Anti-Avoidance Overview & Developments in Asia Pacific

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Agenda

• Overview of anti-avoidance measures in Asia Pacific

• Significant developments in selected countries
  • Australia, China, India, Indonesia

• Developments in various other countries
Overview of anti-avoidance measures

- Anti-avoidance provisions introduced to ensure that specific tax laws, including tax benefits, are not abused by taxpayers
- Measures can be unilateral, bilateral, general, specific
- There are increasingly more countries in Asia that have a GAAR and there are discussions about their scope and issues with legal certainty
- Codified GAAR vs. reliance on court-developed doctrines – e.g. India and China
- Some of the major economies in Asia that don’t have a codified GAAR (in line with US and for a long time, UK) include Japan, Indonesia, South Korea, Philippines, Thailand and Vietnam

Overview of anti-avoidance measures (cont’d)

- All if not most countries have SAARs - transfer pricing focus – e.g. Malaysia, Australia, Indonesia amendment of existing rules
- Bilateral measures also on the rise – LOB clauses and general anti-abuse clauses where treaty relief is concerned
- Tax administrations are more active and attentive in combating tax avoidance and in providing more guidance on the interpretation of tax-abusive behaviour
- Trend towards increased disclosure and transparency requirements – leading to increasing reporting obligations, more scrutiny/ audits, disputes – e.g. China, Malaysia, Indonesia and the Philippines have sent large taxpayers forms requesting detailed information about cross-border transactions with related parties
Overview of anti-avoidance measures (cont’d)

- In addition to extracting more information, tax authorities take transparency another step by sharing their taxpayers’ data with other tax authorities.

- Governments have signed hundreds of bilateral and some multilateral tax information exchange agreements (TIEAs) during the past year, this trend will continue to be on the rise.

- Increasing involvement of the judiciaries in anti-avoidance, e.g. China, India, Indonesia.

GAAR Snapshot

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<th>Australia</th>
<th>China</th>
<th>Hong Kong</th>
<th>India</th>
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<tbody>
<tr>
<td>Legal basis</td>
<td>Statute</td>
<td>Statute</td>
<td>Statute</td>
<td>Statute (proposed)</td>
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| Limbs | 1. There is a scheme. 2. Tax benefit associated with scheme. 3. Scheme entered into for the dominant purpose of obtaining a tax benefit. | 1. There is an arrangement. 2. Arrangement without bona fide commercial purposes. 3. Results in reducing taxable revenue or taxable income. | 1. There is a transaction. 2. Transaction has the effect of conferring a tax benefit. 3. Transaction entered into for the sole or dominant purpose of obtaining a tax benefit. | 1. There is an impermissible avoidance arrangement. 2. Arrangement undertaken for the main purpose of obtaining a tax benefit. 3. Arrangement: not arm’s length; results in misuse of DTC; lacks commercial substance; implemented in non-bona fide way |
| Consequence on application | Cancellation of tax benefit | Recharacterization | Cancellation of tax benefit | Cancellation of tax benefit or recharacterization |
| Burden of proof       | Taxpayer | Taxpayer | Tax authorities | Tax authorities |
| Current reviews       | “Improving the operation of the anti-avoidance provisions in the income tax law”. Discussion Paper, 18 November 2010 | Panel to review GAAR cases to be formed in the near future (Guoshuifa [2012] No. 41) | - | Draft Guidelines on Implementing GAAR Provisions released for consultation in June 2012; Expert Committee formed in July 2012 to undertake stakeholder consultations and finalize the guidelines. |

Adapted from: “Observations of the General Anti-Avoidance Rule in the Asia Pacific Region”, Asia Pacific Tax Notes, PwC, June 2012
### GAAR Snapshot (cont’d)

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<tr>
<th></th>
<th>Malaysia</th>
<th>New Zealand</th>
<th>Singapore</th>
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<tr>
<td>Data introduced</td>
<td>1967</td>
<td>1974</td>
<td>29 Jan 1988</td>
</tr>
<tr>
<td>Legal basis</td>
<td>Statute</td>
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<td>Statute</td>
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</tbody>
</table>
| Limbs          | 1. There is a transaction.  
                2. Transaction has the effect of alterting, reducing, evading, avoiding tax liability or hindering the operation of the Act. | 1. There is an arrangement.  
                2. The arrangement is a tax avoidance arrangement.  
                3. Tax avoidance defined as the altering, relieving, avoiding, postponing or reducing tax liability. | 1. There is an arrangement.  
                2. There is a tax advantage under the arrangement.  
                3. Purpose or effect of arrangement is to alter, avoid or reduce tax liability. |
| Consequence on application | Cancellation or recharacterization | Cancellation or recharacterization | Cancellation or recharacterization |
| Burden of proof | Tax authorities | Taxpayer | |
| Current reviews | - | Report by various professional groups, “Improving the operation of New Zealand’s tax avoidance laws”, October 2011. | - |

