

# A GANTIP

## Was it really such a bad idea?

In June 2003 I argued in *The Tax Journal* (see page 2 of Issue 695) for the introduction of a general anti-avoidance principle. The Editor said this needed an acronym – GAAP was no good as it had already been taken. So between us we came up with the slightly clumsy GANTIP. This was to distinguish it from a general anti-avoidance rule (GAAR), because the argument was for a principle and not a rule.

In this article I shall argue that much trouble would have been saved had we introduced a GANTIP then. Some might argue that the time for it has passed but I suggest that it is needed now as much as ever.

*Judith Freedman, Professor of Tax Law and Director of Legal Research, Centre for Business Taxation, Oxford University, adds to the debate on the Guardian's 'Tax Gap' series on tax avoidance*

promised much but has not delivered anything like a comprehensive solution.

Over the past five years we have seen the introduction of a disclosure regime and a considerable volume of anti-avoidance legislation, much in the form of targeted anti-avoidance rules (TAARs). There have been some indications that these developments have restricted the most aggressive types of avoidance (and it is notable

University Centre for Business Taxation (see [2009] BTR 74) suggests that this engagement is having some success in terms of improved resource allocation, speed of settlement and increased trust and transparency between HMRC and large corporate taxpayers, but it is also clear from the responses of the tax directors that the problem of deciding what kind of tax planning behaviour is 'acceptable' or 'commercial' or 'non-aggressive' remains one that is unlikely to be solved by these administrative devices. Indeed, the extent to which administrative methods should be used to decide this is highly debateable.

### GANTIP - one tool in the toolbox

As Tracey Bowler pointed out in her excellent paper *Countering Tax Avoidance in the UK: Which Way Forward?* written for the Tax Law Review Committee earlier this year, there is no one silver bullet that will solve this problem. Rather, a range of tools and a sensible framework are required. In my view a GANTIP should be found in the toolbox.

There is also a need for continued debate and discussion about the underlying objectives of the tax system, new ways of legislating and very possibly radical new ways of taxing multinational companies in particular, as Michael Devereux and I pointed out in our own comment in the *Guardian* debate (9 February 2009). But while we wait for the more radical changes, the GANTIP could help.

### Spirit of the law and morality

Let me be clear that support of the GAAR/GANTIP does not imply agreement with the argument that the obligation to pay tax should be based on the 'spirit of the law' (which suggests something coming from outside the law as properly interpreted by the courts) or 'morality'.

*Support of the GAAR/GANTIP does not imply agreement with the argument that the obligation to pay tax should be based on the 'spirit of the law' (which suggests something coming from outside the law as properly interpreted by the courts) or 'morality'*

### Why we need change

The recent press coverage of tax avoidance, in particular the series of articles run by the *Guardian* and the reaction to these articles, including that in *The Tax Journal*, highlights the need for a new approach, both to prevent extreme forms of activity and to give all parties – taxpayers, the public and government – the confidence that appropriate tools are available to deal with tax avoidance within the parameters of the rule of law. A GANTIP should be part of that new approach.

Of course we have had other 'new approaches' but those who doubt the need for another tool in the armoury should consider not only the current situation but also history. Tax avoidance is as old as taxation itself, but in the UK it became an industry in the 20th century, particularly in the 1950s with dividend stripping and in the 1970s with the Rossminster and Tucker schemes. The judicial 'new approach' which followed these latter developments

that many of the current press stories relate to quite old schemes) but it would be naïve to suppose that legal tax planning involving artificiality and non-commercial behaviour has entirely ceased, any more than it did following the decision in *Ramsay* [1982] AC 300.

### Non-statutory approaches

At the same time, the legislative developments have been contentious and raised concerns, not least because of the volume of non-statutory guidance which has been required to make the TAARs operable in a practical way. The new legislation has added to the volume and complexity of the tax statutes and surrounding practice for the compliant without solving the problem of non-compliance.

For large companies, much work is being done on increased cooperation following the *Review of Links with Large Business*. A survey of tax directors I undertook with colleagues at the Oxford

Some commentators propose a package that mixes these 'solutions' but this shows a fundamental conceptual confusion. A GANTIP attempts to make the law and the spirit of the law one and the same thing, so that there is no need to look outside this to obtain an answer. It is a central responsibility of government to decide the level of tax to be paid, as well as the tax base, and to enforce the system across the board in an even-handed way. To leave the crucial obligation to pay tax to be dealt with by such difficult and ill-defined concepts as morality and the spirit of the law would be an abdication by government of this key responsibility.

