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What are the GAARdrails?

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Agenda

- What is a GAAR?
- Too many GAARdrails?
- GAAR and SAARs: residual, complementary or overriding?
- How are the courts applying GAARs?
- Best practices and advice to clients
- Ethical boundaries
- So, what are the GAARdrails?

What is a GAAR?

What is a GAAR? A general overview



Spectrum of Tax Compliance

Tax Planning

Arranging one's affairs to take full advantage of the exemptions, deductions, and reliefs expressly provided by the statute without prevarication or **misrepresentation**.

Tax Avoidance

Any arrangement one purports to follow which may be contrary to the intent of the law.
In essence, "***bending the law without breaking it.***"

Tax Evasion

Illegal suppression of income, inflation of expenditure, or misstatement of fact. It is unlawful in all circumstances and attracts both penalty and prosecution, marking the clear boundary where avoidance ends and evasion begins.

The determinative question: Is the transaction genuine, possessing any real, commercial or economic substance, or is it a sham or colourable device with the sole or predominant purpose of avoiding tax, without any independent business rationale?

Form v. Substance: The Doctrinal Origins

1

1935

(1935) 293 US 465.

Gregory v. Helvering (Supreme Court of the United States)

A corporate reorganisation, though technically falling within the wording of the statute, existed solely to secure a tax benefit and was accordingly refused recognition. The decision is widely regarded as the origin of the business-purpose enquiry.

2

1936

[1936] AC 1 (HL).

IRC v. Duke of Westminster (House of Lords, United Kingdom)

"Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be." — Lord Tomlin.

The decision established that legal form, not motive, governs the tax consequence.

3

1982

(1982) AC 300 (HL).

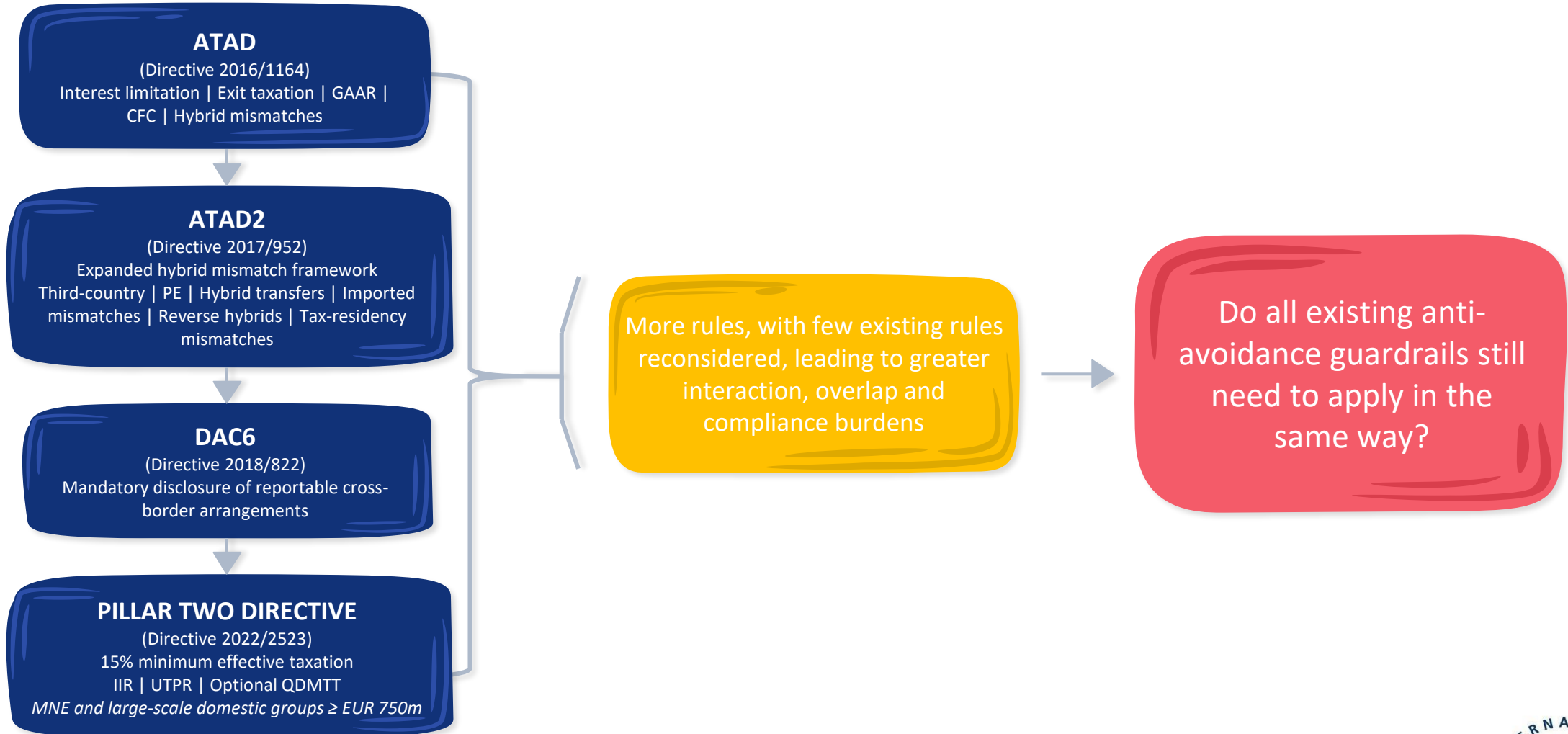
WT Ramsay Ltd. v. IRC (House of Lords, United Kingdom)

Pre-ordained, circular steps that produce no genuine change in the taxpayer's position, and are undertaken solely for tax advantage, may be treated by the courts as a single, composite whole rather than as isolated transactions.

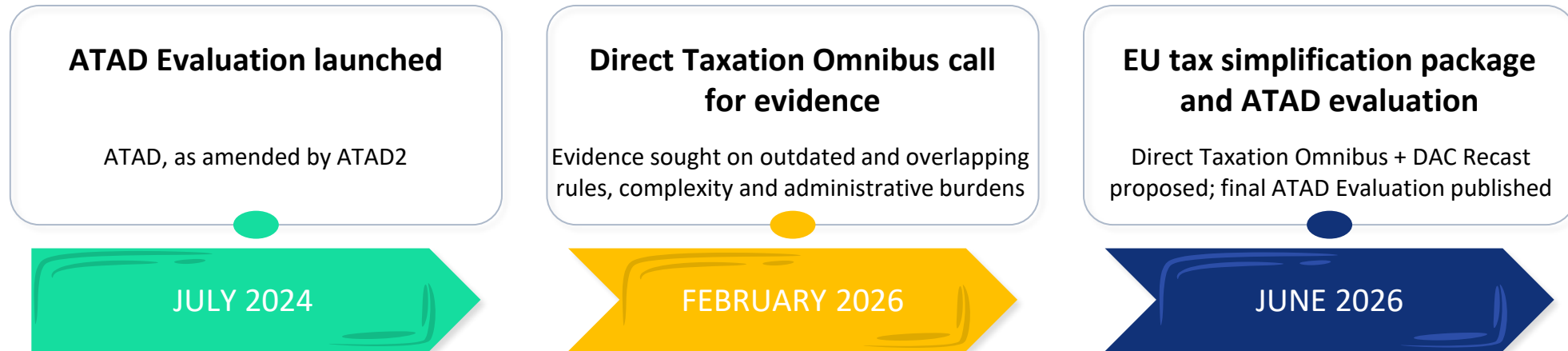
Too many GAARdrails?