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### SAAR Snapshot – Transfer Pricing

- Most countries have transfer pricing rules – Australia, China, Hong Kong, Indonesia, India, Japan, Korea, Malaysia, New Zealand, Philippines, Singapore, Taiwan, Thailand, Vietnam, Bangladesh, Sri Lanka, Pakistan, Fiji etc.

- Singapore, Thailand, Vietnam only have transfer pricing rules and no other types of SAARs
SAAR Snapshot - Others

- Australia and New Zealand frontrunners - most number of rules to combat specific tax avoidance schemes:
  - **Australia**: thin capitalization, CFC, foreign investment regime (FIF) rules, alienation of income, foreign tax credit schemes, dividend stripping rules, dividend streaming, prepayments of deductions, schemes to postpone tax liability, withholding tax schemes, tax promoter penalty regime and etc.
  - **New Zealand**: thin capitalization, CFC, businesses controlled by non-residents, charities, trading stock, transfers of land between associated persons, leases, dividend stripping, payments to spouses, carry forward of tax attributes (losses, imputation credits), trusts etc.

SAAR Snapshot – Others (cont’d)

- **China**: thin capitalization, CFC, beneficial ownership rules for treaty relief and rules on treatment of capital gains of non-residents from shares in Chinese companies
- **Hong Kong**: modified thin capitalization rule, use of service companies to avoid salaries tax
- **India**: DTC proposes CFC rules, specific rules on shifting income/assets to non-residents, securities transactions
- **Indonesia**: CFC, thin capitalization restrictions in practice, use of SPC to buy shares in domestic company, re-characterization of expatriate’s income
SAAR Snapshot – Others (cont’d)

- **Japan**: thin capitalization, CFC, family company, tax havens
- **Korea**: thin capitalization, CFC, unfair (improper) transaction adjustment rule
- **Malaysia**: proposed thin capitalization (deferred to Dec 2012)
- **Philippines**: presumed sales, receipts, deductions, fair market value of properties
- **Taiwan**: thin capitalization

**Agenda**

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  - Developments in various other countries
Australia: Significant developments

Tightening up of GAAR (Pt IVA)

- Recent Pt IVA case losses for the ATO – e.g. Ashwick (2011), RCI (2011), Futuris (2012)

- “Improving the operations of the anti-avoidance provisions in the income tax law”, Treasury, 18 November 2010:
  - Ensure that GAAR is able to deal with existing and emerging risks; and
  - Consolidate, streamline and improve the operation of SAARs.

- In March 2012, the Government announced changes to Part IVA, with effect for any schemes (defined widely to include most transactions and deals) entered into or carried out after 1 March 2012

- Legislation is not yet available but proposed to be introduced into Parliament in September. Public consultation process is ongoing

Australia: Significant developments (cont’d)

- Legislation has been enacted on proposed retrospective amendments to TP rules to ensure enable assessments to be raised under the TP articles in treaties in addition to assessments under domestic law. The changes will also specifically refer to OECD materials and profit-based methods

- Ruling on treaty shopping – TD 2010/20, stating that Pt IVA (GAAR) can apply to deny tax benefit arising from treaty shopping arrangement
China: Significant developments

• EITL contains a raft of anti-avoidance measures, supplemented by Circular 2 (implementation rules), both with effect from 1 Jan 2008
• New anti-avoidance measures include transfer pricing, thin capitalisation, GAAR, CFC
• Indirect share transfers - Chongqing, Xinjiang cases and Circular 698 (2009)

Indonesia: Significant developments

• Lots of SAARs issued e.g. TP, CFC, SPV (2010)
• CFC rules further updated in 2010
• Transfer pricing guidelines issued in 2010, revised in 2011
• Use of SPC (2009) - Purchase of shares of a domestic company by resident taxpayer through the use of a SPC can be deemed to have been conducted directly by the resident taxpayer
• Interpretive circular on limitation of treaty relief and beneficial ownership (2010)
• Tax cases on beneficial ownership and conduit companies – PT Transportasi and Indosat
India: Significant developments

