The UK GAAR and the Indian GAAR

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Elsewhere in this issue, Nikhil Mehta has very helpfully set out the background to the current UK discussions around introducing a GAAR, particularly the report of the study group headed by Graham Aaronson. That Aaronson Report contained a draft of a possible GAAR for the United Kingdom. In practice, it is extremely unlikely that any legislation eventually adopted in the United Kingdom will follow the wording of the Aaronson GAAR. However, the purpose of this short article is to compare and contrast the Aaronson draft with the draft GAAR contained in the Indian Finance Bill. Part of the purpose is to show how very different are the two drafts, and how very different would be their impact in practice.

It may seem an obvious point, but not all tax systems are the same, not all countries have the same approach to retroactive tax legislation, and not all GAARs are the same. To suggest that, because the UK may be contemplating at GAAR, therefore the GAAR contained in the Indian Finance Bill is unobjectionable, totally misses the point of how different can be different GAARs. There are good GAARs and bad GAARs and ghastly GAARs. Into which category the draft Indian GAAR and the Aaronson draft fall is a matter of personal taste.

As a starting point, the two drafts target quite different things. The Aaronson draft targets abnormal arrangements which would achieve an abusive tax result (*see* clause 2 of the draft). The definition of abusive tax result leaves space for reasonable tax planning, which is defined as a reasonable exercise of choices of conduct afforded by the provisions of the Acts (*see* clause 4(1)). Thus, the scope is really limited to highly abusive tax

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arrangements which go beyond what might ever be regarded as reasonable tax planning. By contrast, the Indian draft GAAR targets "impermissible avoidance arrangements" being an arrangement one of the main purposes of which is to obtain a tax benefit and which exhibits various features, including misuse or abuse of the legislation or the deemed lack of commercial substance. It is not particularly clear, bearing in mind the deeming provisions, how far the requirement of the particular features limits the scope of this concept. One is left, therefore, with a provision which is essentially targeted at arrangements one of the main purposes of which is to obtain a tax benefit. That is very broad indeed and certainly does not appear to leave any scope for reasonable tax planning.

The burden of proof is still different between the two provisions. The Aaronson draft makes it very clear (in clause 9) that the burden of proof is on the revenue authorities to show, to the civil standard of proof, the essential elements for the operation of the provision. By contrast, the original draft of the Indian GAAR in the Finance Bill provided (clause 96(2)) that an arrangement which results in any tax benefit is presumed to have as a main purpose obtaining the benefit unless the person obtaining the benefit proves the contrary. The amended draft announced during the Finance Bill debates removes this provision, but without specifying any alternative rule; in particular, it does not specify the level of the proof to be brought. Issues of tax avoidance arrangements are likely to be one of those areas where burden of proof is a significant factor in both the outcome of litigation and in the decision whether to undertake a particular transaction in the first place. It may be very difficult for a taxpayer to prove, perhaps several years after the event, the lack of a purpose of achieving a tax benefit.

The issue of who may operate the GAAR provisions is particularly significant. The Aaronson draft provides clear safeguards in this respect: only an officer of HMRC designated by the Board may operate the legislation (clause 13(1)). By contrast, the Indian draft clause is not so restricted, and one of the biggest concerns of those who have commented on the legislation is that it appears to have no provision to prevent local tax offices from applying the GAAR.

The Aaronson draft has also sought to provide multiple levels of guidance on how it might be operated, so as to provide some certainty for taxpayers. A statutory Guidance Note is proposed to be attached to the GAAR provision (*see* clause 10(1)). Any relevant announcements in Parliament or by HMRC are to be taken into account in applying the GAAR. Perhaps most important, the Aaronson proposals recommend the establishment of an Advisory Panel who could issue an opinion as to whether or not a particularly transaction falls within the GAAR. By contrast, all that clause 101 of the Indian draft GAAR proposes is that it will be applied "in accordance with such guidelines and subject to such conditions and the manner as may be prescribed". At present, no such guidelines or conditions have been published, though a GAAP panel has been mentioned.

The consequences of a transaction falling within the GAAR is also very different. For the Aaronson draft, unless the transaction has no significant purpose other than an abusive tax result, the revenue must propose a corresponding non-abusive arrangement which could have been carried out, and the counter-action would be limited to that corresponding arrangement. The Aaronson GAAR also provides for corresponding adjustments and for the operation of statutory clearances. By contrast, the Indian draft GAAR in section 98, seems to give almost unlimited discretion to re-write, reconstitute, ignore, re-allocate and deem any facts or benefits or persons in whatsoever way necessary in order to prevent the tax benefit arising. This is almost an unfettered discretion to completely re-write the transactions.

Finally, the Aaronson GAAR has bent over backwards to offer safeguards to taxpayers. In fact, in the draft legislation four specific safeguards have been identified. By contrast, it is hard to identify any safeguards in the draft Indian GAAR.

When one puts them side-by-side, one almost ends up asking whether these two creatures belong to the same species or not. There is as much difference between the draft Aaronson GAAR, and the Indian GAAR, even after the

changes announced in the Finance Bill debate, as there is between cabbage and pickled herring.

One of the most fundamental issues that has to be addressed by any legislature, or any sensible revenue authority, in contemplating a GAAR is how much uncertainty it will create in the tax system. The Aaronson GAAR seems to have bent over backwards in trying to achieve as much certainty as possible. One wonders whether the draftsman of the Indian GAAR has not tried to bend over backwards in the opposite direction.

There are good GAARs and bad GAARs and ghastly GAARs. This article leaves it to the gentle reader's choice how to characterise the two draft GAARs discussed here, the Aaronson draft and the Indian draft.