Too many GAARdrails? – The European perspective



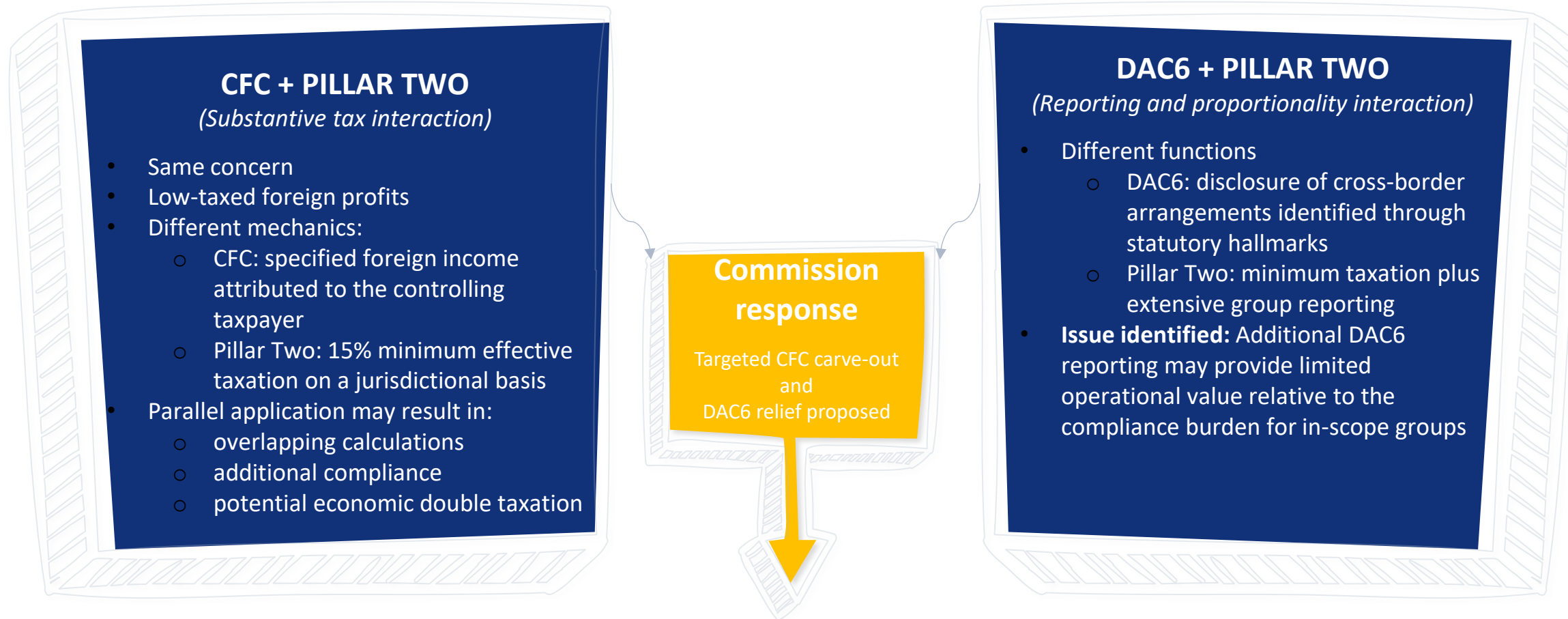
From evaluation to targeted simplification



Key proposed changes relevant to anti-abuse and Pillar Two

- **CFC rules:** taxpayers in groups already subject to Pillar Two would generally **no longer be subject to the EU CFC rules**, reducing the parallel application of two regimes targeting low-taxed foreign profits. *(Direct Taxation Omnibus proposal)*
- **GAAR:** the EU **general anti-abuse rule would be broadened beyond corporate income tax liability to also cover other taxes**, including withholding taxes and Pillar Two top-up taxes. *(Direct Taxation Omnibus proposal)*
- **Hybrid mismatches:** the specific rule targeting **imported hybrid mismatches would be removed**, while the remaining EU anti-hybrid framework would stay in place. *(Direct Taxation Omnibus proposal)*
- **DAC6:** certain cross-border arrangements involving **groups already within Pillar Two would no longer be reportable** under the EU mandatory disclosure regime, subject to specific safeguards. *(DAC Recast proposal)*

Examples of interaction with Pillar Two: CFC and DAC6



Overlap may arise through substantive taxation or through cumulative compliance obligations

Pillar Two is adding its own guardrails

OECD/G20 Inclusive Framework on BEPS

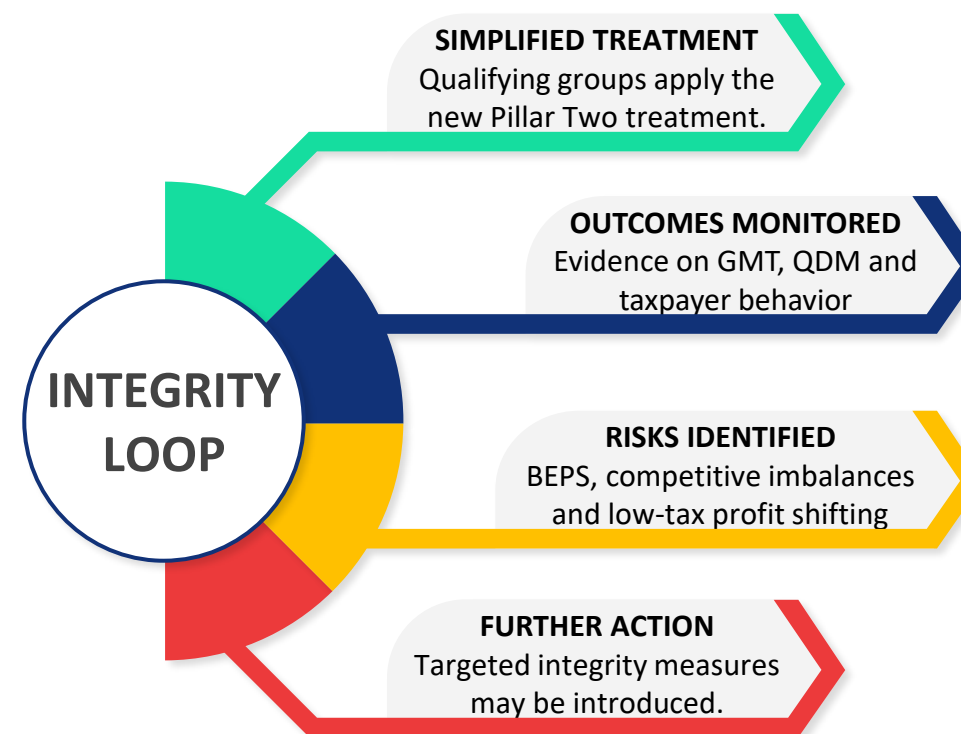
The January 2026 Side-by-Side Package introduced new Pillar Two **simplifications**:

