

A General Anti-Avoidance Rule (GAAR) and the Rule of Law in Japan *

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Abstract

This article analyzes the role and function of a general anti-avoidance (or anti-abuse) rule (GAAR) in the context of Japan, which is one of the rare countries without a statutory GAAR. Such an analysis is needed because some commentators in recent years have strongly argued for the introduction of a GAAR. This article focuses on the relationship between the international debate and the internal Japanese debate on tax avoidance and a GAAR.

The main arguments of this article are the following two points. First, unlike the recent arguments, it is *not* logically accurate to connect the current debate on the Base Erosion and Profit Shifting (BEPS) Project of the OECD/G20, or other international tax policy debates on aggressive tax planning (ATP), directly to the introduction of a GAAR into Japan's tax law. Second, the recent evaluation that argues that the academic debate on tax avoidance in Japan is "lagging," once we reexamine it, is an overstatement. This article asserts that it should *not* be taken for granted that a discussion introducing a process to legislate a GAAR in Japan's domestic tax law, if it once got started, allows tax authorities and courts to disallow tax avoidance more easily; rather, even if it were to be introduced, it is possible and even favorable to introduce a statutory GAAR as a "general anti-avoidance rule *without* limitation in scope of application" simply to confirm and clarify the current case law doctrines and the interpretations of existing quasi-GAARs. After that, complementary arguments on a GAAR design follow.

Key words: Disallowance of tax avoidance, aggressive tax planning, GAAR, tax morality, cooperative compliance, tax corporate governance, BEPS, EU, limitative interpretation doctrine, *Yahoo Japan/IDCF* cases

JEL Classification: H26, K34, M14

I. Introduction

We cannot ignore a discussion on disallowance of tax avoidance when we think about so-called "principle of statute-based taxation,"¹ which can be characterized in Japan as a concept similar to the rule of law in tax matters.² This is because the purposes of this

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principle—namely its historical purpose to give citizens protection from arbitrary taxation by tax authorities, and its modern function to assure them certainty or predictability in taxation—would be substantially threatened if disallowance of tax avoidance were permitted freely from a perspective of “tax fairness.”

This article analyzes the role and function of a general anti-avoidance (or anti-abuse) rule (GAAR) in the context of Japan, which is one of the rare countries without a statutory GAAR. Such an analysis is needed because some commentators in recent years have strongly argued for the introduction of a GAAR. This article does not discuss abstractly whether a GAAR should be introduced. Instead, it focuses on the relationship between the international debate and the internal Japanese debate on tax avoidance and a GAAR.

The main arguments of this article are the following two points. First, unlike the recent arguments, it is *not* logically accurate to connect the current debate on the Base Erosion and Profit Shifting (BEPS) Project of the OECD/G20, or other international tax policy debates on aggressive tax planning (ATP), directly to the introduction of a GAAR into Japan’s tax law. Second, the recent evaluation that argues that the academic debate on tax avoidance in Japan is “lagging,” once we reexamine it, is an overstatement. This article asserts that it should *not* be taken for granted that a discussion introducing a process to legislate a GAAR in Japan’s domestic tax law, if it once got started, allows tax authorities and courts to disallow tax avoidance more easily; rather, even if it were to be introduced, it is possible and even favorable to introduce a statutory GAAR as a “general anti-avoidance rule *without* limitation in scope of application” simply to confirm and clarify the current case law doctrines and the interpretations of existing quasi-GAARs³, which the author understands as substantially a uniform standard to disallow tax avoidance.⁴ After that, two complementary arguments follow. First, a legislative purpose should be more clearly stated in the legislative materials to help courts more easily decide the applicability of a GAAR. Second, we may focus on a discussion of whether a GAAR should target “double non-taxation” if we are to connect the discussion on the BEPS Project to the discussion on introduction of a GAAR.

The rest of this article proceeds in the following parts. Part II introduces recent arguments of some commentators that the debate on tax avoidance in Japan is “lagging behind the international debate” and then sets forth the research agenda for both international and domestic debate. Next, Part III focuses on the concept of “aggressive tax planning (ATP)” in the projects of the OECD/G20 and the European Union (EU). This discussion reveals that the meaning, purpose, and role of the ATP concept differ from those of the “tax avoidance” concept, which is the target of a GAAR (that is, the transactions are to be disregarded for tax purposes). Part IV reconsiders the academic debate and the case law doctrines on tax

¹ NIHONKOKU KENPO [CONSTITUTION], art. 84 (“No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe”).

² See Kaneko (2016b); Kaneko (2002).

³ See Section IV-1-2.

⁴ See Section IV-1-2 (5).

avoidance in Japan. This discussion reveals that current case law doctrines and interpretations of existing quasi-GAARs can be explained consistently using Professor Hiroshi Kaneko's theory, and that the debate in Japan has much in common with the debate in other countries. These findings will urge GAAR legislators to pay more attention to the relationship of the current academic debate and case law doctrines, which functionally overlap a GAAR. Part V provides conclusions.

II. Setting the Agenda: Recent Arguments for the Introduction of a GAAR

Recently, some commentators (hereinafter "the GAAR proponents") have strongly argued that a GAAR should be introduced into Japan's domestic tax law. Those arguments tend to be based on the BEPS Project initiated by the Committee on Fiscal Affairs of the Organisation for Economic Co-operation and Development (OECD). This part introduces some arguments of the GAAR proponents and grasps their theoretical standpoint. Then it selects some points for analysis to evaluate those arguments.

Morinobu (2016)⁵ can be identified as one of the arguments of the GAAR proponents. Its main points can be summarized as follows. The author presents the perception that the debate on tax avoidance in Japan, especially Professor Hiroshi Kaneko's theory, is "lagging behind the international debate," including the discussion in the BEPS Project. Two reasons for this evaluation are raised.

First, Professor Shigeki Morinobu describes the Japanese academic understanding of the tax avoidance concept as:

...reducing or eliminating the tax burden by exploiting the selectivity in private law by means of choosing a legal form that is not ordinarily used without a rational reason from a viewpoint of a purely economic transaction, resulting in an avoidance of satisfying the tax-imposing provisions that would be satisfied by the ordinary legal forms; nevertheless, the aimed economic purpose or result is still achieved in the end.⁶

This definition, according to the author, does not take into account the artificial fulfillment of tax-reducing provisions.

Second, it is not easy to decide whether any one type of tax planning is based on an "ordinary legal form."⁷

Professor Morinobu then argues: "Japan cannot properly implement recommendations in the BEPS project without adapting the level of debate on tax avoidance in this country to that of the BEPS project." Actions 6 and 12 of the project are specially mentioned. The author also shows apprehension on how to implement these action plans in practice under Japan's domestic tax law in the absence of a statutory GAAR. This apprehension leads to a proposal to start a discussion of introducing a GAAR into Japan's domestic tax law.

⁵ Morinobu (2016) at 5-7.

⁶ See Section IV-1-2 (1).

⁷ See also Imamura (2015) at 3, 18-21.

Honjou (2016)⁸ shows a similar opinion. In other words, it reveals a perception that the traditional concept of tax avoidance in Japan is totally different from that of the BEPS Project. On that basis, the author argues for the introduction of a GAAR as one of the countermeasures against ATP, which is one of the main targets of the project.

As exemplified above, the GAAR proponents⁹ contend for introduction of a GAAR based on the perceptions that (i) the traditional debate on tax avoidance in Japan, such as the definition of the concept of “tax avoidance,” is lagging behind, and that (ii) this lag is in comparison to the international discussion, including the BEPS Project in particular. Therefore, in this article we analyze these two points, which are set herein as research agenda to properly evaluate such arguments.

III. The Relationship between ATP and GAAR in the International Debate

This part begins by surveying the discussions in the OECD and the EU (sections III-1 and III-2, respectively) to precisely understand the relationship between ATP and GAAR. Next, it considers the relationship between a GAAR and related concepts that underlie the recent international debate, such as corporate social responsibility in tax matters, tax corporate governance, and tax morality (section III-3).

III-1. The OECD

It is helpful to refer to the discussion in the OECD before the financial crisis, and in the OECD/G20 after the financial crisis¹⁰, to understand the international debate on tax avoidance. Moreover, we need to turn eyes not only to the BEPS Project, but also to the framework of “cooperative compliance,” which preceded the BEPS Project. This part of the article especially reflects on the concept of ATP, which is the main target of the BEPS Project, with special attention to differences from the concept of tax avoidance, which is disallowed by a GAAR. Thus, we examine the question whether a GAAR has been thought to be a main countermeasure against ATP.

III-1-1. The Concept of Aggressive Tax Planning in the Cooperative Compliance Context

(1) The Definition of ATP

The OECD started to use the concept of ATP for the first time in the Seoul Declaration, which was announced after the third meeting of the OECD Forum on Tax Administration in

⁸ See Honjou (2016) at 504-26.

⁹ Imamura (2016a) is also understood to be one of the GAAR proponents.

¹⁰ Christians (2010).

2006. That document proposed “further developing the directory of aggressive tax planning schemes,” and it expressed concern about the “promotion of unacceptable tax minimization arrangements.”¹¹ A study of the role of tax intermediaries, OECD (2008), was published as part of the output of the Seoul Declaration. In that paper, the scope of ATP to be discussed was identified in the process of discussing how to respond to the rapid spread of ATP. Two types of ATP were identified¹²: “planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences” and “taking a tax position that is favorable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law.”

Here, close attention should be paid to the words in the definitions. By including the concept of “tenable,” it is inferable that a tax planning scheme satisfying the definition is not necessarily disregarded for tax purposes by application of a GAAR. This definition has since been directly cited in some OECD reports¹³ and is now incorporated in the framework of cooperative compliance.¹⁴

(2) The Role of the ATP Concept: Constraining the Concept of “Legitimate Tax Planning”

Carrero and Seara (2016) analyzed the role of the ATP concept in the framework of cooperative tax compliance as follows:¹⁵

...a more instrumental use is made in order to constrain the concept of legitimate tax planning by classing (pseudo-illegal) operations that follow the letter, but not the spirit, of the law as aggressive tax planning.

...we can emphasize the instrumental use of the pseudo-category of aggressive tax planning employed by the OECD and the tax authorities in an effort to constrict the concept and possibilities of legitimate tax planning by means of a “para-legal” formula as it does not amend the concept of avoidance, nor does it redefine the scope of anti-abuse clauses.

In reality, it can be expected, whether or not desirable, that the scope of “legitimate tax planning” would be narrow in function because large corporations can enjoy benefits such as less frequent tax investigations if they are cooperative enough in providing tax information to tax authorities. Also, it is obvious here that the concept of ATP used in this program includes tax planning that is not necessarily disallowed by application of a GAAR.

¹¹ OECD (2006).

¹² OECD (2008) at 10-11.

¹³ E.g., OECD (2010) at 13.

¹⁴ OECD (2013a).

¹⁵ Carrero and Seara (2016) at 213-14.

III-1-2. The Concept of ATP in the BEPS Project Context

(1) The Concept of ATP in the BEPS Project

Although the direct target of the BEPS Project is, as the name indicates, taxpayers' behavior that causes base erosion and profit shifting (BEPS), ATP is also included in the target.¹⁶ In particular, the necessity of timely collection of information on tax planning strategies has been stressed from the beginning of Actions 11 and 12.¹⁷ Cooperative tax compliance was also referred to in OECD (2013b) as a tool for enhancing transparency¹⁸ although there is no clear definition of ATP in the entire BEPS Project. This reference suggests a close relationship between the two projects.

