GAAR (anti-avoidance) v GAAR (anti-abuse)

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The author's 'Holy Grail' has been to find the optimal GAAR, in particular to find one that fairly ‘draws a line in the sand’ between legitimate commercial transactions and tax avoidance. Nations such as New Zealand and most recently the United Kingdom have sought to tackle the problem of tax avoidance through General Anti-Avoidance/Abuse Rules (‘GAAR’s) rather than relying solely on specific Targeted Anti-Avoidance Rules (‘TAAR’s). This paper compares and contrasts the approaches taken in New Zealand’s ss BG 1 and GA 1 Income Tax Act 2007 and United Kingdom’s recently enacted Part 5 of the Finance Act 2013. New Zeland has a long history of using a GAAR. The current GAAR (ss BG1 and GA1 Income Tax Act 2007 can be traced back to s 40 Land and Income Tax Assessment Act 1891. By contrast the United Kingdom has long resisted calls for the enactment of a GAAR. Instead the government chose to rely on judicially developed doctrines, such as the Ramsay principle. Thus Part 5 of the Finance Act 2013 incorporates this Nation’s first GAAR, operative from 17 July 2013. This paper compares and contrasts the GAARs in these two Nations. While each is based on the broad legislative goal of combatting tax avoidance, the strategies underpinning each piece of legislation differ. The New Zealand legislation revolves around very broad expansive terms that cast a wide net. Ultimately Parliament has left it to the courts to develop judicial interpretative techniques to determine if arrangements amount to tax avoidance. The new United Kingdom provisions initially revolve around very broad definitions relating to the concept of a “tax arrangement”. However, unlike New Zealand provisions, the legislation is then dramatically narrowed by only being confined to “abusive” tax avoidance. In turn it is left to the courts to determine if an unreasonable abusive position has been adopted. The notion behind this legislative approach of confining the GAAR to abusive tax avoidance is that this will leave HM Revenue & Customs (‘HMRC’) to use the pre-existing TAARs for less extreme schemes. This paper critically evaluates each GAAR to determine which approach (anti-avoidance v anti-abuse) is preferable. It concludes that the United Kingdom GAAR is too narrow, being confined to abusive tax schemes. Whether an arrangement is “abusive” is subjective and uncertain, being determined by a person’s tolerance for tax avoidance. The uncertainty under this GAAR is multiplied by the introduction of the “double reasonableness” test that excludes the scheme from being considered abusive if it can reasonably be regarded as a reasonable exercise of choices of conduct afforded by the provisions of the Act. It is contended that this sets too high a threshold and significantly narrows the scope of the GAAR. Further, the burden of proving this double unreasonableness lies with HMRC, not

the taxpayer. Ultimately while the New Zealand GAAR has been subject to criticism, it is a more effective tool to combat tax avoidance.