- Budget 2012/2013:
  - GAAR proposed to be effective in 2013
  - Prescribed Tax Residency Certificate made mandatory for non-resident to claim treaty benefits
  - TP provisions extended to cover domestic related party transactions and APA framework introduced
- DTC proposes CFC Rules, effective 1 April 2013
- TP safe harbor rules to be finalized by Dec 2012
- Draft GAAR guidelines issued (June 2012) and GAAR expert committee formed (July 2012)
- Judicial front – Vodafone, Azadi, E*Trade, KSPG BV
- International front – renegotiating treaty with Mauritius, Cyprus, will possibly include LOB clauses, new treaty with Luxembourg contains LOB clause

India: Vodafone case

Short-lived Victory........?

- SC did not follow anti-abuse approach of the tax authority
- Government filed a 100 page “review petition” with the SC to reconsider its verdict in Vodafone, citing “misstatements” and “misinterpretations” in the verdict
- Budget 2012 introduces retrospective legislative amendments w.e.f. 1962, nullifying SC judgment
- Legislation now requires Courts to look through a transaction to ascertain the real nature – to bring to tax any indirect transfer of control and management of an Indian company via the transfer of shares of an overseas company by way of legislative power
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Other developments

- New Zealand
  - Exposure draft on IRD’s interpretation of tax avoidance issued in December 2011, sets out the analysis to be undertaken to identify a tax avoidance arrangement
  - Cases – Alesco (2012), Penny Hooper (2010)
  - Changes to SAARs (thin capitalization, depreciation deductions, capital contributions) (Budget 2011)

- 1st GAAR case in Singapore - AQQ v. The CIT (2011)
  - Financing arrangement to fund a corporate restructuring deemed to be a scheme of tax avoidance
  - No evidence that scheme carried out for commercial business reasons
  - Evidence of tax avoidance purposes; absence of minutes documenting the arrangement, absence of documents showing how the arrangement results in commercial benefit; undated discussion paper showing arrangement was to obtain tax benefits
Other developments (cont’d)

- Japan
  - Changes to TP legislation and CFC Rules (2011)

- Hong Kong
  - TP guidelines issued in 2009, followed by APA program in 2012

- Korea
  - Budget 2012:
    - Foreign beneficial owner of Korean-sourced income must submit an application to enjoy a reduced tax treaty rate
    - Amendments to CFC rules
    - SAAR to curb the payment of excessive retirement income of directors
  - Beneficial owner cases (2009) - Substance over form principle - capital gains treaty relief denied to private equity funds with IHCs in Labuan, on the grounds that the IHC is not the beneficial owner, rather the foreign investors in the IHC are the beneficial owners

- Thailand
  - The Supreme Court in mid-2010 issued a judgment that the marketing fee paid by a Thai franchisee under an international franchise scheme would be subject to 15% Thai withholding tax as the fee constituted royalty income.
  - Therefore, marketing fees paid in Thailand to Thai advertising firms would be subject to 15% Thai withholding tax as royalty, as if it had been paid to the foreign franchisor.
  - Court ruling to prevent tax planning by a foreign company (which is not carrying on business in Thailand) from avoiding withholding tax.

- Vietnam
  - GDT issued Official Letter 2268/TCT-CS dated 28 June 2012, stating that capital transfers conducted outside Vietnam and between entities located outside Vietnam shall not be subject to tax if certain conditions are satisfied.
Conclusion

• Recent tax reforms in Asia have focused on amongst others, implementing domestic and international anti-avoidance measures to combat tax avoidance
• Developments are seen on all fronts:
  • tax administrators are more active in providing interpretive guidance as well as discovering tax and combating tax abuse – e.g. increased compliance obligations and renegotiating treaties to prevent treaty abuse via the insertion of LOB clauses;
  • legislators introducing codified GAARs;
  • the judiciary is also becoming increasingly involved in this area
• The recently most active countries are China, India, Indonesia and Australia
• Overall focus appears to be on treaty abuse, transfer pricing and specifically in the case of China and India, on indirect share transfers
• Reliance on GAAR is also prominent, with India and Australia conducting consultations on their proposed and existing rules

Many Thanks!