Monday, September 3

Plenary Session Subject 1: Seeking anti-avoidance measures of general nature and scope - GAAR and other rules

General Reporter: Manuel Tron (Mexico) and Paulo Rosenblatt (Brazil)

Chair: Sai Ree Yun (Korea)

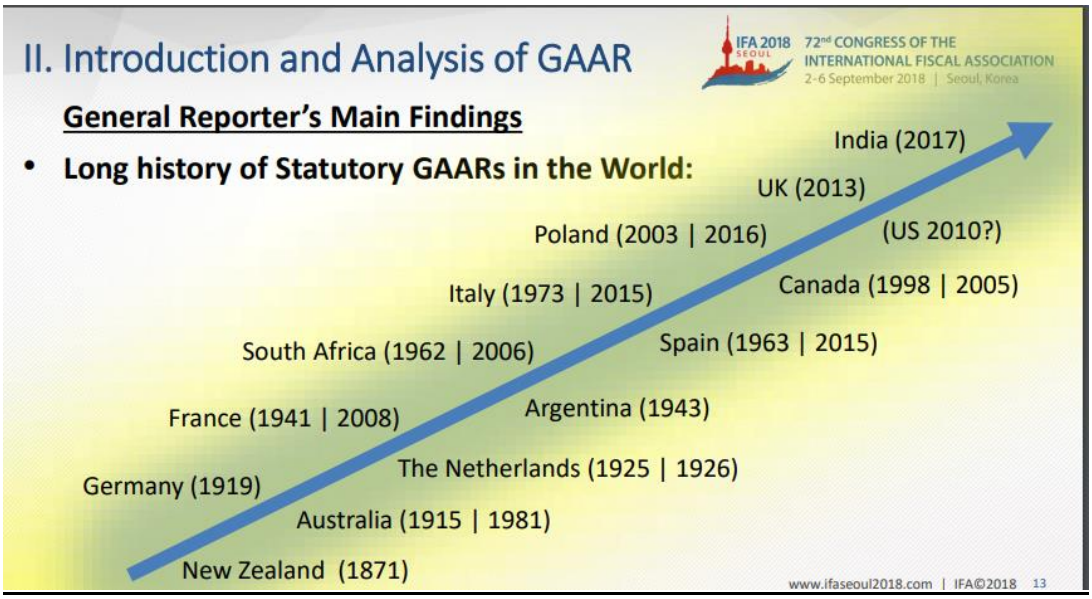
Panel Speakers: Judith Freedman (UK), Craig Elliffe (New Zealand), Masao Yoshimura (Japan), Georg Kofler (EU/Austria), Danielle Rolfes (USA), Philippe Martin (France)

Secretary: Young Ran (Christine) Kim (Korea)

In his opening remarks, the panel Chairman **Mr. Sai Ree Yun** highlighted instances of abuse of anti-avoidance rule by State particularly when motivated by (i) political reasons in domestic context; or (ii) national interest in international context.

The panel kicked off with tracking the history of introduction of Statutory GAAR in the countries across the word.

History of GAAR



Scope of GAAR

Speaking about the main issues of GAAR, it was stressed that the main consequences were denial of tax benefits and re-characterization of the facts.

Thereafter, the Panel examined the scope of GAAR and difference in the use of language of GAAR.

- Narrow: a 'sole purpose', 'the exclusive purpose', or 'the purpose';
- Intermediate: 'principal', 'one of the principal', 'main', 'one of the main', 'significant', 'primary', 'paramount', 'predominant', 'dominant', 'ruling', 'prevailing', 'decisive', or 'most influential' purpose; or
- Broad: 'one of the purposes', 'a purpose', 'not merely incidental' or 'not a secondary purpose', 'relevant' or 'substantial' purpose.

Interplay between domestic GAAR, SAAR and international GAAR

It was explained that GAAR could be applied where SAAR falls short. While acknowledging that GAAR and SAAR are largely complementary to each other, the Panel explained that in case of conflict, some jurisdictions establish a criterion of prevalence, but most don't. The Panel discussed a scenario if GAAR would be applicable when a taxpayer escapes from SAAR. Responding positively, the Panel commented that GAAR is applicable where avoiding SAAR may be part of the abusive scheme and if the avoidance is artificial. However, the Panel agreed that GAAR would not be applicable if there was no tax advantage from the scheme i.e. it would not be applicable if regular substantive tax provision would result in taxation. With respect to the interplay between domestic GAAR & international GAAR, the Panel acknowledged that they have different wordings but similar goals and therefore, interpretation issues may arise.

Finally, the Panel agreed that it is obviously desirable for legislature to provide clear guidance as to whether GAAR prevails or not.