- Side-by-Side and UPE Safe Harbours
- Simplified ETR Safe Harbour
- Substance-Based Tax Incentive Safe Harbour
- Extension of Transitional CbCR Safe Harbour

The package also requires **integrity protection**:

- Eligibility and integrity conditions for the new safe harbours
- Monitoring of Qualified Tax Incentives and Related Benefits
- Further anti-arbitrage work under the Global Minimum Tax

And additional measures announced: Explicitly Conditional Taxes and other discriminatory taxes



GAAR and SAARs: residual, complementary or overriding?

Canada: GAAR and SAARs

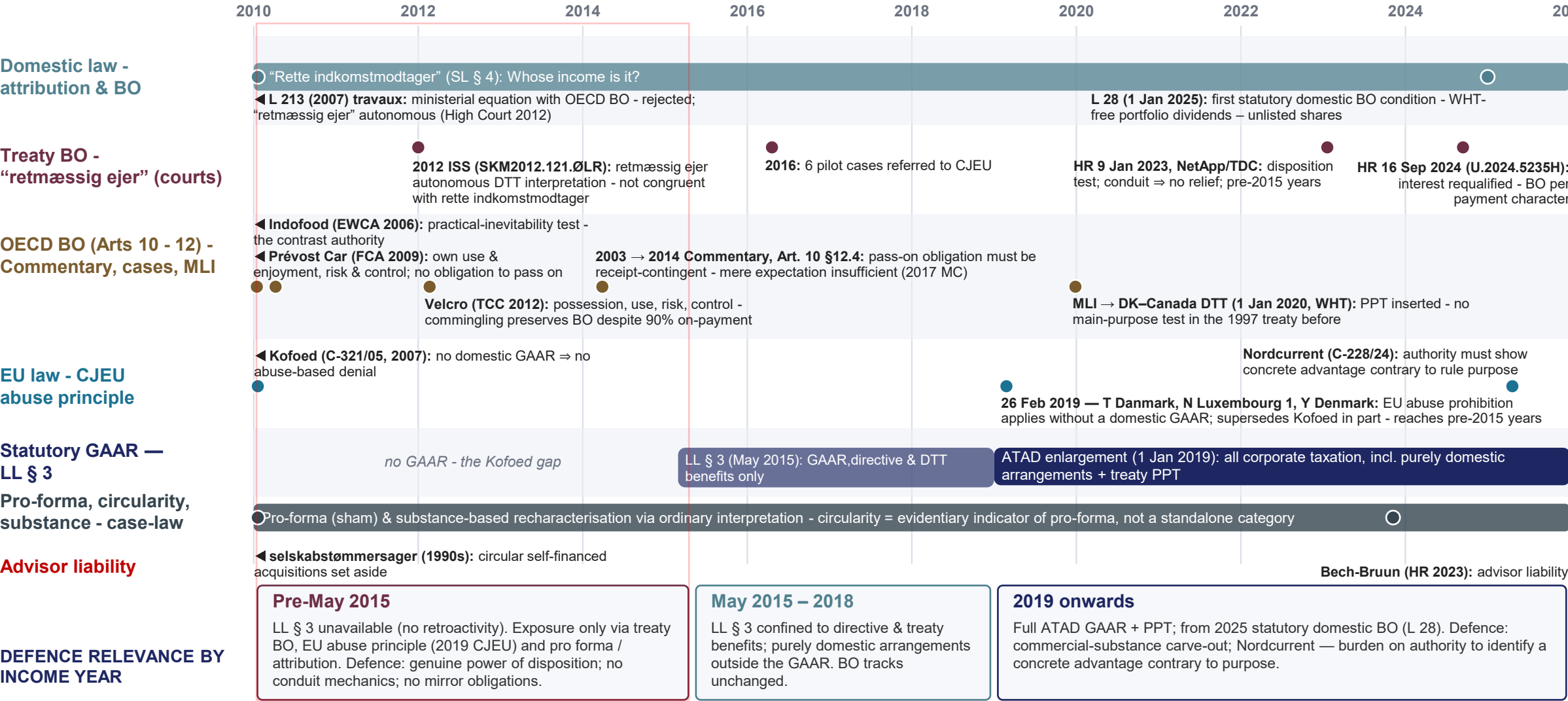
- GAAR: applies where there is (a) a tax benefit, (b) avoidance transaction and (c) misuse or abuse. If GAAR applies, tax authority can redetermine tax consequences
- SAARs: many, many such rules. Non-exhaustive list:
 - **Loss & tax attribute trading**: ss. 111(4)–(5) (acquisition of control); s. 256.1 (deemed acquisition of control); s. 69(11) (dispositions in a series to use another's attributes)
 - **Stop-loss & loss deferral**: ss. 40(2)(g)(i) and 54 (superficial losses); ss. 112(3)–(4) (dividend stop-loss); ss. 18(17)–(23) (straddle transactions)
 - **Financial instruments & character conversion**: s. 80.6 (synthetic dispositions); derivative forward agreements (ss. 12(1)(z.7) and 248(1)); s. 112(2.3) (dividend rental arrangements)
 - **Interest deductibility & base erosion**: s. 18(4) (thin capitalization); s. 18.2 (EIFEL); s. 18.4 (hybrid mismatch arrangements); s. 247 (transfer pricing)
 - **Back-to-back arrangements**: ss. 212(3.1) et seq. (interest, rents and royalties withholding); ss. 15(2.16) et seq. (shareholder loans)
 - **International / outbound**: s. 212.3 (foreign affiliate dumping); s. 95(6) (foreign affiliate status and share acquisitions); s. 94.1 (offshore investment fund property); s. 17 (loans to non-residents)

Canada: Consequences of GAAR Applying

- If GAAR applies,
 - tax authority can redetermine tax consequences as is reasonable in the circumstances
 - 25% penalty on taxpayer, unless transaction was disclosed
- Generally no advisor penalties (other than under mandatory disclosure rules)

Danish anti-avoidance regimes 2010–2026: beneficial ownership, GAAR, court practice

Interaction of domestic, treaty, OECD and EU law instruments over time



SL - *statsskatteloven* (Danish state tax act). §4 defines taxable income as the taxpayer's total annual revenues. Implicit attribution decision required – who's income is it – *rette indkomstmodtager*.
SEL – *selskabsskatteloven* – the Danish corporation tax act. §2 contains the limited tax liability provisions for foreign investors receiving Danish dividends, etc. Collected through withholding tax (*kildeskatteloven* §65). Tax liability is disapplied where the taxing right must be waived or reduced, e.g. under a DTT or the PSD.

