SHORTER ARTICLE AND NOTE

GENERAL ANTI-TAX AVOIDANCE PROVISIONS: THE SINGAPORE POSITION AND AUSTRALASIAN COMPARISONS

This article considers the general anti-tax avoidance provision contained in section 33 of the Singapore Income Tax Act in the context of similar provisions in other countries, particularly in Australasia *(i.e.* Australia and New Zealand). The article first looks at some of the terms in section 33, and at how they might be interpreted. It then considers, in the light of the Australian and New Zealand experience, some of the difficulties of producing definitive interpretations of provisions like section 33. Finally, the application in Singapore of the doctrine of "fiscal nullity" is discussed. Its likely exclusion by the existence of section 33 is noted. Its possible application to some transactions involving dealings with countries with which Singapore has double tax agreements is also considered.

I. INTRODUCTION

THE new general anti-avoidance provision in the Singapore Income Tax Act, section 33,[1] came into force on 29 January 1988. At that time and since, it has been the subject of considerable discussion.[2] Experience in other jurisdictions has shown that a definitive interpretation of a provision such as section 33 is impossible. This article will therefore undertake three tasks – to examine some of the words and phrases in section 33 and suggest possible applications and problems, to illustrate from the Australian and New Zealand experience how any attempt at a final and conclusive interpretation of general anti-avoidance provisions like section 33 is, generally speaking, overly optimistic, and to consider the application of section 33 to international transactions involving Singapore, especially transactions where a double tax agreement applies. In this last context, note will be made of the doctrine sometimes called "fiscal nullity."

[1] As amended by Act No. 1 of 1988.

[2] See *e.g.,* the first statement made by the Minister of Finance during the second reading of the Bill, the letter of 20 January, 1988 by the Inland Revenue Department (I.R.D.) to the Singapore Society of Accountants and Tan Wee Liang, "Tax Avoidance and Section 33 of the Income Tax Act" (1989) 31 Mal. L.R. 78.

II. SECTION 33

Section 33 provides as follows:

"(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,

he 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.

(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.

(3) This section shall not apply to-

(a) any arrangement made or entered into before the commencement of the Income Tax (Amendment) Act 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."

The basic criteria for the operation of section 33 are that there should be (i) an arrangement, (ii) a purpose or effect of altering the incidence of tax, (iii) an arrangement entered into after 28 January 1988, (iv) an arrangement which is not for a bona fide commercial purpose. If these criteria apply, the Comptroller may disregard or vary the arrangement to counteract any tax advantage obtainable.

At the time of its enactment, it was said[3] that section 33 was based significantly on section 99 of the New Zealand Income Tax Act 1976 ("New Zealand Act") and section 260 of the Australian Income Tax Assessment Act ("Australian Act").[4] Certainly common words and phrases

[3] In the I.R.D. letter cited above.

[4] These sections are reproduced in Pok Soy Yoong and Damian C.F. Hong, *Singapore Taxation* (2nd ed., 1989), pp. 500-1.

may be found. Some of the phrases in section 33 will be examined below, in some cases drawing upon Australian and New Zealand experience. However, in the writer's view the main point to be drawn from the similarities between section 33 and the Australian and New Zealand provisions is that section 33 cannot mean literally what it says. This is well established by judicial authority in relation to the Australian provision.[5] It surely cannot be that in all cases (to quote from section 33) "where ... the effect of any arrangement is ... to alter the incidence of any tax" the section applies. The section does provide, in sub-section (3), for its own non-application where an arrangement is "carried out for bona fide commercial reasons and had not as one of its main purposes" a tax purpose. But this proviso leaves unsolved many of the problems of application of the literal words of the section. For example, a father might give income producing assets to his adult children. This would usually alter the incidence of the father's tax by reducing his income. There would be no commercial reason involved. It would be extraordinary for section 33 to apply. Even in a commercial context, what is ordinary business dealing is very hard to resolve in marginal cases.[6] As will be indicated in part F of this article, interpretations of "bona fide commercial reasons" have varied widely over time in Australia and New Zealand.

For these reasons, section 33 will eventually become encrusted with interpretational barnacles. These interpretations may develop as a matter of case law, or of the Comptroller's practice. Some of the provisions likely to be encrusted are discussed below.

