The Plenary Panel

Chair: Jan de Goede (IBFD)
Panellists: Miranda Stewart (University of Melbourne, Australia), Naoki Oka (National Tax Agency, Japan), Sunny Choong (Standard Chartered Bank, Singapore), Brendan Brown (Russell McVeagh, New Zealand)

Summary of discussion

(a) Background

This is a challenging topic which has received a lot of attention over the last few years, most recently in the context of the OECD base erosion and profit shifting (BEPS) initiative. The discussion focused on the following three aspects of the topic from the perspective of academic, government, business and tax consultancy:

– general anti-avoidance rules (GAARs);
– GAARs and specific anti-avoidance rules (SAARs); and
– the blurring of the concepts of tax evasion, tax avoidance and (aggressive) tax planning, and the way forward.

(b) What is a GAAR? (Miranda Stewart)

A GAAR is a general legislative rule that overrides taxpayer arrangements that would otherwise satisfy the literal meaning of tax law provisions. Some countries, e.g., Australia (from 1915) have always had a GAAR in their income tax law. A GAAR is not:

– a doctrine of sham (a common law "sham" applies if the parties have created a "disguise" to hide legal reality and a GAAR overrides legally effective transactions);
– an economic equivalence or "substance" approach;
– a statutory interpretation to prevent abuse (a GAAR overrides transaction allowed under correct interpretation of particular tax provisions); or
– criminal sanctions against evasion.

Key features of Australian GAAR were then considered by the Plenary.

(c) Aspects of a GAAR (Naoki Oka)

In this respect, the following principles and facts should be noted:

– "because tax rules impose obligations on people, under the principle of no taxation without law, tax requirements need to be clear and strict interpretation of provisions providing these are required" (Justice Tony Pagone, Federal Court of Australia); and
– the rule of law and tax predictability are key in gaining the long-term confidence of foreign investors, who promote growth.

Oka then proceeded to examine the use of GAARs by the tax administrations, with specific reference to Japan.

(d) GAAR – a multinational’s perspective (Sunny Choong)

Here the key elements were:

– certainty;
– how uncertainty affects pricing;
– how uncertainty in pricing affects transactions; and
– uncertainty that gives rise to double taxation has a particularly dramatic effect.

Choong considered these issues by way of an example.

(e) Framework for advising on a GAAR (Brendan Brown)

Brown analysed the theory of a GAAR by reference to the following two lines of inquiry (these were from New Zealand, but similar general approaches could be discerned in relation to other GAARs):
– the spirit of law and/or abuse of law, i.e. does the arrangement have tax consequences under the tax provisions, other than for the GAAR, that Parliament cannot have intended; and
– business purpose, i.e. is the arrangement as a whole, or are steps in the arrangement commercially inexplicable and undertaken solely or predominantly for tax reasons?

Brown then considered the framework for advising on GAAR in reality. In this regard, whether or not the arrangement was a “tax product” was important. Brown concluded by examining whether or not there was a “GAAR Pendulum”.

(f) GAAR and SAAR (Naoki Oka)
Oka reviewed various definitions of GAARS and SAARS, their scope, their relationship with each other and the significant aspects of each that should be borne in mind.

(g) GAAR relationship with SAAR i.e. how GAARs co-exist with SAARs (Miranda Stewart)
In this respect, Stewart stated, using the example of Australia, that:
– GAARs can coexist with SAARs (Australia has many SAARs and the Australian GAAR is a provision of last resort);
– the GAAR gives the Australian Commissioner power to “reconstruct” or create a tax liability and not just to set limitations, or “annihilate” or void a transaction; and
– the GAAR has a more structured administration than SAARs.

Again from an Australia perspective, Miranda considered the specific application of the GAAR and SAARs and the relationship between the GAAR and tax treaties.

(h) GAAR versus SAAR – a multinational’s perspective (Sunny Choong)
Sunny illustrated the various issues in relation to multinational enterprises (MNEs) in this respect by way of an example.

(i) Relationship between GAARs and SAARs (Brendan Brown)
The important aspects, by reference to Australia and New Zealand, were domestic law and tax treaties. Treaty shopping and “substance” was a further important issue here.

(j) GAAR and other country tax laws (Miranda Stewart)
With regard to this issue:
– a GAAR is “inward looking” and nationalistic;
– the tax laws or consequences in other countries appear not to be relevant for a GAAR; and
– a GAAR could be amended to refer to other country tax benefits in future

Miranda went on to consider the issue of aggressive tax planning as well as the GAAR and BEPS from an Australian point of view.

(k) Blurring of the Notions and Way Forward (Naoki Oka)
There were a number of important factors here. First, there was the European Commission's Recommendation for introducing national GAARs of December 2012 (C (2012)8806)). Second, the G8, in the Leaders' Communiqué of June 2013, at Lough Erne, United Kingdom, had committed themselves to develop global solutions to the problems of tax evasion and tax avoidance, to act to restore confidence in the fairness and effectiveness of the international tax rules and practices, and to ensure that the equitable and fair collection of tax. In addition, the following aspects applied with regard to the use of anti-avoidance rules as a part of overall tax compliance strategies:
– linkage with various national voluntary disclosure initiatives;
– linkage with mandatory disclosure of tax schemes by promoters;
– linkage with information access;
– greater focus on double non-taxation; and
– the simplification of tax legislation.

(l) Blurring of Concepts (Sunny Choong)
In this regard, the primary question in Choong’s view was – is tax too complex? Complexity should be contrasted with sophistication, insightful and world class practice. A further issue was – is tax keeping up with the ever changing world, especially in respect of traditional concepts of withholding and interest, dividends, royalties, derivatives, and economic equivalence? In addition, what was the place of other traditional concepts, such as letters, faxes and the telegraph? Where did e-mails fit in and is the value chain even similar? All of these issues were illustrated by way of examples.

(m) Use of GAARs to attack hybrid arrangements (Brendan Brown)
Brown approached this concluding topic by considering the decision in Alesco of the New Zealand Court of Appeal (at the time of writing, an appeal to Supreme Court was pending). The question was – is tax planning still permissible? In this regard,
there were the legal risks (specific (technical) provisions and interpretive uncertainty, SAARs, especially with regard to domestic law and tax treaties, and the GAAR). There were also political risks with regard to possible (retrospective) changes in the law and adverse public reaction. What is the Way Forward? In Brendan's view the issues in this respect included:

- codes of conduct and reporting regimes for large enterprises ("name and shame"), the use of publicity by the tax authorities and the blurring of lines between tax administration (interpreting current law) and politics (how much tax "should" be paid)); and
- the implications for the rule of law and constitutional requirements.

Finally, certain questions on the purpose and the application of GAAR were asked and the same were satisfactorily answered by the Panel.

See also

IBFD-1, News 28 November 2013