Policy Forum: Editor’s Introduction

The following Policy Forum contribution by Angelo Nikolakakis continues our inquiry into limitations on tax avoidance under Canadian tax law. Several years ago, the Supreme Court of Canada raised the curtain on the “modern age” of the general anti-avoidance rule (GAAR) with its decisions in *The Queen v. Canada Trustco*¹ and *Matthew v. The Queen*,² providing, in effect, a protocol for applying GAAR. After the release of those decisions, the editors of this journal embarked on a small project to consider GAAR from various perspectives, in order to enrich our collective understanding of its facets and complexities. At that time, and perhaps even until now, we have mostly been concerned with such questions as whether GAAR imports an “economic substance” element; what a “series of transactions” is; whether GAAR applies to each transactional element of a series, and if it does, whether the overall result of the series is sustainable notwithstanding that one of its elements may reflect potentially impugnable “tax avoidance”; and other large questions about the scope and reach of GAAR.

There are signs, however, in recent decisions of the courts, including the Supreme Court’s ruling in *Lipson v. Canada*,³ that we are entering a new phase of GAAR’s life. It is evident now that interpretive minds are turning to some of the more difficult, and possibly less evident, questions that GAAR presents. For example, the notion of “avoidance transaction” has embedded in it two important specific questions. Aside from the “series” issue, what, exactly, is the “transaction”? Is it the composite of all of the steps or elements needed to be accomplished in order to reach a particular objective, all of which occur if any does? This, broadly, might be seen as the approach of the UK courts with respect to tax avoidance. Or is each element of the planning—each step, as it were, in the “closing memorandum”—a separate transaction to be analyzed according to GAAR? And what does “avoidance” mean? Inherently, it is a comparative term. A taxpayer affected by GAAR must be avoiding an outcome that conceivably would otherwise have obtained had the taxpayer proceeded in a different way, but is avoided by taking another tack. How do we identify and evaluate the comparator, objectively or otherwise? These are subtle but nevertheless important questions that we will have to address as our experience with GAAR develops.

¹ 2005 DTC 5523 (SCC).
³ 2009 SCC 1.
In the article that follows, Nikolakakis grapples with one particular manifestation of these embedded questions: What is the “transaction,” and is it an “avoidance transaction” in relation to a “tax benefit”? The questions he poses and the analysis he undertakes—inspired in part by how the Supreme Court of Canada went about deciding the Lipson case—are very important. Essentially, Nikolakakis inquires whether the notion of “avoidance transaction” should be established with reference to a specific “tax benefit,” rather than all possible “benefits” that might arise from the transaction but that might not have been the taxpayer’s objective, or primary objective. In other words, he asks, “Is a transaction an ‘avoidance transaction’ (or not) for all purposes and for all times once that status attaches for any reason, or is it an ‘avoidance transaction’ only in respect of a particular tax benefit or a particular series, such that it can be an ‘avoidance transaction’ with respect to the particular tax benefit or series and not be an ‘avoidance transaction’ with respect to a different tax benefit or series?”

This question causes us to pause. On the one hand, it seems to express an almost self-evidently simple proposition that we should all understand, based upon the notions of “avoidance” (of what, and with respect to whom or what?) and “transaction(s),” including multiple elements of the “transaction(s)” and multiple benefits that might be seen to arise from it (or them). But in fact, Nikolakakis’s question almost takes on the complexity of a metaphysical inquiry into a rule that is somewhat opaque as to its theoretical foundation and its practical application. While there is always a danger of being too didactic with respect to any rule or principle that seems to have a relatively straightforward premise and objective, that is not the case with such fundamental issues as the relationships between “avoidance” and a “transaction,” in reference to particular “tax benefits,” or whether a series of “transactions” has been engaged. Nikolakakis’s article is a sophisticated and welcome contribution to the journal’s continuing inquiry into GAAR. No doubt, coming close on the heels of the Lipson decision, it will provoke a novel consideration of GAAR that, as he observes, seems not to have been adjudicated, or even to have been the subject of very much discussion to date (at least, not in the way that he addresses it).

On a personal note, I would like to add that this is the last introduction to the Policy Forum that I will be writing, at least for a while. As of June 30, I am retiring as a co-editor of the journal, though taking on other responsibilities for the Foundation, to which I remain very much committed. It has been a constant learning experience, and even a joy, to have had the opportunity to be engaged on a regular basis with and by Alan Macnaughton, Lindsie Court, and Lindsie’s predecessor Laurel Amalia, and the many authors whose interest in the Canadian tax system has enriched these pages as well as our own personal experiences, as we try, through the journal, to contribute to an informed debate about topical Canadian tax issues in a way that advances our approach to and understanding of the law. I would like to wish all the best to Alan and Lindsie and their new co-editor, Brian Carr, who I know also brings to this role a longstanding dedication to the Foundation.

Scott Wilkie
Editor