

## Tax avoidance or tax planning? Getting to grips with GAAR



By S. Sharma

In *AQQ v Comptroller of Income Tax* [2011] SGITBR 1, the Income Tax Board of Review delivered its maiden ruling on the general anti-avoidance rules (GAAR) in section 33 of the *Singapore Income Tax Act* (Act) in a case about a corporate restructuring which relied on external funding from an unrelated party.

### Background

A Malaysian listed company holding four Singapore subsidiaries directly and indirectly decided to incorporate a new Singapore intermediate holding company (AQQ) to hold the subsidiaries under a flatter corporate structure.

On 18 August 2003, to fund its acquisition of 100 percent of the Singapore subsidiaries, AQQ issued S\$225m of fixed-rate convertible notes to the Singapore branch of a foreign bank (N Singapore). On the same day, N Singapore split the notes into principal notes and interest notes, and sold the principal notes to its affiliate, N Mauritius for a cash consideration of S\$205m. On the same day, N Mauritius sold the S\$205m of principal notes to a Singapore subsidiary of AQQ. This subsidiary together with the other three Singapore subsidiaries declared and paid AQQ dividends that carried tax credits. As a result, for the years of assessment 2004 to 2007, AQQ declared the franked dividends received and claimed deduction for the interest expense incurred on the notes.

### Provisions in GAAR

Section 33 provides that 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 the Act; or (c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by the 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.

The section contains a safe harbour exception for any arrangement carried out for bona fide commercial reasons which had not as one of its main purposes the avoidance or reduction of tax.

### Board's decision and beyond

The Board came to the conclusion that the financing arrangement with N Singapore had the purpose or effect of tax avoidance within section 33. It found the arrangement was contrived and artificial or was structured in a contrived and artificial way in order for AQQ to obtain a refund of tax through the utilisation of tax credits. The Board also found the arrangement was not carried out for bona fide commercial reasons but had as one of its main purposes the avoidance or reduction of tax.

The Board faulted AQQ for not adducing any documentary or contemporaneous evidence that the intention to restructure the group of companies was indeed the reason or motivation for the financing arrangement. It said it was not persuaded that there was any real commercial justification for the loan, other than as part of an arrangement entered into in order to obtain or extract tax benefits. The Board also said no commercial justification was provided as to why the transaction must occur on the same day or how the occurrence of the transactions on the same day would advance the objectives or purposes of the reorganization or in any way support the reorganization. It found the transactions bore the trace of artificiality or contrivance.

It remains to be seen whether the High Court shares the Board's views and decision when the case is heard on appeal. In view of its wide implications, this case could go on further appeal to the Court of Appeal.

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