With respect to a GAAR, the final report on Action 12 mentions a mutually complementary relationship between a GAAR in each country and a mandatory disclosure regime. According to the report, "A GAAR provides tax administrations with an ability to respond directly to instances of tax avoidance that have been disclosed under a mandatory disclosure regime."¹⁹ The GAAR proponents would insist on the introduction of a GAAR based on this statement. The report, however, states, in the same exact paragraph, as follows:²⁰

Equally, however, the purpose of a mandatory disclosure regime is to provide the tax administration with information on a wider range of tax policy and revenue risks other than those raised by transactions that would be classified as avoidance under a GAAR. Accordingly the definition of a "reportable scheme" for disclosure purposes will generally be broader than the definition of tax avoidance schemes covered by a GAAR and should also cover transactions that are perceived to be aggressive or high-risk from a tax planning perspective.

This statement indicates that the concept of ATP, which is the target under the mandatory disclosure regime, includes tax planning schemes that are not disallowed by application of a GAAR.

(2) The Role of the ATP Concept: The Guiding Principle to Call for International Cooperation

In Carrero and Seara (2016), the role of the ATP concept in the context of the BEPS Project is understood a little differently than in the context of cooperative compliance, as

¹⁶ OECD (2013b) at 13.

¹⁷ *See id.* at 14, 22.

¹⁸ *See id.* at 22.

¹⁹ OECD (2015b), para 35.

²⁰ *Id.*

follows:²¹

This concept (aggressive tax planning) is not used with such instrumentality in the framework of the BEPS Project, but rather it is implemented as a conceptual basis that justifies the modification of the material standards of international taxation, so that the idea of complying with the spirit of the law shall not be regarded, from an interpretative perspective, as a sort of “BEPS GAAR,” but constitutes the foundation of such new standards. (footnote omitted)

The paper also argues:²²

It could be said that the concept of aggressive tax planning it is used within the BEPS Action Plan to explain some dysfunctionalities, loopholes and inconsistencies that form part of the current (pre-BEPS) international tax system, in order to justify and build a more consistent and coherent framework that updates the international tax system.

Dourado (2015) shows a similar understanding of ATP. According to that paper, the BEPS Action Plan covers both “tax avoidance (abuse)” and “aggressive tax planning.”²³ As Action 2 shows, linking rules, which aim to avoid gaps and mismatches, i.e., double non-taxation, go beyond the concepts of tax avoidance or abuse.²⁴ In addition, Action 12, which recommends the disclosure of ATP schemes, does not use “aggressive” and “abusive” transactions as synonyms; rather, it uses them as different concepts.²⁵ Here too, it is obvious that the concept of ATP has been used as a “(vague) concept very much linked to a call to new policy developments and coordinated international action.”²⁶ Therefore, we can understand that the concept includes not only tax planning disallowed by application of a GAAR, but also tax planning that is not necessarily disallowed.

From this analysis, it can be seen that the concept of ATP is used as a basic and broader concept that includes tax planning that cannot be fully countered by interpretive measures like a GAAR. Rather, the concept is used to call for international legislative cooperation.

III-1-3. The Relationship between a GAAR and the BEPS Project

(1) GAARs, ATP, and BEPS Project

It is clear from the above analysis that the arguments for addressing ATP mainly by

²¹ Carrero and Seara (2016) at 213.

²² *Id.* at 214.

²³ See Dourado (2015) at 49.

²⁴ See *id.* at 50.

²⁵ See *id.*

²⁶ *Id.* at 44.

applying a GAAR are not based on a precise discussion in the OECD projects. Even so, the GAAR proponents may insist on their positions on the basis of the references to a GAAR in several Action Plans of the BEPS Project.

However, in the first place, the frequency of references to a GAAR in each final report of the BEPS Project is very limited.²⁷ Also, the references are made in the context of stating the relationship between each Action Plan and the existing domestic measures.²⁸ These facts by themselves enable us to infer that the BEPS Project is not putting heavy weight on a GAAR as a countermeasure to combat BEPS or ATP.²⁹ It may even be possible to assume that the OECD gave a relatively minor role to a GAAR in the BEPS Project because it took into account the current limited effectiveness of GAARs in combatting aggressive tax planning in several countries. It is also important to pay attention to the situation of the United Kingdom (UK), whose experience of introducing a GAAR is often cited in Japan by the GAAR proponents. Freedman (2016) stresses that the UK's introduction of a GAAR into its domestic law in 2013 was not intended as a solution to address BEPS, and that its domestic GAAR is not intended to be a solution to treaty abuse.³⁰

On the other hand, Australia in 2015 introduced its Multinational Anti-Avoidance Law (MAAL) by revising its domestic GAAR (Part IV A) in response to the BEPS Project.³¹ This legislation was unilateral, like the introduction of the Diverted Profits Tax (DPT) in the UK. It can be seen from the perspective of this article that Australia introduced “a GAAR *with* limitation in scope,” terminology of which is discussed later³², into its already installed domestic GAAR to reinforce it. The MAAL, whose assumed target is artificial schemes to avoid attribution of profits to permanent establishments in Australia, can disregard taxpayers' schemes if multinational entities have “a principal purpose or one of the principal purposes” of obtaining a tax benefit or reducing a foreign tax liability. The requirement, influenced by the language of the recommendation in Action 6, is less restrictive than that of existing subsection 177D (1), which requires a finding that avoidance is the “sole and dominant purpose.”³³ The influence of the BEPS Project also can be seen in that the test is met by “a combined purpose of obtaining an Australian tax benefit and reducing (or deferring) a foreign tax liability,”³⁴ because BEPS behavior has a characteristic of exploiting legal gaps and mismatches of tax systems in two or more countries.

In summary, addressing BEPS behavior, strictly speaking, does not always logically lead to the introduction of a GAAR. It should also be noted that even a country like Australia,

²⁷ *E.g.*, OECD (2015a), para. 54, 59; OECD (2015b), para. 35.

²⁸ *See* Yoshimura (2016) at 211.

²⁹ *See* Carrero and Seara (2016) at 216.

³⁰ *See* Freedman (2016) at 742, 759. It is well known that the UK unilaterally legislated the Diverted Profits Tax as an anti-BEPS measure.

³¹ *See* Parliament of the Commonwealth of Australia, House of Representatives (2015). Australia has also introduced a DPT in 2017.

³² *See* Section IV-1-2.

³³ *See* Parliament of the Commonwealth of Australia, House of Representatives (2015), para. 3.59.

³⁴ *Id.*, para 3.56.

which was influenced by the BEPS Project, strengthened its domestic GAAR not by widening the scope of an existing vague (and perhaps dysfunctional) GAAR, but by more specifically targeting multinationals, which are more likely to cause BEPS problems.

(2) Action 6: Preventing Treaty Abuse

The final report of Action 6 recommends as a minimum standard that countries include in their treaties: (i) the combined approach of a limitation on benefits (LOB) and principal purposes test (PPT) rule, (ii) the PPT rule alone, or (iii) the LOB rule supplemented by a mechanism to deal with conduit financing arrangements not already dealt with in tax treaties.³⁵ As mentioned earlier, the GAAR proponents argue for introduction of a GAAR in Japan to implement this recommendation.³⁶ However, the recommendation only calls for inclusion of one of the above three choices in each country's tax treaties, not the introduction of a domestic GAAR. Ogata (2016) suggests that the introduction of a GAAR into domestic law can be considered as a possible interim alternative in case the modification of tax treaties to implement the recommendation proves difficult or protracted.³⁷

A similarity between the PPT rule and a GAAR is often pointed out (depending on the context of the discussion) in that both rules deny tax treaty benefits by testing the taxpayer's purposes.³⁸ Thus the GAAR proponents may say that the concept of "GAAR" includes the PPT rule. Even so, however, this argument does not support their position because Japan already has several tax treaties with the PPT rule (*e.g.*, Article 21(8) of the Japan-Germany tax treaty, newly revised in December 2015) or a similar rule (*e.g.*, the Japan-UK tax treaty). In that sense, "GAARs" (if you include the PPT rule in the meaning) have already been installed in Japan. Therefore, it is unconvincing to argue that it is hard to implement the Action 6 recommendation in Japan without a GAAR.

(3) Action 12: Mandatory Disclosure Rules

As mentioned before, ATP that is to be reported in the collection of information under Mandatory Disclosure Rules (MDRs) includes two types of tax planning schemes: those that are disregarded for tax purposes by application of a GAAR, and those that are not. Accordingly, reference to Action 12 is not very persuasive when proposing the introduction of a GAAR. Rather, MDRs should be understood as tools for collecting information on ATP at an early stage, or for deterring tax scheme promoters, and should be used to encourage and assist in quick legislation of specific anti-avoidance rules.³⁹

³⁵ OECD (2015a) at 10.

³⁶ See Part II.

³⁷ See Ogata (2016) at 206. However, it is also possible to pursue choice (iii) with a country, like the US, that is reluctant to adopt the PPT rule.

³⁸ See, *e.g.*, Taboada (2015); Lang (2014) at 663-64.

³⁹ See Ogata (2016) at 221.

In addition, if one wishes to consider the complementary relationship between MDRs and a GAAR, it seems important in Japan to reflect instead on the MDRs' relationship with quasi-GAARs or case law doctrines on tax avoidance, since there is no statutory GAAR in Japan.

III-1-4. Summary

To summarize, Section III-1 shows that the OECD uses the concept of ATP in two ways. First, it has created an instrumental concept of ATP to make a new category of tax planning, which is not legally disregarded for tax purposes but is undesirable, to constrain the scope of "legitimate tax planning" in the cooperative tax compliance context. Second, the OECD uses the concept as a guiding principle to call for change in international tax policy and global cooperation, with the goal of promoting specific legislative solutions in the BEPS Project context. In that context, a GAAR is not given a substantial role as a measure to combat aggressive tax planning. Rather, it can be inferred that the BEPS Project was launched to reinforce specific legislative solutions through international cooperation because existing domestic GAARs in several countries have not been successful in combating BEPS. Therefore, it is questionable to propose an introduction of a GAAR into Japan's domestic tax law by directly invoking the BEPS Project.

III-2. The EU

III-2-1. The Concept of ATP in the EU

(1) European Commission Recommendation on Aggressive Tax Planning of 6 December 2012

In the EU, countermeasures against ATP were discussed independently before February 2013, when OECD (2013b) was made public.⁴⁰ The European Commission published a recommendation on ATP in December 2012,⁴¹ stating that "aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability" (para. (2)). The problem was described as follows: "Member States find it difficult to protect their national tax bases from erosion through aggressive tax planning... National provisions in this area are often not fully effective, especially due to the cross-border dimension of many tax planning structures and the increased mobility of capital and persons" (para. (3)). The document stressed the necessity of encouraging "all Member States to take the same general approach towards aggressive tax

⁴⁰ The development of actions against aggressive tax planning in the EU area is chronologically summarized in Panayi (2016) at 646-54.

⁴¹ Commission Recommendation of 6.12.2012 on aggressive tax planning, C (2012) 8806 final.

planning” for a better functioning of the internal market (para. (4)). In particular, it was regarded as important to address both double taxation and double non-taxation situations (para. (7)). This attention led to the recommendation of introducing a subject-to-tax clause in member states’ tax conventions (para. 3). Moreover, what is worth mentioning is that member states were encouraged to introduce a common GAAR (general anti-abuse rule) into their national legislation (para. 4). On this point, the EU approach is distinctly different from the OECD approach.

