

A Trilogy of Cases in Malaysian Anti-Tax Avoidance Law

Mohsin Hingun
ICCL II
IIUM 18/09/2013

Anti-tax Avoidance

- Tax Evasion
- Tax Avoidance
- Tax Mitigation
- Specific anti avoidance provisions
- General anti avoidance provisions/rules
[GAAP/GAAR]

S 140: The Malaysian GAAP

- **140. Power to disregard certain transactions**
- (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of
- altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;
- relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
- evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
- hindering or preventing the operation of this Act in any respect,

Statutory Interpretation: Tax Cases

- Strict interpretation as stated by Rowlatt J in **Cape Brandy Syndicate v IRC** (1921) 12 TC 358 :
- ... *in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...*

Departure from strict literal interpretation

- Rowlatt J in **Cape Brandy Syndicate v IRC** :
- ...*the object of the construction of a statute being to ascertain the will of legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.*

140. Power to disregard certain transactions

- 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.

Doctrine of form and substance

Lord Tomlin in IRC v Duke of Westminster: [1936] AC 1:
Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

Viscount Simon LC, in *Latilla V IRC* [1943]

- Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts or those of the professional gentlemen who assist them in the matter, should be regarded as a **commendable exercise of ingenuity** or as a discharge of the duties of good citizenship...

Chua Lip Kong v DGIR [1982]

- 1964 T/P bought land for \$320k to extract timber. No exploitation took place
- 1966 T/P sold land to CYK for \$580k
- Same day resold to KH Co Ltd for \$ 595k - 380k was paid directly by CYK but the balance of 200k was paid by cheque drawn on KH Co Ltd
- Tax raised on the 200k - that T/P had in fact sold timber to KH Ltd and receipt of 200k was taxable. T/P argued it was capital gains.
- Finding by SC that the sale to CYK was

- was fictitious confirming DGIR's position.
- T/P appealed to HC and Fed Court and appeals were dismissed.
- Although transfer was described as "fictitious" "not bona fide" neither DGIR nor any of the local judges referred to the then GAAR embodied in S 29 ITO 1956 under which an artificial or fictitious transaction could be disregarded to prevent tax avoidance

SBSB Sdn Bhd v DGIR

- SBSB, the T/P
- involved in extraction and trading of timber and Sabah Foundation, a registered charity had the same chairman, Chief Min. of Sabah.
- Almost all profits from 1982-7 given to Foundation
- Donations claimed as allowable expenditures
- DGIR – tax avoidance for no declaration of dividends

Special Comnr:

- Donations were not "gift" within the deduction provision, therefore do not qualify for deduction
- Alternatively Sec 140 applied
- Scheme to pay almost all profits as donations was tax avoidance scheme within S 140(1)(C))
- Relationship between the parties attracted the application of S 140(6)

S140(6)

- (6) Transactions
 - (a) between persons one of whom has control over the other;
 - (b) between individuals who are relatives of each other;
 - (c) between persons both of whom are controlled by some other person,
- shall be deemed to be transactions of the kind to which subsection (1) applies if in the opinion of the Director General those transactions have not been made on terms which might fairly be expected to have been made by independent persons engaged in the same or similar activities dealing with one another at arm's length.

Appeals**High Court**

- H C upheld SC's order on only one ground:
- Donations were not gift as they were made involuntarily under compulsion

Court of Appeal

- Transfers by T/P to Foundation was voluntary in the absence of consideration- they were therefore "gift" and deductible against gross income.
- Since DGIR only argued only the point on "gift" at the HC, it was correct to reject the other grounds(incl. tax avoidance under Sec 140)
- Nevertheless CA dealt with tax avoidance issue

- CIR v Challenge[1986], a PC case from N Zealand applied: distinction between evasion, avoidance and mitigation.
- Not a case of evasion as there was an actual donation
- Also not a case of avoidance since S 44(6) ITA provided for the deduction of gift to charitable bodies

Yeoh Eng Hock Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) HC

- T/P had given out interest free loans to its directors free of interest with no terms of repayment which were placed in numerous FDs, each deposit < RM 100,000.00
- T/P had full control over deposits
- Interest from such deposits tax exempted
- Whether such tax free interest earned caught by S140

- S Cmnr: Deposits were in fact T/P's money and it had perpetrated such a scheme deliberately with the intention to alter its tax position
- Appeal to HC: Relying on SBSB Sdn Bhd T/P argued it was tax mitigation in which case S 140 had no application
- HC: On the facts this is not a case of mitigation but a scheme to disguise deposits as loans to benefit from tax exemption given on interest earned on deposits lower than RM100K . The scheme altered the tax position attracting the application of S 140

SUMMARY

- **Chua Lip Kong:** Although the SCmnrs, the HC and the Federal Court were of the view that there was a fictitious, not bona fide transaction, tax avoidance was not discussed at all
- **SBSB Sdn Bhd:** The SCmnrs in an admirable decision found that the transfer was not a deductible gift and further examined and confirmed the application of S 140 – T/P tried to reduce its tax liability

- HC: Transfers were not a gift as required by the ITA. S 140 was not considered at all.
- CA: Rejected HC's reasoning and applying the equitable principles applicable to private gifts reversed the HC and held transfers amounted to gift.
Although the only issue was centred on nature of the transfer (whether gift or not) CA nevertheless considered the application of S 140 and held it was not applicable- this was a tax mitigation case
- **Yeoh Eng Hock Holdings:** SCmnrs and HC: A tax avoidance case and S 140 empowered the DGIR to disregard the transaction

CONCLUSION

- **Chua Lip Kong:** none of the local adjudicators were aware of GAAR embodied in S 29 ITO
- **SBSB Sdn Bhd:** SCmnrs were correct on the nature of transfers as not a gift and on the application of S140 on transactions designed to avoid tax. HC correct on transfers not qualifying as gift. CA: incorrect on transfers as gift and incorrect on non applic of S140
- **Yeoh Eng Hock Holdings:** SCmnrs and HC both correct that on finding of tax avoidance and application of S140