

LAND TRANSACTION TAX AND ANTI-AVOIDANCE OF DEVOLVED TAXES (WALES) ACT 2017

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 7 – General Anti-Avoidance Rule

Section 66 - General anti-avoidance rule

82. This section amends TCMA by inserting Part 3A, General anti-avoidance rule.

Section 81A TCMA - Meaning of “general anti-avoidance rule” and overview

83. This Part enables WRA to counteract tax advantages in relation to the devolved taxes that arise from artificial tax avoidance arrangements. Subsection (2) provides that the rules in this Part, taken together, are to be known as the general anti-avoidance rule (GAAR).

84. The term “avoidance” refers to a spectrum of activities designed to reduce tax charge in a manner which is contrary to the intention of the National Assembly for Wales when passing tax legislation. Subsequent sections in Part 7 define the terms used and provide more detail about how the provisions as a whole are to work.

85. The GAAR is intended to operate in tandem with targeted anti-avoidance rules (TAARs).

Section 81B TCMA - Tax avoidance arrangements

86. This section sets out the definition of a “tax avoidance arrangement”. Subsection (1) defines a “tax avoidance arrangement” as an arrangement which has as its main purpose or one of its main purposes, the obtaining of a “tax advantage” for any person entering into the arrangement. In determining whether or not an arrangement has such a purpose, WRA may take account of the amount of tax that would have been chargeable in the absence of the arrangement.

87. Subsection (3) gives a broad definition of an “arrangement”, which includes transactions, schemes, actions, operations, agreements etc. The definition includes any such element taken individually, or taken as a series of elements or stages. As such, a wide range of arrangements can be considered to determine whether they constitute tax avoidance arrangements.

Section 81C TCMA - Artificial tax avoidance arrangements

88. This section sets out the tests for deciding whether a tax avoidance arrangement is artificial. Subsection (1) provides that an arrangement is artificial if the entering into or

carrying out of it is not a reasonable course of action in relation to the tax legislation in question.

89. Subsections (2)(a) and (2)(b) make further provision to assist in determining the question. In subsection (2)(a) regard may be had to whether the arrangement lacks economic or commercial substance (other than obtaining a tax advantage). In subsection (2)(b) regard may be had to whether the arrangement resulted in a different amount of tax chargeable than what was anticipated when the tax legislation was enacted.
90. Subsection (3) provides for a particular case where an arrangement is not artificial. This is where the arrangement was consistent with generally prevailing practice at the time it was entered into and WRA had indicated its acceptance of that practice.
91. Subsection (4) provides that, where a tax avoidance arrangement forms part of any other arrangements, then, in determining whether it is artificial or not, these other arrangements must also be considered.
92. Subsection (5) provides the meaning of “Welsh tax legislation” being the Welsh Tax Acts (as defined by section 192(2) TCMA) and any subordinate legislation made under those Acts.

Section 81D TCMA - Meaning of “tax” and “tax advantage”

93. This section gives the meaning of “tax” for this Part as being any devolved tax and the meaning of tax advantage as being:
 - relief or increased relief from tax;
 - repayment or increased repayment of tax;
 - avoidance or reduction of a charge to tax;
 - deferral of a payment of tax or advancement of a repayment of tax; and
 - avoidance of an obligation to deduct or account for tax.

Section 81E TCMA - Adjustments to counteract tax advantages

94. This section provides WRA with the power to adjust the tax liability of a taxpayer who would otherwise benefit from a tax advantage in relation to the devolved taxes arising from an artificial tax avoidance arrangement. Subsection (1) provides that WRA may make any adjustments that it considers to be just and reasonable in order to counteract such a tax advantage. Subsection (2) makes clear that these adjustments may be made in respect of the devolved tax in relation to which a tax advantage has been gained, or in respect of any other devolved tax.
95. Subsection (3) requires that, where the adjustment relates to a tax return in respect of which there is an open enquiry, that adjustment is to be made by a closure notice. In all other cases, the adjustment is to be made by means of a WRA assessment (issued at any time). Before making any adjustment WRA must issue a notice of proposed counteraction, and then a final counteraction notice – this process, in particular, allows the relevant taxpayer to make written representations before any adjustment is made.

Section 81F TCMA - Notice of proposed counteraction

96. This section provides for WRA to issue a proposed counteraction notice to notify a taxpayer when it is intending to counteract a tax advantage that has arisen from an artificial tax avoidance arrangement in relation to a devolved tax.
97. Where a counteraction notice is issued by WRA it must:
 - specify the tax avoidance arrangement and the tax advantage;

These notes refer to the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 (c.1) which received Royal Assent on 24 May 2017

- provide an explanation of why WRA considers that a tax advantage has arisen to the taxpayer from an artificial tax avoidance arrangement;
 - set out the adjustment that WRA proposes to make to counteract the tax advantage; and,
 - specify any amount that the taxpayer will be required to pay.
98. The proposed counteraction notice must also inform the taxpayer that a final counteraction notice (section 81G) will be issued after the expiry of a 45 day period from when the proposed counteraction notice is issued. It must also state that the taxpayer may request an extension to the 45 day period, and that they may make representations to WRA before the final counteraction notice is issued.

Section 81G TCMA - Final counteraction notice

99. Subsection (1) provides that where a taxpayer has been sent a notice under section 81F, after the period for making representations about the notice has expired, WRA must issue the taxpayer with a “final counteraction notice”.
100. Under subsection (2) any final counteraction notice issued by WRA must state whether the tax advantage is to be counteracted by an adjustment under section 81E. In determining whether the tax advantage is to be counteracted, WRA must under subsection (3) have regard to any representations made by the taxpayer.
101. If a final counteraction notice states that a tax advantage is to be counteracted by means of an adjustment the notice must also—
- specify the adjustment required to give effect to the counteraction,
 - specify the amendment of the return which is to be included in the closure notice issued under section 50 when WRA reaches its conclusions in the enquiry,
 - if the adjustment is not going to be given effect by amending the return, identify or be accompanied by WRA assessment which gives effect to the adjustment,
 - specify any amount that the taxpayer is required to pay where WRA has reached a conclusion to an enquiry, or is required to pay in accordance with an assessment made by WRA.
102. Under subsection (5) where a tax advantage is not to be counteracted, the final counteraction notice must state the reasons for WRA’s decision.

Section 81H TCMA - Proceedings in connection with the anti-avoidance rule

103. This section makes provision in relation to court or tribunal proceedings arising from the operation of the GAAR in relation to the devolved taxes. Where WRA has made (or is to make) an adjustment to counteract a tax advantage, the burden of proof is on it to demonstrate that there is a tax avoidance arrangement that is artificial, and that the adjustments made to counteract the tax advantage arising from the arrangement are just and reasonable.
104. In determining any issues in connection with the GAAR, a court or tribunal may take account of guidance published by WRA about the GAAR which was extant when the tax avoidance arrangement was entered into. They may also take account of any other guidance, statements or other material (whether published or made by WRA or any other person) that was in the public domain at the time when the tax avoidance arrangement was entered into. They may also take account of evidence of practice generally prevailing at that time.

Section 81I TCMA - General anti-avoidance rule: commencement and transitional provision

105. This section makes provision relating to when the GAAR comes into effect and for transitional arrangements. Subsection (1) provides that the GAAR has effect in relation to a tax avoidance arrangement entered into on or after the date that the GAAR provisions come into force. Subsection (2) provides that where the tax avoidance arrangement forms part of other arrangements that were entered into before the GAAR came into force, such other arrangements are to be ignored for the purpose of section 81C(4) unless having regard to them would be to determine that the tax avoidance arrangement was not artificial.