According to Dourado (2015)⁴², the concept of ATP in the EU “also covers the existence of legal gaps or mismatches exploited in transnational situations,” and “legal gaps cannot be overcome by GAARs” because “tax abuse” is required. “Tax abuse” is the EU law concept to justify a restriction of a taxpayer’s fundamental freedoms.⁴³ That is, the EU concept of ATP includes not only “tax avoidance” or “tax abuse,” which tax authorities and courts can combat by a law such as a GAAR, but also tax planning that *does not amount* to “tax avoidance” or “tax abuse.”⁴⁴ Dourado (2015) analyzes the concept of ATP in the EU as an umbrella concept covering both tax avoidance (or abuse) and the mere exploitation of legal gaps. Therefore, the function of the concept in the EU, as in the OECD, is to call for coordinated legislative action by the member states to overcome legal gaps or mismatches.⁴⁵

(2) *The Difference from the OECD*

On the other hand, the difference between the EU concept of ATP and that of the OECD is pointed out in Carrero and Seara (2016),⁴⁶ where it is summarized as two main issues. First,

It seems that the European Commission perceives aggressive tax planning to be a kind of “super-category” which would cover a broad and heterogeneous range of “tax anomalies” arising from the lack of tax coordination, the absence of genuine international tax cooperation, and from the tax competition between Member States of the European Union. In turn, the OECD applies a more limited, or stricter concept, of aggressive tax planning, ***that does not include artificial arrangements with purely tax purposes and lacking economic substance***, although it is also true that the work of the OECD does not reflect a monolithic, closed and uniform concept of aggressive tax planning, so it is

⁴² Dourado (2015) at 48.

⁴³ *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue* C-196/04[2006] ECR-I-7995 (“In order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of ***wholly artificial arrangements*** which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.”) (emphasis added).

⁴⁴ See Dourado (2015) at 48.

⁴⁵ See *id.* at 48-49.

⁴⁶ Carrero and Seara (2016) at 215.

important to consider the differences that exist between the various projects and actions carried out with regard to this concept. (emphasis added)

The authors opine⁴⁷ that “the EU Recommendation on aggressive tax planning constitutes an attempt to enhance the concept of corporate tax avoidance in order to cover the complete set of ‘artificial BEPS behaviours’ that do not fit within the legal concept of tax abuse.”

Second, the authors’ other main point is summarized as follows:⁴⁸

From an instrumental perspective, the European Commission, in its Recommendation on Aggressive Tax Planning (2012), also seems to pursue broader objectives than the OECD when it recommends that Member States should introduce two measures into their legal systems that aim to combat aggressive tax planning, namely: (a) a subject-to-tax clause applicable within the framework of the exemption method regulated unilaterally or in the network of its DTAs; and (b) the establishment in their domestic legislation of a general and common anti-abuse clause. (footnote omitted)

This point is contrary to the approach of the OECD, especially in the BEPS Project, which does not rely on implementation tools such as a “BEPS GAAR.” It is true that the OECD is using the concept of ATP instrumentally, like the EU, to constrain the scope of “legitimate tax planning” not by law, but by practical tax administration. However, unlike the EU, the OECD does not aim to reflect the ATP concept instrumentally on the interpretation of a GAAR.⁴⁹

III-2-2. Proposals for EU-GAARs

An important difference from the OECD is that a series of proposals have been made in the EU for multiple but common domestic GAARs (EU-GAARs) in member states. This point attracts great attention from the perspective of this article, as its purpose is to attain a wide grasp of the international debate.

(1) European Commission Recommendation on Aggressive Tax Planning of 6 December 2012

Proposed EU-GAARs in the recommendation on aggressive tax planning of 2012 were based on the assumptions that “specific anti-abuse measures often turn out to be inadequate for successfully catching up with novel aggressive tax planning structures” and that “it is

⁴⁷ *Id.* at 215-16.

⁴⁸ *Id.* at 216.

⁴⁹ *See id.* at 216-17.

appropriate to recommend the adoption by Member States of a common general anti-abuse rule, which should also avoid the complexity of many different ones” (para. (8)). It was also noted in the proposal that the recommendation did not apply within the scope of existing Council Directives such as Merger Directive (2009/133/EC), Parent-Subsidiary Directive (2011/96/EU), and Interest and Royalty Directive (2003/49/EC) (para (9)).

The language of the proposed EU-GAARs was as follows:

An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance. (point 4.2)

For the purposes of point 4.2, a given purpose is considered “essential” where any other purpose that is or could be attributed to the arrangement or series of arrangements appears negligible, at most, in view of all the circumstances of the case (point 4.6). An arrangement or series of arrangements is considered “artificial” where it lacks commercial substance. Concrete factors to be considered in determining whether the arrangement or series of arrangements is artificial are enumerated in point 4.4.⁵⁰ Additionally, the purpose of an arrangement or series of arrangements consists in “avoiding taxation” where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit, and purpose of the tax provisions that would otherwise apply (point 4.5).

There seemed to be a lot of objections against this proposal. One of the strongest criticisms was the difficulty of EU-wide uniform application of EU-GAARs, which were to be applied by a domestic court in each member state.⁵¹

(2) Introduction of a GAAR into the Parent-Subsidiary Directive in January 2015

In January 2015, Council Directive (2015/121) revised the Parent-Subsidiary Directive (PSD) (2011/96/EU), which stipulates exemption of a dividend from a subsidiary to its parent company. It introduced, so to speak, “a GAAR *with* limitation in scope” into the Directive as

⁵⁰ Paragraph 4.4 enumerates:

- (a) the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole;
- (b) the arrangement or series of arrangements is carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduit;
- (c) the arrangement or series of arrangements includes elements which have the effect of offsetting or cancelling each other;
- (d) transactions concluded are circular in nature;
- (e) the arrangement or series of arrangements results in a significant tax benefit but this is not reflected in the business risks undertaken by the taxpayer or its cash flows;
- (f) the expected pre-tax profit is insignificant in comparison to the amount of the expected tax benefit.

⁵¹ See Platform for tax governance of the European Commission (2014). See also Franz (2015).

a *de minimis* anti-abuse rule. As an initial proposal, which was stimulated by the launch of the BEPS Project, there were two aims: (1) to address double non-taxation arising from the use of certain hybrid loan arrangements *within the scope of* the PSD and other Directives; and (2) to introduce a general anti-abuse rule to protect the functioning of the PSD.⁵² As for the latter, the GAAR was introduced into Article 1 (2) of the PSD in January 2015, later than the introduction of the anti-hybrid rule into Article 4 (1) (a) of the PSD in July 2014. The revision legally mandated member states to enact implementing legislation or other measures by the end of 2015,⁵³ in contrast to the recommendation in 2012, which was only a “soft law.” The language of the introduced GAAR is as follows:

2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

(3) *The Anti-Tax Avoidance Directive in 2016*

On January 28, 2016, the European Commission published a proposal for newly introducing a directive to take a minimum level of actions against tax avoidance in the EU area.⁵⁴ The proposal was adopted on July 12, 2016, as the Anti-Tax Avoidance Directive (ATAD) (2016/1164).⁵⁵ The directive is a part of a full European Commission Anti-Tax Avoidance package. One of the aims of the proposal for the directive was to provide a coherent and coordinated transposition of the OECD BEPS measures within the EU. At the same time, it was also aimed to prepare for the re-launch of a proposal for a Common Consolidated Corporate Tax Base (CCCTB).⁵⁶

The directive contained a legally binding proposal for introducing a general anti-abuse rule (GAAR). This proposed EU-GAAR was more overarching than the GAAR in the revised PSD, which denies only the tax benefit provided by the directive. Such a proposal can be seen as going beyond the BEPS final reports, which adopted more specific measures.⁵⁷

In the proposal, it was recognized that a GAAR is a useful tool against abusive schemes because the elaboration of tax planning schemes is so rapid that it is difficult for countries to

⁵² See Debelva and Luts (2015) at 223.

⁵³ See *id.* at 228-234 (examining the relationship between the PSD-GAAR and domestic GAARs and anti-treaty abuse rules).

⁵⁴ Proposal COM (2016) 26 final, proposal for laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

⁵⁵ Council Directive (EU) 2016/1164 of 12 July 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

⁵⁶ Proposals for Council Directives (COM (2016) 683 final; COM (2016) 685 final were published in October, 2016.

⁵⁷ See Dourado (2016) at 442.

legislate specific anti-avoidance rules in a timely manner.⁵⁸ The proposal also stated that the proposed GAAR is designed to reflect the artificiality tests⁵⁹ of the EU law.⁶⁰ Furthermore, it stressed the importance of applying the GAAR in domestic situations within the EU and vis-à-vis third countries in a uniform manner.⁶¹

The language of the proposed GAAR (article 7 of the proposed directive) was as follows:

1. Non-genuine arrangements or a series thereof carried out for the *essential purpose* of obtaining a tax advantage that defeats the object or purpose of the otherwise applicable tax provisions shall be ignored for the purposes of calculating the corporate tax liability.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated by reference to economic substance in accordance with national law. (emphasis added)

A criticism was made against the proposal about the relationship to existing domestic GAARs in each member state and differences of languages,⁶² as had been made against the recommendation in 2012.

The proposal was revised after discussion in the EU's Economic and Financial Affairs Council (ECOFIN) on June 17, 2016,⁶³ and was enacted as a directive on July 12, 2016. Member states shall, by December 31, 2018, adopt and publish the laws, regulations, and administrative provisions necessary to comply with the directive (except exit taxation) (Article 11). The final version of the directive does not refer to the artificiality tests (para. (11)).⁶⁴ Also, the purpose requirement was broadened from "essential purpose" to "the main purpose or one of the main purposes" (Article 6(1)).⁶⁵ This language seems to be influenced by the PPT provision in BEPS Action 6 and the revised PSD.

(4) Observations

It is true that the expectation for a GAAR is greater in the EU than in the OECD. However,

⁵⁸ See COM (2016) 26 final at 9.

⁵⁹ *Cadbury Schweppes plc*, *supra* note 43.

⁶⁰ See COM (2016) 26 final at 9, 12.

⁶¹ See *id.* at 12-13.

⁶² See Navarro et al. (2016) at 124-25.

⁶³ Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market – Outcome of ECOFIN meeting, 17 June 2016, 2016/0011(CNS). Switch-over clause was omitted due to strong objections. See, e.g., Cédelle (2016) at 504 (noting the stance of UK government against it); Dourado (2016) at 441-42.

⁶⁴ On the other hand, mentions of GAAR penalties and financial activities were added in paragraph (11).

it seems the EU-GAAR proposals, especially in the EU's Anti Tax Avoidance Directive (ATAD), were made to achieve uniform application of GAARs in each member state that was already equipped with its own domestic GAAR.⁶⁶ As we can easily imagine, there has been criticism in relation to the existing domestic GAARs. The EU's tax policy environment is considerably different from Japan's, which does not have to be concerned directly with the Single Market. Accordingly, after observing the situation in the EU, which puts heavier weight on a GAAR than does the OECD, it can be concluded that we still may be skeptical about an argument that puts too much weight on the introduction of a GAAR into Japan's domestic law as a countermeasure against ATP and BEPS.