A. *"ARRANGEMENT"*

"Arrangement" is defined as meaning (as opposed to including) the words in section 33(2), except as excluded by section 33(3). Similar terminology caused difficulty in Australia for some years because of what was often called the "antecedent situation" argument. The argument ran that if a structure, for example a particular trust or company, were set up *ab initio* then there was no "arrangement." For example, in *Mullens* v. *F.C.T.*[7] Barwick C.J. in the High Court of Australia held that it was open to a taxpayer to choose a particular structure, and it was only if an existing situation were altered for the purpose of tax avoidance that section 260 applied. In other words, the word "arrangement" connoted altering a particular existing or antecedent situation.

[5] See *e.g., D.F.C.T.* v. *Purcell* (1921) 29 C.L.R. 464.
[6] See *C.I.R.* v. *Challenge* [1987] 1 A.C. 155 and *Newton* v. *F.C.T.* (1958) 98 C.L.R. 1 P.C.
[7] (1976) 76 A.T.C. 4,288, at 4,295.

This "antecedent situation" principle has now been rejected in Australia in *Bunting* v. *F.C.T.*[8] and *Gulland* v. *F.C.T.*[9] In so far as Australian authority is relevant, it is therefore reasonable to conclude that section 33 applies as much to *ab initio* arrangements as to altered arrangements.

B. *PURPOSE OR EFFECT OF "ALTERING" THE INCIDENCE OF TAX*

"Purpose" and "effect", as a matter of ordinary English usage, have different meanings. The two words are used disjunctively in section 33, in the former section 108 in the New Zealand Act and in section 260 of the Australian Act. They do not appear in a similar way in the former section 33 of the Singapore Income Tax Act, the current New Zealand section 99, the current Australian Part IV A or analogous United Kingdom provisions.[10] "Purpose" is usually associated with motive or intention in ordinary usage. Effect is usually associated with end result. If a transaction were caught by section 33 if either test applied – that is if *either* its purpose *or* its effect was tax avoidance, odd results might follow. Thus, for example, a taxpayer's intention may be to produce a tax advantage, but the intention may fail, because the relevant transactions are a sham or not completed. If a sham, they would be disregarded by the revenue.[11] More importantly, many transactions with no tax purpose have the end result of altering the incidence of taxation. Salary changes following promotion and demotion of employees are examples. The inclusion of "purpose or effect" (disjunctively) in the new section 33 would produce such theoretical problems.

As a matter of judicial authority these problems have been defined away by two Privy Council cases. In *Newton* v. *F.C.T.*[12] (on appeal from the High Court of Australia) it was said:[13]

> "The word 'purpose' means, not motive, but the effect which it is sought to achieve – the end in view. The 'effect' mean the end accomplished or achieved. The whole set of words denotes *concerted action to an end – the end of avoiding tax".*

[8] (1989) 89 A.T.C. 5,245.
[9] (1985) 85 A.T.C. 4,765, at 4,775.
[10] Such as section 32 of the Finance Act 1951 and section 28 of the Finance Act 1960.
[11] See *Snook* v. *London & West Riding Investments Ltd.* \ 1971] 2 Q.B. 786 at 802, *Newton* v. *F.C.T.* (1958) 96, C.L.R. 577 at 646 and *Stubart International Ltd.* v. *The Queen* (1984) D.L.R. 1 at 33.
[12] (1958) 11 A.T.D. 442.
[13] *Ibid.,* at 445, italics added.

Similarly, in *Ashton* v. *C. of I.R. (N.Z.),*[14] the Privy Council said:[15]

> "If an arrangement has a particular purpose, then that will be its intended effect. If it has a particular effect, then that will be its purpose...."

A purist in English expression might, with respect, feel some disquiet about these verbal gymnastics by the Privy Council. Indeed, various Australian judges have at times wrestled with the "purpose" or "effect" disjunction, and sometimes regarded the words as synonymous, other times as alternatives.[16] However as a matter at least of Privy Council authority it would appear that the "purpose or effect" means purpose *and* effect, and the disjunction problem does not exist.

