MOTIVE, INTENTION AND PURPOSE AND THE UK'S GENERAL ANTI-ABUSE RULE

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Introduction

The UK's general anti-abuse rule[2] states that it is aimed at "counteracting tax advantages arising from tax arrangements that are abusive."[3] The GAAR has various stages to determine whether an arrangement is abusive. This article provides a critical outline of the central provisions of the UK GAAR in order to ascertain the extent to which a taxpayer's motive, intention or purpose can be subjectively examined by the judiciary. It will be argued that the UK GAAR does permit consideration of these factors, which, it will be argued, is undesirable because of the subjective nature of these terms and the possibility of judges ascribing a motive, intention or purpose on the taxpayer which may not be factual in reality. An evaluation of the meaning of the central provisions of the GAAR will be given. These central provisions include a tax advantage,[4] a tax arrangement,[5] the main purpose test[6] and the double reasonableness test.[7] Scrutinising the GAAR's provisions will strengthen the argument that the GAAR allows for a significant amount of discretion to be exercised by the judiciary in determining whether an arrangement amounts to acceptable tax avoidance. In order to reinforce the view that the level of discretion afforded to the judiciary is

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2 GAAR

3 s206(1) Finance Act 2013

4 s208 Finance Act 2013

5 s207(1) Finance Act 2013

6 *Ibid*

7 s207(2) Finance Act 2013

undesirable, the usefulness of the guidance on what amounts to abuse, according to the GAAR and the GAAR guidance, will be assessed, including, what does not qualify as abusive. The requirements within the GAAR guidance will also be examined as the GAAR legislation states that the courts must take it into consideration.[8] Consequently, when discussing the scope of the GAAR, it will be suggested that the targeted GAAR can be interpreted widely and has the potential to apply to a broad range of arrangements due to its inherent ambiguity.

The GAAR: An overview

The GAAR states that it applies to various taxes including; income tax,[9] corporation tax,[10] capital gains tax,[11] petroleum revenue tax,[12] inheritance tax,[13] stamp duty land tax[14] and annual tax on enveloped dwellings.[15] Despite the various judicial views on what amounts to acceptable and unacceptable tax avoidance, the GAAR "has imposed an overriding statutory limit on the extent to which taxpayers can go in trying to reduce their tax bill."[16]

The GAAR has two main objectives and was introduced to operate primarily as a deterrence aimed at taxpayers and prospective promoters of tax avoidance schemes.[17] The second objective of the GAAR is to "counteract the abusive tax advantage"[18] by requiring a tax adjustment to be made.[19] The GAAR was introduced by the Coalition Government in 2013 in order to tackle abusive tax arrangements.[20] The requirements of an abusive arrangement will be analysed to

8 s211(2)(a) Finance Act 2013

9 s206(3)(a) Finance Act 2013

10 s206(3)(b) Finance Act 2013

11 s206(3)(c) Finance Act 2013

12 s206(3)(d) Finance Act 2013

13 s206(3)(e) Finance Act 2013

14 s206(3)(f) Finance Act 2013

15 s206(3)(g) Finance Act 2013

16 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p5

17 Ibid

18 *Ibid,* p6

19 *Ibid*

20 s206 Finance Act 2013

ascertain what factors the judiciary may take into account when establishing whether a tax scheme is abusive.

The GAAR provisions

The GAAR's provisions are laid down in Part 5 of the Finance Act 2013. The GAAR is separated into three key stages. Firstly, there must be a tax advantage.[21] Secondly, there must be a tax arrangement which is also the point at which the main purpose test is utilised.[22] Lastly, the double reasonableness test is applied in order to establish whether an arrangement is abusive.[23] The GAAR does not apply unless the double reasonableness test is satisfied. Therefore, the first two stages of the test can be seen as the preliminary stages which filter the permissible arrangements.

Tax advantage

Significantly, the HMRC GAAR guidance admits that the scope of the term "tax advantage" is broad.[24] Such broadness "sets a low threshold."[25] Moreover, the guidance asserts that "it is likely that many transactions that would achieve some tax advantage will fall within this definition."[26] The GAAR has also provided a list of examples of what can constitute a tax advantage.[27] The broadest example is where a tax advantage is equated to the "avoidance or reduction of a charge to tax or an assessment to tax."[28]

Other benefits which would constitute a tax advantage include; a "relief or increased relief from tax",[29] a "repayment or increased repayment of tax"[30] an

21 s208 Finance Act 2013

22 s207(1) Finance Act 2013

23 s207(2) Finance Act 2013

24 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p9

25 *Ibid,* p17

26 *Ibid*

27 s208 Finance Act 2013

28 s208(c) Finance Act 2013

29 s208(a) Finance Act 2013

30 s208(b) Finance Act 2013

"avoidance of a possible assessment to tax",[31] a "deferral of a payment of tax or advancement of a repayment of tax"[32] and lastly, "avoidance of an obligation to deduct or account for tax".[33] The way in which a tax advantage has been described ensures that a diverse range of transactions will attract the GAAR. The definition of a tax advantage rightly should encompass reliefs, repayment and the avoidance of tax. However, it is questionable as to whether a deferral should amount to avoidance since tax is not being avoided completely.

Tax arrangement

The GAAR dissected the term abusive arrangement[34] and provided definitions for both words for tax purposes. A tax arrangement is described as being where "obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements."[35] The test can be criticised for the difficulty in determining whether tax avoidance was one of the main purposes as it would involve an exploration of all the possible purposes. Furthermore, as Krikorian explains, if a person discovers "new suggestions and possibilities... the final result can hardly be described as the realisation of a preconceived plan."[36] This test can also lead to examining the taxpayer's or their advisor's purpose and result in a purpose being imputed.

The GAAR does not explain in great detail the meaning of an arrangement. The legislation broadly states that an arrangement includes an; "agreement, understanding, scheme, transaction or series of transactions."[37] The GAAR guidance acknowledges that the definition of a tax arrangement undeniably "set[s] a low threshold"[38] for arrangements falling under the supposed targeted GAAR. Gammie has also remarked that the definition of a tax arrangement "encompass[es]

31 s208(d) Finance Act 2013

32 s208(e) Finance Act 2013

33 s208(f) Finance Act 2013

34 s207 Finance Act 2013

35 s207(1) Finance Act 2013

36 Krikorian, Y.H. *'The Meaning of Purpose',* [1930], The Journal of Philosophy, Vol. 27, No. 4, p98

37 s214 Finance Act 2013

38 'HMRC GAAR Guidance: Parts A, B and C' cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p9

most ordinary tax planning."[39] Moreover, others have also recognised that "any arrangements which have been structured in such a way as to give effect to tax advice, are likely to be caught."[40]

Other tax legislation has sought to delve deeper into the meaning of an arrangement. For example, under the Corporation Tax Act 2010, the legislation states what constitutes an arrangement for transferring reliefs according to what effect the arrangement has.[41] These effects are based on the different possible people who could receive payment and encompass a company,[42] a person connected with the company,[43] a partner[44] and "a person connected with another partner".[45] Therefore, the definition of an arrangement in the GAAR could also outline what effect each type of arrangement would have such as a circular scheme or a series of transactions carried out in quick succession.

