General Anti-Avoidance Rule and Inter-Provincial Anti-Avoidance

References: section 5, 5.1, 5.2, 5.3, 29.1, 31.1, 80, subsection 14(3.1), 32(3), 34(10), 92(1)

Application

This bulletin replaces the discussion of the General Anti-Avoidance Rule found in Information Bulletin Number 2742 originally published February 1993. This bulletin updates the discussion for changes to section 5 and adds references to several anti-avoidance provisions in the Corporations Tax Act *(Ontario)(CTA).*

This bulletin is intended to provide information to taxpayers and is not intended as a substitute for the relevant legislation. Any references to legislation are to the provisions of the CTA and its Regulations, unless otherwise noted.

General Anti-Avoidance Rules

General

1. The general anti-avoidance rule (GAAR) found in section 5 generally parallels the federal rule found in section 245 of the *Income Tax Act (Canada)* (ITA). However, in addition to calculating corporate income tax Ontario's GAAR provision may apply to calculate:
   - other taxes under the CTA such as capital tax and premium tax, and
   - the allocation of a corporation's taxable income and taxable capital to jurisdictions outside Ontario.
2. GAAR is intended to prevent tax avoidance transactions or arrangements and will not apply to arrangements that meet the spirit of the CTA read as a whole. Subsection 5(2) allows the Minister to determine in a reasonable manner, the tax consequences of an "avoidance transaction" in order to deny any tax benefit that may result.

Advoidance Transaction

3. An avoidance transaction is a single transaction or a part of a series of transactions resulting in a tax benefit, unless the transaction is undertaken mainly for business purposes other than to receive the tax benefit. For this purpose, "tax benefit" includes a reduction, avoidance or deferral of tax or any other amount payable under the CTA or ITA, or an increase in a refund of tax or any other amount under the CTA or ITA.
4. Any transaction undertaken or arranged in good faith for purposes other than to obtain a tax benefit, is not an avoidance transaction. The purpose of the transaction is determined after considering the surrounding facts and circumstances.
5. Subsection 5(3) provides that GAAR will not apply to a transaction if it does not result in a misuse or abuse of the provisions of the CTA, when read as a whole. As a result, the rule will not be applied to tax planning transactions which may be tax motivated, but which follow the provisions of the CTA in order to obtain a tax benefit consistent with the object and spirit of the provisions of the CTA, when read as a whole. If however, an avoidance transaction relies on specific provisions of the CTA to achieve a tax benefit that is inconsistent with the object and spirit of the CTA, the Minister may apply GAAR.

Tax Consequences

6. "Tax consequences" defined in subsection 5(1) include any amount payable by, or refundable to, the corporation under the CTA, or any amount that is relevant in computing amounts payable or refundable under the CTA. Subsection 5(4) further discusses the determination of tax consequences.

7. Examples of tax consequences are a corporation's:

   - income and taxable income (for income tax)
   - taxable income earned in a jurisdiction other than Ontario (for allocation purposes)
   - adjusted net income and adjusted net loss (for corporate minimum tax)
   - paid-up capital, taxable paid-up capital (for capital tax)
   - gross premiums (for premium tax), and
   - contributions to a funded benefit plan within the meaning of section 74.2 (for tax on uninsured benefit arrangements).

Administration

8. Efforts have been made to simplify the adoption of GAAR for purposes of the CTA. In the application of GAAR, Ontario will follow the policies of the Canada Customs and Revenue Agency (CCRA). For information on the federal GAAR provisions, refer to Information Circular IC 88-2.

9. Federally-issued GAAR assessments will be followed by Ontario to the extent that they relate to the calculation of Ontario income tax payable. Such an assessment is called a "specified assessment" (see the Specified Assessments section in paragraphs 14 and 15 below).

10. GAAR may also apply to the calculation of other taxes under the CTA including corporate minimum tax, capital tax, premium tax and to income tax provisions which differ from those of the ITA. For example, GAAR may apply in cases where the paid-up capital of a corporation would be greater had it not been for an avoidance transaction that reduced or eliminated amounts otherwise included. In such a case, the application of GAAR could reinstate the corporation's paid-up capital to what it would have been if the transaction had not occurred.