C. *"Alter the Incidence of any Tax" – But Whose?*

It was sometimes argued that under the former section 260, the Australian general anti-avoidance provision, arrangements to avoid tax must be made by the taxpayer to reduce his own tax (rather than somebody else's); otherwise the section did not apply.[17] The former section 33 was similar to the old section 260, as was discussed in *C.I.T.* v. *A.B. Estates Ltd.*[18] and *C.E.C.* v. *C.I.T.*[19] The same argument advanced in relation to section 260 may have been open under the former section 33. However, it is clear from the words of the current section 33 that these arguments are not open under it. The arrangements may relate to the tax of "any person". So, for example, associated companies or people who benefit from a taxpayer's arrangements are caught by section 33.[20]

D. *Variation by the Comptroller*

Under the former section 33, the Comptroller was empowered to disregard tax avoidance transactions. In theory, simply disregarding tax avoidance arrangements might not produce a taxable situation. For example, if a tax avoiding contract is disregarded, then another contract which might have been made in another way cannot simply be substituted for it. A similar provision in the Australian section 260 as to the disregarding of tax avoiding arrangements was often a problem for the Australian Commissioner of Taxation.[21] The problem does not arise under the current section 33.

[14] (1975) 75 A.T.C. 6,001.
[15] *Ibid.,* at 6,005.
[16] *See e.g., Newton* v. *F.C.T.* (1957) 11 A.T.D. 187 at 216, *F.C.T.* v. *Lutovi* (1978) 78 A.T.C. 4,708, *Gulland* v. *F.C.T.* (1985) 85 A.T.C. 4,765 and *Insommia* v. *F.C.T.* (1986) 86 A.T.C. 4,145.
[17] See *e.g.. Stamp* v. *F.C.T.* (1988) 88 A.T.C. 4803 and *Davis* v. *F.C.T.* (1989) 89 A.T.C. 4,377.
[18] [1967] 1 M.L.J. 89.
[19] [1971] 2 M.L.J. 43.
[20] The current Australian provisions, Part IV A, are of like effect.
[21] See *e.g., Clarke* v. *F.C.T.* (1932) 48 C.L.R. 56, *Bell* v. *F.C.T.* (1953) 87 C.L.R. 548 and *Peate* v. *F.C.T.* (1966) 116 C.L.R. 198 P.C.

The power of variation allows situations to be reconstructed. The power is not expressly subject to any significant limitations.[22] The Comptroller is empowered to make adjustments which "he considers appropriate ... to counteract any tax advantage". In theory, this could arguably mean that once a tax avoidance arrangement is found, the incomes of any taxpayers involved, however indirectly affected, could be increased by as much as the Comptroller subjectively regarded as appropriate to counteract any tax advantage. This could result in much more tax being payable than if no tax avoidance arrangement had ever been entered. However, presumably if necessary by means of judicial control, the Comptroller's power of variation would be exercised bona fide and in a matter which was fair and reasonable in all the circumstances. Thus, for example, in *Sharp* v. *Wakefield*[23] Lord Halsbury said[24] that a Minister must act:

> "... according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is not to be arbitrary, vague and fanciful, but legal and regular."

There is a substantial body of authority to similar effect.[25]

E. *VARIATION – TIMING ASPECTS*

The Comptroller acting under section 33 would normally vary a transaction and raise any appropriate assessments after at least one of the relevant taxpayers involved in the transaction had lodged a return.

This variation procedure may produce some delay in tax becoming payable. Further, no interest either to counteract inflation or by way of penalty will become payable under section 88 until after an assessment has issued. A similar situation existed in Australia under the former section 260 of the Australian Act. In some cases, assessments did not issue for some years. Thus sometimes taxpayers were actually better off financially because, even though they were eventually required to pay tax, they enjoyed the use of their money for a considerable intervening period. This is no longer the case in Australia because the combined effect of the new Part IV A and the new section 226 is that any taxpayer caught under the general anti-avoidance provisions may be required to pay up to three times the tax levied on the transaction as varied.

There are no similar provisions in Singapore. The general penalty provisions, such as section 95 for incorrect returns and section 96 for

[22] Compare the variation provisions in the current Australian section 177F, where phrases such as "fair and reasonable" appear.
[23] [1891] A.C. 173.
[24] *Ibid.,* at 179.
[25] See *e.g., M.N.R.* v. *Wrights Canadian Ropes Ltd.* (1946) 2 D.T.C. 927 P.C., *Avon Downs Pty. Ltd.* v. *F.C.T.* (1949) 78 C.L.R. 353, *Julius* v. *Lord Bishop of Oxford* (1879) 5 App. Cas. 214, *Finance Facilities* v. *F.C.T.* (1971) 127 C.L.R. 106, *Thomas* v. *F.C.T.* (1975) 75 A.T.C. 4,028, *Giris* v. *F.C.T.* (1969) 119 C.L.R. 365 and *Kolotex Hosiery* v. *A.C.T.(* 1975) 132 C.L.R. 535.

fraud, may still apply. However, no offence may have been involved in the section 33 transaction. Thus, because of timing factors, there may at the end of the day be little financial loss to taxpayers even if section 33 is applied.

