These notes refer to the Finance Act 2013 (c.29) which received Royal Assent on 17 July 2013

FINANCE ACT 2013

EXPLANATORY NOTES

INTRODUCTION

Sections 206 – 215, Schedule 43: General Anti-Abuse Rule

Summary

1. Sections 206 to 215 and Schedule 43 introduce a general anti-abuse rule (GAAR) that provides for counteraction of tax advantages arising from tax arrangements that are abusive. The GAAR applies to income tax, corporation tax including amounts chargeable/treated as corporation tax, capital gains tax, petroleum revenue tax, inheritance tax, and stamp duty land tax. It will also apply to the annual tax on enveloped dwellings due to be enacted with effect from 1 April 2013. Schedule 41 outlines the procedural requirements relevant to the application of the GAAR by HM Revenue & Customs (HMRC).

Details of the Sections

2. Section 204 sets out the purpose of the GAAR, noting that it applies only to "tax arrangements" which are "abusive" (see paragraphs 4 and 5 below) and listing the various taxes covered by the GAAR (see paragraph 1 above).

3. Section 207 sets out how 'tax arrangements' and 'abusive' are defined for the purposes of the GAAR.

4. Subsection (2) defines "abusive" tax arrangements. Arrangements are "abusive" if entering into them or carrying them out cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions. Again, all circumstances must be taken into account and the section includes a non-exhaustive list of circumstances which must be considered.

5. Subsection (4) lists examples of things which might indicate that the tax arrangements are abusive. Tax arrangements may be abusive if they give rise to certain results (such as a tax result which differs from the economic result) but only if it is reasonable to assume that the result was not anticipated when the relevant tax provisions were enacted.

6. Subsection (5) notes that a possible indicator of non-abusive arrangements is that the tax arrangements accorded with established practice at the time they were entered into and HMRC had, at that time, indicated its acceptance of that practice.

7. Section 208 defines the term "tax advantage". This is a similar meaning to other uses of the term elsewhere in the Tax Acts, and is not an exhaustive definition.

8. Section 209 explains that the tax advantages arising from abusive tax arrangements are to be counteracted by the making of just and reasonable adjustments, whether in respect of the tax in question or any other tax to which the GAAR applies. So, for example, an abusive arrangement may attempt to reduce or eliminate a charge to capital gains tax, but the counteraction may involve an adjustment to income tax.

9. Subsection (4) confirms that tax is to be charged in accordance with any adjustment that imposes or increases a liability to tax.

10. Subsection (5) provides for the various ways in which the adjustments that are required to be made (whether by HMRC or by the person to whom the tax advantage arises) may be made.

11. Subsection (6) confirms that: HMRC must comply with the procedural requirements set out in Schedule 41 before making any such adjustments; and that any time limits imposed elsewhere in the tax legislation apply to the power to make adjustments under the GAAR.

12. Subsection (7) notes that any adjustments made have effect for all purposes. This means that the adjustments are deemed to have effect for purposes other than just counteracting the tax advantage. They might, for example, adjust the base cost of an asset for a future capital gains disposal event.

13. Section 210 sets out the process by which consequential relieving adjustments may be made.

14. Subsection (1) sets out that the section is only applicable where the counteraction of a tax advantage is final. But, in a case where counteraction has been self-assessed, the section will not apply unless the taxpayer has notified HMRC of the counteraction. Subsection (8) explains when a counteraction is regarded as final for these purposes.

15. Subsection (4) explains that adjustments may be made in respect of any period and may affect any person. However, subsection (5) specifies that HMRC may not make consequential adjustments which result in an increased tax liability for any person.

16. Subsection (6) extends the application of existing administrative provisions for certain taxes to claims for consequential adjustments under the GAAR and so provides a consequential adjustments claim procedure in respect of each of the taxes covered by the GAAR.

17. Subsection (9) lists the means by which a consequential adjustment may be made and stipulates that time limits imposed by or under any other enactment do not constrain the making of consequential adjustments under the GAAR.

18. Section 211 sets out information relating to proceedings before a court or tribunal.

19. Subsection (1) imposes the burden of proof on HMRC in any proceedings before a court or tribunal in connection with the GAAR. HMRC must show that there are tax arrangements which are abusive and that the adjustments made to counteract the resulting tax advantages are just and reasonable.

20. Subsection (2) requires a court or tribunal, in determining any issue in connection with the GAAR, to take into account HMRC guidance (as approved by the GAAR Advisory Panel at the time the arrangements were entered into) and any opinion of the GAAR Advisory Panel about the arrangements.

21. Section 212 sets out how the GAAR fits with other parts of the tax code.

22. Subsection (1) provides that all priority rules, as defined in subsection (2), are to have effect subject to the GAAR. This means, for example, where a rule such as section 464 of CTA 2009 stipulates that tax may only be charged under that Part in respect of the relevant subject matter (in that case, loan relationships), the GAAR can override the effect of this rule, picking up the exception set out in section 464(2) of CTA 2009.

