The Drafting of General Anti-Avoidance Rules

Michael Littlewood

ATTA 2013
The New Zealand GAAR

The Income Tax Act 2007 (NZ) s BG 1:

(1) A tax avoidance arrangement is void as against the Commissioner for income tax purposes.

(2) Under Part G (Avoidance and non-market transactions), the Commissioner may counteract a tax advantage that a person has obtained from or under a tax avoidance arrangement.
The New Zealand Definition of “Tax Avoidance”

Section YA 1 provides: “tax avoidance...includes –

a) directly or indirectly altering the incidence of any income tax;

b) directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax;

c) directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax.”
The New Zealand Cases

The Australian GAAR

The Income Tax Assessment Act 1936 (Aust) s 177D provides:

This Part applies to any scheme that has been or is entered into after 27 May 1981, and to any scheme that has been or is carried out or commenced to be carried out after that date (other than a scheme that was entered into on or before that date), whether the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia, where:

(a) a taxpayer (in this section referred to as the relevant taxpayer) has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme; and

(b) having regard to:

(i) the manner in which the scheme was entered into or carried out;
(ii) the form and substance of the scheme;
(iii) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
(iv) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;
(v) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;
(vi) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;
(vii) any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and
(viii) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi);

it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme or of enabling the relevant taxpayer and another taxpayer or other taxpayers each to obtain a tax benefit in connection with the scheme (whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers).
The Scope of Section 177D (Part I)

This Part applies to any scheme ... where:
(a) a taxpayer ... has obtained a tax benefit in connection with the scheme; and
(b) having regard to [8 specified factors] it would be concluded that the person who ... carried out the scheme ... did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme....
The Scope of Section 177D (Part II)

The 8 factors:

i. the manner in which the scheme was entered into or carried out;

ii. the form and substance of the scheme;

iii. the time at which the scheme was entered into and the length of the period during which the scheme was carried out;

iv. the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;

v. any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;

vi. any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;

vii. any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and

viii. the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi)....
The Australian Cases


Conclusion

1. The New Zealand GAAR is the best in the world.
2. Resolving difficult questions incrementally is exactly the strength of the common law.
3. In some fields the subtlety and flexibility of judge-made law is superior to anything achievable by the legislature.
4. Every word added to a GAAR gives the Revenue and taxpayers something extra to argue about.
5. Every added word distracts from the central issue.