Treaty Abuse: PPT, LOB and Beneficial Ownership

Principal Purpose Test (PPT)

Under Article 7 of the Multilateral Instrument ("MLI"), it is stipulated that treaty benefit is denied where obtaining that tax benefit was one of the principal purposes of the arrangement, a materially lower threshold than GAAR's requirement of a "*main purpose*." India applies the PPT across its entire treaty network.

Limitation on Benefits (LOB)

The LOB clause tests whether the taxpayer satisfies prescribed conditions relating to legal status, ownership, control, or business activity, rather than enquiring into why the arrangement was undertaken in the first place. The LOB is an objective, criteria-based filter, and jurisdictions may adopt either or both under the BEPS Action 6 minimum standard.

Beneficial Ownership

Principle of Beneficial ownership, introduced into the OECD Model in 1977 in the articles pertaining to the dividends, interest and royalty, The said principle denies treaty benefits to an entity/person that is merely the formal recipient of income while another entity/person possesses the rights to use and enjoy it.

Substance & Conduit Test

The core enquiry under the Substance and Conduit test is whether an entity performs a real economic function, involving genuine decision making, risk, and resources, or whether it merely serves as a conduit, passing income through to another, real, economic beneficiary.



General Anti-Avoidance Rules: Codifying the Abuse Standard

“Impermissible Avoidance Arrangement”

Under Section 96 of the Income Tax Act, 1961 an arrangement is deemed impermissible if it is primarily designed to secure a tax benefit and exhibits one or more of the following attributes:

- **Abnormal rights / obligations not at arm's length**
- **Misuse or abuse of the Act's provisions**
- **Lack of commercial substance**
- **Not carried out in a bona fide manner**

Chapter X-A, Sections 95–102 of the Income Tax Act, 1961

Chapter X-A, Sections 95–102 of the Act, Introduced by the Finance Act, 2012, and effective from Assessment Year 2018-19, this chapter forms the statutory backbone of India's GAAR regime. Section 144BA supplies the procedural safeguard of a mandatory reference to, and approval by, an Approving Panel before GAAR can be invoked, while Section 90(2A) of the Act provides that GAAR overrides any beneficial relief otherwise available under a tax treaty.

GAAR – SAAR Interplay (CBDT Circular No. 7 of 2017)

General Anti-Avoidance Rules (“GAAR”) and Specific Anti-Avoidance Rules (“SAAR”) are designed to operate together, applicable as may be necessary on the facts of each case. Where a treaty's LOB clause already and sufficiently addresses the avoidance, there is no occasion to separately invoke GAAR.

CBDT Notification No. 54/2026 dated 31 March 2026

Following Tiger Global, the Supreme Court interpreted the then existing Rule 10U of the Income Tax Rules, 1962, framework to permit GAAR scrutiny of an arrangement yielding a post 1 April 2017 tax benefit notwithstanding the pre 1 April 2017, vintage of the underlying investment. In response, CBDT Notification No. 54/2026 amended Rule 10U to expressly provide that GAAR shall not apply to income arising from the transfer of investments made before 1 April 2017. Accordingly, while the amendment restores the statutory grandfathering protection for capital gains arising from the transfer of pre 1 April 2017 investments, it does not constitute a general immunity from GAAR for all subsequent arrangements or income associated with such investments. The temporal application of the amendment to proceedings relating to the intervening period remains a distinct legal issue.



How are the courts applying GAARs?

DK Eastern High Court judgment

SKM2025.238.ØLR

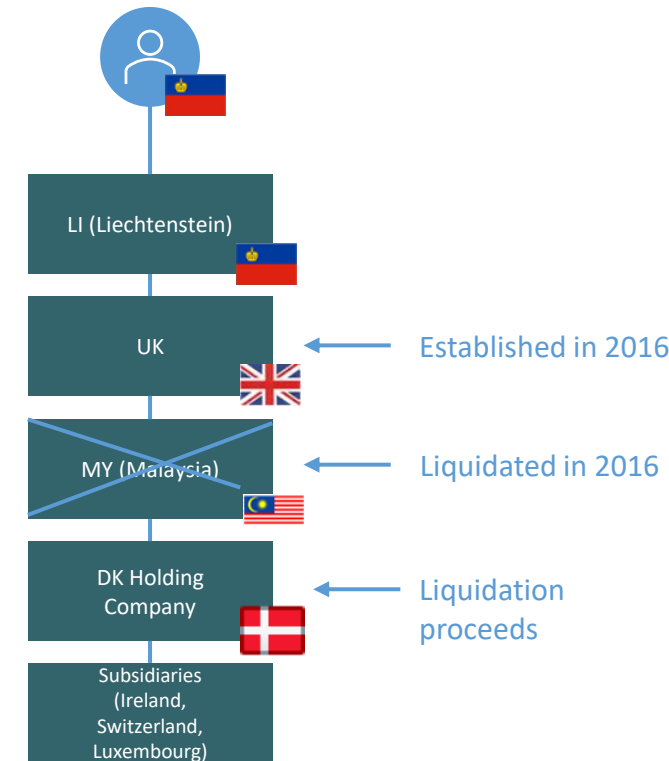
(Appealed to the Supreme Court)