III-2-3. Summary

Section III-2 can be summarized as follows. The concept of ATP in the EU focuses on the exploitation of double non-taxation, which does not necessarily lead to an application of a GAAR. Also, similarity of the concept to that of the OECD BEPS Project can be found in the point that the concept is also used as a comprehensive concept to call for collective action in legislation of specific countermeasures against ATP. On the other hand, the EU greatly differs from the OECD in that it sought introduction of EU-GAARs as one of the main countermeasures against ATP, even though some scholars and practitioners doubt its effectiveness. It is worth paying attention to the EU-specific background, in that many of the member states are already equipped with domestic GAARs. Inconsistent application of them in each jurisdiction may prevent a uniform implementation of the BEPS Project and may harm the Single Market. Therefore, tax policymakers in Japan are not likely to make a good case for introducing a domestic GAAR by directly invoking the discussion in the EU.

⁶⁵ The language of Article 6 of the ATAD is as follows:

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

As it can be seen above, the wording of "economic substance" in article 7(3) was deleted. *See* Rigaut (2016) at 503.

⁶⁶ Cf. Gutmann et al. (2017) at 9-12, 18 (surveying the similarities and differences between the EU-GAAR and each country's domestic GAARs in Belgium, France, Germany, Italy, Netherlands, Poland, and Spain).

III-3. GAARs and the Discussion of Soft-Law Measures

There is an international trend⁶⁷ to pursue soft-law measures against ATP, such as corporate social responsibility (CSR), tax corporate governance, and tax morality. These measures are “soft” because they are not supported by tax legislation. Arguments of the GAAR proponents in Japan can be seen as being influenced by this trend. This section discusses the relationship between these soft-law measures and a GAAR from the perspective of the principle of statute-based taxation, which is based on the concept of the rule of law as incarnated in Japan’s Constitution.

The most important feature of soft-law measures is that they intend to influence taxpayers’ tax-mitigating behavior without resorting to “hard law.” This feature can be evaluated as follows.

First of all, it can be assumed basically, from the perspective of the principle of statute-based taxation, that taxpayers can act freely (whether or not this is called “exercising their legal rights”) to mitigate their tax burden as long as they follow tax statutes legislated by the Diet. Furthermore, it is usually assumed in corporate law theory that a corporate manager should act for the interest of the corporation’s shareholders, leading in the end to the benefit of all of the corporation’s stakeholders. Accordingly, there can be a contradiction if it is argued that firms are obliged to pay a given amount of tax by nature as their CSR,⁶⁸ or that a corporate manager should exercise “tax corporate governance” that does *not* necessarily advance the interests of the shareholders or the corporation. Therefore, a corporate manager should take these CSR and tax corporate governance norms into her behavior, as an implementation of her duty of care, only when they benefit the shareholders or the corporation. Such an understanding can avoid moral taxation and can barely maintain the *legal* framework to counter ATP although it is based not on tax law, but on private law.⁶⁹

From that standpoint, relying on the notions of “CSR in tax matters” or “tax corporate governance” to discourage taxpayers’ tax-mitigating behavior can be justified only in limited situations. For instance, one possible situation is when tax-mitigating behavior harms the firm’s value in the long run by exposing it to large reputational risk. Another is when such behavior signals the existence of an agency problem between the manager and the shareholders.⁷⁰ In only these limited situations, implementing those notions by a soft-law framework like the cooperative compliance project, or invoking those notions to call for countries’ legislative actions against purely tax-motivated behavior that harms social welfare,⁷¹ will be effective and will not conflict with the principle of statute-based taxation.

On the other hand, the demerits of such measures should also be carefully recognized.

⁶⁷ See generally Christians (2014); Panayi (2015), ch. 1; Carrero and Seara (2016); Shaviro (2016).

⁶⁸ E.g., Avi-Yonah (2014).

⁶⁹ Nakazato (2017) at 234-35 (arguing for a legal framework against ATP based on private law).

⁷⁰ See Desai and Dharmapala (2006a); Desai and Dharmapala (2006b); Desai and Dharmapala (2009).

⁷¹ See Weisbach (2002).

For example, it is not fair if only particular industries that are vulnerable to reputational risk, like retail businesses, are more often accused of tax immorality. Also, there is fear that taxpayers' behavior may be determined not by law but by tax administrations' criteria for tax investigations.⁷² Moreover, overregulation, which leads to welfare loss, may be brought about by legislation and legal interpretation that are influenced by excessively political statements. Accordingly, using soft-law measures like CSR or tax corporate governance should be evaluated from an institutional design perspective under the condition that taxpayers can resort to a court's decision in the end.⁷³ It is important to consider the costs and benefits of using specific anti-avoidance rules or these soft-law measures.

With respect to a GAAR, it is especially worth mentioning that, in application of a GAAR or anti-abuse doctrine, the content of the law is characteristically not determined by legislators *ex ante*, but by judges *ex post*.⁷⁴ In other words, by application of a GAAR, taxpayers are taxed by rules that are created after their behavior. Therefore, a substantial content of the law is made not by the Diet, but by the courts. This feature may conflict with the constitutional structure of power allocation adopted by the principle of statute-based taxation in Japan. To avoid the conflict, we should cautiously abstain from implementing the concept of tax morality, which is quite diverse among people, via the interpretation of a GAAR by courts without a legitimizing process through the Diet (see Section IV-2-2).⁷⁵

IV. The Debate on Tax Avoidance in Japan

This part of the article reconsiders the literature on tax avoidance in Japan, which GAAR proponents evaluate as “lagging behind.” This evaluation is an overstatement. In the reconsidering process, we especially focus on the uniformity of existing quasi-GAARs and the case law doctrine (especially that of the *Resona Bank* case⁷⁶) in Japan to combat tax avoidance.

⁷² Okamura (2011) at 159-60.

⁷³ It is also stressed in OECD (2013a) at 49.

⁷⁴ See generally Weisbach (1999).

⁷⁵ As for this matter, Freedman (2004) argues that the notion of CSR or morality should be backed up by legislation of a general anti-avoidance principle (with a sacrifice of legal certainty) to change taxpayers' code of conduct. Such a view is different from that of the UK's Aaronson Report, which argues that legal certainty is going to be secured by the legislation of a GAAR (Oka (2016) at 114). The difference from this article's viewpoint may not be so large because Professor Freedman also stresses the importance of clarifying the purpose of specific articles in legislation, and pays much attention to *legally* reinforcing the notion of morality and CSR.

⁷⁶ Supreme Court, 19 December 2005, MINSHU, Vol. 59 No. 10, 2964. See Section IV-1-2 (2). Unofficial translations of judgments of the Supreme Court are available at the court's web page, http://www.courts.go.jp/app/hanrei_en/search?

IV-1. Traditional Theories and Existing Case Law Doctrine

IV-1-1. Professor Kiyonaga's Theory

Professor Keiji Kiyonaga's theory is one of the more widely accepted traditional theories in Japan's academic debate on disallowance of tax avoidance.⁷⁷ He defined the theoretical concept of tax avoidance by borrowing that of Albert Hensel, a German scholar, as "reducing or eliminating the tax burden, by not choosing an ordinary legal form of transaction, but choosing one that is different from it, where, nonetheless, the economic result is the same or almost the same as choosing the ordinary legal form."⁷⁸ Professor Kiyonaga often pointed out that the purpose of Article 132 of *Houjinzeihou* (the Corporation Tax Act, CTA), which denies manipulative acts or calculations by family corporations, is to disallow tax avoidance.⁷⁹

On the other hand, it is not clear what he thought about the decision of the Supreme Court of Japan (SCJ)⁸⁰ in the *Resona Bank* case and Professor Hiroshi Kaneko's limitative interpretation method (explained in Section IV-1-2 (2)). Professor Kiyonaga argues that strict statutory interpretation is generally required in tax law, and that it is also necessary to consider the objective and purpose of the provisions at issue when the wording of the provisions is not decisive and several interpretations are possible.⁸¹ He does not, however, clearly express his opinion on *Resona Bank*, only referring to the possibility that several views can exist on the objective and purpose of the relevant provisions.⁸²

IV-1-2. Professor Kaneko's Theory

Professor Hiroshi Kaneko's theory,⁸³ embodying his limitative interpretation method, is another widely accepted traditional theory on disallowance of tax avoidance in Japan. This article proposes a hypothesis that the requirement of "unreasonably" in Articles 132 and 132-2 of the CTA substantially overlaps limitative interpretation doctrine, so that his theory on disallowance of tax avoidance behavior can be explained in an orderly and uniform way (hereinafter I refer to this feature as "the uniformity of Professor Kaneko's theory").

(1) General Theory on Tax Avoidance: German Origin

In the first edition of his textbook, published in 1976, Professor Kaneko also defined the

⁷⁷ Okamura (2015c) precisely analyzes Professor Kiyonaga's theory.

⁷⁸ Kiyonaga (1995) at 369 [originally published in 1967]. See also Kiyonaga (2013) at 42.

⁷⁹ See, e.g., Kiyonaga (1995) at 385 [1982]; 413-15 [1985].

⁸⁰ A general description of courts system in Japan is provided in Masui (2015) at 494-97.

⁸¹ Kiyonaga (2013), at 35.

⁸² *Id.* at 36.

⁸³ His influence on tax scholars and tax practice in Japan is enormous. See Nakazato and Ramseyer (2010).

concept of tax avoidance (or *Steuerumgehung*) by referring to Hensel's definition, which he described as "reducing or eliminating the tax burden by exploiting the selectivity in private law by means of choosing a legal form which is not ordinarily used without a rational reason from a viewpoint of a purely economic transaction, resulting in the avoidance of satisfying the tax-imposing provisions that would be satisfied by the ordinary legal form; nevertheless, the aimed economic purpose or result is still achieved in the end."⁸⁴ Furthermore, he defined disallowance of tax avoidance behavior as "treating a case of tax avoidance as if the tax-imposing provisions were satisfied, as is the case if the ordinary legal form were chosen, by disregarding the legal form the taxpayer chose for tax purposes."⁸⁵ After defining these concepts, he clarified his general disapproval of the use of interpretation without rules to disallow tax avoidance behavior.⁸⁶

(2) *Theory of Limitative Interpretation as a Type of Disallowance of Tax Avoidance: United States Origin*

Professor Kaneko's theory on disallowance of tax avoidance behavior has two features. First, his theory is not limited to tax avoidance in its strict meaning. Second, it can explain the case law doctrine on "the problem of tax avoidance in its wider meaning." These points are explicated below.

In his article published in 1978, titled "Tax Law and Private Law" (Kaneko (1978)),⁸⁷ he pointed out the problem of "a taxpayer's tendency to choose a legal form or a transactional form that results in the least tax burden by adjusting her behavior to the tax system." He named this problem as "the problem of tax avoidance in its wider meaning." This is distinct from the concept of tax avoidance in its strict meaning, as introduced in subsection (1) above. The rest of the article developed his discussion of "the problem of tax avoidance in its wider meaning."⁸⁸ The discussion introduced the *Gregory* case⁸⁹, which is thought to have established the business purpose doctrine in the United States (US). He characterized *Gregory* as "a case which results in the same as admitting interpretive disallowance of tax avoidance, due to a teleological interpretation that considers the objective and purpose of the contested provisions" (i.e., in that case, non-recognition of gain and loss in a corporate reorganization). Despite his basic attitude against interpretive disallowance of tax avoidance,

⁸⁴ Kaneko (1976) at 105.

⁸⁵ *Id.* at 106.

⁸⁶ *Id.* at 107. Before Kaneko (1976), he showed a possibility of affirming disallowance by interpretation in Kaneko (2010) [1966]; Kaneko (1972). However, Kaneko (1975) decided to deny it. *See also* Kaneko et al. (2012).

