Authors Boost Clarity

Anti-avoidance Within and Beyond

A Multi-country Insight to Anti-avoidance Laws

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(from left) Allen & Gledhill Partners Usha Chandradas and Tang Siau Yan provided a detailed multi-country review of the anti-avoidance laws in the context of the recent CIT v AQQ Appeal Judgement

Singapore's anti-tax avoidance laws came into the limelight recently with the case of Comptroller of Income Tax v AQQ – Singapore's first anti-avoidance case decided by the Court of Appeal.

To understand Singapore's legislation on anti-avoidance which is set out at section 33 (S33) of the Income Tax Act (ITA), it is vital to understand the anti-avoidance laws of various countries, particularly Australia and New Zealand, as Singapore's legislation was crafted based on these laws. With this understanding, tax professionals are then in a better position to appreciate the fundamental principles of anti-avoidance and possibly anticipate future developments concerning Singapore's legislation in this area.

This was the backdrop of a presentation organised by the Singapore Institute of Accredited Tax Professionals. Presented by two tax authors who are established tax lawyers, the Authors Boost Clarity session provided the apt platform for tax specialists to gain greater clarity in this key area of tax.

Anti-avoidance Laws in Australia

In the past, a more transactions-based approach was adopted in determining if an arrangement would be deemed as anti-avoidance. For example, a convoluted transaction would tend to fall foul of the rule (Clarke (1932), Australia) but an ordinary transaction of restructuring and incorporation of a company (Keighery (1957), Australia), where no general provision of the relevant taxing Act had been frustrated, would not be deemed as anti-avoidance.

The Predication Test was later introduced in the Privy Council decision of Newton (1958). This test involved a consideration of whether it could be "objectively predicated" from the acts performed by the taxpayer, and the effects of those acts, that the relevant transactions must have been implemented in order to avoid tax. Under this objective test, the court would have to consider whether the transaction in question could be commercially explained through ordinary business or family dealing.

The next important development post-Newton is that of the emergence of the Choice Principle. Under this test, taxpayers must be permitted to make a choice if the relevant taxing legislation does not specify the

form of the transaction that they must adopt. Thus, if one option exposes the taxpayer to liability to taxation and another exists which will not, the taxpayer is at liberty to proceed with the option that minimises his tax liability, assuming that the transaction satisfies all the requirements of the relevant tax laws.

For example, in the Mullens (1976) case in Australia, the taxpayer was a stockbroker who wanted to take advantage of a tax benefit that allowed for deduction claims on money paid for shares of a certain type of petroleum exploration company. He became aware of a rights issue by such a company and that one of the rights holders was not prepared to take up the shares. The taxpayer entered into an arrangement whereby he would pay for the rights issue and the shareholder would then hold the shares in a trust for him. This arrangement then allowed the taxpayer to claim the deduction by having "paid" for the shares. The Court concluded that the anti-avoidance laws would not apply as the relevant legislation did not specify the conditions that had to be fulfilled to claim the tax benefit (particularly, the law did not specify that payment had to have been made by the registered holder of the shares).

Thus over time, anti-avoidance legislation principles evolved from a transactions-based approach to one that relied on the Predication Test and subsequently on the Choice Principle. Under the Choice Principle, most arrangements would not have been caught by anti-avoidance legislation.

The Gulland case in 1985 (which was the last Australian case to provide substantial guidance on the Choice Principle) attempted to reconcile the Choice Principle with the Predication Test. In the Gulland decision, it was held that the Choice Principle would apply if the taxpayer was seeking to arrange his affairs to meet the express requirements for a tax benefit to be conferred on him under the relevant tax legislation. Whether the tax benefit was truly conferred through such legislation, would be a matter of statutory construction considering the entire context of the taxing act. In the absence of any such specific statutory provision, the Predication Test would apply.

From the above Australian case law, it can be seen that notwithstanding the existence (at different points in time) of dedicated theories on legislative interpretation, the courts were still able to form new principles as and when new facts were presented before them.

Section 260 of the Australian Income Tax Assessment Act 1936 (upon which S33 is modelled) was subsequently replaced by a substantially different piece of legislation, Part IVA of the Australian Income Tax Assessment Act (Part IVA).

Anti-avoidance Laws in Hong Kong

Hong Kong's legislation under Section 61A of the Inland Revenue Ordinance is substantially similar to Australia's Part IVA. Broadly, the Hong Kong approach requires the Commissioner to identify the tax benefit and compare it to an alternative hypothesis of what could have been done, to determine if the scheme is one which falls foul of the anti-avoidance legislation.