Facts and issue

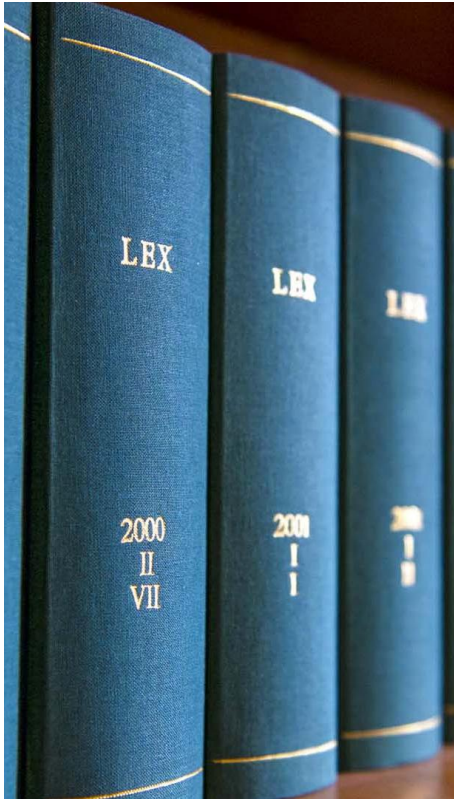
- The case arose from a request for a binding ruling, in which a Danish holding company ("DK"), wanted an answer as to whether a liquidation distribution was covered by section 3 of the Danish Tax Assessment Act (the GAAR), which would result in the liquidation distribution being subject to withholding tax.
- DK was part of a group that was engaged in asset management. DK acted as a holding company for a number of subsidiaries in Ireland, Switzerland and Luxembourg, and DK's income consisted of dividends from the subsidiaries. DK was owned by a Malaysian company ("MY"), until MY was liquidated in connection with a restructuring in 2016, after which DK has been owned by a British company ("UK"). UK was owned by a Liechtenstein company ("LI"), whose ultimate owner was a natural person who was resident for tax purposes in Liechtenstein.
- The group considered winding up redundant companies, including DK. According to the group, the liquidation of DK would result in an annual cost saving of approximately DKK 1.1 million.
- The group had set up an internal working group, the Tax (Planning) Committee, which assessed that the liquidation of DK entailed a "tax risk" of around DKK 171 million.
- DK had had a loss for several years, which meant that DK had a taxable loss of approximately DKK 75 million.

Simplified group structure



Arguments of the parties

The tax advantage



- **Ministry of Taxation:**

- Dividends DK → UK: not subject to withholding tax
- Dividends DK → MY: liable to withholding tax
- The restructuring where DK was transferred from MY to the UK = withholding tax advantage
- Alternative approaches are irrelevant

- **DK:**

- Interpretation of DK–MY DBO is incorrect (liquidation proceeds DK → MY would be tax-free)
- The restructuring did not provide any actual tax advantage – other methods could avoid withholding tax

Arguments of the parties

Main purpose

- The Ministry of Taxation argued that DK had to prove that DK achieved such significant commercial benefits from the arrangement that the tax advantage of DKK 171 million was not one of the main objectives of the restructuring (proportionality assessment).
- DK argued that the overall aim of the restructuring was to simplify the group structure by removing redundant companies.

DK's key arguments for the commercial justification of the restructuring	The Ministry of Taxation's comments
The UK was established with a view to taking over the ownership of a British group in 2016, and the establishment of the UK was therefore commercially justified.	None.
The restructuring enabled a separation of the group's business areas in private banking and asset management, respectively.	The intention to separate the group's business lines arose in 2020 and therefore did not exist when the restructuring began.
DK was superfluous, and the group wanted to save administration costs of approx. DKK 1.1 million annually.	The calculated savings are based on accounting figures and do not take into account the expenses that the administration of the activities in Denmark will continue to require after the liquidation of DK.
DK reports a tax loss of approx. DKK 76 million.	DK will not use the loss, as DK's income consists of dividends from subsidiaries.

Arguments of the parties

The purpose of the double taxation treaty

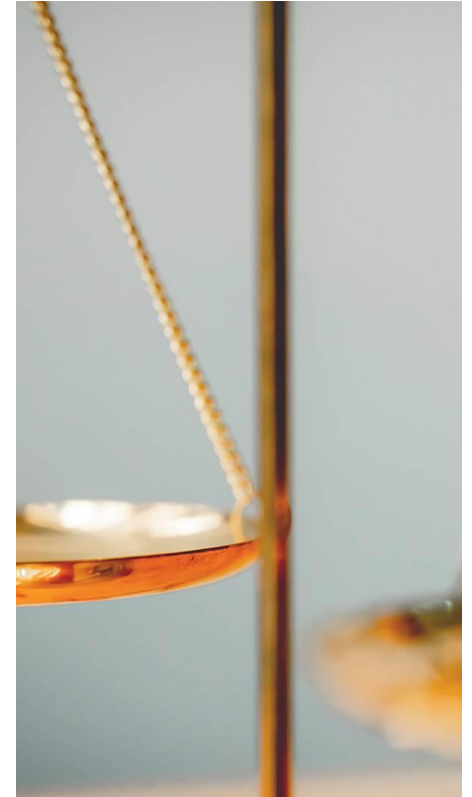


- The Ministry of Taxation stated that the purpose of the double taxation treaty was to prevent tax advantages from being obtained through arrangements that were not sufficiently commercially justified
- DK stated that the purpose of the double taxation treaty was to avoid dividend taxation of the beneficial owner in cases where the company profits had been taxed in the country where the business was operated (specifically in Ireland and Switzerland).
- Thus, DK argued that the purpose of the double taxation treaty was to avoid double taxation in scenarios such as the current one.

Eastern High Court judgment (i)

Tax advantage

- The Eastern High Court found that there was a tax advantage:
- The tax advantage consisted in the fact that the liquidation proceeds were subject to withholding tax when MY owned DK, whereas the liquidation proceeds were not subject to withholding tax when UK owned DK.
- The assessment was to be made on the basis of the specific planned restructuring and the assumptions used in the request for the binding ruling – not on the basis of DK's alleged alternative approaches.



Eastern High Court judgment (ii)

Main purpose

- The Eastern High Court established that one of the main purposes of the restructuring was to obtain a tax advantage.
- The group carried out extensive investigations into how the activities in Denmark could be transferred in a tax-appropriate manner, and the liquidation of DK was assessed to entail a "tax risk" of approx. DKK 171 million.
- On this basis, the High Court found that it was reasonable to establish that the tax advantage was one of the most important purposes of the contemplated restructuring.



Eastern High Court judgment (iii)

The purpose of the double taxation convention

- It was therefore for DK to demonstrate that, in the circumstances of the case, the grant of the advantage would be consistent with the content and purpose of the double taxation treaty between Denmark and the United Kingdom.
- The Eastern High Court then emphasised that the tax losses could not be used, since DK's income consisted of dividends from subsidiaries.
- The savings from the liquidation of DK were insignificant in relation to the size of the tax advantage, and the significant tax advantage was not reflected in a corresponding loss or other business risk.

“

In the case, there are no minutes of the board, presentations to the management or the like prior to the case describing the alleged business considerations behind the decision to restructure, including the change of ownership of [DK] from Malaysia to the UK and then liquidating the company.

”

Eastern High Court,
SKM2025.238.ØLR



Eastern High Court judgment (iv)

The conclusion...

Against this background, the High Court finds that [DK] has not demonstrated that the intended restructuring procedure is organised for well-founded commercial reasons and that it would therefore not be in accordance with the purpose of the double taxation treaty between Denmark and Great Britain to grant [DK] the tax advantage in question in the liquidation. In this regard, it should be noted that it is apparent from the preparatory work for section 3(5) of the Danish Tax Assessment Act that one of the purposes of double taxation treaties is to prevent the conventions from giving rise to tax avoidance and tax evasion, and that the double taxation treaties should therefore not give rise to double non-taxation.

