

REVENUE SCOTLAND AND TAX POWERS ACT 2014

EXPLANATORY NOTES

THE ACT

Part 5 – the General Anti-Avoidance Rule

Introductory

Section 62 – The general anti-avoidance rule: introductory

76. This section sets out the overall purpose of this Part of the Act – to enable Revenue Scotland to counteract tax advantages in relation to the devolved taxes that arise from tax avoidance schemes that are artificial. Subsection (2) provides that the sections in this Part, taken together, are to be known as the general anti-avoidance rule (GAAR). Under UK legislation set out in the Finance Act 2013, provision is made for a general anti-abuse rule. Although the terms “avoidance” and “abuse” do not have exact definitions, avoidance generally refers to a spectrum of activities designed to reduce tax liability, while abuse is often used to describe highly contrived schemes. Subsequent sections in Part 5 define the terms used and provide more detail about how the provisions as a whole are to work. The GAAR is intended to operate in tandem with Targeted Anti-Avoidance Rules (TAARs) and the “Ramsay principle” of purposive statutory interpretation applied by the Scottish courts and tribunals.

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.
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.
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.

Counteracting tax advantages

Section 66 – Counteracting tax advantages

92. This section provides Revenue Scotland with the power to adjust the tax liability of a taxpayer who would otherwise benefit from a tax advantage in relation to the devolved taxes arising from an artificial tax avoidance arrangement. Subsection (1) provides that Revenue Scotland may make any adjustments that it considers to be just and reasonable in order to counteract such a tax advantage. Subsection (2) makes clear that these adjustments may be made in respect of the tax in relation to which a tax advantage has been gained, or in respect of any other tax.
93. Subsection (3) makes clear that the adjustments made to counteract a tax liability include adjustments that impose or increase a tax liability, and that tax is to be charged in accordance with the adjustment. Subsection (4) provides that the adjustment made to counteract a tax advantage may take the form of a tax assessment, a modification to an existing assessment, an amendment, or the disallowance of a claim (for a relief or reduction in tax) amongst other things.
94. Subsection (5) requires that in counteracting a tax advantage Revenue Scotland is obliged to adhere to the procedures and steps set out in later sections in this Part of the Act.
95. Subsection (6) provides that the power to make adjustments is subject to any time limit set out in Part 6 or any other enactment.

Section 67 – Proceedings in connection with the general anti-avoidance rule

96. This section makes provision in relation to court actions arising from the operation of the GAAR in relation to the devolved taxes. Subsection (1) provides that, where Revenue Scotland makes adjustments to counteract a tax advantage, the burden of proof is on it to demonstrate that there is a tax avoidance arrangement that is artificial, and that the adjustments made to counteract the tax advantage arising from the arrangement are just and reasonable.
97. Subsection (2) provides that, in determining any issues in connection with the GAAR, a court or tribunal is obliged to take account of guidance published by Revenue Scotland

about the GAAR which was extant when the tax avoidance arrangement in question was entered into.

98. Subsection (3) provides that a court or tribunal may also take account of guidance, statements or other material in the public domain at the time the tax avoidance arrangement in question was entered into, and may also take account of evidence of established practice at that time.

Section 68 – Notice to taxpayer of proposed counteraction of tax advantage

99. This section sets out Revenue Scotland’s responsibility for notifying a taxpayer when it is intending to counteract a tax advantage in relation to the devolved taxes.
100. Subsection (1) provides that if a member of staff in Revenue Scotland (“a designated officer”) considers that a tax advantage has arisen from a tax avoidance arrangement that is artificial, and that the tax advantage should be counteracted, the designated officer must notify the taxpayer.
101. Subsection (2) specifies that a notification must include a statement of the tax avoidance arrangement and the tax advantage; an explanation of why the designated officer considers that a tax advantage has arisen to the taxpayer from a tax avoidance arrangement that is artificial; a statement of the counteraction that Revenue Scotland intends to take; and a statement of the period of time that the taxpayer has for making representations (45 days under subsection (4)).
102. Subsection (3) provides that a notice to a taxpayer may also describe the steps that the taxpayer can take to avoid the proposed counteraction.
103. Subsection (4) provides that when a taxpayer receives a notice under this section, they have 45 days in which to respond to the notice by making written representations. Subsection (5) gives the designated officer power to increase the number of days within which written representations may be made to more than 45 days, if the taxpayer makes a written request. Subsection (6) provides that the designated officer must take account of any representations made by the taxpayer in response to the notification given under subsection (1) and (2).

Section 69 – Final notice to taxpayer of counteraction of tax advantage

104. This section provides that where a taxpayer has been sent a notice under section 63(1), after the period for making representations about the notice has expired, the designated officer must provide the taxpayer with another written notice setting out whether or not the tax advantage arising from the tax avoidance arrangement is to be counteracted as proposed in the earlier notice.

Section 70 – Counteraction of tax advantages: payment of tax charged etc.

105. Section 70 provides that, where a taxpayer has been sent a notice of counteraction under section 64, the taxpayer must pay any tax amount, penalty or interest which is payable within 30 days of the notice being issued.
106. Subsection (2) stipulates that if the tax advantage is to be counteracted, the notice must explain the adjustments required to give effect to the counteraction, and any steps required of the taxpayer in this regard.

Section 71 – Assumption of tax advantage

107. This section gives a designated officer power to give a taxpayer a notice under section 68 and section 69 where the designated officer thinks that a tax advantage in relation to the devolved taxes might have arisen to the taxpayer. Subsection (2) makes clear that this enables a designated officer to send a notification to a taxpayer on the assumption that a tax advantage does arise.

General anti-avoidance rule: commencement and transitional provision

Section 72 – General anti-avoidance rule: commencement and transitional provision

108. This section makes provision relating to when the GAAR comes into effect and for transitional arrangements. Subsection (1) provides that the GAAR has effect in relation to a tax avoidance arrangement entered into on or after the date that the GAAR provisions come into force. Subsection (2) provides that where the tax avoidance arrangement forms part of another arrangement that was entered into before the GAAR came into force, this other arrangement is to be ignored for the purposes of section 64(7) (which provides that all parts of an arrangement of which a tax avoidance arrangement forms part are to be considered in deciding if a tax avoidance arrangement is artificial). Subsection (3) provides that the earlier arrangements should be taken into account, if, as a result of taking them into account, the tax avoidance arrangement would not be artificial.