Comparison of global GAAR provisions

Specifically on UK GAAR, the Panel elaborated on the **double reasonableness test** to establish that the advantage is abusive i.e. "The entering into or carrying out of [the arrangement] **cannot reasonably be regarded** as a **reasonable course of action** in relation to the relevant tax provisions, having regard to all the circumstances", including a number of listed factors. Thereafter, the Panel discussed about Targeted Anti-Avoidance Rules (TAAR) in UK which are in addition to GAAR and SAARs (e.g. Taxation of Chargeable Gains Act 1992 of UK). It was stated that TAARs are like mini-GAAR without many safeguards that GAAR contemplates. Highlighting that UK has over 300 TAARs despite introduction of GAAR, the Panelists termed it *"a worrying trend".*

The Panelists then threw light on EU GAAR emanating from a 'fusion' of concepts in Article 6 ATAD:

- **Arrangement or series of arrangements**...
- ... having put into place for the **main or one of the main purposes** ...
- ...of obtaining a **tax advantage** that **defeats the object or purpose of the applicable tax law**...
- ... and are **non-genuine** (not put into place for valid commercial reasons)

The Panel also commented that there was no substantive difference between GAAR in common law and civil law countries.

Role of GAAR Case Law

While acknowledging the vital role of judiciary in making/interpreting/developing law, whether judicial or statutory, the Panel highlighted that:

- GAAR may work best without much or any case law
- Uncertainty can have deterrent value
- Influence of public opinion is strong in application of both judicial rules and statutory GAARs
- Is the danger of 'smell' test greater with statutory GAAR or judicial rules?
- Balance between deterrence and certainty.

The Panel also stated that even with statutory GAAR, Courts have wide margin for interpretation because of vague wordings, principle involved etc. In this regard, the Panel gave the example of France which has had statutory GAAR since 1941. Thereafter, case law in 1981 re-wrote the legal tests while case law in 2006 expanded the scope and fine-tuned the tests after which Parliament in 2008 copied the case law into new abuse of law provision in tax code.

Taxpayer's safeguards

On establishing burden of proof, the Panel highlighted how it is a matter of principle which may vary according to tax systems (e.g. France puts the burden on the tax administration). The Panel highlighted that the possible safeguards include:

- availability of public or private rulings;
- published guidance;
- rules on how advantage is to be counteracted;
- protection if taxpayer has acted reasonably (e.g. UK double reasonableness test);
- provision that litigation must be authorized by high level official;
- GAAR Panel.

Availability of Rulings

The Panel explained that in a few countries (like Portugal, Chile, Chinese Taipei, and France), taxpayers are entitled to clearances that, if not forthcoming within specified time (e.g., 6 months), the tax authority cannot invoke the procedure. Further, the Panel stated that Canada publishes summaries of rulings to provide future informal guidance and an independent body in Sweden publishes binding rulings.

GAAR penalties

In common practice, the Panel highlighted that penalty for violation of GAAR is quite common in many jurisdictions with the rates being hugely variant. The lowest seems to be at 15% (Israel) whilst the highest (Italy) is 180%. The average seems to be around 70%. However, some jurisdictions have no GAAR penalty regime (Belgium, Canada, Luxembourg, the Netherlands, Norway, Peru, Poland and Switzerland).

Conclusion

Finally, the Panel concluded that along with application of GAAR, taxpayer's protection of rights should also be adopted. Tax authorities are human and are bound to err and hence safeguards are required.

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DTS & Associates Take:

Today's session was very interesting. Not sure about how far all these acronyms GAAR, SAAR, TAAR will take us but looking at the way in which the subject of GAAR and tax-avoidance are now being dealt by all the countries across the world, one will realize, how certainly everyone has become so conscious about the tax base. It's going to be an interesting proposition.

It's going to be a challenging time ahead and it is interesting to see how every country is going to implement it. The most important desire from the MNCs is to get tax certainty and to ensure that there is elimination of double tax. Even if there is a double tax, they want an assurance that they should be able to get credit for the taxes paid in the foreign country. India introduced equalisation levy which is something similar to withholding tax, where again the issue of 'foreign tax credit' is there.

It's going to be challenging time ahead for taxpayers and tax professionals with multi-pronged action - BEPS getting implemented through MLI, EU trying to come out with anti-directive rules and countries acting independently with regard to protect their tax bases.