Eastern High Court,
SKM2025.238.ØLR



Do we need a GAAR in Danish law ... ?



Skatteankestyrelsen proposes that the National Tax Tribunal decide the case as follows. We note that the National Tax Tribunal has not yet considered the case, and no decision has been rendered.

The case concerns whether it was correct for the years 2015 and 2016 ... including whether section

It is therefore correct that the Danish Tax Agency has adjusted the company's income, as the company, pursuant to section 3 of the Tax Assessment Act, cannot claim the benefits arising from the EU Parent-Subsidiary Directive and its implementation in section 13(1)(2) of the Danish Corporation Tax Act.

The National Tax Tribunal further finds, on the basis of an overall assessment, that the establishment of the companies in Jersey and Malta, taken together with the agreements entered into, did not have a business purpose, cf. SKM2014.422HR and SKM2016.16HR. Based on the information available, the purpose must have been to establish an arrangement whereby it was possible to make tax-free distributions of dividends to the Danish companies on the basis of income that had not been taxed abroad. It is therefore also correct, in accordance with Danish case law, that the Danish Tax Agency made the aforementioned adjustments.

"In light of the angry political mood concerning the tax practices of certain multinational groups, drawing that dividing line is no easy task for the Court of Justice, unless every action by an individual to reduce their tax is to be open to a verdict of abuse. **A driver who sells his car following an increase in road tax obviously acts in order to avoid road tax. However, that cannot be construed as an abuse of law, even if his sole reason was to save tax.**"

— AG Kokott in C-119/16 (4)



Canada: *Deans Knight Income Corp. v. The Queen* (2023)

- *Deans Knight* is a case where a SAAR was circumvented and the issue was whether GAAR applied (i.e., GAAR as **residual** backstop to a SAAR)
- The SAAR: ITA s. 111(5) restricts loss carryovers for a corporation that has an acquisition of control (except if it carries on same/similar business)
- Facts:
 - Deans Knight (DK) was a public pharma company that had \$90M of tax losses
 - DK spun out its business into a new parent corporation (Newco)
 - A new investor, Matco, bought a \$3M debenture issued by DK from Newco, convertible into 35% of the voting shares and 100% of the non-voting shares of DK
 - Newco obtained a right to sell its 65% of the DK voting shares to Matco for \$800K within 1 year

Canada: *Deans Knight Income Corp. v. The Queen* (2023)

- Facts (cont'd):
 - Matco obtained right to oversee the makeup of DK's board and had veto rights restricting DK from engaging in a range of activities.
 - DK started a new mutual fund management business.
 - The new business was funded through an IPO of 10 million voting shares
 - Immediately before the IPO, Matco converted its debenture into 35% of the voting shares of DK.
 - After the IPO, Matco purchased the remaining shares from Newco.
- Technically, Matco never acquired control, so DK went on to use its pharma loss carryforwards against income from the mutual fund business

Deans Knight – the GAAR analysis

- Taxpayer had avoided the application of 111(5), which requires an acquisition of *de jure* control
- Only GAAR issue was whether there was a **misuse or abuse** – including by circumvention of a provision that defeats its underlying policy
- SCC: Policy of s. 111(5) = prevent acquisition of corporations by unrelated parties in order to deduct the target's unused losses against income from another business for the benefit of new shareholders
- Taxpayer argued that this policy was embodied in *de jure* control test, which achieves clarity & certainty
- SCC held the *de jure* control test was only a “rough proxy” for Parliament's actual intention, which intended to target a new party gaining the “functional equivalent” of majority voting power, as this severs continuity with the past corporate identity

Canada: *Deans Knight Income Corp. v. The Queen* (2023)

- **Takeaways**

- A precisely drafted SAAR does not necessarily displace GAAR — a specific rule is not immune from abuse
- Abuse analysis asks why a provision was enacted (its underlying rationale — object, spirit and purpose), not merely how it was drafted
- GAAR can apply where a transaction achieves a result functionally equivalent to what the SAAR was designed to prevent
- Confirms GAAR remains available to police schemes even where Parliament has already legislated a targeted response to certain planning

Dutch anti-abuse case law: interaction Dutch SAAR and fraud legis

ARTICLE 10a CITA:

SAAR that targets base erosion by limiting interest deduction on related party loans linked to certain tainted transactions

Supreme Court 2021

OUTSIDE 10a

GAAR fills the gap in case out of scope from SAAR

Fraud legis may deny interest deduction although transactions not in scope of 10a SAAR.

Supreme Court 2023

10a ESCAPE

Statutory guardrail may prevent GAAR

A genuine treasury function supports business reasons and constrains fraud legis.

Supreme Court 2024

FURTHER DEFINING LANDSCAPE

Fraud legis may apply to engineered structures

Fraud legis GAAR may address an engineered structure to artificially avoid application of 10a SAAR, but tax saving alone not decisive.

Supreme Court 2025

BEYOND 10a

Passing 10a rebuttal does not exclude fraud legis

A successful business-reasons rebuttal does not necessarily prevent fraud legis under the CITA as a whole.

Supreme Court 2026

EU LAW + GAAR

Fraud legis explained in line EU abuse

Fraud legis may remain to apply to wholly artificial structures in line with EU concept of abuse, despite from 10a rebuttal.

Paradigm Shift in Indian Jurisprudence on Anti-Avoidance

McDowell & Co. v. CTO

Supreme Court of India

(1985) 3 SCC 230

1

The Hon'ble Supreme Court, dealing with an excise-duty structuring arrangement, held that *"colourable devices cannot be part of tax planning"* and that it is up to the Court to expose a device for what it really is. In a separate but concurring opinion, Chinnappa Reddy, J. went further, declaring that *"the proper way to construe a taxing statute... is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax"*.

Union of India v. Azadi Bachao Andolan

Supreme Court of India

(2003) 263 ITR 706 (SC)

2

While examining the India-Mauritius DTAA and CBDT Circular No. 789 (which treated a Mauritian Tax Residency Certificate as sufficient evidence of residence and beneficial ownership for treaty purposes), the Hon'ble Supreme Court upheld "treaty shopping" as legitimate, holding that *"while tax planning may be legitimate, provided it is within the framework of law, colourable devices cannot be part of tax planning... it is wrong to assume that every attempt at tax planning is illegitimate"*.