⁸⁷ Kaneko (2010) at 385 [1978].

⁸⁸ Kaneko (2010) at 401 [1978]. It was pointed out that Professor Kaneko distinguished "the problem of tax avoidance in its wider meaning" from the strict concept of "tax avoidance" in Okamura (2015c) at 307-308.

⁸⁹ *Gregory v. Helvering*, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596 (1935).

he suggested the usability of *Gregory's* interpretive method in his own country.⁹⁰ Twenty years later, Professor Minoru Nakazato in the *Resona Bank* case developed that suggestion into a method of “disallowance” (which is *not* disallowance in its strict meaning of disregarding a taxpayer’s choice of legal form for tax purposes) by limitative interpretation of tax provisions that aimed to achieve specific policy objectives other than raising revenue.⁹¹

In Professor Kaneko’s textbook, he characterizes *Resona Bank* and similar cases,⁹² where taxpayers’ exploitation of foreign tax credit systems was denied as abuse of the system,⁹³ as cases “not generally affirming the disallowance without specific statutes, but conducted using a limitative interpretation of the specific provisions, by referring to the objective and purpose of the foreign tax credit system.”⁹⁴ At the same time, he follows this statement with an important reservation: “Considering the purposes of the principle of statute-based taxation, due deliberation is required in applying the doctrine of limitative interpretation.”⁹⁵

How, then, is the doctrine of limitative interpretation understood in the general theory of legal interpretation of tax law?⁹⁶ In his textbook, Professor Kaneko states that “legal interpretation of tax law should, in principle, be based on literal interpretation because it is one of the interventional norms (*Eingriffsnormen*) that strongly require legal stability.” He also states, however, that “it goes without saying that it is required to clarify the meaning of a provision by considering the objective and purpose of the provision when it is hard to clarify the meaning of it by only literal interpretation.”⁹⁷ In addition, regarding the interpretation of tax provisions for policy objectives other than raising revenue, he notes that “literal interpretation is required in principle, but it is also required to consider the objective and purpose of the provisions... In considering them, reference to legislative purposes will be needed in many cases.”⁹⁸

In understanding Professor Kaneko’s theory, it is important to pay attention to his categorization, which is clarified by recent revisions of his textbook. There he categorizes “satisfying the requirement of the tax-reducing provisions merely for formality by structuring a transaction with a sole purpose of reducing tax burden, where nonetheless the transaction does not fit with the objective and purpose of the provisions” as one of the types of tax

⁹⁰ Kaneko (2010) at 404-09 [1978].

⁹¹ Nakazato (2002) at 225-38 [1999, 2000].

⁹² Supreme Court, 23 February 2006, HANREI TIMES, No. 1206, 172.

⁹³ The concrete scheme and the judgment of the Supreme Court of Japan are precisely summarized in Masui (2015) at 508-09.

⁹⁴ Kaneko (2016a) at 131. Both cases were understood as the cases that denied the exploitation of foreign tax credit systems as an abuse, based on the same reasons by anonymous commentary on the latter case, assumed to have been written by the SCJ research law clerks, whose commentary is quite influential in practice in Japan. This understanding was also adopted in the commentary of the SCJ research law clerks on the *Yahoo Japan/IDCF* cases (*see* Section IV-1-2 (4)(B)).

⁹⁵ Kaneko (2016a) at 131.

⁹⁶ *See generally* Masui (2014).

⁹⁷ Kaneko (2016a) at 115-16.

⁹⁸ *Id.* at 117.

avoidance mentioned in subsection (1) above.⁹⁹ This categorization, which includes reduction of the tax burden by the satisfaction of tax-reducing provisions, into the concept of tax avoidance in its strict meaning is well balanced considering that, in Germany too, a similar trend was observed for Hensel's concept of tax avoidance.¹⁰⁰ It can be analyzed that Professor Kaneko originally borrowed the definition of tax avoidance in its strict meaning from the German scholar, and properly borrowed and integrated US case law doctrine into the concept.¹⁰¹

As mentioned elsewhere, Professor Kaneko understood the SCJ's judgment in *Resona Bank* to be based on the doctrine of limitative interpretation that he once suggested. It can be inferred, from commentary on the case by the SCJ research law clerks, that the SCJ shares that understanding with him. This suggests that limitative interpretation was conducted under the influence of *Gregory*,¹⁰² even though some commentators strongly argue for different understandings.¹⁰³

(3) Article 132 of TCA as a quasi-GAAR on Family Corporations

Next, Professor Kaneko's understanding of Article 132 of the CTA¹⁰⁴, which is characterized as a quasi-GAAR¹⁰⁵ on family corporations, is reconsidered here.

It can be inferred that he has a negative evaluation of GAARs that lack limitation in scope from his statement in Kaneko (1978)¹⁰⁶ where he argued that there are two possible countermeasures against tax avoidance behavior: a GAAR or specific anti-avoidance provisions. The latter is more reasonable, he wrote, because it can better achieve the goals of

⁹⁹ Kaneko (2015a) at 129; Kaneko (2016a) at 130. We can understand that these revisions were not modifications, but just clarifications, from his recent remarks in a discussion meeting and the fact that his original article on tax avoidance purposely referred to the *Gregory* case. See Kaneko (1978); Kaneko et al. (2012) at 72 ("Gregory case can be viewed as one type of disallowance").

¹⁰⁰ See Taniguchi (2014a) at 8-9 [2010].

¹⁰¹ See Kaneko et al. (2012) at 72.

¹⁰² Sugihara (2008) at 997-99.

¹⁰³ See Taniguchi (2014a) at 58-59 [2007]; Okamura (2016b) at 39 (arguing that the SCJ did not seem to conduct a limitative interpretation on specific wording (such as "payment") of the provision); *but see* Nakazato (2002) at 234-36 [1999, 2000].

¹⁰⁴ The tentative translation of Article 132 is provided by the Ministry of Justice (<http://www.japaneselawtranslation.go.jp/>) as follows:

(Denial of Acts or Calculation by Family Corporations, etc.)

Article 132 (1) In the case where the district director of the tax office makes a reassessment or determination with regard to corporation tax related to a corporation listed as follows, when it is found that any acts conducted or calculations made by the corporation will, if allowed, unreasonably reduce the burden of corporation tax, he/she may calculate the tax base of corporation tax related to the corporation, the amount of loss, or the amount of corporation tax, based on his/her own recognition, notwithstanding the said acts or calculation:

(i) A family corporation that is a domestic corporation

(ii) [translation omitted]

¹⁰⁵ See, e.g., Masui (2015) at 506-507.

¹⁰⁶ See Kaneko (2010) at 409-12 [1978].

legal stability on one hand and equity in tax burden on the other hand.

At the same time, however, since the first edition of his textbook, he has acknowledged the unavailability and necessity of using imprecise terms to some extent in tax law from the perspective of tax equity, and has concluded that Article 132 of the CTA does not violate the principle of preciseness derived from Article 84 of Japan's Constitution.¹⁰⁷

Professor Kaneko finds two trends in lower courts' case law interpreting the "unreasonably" requirement¹⁰⁸ stipulated in Article 132 of the CTA.¹⁰⁹ One trend is to call acts or calculations unreasonable when they can be conducted due to the taxpayers' nature as family corporations, but cannot ordinarily be conducted by non-family corporations. The other trend is to disallow acts or calculations that are "unreasonable and unnatural as those of a pure economic taxpayer." He adopts the latter test in the abstract and would disregard an act or calculation of a taxpayer "when it lacks economic reasonableness." This test is called the "economically reasonable" test in Japan.

According to Professor Kaneko's understanding, acts or calculations lack economic reasonableness when (1) they are abnormal or irregular, and (2) they have no legitimate reason or business purpose.¹¹⁰ It follows that transactions between related corporations, which are different from arm's-length transactions between mutually independent corporations, would satisfy this test in many cases.

Here are some thoughts on the relationship between the "unreasonably" requirement of Article 132 and the *Gregory* case or the doctrine of limitative interpretation. First of all, the focus on "business purpose" reminds us of *Gregory*. In addition, the focus on "legitimate reason" fits with the view that an application of a tax-reducing provision is usually not denied if there is a legitimate reason that coordinates with the objective and purpose of the provision, even if a business purpose is lacking. Moreover, the selection of a legal form to satisfy a tax-reducing provision, if it deviates from the objective and purpose of the provision, would be usually viewed as "abnormal or irregular." From this analysis, it appears that the "unreasonably" requirement in Article 132 substantially overlaps the limitative interpretation doctrine, which brings the same result as disallowing tax avoidance behavior.

¹⁰⁷See Kaneko (1976) at 73-74. Later the SCJ decided that Article 132 of the CTA did not violate Article 84 of Japan's Constitution in Supreme Court, 21 April 1978, SHOMU GEPPOU, Vol. 24 No. 8, 1694. The principle of preciseness is introduced in Kaneko (2002) at 66-69; Kaneko (2016b).

¹⁰⁸The word "unreasonably" is borrowed from the translation provided by the Ministry of Justice. See *supra* note 104. It is also possible to use the word "unduly" or "unfairly."

¹⁰⁹This paragraph is based on Kaneko (2016a) at 477-78.

¹¹⁰The requirement of "subjective intent of tax avoidance," which had been included since the 17th edition, was deleted in Kaneko (2016a) because it was merely a repetition of the subjective aspect of the second requirement.

(4) *Article 132-2 of the CTA as a Quasi-GAAR on Corporate Reorganizations*

A. Lower Courts' Decisions in the *Yahoo Japan/IDCF* Cases

The tax system reform of 2001 introduced another quasi-GAAR on corporate reorganizations as Article 132-2¹¹¹, where a set of rules involving corporate reorganizations was added to the CTA. Professor Kaneko's textbook has been waiting for the accumulation and development of case law on this article.¹¹² In 2016, the SCJ, for the first time, handed down decisions that showed its interpretation of the "unreasonably" requirement in Article 132-2. The decisions came in the *Yahoo Japan/IDCF* cases.¹¹³

These cases arose from the attempt of SoftBank Group Corporation to transfer and utilize expiring business losses of a related corporation, SoftBank IDC Solutions Kabushiki Kaisha (IDCS), through a series of corporate reorganizations. SoftBank held all the shares of IDCS, which had unutilized business losses amounting to approximately 66.6 billion yen. It appeared that IDCS by itself would not be able to utilize these losses before the expiration date. SoftBank at the time also held approximately 42.1 percent of the voting shares of Yahoo Kabushiki Kaisha ("Yahoo Japan"), which was profitable; so SoftBank used Yahoo Japan as a vehicle to absorb and utilize 54.3 billion yen of IDCS's business losses by an absorption-type merger in which IDCS was a merged company. Before effecting the merger, a new

¹¹¹ The article's tentative translation is provided by the Ministry of Justice (<http://www.japaneselawtranslation.go.jp/>) as follows:

(Denial of Acts or Calculation Pertaining to Organizational Restructuring)

Article 132-2 In the case where the district director of the tax office makes a reassessment or determination with regard to corporation tax related to a corporation listed as follows that was involved in a merger, company split, capital contribution in kind, post-formation acquisition of assets and/or liabilities (meaning a post-formation acquisition of assets and/or liabilities as prescribed in Article 2, item (xii)-6 (Definitions)), share exchange or share transfer (hereinafter referred to as a "merger, etc." in this Article), when it is found that any acts conducted or calculations made by the corporation will, if allowed, unreasonably reduce the burden of corporation tax, due to a decrease in the amount of profit or an increase in the amount of loss on the transfer of assets and liabilities transferred as a result of a merger, etc., an increase in the amount to be credited from corporation tax, a decrease in the amount of profit or an increase in the amount of loss on the transfer of shares (including capital contributions; the same shall apply in item (ii)) of a corporation listed in item (i) or item (ii), a decrease in the amount of deemed dividend (meaning the amount deemed to be the amount listed in Article 23, paragraph (1), item (i) (Exclusion from Gross Profits of Dividend Received, etc.) pursuant to the provisions of Article 24, paragraph (1) (The Amount Deemed to be That of Dividend, etc.)), or due to other grounds, he/she may calculate the tax base of corporation tax related to the corporation, the amount of loss, or the amount of corporation tax, based on his/her own recognition, notwithstanding the said acts or calculation:

(i) A corporation or the other corporation that has effected a merger, etc.