The Ngai Lik Electronics (2009) and Shui On Credit (2009) cases provide further details on the above approach and it is worth noting that these cases highlighted the procedural difficulties of Hong Kong's position. Particularly, the Commissioner had to identify with workable clarity at an early stage, the tax benefit that it sought to challenge; the transaction conferring such tax benefit and the persons having the relevant "dominant purpose" of obtaining the tax benefit (as set out in Section 61A). For more complex schemes, the Commissioner would also face difficulties in producing realistic and reasonably postulated alternative hypotheses.

Anti-avoidance Laws in New Zealand

The general anti-avoidance provision can be found under Section BG1 of the Income Tax Act 1994 and includes any arrangement that directly or indirectly reduces any liability to tax. A scheme constitutes tax avoidance if tax avoidance is one of the scheme's purpose or effect, and is not merely incidental to the arrangement.

In New Zealand, the courts have applied the "Scheme and Purpose" approach. Under this test, it would be relevant to consider whether the taxpayer's use of a specific statutory provision is consistent with Parliament's purpose, as determined by an objective analysis of the overall scheme and purpose of the tax legislation. In other words, the first step is to consider the provision in isolation and determine if the arrangement falls within the literal meaning of those provisions. If the arrangement passes this test, the next step is to consider if the provision has been used by the taxpayer in a way that is congruent to the purpose of Parliament when the provision was enacted.

In summary, the development of anti-avoidance legislation in Australia was marked by the broad transactions-based approach, Predication Test and Choice Principle. Subsequently, Part IVA was enacted in Australia, and similar legislation was enacted in Hong Kong. These laws set out more structured and specific tests (although these tests were not without their own procedural challenges). In a different approach, New Zealand's Scheme and Purpose Test shifts the focus entirely to the statutory interpretation of the relevant taxing legislation.

AQQ: Court of Appeal Judgement

In Singapore, the Court of Appeal (Court) issued a landmark decision in the AQQ case on 26 February 2014. This was the first case of anti-avoidance in Singapore which was tested before the courts, and came 26 years after the re-enactment of S33 of the ITA in 1988.

It involved two cross appeals against the decision of the High Court which held that the taxpayer's financing arrangement amounted to tax avoidance within S33 and also held that the Comptroller had acted ultra vires in the exercise of his power in issuing the additional assessments for the Years of Assessment (YAs) 2004 to 2006.

In summary, the Court found that the arrangement constituted tax avoidance and noted that as the main purpose of the arrangement was to avoid tax, it was not carried out for bona fide commercial reasons. The Court thus held that the additional assessments issued by the Comptroller for YAs 2004 to 2006 should be discharged because the Comptroller had counteracted the effect of the arrangement incorrectly. The Court however found that the Notice of Assessment for YA 2007 was valid.

Although the Court found that the arrangement was a tax avoidance arrangement, the Comptroller was not able to recover substantial tax refunds that had been paid as he had failed to exercise his powers under S33(1) appropriately to counteract the tax advantage obtained. That said, the Court left the possibility open for the Comptroller to recover the amount refunded to the taxpayer through civil action.

In conclusion, the AQQ case provided some guidance to both taxpayers and the tax authorities on the ambit and operation of S33. The Scheme and Purpose Test advocated by the Court of Appeal (and approved in New Zealand case law) is able to provide theoretical guidance but may be difficult for taxpayers to apply in practice. There are still uncertainties on how S33 is to be applied and some would expect that future anti-avoidance cases would involve issues of procedural fairness, how the adjustments are made by the Comptroller and how the taxpayer would be able to rebut these adjustments.

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Siau Yan specialises in tax dispute resolution and cross-border tax issues. His expertise includes advising foreign and multinational clients on Singapore taxation and tax-efficient corporate structures for regional investments, tax compliance and regulatory matters. He has also assisted clients in negotiating and resolving tax disputes with the Inland Revenue Authority of Singapore.

After graduation, Siau Yan joined the Inland Revenue Authority of Singapore and was the Deputy Director of the Legislation branch when he left in 2007.

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Prior to joining Allen & Gledhill, Usha had spent five years with the IRAS as a Principal Legal Officer with its Law Division, and held dual appointments in its Enforcement and Tax Policy & International Tax Divisions.

This technical event commentary is written by SIATP's Tax Manager, Ms Eileen Goh. With over six years of experience in both corporate and GST accumulated from mid-tier consultancy, Big Four and multi-national corporation background, she now champions various initiatives of Singapore's first dedicated professional body for tax specialists, to enhance Singapore's position as a centre of tax excellence.