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1. INTRODUCTION

General anti-avoidance rules (GAARs) are used as broad mechanisms to curb impermissible tax avoidance in many jurisdictions. Australia and the UK are two of these jurisdictions. Due to the dynamic and complex nature of the target of GAARs, GAARs isolate or define impermissible tax avoidance in different ways, even though

In this regard, the Document stated that the proposed GAAR would have a narrower ambit than the GAARs in other countries.[29]

2.2 The provisions

The UK GAAR was introduced in 2013 following the aforementioned consultation process. The scheme is detailed in Part 5 of the Finance Act 2013 (UK). To reinforce that the GAAR is targeted at abusive tax avoidance, as opposed to tax avoidance, s°206(1) states that '[t]his Part has effect for the purpose of counteracting tax arrangements that are abusive'. Section°206(2) continues in the same vein, providing that '[t]he rules of this Part are collectively to be known as the general anti-abuse rule'.

Section°207(1) defines tax arrangements as those that can reasonably be said to have a sole or main purpose of obtaining a tax advantage. An objective sole or one of the main purposes to obtain a tax advantage is not the sole focus of the UK GAAR, which requires more. This is in line with its intended exclusive focus on abusive tax avoidance. Section°207(2) defines abusive tax arrangements as follows:

> Tax arrangements are abusive if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including:
>
> (a) Whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions
>
> (b) Whether the means of achieving those results involves one or more contrived or abnormal steps, and
>
> (c) Whether the arrangements are intended to exploit any shortcomings in those provisions.

This section contains the so-called 'double reasonableness' test. Its reference to 'a reasonable course of action in relation to the relevant tax provisions' shows that it is partly based on the principles in the Report by Aaronson QC, that the focus of the GAAR must be on what makes responsible tax planning permissible. The indicators listed under s°2017(2)(a)-(c) direct the enquiry into the abusive nature of an

Section°207(4) refers to the provisions quoted below as indicating the abusive nature of an arrangement:

> (a) The arrangements result in an amount of income, profits or gain for tax purposes that is significantly less than the amount for economic purposes
>
> (b) The arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes
>
> (c) The arrangements result in a claim for the payment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid
>
> but in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.

Given the UK experience with complex composite arrangements, the UK GAAR recognises that an arrangement can be part of a composite, multi-step arrangement, or be the wider arrangement itself. Section°207(3) provides that if a targeted arrangement is part of a wider multi-step arrangement, then 'regard must be had to those other arrangements' before the arrangement can be targeted for GAAR purposes.

In line with other GAARs, the GAAR in s°207(1) requires the existence of a tax advantage. Under s°208, a tax advantage includes:

> (a) Relief or increased relief from tax
>
> (b) Repayment or increased repayment of tax
>
> (c) Avoidance or reduction of a charge to tax or an assessment to tax
>
> (d) Avoidance of a possible assessment to tax
>
> (e)

> [t]he proposed provisions … seek to give effect to a policy that such measures ought to strike down blatant, artificial or contrived arrangements,

Have regard to certain matters:

2. For the purpose of subsection (1), have regard to the following matters:

   (a) the manner in which the scheme was entered into or carried out;

   (b) the form and substance of the scheme;

   (c) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;

   (d) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;

   (e) any changena
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purposes of using the commercial nature of these broader schemes to effectively launder the potentially abusive single schemes. Most, if not every, broad commercial schemes or courses of action have a part that is decisive in obtaining a tax benefit. Isolating this part could render

> The reference to circumstances being "robbed of all practical meaning" appears to have been understood in the Full Court in the present matters as a criterion which must be applied in deciding whether there is a scheme to which Part IVA applies. That is not right. First, it is far from clear what legal test is intended by saying that a scheme must "stand on its own feet". It is not clear how the metaphor is to be translated into legal principle. Secondly, as the Full Court pointed out in the present matters, the words "robbed of all practical meaning", which were adopted in Peabody were taken from IRC v Brebner. There they were used in a very di8.9 (t)-99 (e)-1.087 0 t

