
Policy Forum: Editor's Introduction— The General Anti-Avoidance Rule at 25

Last year marked the 25th anniversary of the enactment of the general anti-avoidance rule (GAAR) in section 245 of the Income Tax Act.¹ As an apparent response to a perceived reluctance of the Canadian judiciary to articulate robust anti-avoidance doctrines, the introduction of GAAR provoked considerable reaction in the Canadian tax community. It is probably accurate to suggest that GAAR has altered the contours of tax planning in Canada. That altered landscape may be attributable in part to the fact that the jurisprudence considering the interpretation and application of this provision does not readily yield an especially clear road map, at least in the sense of providing certainty and predictability of result. Although there are a handful of cases that turn on the critical concepts of a tax benefit and an avoidance transaction, the more problematic feature of GAAR remains the requirement in subsection 245(4) that an avoidance transaction constitute a misuse of the provisions of the Act or an abuse of the provisions of the Act read as a whole; it is, of course, only such avoidance transactions that are subject to a denial of the tax benefit that would otherwise be available. Confusion over the precise contours of this necessary characterization as an outcome of an exercise in statutory interpretation appears to remain despite what is now a deep body of case law, including the considered opinion of the Supreme Court of Canada on four different occasions.

Given the lack of clarity in the interpretation and application of GAAR, it is hardly a surprise that there is no shortage of literature analyzing the case law generally and the Supreme Court of Canada's decisions in particular. Nonetheless, we thought that the 25th anniversary of the enactment of GAAR provided a convenient opportunity to reflect further on what, if anything, we have learned from the jurisprudence. To that end, we invited a Canadian tax commentator and two Canadian tax practitioners to provide their thoughts on the state of the GAAR jurisprudence. We also invited a legal academic from New Zealand to comment on a recent line of cases considering a similar provision in the income tax legislation of that country. That case law is quite extraordinary for the radical change in the judicial attitude to tax avoidance that it reflects, and we think it provides a striking contrast in approach to that of Canadian courts.

In the first article that follows, Brian Arnold examines the development of the Supreme Court of Canada's approach to the concept of abuse in subsection 245(4)

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this introduction are to the Act.

and considers where that approach is likely to lead. He suggests that, with the elevation of Rothstein J to the Supreme Court, there has been a subtle but significant shift in approach involving two important propositions: (1) that subsection 245(4) is an interpretive provision, not a substantive rule; and (2) that the determination of purpose is an interpretive exercise based on a textual, contextual, and purposive analysis of the relevant provisions implicated by an avoidance transaction. Arnold emphasizes that this exercise in statutory interpretation invariably requires a court to go beyond the words of such provisions in order for GAAR to have any meaning. He concludes, however, that the Supreme Court fails to articulate any kind of objective test or tests for the determination of abuse that can be applied with some degree of certainty.

In the second article, Alan Schwartz and Kevin Yip focus on the lessons of eight years of GAAR jurisprudence following the first two Supreme Court decisions. These lessons are framed from the important perspective of a tax practitioner defending against a GAAR assessment. Schwartz and Yip discuss both evidentiary issues and substantive issues related to the application of GAAR. Not surprisingly, much of their discussion concerns the exercise in statutory interpretation implicated by subsection 245(4). But they also make the notable point that tax practitioners should not concede too readily the existence of a tax benefit or the characterization of a transaction as an avoidance transaction. Indeed, Schwartz and Yip suggest that these two issues will be an area of increased dispute resolution, although the principal area of contentiousness will remain proof of the policies underlying relevant provisions in the context of a misuse or abuse inquiry.

In the third article, Craig Elliffe analyzes the recent GAAR jurisprudence in New Zealand. Despite the absence of a misuse or abuse requirement in New Zealand's GAAR comparable to that in subsection 245(4) of the Act, NZ courts have interpreted that country's GAAR to require a purposive exercise in statutory interpretation before a tax benefit provided by a tax-avoidance transaction can be denied. As Elliffe argues, NZ courts have read in this statutory overlay in an effort to narrow the application of what is perceived to be an overly broad prohibition on tax planning. A recent line of cases has significantly expanded such application, however, by emphasizing the legislative purpose of New Zealand's GAAR itself and, most importantly, the relevance of "commercial and economic realities" in drawing the line between acceptable and abusive tax avoidance as an outcome of an exercise in statutory interpretation. It is not too difficult to imagine the kind of shock waves that would be felt in the Canadian tax community if our courts suddenly changed their attitude to the interpretation and application of section 245 in a manner similar to that evident in the recent GAAR case law in New Zealand.

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