F. *PROBLEM OF INTERPRETING GENERAL ANTI-AVOIDANCE PROVISIONS*

It has been suggested by the Singapore Inland Revenue Department ("IRD") that the potential width of section 33 should not be regarded as a problem for taxpayers. This is because "the safeguards provided ... are to be found in the judicial interpretations of legislations having similar wordings such as New Zealand and Australia."[26]

With great respect, these safeguards are not nearly as available as has been suggested. This is because of the problems of providing long-term definitive interpretations of general anti-avoidance provisions like section 33.

One set of reasons for not relying excessively on New Zealand and Australian interpretations of their general anti-avoidance provisions has been discussed by Tan Wee Liang in his commentary on section 33.[27] These reasons include the differences from each other, and from section 33, of the current Australian and New Zealand provisions, the differing interpretations of Australian and New Zealand courts, and the uncertainty of whether Australian and New Zealand courts will follow each other's decisions.[28] The last mentioned uncertainty became more acute when appeals on taxation cases from Australian courts to the Privy Council were abolished.[29]

The other set of reasons for the difficulty in putting clear long-term interpretations on general anti-avoidance provisions may go rather deeper. For a variety of reasons, both Australia and New Zealand have seen judicial interpretations of their anti-avoidance provisions undergo enormous changes over a decade or so. Whatever the reasons, which may include variations in political and social attitudes to tax minimisation and its economic effects, these changes amount in effect to a 360 degree turn in the case of New Zealand and a 180 degree turn in the case of Australia, both over a period.

It is beyond the scope of this article to analyse all the Australian and New Zealand anti-avoidance decisions over the last 30 years. Some examples, however, indicate what is meant by dramatic change in interpretation. In New Zealand, right through the 1960s there was a series

[26] From the letter of 20 January, 1988 to the Singapore Society of Accountants.
[27] *Op. cit., supra,* note 2.
[28] *Ibid.,* at 105-6.
[29] Effectively appeals in all other cases were also abolished, although in theory certain constitutional appeals could still lie.

of decisions allowing taxpayers to split income. Then in the 1967 case of *Elminger* v. *C.I.R.*[30] the general anti-avoidance provision of that time, section 108, was applied to such activity. This remained the position until 1974, when *C.I.R.* v. *Gerard*[31] and *Loader* v. *C.I.R.*[32] were decided. These cases again permitted income splitting, which has remained the New Zealand position since that time.

The Australian position has seen similar dramatic shifts, although not to the same end result. During the 1970s, there was a series of decisions where schemes which, in retrospect, involved logic defying convolutions and elaborations were held not to attract the general anti-avoidance provision. Examples are *Mullens* v. *F.C.T.*[33] (highly elaborate purchase and sale arrangements for shares), *Slutzkin* v. *F.C.T.*[34] (complex dividend stripping arrangements) and *Cridland* v. *F.C.T.*[35] (an arrangement whereby more than 5000 otherwise unconnected university students became beneficiaries of a primary production trust). Since *Newton* v. *F.C.T.*,[36] the classic distinction between, on the one hand, ordinary business and family dealings and, on the other hand, tax avoidance, has often been referred to (including by the I.R.D. in its letter[37] and, by implication, in section 33(3)(b) itself). In Australia, this distinction seemed, to the benefit of taxpayers, to have disappeared. Indeed it was expressly rejected by Mason J. in *Cridland.*[38]

The position then changed again. Cases like *F.C.T.* v. *Gulland, Pincus and Watson,*[39] *F.C.T.* v. *Tupicoff*[40] and *Bunting* v. *F.C.T.*[41] all held that income splitting arrangements (which were not very complex arrangements compared to the arrangements – in the 1970s cases already mentioned) infringed the then general anti-avoidance provision. There was judicial indication, sometimes explicit, of dissatisfaction with the line of cases in the 1970s.[42]

In view of these various changes in interpretation, in the writer's view it is not possible to place too much reliance on the light shed from Australia and New Zealand. The light may be clear enough from one of those countries at any given time, but it may be different from the other country, and it may change in a few years' time.

