty with respect to the application of GAARs around the world as well as fair and effective treatment through reasonable safeguards. The suggested design features described above provide a conceptual framework to help achieve these goals. Businesses should consider taking proactive steps to help tax authorities and other stakeholders understand the importance of striving for a balanced approach. Thinking ahead about how a GAAR (or potential GAAR) could affect your company's operations now and in the future should be a business imperative.

Background information - Attachment

The following table summarizes some of the features for the GAARs of 17 countries.

	Australia	Brazil	Canada	China	Germany	Hong Kong
Date of introduction	May 27, 1981	2001	1988	January 1, 2008	January 1, 2008	1986
Impetus for introduction of the anti-avoidance rule	Social pressures from increase in tax-driven schemes in late 1970s and budgetary pressures. Aspery Committee Report, 1975.		Department of Finance concern that "the existing provisions of the Income Tax Act are inadequate to deal with a number of blatant tax avoidance arrangements".	Concerns regarding holding structures used by multinational companies, avoiding withholding tax on capital gains, and abuse of tax treaties.	Desire to restrict the judicial principle that a taxpayer may order their affairs to minimise tax.	
Legal basis	Statute	Statute	Statute	Statute	Statute	Statute
Original intent	To "strike down blatant, artificial or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their tax affairs".	Prevent tax planning structures that are formally in compliance with the law but performed exclusively to reduce the tax burden, lacking a legal cause.	Deterring or preventing abusive or artificial tax avoidance schemes, without interfering with legitimate commercial or family transactions	Designed to apply as a catch-all mechanism to prevent tax avoidance.	Taxpayers should have the ability to order their tax affairs to minimise tax liability, but tax should not be circumvented by abusive behaviour.	To strike down "blatant, or contrived tax avoidance arrangements". Modelled on the Australian GAAR.
Limbs	<ol style="list-style-type: none"> 1. There is a scheme 2. Tax benefit associated with scheme 3. Scheme entered into for the dominant purpose of obtaining a tax benefit 	<ol style="list-style-type: none"> 1 There is an artificial transaction 2 The transaction was entered into for the sole purpose of tax avoidance 	<ol style="list-style-type: none"> 1. There is an avoidance transaction 2. There is a tax benefit associated with the avoidance transaction 3. There is an abusive tax avoidance purpose 	<ol style="list-style-type: none"> 1. There is an arrangement 2. The arrangement is without a reasonable commercial purpose 3. The arrangement results in a reduction of taxable gross income or taxable income 	<ol style="list-style-type: none"> There is a clear intention to avoid tax 2. The legal arrangement is inappropriate for its economic purpose. 3. There is no other economic or legitimate (non-tax) purpose for its use 4. The arrangement chosen has a more favourable tax outcome 	<ol style="list-style-type: none"> 1. There is a transaction 3. The transaction has the effect of conferring a tax benefit 3. The transaction entered into for the sole or dominant purpose of obtaining a tax benefit
Exceptions to the application of the anti-avoidance rule	Where the tax benefit is attributable to the making of an agreement, declaration, election, selection, giving of a notice, or exercise of an option.		Where the transaction does not frustrate or defeat the object, spirit or purpose of the tax provisions – misuse or abuse exception.		None	None
Consequence of application	Cancel tax benefit		Recharacterisation	Recharacterisation	Recharacterisation	Cancel tax benefit
Burden of proof	Taxpayer		Taxpayer – limbs (1) and (2); Tax authority – limb (3)	Taxpayer	Tax authority	
Special penalties	50% penalty for the scheme shortfall amount.		No Federal penalty, province of Quebec has introduced a penalty where GAAR is found to apply and taxpayer did not disclose the transaction.	A special "Interest Levy" at the Chinese basic interest rate plus 5%, will be imposed on GAAR adjusted tax, calculated from June 1st of the year following.	None	
Current reviews	"Improving the operation of the anti-avoidance provisions in the income tax law" review (November 18, 2010).			The Chinese SAT is considering developing a set of administrative procedures, designed to improve the effectiveness and efficiency of the GAAR.	No review in progress; special anti-avoidance rules are under current review.	None