Seminar A: Effectiveness of anti-tax avoidance mechanisms (including Limitations of Benefits)

Chair: Patricia Brown (University of Miami, USA)

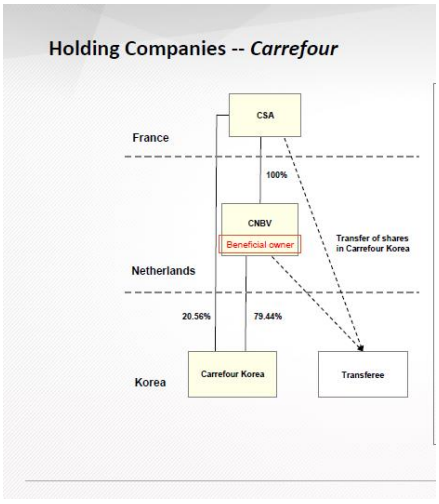
Panel Speakers: Michael J. Miller (Roberts & Holland LLP, USA), Casey Plunket (Inland Revenue, New Zealand), Jay Shim (Lee & Ko, Republic of Korea), Axel Verstraeten (Levene, Argentina), Dennis Weber (Loyens & Loeff, Netherlands)

Secretary: Mariana Eguiarte Morett (Mexico)

The objective of the seminar was to examine practical effects of various anti-abuse rules. The Panel discussion kicked off with examining purposes (stated as well unstated) of introducing the anti-avoidance rules and the tax policy criteria (such as horizontal and vertical equity, economic effect etc.).

Regarding application of criteria to specific GAAR & SAARs, the Panel discussed certain landmark rulings like Prevost, Carrefour, Molinos etc.

In Prevost case, ruling against the tax administration, the Canadian Court ruled that "*When corporate entities are concerned, one does not pierce the corporate veil unless the corporation… has absolutely no discretion as to the use or application of the funds put through it….".*



The Panel then discussed the South African case involving Carrefour. The Supreme Court of Korea ruled in favour of the taxpayer and observed that the holding company had many subsidiaries, also had physical substance and was not established for tax avoidance purpose. The panel noted that in applying the "substance over form principle" to this case, the Supreme Court first mentioned the key factual findings made by the lower court, such as, that CSA established CNBV in 1982, and CNBV established Carrefour Korea in 1994, held the shares continuously, and then realized gains by selling the shares in 2006. The Court ruled that, in light of the purpose and background of establishing CNBV, details of its business activities, existence of employees and offices, decision

making process in relation to the sale of the shares at issue, and the flow of the sales proceeds, CNBV should be considered a legitimate holding company which is structurally independent from its parent French Co. and thus can be deemed as the BO of the capital gains at issue rather than a conduit. The Panel thereafter also discussed Argentinian ruling in case of Molions involving holding structure and where the ruling from the Supreme Court is awaited.

Elaborating on EU GAAR, the Panel explained that Article 6 of ATAD has 4 linked tests:

- Non-genuine (artificial) arrangements (or a series thereof)
- Having been put in place for the main purpose or one the main purposes (subjective test)
- of obtaining a tax advantage
- That defeats the object or purpose of the applicable tax law (norm test)

Thereafter, the Panel stated that as per European Court, finding of abuse is on a case-by-case basis after overall assessment of the relevant situation including organizational/economic/other substantial features of the group as well as structures and strategies of that Group. The Panel remarked *that "European Court thinks not in substance but in (valid) (commercial) reasons"*.

The Panel then explained that USA, on the other hand, applies a very objective LOB test e.g. in evaluating holding company benefit test. The Panel discussed various case studies from USA including Aiken ruling.

The Panel touched upon New Zealand GAAR and noted that New Zealand's Inland Revenue uses the extensive statement published in 2013, while considering application of the GAAR in all contexts. Further, it was highlighted that Commissioner publishes guidance on the application of the GAAR to the particular type of transactions, e.g. dividend stripping, corporate refinancing, use of fiscally transparent vehicles. The Commissioner also gives binding rulings on whether the GAAR applies to transactions and publishes public rulings on the GAAR. Highlighting that around 50% of all ruling applications seek a ruling that the GAAR does not apply, the Panel informed that 80% of the GAAR ruling applications are successful. Further, it was stated that the adjustment process includes a right for taxpayers to "appeal" to Inland Revenue's "Adjudication Unit" and around 15% of the adjudications involve GAAR. It was highlighted that out of 32 cases filed since 2012 involving GAAR - Commissioner recovered the full amount in 14, Taxpayer successfully defended 2 and 16 resulted in some form of partial settlement.

Thereafter, discussing about Mexico's thin capitalization rules, it was highlighted that a 3:1 debt to equity ratio must be met to deduct interest paid to foreign related parties. In Argentina, the Panel explained that the tax authority challenged loans using GAAR but issued an internal regulation (747/2005) establishing a special audit program on companies with losses caused by foreign exchange differences derived from cross border loans.

On balancing anti-avoidance with investment promotion, the Panel elaborated that lawyers' opinions are commonly used to give assurance to boards and others. This helps tax authorities by ensuring "bad" transactions do not proceed. It was explained how the banks now tend to seek assurance from tax authorities – binding rulings or similar.

