

REVENUE SCOTLAND AND TAX POWERS ACT 2014

EXPLANATORY NOTES

THE ACT

Part 5 – the General Anti-Avoidance Rule

Artificial tax avoidance arrangements

Section 63 – Tax avoidance arrangements

77. This section sets out the definition of a “tax avoidance arrangement”. Subsection (2) gives a broad definition of an “arrangement”, which includes transactions, schemes, agreements etc., either individually or combined in parts and stages. This definition is kept broad so that a wide range of arrangements can be considered to determine whether they constitute tax avoidance arrangements.
78. Subsection (1) defines a “tax avoidance arrangement” as an arrangement (defined in subsection (2)) which appears to have as its main purpose or one of its main purposes the obtaining of a “tax advantage”. The test for determining whether or not an arrangement has such a purpose is that it would be reasonable in all the circumstances to conclude that it did. Section 65 defines a tax advantage.

Section 64 – Meaning of “artificial”

79. This section sets out the definition of “artificial” in the context set out in section 62 – that the purpose of this Part of the Act is to give power to counteract “tax avoidance schemes that are artificial”.
80. The section sets out two tests for deciding whether a tax avoidance scheme is artificial. An arrangement is artificial if it satisfies either test. The first test is set out in subsection (2). It is that the arrangement under consideration is artificial if, in all the circumstances, it is not a reasonable course of action in relation to the tax legislation in question. Subsections (2)(a) and (2)(b) make further provision to assist in determining the question. Subsection (2)(a) provides that if the substantive results of the arrangement are consistent with any principles on which the tax legislation in question is known to be based, and the results are consistent with the policy objectives of the legislation, this would be a relevant factor in deciding that the course of action is reasonable in all the circumstances and, therefore, not artificial.
81. Subsection (2)(b) adds a further ground for determining reasonableness: whether the arrangement is intended to exploit any shortcomings in the tax legislation in question. Another way of describing this would be exploiting a ‘loophole’ or ‘loopholes’ in tax legislation. If an arrangement is intended to exploit shortcomings, the effect of subsection (2)(b) is that such an arrangement may not be a reasonable course of action in all the circumstances and may be regarded as artificial.

These notes relate to the Revenue Scotland and Tax Powers Act 2014 (asp 16) which received Royal Assent on 24 September 2014

82. The grounds for determining reasonableness set out in subsection (2) are not exhaustive, meaning that Revenue Scotland can take account of other factors in determining whether entering into a tax avoidance arrangement was a reasonable course of action or not.
83. The second test is set out in subsection (3). It is that a tax avoidance arrangement is artificial if the arrangement lacks economic or commercial substance.
84. Subsection (4) then provides examples of characteristics of a tax avoidance arrangement that could indicate that an arrangement lacks economic or commercial substance. These are where:
- the manner of carrying out the arrangement would not normally be employed by a person in reasonable business conduct
 - the legal characterisation of the steps in the arrangement is inconsistent with the legal substance of the arrangement as a whole
 - elements in the arrangement effectively offset each other or cancel each other out
 - the transactions are circular in nature
 - the arrangement results in a tax advantage not reflected in the business risks undertaken by the taxpayer.
85. These characteristics are not exhaustive but illustrative. They are intended to be helpful to taxpayers and to Revenue Scotland in determining under subsection (3) whether a tax avoidance arrangement is artificial.
86. Subsection (5) provides an example of characteristics of a tax avoidance arrangement that could indicate that the arrangement is not artificial. The example given is where:
- A tax avoidance arrangement accords with established practice and at the time it was entered into, Revenue Scotland had indicated that it accepted this practice.
87. As in subsection (4), this example is not exhaustive but illustrative. This subsection is only applicable where both conditions are fulfilled – that is, that a tax avoidance arrangement accords with established practice, and that Revenue Scotland had indicated its acceptance of that practice at the time it was entered into. It is expected that Revenue Scotland will publish guidance about acceptance of established practice, either at its own initiative or in response to requests from taxpayers or agents.
88. Finally, subsection (7) provides that, where a tax avoidance arrangement forms part of any other arrangements, then in determining whether it is artificial or not these other arrangements must also be considered.

Section 65 – Meaning of “tax advantage”

89. This section sets out the criteria for determining whether a tax advantage exists or not. A tax advantage could consist of:
- Relief or increased relief from tax
 - Repayment or increased repayment of tax
 - Avoidance or reduction of a charge to tax or an assessment to tax
 - Avoidance of a possible assessment to tax
 - Deferral of payment of tax or advancement of a repayment of tax.
90. These criteria are not exhaustive.

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91. Subsection (2) provides that in determining whether a tax avoidance arrangement has resulted in a tax advantage, Revenue Scotland may take account of the amount of tax that would have been payable in the absence of the arrangement.