Vodafone International Holdings v. UOI

Supreme Court of India

(2012) 6 SCC 613

3

The Hon'ble Supreme Court held that the transfer of shares of a foreign holding company by one non-resident to another, even where the underlying asset base was India, was not, on the facts, a taxable transfer of a capital asset *"situate in India"* under the Section 9(1)(i) of the Income Tax Act, 1961 (*"the Act"*). While courts must look at a transaction *"as a whole"* and not adopt a *"dissecting approach"*; a holding-company structure adopted for bona fide commercial reasons, and not shown to be a sham or "look-through" device, is not vitiated merely because it achieves a fiscally efficient outcome; and, decisively.

AAR v. Tiger Global International Holdings

Supreme Court of India

[2026] 182 taxmann.com 375 (SC)

4

The Hon'ble Supreme Court held that a Tax Residency Certificate raises a presumption of residence, but it does not foreclose scrutiny into the underlying substances and control of the entity. GAAR was held applicable notwithstanding pre-2017, grandfathered investment, since the benefits in question itself accrued only upon the 2018 sale.



INDIA: THE AUTHORITY FOR ADVANCE RULING (INCOME TAX) VS TIGER GLOBAL INTERNATIONAL

II HOLDINGS

[2026] 182 taxmann.com 375 (SC)

DECISION

- The Hon'ble Supreme Court of India held that the Mauritius entities could not claim exemption under Article 13(4) of the India–Mauritius DTAA, whither the transaction was found to constitute an impermissible tax avoidance arrangement. The Hon'ble Court held that GAAR under Chapter X-A of the Income Tax Act, 1961 can apply to arrangements involving pre-01.04.2017 investments where the relevant tax benefit arises from an arrangement after 01.04.2017, and Rule 10U (2) operates notwithstanding Rule 10U(1)(d). Rule 10U(1)(d) provides the grandfathering exclusion for income arising from the transfer of investments made before 01.04.2017, subject to Rule 10U(2).
- A Tax Residency Certificate and treaty protection do not place a transaction beyond scrutiny where there is material demonstrating an impermissible or sham arrangement. The Revenue can examine the substance of the transaction and invoke GAAR/anti-avoidance principles where the statutory conditions are satisfied.
- The AAR was justified in rejecting the applications under provision (iii) to Section 245R(2) as relating to transactions prima facie designed for tax avoidance. The High Court judgment was set aside and the appeals were allowed.



INDIA: THE AUTHORITY FOR ADVANCE RULING (INCOME TAX) VS TIGER GLOBAL INTERNATIONAL II HOLDINGS

[2026] 182 taxmann.com 375 (SC)

Major Takeaways

- *Treaty protection is not an absolute defence to statutory anti-avoidance scrutiny.*
- *While an Assessee is entitled to structure its affairs to lawfully minimise tax, the arrangement must possess legal validity and cannot be a sham or impermissible mechanism designed to obtain a treaty benefit.*
- *A TRC and a pre-01.04.2017 investment do not, by themselves, immunise a subsequent arrangement from scrutiny under Chapter X-A where the tax benefit arises from an impermissible arrangement.*



Best practices and advice to clients



Canada: The Interpretive ‘Matrix’

- GAAR’s misuse/abuse test and statutory interpretation
 - Generally -- “The interpretation of a statutory provision must be made according to a *textual*, *contextual* and *purposive* [(“TCP”)] analysis to find a meaning that is harmonious with the Act as a whole”
 - TCP analysis is used:
 - in ordinary interpretation, to determine what the statutory words mean
 - in a GAAR analysis, to determine the object, spirit or purpose of a provision

Canada: The Interpretive ‘Matrix’

- Rationale may be broader than the text – but when?
- *Deans Knight* – critical to separate a provision’s rationale from the means chosen to give that rationale effect
- Other recent SCC cases refer to a “purpose error” in statutory interpretation
 - When courts fail to harmoniously interpret a statute, they can do so by giving too much weight to **primary purposes** of a statute – why a statute was enacted at a high level of abstraction – over **secondary purposes** represented in legal rules and standards sourced in text – how a statute aims to accomplish its goals
 - to avoid the purpose error, courts should not choose different means, because the means chosen are a legislative judgement as to how to obtain a certain goal that the legislature has specified
- Difficult for advisors to know how much weight will be given to the text relative to the rationale

The Ethical Boundaries



Walking the Tightrope Between Probity and Pragmatism

Neutrality vs. Moral Accountability

Judith Freedman, a Professor of Taxation Law and Policy at the University of Oxford, argues that advisers who design, promote, and implement complex structures cannot be regarded as neutral. Where a scheme knowingly exploits an unanticipated legislative gap, technical legality does not fully insulate the adviser from moral accountability.

Privilege Is Not Absolute

Client-Attorney Privilege belongs to the client, not the advocate, and cannot be invoked by the advocate as a matter of personal immunity. The House of Lords in *R v. Derby Magistrates' Court, ex parte B* [1996] A.C. 487 affirmed privilege as a fundamental condition of justice, while equally recognising the well-established exception that it does not extend to communications made in furtherance of crime or fraud.

Puneet Batra v. Union of India & Ors. [2026] 190 taxmann.com 664 (Delhi)[18-09-2026]

The Petitioner, an Advocate, challenged the search of his office under CGST Act and seizure of his CPU while Department alleged that the Petitioner was not merely acting as legal counsel but was himself involved in the affairs under investigation. The Hon'ble Delhi High Court held that Advocate-Client privilege is an important protection, but it does not create an absolute immunity. It protects only genuine professional communications but cannot be invoked as an absolute bar against a valid statutory search where prima facie material indicates the Advocate's own involvement in the matter.

Statutory 'Enabler' Liability

The UK Finance (No. 2) Act 2017 penalises persons who design, market, manage, or otherwise assist abusive avoidance schemes, extending liability beyond the taxpayer to those who create and facilitate such arrangements. A parallel regime exists in the United States, where IRC Section 6700 imposes promoter penalties on advisers who organise or participate in the sale of abusive tax shelters. Together, these provisions reflect a broader legislative shift toward holding intermediaries directly accountable for the structures they help bring into being.

The Indian Position — S.R. Batliboi & Co.

The Hon'ble Supreme Court in case of *Department of Income Tax v. S.R. Batliboi & Co.* [2009] 17 SCC 767 held that data seized from a firm of chartered accountants, who were not themselves the target of the search but happened to be present at the searched premises, could be inspected by the revenue authorities. However, data relating to unrelated third-party clients could not be copied, thereby preserving a measure of professional confidentiality where there was no direct connection between those clients and the target assessee.

Maulikkumar Satishbhai Sheth v. Income-tax Officer, Assessment Unit, Ahmedabad [2024] 161 taxmann.com 543 (Gujarat)

In the case of *Maulikkumar Satishbhai Sheth v. Income-tax Officer, Assessment Unit, Ahmedabad* [2024] 161 taxmann.com 543 (Gujarat), wherein the Revenue searched the premises of a practicing advocate under the India Tax Statute and seized material belonging to his clients, the Hon'ble High Court adjudicating upon the same held that if the advocate learnt of fraud or illegality during the engagement with the client, the Revenue may act under the provisions of the Tax Statute and the doctrine of attorney client privilege would not come in the Revenue's way.



