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The new Guidance on the new General Anti-Abuse Rule (GAAR) in UK taxation has been published today. I sat on the committee drafting this guidance, and so there are some restrictions on what I can say about it, especially with regard to process, but no restrictions at all on what I can say about what it means.

First, let's get the obvious observation out of the way: despite all that I will say that is positive about the GAAR it remains the case that this is not the legislation I wanted to tackle tax avoidance in this country. I'll deal with that in a separate post, because this GAAR does have major structural problems within it.

And then let me say that within this constraint I welcome the GAAR and most especially parts A to C of the new Guidelines that are published to day.

The reason for my enthusiasm is that the GAAR Guidelines are without precedent as far as I know in UK tax law, because they are in effect legal precedent in their own right that any court has to take into account once Royal Assent is given. And that opportunity has been seized by those drafting them to fundamentally change the environment of UK tax avoidance law forever.

For over seventy years UK tax avoidance has been considered legal on the basis of four UK court decisions. As Part B of the new Guidance notes:

*Amongst these Court decisions the following are routinely cited as providing legitimacy to even the most abusive tax avoidance schemes:*

*“My Lords, the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing, he neither comes under liability nor incurs blame.”[1]*

*“Every man is entitled if he can to order his affairs so that the tax attracted under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay*

*an increased tax."[2]*

*"No man in this country is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow — and quite rightly — to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue."[3]*

And as the GAAR Guidance then notes:

*The GAAR Study Group Report was based on the premise that the levying of tax is the principal mechanism by which the state pays for the services and facilities that it provides for its citizens, and that all taxpayers should pay their fair contribution. This same premise underlies the GAAR. It therefore rejects the approach taken by the Courts in a number of old cases to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might diverge from the real economic position.*
*The last quote from the judgment of Lord Clyde in the Ayrshire Pullman case epitomises the approach which Parliament has rejected in enacting the GAAR legislation. Taxation is not to be treated as a game where taxpayers can indulge in any ingenious scheme in order to eliminate or reduce their tax liability.*

*Accordingly, it is essential to appreciate that, so far as the operation of the GAAR is concerned, Parliament has decisively rejected this approach, and has imposed an overriding statutory limit on the extent to which taxpayers can go in trying to reduce their tax bill. That limit is reached when the arrangements put in place by the taxpayer to achieve that purpose go beyond anything which could reasonably be regarded as a reasonable course of action.*

So let's be unambiguous: the argument that tax avoidance is legal has now been cast aside, forever. That is no longer true. And for those in doubt, a case that in 2007 (*see here, page 9*) *said needed to be over-turned for good has also been cast aside by this GAAR Guidance. As part C of the Guidance notes when discussing extreme views that can be ignored when determining what is reasonable in the GAAR context notes:*
*There are less obviously extreme views — which may be commonly held — that nonetheless cannot be regarded as reasonable for the purposes of the GAAR. Perhaps the clearest example is the view that it is the function of HMRC and the Parliamentary drafter to get the legislation right, and that if they fail to do so there is nothing wrong with individuals or companies exploiting defects in the drafting[4]. However, this is wholly inconsistent with one of the basic purposes of the GAAR, namely to deter or counteract the deliberate exploitation of shortcomings in the legislation. Accordingly, even if such views are held by someone who would ordinarily be regarded as*

*reasonable, and indeed may be eminent in a field of work (such as accountancy or the legal professions), those views themselves would not fall to be regarded as reasonable for the purposes of the GAAR.*

So let's be clear: the argument that loopholes are there to be exploited is now dead. And the rule in Partington v The Attorney General of 1869 is no longer UK law. That rule was the consequence of this statement:

*If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute.*

That nonsense has now come to an end. But let me add another note of satisfaction. In 2009 I discussed a general anti-avoidance principle with Dave Hartnett in a private conversation as a result of general anti-avoidance rules I had assisted MPs to table in parliament (see *here* and *here*). *He said at the time that he would love to kill off the Duke of Westminster ruling but had no idea how to do it. Well now that Duke of Westminster has, for tax purposes, been put in his box for good, as have all the other wholly unhelpful precedents I have referred to. If I played a part, I'm pleased.*

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*[1] Lord Sumner in Fisher's Executors v CIR* [1926] AC395

*[2] Lord Tomlin in Duke of Westminster v CIR* [1936] AC1

*[3] Lord Clyde in Ayrshire Pullman v CIR* (1929) 14TC754

*[4] Reflecting the dicta of Lord Cairns in Partington v Attorney-General* (1869) L.R. 4 E. & I. App. 100