The GAAR guidance also elucidates the flexibility of the term "arrangement". Interestingly, "the GAAR can be applied to an arrangement that is part of a wider arrangement or to the wider arrangement as a whole."[46] Therefore, the judiciary can select which the part of the arrangement the GAAR will be applied to. This provision is also reminiscent of how Lord Oliver in *Craven* described the underlying principle of *Ramsay*. He asserted that *Ramsay* promoted the use of establishing the "relevant transaction".[47] However, Lethaby justifiably argues that

> "the fact that elements of a commercially driven transaction can be isolated and treated as discrete tax arrangements for the purposes of applying the rules is particularly concerning."[48]

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39 Gammie, M. *"When is avoiding tax not abusive? Comparative approaches to a GAAR in Australia and the United Kingdom"*, [2013], 42 Australian Tax Review 279, p289

40 Gothard, C. and Austen, J. *"'Abusive' tax avoidance: what are the implications of HMRC's draft GAAR?",* [2012], Trusts and Trustees, Vol. 18 No. 9, 876-885, p878

41 s959(1) Corporation Tax Act 2010

42 *Ibid*

43 *Ibid*

44 *Ibid*

45 *Ibid*

46 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015,, p18

47 *Craven v White; IRC v Bowater; Property Developments Ltd v Gregory* [1988] 3 W.L.R. 423, [1989] A.C. 398, 499 (Lord Oliver)

48 Lethaby, H. *"Analysis- Reflections on Tax and the City",* [2014], Tax Journal Issue 1220, 10, p11

The main purpose test

The main purpose test gives the judiciary the opportunity to examine the arrangement's purpose.[49] Interestingly, Aaronson first envisaged the main purpose test to be subjective in his supplementary report, although it was acknowledged in the report that this would be inappropriate.[50] The apparent safeguard was entitled "arrangements without tax intent"[51] and initially, Aaronson believed that "there would be no need to give any thought to the GAAR in the context of transactions without any tax motivation."[52] Therefore, this shows that the initial conceptions of the main purpose test essentially examined the taxpayer's intentions to distinguish between acceptable and abusive tax avoidance. However, it was recognised that the "safeguard operated on the basis of subjective intent."[53] Although this appears to be a minor revelation, it is significant as it demonstrates that those who were involved in designing the GAAR believe that the term "intention" has subjective connotations. The subjective affiliations with intention are particularly important when examining the use of it in the double reasonableness test. The revelation is interesting as it provides an indication as to the mindset of those who formulated the GAAR. Moreover, it has been recognised by some practitioners that explicitly examining the absence of a tax intent would be unfeasible as it is "unlikely to be satisfied in any scenario where a taxpayer had sought professional advice."[54] However, in practice, schemes may truly fail due to the inclusion of fiscal advice.

Judges are at liberty creatively to interpret the facts to ascribe a purpose to the arrangements. However, this could also extend to scrutinising the taxpayer's purpose in embarking on the transactions, although Lord Clyde in *McGuckian* proclaimed that the taxpayer's purpose is irrelevant.[55] Similarly, the GAAR guidance echoes that "it is neither necessary nor appropriate to enquire whether

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49 s207(1) Finance Act 2013

50 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2012] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf, accessed 04.06.2016, p4

51 *Ibid*, p3

52 *Ibid,* p4

53 *Ibid*

54 Sullivan and Cromwell, *"UK Tax: General Anti-Abuse Rule"*, (Sullivan and Cromwell LLP, 16.07.2012), cited in https://www.sullcrom.com/siteFiles/Publications/SC_Publication_UK_Tax_General_Anti-Abuse_Rule_2.pdf, accessed 05.06.2016, p8

55 *IRC v McGuckian* [1997] 1 W.L.R. 991, 1006 (Lord Clyde)

any particular person... actually had that intention."[56] However, this can be interpreted as meaning that the relevant intention can be imputed without investigating whether the taxpayer actually had the intention. Despite the assurance that the taxpayer's intention is both an irrelevant and inappropriate consideration, the GAAR guidance acknowledges that an assessment of the objective purpose of the arrangement can coincide with the taxpayer's subjective intentions in practice.[57] This notion corresponds with the view that a purpose can also denote the "object [or] thing intended."[58] Therefore, although tax law exudes objectivity through emphasising the separateness of the taxpayer's intentions and the arrangement's purpose, the two influences are generally regarded as potentially similar in practice and can overlap. The GAAR guidance then discusses the taxpayer's purpose in the same context which suggests that the guidance views these terms as interchangeable.[59] Undoubtedly, there can be situations where a taxpayer intends to avoid tax and the main purpose of the arrangement is also to avoid tax. However, there may also be instances where there was no tax avoidance intention but due to a tax advantage gained, the courts infer a tax avoidance purpose.

The taxpayer's purpose is inextricably linked to the arrangement's purpose as the guidance explains that

> "it would be very rare to find a situation where objectively the obtaining of a tax advantage appeared to be one of the main purposes of an arrangement although, subjectively, the participators did not in fact have any such aim."[60]

Therefore, it is evident that HMRC views the arrangement's purpose as being virtually inextricably linked to the taxpayer's subjective purpose. This may suggest that the former formulation was devised in order to give the appearance of objectivity, when this was not the real intention. Consequently, the taxpayer's purpose may be sought under the guise of examining the arrangement's purpose.