Assessments

11. Subsection 5(7) provides that if a corporation has entered into an avoidance transaction, the tax consequences to the corporation for the current or prior years will be conveyed by means of an assessment or reassessment.

12. In some cases, such as an adjustment to the adjusted cost base of a property, the tax consequences of a transaction will not be realized until a future taxation year. Since a notice of assessment cannot be issued for a future taxation year, corporations will be notified of these adjustments through a notice of determination. A notice of determination is treated the same as an assessment for purposes of the objections and appeals procedures under sections 84 to 92.

13. Refer to subsections 5(5) and 5(6) for the rules relating to a request for adjustments by third parties.

Specified Assessments

14. A specified assessment issued pursuant to subsection 92(1) is defined as an assessment or part there of that:

   - states that it is a specified assessment
   - involves the application of section 5, and
   - results from the issuance of a notice of assessment or notice of determination pursuant to section 245 of the ITA.

Specified Assessments (continued)

15. Since a specified assessment is based on a federal determination of tax consequences, corporations that want to dispute a specified assessment must do so through federal objection and appeals procedures. An Ontario notice of objection is not required. This process reduces administrative work for both the corporation and the Ministry, and allows the issue in dispute to be settled with the taxing authority that initiated the matter. Both the corporation and the Ministry are bound by the resolution of the issue at the federal level.

Objections and Appeals Procedures

16. Corporations can object to an assessment issued pursuant to section 80 by filing a notice of objection in accordance with section 84 of the CTA, within 180 days from the date of mailing of the notice of assessment.

17. In some cases, it is necessary to file objections with both taxing authorities. This can occur where a federally-initiated GAAR assessment is paralleled by an Ontario assessment that includes both the specified GAAR items as well as Ontario initiated adjustments. It could include an Ontario-initiated GAAR adjustment or any other Ontario-initiated matter pertaining to income tax, corporate minimum tax or capital tax. Corporations may need to file notices of objection with either CCRA, the Ministry of Finance, or both, depending on which issues the corporation wishes to dispute.

Inter-provincial Anti-Avoidance

Introduction

18. Paragraphs 20 to 26 provide a brief summary of the provisions of the CTA which impact corporations involved in inter-provincial asset transfers, and corporations claiming inconsistent discretionary deductions or specified reserves across different jurisdictions.

Inter-provincial Asset Transfers

19. When certain conditions apply, section 5.1 prevents corporations or corporate members of partnerships from utilizing inter-provincial asset transfers to avoid Ontario income tax on the disposition of assets. This section applies to dispositions and acquisitions of property that are a part of a series of transactions or events if the series is completed after December 19, 1996.

20. Subject to certain exceptions, sections 29.1 and 31.1 prevent a corporation or partnership from filing an Ontario election unless a valid federal election has been made pursuant to subsections 85(1), 85(2) or 97(2) of the ITA. The Ontario elected amount must be equal to the federal elected amount. These provisions apply to elections in respect of dispositions occurring on or after May 6, 1997.

21. Subsection 32(3) prevents corporations from using elective provisions applicable to trusts resident in another province, for the purposes of avoiding provincial tax payable by the trust and its corporate beneficiaries.

22. Subject to certain exceptions, subsection 34(10) requires corporations to designate the same amount for provincial purposes as they have designated for federal purposes under paragraph 111(4)(e) of the ITA in respect of deemed dispositions of capital properties prior to an acquisition of control.

Discretionary Deductions and Specified Reserves

23. Section 5.2 prevents corporations from claiming an inconsistent discretionary deduction for Ontario tax purposes compared to that claimed for federal or other provincial tax purposes when certain conditions exist. The rules in subsections 5.2(1) to 5.2(4) are applicable for taxation years ending after December 18, 1998. Subsections 5.2(5) and 5.2(6) are applicable for taxation years ending on or after December 14, 1999.

24. Section 5.3 prevents corporations from claiming inconsistent specified reserves for Ontario tax purposes compared to that claimed for federal or other provincial tax purposes. Subsection 5.3 applies to taxation years ending on or after December 14, 1999.

25. Subsection 14(3.1) prevents corporations from claiming an Ontario capital gains reserve greater than the federal reserve claimed. This provision does not apply if section 5.2 or 5.3 applies.

For More Information

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