



## **Singapore Business Tax Alert** Stay informed of changes

Greetings from your tax team at Deloitte Singapore. This newsletter is your reference for practical information on relevant business tax issues.

### **Income Tax: The General Anti-avoidance Provision and its Application (First Edition)**

The Inland Revenue Authority of Singapore (IRAS) has published the first edition of its e-Tax Guide on "Income Tax: The General Anti-avoidance Provision and its Application" on 11 July 2016.

The e-Tax Guide sets out the Comptroller of Income Tax's (CIT) approach to the construction of the general anti-avoidance provisions in Section 33 of the Income Tax Act (ITA) and provides some examples of arrangements, which the CIT views as having the purpose or effect of tax avoidance within the meaning of Section 33(1) of the ITA.

The e-Tax Guide addresses tax avoidance arrangements within the meaning of Section 33 of the ITA and does not cover arrangements that form the subject of specific anti-avoidance provisions in the ITA and/or involve the evasion of tax.

Section 33 of the ITA is the general anti-avoidance section and reads as follows:

"33(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly—

- a) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;
- b) to relieve any person from any liability to pay tax or to make a return under this Act; or
- c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,

the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.

33(2) In this section 'arrangement' means any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.

33(3) This section shall not apply to—

- a) any arrangement made or entered into before 29th January 1988; or
- b) any arrangement carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax."

### **CIT's approach to the interpretation of Section 33 of the ITA**

In the interpretation of Section 33 of the ITA, the CIT has essentially adopted the principles enunciated by the Court of Appeal in the case of *CIT v AQQ* [2014] SGCA 15. The CIT views that a tax avoidance arrangement normally involves "an arrangement that is artificial, contrived or has little or no commercial substance and is designed to obtain a tax advantage that is not intended by Parliament".

Based on the e-Tax Guide, the CIT has adopted the "scheme and purpose approach" on the interpretation of Section 33 of the ITA as follows:

#### **Step 1: Whether an arrangement falls within any of the three threshold limbs in Section 33(1) of the ITA**

The CIT will consider objectively based on the observable acts by which an arrangement is implemented whether such arrangement prima facie falls within any of the three threshold limbs of Section 33(1) of the ITA such that the taxpayer has derived a tax advantage.

#### **Step 2: Whether the taxpayer may avail himself of the statutory exception under section 33(3)(b) of the ITA**

The CIT will consider the taxpayer's subjective commercial motives for entering into the arrangement and subjective consequences that the taxpayer wishes to obtain. The CIT has clarified that bona fide commercial transactions which are

carried out not in pursuance of any tax avoidance arrangement will not come within the scope of Section 33 of the ITA.

### **Step 3: Whether the tax advantage obtained arose from the use of a specific provision in the ITA**

The CIT will consider whether the tax advantage obtained by the taxpayer arose from the use of a specific provision in the ITA that was “within the intended scope and Parliament’s contemplation and purpose, both as a matter of legal form and economic reality within the context of the entire arrangement”. Some of the factors that the CIT will consider include:

- The manner in which the arrangement was carried out;
- The role of all relevant parties and any relationship they may have with the taxpayer;
- The economic and commercial effect of documents and transactions;
- The duration of the arrangement; and
- The nature and extent of the financial consequences that the arrangement.

### **Examples of tax avoidance arrangements**

The e-Tax Guide has broadly outlined the various categories of arrangements, which the CIT may consider as having a characteristic or feature of tax avoidance, including:

- Circular flow or round-tripping of funds;
- Setting-up of more than one entity for the sole purpose of obtaining tax advantage;
- Change in business form for the sole purpose of obtaining tax advantage; and
- Attribution of income that is not aligned with economic reality.

Specific examples that encompass the above features have been provided in the e-Tax Guide.

Similarly, the e-Tax Guide has also set out certain examples, which the CIT views as genuine commercial transactions and not intended to be a subject of the CIT’s exercise of his powers under the scope of Section 33 of ITA, such as:

- placement of monies in a local bank or with a bank outside Singapore,
- provision of housing accommodation to employees directly instead of giving a taxable housing allowance; or
- non-remittance of foreign income.

The CIT has indicated that the above guidelines and accompanying examples in the e-Tax Guide are not meant to be exhaustive, and the CIT may update this e-Tax Guide where necessary.

## CIT's powers under Section 33(1) of the ITA

The e-Tax Guide also outlines the wide powers available to the CIT under Section 33(1) of the SITA. Where an arrangement falls under a tax avoidance arrangement, the IRAS has the power to make the following adjustments:

- Include an income that was sought to be excluded;
- Disallow an expense that was sought to be made;
- Compute and assess the hypothetical tax liability on what would likely have happened if the taxpayer had not entered into the tax avoidance arrangement or if the arrangement simply had not taken place.

Having said that, the CIT has reiterated that it will exercise its powers under Section 33(1) of the ITA in a fair and reasonable manner.

## Deloitte's view

The e-tax Guide provides greater clarity to the distinction between tax avoidance and tax planning. Tax planning is acceptable and taxpayers should be free to plan and carry out their businesses in the most tax-efficient manner. However, tax avoidance arrangements (and tax evasion), are clearly not acceptable to the IRAS.

Through the examples in the e-Tax Guide, it is hoped that taxpayers would be deterred from entering into such tax avoidance arrangements. Taxpayers may wish to re-look at the existing arrangements put in place to determine if there is a risk of the IRAS challenging such arrangements on grounds of tax avoidance. Taxpayers should also seek appropriate tax advice when they are in doubt about the tax consequences of their contemplated transactions or structure.

## Contacts

For more information on any of these issues, or any other Business Tax matters, please contact **Low Hwee Chua**, or your usual Business Tax Services contact in Deloitte.

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