

Time for a General Anti-Avoidance Principle

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Mark Lee has kindly drawn [my attention to two articles](#) of some significance.

The first is the editorial of [Taxation](#) magazine this week — written by Mike Truman. He is a long time critic of abusive taxation, but concludes:

If we want to preserve the right of taxpayers and their advisers to pursue reputable, non-packaged, tax planning, we need to accept that the writing is on the wall for the aggressive packaged schemes.

And in support says:

The first step in doing that might be to re-establish some basic principles about tax avoidance which have been true for most of my working life in tax. From 1981 to 2004 it was accepted that, if a set of transactions involved money going round in a circle, or if steps were introduced into such a composite transaction with no commercial effect, then they equally had no tax effect.

We are now told that this was merely a way of describing the principle of purposive statutory construction, and applying it to tax. The result is that no one is really sure when a transaction will be caught and when it will not, and a large number of taxpayers are being encouraged to take the risk and see if they can reduce their tax liabilities to almost nothing through the use of such schemes.

So if the principles as set out by Lord Brightman worked pretty well in the past, why not actually enact them now as a form of general anti-avoidance rule (GAAR)?

Because to think that some sort of GAAR isn't on the way at some time over the next few years seems to me to be similar to thinking that Portsmouth are going to win the Premiership during the same period — it's not entirely out of the question, but it is highly unlikely.

Mike and I have discussed this before — and he has provided useful commentary on the General Anti-Avoidance Principle (I prefer principles to rules) that two MPs tabled in

the Commons this year — both authored by me.

And I think that Mike is bang on about the need for a GAntiP (or even a GAAR) but wrong about timing. Portsmouth are not going to win the premiership — but their success is not correlated to the chances of getting a GAntiP — which I rank as quite high.

Very encouragingly [Stephen Herring of BDO](#), not normally an ally of mine as I recall it, shares the view, as reported by Mark at the Tax Buzz blog. Stephen has written today:

I am disappointed that at some time in the early 1990s certain parts of the tax profession 'sold out' to the sales teams seeking to 'roll out' tax 'products/solutions/ideas' across the client base with little regard to their suitability.

I agree that some products may succeed in the courts and some clients are capable of implementing and willing to defend them as far as is needed but what I'm saying is that too many marginal tax products are sold to too many unsuspecting companies and individuals.

I suspect that before too long, HMRC will come to the conclusion that the only way to restrict the marketing of artificial tax arrangements is to copy the stance adopted by the IRS in the US and seek criminal penalties in some situations to draw a line in the sand between acceptable, even if aggressive, tax planning and purely artificial schemes. This would be a hugely disappointing outcome but one which I consider at the moment to be almost inevitable.

Stephen is, I think wrong. I think that is a desirable outcome but one that could be avoided. The combination of a GAntiP and a legally backed [Code of Conduct](#) for tax advisers as a condition of their registration for business would ensure such abuse could not happen.

I'll be arguing this in a lecture at the Treasury next week. I guess it's another sign of the times that I've been asked to deliver a lecture on tax and morality at the Treasury. The times may really be a'changing. I hope so.