23. Subsection (3) lists examples of priority rules found in tax legislation.

24. Section 213 makes an amendment to the administrative provisions contained in Taxes Management Act (TMA 1970) to provide that the procedural requirements set out in

section 42(2) of TMA 1970 in relation to certain claims do not apply to consequential adjustment claims under the GAAR.

25. Section 214 provides definitions.

26. Section 215 sets out the commencement and transitional rules.

27. Subsection (1) provides that the GAAR applies to any tax arrangements entered into on or after Royal Assent to Finance Act 2013 ("the Commencement Date").

28. Subsection (2) specifies that, where the tax arrangements under consideration form part of other arrangements entered into before the Commencement Date, the other arrangements should be ignored in determining whether the tax arrangements in question are abusive. However, subsection (3) notes that the other arrangements may be taken into account as evidence that the tax arrangements under consideration are not abusive.

Details of the Schedule

29. Schedule 41 sets out procedural arrangements for the GAAR, including the arrangements for the GAAR Advisory Panel. It explains how matters are referred to the Panel, time limits, what information is to be provided (and how), and how the Panel's opinions are delivered.

30. Paragraph 1 defines "the GAAR Advisory Panel" and "the Chair".

31. Paragraph 2 defines "designated HMRC officer".

32. Paragraph 3 requires a designated HMRC officer ("designated officer") to notify a taxpayer in writing where the officer considers that the taxpayer has obtained a tax advantage which should be counteracted under the GAAR and lists the information which must be contained in the notice.

33. Paragraph 4 specifies that the taxpayer has 45 days from the day on which the notice is given to provide written representations in response to the notice to the designated officer. The designated officer may extend the 45 day period at the written request of the taxpayer.

34. Paragraph 5 provides that, if no representations are made by the taxpayer, a designated officer must refer the matter to the GAAR Advisory Panel (the "Panel").

35. Paragraph 6 requires any representations made by the taxpayer to be considered by a designated officer. If the designated officer considers that counteraction is still appropriate the matter must be referred to the Panel.

36. Paragraph 7 sets out the information which must be provided to the Panel by the designated officer when making a referral. This includes any comments which the designated officer has on any representations made by the taxpayer.

37. Paragraph 8 requires the designated officer to notify the taxpayer (at the same time as the referral is made) that the matter is being referred to the Panel and lists the information which must be included with the notice.

38. Paragraph 9 allows the taxpayer 21 days, from the day on which the notice under paragraph 8 is given, to make written representations to the Panel about the notice sent by the designated officer under paragraph 3 or about any comments provided to the Panel by the designated officer under paragraph 7(b). The Panel may extend the 21 day period at the written request of the taxpayer.

39. Paragraph 10 sets out the arrangements for the Chair to appoint a sub-panel of the Advisory Panel to give an opinion on cases, and how information is provided to the sub-panel.

40. Paragraph 11 requires the sub-panel to produce either one opinion notice stating the joint opinion of all sub-panel members or two or three opinion notices which together state the opinions of all sub-panel members. Sub-paragraph (2) requires the sub-panel to give a copy of the opinion notice(s) to the designated officer and the taxpayer.

41. Sub-paragraph (3) explains what must be included in an "opinion notice", confirming that the sub-panel members must consider whether the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the relevant tax provisions, taking account of the various circumstances and indicators listed in section 206. An opinion notice must also include the reasons for the opinion.

42. Sub-paragraph (4) notes that, for the purposes of giving their opinion(s), the sub-panel is to assume that the arrangements are tax arrangements.

43. Sub-paragraph (5) notes that a reference to any opinion of the Panel in Part 5 is a reference to the contents of any opinion notice.

44. Paragraph 12 requires the designated officer to consider the opinion of the Panel and then notify the taxpayer in writing as to whether or not the tax advantage is to be counteracted under the GAAR. If the notice states that the tax advantage is to be counteracted, sub-paragraph (2) requires the notice to specify, in addition, the adjustments required, and any steps required to be taken by the taxpayer, to give effect to the counteraction.

45. Paragraph 13 clarifies that a designated officer may take any action under Schedule 41 where the officer considers that a taxpayer might have obtained a tax advantage. Therefore, any notice given by a designated officer under this Schedule may be given on the assumption that a tax advantage has been obtained.

Background

46. This section was announced at Budget 2012 following the publication, in November 2011, of a report by an independent study group led by Graham Aaronson QC. The Government accepted the group's recommendations that a general anti-abuse rule (GAAR) targeted at artificial and abusive tax avoidance schemes would be the right approach for the UK.

47. A consultation document on the GAAR, which included draft legislation, was published on 12 June 2012. The consultation ran until 14 September 2012. A number of changes were made to the original draft of the legislation in order to reflect comments received during the consultation process. A response document was published on 11 December 2012 to summarise the responses to the consultation, note the various amendments to the draft legislation and explain why these changes (and not others) were made. Revised draft legislation and draft guidance were published for technical consultation on 11 December 2012.