In another case, FCT v Futuris,[46] the taxpayer decided to sell one of its divisions. Through a series of transactions involving the transfer of shares between subsidiaries and the declaration of rebatable dividends from the profits obtained from the transfers, the end result was a rise in the cost base of the shares in the division sold. This meant that the capital gain obtained was lesser and the Commissioner included the capital gain that would have been obtained if the division had been disposed of without any cost base increase. The taxpayer contended that the alternative postulate advanced by the Commissioner was not reasonable, as it would have resulted in two disposals (one internal between the subsidiaries and the other external), hence, two instances where capital gains tax could have been levied for the same economic result. The taxpayer argued that it was not a reasonable alternative that its directors would have committed to, as it would have meant facing double capital gains taxation. The court accepted this argument, and a tax benefit could not be established.[47] In these cases,9.8 (n)-taxul artl (a)-10

Section°177CB(2)(a) empowers the Commissioner to annihilate all the steps in the scheme before focusing on the surrounding events or circumstances that actually occurred or existed. This excludes any speculation on what could or may have happened but for the scheme. Section°

Commissioner to speculate that if the substance of the scheme is considered, the taxpayer could have achieved the same economic objective(s) in an alternative scheme that would have resulted in less tax benefits.

In practice, the application of the sole or dominant purpose test has shown one significant characteristic of Part IVA. In FCT v Spotless Services Ltd it was stated that the dominant purpose is the 'ruling, prevailing or most influential purpose'.[57] This case showed that Part IVA could apply to schemes with both commercial objectives and tax benefits. The court unanimously applied Part IVA to strike down an investment that offered good after-tax returns in the Cook Islands. The taxpayer's argument that the purpose behind the scheme was to secure the investment of a large sum was rejected by the court, which stated that the required purpose lay in the particular means the taxpayer adopted to obtain the commercial advantage. The court held that the presence of a rational commercial decision was irrelevant to the question whether a taxpayer had operated a scheme with a dominant purpose to obtain a tax benefit.[58] In stating this, the court made it clear that s°177D required a close inspection of the particular method(s) utilised to obtain the tax benefit.[59] An examination of the scheme in this case reveals that it had a commercial basis. The taxpayer invested a huge sum and got a considerable return. This means that it was not the lack of a commercial purpose that led to an adverse conclusion for the taxpayer. The inquiry turned on the particular method the taxpayer relied on to obtain the tax benefit. Since the particular method was complex and involved a series of planned steps the court opined that the method could largely be explained by reference to the tax benefits obtained.

This decision demonstrates that Part IVA can be used to strike down an ordinary commercial scheme if the scheme is 'elaborate' and has 'attendant circumstances' that 'lead inevitably to the conclusion that the scheme was not merely tax-driven but that its purpose was to enable the taxpayer to obtain a tax benefit by participating in the scheme'.[60] The reasoning behind the decision was that the most influential, prevailing, or ruling purpose of the transaction was to obtain a tax benefit.[61] In another case, FCT vConsolidated Press Holdings Ltd, was stated that:

> [t]he fact that the overall transaction was aimed at a profit making does not make it artificial and inappropriate to observe that part of the structure of the transaction is to be explained by reference to a s°177D purpose. Nor is there any inconsistency involved, as was submitted, in looking to the wider

[57] (1996) 34 ATR 183 192. For more discussion of this case, see generally John Passant, 'Spotless Removing the Stain of Tax Avoidance in Australia' (1997) 2 British Tax Review 131, who describes the case as an 'outstanding victory for the Revenue'. See also Michael D'Ascenzo, 'Part IVA Post Spotless' (1998) Journal of Australian Taxation 3 <http://www.austlii.edu.au/au/journalsscrib submic 0 (c 0 (c18.3 (ng)13.7 (v)13(v)1oI3 0 Td [(A P)-19 (o)-21.7 (sb7taI(o)

The criticism of Part IVA can be tempered by reference to cases such as Eastern Nitrogen Ltd v Commissioner of Taxation.[67] This case involved a sale and leaseback scheme. The finance proposal presented to the taxpayer had a lower after-tax cost than other borrowing methods. The Commissioner sought to apply Part IVA to this scheme and to disallow the deduction sought for rentals paid by the taxpayer. The court rejected the Commissioner's contentions and stated that:

> [d]ue and proper management of the business required assessment to be made of the net cost of finance after taking into account the extent to which any outgoings associated with that cost were allowable deductions from assessable income. In the circumstances of this case, to say that the appellant was attracted by a proposal that provided finance at a lower after-tax cost than other means of obtaining funds for the business would not, without more, support an objective conclusion that the appellant obtained finance for the dominant purpose of obtaining the tax benefit constituted by the deductibility from assessable income the outgoings incurred in connection with the obtaining of that finance.[68]

court stated that the sub-scheme must be capable of standing alone, which is related to the UK GAAR approach because a consideration of the other schemes would determine whether the sub-scheme makes sense when isolated. This approach was rejected in Hart. It is submitted that the UK GAAR approach to arrangements would not weaken Part IVA if it was to be adopted in Australia. This is because sub-schemes would still be isolated and sole or dominant purpose ascribed to them where, after

schemes with the least tax benefits. If problems are encountered with these subsections, the UK approach to establishing a tax advantage, which focuses only on the actual arrangement, must be considered. This will not necessarily require much change since s°177CB(2) already encapsulates the UK approach and can be used as the sole test for a tax benefit in Australia.[71]

4.3 The identification of impermissible tax avoidance and the threshold

GAARs ideally should not affect all schemes or arrangements where tax is avoided, so the identification of impermissible tax avoidance is critical to the efficacy of a GAAR. Part IVA basically defines impermissible tax avoidance as a scheme that has a sole or dominant purpose, objectively determined, to obtain a tax benefit. In case law on Part IVA, discussed in Section 3.2.1, it is clear that taxpayers have lost Part IVA cases on the basis of the facts surrounding the implementation of their schemes. The courts have held that if a scheme is implemented in a particular way in order to obtain tax benefits, Part IVA will apply.

pair the success of Part IVA with its propensity to apply to some commercial schemes, one may come up with this question: since it has proven to be impossible, to date, to create a perfect GAAR, is an approach that targets impermissible tax avoidance by setting a low threshold and affecting some commercial transactions that have tax benefits the best way to curb impermissible tax avoidance? This question will be answered below.

In the UK, part of the background to the introduction of a GAAR was characterised by one consistent theme; that the UK needs a GAAR that is targeted and narrow, rather than broad and uncertain. This led directly to the introduction of the UK general anti-abuse (as opposed to avoidance) rule that targets abusive tax avoidance.[76] The emphasis on abuse is patent. Abusive tax avoidance is basically singled out as an arrangement with a sole, or one of the main purposes, to obtain a tax advantage in a manner that cannot reasonably be said to be a reasonable exercise of choices offered by legislation. The double reasonableness test is the one that draws the line between permissible tax avoidance and abusive tax avoidance. This test gives effect to the long held views on the ideal GAAS iow o ogdewasonnu.ol8.6 (d v)77 (i)-4.6 (ed v)77 (i8 (o)l8)4.6 7(A)4.

reasonable person would find them reasonable. There is no case law on the UK GAAR yet but the application of this test could result in some arrangements that could be found impermissible in, for instance, Australia under Part IVA being accepted under the UK GAAR because the degree of abusiveness does not cross the high threshold. This leads to another fundamental question: considering that there is no knowledge of where the line between permissible and abusive tax avoidance is, is it better to curb abusive or impermissible tax avoidance by focusing exclusively on arrangements or schemes that are unanimously abusive and allowing borderline arrangements to thrive? To answer these two questions, it is submitted that no GAAR is perfect and it is distinctly possible that perfection in this area of tax lawseyh((s)2.7 (s)/(v)12.9 (e2

found to be abusive in terms of a GAAR with a lower threshold. An ideal GAAR should not target commercial arrangements. It should also not target only the most abusive arrangements. Due to the fact that the ideal GAAR is elusive, is a GAAR that targets abusive arrangements and, in the process, affects commercial arrangements better than a GAAR that targets only the most abusive arrangements while allowing less abusive ones? It is submitted that the approach in Part IVA, which has been successfully applied in a number of cases, is a greater deterrent than the approach taken in the UK GAAR. It is also submitted that considering the fact that a perfect GAAR has not been drafted yet, a GAAR whose indicato-1.141 Td c]8.7 (so8)8.2 (m)19..3 (--2.6
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