

Gold bullion bonuses – GAAR Advisory Panel

(Lecture P1055 – 18.29 minutes)

On 3 August 2017, the GAAR Advisory Panel published their first opinion. The Panel is an independent body of tax experts established to give their view on cases where HMRC consider that the GAAR legislation may be in point. Although the GAAR has been in force since the enactment of FA 2013, this is the first time that the Panel have issued an opinion on a specific case. Any previous commentary has been restricted to examples provided in the original GAAR Guidance.

The opinion relates to employee rewards provided in the form of gold bullion and covers the position of the employer company and the two taxpayers involved. The Panel was asked to decide whether or not the provision of gold bullion in a manner that was designed not to give rise to any charge to income tax or NICs was a reasonable course of action. The opinion is interesting in that it highlights the type of case referred to by HMRC, the process for making reference to the Panel and which parts of the GAAR legislation and the associated GAAR Guidance were considered by the Panel.

In examining the provisions of the GAAR, the Panel focused on the following questions:

1. Did what was done involve contrived or abnormal steps?
2. When looking at what was done, was this consistent with both the principles on which the relevant legislation was based and the policy objectives of that legislation?
3. Was there a shortcoming in the relevant legislation that was being exploited?

The tax at stake in this referral was relatively modest (the bonuses were in the order of £300,000), but it is not clear whether there were other ‘following’ arrangements. If so, HMRC’s reaction may be perceived as being rather more strategic. In the light of the tax planning referred to above, the Panel’s verdict was certainly foreseeable – they summed up the position as follows:

‘This is a clear case of associated taxpayers seeking to frustrate the intent of Parliament by identifying potential loopholes in complex interlinking anti-avoidance legislation and arranging a series of intricate and precise steps to exploit those loopholes so as to gain an unexpected and unintended tax “win”.

It should not come as a surprise that we conclude the steps taken are not a reasonable course of action.’

In other words, the result was game, set and match to HMRC.

This case was referred by HMRC to the Panel to consider whether ‘the arrangements entered into cannot reasonably be regarded as a reasonable course of action’ (the so-called ‘double reasonableness test’). Given that HMRC succeeded in convincing the Panel, the authorities will undoubtedly be issuing counteraction notices to nullify any perceived tax advantage.

However, even if the Panel had taken a contrary view, HMRC would not have been bound by this. They would be quite at liberty to disregard it and go ahead anyway with the issue of counteraction notices. The Panel's main rationale, that the arrangements did not constitute a reasonable course of action, stemmed from the fact that the company could simply have provided the two employees with an equivalent amount of cash (which would of course have been taxable). In the Panel's words:

'Had cash been used and gold not been involved . . . neither the company nor the employees would have been in a substantially different economic or commercial position.'

There are two other extracts from the Panel's opinion to which attention should be drawn. Both are quite short. The first one states:

'Merely because legislation deals with particular positions . . . does not mean that choosing a course of action to utilise that legislation is necessarily either a course of action that is not abnormal or a course of action that is not contrived.'

The second one makes the following point:

'The course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable.'

As a result, HMRC and the Panel virtually have the power to decide that something which Parliament set down did not really mean what it says, simply because Parliament did not consider the matter properly. Had they thought about it more carefully, they would have enacted something a little different, ie. something which would probably correspond more closely to the HMRC point of view. As one eminent tax commentator has written:

'I am not sure that Parliament will be too happy about these people having the power to change the law that Parliament has enacted to something which they find preferable.'

Well said!

Contributed by Robert Jamieson