(ii) A corporation that has issued shares delivered as a result of a merger, etc. (excluding a corporation listed in the preceding item)

(iii) A corporation that is a shareholder, etc. of a corporation listed in the preceding two items (excluding a corporation listed in the preceding two items)

¹¹² *E.g.*, Kaneko (2016a) at 470.

¹¹³ Supreme Court, 29 February 2016, MINSHU, Vol. 70 No. 2, 242 [*Yahoo Japan*]; Supreme Court, 29 February 2016, MINSHU, Vol. 70 No. 2, 470 [*IDCF*].

company, Kabushiki Kaisha Softbank IDC Frontier (IDCF), was created by means of a company split of IDCS. Then most of IDCS's business was transferred to IDCF, and IDCS's remained losses (10 billion yen), which were predicted not to be fully utilized by Yahoo Japan, were converted into amortizable losses of IDCF. The amortizable losses (10 billion yen) were created because the total value of the transferred business was estimated to be only 1.5 billion yen, while the total value of the IDCF shares issued as compensation was 11.5 billion yen. The company split was not a "qualified" split, in which non-recognition treatment is allowed, because the issued IDCF shares were planned to be sold, and actually were sold (Sale 1), from IDCS to Yahoo Japan soon after the split. The capital gains (10 billion yen) could be offset by IDCS against its business losses. Soon after Sale 1, SoftBank sold all the IDCS shares to Yahoo Japan (Sale 2) to effect a "qualified merger" transferring the business losses (54.3 billion yen) to Yahoo Japan. However, a transfer of business losses in a qualified merger is allowed only when it satisfies the additional requirements of Article 57(3) of the CTA and delegated provisions of *Houjinzeihou Sekourei* (Cabinet Order for Enforcement of CTA). Yahoo Japan took action to satisfy one type of requirements of the Cabinet Order, which was easy to fulfill among two selective types. This type requires that at least one of a list of specified officers (president, vice president, representative executive officer, etc.) in each merged and merging corporation must be expected to become a specified officer of the merging corporation after the qualified merger. To meet the requirement, Yahoo Japan sent A, who was its president and a director, to IDCS as a vice president two month before Sale 2, or three months before the merger, although all the directors of IDCS except A resigned from office following the merger.

The tax authority responded to this course of corporate reorganization by invoking Article 132-2. It disallowed the transfer of business losses (this issue went to court as the *Yahoo Japan* case) and refused to recognize the amortizable losses (this issue became the *IDCF* case).

In these cases, the plaintiff taxpayers, on the one hand, based their arguments on the "economically reasonable" test. The defendant (Government of Japan), on the other hand, based its arguments on the "abuse of the tax system" test, strongly stressing teleological interpretation. To precisely understand the decisions of the SCJ, it is important to review the preceding decisions of the lower courts in these cases.

Tokyo District Court¹¹⁴ in *Yahoo Japan* decided that two patterns together made one act or calculation of a taxpayer an unreasonable tax avoidance under Article 132-2. First, it held that the transactions were "unnatural and unreasonable, as in the application of Article 132" (this is thought to have led to adoption of the "economically reasonable" test). Second, the court stated:

¹¹⁴Tokyo District Court, 18 March 2014, HANREI JIHOU, No. 2236, 25 [*Yahoo Japan*]. In the *IDCF* case, Tokyo District Court decided the same as in the *Yahoo Japan* case on the interpretation of Article 132-2. See also Tokyo District Court, 18 March 2014, HANREI JIHOU, No. 2236, 47 [*IDCF*].

It is obvious that accepting the effect that is brought by the application of relevant provisions violates the objective and purpose of the tax system of corporate reorganizations or those of relevant specific provisions, even if a part of a taxpayer's act involving corporate reorganizations satisfies the requirement of specific provisions on corporate reorganizations merely for formality, so that it has the effect of reducing the tax burden concerning the series of corporate reorganizations including the contested act.

Some commentators criticized the second part of the decision by pointing out the similarity to the limited interpretation doctrine, whose interpretation method can conflict with the principle of statute-based taxation (especially the principle of reservation to statutes¹¹⁵), and they made proposals to improve the test.¹¹⁶ It is not clear whether these criticisms and proposals influenced the decisions on appeal, but in the appeal of *Yahoo Japan*, Tokyo High Court¹¹⁷ substantially approximated the method of applying the “abuse of the tax system” test to the determined facts, to the method of the “economically reasonable” test. Nevertheless, the court sustained the contrast between the two tests, and it followed the general interpretation of Article 132-2 given by Tokyo District Court. To be concrete, Tokyo High Court put great weight on the determination of “business necessity” of the contested act (i.e., A's assumption of the vice presidency of IDCS), which it assumed to be the same as “business purpose” in determining whether an abuse existed.¹¹⁸

Professor Kaneko has criticized the terminology of the lower courts, which termed Article 132-2 not as a “general,” but rather as a “comprehensive” anti-avoidance rule:

Even if one calls Article 132-2 a general anti-avoidance rule, whether this article is applied is decided with due consideration to the objective and purpose of the relevant category of corporate reorganization and those of specific provisions, not based on only the first test [= the “economically reasonable” test] to which the decisions referred. Accordingly, it does not follow that the scope of this article gets wider or narrower by using the concept of a comprehensive anti-avoidance rule instead of the concept of a general anti-avoidance rule.¹¹⁹ (parenthetical note added)

We can infer as follows from the above statement: A set of rules involving corporate reorganizations is characterized as one set of tax provisions for policy objectives that allows non-recognition of capital gain or loss and transfer of tax attributes. Therefore, its scope is

¹¹⁵ See Kaneko (2002) at 57-64; Kaneko (2016b).

¹¹⁶ Taniguchi (2014b); Yoshimura (2014).

¹¹⁷ Tokyo High Court, 5 November 2014, SHOMU GEPPOU, Vol. 60 No. 9, 1967 [*Yahoo Japan*]. See also Tokyo High Court, 15 January 2015, courts web page [*IDCF*].

¹¹⁸ See Nagato (2016).

¹¹⁹ Kaneko (2016), at 472. See also Kaneko (2015b).

decided by referring to the objective and purpose of relevant provisions. Also, an abusive method of satisfying the requirements for tax-reducing provisions is categorized as one type of tax avoidance, so that there is room for a “disallowance”¹²⁰ under the limitative interpretation doctrine. However, in the case of corporate reorganization, Article 132-2 already exists and plays that role instead of the doctrine. In this area, the function of Article 132-2 overlaps that of the limitative interpretation doctrine. Article 132 also overlaps the limitative interpretation doctrine as described in subsection (3) of this section. Thus, a hypothesis can be drawn from the analysis that all three situations can be explained as substantially uniform tests from a perspective of methods of addressing tax avoidance in Professor Kaneko’s theory. This hypothesis is reinforced by the recent SCJ decisions in the *Yahoo Japan/IDCF* cases.

B. The Supreme Court’s Decisions in *Yahoo Japan/IDCF* Cases

In its review of *Yahoo Japan*¹²¹, the SCJ decided as follows:

The concept of an act or calculation that will “result in unreasonably reducing the burden of corporation tax,” as referred to in said article [Article 132-2], should be interpreted as meaning that an act conducted or calculation made by a corporation will lead to reducing the burden of corporation tax by improperly using the provisions concerning the tax system for organizational restructuring [corporate reorganization] as a means of tax avoidance. (parenthetical notes added)

Then it went on to say:

Determination as to whether or not any such improper use was committed, should be made by first taking into consideration, among others, [i] whether the corporation’s act or calculation in question is of unnatural nature (e.g., it employed a procedure or method of organizational restructuring that would not have normally been thought of, or it resulted in the creation of an appearance that is alienated from reality), and [ii] whether there was any business objective or any other factor that could be a reasonable ground for performing such act or calculation, except for reducing the tax burden; and then by considering whether the act or calculation in question can be deemed to have been performed in an attempt to reduce the tax burden by taking advantage of organizational restructuring and aimed at seeking or avoiding the application of the provisions concerning the tax system for organizational restructuring in a manner that deviates from the original purposes and objectives of those provisions.

¹²⁰See *supra* note 91 and accompanying text.

¹²¹In the *IDCF* case, the SCJ decided almost the same as in the *Yahoo Japan* case on the interpretation of Article 132-2.

The SCJ law clerks showed their understanding of this decision in their commentary¹²² as clarifying the adoption of the “abuse of the tax system” test by referring to the legislative objective and purpose of Article 132-2, which could be inferred from the legislative materials at that time. In particular, they ostensibly excluded the “economically reasonable” test by stating that there is a fear that it is so hard to determine, from its starting point of discussion, what is a natural and reasonable corporate reorganization as an act of purely economic taxpayers (normal economic taxpayers without particular interests) that it may not be possible to determine reasonableness properly in some cases.

However, on the other hand, the clerks understood that the SCJ gave special importance to factors [i] and [ii] raised above in determining whether there was an abuse. They understood that the SCJ modified the expression of the two factors raised by Professor Kaneko, which are to be considered in applying the “economically reasonable” test, to make them fit a situation of corporate reorganization. In the end, they evaluated that the judgment of the SCJ is based on the “abuse of the tax system” test and, at the same time, substantially incorporates Professor Kaneko’s understanding of the “economically reasonable” test. This ambivalent evaluation weakens by itself the plausibility that they understood that the “economically reasonable” test should be excluded.

In addition, they understood the decision of the SCJ narrowly by saying that the SCJ implied that it is mandatory to consider the two factors above. They even characterized these two points as requirements to be always satisfied, rather than just factors to be considered, although one commentator criticized the SCJ’s decision as showing only a “viewpoint,” not a test.¹²³ This explanation by the clerks, by itself, casts doubt on the significance of stressing the difference between the two tests, an issue that both parties originally brought to court. Furthermore, the clerks quoted the *Resona Bank* case for the meaning of the “abuse of the tax system” concept in the commentary. This evidences the substantial overlap of the requirements between Article 132-2 and the limitative interpretation doctrine.

To summarize, it is probable that the SCJ decided the *Yahoo Japan/IDCF* cases under the influence of the competing arguments of both parties, based on the presumed conflict between the “economically reasonable” test and the “abuse of the tax system” test,¹²⁴ although the SCJ itself implicitly assumed both the uniformity of Professor Kaneko’s theory and the substantial equality of the requirements in rules, namely the two CTA articles and the doctrine.

