

Anti-avoidance Measures and the Rule of Law

J. David B. Oliver, Coopers & Lybrand, London; Visiting Professor of International Taxation, London School of Economics and Political Science

If it is accepted that the imposition of taxation should be subject to the rule of law then it should follow that anti-avoidance measures, being also concerned with taxation, should likewise be subject to the rule of law. This would mean that they should be enacted as laws rather than decrees, that they will be equally binding on the administration and the taxpayer, and that they should have those features of predictability and clarity which go to make a 'good' law.

Measures to counter tax avoidance may take many different forms but they can loosely be grouped into three categories. First, there are those approaches which are based on a legal analysis or interpretation of the transaction(s) by the Courts such as a business purpose test, a step transaction doctrine or a composite transaction approach. Secondly, there are those which depend on a particular approach by the Courts to the construction of the taxing statutes, seeking out perhaps the principles or purpose of the legislation rather than its literal meaning or applying a doctrine of *abus de droit*. Then there is the third category which is the legislative approach. This may take the form of either specific or general statutory anti-avoidance provisions.

The first two categories are by definition a judicial-based approach and are subject to all the restraints which that implies, restraints which may include frustration of the policymakers when transactions are let through which the policymakers might prefer to have seen blocked. They certainly, however, can be said to be subject to the rule of law.

It is in the third category, that of statutory provisions, that more problems arise and that the rule of law issue becomes most relevant. To begin with, there is the issue as to the relationship between specific anti-avoidance provisions and general anti-avoidance provisions. If there is a general anti-avoidance provision then why have a specific anti-avoidance provision unless that specific provision is intended to be the only test in that particular situation to the exclusion of the general provision?

Next comes the mode of operation of, say, a general anti-avoidance provision. Clearly, anti-avoidance provisions may to some extent be relied upon by policymakers for their *in terrorem* effect and to that extent they will operate simply by ensuring that transactions of the type envisaged do not take place. In other instances, however, there will be a need to determine whether the provisions apply to the particular case. This may involve interpretation of the meaning of the provision or consideration of the circumstances and motive of the taxpayer. This moves back to the Courts the final decision as to where the line is to be drawn and experience with general anti-avoidance rules in Sweden, Australia and Canada suggests that there are no easy answers. There is a wealth of material on this and on other issues in this area to be found in a recently published volume of perceptive and readable essays arising out of a conference held in Sydney in 1995.¹

One result may be calls for a clearance procedure. Such a procedure should not itself prevent recourse to the Courts, however, whether under an appeal process in relation to a refusal of a clearance or in relation to the transaction itself if carried out notwithstanding the refusal of a clearance.

Allowing an appeal against the refusal of a clearance may well be imposing an unacceptable burden on the Courts but if there is no such appeal then the balance of advantage is tilted towards the administration. This is a matter for debate where it may be concluded that the greater good requires this tilting of the scales against the adventurous taxpayer even if it leads to more uncertainty.

What is clear is that a statutory general anti-avoidance rule is no panacea. It is particularly interesting that the United States, which is never shy to make regulations, has no statutory general anti-avoidance rule; it only has specific statutory anti-avoidance provisions and otherwise relies on the judicial application of a business purpose test.

Notes

¹ Graeme S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (IBFD Publications B.V., 1997).