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56 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p16

57 *Ibid*

58 Coulson, J., et al. *'The Oxford Illustrated Dictionary',* [1981], 2nd edn, Oxford University Press, Wiltshire, p686

59 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p16

60 Ibid

Deciding whether the tax advantage was the main purpose of the arrangement is deemed a seemingly simple task in the HMRC GAAR guidance. It states that a tax advantage would be considered the main purpose of an arrangement where it

> "would not have been carried out at all were it not for the opportunity to obtain the tax advantage; or where any non-tax objective was secondary to the benefit of obtaining the tax advantage."[61]

However, the guidance acknowledges that it would be a harder task to prove that a tax advantage was only one of the main purposes[62] which is perhaps why this part of the test should be excluded from the GAAR. It is important to acknowledge that if a tax advantage is only "one of the main purposes of the arrangement"[63], it presupposes the existence of another or other main purposes, as stated in *Ensign*.[64] Therefore, the task in uncovering whether the tax advantage was a main purpose is complicated by untangling the competing purposes. Consequently, the GAAR seeks to ascertain the "purposive result"[65] as advocated by Krikorian. The HMRC GAAR guidance advises that in order to establish whether the tax advantage was a main purpose, regard must be had to a two-fold test. The test seeks to uncover

> "whether a transaction which would otherwise have occurred has been reshaped or has been entered into under different terms and conditions, in order to change significantly the tax result that would otherwise have arisen, and where the desired tax result is itself a substantial objective."[66]

Therefore, the two key elements in the tests questions whether the arrangement has been reshaped or whether the terms and conditions have been constructed so as to bring about a different tax result had these methods not been utilised. There is much to consider in this test and it is unclear how the judiciary should apply the GAAR alongside the additional tests within the guidance. The test does not seem particularly helpful as it still involves a degree of judicial discretion and restructuring of the facts.

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61 *Ibid,* p17

62 *Ibid*

63 s207(1) Finance Act 2013

64 *Ensign Tankers (Leasing) Ltd. v Stokes* [1991] 1 W.L.R. 341, 355 (Sir Nicolas Browne-Wilkinson V.C.)

65 Krikorian, Y.H. *'The Meaning of Purpose',* [1930], The Journal of Philosophy, Vol. 27, No. 4, p97

66 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p17

The double reasonableness test

The GAAR does not imply that a tax arrangement alone is sufficient to amount to an abusive tax arrangement. Similarly, the main purpose test is also not conclusive of an abusive arrangement. This indicates that a tax advantage can be the main purpose of a genuine, non-abusive, transaction. The key term in the GAAR is "abusive" as this is what separates the GAAR from the pre-existing targeted anti-avoidance provisions.[67] What amounts to an abusive arrangement has been defined in the "crux of the GAAR"[68] which is the double reasonableness test. According to the GAAR, an arrangement is abusive where it "cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions."[69] The test is essentially twofold. It requires both the view of the judge making the decision and the arrangement to be reasonable. Therefore, "the two instances of reasonableness operate independently of each other."[70] The double reasonableness test is vague which is concerning given that it is regarded as "the most important of the protections… for responsible tax planning."[71] The test is pivotal as it determines whether the GAAR applies. Therefore, the double reasonableness test effectively decides the demarcation between abusive and non-abusive tax avoidance.

The issue of what is reasonable has been described as involving the "type of question that if you have to think about it for too long, you probably have a problem and should consider alternative transactions or steps."[72] However, many taxpayers and advisors are likely to consider carefully whether their arrangement can be viewed as reasonable, particularly as the untested GAAR is vague. It is difficult to know what is reasonable or, more importantly, what amounts to unreasonable and where the demarcation between reasonable or unreasonable tax avoidance is. There are various ways in which the term "reasonable" can be interpreted. Tax advisors, corporations and HMRC are all likely to have different interpretations as to whether an arrangement is reasonable. Therefore, the double

67 *Ibid*, p8

68 *Ibid,* p23

69 s207(2) Finance Act 2013

70 Clifford Chance, *"The draft GAAR: the 'double reasonableness' test"*, [2012], cited in https://www.cliffordchance.com/briefings/2012/09/the_draft_gaar_thedoublereasonableness test.html, p3

71 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p40

72 Tobin, J. J., *'Resorting to GAAR?'*, [2013], Tax Management International Journal 42.2, p102

reasonableness test is unhelpful to taxpayers and the judiciary. The Aaronson report attempts to provide an objective dimension to the double reasonableness test by stating that an arrangement would be reasonable

> "not only if the judge himself regards the arrangement as a reasonable exercise of choices of conduct but also, where he does not himself take that view, he nonetheless considers that such a view may reasonably be held."[73]

Reasonableness is an important concept in the GAAR. Gammie has asserted that

> "the United Kingdom has now decreed that taxpayers are not necessarily to be taxed according to the purpose of the Act and the reality of the arrangements but by reference to whether their tax arrangements can or cannot be characterised as reasonable."[74]

However, it would be more objective to consider whether the taxpayer should be taxed according to the specific words of the Act or the purpose of a particular provision.

Abusive according to the GAAR

Due to the vagueness of the double reasonableness test alone, the Finance Act 2013 goes on to detail three factors which the court should be mindful of when deciphering whether an arrangement is abusive. Firstly, the court is permitted to examine "the substantive results of the arrangements"[75] and whether these are "consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions."[76] The aforementioned provision is wide because it permits judges to develop general broad principles and also examine policy considerations. Canadian Courts have rightly viewed the formulation of policy by judges as undesirable as

> "to send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in

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73 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p64

74 Gammie, M. *"When is avoiding tax not abusive? Comparative approaches to a GAAR in Australia and the United Kingdom"*, [2013], 42 Australian Tax Review 279, p292

75 s207(2)(a) Finance Act 2013

76 *Ibid*

> the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped."[77]

The provision regarding policy considerations has received criticism for being "a radical and untested departure from the established principles of statutory interpretation that [is]... unique to English law."[78] This is because "*Ramsay* did not alter the principle that the court must look to the words of an act of Parliament to ascertain Parliament's intentions."[79] However, the

> "GAAR departs from this principle by requiring the taxpayer (and, ultimately, the court) to consider the 'principles' underlying a given legislative provision and, even worse, their policy objectives. Gone is the rule that Parliament's words are the guide to its intentions."[80]

Moreover, Gothard and Austen argue that

> "how a taxpayer is supposed to divine with any certainty the 'principles' purportedly underlying a given statutory provision or the relevant policy objectives- particularly in such unchartered legal territory- is not explained."[81]

The GAAR also allows an investigation into the method of executing the transactions in order to determine "whether the means of achieving those results involves one or more contrived or abnormal steps."[82] There is no guidance on what would amount to an abnormal step which indicates that the judiciary can use their discretion in relation to how an abnormal step is defined. This provision is also reminiscent of the approach taken in *McGuckian* where Lord Browne-Wilkinson held that the abnormal transactions should be ignored and the legislation should be applied to the resulting arrangement in a holistic manner.[83] However, the GAAR does not suggest that any abnormal steps should be ignored. Instead, the abnormal step will be regarded as abusive, which relieves the courts of the task of imagining what the arrangement would look like had the abnormal step not been inserted. The existence of an abnormal step would point to abuse. As *McGuckian* favoured and built on the *Ramsay* approach, it can be said that the GAAR has been

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77 *Canada Trustco Mortgage Co. v R* [2005] 2 S.C.R. 601, [41] (per curiam)