Ethical Framework; Guiding Principles

1 Credible-Basis Test

This test evaluates whether the position rests on a reasonable, good faith interpretation of the law, one genuinely capable of succeeding if challenged, rather than a merely arguable or aggressive reading adopted only because it cannot easily be disproved.

2 Substance Test

This test evaluates whether the arrangement is supported by a genuine commercial rationale that exists independently of the tax benefit, one that would justify the transaction even if the tax advantage were set aside.

3 Transparency Test

This test determines whether the position adopted, together with the adviser's role in structuring it, would withstand complete disclosure to the tax authority or to the public at large.

4 Client vs. System Interest

The adviser's duty to minimise a client's tax liability within the framework of the law does not extend to manufacturing structures whose sole function is to defeat the evident purpose of the statute.

From Indian Perspective: The Code of Ethics, 2026: Guidance – Institute of Chartered Accountants of India

The Institute of Chartered Accountants of India (“ICAI”) has formulated the Revised Code of Ethics, 2026 for the tax practitioners. The Code is structured across three volumes: Volume I sets out domestic ethical provisions and ICAI guidelines, Volume II aligns with the IESBA Code of Ethics, 2024, and Volume III introduces dedicated ethical and independence standards for sustainability assurance engagements. The framework retains the core principles of integrity, objectivity, professional competence, confidentiality, and professional behaviour, while strengthening standards on independence, conflicts of interest, and non-compliance with laws and regulations (“NOCLAR”), and extending ethical coverage to emerging areas such as artificial intelligence and digital professional communication.

Canada: Mandatory Disclosure Rules as Ethical Backstop

- One role of ethical rules and norms is to regulate behaviour within a society (to maintain social order and cooperation)
- Canada's self-assessment system is shifting — government is increasingly unwilling to rely on taxpayer judgment or conscience alone to get the right behavioral outcomes
- New GAAR penalties and disclosure rules aimed at driving taxpayers to question whether to engage in — and if so, to disclose — certain types of transactions

Canada: Mandatory Disclosure Rules as Ethical Backstop

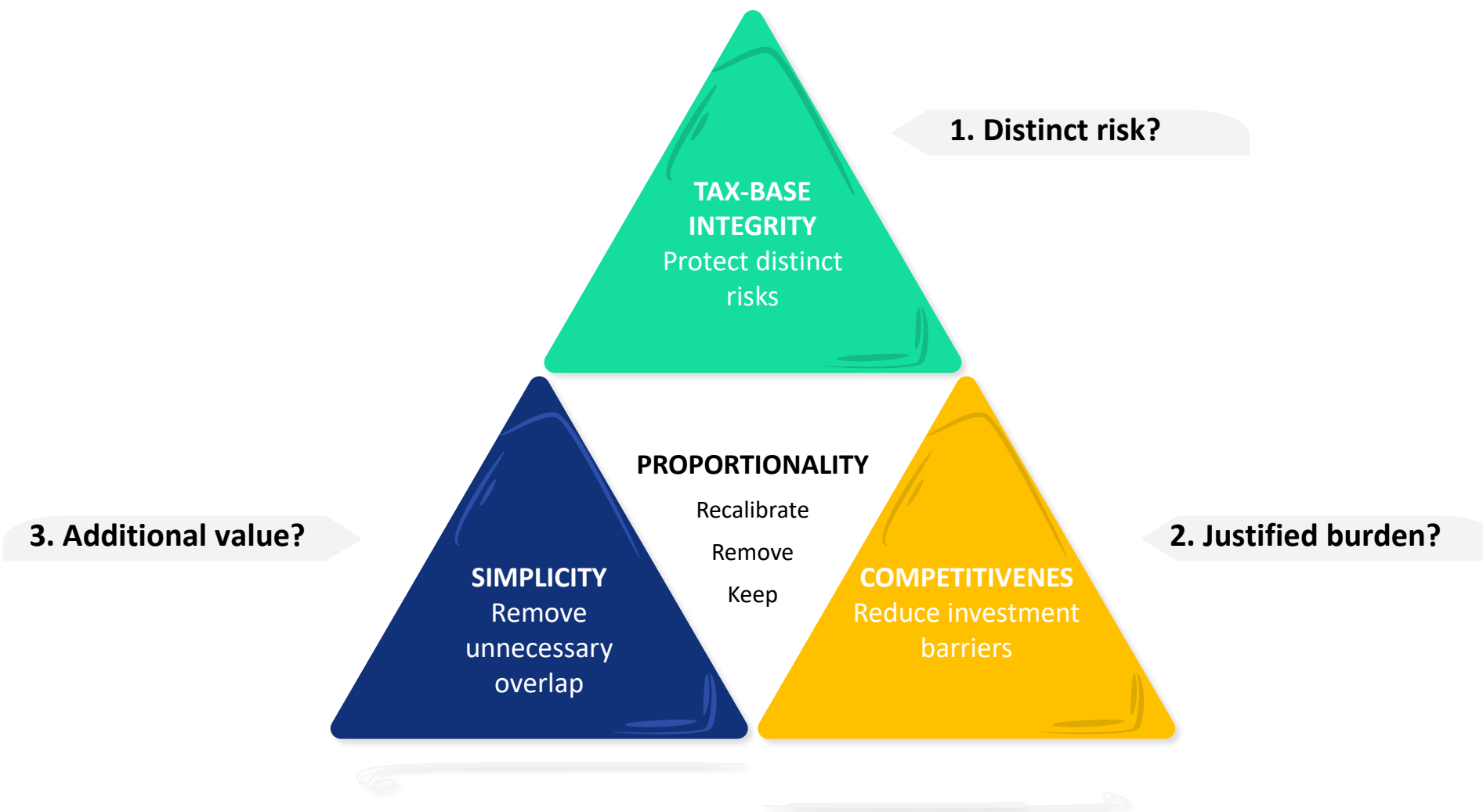
- New measures affecting behavioral calculus in tax planning:
 - A 25% GAAR penalty (on the increased tax from applying GAAR) applies to transactions found to be abusive under s. 245
 - The penalty is avoided if the transaction was reported under the mandatory disclosure rules — reportable or notifiable transactions — or via an optional (voluntary) RC312 filing
 - Same disclosure also avoids the extended, +3-year reassessment period that otherwise applies to GAAR assessments
 - Failing to report (and pay resulting penalties) causes GAAR to be read without its misuse-or-abuse element satisfied, effectively lowering the bar for GAAR to apply (until the transaction is reported and penalties paid)



So, what are the GAARdrails?



When does a GAAR stop adding value?





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