The implementation of the GAAR

Denmark

Skatteministeriet

The situation pre-implementation

- The implementation of the GAAR in Denmark has been substantially influenced by the Danish legal tradition
- Previously, no codified GAAR in Danish tax legislation
- The introduction of a codified GAAR has been seen as conducive to creating legal insecurity
- Better left to the courts to deal with the issue through case-law

The situation pre-implementation

- Pre-GAAR case-law has been heavily discussed – is there a case-law based AAR?

- A number of judgments permit the utilisation of loop-holes – ”The Duke of Westminster-principle” is, however, not always followed, see e.g.:

- ”Nordland” (TfS1998.99H – ”abuse” of the Business Tax Act),
- ”Bagenkop” (TfS1998.199 – fixing interest payments in case of ”circumvention”)
- ”The Faroe-case” (SKM2016.16H – dividend tax applied to transactions with no business purpose other than avoiding dividend taxation)

The situation pre-implementation

- In 2015, a limited GAAR was introduced in the Tax Assessment Act (ligningsloven) § 3 – a consequence of an amendment to the Parent-Subsidiary Directive making implementation of the AAR of the directive obligatory

- Limited to excluding advantages accorded by the Parent-Subsidiary Directive, the Interest-Royalty Directive, the Merger Directive, and DTAs

- Only cross-border transactions, even when purely national transactions are governed by identical rules

The implementation

- The Tax Assessment Act (ligningsloven) § 3 was – as of 1 Jan 2019 – expanded to include situations covered by ATAD article 6

- The wording is basically a copy-paste of ATAD article 6 – though disregard of an arrangement also applies to physical persons

- During public consultation and the Parliamentary debates: Questions re. the expected application of the GAAR in specific instances – Traditional fears re. legal incertainty + (perceived) ”aggresive” practice of the Danish Tax Authorities

The implementation

- As a ”counterweight”, all decisions on the application on the GAAR must be decided upon by the Danish Tax Council (DTC - ”Skatterådet”)

- DTC mainly adopts binding tax rulings when they raise questions of principle. With members chosen by Parliament (6) and the minister (13) – many on the basis of nominations from organisations etc – it is perceived as ”independent”

- Decisions of the DTC can be appealed to the Tax Tribunal (”Landsskatteretten”), also by the Ministry when involving EU law, e.g. cases applying the GAAR

The situation post-implementation

- The DTC has adopted approx. 20 decisions re. the GAAR – all following the solution proposed by the Tax Authority. Only a few of these have been appealed to the Tax Tribunal and those appeals are still pending

- Has the GAAR led to major changes of the legal situation in Denmark?

- A definitive answer is still pending: TAARs are still introduced when specific loop-holes are discovered, and most GAAR-decisions concern conduit companies (beneficial owner cases).