	India	Ireland	Japan	Netherlands	New Zealand	Poland
Date of introduction	N/A	1989	No GAAR codified -- three specific tax avoidance rules	Statutory GAAR – 1930s Judicial GAAR – 1987	1974	2006
Impetus for introduction of the anti-avoidance rule	Liberalisation of the economy resulting in: <ul style="list-style-type: none"> Increasingly complex forms of tax avoidance; and Cross-border tax avoidance arrangements. 	Reluctance of Courts to develop an anti-avoidance rule leading to calls for the enactment of a statutory GAAR.		Desire to prevent tax avoidance and abuse of the tax code – specifically, international restructurings which create interest deductions from profits that are taxable in the Netherlands	The current GAAR was introduced to provide certainty regarding its operation. The previous GAAR (section 108 of the Land and Income Tax Act 1954) had been described by the courts as being "unreasonably restrictive and too broad in its application."	Former GAAR contained in Art. 24b s1 of the General Tax Act (1997) struck down as unconstitutional in <i>K 4/03, OTK 2004, no. 5a</i> on the basis that: <ul style="list-style-type: none"> GAAR breaches rule of law by penalising an action permitted by law The obligation to pay tax does not prohibit tax planning
Legal basis	Statute (proposed)	Statute	Statute	Statute (rarely used) and judicially developed (i.e., substance over form)	Statute (subsequently judicially developed)	Statute
Original intent	Deterring increasingly complex forms of tax avoidance.	Introduced to counteract transactions that have little or no commercial reality, but are carried out primarily to create an artificial tax advantage.	Originally intended to apply to closely-held companies.		Designed to protect the integrity of the tax system from tax avoidance devices implemented to frustrate it.	Designed to get around Constitutional Tribunal ruling
Limbs	<ol style="list-style-type: none"> There is an arrangement The arrangement's main purpose or one of the main purposes is to obtain a tax benefit. The arrangement: <ul style="list-style-type: none"> is not arm's length; or results in misuse of the provisions of the tax code lacks commercial substance is entered into, or carried out, in a manner that is not bona fide 	<ol style="list-style-type: none"> There has been a tax avoidance arrangement A tax advantage has been obtained The tax advantage was the primary purpose 	There has been an improper decrease in the tax burden	<ol style="list-style-type: none"> There has been a legal transaction Tax avoidance is the predominant motive of the transaction The tax effects are contrary to the purpose of the tax law 	<ol style="list-style-type: none"> There is an arrangement The arrangement is a tax avoidance arrangement 	Quasi-GAAR in that new Art. 199a s3 allows the revenue authority to look into the true intentions of the parties to the transaction.
Exceptions to the application of the anti-avoidance rule						None
Consequence of application	Recharacterisation	Recharacterisation	Recharacterisation	Recharacterisation	Cancel tax benefit or recharacterisation.	Cancel tax benefit
Burden of proof	Tax authority	Taxpayer			Taxpayer	Tax authority
Special penalties	None	20% penalty			A range of penalties from 20% to 150% of the shortfall amount may be applicable depending on the circumstances. However, the most common penalty imposed is the 100% shortfall penalty which applies if the arrangement results in an abusive tax position.	
Current reviews	Currently considering introduction of GAAR. Committee will be established by Director General of Income Tax to reconsider rules and guidelines for GAAR implementation and to suggest safeguards.	No review in progress		No review in progress	Report by various professional groups titled "Improving the operation of New Zealand's tax avoidance laws" (October 2011).	

	Singapore	South Africa	South Korea	United Kingdom	United States
Date of introduction	January 29, 1988	November 2, 2006	No GAAR, codified substance over form principle (1960s), and economic substance principle (2007)	N/A	No GAAR, however in 2010 the 'economic substance' doctrine was codified
Impetus for introduction of the anti-avoidance rule		South African Revenue Services (SARS) consultation process and public hearings into the former GAAR determined it to be inappropriate and ineffective in combating complex and aggressive tax planning structures.		N/A, see 'current reviews' below	US courts are relatively liberal in developing various judicial doctrines to attack perceived tax abuse arrangements.
Legal basis	Statute	Statute	Statute	Judicially developed	Judicially developed and statute (i.e. economic substance doctrine)
Original intent	Based on the now superseded s99 of the Income Tax Act (NZ) and s260 of the Income Tax Assessment Act (Aus)			N/A	Courts inconsistent in application of the economic substance doctrine
Limbs	<ol style="list-style-type: none"> 1. There is an arrangement 2. There is a tax advantage under the arrangement 3. Purpose or effect of the arrangement is to alter, avoid or reduce tax liability 	<ol style="list-style-type: none"> 1. There is an arrangement 2. The arrangement results in a tax benefit 3. The sole or main purpose of the arrangement is to obtain a tax benefit 4. The avoidance arrangement is characterised by one or more of the tainted elements: <ul style="list-style-type: none"> • arrangement has no bona fide business purpose other than obtaining the tax benefit • lacks commercial substance • created rights or obligations not normally created between arm's length parties • results in misuse or abuse of the provisions of the Act 	<p>Art. 14 of the Basic National Tax Act codifies following principles:</p> <ul style="list-style-type: none"> • taxation should follow real not nominal ownership • taxation should follow substance regardless of name or form • taxation based on economic substance of overall transaction by integrating a series of supposed separate steps in a transaction. 	Various jurisprudence, based on <i>Ramsay v IRC</i> (1981). It is a rule of statutory construction.	Various jurisprudence from courts including: <ul style="list-style-type: none"> • substance over form; • business purpose; • sham transaction; • step transaction; • economic substance.
Exceptions to the application of the anti-avoidance rule	Arrangements carried out for bona fide commercial reasons which does not have as one of its main purposes the avoidance or reduction of tax.				
Consequence of application	Recharacterisation	Recharacterisation		N/A	Recharacterisation
Burden of proof		Taxpayer: limbs (1) - (3), Tax authority: limb (4)		N/A	
Special penalties	None			N/A	Codification of 'economic substance' doctrine introduced a penalty of up to 40% of shortfall amount
Current reviews	None	No review in progress		Aaronson report (November 21, 2011) recommended narrow GAAR to apply to income tax, capital gains, corporation tax, petroleum tax and national insurance contributions. Currently awaiting a Consultation Document from the government.	No review in progress

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