In some situations we encounter, such as Ann Redston's case of rescuing a drowning baby (see page 5 of Issue 975 of *The Tax Journal*), morality gives an obvious answer, but in the case of tax it does not. It is a moral obligation to pay tax due but morality does not answer the question of how much tax is due. The law is required to give that obligation content.

If there are problems with our tax system and its operation, and if there is a gap between the law as interpreted by the courts and the law as Government wants it to be, this should be dealt with through a change in the law and the way we make tax law, in terms of content, form and procedure. Changing the law every time a problem is encountered, however, creates complexity and, moreover, is always a little too late.

Applying an overriding principle at a level above other tax legislation to deal with problems not specifically encountered or foreseen might eventually save the need for legislation (though not until the revenue authorities had come to trust it) and would operate on the law in advance of the problem.

A GANTIP would be pointless unless it was intended to change the law, and to change the starting point for the tax avoidance debate. By modifying the tax minimisation principle in the *Duke of Westminster's* case [1936] AC 1, a fresh start would be achieved.

#### Parliamentary intention

I refer here to law as the Government wants it to be and not Parliamentary intention. They are not the same thing. Some of the problems arising in the tax avoidance debate are due to a muddling of the two.

Government needs to translate its policies into law. The fact that MPs or even Ministers often do not understand what they are debating



Judith Freedman

when they discuss tax, though it is a very big problem for the process and one which should be tackled if possible, does not mean that there is no Parliamentary intention. As Lord Hoffmann has pointed out (see [2008] BTR 197), Parliament can only express its intention through statute and that

#### A principle modifying rules

The GANTIP would be broader than a detailed rule and would modify the specific rule in that it would provide the authority to apply the rule in a certain way in certain circumstances. It would be more than purposive interpretation because it would look beyond the language of the statute at the surrounding facts. This has echoes of the much favoured description of the *Ramsay* approach propounded by Ribeiro PJ in *Collector of Stamp Revenue v Arrowsmith Assets Ltd* [2003] HKCFA 46 (the test being whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically). This test suggests to me that, whatever the House of Lords may say, the current judicial approach is also more than a pure rule of statutory interpretation because it takes a particular view of the surrounding circumstances. A GANTIP would give this approach more legitimacy and it would not have to be hidden behind a mask of pure purposive interpretation.

#### Responses to the critics

Critics of this view will argue that a GANTIP will lead to lack of clarity,

*[A GANTIP] would not be undermining Parliament or creating retrospectivity or uncertainty but it would set up an overriding principle to give proper effect to Parliamentary intention as expressed in the legislation setting out the principle. It would be known in advance and a formal set of protections, such as clearances and appeals, could be built up around it*

statute, as interpreted by the courts, is the embodiment of the intention. It may be that it is not what the policy-makers wanted it to be, or would have wanted it to be had they thought about it, but it is still the intention of Parliament.

That is where a GANTIP comes in: it could provide a signal to the courts that in certain situations legislation should be applied in a special way. That would not be undermining Parliament or creating retrospectivity or uncertainty but it would set up an overriding principle to give proper effect to Parliamentary intention as expressed in the legislation setting out the principle. It would be known in advance and a formal set of protections, such as clearances and appeals, could be built up around it.

will just be another layer of legislation superimposed on an already complex system, because we shall continue to have specific anti-avoidance measures and that it will not help unless the underlying tax system is improved and its principles and objectives become more discernible. Some of these comments are valid but they miss the point of a GANTIP.

I do not suggest that it will solve every problem or provide a comprehensive set of answers for every case. Its importance is as a signal and as a modification of the starting point for our debate. While it is a fundamental requirement of the rule of law that people should be able to use the law as a guide, it is not essential that the guide dictates an outcome in every case (see T Endicott (1999) 19

*Oxford Journal of Legal Studies* 1). The function of a GANTIP is not to provide a bright line between 'acceptable' and 'unacceptable' avoidance, which would only create scope for planning, but is to function as a guide to finding the answer that does not depend entirely upon the view of officials but is justiciable.

A GANTIP would be a better guide than the current case law. The judiciary could apply it and develop it with full legitimacy. It should be accompanied by a system of clearances based on judicial decisions. It could subsume the many TAARs that have been enacted. As Bowler comments, we already have what amounts to a GAAR in the form of many TAARs but instead of one overarching provision we

principles, although we should not give up on this. But a GAAR/GANTIP based on purpose tested by objective factors, as found particularly in Australia and South Africa, could work in at least some of the cases where it is needed.