78 Gothard, C. and Austen, J. *"'Abusive' tax avoidance: what are the implications of HMRC's draft GAAR?",* [2012], Trusts and Trustees, Vol. 18 No. 9, 876-885, p879

79 *Ibid*, p880

80 *Ibid*

81 *Ibid*

82 s207(2)(b) Finance Act 2013

83 *IRC v McGuckian* [1997] 1 W.L.R. 991, 996 (Lord Browne-Wilkinson)

influenced by *Ramsay* and its supporting cases. Therefore, the advent of the GAAR has generated a shift from "a judicial GAAR to a legislative GAAR."[84]

Lastly, in determining whether an arrangement is abusive, the courts can also deliberate on "whether the arrangements are intended to exploit any shortcomings in those provisions."[85] This provision is important as it indicates that the judiciary can examine the taxpayer's intentions to determine whether the design of the arrangement was constructed so as to take advantage of loopholes in the tax system. However, as Anscombe recognised, a person's intention can "often not be seen from seeing what he does."[86] As aforementioned, even HMRC acknowledge that there is an overlap between the arrangement's purpose and the taxpayer's intentions. The judiciary are therefore permitted to examine the arrangement's purpose in the main purpose test as well as the taxpayer's intentions. This clearly indicates that they are two distinct considerations. In this instance, the Finance Act 2013 has sought to include the more subjective term "intention" which can more easily be equated to the taxpayer's intentions. The provision also serves to cloud the demarcations between abusive and non-abusive tax avoidance. By associating a tax avoidance intention with unacceptable tax avoidance, it implies that those engaging in legitimate tax avoidance schemes must do so without the corresponding intention. However, Anscombe argued that intentional actions cannot be recognised by "any extra feature which exists when it is performed."[87] Moreover, there is a

> "inherently objective nature of tax avoidance; intention on the part of the taxpayer, which constitutes an essential element of evasion, is not required as a condition for the existence of avoidance."[88]

The aforementioned provision regarding exploiting Parliament's shortcomings has attracted strong criticism for facilitating the "transferred fault of the citizen and not the responsibility of the Executive who perpetrated it."[89] Greenberg has largely based his criticisms on the addition of the term "shortcoming" in the provision.[90]

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84 Lethaby. H, *'Aaronson's GAAR',* [2012], British Tax Review 27, p28

85 s207(2)(c) Finance Act 2013

86 Anscombe, G.E.M. *'Intention',* [1963], 2nd edn, Basil Blackwell, Oxford, p9

87 *Ibid,* p28

88 *Direct Cosmetics Ltd and Laughtons Photographs Ltd v Commissioners of Customs and Excise* (C-138/86) [1988], [22] (per curiam)

89 Greenberg. D, *'Dangerous Trends in Modern Legislation',* [2015], Public Law 96, p101

90 *Ibid*

The worrying implication is that

> "if the drafter and the Executive get a particular piece of fiscal legislation "wrong", in the sense that they fail to achieve what they might have wished to achieve, they can absolve themselves of any responsibility, and transfer responsibility to the citizen."[91]

Greenberg therefore insinuates that the taxpayer is used as a scapegoat for lawfully taking advantage of inadequacies in tax legislation. Others have also remarked "that HMRC and parliamentary draftsmen may use [the] GAAR as a cover for inadequate draftsmanship."[92]

The burden is on the taxpayer to uncover what the legislation ought to tackle and if not, "penalise him or her for not working out what it was intended to achieve and how Parliament and the Executive meant to achieve it."[93] Moreover, Gammie also argues that

> "the UK GAAR is based on the wrong premise and does little to improve the tax system and address its manifest 'shortcomings'. An objection to the GAAR is that it tolerates such shortcomings rather than addresses them."[94]

An apparent safeguard is that the burden is on HMRC to establish whether an arrangement amounts to an abusive arrangement.[95] The GAAR guidance had anticipated views such as Greenberg's and has asserted that these views in particular are "wholly inconsistent with one of the basic purposes of the GAAR, namely to deter or counteract the deliberate exploitation of shortcomings in legislation."[96] By the inclusion of the term "deliberate"[97], the GAAR guidance indicates that tax avoidance must be intentional. Nevertheless, it does raise the argument of why the shortcomings were not blocked in the first place rather placing a blanket ban on avoidance with the onus on the taxpayer to respect Parliament's shortcomings.

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91 *Ibid*

92 Gothard, C. and Austen, J. *"'Abusive' tax avoidance: what are the implications of HMRC's draft GAAR?",* [2012], Trusts and Trustees, Vol. 18 No. 9, 876-885, p880

93 Greenberg. D, *'Dangerous Trends in Modern Legislation',* [2015], Public Law 96, p101

94 Gammie, M. *"When is avoiding tax not abusive? Comparative approaches to a GAAR in Australia and the United Kingdom"*, [2013], 42 Australian Tax Review 279, p292

95 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p10

96 *Ibid,* p25

97 *Ibid*

Due to the ambiguous nature of the double reasonableness test, the GAAR has also sought to elucidate on what amounts to an abusive arrangement by outlining three key points which are indicative of abuse. Firstly, the GAAR warns that an arrangement resulting in profit which is "significantly less than the amount for economic purposes"[98] would be regarded as abusive. The provision is very unclear as the term "economic purposes" has not been defined in the GAAR nor guidance therefore, it is difficult to ascertain what that amount is and consequently, how low a profit must be in order to constitute abuse. Gammie has also argued that

> "an economist would not think it especially helpful to refer to 'the amount for economic purposes' and a reference to the financial outcome or result of the arrangements might have been better."[99]

If it is presumed that the term "economic purposes" refers to a tax advantage, the requirement means that the arrangement must obtain a higher profit than the tax advantage gained. However, this is a speculative interpretation of this provision therefore, it can be interpreted in other ways. For example, "economic purposes" could also refer to the amount of profit which one would have in a similar arrangement under slightly different terms. In this case, the aforementioned provision indicates that if the profit is significantly less than profit resulting from a similar arrangement, it would indicate abuse. As it is unclear what "economic purposes" means, it not only causes confusion and inconsistency in adjudication but it does little to provide guidance as to what will be considered abusive.

Secondly, if the arrangement "result[s] in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes,"[100] the arrangement may be held to be abusive. The provision may simply be indicating that large losses or unusually generous deductions are indicative of abuse. However, due to the inclusion of the elusive term "economic purposes", it is difficult to attribute concrete meaning to this provision. The deductions and losses must be much less than the "amount for economic purposes"[101] which may mean that the deductions and losses must be less than the overall tax advantage gained. However, without explicit confirmation by Parliament, it is difficult to interpret this provision accurately.