Regarding the relationship between anti-tax avoidance rules and tax disclosures, the Panel stressed that effectiveness of anti-tax avoidance mechanisms depends on high level compliance with general tax rules. If the anti-tax avoidance rules are too complicated or costly and the consequences of non-compliance are insignificant, anti-tax avoidance rules become ineffective, however well-drafted.

Finally, the Panel Chair **Ms. Patricia Brown** concluded that it would be ideal to have rules that reflect economics or policy and rules that don't reflect that policies are likely to fail. While stating that Governments don't want to be tied down, partly due to information asymmetry, it should show some restraint in anti-abuse rules and accept that some level of tax planning is allowed.

Seminar B: Alternatives to resolving tax disputes - evolving experience and possible developments

Chair: Michael Quigley (USA/Republic of Korea)

Panel Speakers: Mukesh Butani (India), Sjoerd Douma (Netherlands), Judge EuiYoung Lee (Republic of Korea), Peter Nias (UK)

Secretary: Eun Jin (Eunice) Choi (Republic of Korea)

Mr. Mukesh Butani (IFA India Chairman) began the proceedings by highlighting the failure of BEPS to make meaningful progress in the area of dispute resolution. He then outlined the reasons for the rise in disputes, citing new regulations catching up with new business models, tax administrations being driven by the fear of base erosion, the 'trust deficit' between treaty partners and the mechanisms to settle/compromise seldom being resorted to. Mr. Butani lamented the world adopting 'disparate' measures when it comes to dispute resolution. He then went on to talk of the challenges in this area, primary among them being the inadequacy of domestic adjudicatory institutions, backlog of APAs, the unresolved MAPs and the consistency (across jurisdictions) of domestic law provisions with MAP outcome.

The panel briefly discussed the slow APA process in some countries, especially in light of recent statistics that have shown a big increase in time required for APA disposals (32 months in UK, almost double of what it used to take a few years ago, and 38 months in India as per the APA Annual report released last week by the Indian Govt.). The panelists wondered if the increase in average time of MAP & APA disposals had anything to do with we being in the post-BEPS era.

Judge Lee (Research Judge at South Korean Supreme Court) then enlightened the delegates on the Alternate Dispute Resolution status in the host nation. As of 2016 there were 551 APA filings in South Korea, of which 379 had been successfully concluded and 209 of them were Bilateral APAs through MAP with 13 countries. Judge Lee however went on to add that Alternate Dispute Resolution (ADR) was not a popular tool in South Korea and that it was rare to see tax disputes being settled by negotiations or dialogue. She pinned the blame for this mainly on 'cultural' barriers against ADR, especially among the tax officers.

Panelist **Peter Nias** made a strong case for adoption of Collaborative Dispute Resolution (CDR) approaches, in order to foster a more positive and collegiate relationship between Competent Authorities and also with taxpayers. He opined that CDR would improve efficiencies and use of existing resources, with both time and cost savings and could also reduce the need for litigation and arbitration. He then explained CDRs as a collaborative working environment between Competent Authorities and taxpayers, wherein the best practice protocol is adopted right from when the dispute is first identified. One of the important elements of the 'non-binding' CDR programme is the access to third party 'mediators' and trained facilitators. Some of the CDR techniques outlined by him included facilitation, non-binding expert determination, mediation, arbitration. Mr. Nias added that CDR is Article 25 compliant and not dependent on MAP arbitration clause. He quipped *"Use of mediation/third party can unlock disputes."*

Prof. Douma dwelled at length on the advance tax rulings and its purpose but warned that too much 'friendship' between a taxpayer and the tax authority in a given country may result in distrust elsewhere, i.e. in some other jurisdiction.

The panel extensively discussed the hot button issue of arbitration from all perspectives. Mr. Butani called 'Mandatory Arbitration' a 'misleading term' as it gave an impression that the sovereignty of nations was being impinged on. He also summed up the concerns around arbitration as more about the 'process' than arbitration itself. Judge Lee shared the South Korean position on arbitration, stating that while no bilateral tax treaty concluded by South Korea has the arbitration clause, there is however no provision in the South Korean constitution prohibiting arbitration itself. She identified the real issue as treaty arbitration operating within constitutional principles and to ensure that arbitrators have proper understanding of Korean law. Mr. Nias

chipped in, saying that arbitration is a 'stick' and not carrot and termed the entire scene around Alternate Dispute Resolution as the 'fear of the unknown.' Panel moderator Michael Quigley, in conclusion, remarked that *"Trust is better than mistrust... sunshine is better than secrecy... Understanding is better than ignorance..."*