(5) GAAR as a “General Anti-Avoidance Rule without Limitation in Scope of Application”

In summary, it can be analyzed that Professor Kaneko, like Professor Kiyonaga, started

¹²² See Tokuchi and Hayashi (2016) at 84-87.

¹²³ Okamura (2016a).

¹²⁴ It seems that such a conflict was substantially eliminated by Tokyo High Court in applying the test to the determined facts.

to develop his theory on tax avoidance on the basis of Hensel's theory. He then melded with it the business purpose doctrine of the US, and this combination led to a coherent explanation of substantially the same requirements of quasi-GAARs and limitative interpretation doctrine in Japan. This explanation seems to have been accepted by the SCJ.

Among the three rules, Article 132 and Article 132-2 are characterized as "general anti-avoidance rules *with* limitation in scope"¹²⁵ or quasi-GAARs. Also, the remaining one of the three rules, the limitative interpretation doctrine, functions as a general anti-avoidance doctrine in the area of tax-reducing provisions for policy objectives not covered by the quasi-GAARs. Accordingly, although it is true that there is no statutory GAAR in Japan, yet there surely are rules and a doctrine that function like a statutory GAAR, at least at the level of substantive tax law. In addition, because it is the general academic understanding in Japan that the limitative interpretation doctrine should be invoked only in very abusive situations,¹²⁶ this modest use of the doctrine is probably functioning well to prevent arbitrary taxation by tax authorities. It is the fear of arbitrary taxation that is the chief objection to introducing a statutory GAAR into Japan.

IV-2. Evaluation of the Current Situation and Cautions in Considering a GAAR Introduction

IV-2-1. Is the Debate on Tax Avoidance in Japan "Lagging Behind"?

We should reconsider whether the debate on tax avoidance in Japan is fairly evaluated as "lagging behind" compared to other countries. We should also discuss what direction is appropriate if Japan is to consider the introduction of a statutory GAAR into its domestic law.

Concerning the first point, one of the criticisms of traditional theories, raised by those commentators who say we are lagging behind, is that the traditional concept of tax avoidance cannot cover abusive methods of satisfying tax-reducing provisions. However, this criticism is not persuasive because those cases are included in the concept of tax avoidance according to Professor Kaneko's theory, as mentioned elsewhere in this article.¹²⁷

Another criticism is that it is not easy to determine whether any one type of tax planning is based on "ordinary legal forms." However, this criticism is not plausible in view of the fact that one commentator who raised it has himself welcomed the decisions of the SCJ in the *Yahoo/IDCF* cases, which required consideration of the "unnaturalness" of the contested act or calculation.¹²⁸ Also, it is common to consider the "abnormality or irregularity" of the transaction to some extent, both in Professor Kaneko's definition and in foreign GAARs,

¹²⁵Kaneko (2015b).

¹²⁶See *supra* note 95 and accompanying text.

¹²⁷See *supra* note 99 and accompanying text.

¹²⁸Imamura (2016b).

including that of the UK¹²⁹, which is often cited by Japanese scholars.¹³⁰ It seems the difference is only a matter of degree.

Furthermore, it is convenient to take “abnormality or irregularity” into account after the disallowance, in recalculating the tax burden that would have been payable if a normal or regular legal form had been used.¹³¹ In fact, in 2013, Australia, which pays attention to the rule of law in determining tax burden after the disallowance,¹³² took legislative action to introduce methods of recalculation to combat “do nothing” defenses¹³³ raised by taxpayers. (A “do nothing” defense is where the taxpayer argues that it would have “done nothing” in the alternative, such that no amount would have been included in its taxable income, and therefore no “tax benefit” would have arisen.)

Seeing this trend in the UK and Australia of taking “abnormality or irregularity” into account, the traditional debate in Japan, which has been doing likewise, has much in common with the debate in these other countries.

In conclusion, evaluating the debate in Japan as “lagging behind” seems an overstatement. Instead, it is even possible to say that Japan’s tax law and its debate on tax avoidance have much in common with other countries because Japan has tax law provisions that function like a statutory GAAR, at least in the aspect of substantive tax law. The main feature of comparison between Japan and GAAR countries is whether there exists a statutory GAAR *without* limitation in scope. Where there is a statutory GAAR, of course, this may lead to a great difference, especially in applying procedures like a GAAR panel. If Japan starts to consider the introduction of a GAAR, it is important to analyze the functions of existing quasi-GAARs and case law doctrine. It should not be assumed as a matter of course that introduction of a statutory GAAR always leads to easier disallowance.

IV-2-2. Learning from Critics

It is true that there are some persuasive criticisms of the limitative interpretation doctrine, although the doctrine can be explained harmoniously with quasi-GAARs according to the hypothesis of the uniformity of Professor Kaneko’s theory.

Professor Setsuo Taniguchi¹³⁴ strictly distinguishes a limitative interpretation approach from an “abuse of the tax system” approach. He classifies the decision in *Resona Bank* into the latter approach and criticizes the SCJ’s decision therein as a violation of the principle of

¹²⁹The UK GAAR takes into account the abnormality of taxpayers’ arrangements in determining whether tax arrangements are “abusive.” See Finance Act 2013, 207(2)(B).

¹³⁰See, e.g., Oka (2016).

¹³¹See Waerzeggers and Hiller (2016) at 3; Krever (2016) at 11.

¹³²See Cooper (2013) at 268 (arguing that the reconstructed transaction “is an affair governed by the rule of law rather than the whim of the administrator”).

¹³³See generally Cooper (2011).

¹³⁴See Taniguchi (2015).

statute-based taxation. Also, he recently made an argument criticizing courts' tendency to assume the objective and purpose of provisions themselves, not their literal wording, as law, characterizing Tokyo District Court's approach in the *Yahoo Japan/IDCF* cases as "the hyperplasia of teleological interpretation."

Professor Tadao Okamura also criticizes the decision of the SCJ in *Resona Bank* because it talked about the objective and purpose of a foreign tax credit system without referring to clear legislative materials.¹³⁵ In the *Yahoo/IDCF* cases, he views the SCJ as substantially adopting the so-called economic observation method or *wirtschaftliche Betrachtungsweise*, which was once adopted in Germany and gave its tax authority a wide discretion to disallow. He also criticizes the SCJ for affirming disallowance even though the challenged acts were not so abusive as in *Resona Bank*.

These critics differ from the view of this article in that they interpret *Resona Bank* as not being a case that involved "tax avoidance" in its strict meaning. However, we can learn from them because they correctly point out the danger of teleological interpretation without plausible legislative materials. The danger is also surely recognized in Professor Kaneko's theory,¹³⁶ but they seem hypervigilant. To allay such fears if we start to consider the introduction of a statutory GAAR, we should design mechanisms to protect taxpayers from disallowance in cases where the objective and purpose of the relevant provisions are not obvious. In particular, as has long been argued in both Japan and other countries, it would be indispensable to improve the mechanism to systematically improve the quality and quantity of legislative materials in the tax legislation process.¹³⁷ As for the courts, it is difficult to restrict judges' discretion, but they should abstain from presupposing the objectives and purposes of the relevant provisions without consulting sufficient legislative materials, whether under the conscious or unconscious influence of the notion of tax morality.

IV-2-3. A GAAR Design Issue and the BEPS Project

Finally, we succinctly refer to a GAAR design issue relating to the BEPS Project. In designing a GAAR, what is really relevant to the BEPS Project is, as mentioned in Part III, whether problems of "double non-taxation" and "tax reduction in other countries" should be taken into account in applying a GAAR or PPT. One commentator has already argued for taking this approach¹³⁸ in regard to a recent case in Japan.¹³⁹

However, as seen in this article, the BEPS Project called for cooperation among countries and put more weight on specific anti-avoidance measures than a GAAR in addressing BEPS or ATP. Accordingly, due deliberation may be required to resort to applying a domestic

¹³⁵Okamura (2016b).

¹³⁶See *supra* note 95 and accompanying text.

¹³⁷See, e.g., Freedman (2014) at 168; Avi-Yonah and Pichhadze (2016).

¹³⁸Okamura (2015b).

¹³⁹Tokyo High Court, 25 March 2015, HANREI JIHOU, No. 2267, 24 [IBM].

GAAR unilaterally,¹⁴⁰ rather than to specific anti-avoidance measures, in combatting BEPS behavior.

V. Concluding Remarks

In this article, recent arguments of the GAAR proponents in Japan, who evaluate the debate on tax avoidance in this country as “lagging behind” compared to the international debate, were introduced. Then, after a close examination, it was concluded that their evaluation was not very convincing.

The review of international debate in this article revealed that ATP, against which countermeasures are being discussed in the OECD and the EU, includes tax planning that is not disallowed by application of a GAAR. Because of that, a GAAR is not counted as a main countermeasure against it. In addition, this review revealed that there exists a trend of using soft-law mechanisms, such as CSR in tax matters or tax corporate governance, between taxing agencies and taxpayers to prevent taxpayers from being too aggressive. To conclude, this article argues that such a trend, which has very much a moral aspect, should not govern the application of a GAAR.

Moreover, this article concludes after reexamination that evaluating the debate on tax avoidance in Japan as “lagging behind” in comparison to other countries is an overstatement. Current case law in Japan can be explained using Professor Kaneko’s theory, which has much in common with other countries. Finally, some supplementary remarks were made on GAAR design issues, such as the importance of improving legislative materials and how to treat double non-taxation.

References

- Avi-Yonah, R. (2014), “Corporate Taxation and Corporate Social Responsibility,” *New York University Journal of Law & Business*, Vol. 11 No. 1, pp. 1-29.
- Avi-Yonah, R., and A. Pichhadze (2016), “GAARs and the Nexus between Statutory Interpretation and Legislative Drafting: Lessons for the U.S. from Canada,” *Accounting, Economics and Law - A Convivium*, DOI: <https://doi.org/10.1515/acl-2015-0019>.
- Carrero, J., and A. Q. Seara (2016), “The Concept of ‘Aggressive Tax Planning’ Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning,” *Intertax*, Vol. 44 Issue 3, pp. 206-26.
- Cédelle, A. (2016), “The EU Anti-Tax Avoidance Directive: A UK Perspective,” *British Tax Review*, Issue 4, 2016, pp. 490-507.
- Christians, A. (2010), “Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20,” *Northwestern Journal of Law and Social Policy*, Vol. 5, pp. 19-40.

¹⁴⁰ See Yoshimura (2016) at 211; Cooper (2016) (warning that Australia’s tax policy shows an appetite for unilateralist approaches although it presents itself as BEPS compliant).