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98 s207(4)(a) Finance Act 2013

99 Gammie, M. *"When is avoiding tax not abusive? Comparative approaches to a GAAR in Australia and the United Kingdom"*, [2013], 42 Australian Tax Review 279, p289

100 s207(4)(b) Finance Act 2013

101 *Ibid*

Lastly, wherever an arrangement leads to a "repayment or crediting of tax [that]…is unlikely to be paid"[102] it may be conclusive of an abusive arrangement. Despite these calculation-based and objective tests which are indicative of abusive, the GAAR has a significant caveat which colours the objective provisions with an important requirement which is subject to judicial discretion. Although the three aforementioned examples would point to an abusive arrangement, the GAAR specifies that these situations would only amount to abuse if "such a result was not the anticipated result when the relevant tax provisions were enacted."[103] Therefore, the GAAR leaves open scope for considerable judicial discretion to ascertain whether Parliament had foreseen such results and if it is decided that Parliament had not foreseen the result, it amounts to an abusive arrangement. This provision is important as it suggests that ultimately, the GAAR will apply in all circumstances where the judiciary believe that Parliament had not anticipated the result of the arrangement. While it is generally accepted that the courts can seek to ascertain Parliament's intentions, there is less justification for judges to have the task of barring arrangements which Parliament had not even contemplated. Moreover, "there is often fierce debate, at least in Australia, about what was or was not within the contemplation of Parliament when enacting a specific provision."[104] However, courts may decide what Parliament did not intend by examining whether the arrangement falls within the wording of the statute when read literally or purposively.

The breadth of the GAAR is therefore wide and unclear. Although the GAAR is seemingly targeted through specifying that it should only apply to abusive arrangements, the definition of an abusive arrangement branches out in order to define what is an abusive arrangement, an arrangement and what is abusive. The assortment of tests which these definitions contain are wide and leaves the judiciary with little limitations or guidance in adjudication. Therefore, "the concept of 'abusiveness', which seems so clear to politicians, activists and columnists, is near-impossible to define satisfactorily in the context of the UK tax code."[105]

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102 s207(4)(c) Finance Act 2013

103 *Ibid*

104 Pagone, G.T. *"Aspects of tax avoidance: Trans-Tasman Observations"*, [2011], Australian Tax Review 40, p155

105 Gothard, C. and Austen, J. *"'Abusive' tax avoidance: what are the implications of HMRC's draft GAAR?",* [2012], Trusts and Trustees, Vol. 18 No. 9, 876-885, p879

Abuse according to the GAAR guidance

The HMRC GAAR guidance describes the double reasonableness test as not being as simple as it appears in an attempt at ensuring objectivity and minimising judicial discretion. The guidance states that judges should not base their decisions on whether they believe the arrangement is unreasonable or not.[106] However, if an arrangement cannot be regarded as reasonable, it is analogous to regarding the arrangement as unreasonable. The GAAR would be made clearer if principles were laid down to explain what would be deemed unreasonable rather that than what is reasonable. A single unreasonableness test would work better as it is far simpler to explain what is not permitted rather than what is permitted.

In an attempt to avoid subjectivity, the guidance states that judges must study "the range of reasonable views that could be held in relation to the arrangements."[107] However, this guidance is unhelpful as it does little to remedy the problem of subjectivity inherent in the double reasonableness test. The application of the test is further obscured by the possibility of a multitude of views arising as to the reasonability of the arrangement. The guidance states that where there exists a view which regards the arrangement as being reasonable, "it is necessary to test that view to see whether that view itself can be regarded as reasonable."[108] The requirements of tediously evaluating the reasonable views then testing the reasonability of the view in favour of the arrangement arguably creates a stratified GAAR, layered by the obligation to investigate and then test the views. The complexity of the double reasonableness test may instead lead to judges analysing whether, in their view, based on common law principles, the arrangement can be considered unreasonable. Furthermore, although the test is presumably designed to appear as if it is setting a higher threshold for tax avoidance, judges are still at liberty to define what is reasonable.

The vagueness of the double reasonableness test fuels uncertainty and inevitable judicial discretion, although the GAAR guidance states that a targeted GAAR "would help reduce the risk of stretched interpretation and the uncertainty which

106 *'HMRC GAAR Guidance: Parts A, B and C',* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p24

107 *Ibid*

108 *Ibid*

this entails."[109] Significantly, HMRC acknowledges that discretion leading to wide interpretation leads to uncertainty which is undesirable.

The GAAR Advisory Panel is important as the GAAR states that the judiciary "must take into account… any opinion of the GAAR Advisory Panel about the arrangements."[110] Moreover, the guidance provides a safeguard to taxpayers in relation to the double reasonableness test which requires HMRC to consult with the independent advisory panel as to whether the taxpayer's actions were reasonable before the GAAR is applied.[111] However, the extent to which this safeguard will protect taxpayers is uncertain as the advisory panel will merely be consulted. Consequently, if the taxpayer's actions are deemed to be an unreasonable course of action by the advisory panel, the ultimate decision lies with the judiciary to apply the wide GAAR provisions using their discretion. Although, the GAAR guidance also reiterates that the views of the advisory panel can be considered by the court.[112]

What is not abusive

Another form of defence to the taxpayer is contained in s207(5) Finance Act 2013 where it lays down in what circumstance an arrangement would not be viewed as abusive. The defence is a twofold test that requires an arrangement to firstly "accord with established practice"[113] which the GAAR guidance states is "published material."[114] Secondly, in relation to the evidenced practice, HMRC must have also "indicated its acceptance of that practice".[115] The guidance also

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109 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p5

110 s211(2)(b) Finance Act 2013

111 *'HMRC GAAR Guidance: Parts A, B and C',* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p10

112 *Ibid,* p32

113 s207(5) Finance Act 2013

114 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p26

115 s207(5) Finance Act 2013

infers that the location of where the acceptance is published is key to determining whether HMRC accepts the practice.[116] Acceptance of the practice may be published "from HMRC, or textbooks or articles in journals"[117] which includes a vast array of material. However, the guidance widens this selection of materials by adding that acceptance can also be indicated "by other evidence of what had become a common practice by the relevant time."[118] This is less specific as it can encompass many sources. Although, it would have been useful if the guidance was more specific by citing a particular source such as case law. The reason that vague sources are unhelpful is that, in practice, HMRC may exclude particular sources for not coming within the scope of their preferred source list to the detriment of the taxpayer.

The published information alone cannot provide a defence to taxpayers unless HMRC also clearly indicates that it supports the practice. Therefore, this particular defence is extremely narrow and inevitably, subject to change. The two-stage test makes it difficult for taxpayers to satisfy both stages which renders the safeguard minimally protective.