One common criticism of the GAAR is that it has not worked in other jurisdictions. It is true that its development in most countries has been painful and slow but recent evidence suggests that the judiciary are beginning to take their cue from the legislation and to develop the tools they have been given. Recent cases in the highest courts in Australia, Canada, Hong Kong and New Zealand have all upheld the application of the relevant GAARs, although not without some

legal route to attempt to deal with tax avoidance by banks. The current economic climate and hostility towards the banks, combined with public pressure, have made this an attractive political option. The Chancellor, Alistair Darling, has announced that he plans to introduce a code of conduct to regulate tax avoidance activity by banks (see *Hansard*, 16 March 2009 Col 659). He has stated:

'In each of the Budgets since 1997, we have introduced measures to cut tax avoidance. By its very nature, tax avoidance must be dealt with all the time. As we close one loophole, there are those who will seek to find others, which need to be closed down. It is important to have a code of conduct partly, as the hon. Gentleman says, because of the very complexity of banking and the way in which investment banks and others have sometimes sought to develop instruments in order to avoid paying taxes.

That has, in itself, posed a systemic threat to the system, which is one of the reasons why we need a code, so that people abide by the letter and the spirit of the law. Our intention is to produce a draft code, probably at the time of the Budget, and then to consult with a view to getting it introduced as soon as possible'. There are two worries about this statement. The first concern is the idea that there is some inevitability about the spirit of the law being different from the letter (even though we already have purposive interpretation) and the second that instead of trying to remedy this through better legislation the Government will throw up its hands in despair and try to fudge this through a 'voluntary' code. It may be that the banks will accept this code, partly out of political and economic necessity but also partly because it is somewhat meaningless and therefore not too difficult to deal with. In the long run this will not help the banks, their critics, or anyone else. This approach should be resisted rather than welcomed by those who argue for stronger controls on tax avoidance. Tax is not an area for voluntary codes or calls to the 'spirit of the law' but for properly debated and processed legislation.

Judith Freedman is also a member of the Tax Law Review Committee, but all the views expressed here are entirely personal.

She can be contacted at [judith.freedman@law.ox.ac.uk](mailto:judith.freedman@law.ox.ac.uk).

*There are worrying signs, however, that the Government is planning not a clarification of the law but an extra-legal route to attempt to deal with tax avoidance*

have numerous provisions of varying breadth. A GANTIP might not result in the immediate disappearance of all existing TAARs but it should at least reduce the number of new ones and hopefully, gradually, as experience of the principle built up, the TAARs could be dispensed with.

Had the GANTIP been introduced in 2003 we could have been a little closer to that goal. It may take many years but the sooner we start the process the better. It is surprising that the business community has accepted the TAARs but balked at a GAAR. Some, such as the Institute of Chartered Accountants of Scotland, have warmed to the idea of a GAAR in view of the volume of recent legislation. Simon Yates, (page 11 of this issue) an experienced City lawyer, has also supported the idea as part of the 'Tax Gap' debate. They join the TUC and the *Guardian* in seeing a GAAR/GANTIP as part of the solution to the current problems.

The biggest objection to a GAAR/GANTIP, which will need to include a purpose test, is that if the underlying tax system is incoherent it is not possible to apply an anti-avoidance clause based on the avoidance purpose. The tax system would undoubtedly benefit from a total rethink but this is unlikely to happen in the near future. Principles-based drafting is also proving problematic, in view of the difficulty of finding sensible

dissent and criticism (see *FCT v Hart* (2004) 55 ATR 712 (Australia); *Lipson v Canada* 2009 SCC 1; *Ben Nevis Forestry Ventures Ltd v CIR* SC43/2007 and *Glenharrow Holdings Ltd v CIR* SC59/2007 (New Zealand); *CIR v HIT Finance Ltd* FACV 8/2007 and 16/2007 and *CIR v Tai Hing Cotton Mill (Development) Ltd* FACV 2/2007 (Hong Kong)). A response to a call for a GAAR/GANTIP in the UK is often that the person proposing it should draft one. This would of course be the acid test but there is considerable experience now of what to do and what not to do in order to ensure that a clear message is conveyed to the courts. Anyone drafting a clause for the UK would have considerable assistance from this source.

A GANTIP, therefore, could have real teeth and could also, over time, simplify our tax law and cut down on the need for new provisions. Instead of being seen as an anti-competitive device of which business and therefore Government is fearful, it should be seen as valuable tool to help clarify the current tangle of judicial and legislative provisions. It could demonstrate the will to deal with artificial and aggressive tax avoidance without damaging business.

### A proposed code?

There are worrying signs, however, that the Government is planning not a clarification of the law but an extra-