

# General Anti-Avoidance Rules in Asian Countries

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# Context

Why General Anti-Avoidance Rules (GAARs) are now in the spotlight

- Need to counter tax avoidance
  - Limitations of Specific Anti-Avoidance Rules?
  - Limitations of case laws?
- Political climate
- Should the tax authorities jump to GAARs?
- Are GAARs good for emerging and developing countries?
- Are there any alternative approaches?

# Outline

1. What is a General Anti-Avoidance Rule (GAAR)?
2. Overview of GAARs in Asian countries
3. Points to be considered in designing GAARs
4. Advance ruling
5. Advisory committee

# What is a GAAR?

- A GAAR is a set of broad and general principles-based rules within a country's tax code that enables tax authorities to counteract the perceived avoidance.

# Judicial GAARs and Codified GAARs

- Judicial GAARs

  - Gregory case (U.S.) (1934)

  - Ramsay case (U.K.) (1982)

  - limitations of purposive interpretation by the court (Aronson report)

- Codified (statutory) GAARs

  - Australia (1915), The Netherlands (1924),  
Singapore (1988)

# Judicial GAARs and Codified GAARs (cont'd)

- Codified (statutory) GAARs

Australia (1915), The Netherlands (1924),  
Singapore (1988)

- provisions differ by country

Q. Will the U.K. GAARs complement judicial GAARs?

Or, will hinder the court applying judicial GAARs?

- the Australian and Canadian courts

# Overview of GAARs in Asian countries

As of April 2013

- China, Hong Kong SAR, Indonesia, Korea  
Malaysia, Nepal, Singapore, and Sri Lanka have  
codified GAARs
- India plans to apply GAARs in 2016

# China

## Corporate Income Tax Law

- Article 47: “When the taxable income or amount of income of an enterprise is reduced as a result of arrangements with no reasonable commercial purposes implemented by the enterprise, the tax authorities have a right to make adjustments according to a reasonable method.”

(introduced in 2008)



# Hong Kong SAR

Inland Revenue Ordinance, CAP. 112

## **61. Certain transactions and dispositions to be disregarded**

Where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.

(introduced in 1947)

# Hong Kong SAR (cont'd)

## 61A. Transactions designed to avoid liability for tax

(1) This section shall apply where any transaction has been entered into or effected after the commencement of the ...Ordinance 1986 ...and that transaction has, or would have had but for this section, the effect of conferring a tax benefit on a person .. and, having regard to –

- (a) the manner in which the transaction was entered into or carried out;
- (b) the form and substance of the transaction;

.....

it would be concluded that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit.

(introduced in 1986)

# Indonesia

## Income Tax Law

Article 4: Taxable Object is income, which is defined as any increase in economics capacity received by or accrued by a taxpayer from Indonesia as well as from offshore, which may be utilized for consumption or increasing the taxpayer's wealth, **in whatever name and form**, including .....

Article 23 and 26: The following income, **in whatever name and form**, paid, apportioned to be paid, or on the due date of payment by .....shall be subject to withholding tax of .....%:"

(Introduced in 2008)

# Malaysia

## Income Tax Act

**140.** (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of—

- (a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;
- (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
- (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
- (d) hindering or preventing the operation of this Act in any respect,

# Malaysia (cont'd)

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction.

- Introduced in 1967

# Nepal

## Income Tax Act

### 35. General Anti-Avoidance Rule

- (1) For the purposes of determining liability to tax under this Act, the Department may-
  - (a) re-characterise an arrangement or part of an arrangement that is entered into or carried out as part of a tax avoidance scheme;
  - (b) disregard an arrangement or part of an arrangement that does not have substantial economic effect; or
  - (c) re-characterise an arrangement or part of an arrangement the form of which does not reflect its substance.

**Clarification**:- For the purpose of this section, tax avoidance scheme means any arrangement, one of the main purposes of which is the avoidance or reduction of liability to tax.

- **Introduced in 2001**

# Singapore

## Income Tax Act

### Comptroller may disregard certain transactions and dispositions

**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.

- Introduced in 1988

# India

Income Tax Act (Sec. 95-102, and 144)

Section 95 (proposed)

Notwithstanding anything contained in the Act, an arrangement entered into by an assessee may be declared to be an impermissible avoidance arrangement and the consequence in relation to tax arising therefrom may be determined subject to the provisions of this Chapter.



# India (cont'd)

## Section 96 (proposed)

- (1) An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and it—
- (a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;
  - (b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;
  - (c) lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or
  - (d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.

# India (cont'd)

## Structure of GAARs

**Main purpose is to obtain a tax benefit**

AND

**Not at “arm’s length”**

**OR “Misuse/abuse” of tax provisions**

**OR Lacks “commercial substance”**

**OR Not for bona fide purposes**

**=> Impermissible Avoidance Arrangement**

# India (cont'd)

## **Approving Panel**

- Approving Panel shall consist of a Chairperson who is/has been a Judge of a High Court; one Member of the Indian Revenue Service; and one Member who shall be an academic or scholar.
- Directions to be issued within 6 months
- The directions issued by the Approving Panel shall be binding on the taxpayer and the income-tax authorities.

	China	HK	India	Indonesia	Malaysia	Nepal	Singapore	Sri Lanka
Advisory Panel	Y	?	Y	N	?	N	N	?
Advance Ruling	?	Y	Y	?	?	?	?	?
Admin. Guideline	Y	Y	Y	Y	N	Y	N	N
Burden of Proof	?	Taxpayer	Taxpayer	?	Tax Auth	Tax Auth	?	Taxpayer
GAAR & SAAR	Y	Y	Y	Y	Y	Y	?	N

# Points to be considered in designing GAARs

- Certainty
  - the rule of laws
- Fairness (Consistency)
- Competitiveness
  - compliance costs

How to strike a balance between the need to observe the principles and the need to counter tax avoidance

# Points to be considered in designing GAARs (cont'd)

In drafting GAARs

- Scope
- Quantification of a tax benefit
- Purpose test
- Penalties
- Safe harbor
- Burden of proof
- Treaty override
- Need for an independent (balanced) study group /an expert committee

# Points to be considered in designing GAARs (cont'd)

## In applying GAARs

- Advance ruling (clearance)
- Advisory panel
- Detailed guidance
- HQs' control

# Issues to be addressed prior to or in parallel with codifying GAARs

- Tax Treaties with harmful tax regime jurisdictions
- Tax incentives
- Disclosure of tax avoidance scheme
- Responsibility of tax practitioners
- SAARs
- Capacity building of tax examiners



# Advance Ruling (Clearance) on GAARs

- Could mitigate uncertainty for taxpayers
- But, would increase administrative costs and weaken the deterrent effect of GAARs?
  - no private ruling for IRC7701(o)
  - no advance clearance in the new UK GAARs
- Capacity of tax authorities
- Timing (should be “advance”)

# Advisory Panel

- Composition of the panel
  - should tax authorities be a member?
- Should the panel decision bind taxpayers?
- Should the panel decision be publicly available?
- It could make GAAR application more transparent, objective, and consistent