The disclosure of tax avoidance schemes[119] regime may also be relevant in determining what is not abusive. The regime requires that "certain people must provide information to HMRC about avoidance schemes within 5 days of the schemes being made available or implemented."[120] Therefore, if HMRC have advanced notice of a scheme from the taxpayer and HMRC has indicated that it is content with it, the taxpayer's scheme is less likely to attract the scrutiny of the GAAR. This is because HMRC has not objected to the scheme. Consequently, schemes which pass the scrutiny of the DOTAS regime can be deemed not to be abusive.

116 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p26

117 *Ibid*

118 *Ibid*

119 DOTAS

120 HMRC, *"Disclosure of tax avoidance schemes",* https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview accessed 09.01.2018

The scope of the GAAR

The GAAR's intended scope is "targeted at abusive arrangements."[121] The alleged targeted nature of the GAAR has been designed by the GAAR study group in order to avoid "a broad spectrum general anti-avoidance rule [which] would *not* be beneficial for the UK tax system."[122] The GAAR "began life as a general anti-avoidance rule but was re-designated a general anti-abuse rule."[123] The GAAR study group has acknowledged that creating a broader rule may result in "undermining the ability of business and individuals to carry out sensible and responsible tax planning."[124] Therefore, it is essential that the scope of the GAAR has clearly identifiable limitations for the sake of economic growth, if not for the ease of compliance for the taxpayer.

The scope of the GAAR is particularly important as the legislative rules of the GAAR take precedence over common law rules. As aforementioned, the GAAR is aimed at "counteracting tax advantages arising from tax arrangements that are abusive."[125] The GAAR guidance itself attributes a wide definition to a tax arrangement which it admits will encompass many arrangements.[126] It is uncertain why a targeted GAAR would have supplementary guidance indicating that a vast amount of arrangements can fall within the legislation. The GAAR guidance is influential as it can be used as an aid to interpretation of the GAAR.[127] Gammie has also stated that under the GAAR, "anything is an arrangement and everything is a tax advantage"[128] which also reinforces the argument that the GAAR is wide.

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121 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p4

122 *Ibid,* p3

123 Gething, H. and Silverman, A. *"What Canada's GAAR experience can tell us about new UK rules"*, [2013] 24 International Tax Review 56, p56

124 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p3

125 s206(1) Finance Act 2013

126 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p17

127 *Ibid,* p3

128 Gammie, M. *"When is avoiding tax not abusive? Comparative approaches to a GAAR in Australia and the United Kingdom"*, [2013], 42 Australian Tax Review 279, p287

The GAAR was "intended to apply only to egregious, or very aggressive, tax avoidance schemes."[129] However, Lethaby has perceptively recognised that what amounts to egregious tax planning "necessarily imply value judgements"[130] which insinuates the scope for subjectivity. Abusive tax avoidance schemes which are deemed "GAAR-able"[131] are therefore placed in this category using discretion. Lethaby recognises that the GAAR embodies Parliament's will.[132] However, she stated that

> "that is not to say that I necessarily agree that the GAAR is appropriately narrowly framed so as to catch only the most 'egregious' transactions at which it was allegedly targeted. I don't agree".[133]

Furthermore, the case law on tax avoidance has illustrated that the judiciary have been probing the taxpayer's intentions. Therefore, the GAAR can be said to "simply serve to legitimise a discretion that the courts are already exercising."[134] Consequently, whilst the GAAR "should not affect the large centre ground of responsible tax planning"[135], there is no guarantee that it will not do so in practice. However, Freedman makes the very compelling argument that "even if legitimisation were the only outcome, then this would be a worthwhile one".[136] Constitutional legitimisation is invariably important although, the design of the GAAR must have identifiable boundaries for taxpayer certainty.

As well as the provisions being wide, the GAAR guidance also widens normal rules of evidence in relation to abusive arrangements.[137] The court can examine

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129 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p25

130 Lethaby. H, *'Aaronson's GAAR',* [2012], British Tax Review 27, p32

131 *Ibid,* p33

132 Lethaby, H. *"Analysis- Reflections on Tax and the City",* [2014], Tax Journal Issue 1220, 10, p11

133 *Ibid*

134 Lethaby. H, *'Aaronson's GAAR',* [2012], British Tax Review 27, p28

135 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p28

136 Freedman. J, *'GAAR as a Process and the Process of Discussing the GAAR',* [2012], British Tax Review 22, p24

137 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__

"all relevant material, whether or not such material would be admissible in court proceedings under the normal rules of evidence."[138] The GAAR also takes precedence over tax legislation to which it applies.[139]

The requirement of whether Parliament had anticipated the resulting arrangement is crucial in determining abuse. However, this provision is broad as

> "the GAAR moves away from a focus on what Parliament intended to a focus on what Parliament anticipated, and allows the courts to have regard to a wider range of material as evidence of what was anticipated."[140]

The analysis of the GAAR's scope demonstrates that there is an "unspecified boundary set by the GAAR beyond which taxpayers stray at their peril".[141] The GAAR guidance has provided specific definitions for key terms in the GAAR and these are left purposely broad. Therefore, if there was any uncertainty over whether specific terms of the GAAR should be interpreted widely, the guidance confirms that this is the correct approach. Consequently, the scope of the targeted GAAR is obscured by ambiguity and the further "uncertainty as to what even the architects of the draft GAAR intend to be caught by it."[142] There is also the general parallel concern of "whether such schemes can be accurately targeted"[143] which suggests that a targeted GAAR is understandably challenging to design due to the inherent complexity in tax avoidance schemes.

The Aaronson Report

It is useful to analyse the recommendations and draft GAAR laid down in the Aaronson Report in order to establish what it recommended, why these recommendations were made and the extent to which the final legislation bears resemblance to the report's recommendations. It will be helpful to examine

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HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p32

138 *Ibid*

139 s212(1) Finance Act 2013

140 Lord Reed, R. *"Anti-avoidance principles under Domestic and EU law",* [2016], British Tax Review 288, p289

141 Gammie, M. *"When is avoiding tax not abusive? Comparative approaches to a GAAR in Australia and the United Kingdom"*, [2013], 42 Australian Tax Review 279, p283

142 Lethaby. H, *'Aaronson's GAAR',* [2012], British Tax Review 27, p35

143 Freedman. J, *'GAAR as a Process and the Process of Discussing the GAAR',* [2012], British Tax Review 22, p24

whether the problems which the Aaronson report sought to avoid can be avoided with how the final draft of the GAAR was written.

