The legal consequenses of applying GAARs – a Norwegian perspective

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1. Introduction

- Sec. § 13-2: Only primary effects
- Aim of lecture: brief account of primary and more remote effects of applying GAARs
- Only substantial effects

- (Sec. 13-3 specific rules; only touched upon)

2. Primary effects
2.1 Main rule

2.1.2 *The recharactized legal facts*

Mainly continuation of earlier law

Par. 4: Taxation as if disposition carried out according to its economic substance

Par. 6: restricted to eliminating the tax benefit

Tax benefit: Difference between tax according to private law form and according to economic substance

- Examples
- Sircular step transactions: no realisation
    - Sale – buy back of shares
- Linear step transactions: eliminate tax avoidance disposition
    - Rt. 2006 p. 1062: Gift to children who sold to third person
    - Rt. 2004 p. 1331 (Aker Maritime): reorganisation

Unclear benefits:

- HR-2016-2165-A (Ikea): loan established as part of reorganisation, all the interest deduction a tax benefit?
  - Ikea N (borrower) ----------- Ikea Belgium (lender)
- Rt. 2000 p. 1865 (Nygård)

- 2.1.3 *Time of deciding effects*

- The year the avoidance disposition takes place
- Applies also to tax positions with only future effects (ex: carrying forward of losses)

- 2.1.3 *Effect restricted to eliminating tax benefit*

- Earlier law: effects may have been more far-reaching
- Par. 6: only elimate tax benefits

- Possible exeption: tax position denied totally or only to the extent of better position?
- Example 1: Company A with loss carry forward merged with profitmaking company B. Tax avoidance rule applies: No carry forward to deduct A’s losses in B’s profits. But what if earlier A makes profits after merger? Preparatory works: deduction denied for practical reasons.
- Example 2: Shares in company A sold to a group with profitmaking companies. Tax avoidance rule denies deduction of A’s loss in group contribution. But carry losses forward to A’s own profits? Less practical reasons

2.2 Subsidiary rule

- Where no obvious recharacterisation
- Main example: Sale of shares instead of assets owned by the company
- Sec. 5: Analogous interpretation of unfavourable tax rule, resticted interpretation of favourable rule
- Rt. 2014 p. 227 (Tangen): Rule for assets (taxable gain) used for gain on shares

3. Secondary effects
3.1 Introduction

- No rule in tax statute
- No private law effect
- Point of departure: tax avoidance as an issue between the taxpayer and the tax office for a certain year

3.2 Later income taxation of the same taxpayer

- Carry forward of losses
- The same issue later years (example: Rt. 2007 p. 209 Hex)
- Consequences later year after having applied the GAAR
  - Loss deduction denied (Rt. 2002 p. 256 (Hydro Canada); Hydro sold shares in sub Can to sub Den with a loss
    - H -----------→ sub Den -----------→ sub Can
  - Loss added to cost price of shares, but which shares?
  - Right to deduct loss a general tax position for Hydro?

- Later income tax issues not related to the tax avoidance
  - Example: Rt. 2007 p. 209 (Hex): Cross ownership of shares denied
  - Who shall be taxed for dividends and cap gains?
    - Following private law (accept sale of shares) or tax avoidance position (not accepting the sale of shares)

	Comp X	Comp Y
Originally	A 100 %	B 100 %
After cross sale	A 64 %	B 64 %
	B 36 %	A 36 %

3.3 Effect for other taxes than income tax

- *Wealth tax*
- Hex again: tax avoidance concerned income tax, thus no impact on wealth tax
  - Step transactions: intermediate receive asset
- *Stamp duty*
- *(Inheritance tax)*

3.4 Effect for other taxpayers

- Main rule: no effect
  - Conditions for applying GAAR not fulfilled for all participants in a disposition
    - Example: Sale of shares with both resident and non-resident sellers, recharactised to dividends, treaty witholding tax zero: No tax benefit for non-resident taxpayer
- Exception to avoid double taxation
  - Example: Taxation according to private law transactions must be cancelled to avoid double taxation
  - Example step transactions: Giver's cost price 10, value of asset 100, gift to intermediate who sell for 105 to third person. Tax avoidance: Giver taxed for 105 – 10 = 95. Intermediate gain 5, but already taxed

4. Concluding remarks