- Christians, A. (2014), "Avoidance, Evasion, and Taxpayer Morality," *Washington University Journal of Law and Policy*, Vol. 44, pp. 39-59.
- Cooper, G. (2011), "Predicting the Past: The Problem of Finding a Counterfactual in Part IVA," *Australian Tax Review*, Vol. 40 Issue 3, pp. 185-200.
- Cooper, G. (2013), "Taxation by Analogy," *Australian Tax Review*, Vol. 42 Issue 4, pp. 255-68.
- Cooper, G. (2016), "Implementing BEPS, or Maybe Not - The Australian Experience One Year On," *Sydney Law School Research Paper*, No. 16/91.
- Debelva, F., and J. Luts (2015), "The General Anti-Abuse Rule of the Parent-Subsidiary Directive," *European Taxation*, Vol. 55 No. 6, pp. 223-34.
- Desai, M., and D. Dharmapala (2006a), "Corporate Social Responsibility and Taxation: The Missing Link," *Leading Perspectives*.
- Desai, M., and D. Dharmapala (2006b), "Corporate Tax Avoidance and High-powered Incentives," *Journal of Financial Economics*, Vol. 79, pp. 145-79.
- Desai, M., and D. Dharmapala (2009), "Corporate Tax Avoidance and Firm Value," *Review of Economics and Statistics*, Vol. 91 No. 3, pp. 537-46.
- Dourado, A. P. (2015), "Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Action 2 and 6," *Intertax*, Vol. 43 Issue 1, pp. 42-57.
- Dourado, A. P. (2016), "The EU Anti Tax Avoidance Package: Moving Ahead of BEPS?," *Intertax*, Vol. 44 Issue 6 & 7, pp. 440-46.
- Franz, T. (2015), "The General Anti-Abuse Rule Proposed by the European Commission," *Intertax*, Vol. 43 Issue 11, pp. 660-72.
- Freedman, J. (2004), "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle," *British Tax Review*, Issue 4, 2004, pp. 332-57.
- Freedman, J. (2014), "Designing a General Anti-Abuse Rule: Striking a Balance," *Asia-Pacific Tax Bulletin*, Vol. 20 Issue 3, pp. 167-73.
- Freedman, J. (2016), "United Kingdom," in M. Lang (ed), *GAARs: A Key Element of Tax Systems in the Post-BEPS World*, IBFD.
- Gutmann, D, A. Perdelwitz, E. R. Blétière, R. Offermanns, M. Schellekens, G. Gallo, A. Hap, and M. Olejnicka (2017), "The Impact of the ATAD on Domestic Systems: A Comparative Survey," *European Taxation*, Vol. 56, No. 1, pp. 2-20.
- Honjou, T. (2016), *Kokusai Kazei ni Okeru Juyou na Kazei Gensoku no Saikentou (Chu) [Reexamination of Important Tax Principles in International Taxation (2)]*, Nihon Sozei Kenkyu Kyokai.
- Imamura, T. (2015), *Sozei Kaihi to Ranyou Houru* [Tax Avoidance and Abuse of Law] Okura Zaimu Kyokai.
- Imamura, T. (2016a), "Sozei Kaihi no Igi to G8 Kakukoku no Taiou [Significance of Tax Avoidance and the G8 Countries' Response]," *Financial Review*, Vol. 126, pp. 17-46.
- Imamura, T. (2016b), Case Note, *Zeimu Kouhou*, Vol. 64 No. 7, pp. 54-63.
- Kaneko, H. (1972), "Shihoujou no Torihiki to Sozeihou [Private Transactions and Tax Law],"

- in K. Yamauchi and I. Ogawa (eds), *Enshu Gyoseihou* [Seminar on Administrative Law], Ryousho Hukyu Kai.
- Kaneko, H. (1975), "Shotokuzei to Kyapitaru Gein [Individual Income Tax and Capital Gains]," *Sozeihou Kenkyu* [Japan Tax Law Review], Vol. 3, pp. 40-62.
- Kaneko, H. (1976), *Sozeihou* [Tax Law], 1st ed., Koubundou.
- Kaneko, H. (2002), "The Principle of Statute-Based Taxation in Japan: Trends in Scholars' Opinion and Case Law," in P. Kirchhof et al. (eds), *International and Comparative Taxation: Essays in Honour of Klaus Vogel*, Kluwer Law International.
- Kaneko, H. (2010), *Sozeihou Riron no Keisei to Kaimei (Jou)* [Formation and Clarification of Tax Law Theories], Yuhikaku.
- Kaneko, H. (2015a), *Sozeihou* [Tax Law], 20th ed., Koubundou.
- Kaneko, H. (2015b), "Sozeihou ni Okeru Gainen Kousei [Concepts in Tax Law]," *Zeiken*, No. 182, p. 14.
- Kaneko, H. (2016a), *Sozeihou* [Tax Law], 21st ed., Koubundou.
- Kaneko, H. (2016b), "Rule of Law and Japanese Tax Law," <https://www.jtri.or.jp/about/information.php>.
- Kaneko, H., M. Nakazato, H. Satou, and M. Yoshimura (2012), "Zadankai Kaneko Hiroshi Sensei ni Kiku (1) Sozeihou no Kaishaku Tekiyou, Sozeihou to Shihou [Interview with Professor Hiroshi Kaneko (1) Interpretation and Application of Tax Law, Tax Law and Private Law]," *Houritsu Jihou*, Vol. 84 No. 4, pp. 64-74.
- Kiyonaga, K. (1995), *Sozei Kaihi no Kenkyu* [Studies on Tax Avoidance], Mineruva Shobou.
- Kiyonaga, K. (2013), *Zeihou* [Tax Law], new edition, Mineruva Shobou.
- Masui, Y. (2014), "Legal Interpretation of Tax Law: Japan," in R. Brederode and R. Krever (eds), *Legal Interpretation of Tax Law*, Kluwer Law International.
- Masui, Y. (2015), "The Responsibility of Judges in Interpreting Tax Legislation: Japan's Experience," *Osgoode Hall Law Journal*, Vol. 52, Issue 2, pp. 491-512.
- Morinobu, S. (2016), "Beppusu to Sozei Kaihi heno Taiou [BEPS and Response to Tax Avoidance]," *Financial Review*, Vol. 126, pp. 5-16.
- Nagato, T. (2016), Case Note, *Jurist*, No. 1490, pp. 135-38.
- Nakazato, M. (2002), *Takkusu Sheruta* [Tax Shelters], Yuhikaku.
- Nakazato, M. (2017), "Aguressibu na Sozei Kaihi to Kaishahou [Aggressive Tax Avoidance and Corporate Law]," *Hougaku Shinpou*, Vol. 123 No. 11 &12, pp. 221-44.
- Nakazato, M., and J. M. Ramseyer (2010), "Tax Law, Hiroshi Kaneko, and the Transformation of Japanese Jurisprudence," *American Journal of Comparative Law*, Vol. 58 Issue 3, pp. 721-36.
- Krever, R. (2016), "General Report: GAARs," in M. Lang (ed), *GAARs: A Key Element of Tax Systems in the Post-BEPS World*, IBFD.
- Navarro, A., L. Parada, and P. Schwarz (2016), "The Proposal for an EU Anti-avoidance Directive: Some Preliminary Thoughts," *EC Tax Review*, Vol. 25 No. 3, pp. 117-31.
- OECD (2006), "Third Meeting of the OECD Forum on Tax Administration, 14-15 September 2006 Final, Seoul Declaration," <https://www.oecd.org/tax/administration/37415572.pdf>

- OECD (2008), *Study into the Role of Tax Intermediaries*, OECD Publishing.
- OECD (2010), *A Framework for a Voluntary Code of Conduct for Banks and Revenue Bodies*. OECD Publishing.
- OECD (2013a), *Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance*, OECD Publishing.
- OECD (2013b), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
- OECD (2015a), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing.
- OECD (2015b), *Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing.
- Ogata, K. (2016), “Beppusu Purojekuto tou ni Okeru Sozei Kaihi Hinin wo Meguru Giron [Debate about Anti-Tax Avoidance Measures under the BEPS Project, etc.],” *Financial Review*, Vol. 126, pp. 196-225.
- Oka, N. (2016), “Eikoku no Aaronson Houkokusho to GAAR [UK Aaronson Report and GAAR],” *Financial Review*, Vol. 126, pp. 107-40.
- Okamura, T. (2011), “Sozei Houritsu Shugi to Sofuto Ro [Soft Law in Taxation],” *Zeihogaku* [Tax Jurisprudence], No. 563, pp. 141-62.
- Okamura, T. (2015a), “Soshiki Saihensei to Kouji Keisan Hinin (2) [Corporate Reorganization and Disallowance of Act or Calculation (2)],” *Zeiken*, No. 179, pp. 65-71.
- Okamura, T. (2015b), “Beppusu to Kouji Keisan Hinin [BEPS and Disallowance of Act or Calculation (3)],” *Zeiken*, No. 182, pp. 68-75.
- Okamura, T. (2015c), “Sozei Kaihi Kenkyu no Igi to Hatten [Significance and Development of the Studies in Tax Avoidance],” in T. Okamura (ed), *Sozei Kaihi Kenkyu no Tenkai to Kadai* [Evolution and Problems of Studies in Tax Avoidance], Mineruva Shobou.
- Okamura, T. (2016a), Case Note, *WLJ-Hanrei Koramu*, No. 77.
- Okamura, T. (2016b), Case Note, in M. Nakazato et al. (ed), *Sozei Hanrei Hyakusen* [Selected 100 Tax Cases], 6th ed., Yuhikaku, pp. 38-39.
- Panayi, C. (2015), *Advanced Issues in International and European Tax Law*, Hart Publishing.
- Panayi, C. (2016), “International Tax Law Following the OECD/G20 Base Erosion and Profit Shifting Project,” *Bulletin for International Taxation*, Vol. 70 No. 11, pp. 628-60.
- Parliament of the Commonwealth of Australia, House of Representatives (2015), Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015, Explanatory Memorandum.
- Platform for tax good governance of the European Commission (2014), Discussion Paper on General Anti-Abuse Rules (GAAR).
- Rigaut, A. (2016), “Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons,” *European Taxation*, Vol. 56 No. 11, pp. 497-505.
- Shaviro, D. (2016), “Interrogating the Relationship between “Legally Defensible” Tax Planning and Social Justice,” *NYU School of Law, Public Law Research Paper*, No. 16-42.

- Sugihara, N. (2008), Case Note, in *Saikou Saibansho Hanrei Kaisetsu Minji Hen [Heisei 17 Nendoban]* [Case Notes on the SCJ decisions][in 2005 Fiscal Year], pp. 990-1005, Housoukai.
- Taboada, C. P. (2015), “OECD Base Erosion and Profit Shifting Action 6: The General Anti-Abuse Rule,” *Bulletin for International Taxation*, Vol. 69 Issue 10, pp. 602-08.
- Taniguchi, S. (2014a), *Sozei Kaihi Ron* [Discussion on Tax Avoidance], Seibundou.
- Taniguchi, S. (2014b), Case Note, *Zeiken*, No. 177, pp. 20-30.
- Taniguchi, S. (2015), “Sozei Kaihi to Zeihou no Kaishaku Tekiyou Houhou Ron [Tax Avoidance and Methodology on Interpretation and Application of Tax Law],” in T. Okamura (ed) *Sozei Kaihi Kenkyu no Tenkai to Kadai* [Evolution and Problems of Studies in Tax Avoidance] Mineruva Shobou.
- Tokuchi, J., and F. Hayashi (2016), Case Note, *Jurist*, No. 1497, pp. 80-90.
- Waerzeggers, C., and C. Hillier (2016), “Introducing a General Anti-Avoidance Rule (GAAR),” *Tax Law IMF Technical Note 2016/1*, International Monetary Fund (IMF) Legal Department.
- Weisbach, D. (1999), “Formalism in the Tax Law,” *University of Chicago Law Review*, Vol. 66, pp. 860-86.
- Weisbach, D. (2002), “Ten Truths about Tax Shelters,” *Tax Law Review*, Vol. 55, pp. 215-54.
- Yoshimura, M. (2014), Case Note, *Zeimu Kouhou*, Vol. 62 No. 7, pp. 58-64.
- Yoshimura, M. (2016), “Beppusu ni Yotte Naniga Kawattaka? [What Has Been Changed by the BEPS Project?],” *Sozei Kenkyu*, No. 799, pp. 205-18.