The scope of the GAAR was not intended to be wide as the Aaronson Report acknowledged that "a broad spectrum general anti-avoidance rule would *not* be beneficial for the UK tax system."[144] Similarly, Aaronson recognised that, prior to the implementation of the GAAR, "judges inevitably…[were] faced with the temptation to stretch the interpretation"[145] of taxing statutes and that this caused uncertainty.[146] However, as aforementioned, the scope of the GAAR is potentially wide and heavily relies on judicial discretion. Consequently, the GAAR is capable of being applied to more than "the most egregious tax avoidance schemes".[147]

The enacted GAAR is targeted at a wider range of taxes than laid down in the Aaronson Report. The report only envisaged "income tax, capital gains tax, corporation tax and petroleum revenue tax"[148] to be covered by the GAAR. However, the enacted GAAR extended the recommendations made by Aaronson to cover inheritance tax,[149] stamp duty land tax[150] and annual tax on enveloped dwellings.[151] Therefore, the enacted GAAR is undoubtedly wider than the scope envisaged by the Aaronson Report. It was also recommended that stamp duty land tax should only be included within the GAAR's remit once the GAAR was "seen to operate fairly and effectively".[152] However, this recommendation went unheeded.

As well as differences in the intended scope of the GAAR, the Aaronson Report also made it clear that "where there can be reasonable doubt as to which side of the line any particular arrangement falls on, then that doubt is to be resolved in

144 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in <http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 25.08.2014, p3

145 *Ibid,* p5

146 *Ibid*

147 *Ibid,* p20

148 *Ibid,* p7

149 s206(3)(e) Finance Act 2013

150 s206(3)(f) Finance Act 2013

151 s206(3)(g) Finance Act 2013

152 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p7

favour of the taxpayer."[153] This reasoning was adopted from the words of Salmon L.J. in *Fleming v Associated Newspapers*[154] wherein he stated that "if in a taxing statute words are reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject".[155] However, no such assurances were made in the GAAR. Instead, the GAAR guidance states that where an arrangement could be regarded as reasonable, that view must then be tested as to its reasonableness.[156]

The Aaronson Report states that, in applying the GAAR,

> "the starting point should be to see whether the arrangement is abnormal, in the sense of having abnormal features specifically designed to achieve a tax advantageous result."[157]

The effect of examining abnormalities in the early stages of the GAAR means that "if there is no such feature then it is immediately dismissed from consideration."[158] However, the GAAR only examines the existence of abnormal steps at the final stage when considering whether an arrangement is abusive. The approach taken by Aaronson would have ensured that arrangements which are not abusive are dismissed at an earlier stage.

Despite the differences between the Aaronson Report and the final GAAR, there are some similarities. For example, the double reasonableness test is similar to the Aaronson Report's equivalent that "the arrangement *cannot* reasonably be regarded as a reasonable exercise of choice."[159] Similarly, the main purpose test in the draft GAAR also closely resembles the main purpose test in the Aaronson Report.[160]

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153 *Ibid,* p28

154 *Fleming v Associated Newspapers* [1971] 3 W.L.R. 551, [1972] Ch. 170

155 *Ibid,* 192 (Salmon J.)

156 *'HMRC GAAR Guidance: Parts A, B and C'* cited in <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf>, accessed 24.12.2015, p24

157 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in <http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 25.08.2014, p31

158 *Ibid*

159 *Ibid,* p33

160 *Ibid,* p45

As aforementioned, the GAAR does examine the taxpayer's intentions.[161] The draft GAAR in the Aaronson Report also examines the taxpayer's intentions.[162] Nevertheless, the report states that it is "unlikely that arrangements which have no tax intent at all would in fact give rise to a tax advantage. However, that is nonetheless possible."[163] Aaronson gives the case of *Five Oaks Properties Ltd v HMRC*[164] as an example of where there was no intention to gain a tax advantage despite the possibility of a tax advantage being made. The case concerned five appellant companies which were all part of the Tribeca Group and previously members of the Delancey Group. The issue was whether the losses incurred by these companies, prior to the merging with the Tribeca Group, could be used to offset gains made by another company within the Tribeca Group.[165] Although HMRC conceded that the "transactions were not pre-planned as part of a tax avoidance scheme",[166] the Special Commissioners held that the pre-entry loss rules prevented the companies from offsetting their losses against the gain made by a company in the same group. It was recognised that

> "the pre-entry loss legislation fails to deal with the present factual situation, which it is common ground, results from commercial transactions not intended to avoid the effect of the legislation."[167]

Therefore, the case illustrates how examining intentions is an unreliable consideration.

The Aaronson report also states that "it is not necessary to demonstrate that the promoter of the arrangement or the parties to it subjectively intended the abnormal feature to have such purpose".[168] Moreover, the Aaronson report provides "that the absence of intent must be shown to extend to every person involved in the

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161 s207(2)(c) Finance Act 2013

162 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in <http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 25.08.2014, p44

163 *Ibid,* p35

164 *Five Oaks Properties Ltd v HMRC* [2006] STC (SCD) 769

165 *Ibid* [3.2] (John F. Avery Jones)

166 *Ibid* [3.6]

167 *Ibid,* [4.1]

168 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in <http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 25.08.2014, p61

planning and execution of the arrangement."[169] This formulation of examining the taxpayer's intentions is wider than required by the GAAR. However, the Aaronson report illustrates that there is scope to examine the intentions of all involved in the scheme which could mean imputing the intention of a tax advisor on the taxpayer. The requirement that every participant of the scheme must not have an intention to gain a tax advantage also sets a low bar for unacceptable tax planning which could widen the scope of the GAAR.

Where the GAAR mentions the term "economic purposes"[170] in relation to whether an arrangement can be regarded as abusive, this term has not been defined. However, the Aaronson Report provides a better understanding as to what this term means. Consequently, Aaronson states that an arrangement would be regarded as abusive where that

> "arrangement would, apart from the operation of this Part, result in receipts being taken into account for tax purposes which are significantly less than the true economic income profit or gain".[171]

Similarly, an arrangement would also be regarded as abusive where that

> "arrangement would, apart from the operation of this Part, result in deductions being taken into account for tax purposes which are significantly greater than the true economic cost or loss".[172]

Therefore, it is clear that the "economic purposes" requirement refers to profit and losses. However, this is not made clear in the GAAR. Hence, this term can still be open to interpretation.

The Aaronson Report also includes hallmarks of abuse which were not included in the GAAR. For example, an indication of abuse is where "the arrangement includes a transaction at a value significantly different from market value, or otherwise on non-commercial terms".[173] The report also states that an arrangement could be regarded as abusive where "the arrangement, or any element or it, is

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169 *Ibid,* p64

170 s207(4)(a) and s207(4)(b) Finance Act 2013

171 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in <http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf> accessed 25.08.2014, p47

172 *Ibid*

173 *Ibid*

inconsistent with the legal duties of the parties to it".[174] Moreover, the report outlines how an arrangement is likely to be abusive where "a person, a transaction, a document or significant terms in a document, which would not be included if the arrangement were not designed to achieve an abusive tax result".[175] In addition to these factors, other indications of abuse include where an

> "arrangement omits a person, a transaction, a document or significant terms in a document which would not be omitted if the arrangement were not designed to achieve an abusive tax result".[176]

Furthermore, an arrangement could be abusive where it

> "includes the location of an asset or a transaction, or of the place of residence of a person, which would not be so located if the arrangement were not designed to achieve an abusive tax result."[177]

These factors are all objective considerations which would limit the amount of discretion exercised by the judiciary when deciding whether an arrangement is abusive.

The report lists material which can be considered when deciding whether an arrangement is abusive. The list in the Aaronson Report resembles the list in the GAAR. However, the Aaronson report states that the courts may take into account "evidence of practice commonly adopted at the time of the arrangement".[178] However, the GAAR states that HMRC must have "indicated its acceptance of that practice"[179] in order for an arrangement to be considered unabusive.

Conclusion

There are various problems with the provisions of the UK GAAR. The judiciary may be able conclusively to decide that an arrangement is unacceptable where a tax advantage was the main purpose of the arrangement. However, it is much more difficult to establish whether a tax advantage was one of the main purposes of embarking on the arrangement due to the existence of other purposes. The exercise of deciphering which purposes are the main purposes and which are the

174 *Ibid*

175 *Ibid*

176 *Ibid*

177 *Ibid*

178 *Ibid,* p50

179 s207(5) Finance Act 2013

subordinate purposes hinders the job of the courts. Furthermore, there is no definition or helpful guidance as to what amounts to abuse in the double reasonableness test which confers significant discretionary power in the hands of the judiciary. Moreover, the existence of the double reasonableness test unrealistically implies that a tax advantage can be the main purpose of an arrangement which HMRC deem acceptable.

One of the crucial challenges in the GAAR is the fact that where the GAAR outlines what is abusive, the term "economic purposes"[180] has not been defined at all. However, despite the various tests, the GAAR suggests that the main issue is whether or not Parliament can be said to have anticipated the arrangement.[181] The GAAR guidance also does not help to define what amounts to an abusive arrangement. Furthermore, the GAAR's equivocal list about what is abusive is unhelpful as it cites many sources which could be utilised by HMRC and is subject to change.

Notably, the GAAR ensures that both the terms purpose and intention are included, suggesting that the GAAR seeks to examine both, and that Parliament recognises that the terms are distinct. The purpose of the arrangement is mentioned in the main purpose test and the taxpayer's intentions are sought in s207(2)(c) of the Finance Act 2013. The principle in the EU case of *Halifax Plc and others v Customs and Excise Commissioners*[182] *(Halifax)* established that if there is more than one purpose, the arrangement would not be considered abusive.[183] If the UK were to adopt a *Halifax*- style approach to the GAAR, it would bring tax avoidance in line with the legislation on expenditure which requires that the expenditure "incurred wholly and exclusively for the purposes of the trade."[184]

The supplementary report also admitted that the taxpayer's intentions should not be considered because of its subjective connotations.[185] To reinforce that intentions

180 s207(4)(a) and s207(4)(b) Finance Act 2013

181 s207(4)(c) Finance Act 2013

182 *Halifax Plc and others v Customs and Excise Commissioners* (C-255/02) [2006] Ch. 387

183 *Ibid,* 436 (Advocate General Poiares Maduro)

184 s34(1)(a) ITTOIA 2005

185 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2012] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf, accessed 04.06.2016, p4

are irrelevant, the GAAR guidance also echoed this.[186] Including the taxpayer's intentions as a factor in determining abuse only serves to conclude the GAAR's sub-tests are yet another factor which is open to interpretation. Too much discretion can lead to judges imputing an intention on the taxpayer that they did not intend.

The GAAR guidance adds little substance to GAAR and its recommendations arguably make the taxpayer's case more likely to fail. For example, the guidance states that the double reasonableness test can be answered by examining all the possible reasonable views.[187] However, where one of those views regards the taxpayer's arrangement as being reasonable, that view itself is then subject to scrutiny as to whether it is reasonable.[188] This approach arguably stretches the double reasonableness test further and creates a triple reasonableness test. As aforementioned, the first reasonableness requirement derives from the double reasonableness test and assesses the reasonableness of the judge's view.[189] The second reasonableness requirement also derives from the double reasonableness test and evaluates whether the arrangement can be deemed reasonable.[190] The third reasonableness requirement derives from the GAAR guidance which states that where there exists a view which regards the arrangement as being reasonable, this view must be assessed as to its reasonableness.[191] The excessive reliance on subjective reasonableness merely serves to weaken the taxpayer's position as the GAAR guidance does not state that a view which rejects the taxpayer's arrangement must also be tested for its reasonableness.

The scope of the GAAR appears to be wide, although it is designed to be targeted. This is undesirable as it is overly dependent on judicial discretion and subjective interpretations of key provisions. The GAAR has attempted to explain its provisions by including definitions of some of the key words including; tax

186 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p16

187 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p24

188 *Ibid*

189 s207(2) Finance Act 2013

190 *Ibid*

191 *'HMRC GAAR Guidance: Parts A, B and C'* cited in https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399270/2__HMRC_GAAR_Guidance_Parts_A-C_with_effect_from_30_January_2015_AD_V6.pdf, accessed 24.12.2015, p24

advantage, abusive, arrangement and abusive arrangement taken as a whole. The definitions of these fundamental terms are broad. This is recognised by the GAAR guidance[192] however, it has two important caveats which restrain judicial creativity. Firstly, even if an arrangement falls within the definition of the GAAR and the purpose or one of its main purposes is the avoidance of tax,[193] it must amount to an abusive arrangement as defined by the double reasonableness test.[194] Secondly, abuse is defined broadly and there are many factors which constitute abuse, as laid down in the GAAR and GAAR guidance. However, even where one of these factors are satisfied, an arrangement will only be considered abusive where the result was not anticipated by Parliament.[195] As aforementioned this latter safeguard is extremely broad and the judiciary can widely interpret what Parliament intended. Disconcertingly, HMRC itself admits that wide interpretation leads to uncertainty.[196]

192 *Ibid*, p9

193 s207(1) Finance Act 2013

194 s207(2) Finance Act 2013

195 s207(4)(c) Finance Act 2013

196 Aaronson. G, *'A Study to Consider whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System',* [2011] cited in http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf accessed 25.08.2014, p5