30 [1967] N.Z.L.R. 161.
31 [1974] 1 N.Z.T.C. 61,151.
32 [1974] 1 N.Z.T.C. 61,132.
33 [1976] 76 A.T.C. 4,288.
34 [1977] 77 A.T.C 4,076
35 [1977] 77 A.T.C. 4,538.
36 (1958) 98 C.L.R. 1 P.C.
37 *Op. cit., supra,* note 2.
38 *Loc. cit.,* at 4,542.
39 [1985] 85 A.T.C. 4,765.
40 [1984] 84 A.T.C. 4,851.
41 [1989] 89 A.T.C. 5,245.
42 For example by Dean J. in *F.C.T.* v. *Gulland, loc. cit.,* at 4,784-6.

G. *SECTION 33 "FISCAL NULLITY" AND INTERNATIONAL TRANSACTIONS*

The doctrine of "fiscal nullity", as it is sometimes called, was developed by a number of English cases in the 1980s. These included *W.T. Ramsay Ltd.* v. *I.R.C.,*[43] *I.R.C.* v. *Burmah Oil Co. Ltd.,*[44] *Furness* v. *Dawson*[45] and *Craven* v. *White.*[46] It is beyond the scope of this note to consider these cases in detail, but their general thrust is that if there is a pre-ordained set of transactions, and extra steps are inserted for the purpose of tax avoidance, then those extra steps should be disregarded by the courts as mere "fiscal nullities".

The general view, with which the writer respectfully agrees, is that if a tax act has a general anti-avoidance provision, such as section 33, then the doctrine of "fiscal nullity" does not apply in that jurisdiction. Although there is no judicial authority in Singapore, this is the view of most commentators.[47] In Canada, the only judicial authority to date is *Stubart Investments Ltd.* v. *M.N.R.*[48] Two judges took the view that "fiscal nullity" did not apply where there was a general anti-avoidance provision, and two judges did not consider the matter. In New Zealand, the issue was considered in *C.I.R.* v. *Challenge* by both the New Zealand Court of Appeal[49] and the Privy Council.[50] There are *dicta* to the effect that New Zealand's general anti-avoidance provision precludes the application of the "fiscal nullity" doctrine, although this appears to have been conceded by counsel for the revenue. In Australia, since 1989, it is clear that "fiscal nullity" does not apply because of the existence of anti-avoidance provisions. In *John* v. *F.C.T.,*[51] five judges of the High Court unanimously remarked:[52]

> "The Act, in section 260 and now in Part IVA, makes specific provision on the topic of what may be called tax minimisation arrangements and thereby excludes any implication of a further limitation upon that which a taxpayer may or may not do for the purpose of obtaining a taxation advantage."

H. *"FISCAL NULLITY" AND SINGAPORE INTERNATIONAL TRANSACTIONS*

From the above discussion, it may be concluded that "fiscal nullity" doctrine will not apply when section 33 does. However, it is arguable that section 33 does not apply to any situation covered by one of Sin-

43 [1982] A.C. 300.
44 [1982) B.T.C. 56.
45 [1984] B.T.C. 71.
46 [1988] B.T.C. 268.
47 See *e.g.,* Tan Wee Liang *op. cit., supra,* note 2, at 103; and Pok Soy Yoong and Damian C.F. Hong, *op. cit., supra,* note 4 at 520-6.
48 (1984) 10 D.L.R. 1.
49 (1986) 8 N.Z.T.C. 5,001.
50 [1987] 1 A.C. 155.
51 [1989] A.T.C. 4,101.
52 Ibid., at 4,110.

gapore's current 25 double tax agreements. In theory, transactions could be structured, for purely tax avoidance purposes, through countries with which Singapore has double tax agreements. If such structures were adopted, then section 33 might in theory apply because the whole arrangement was for the purpose of reducing Singapore tax. Section 33 would counteract the tax effects of that arrangement if it applied, but it may not. This is because of the wording of section 49 of the I.T.A., which gives the double tax treaties effect. Once the Minister declares a treaty to have effect, then under section 49 "the arrangements shall have effect nothwithstanding anything in any written law." This means that the treaty prevails over all the provisions of the I.T.A., *including* section 33.

One therefore may have the situation where there is an international transaction for a tax avoidance purpose. For example, there may be an attempt to use Australia as a tax haven for income splitting purposes. The I.T.A. provisions, such as section 33A against certain user of trusts to benefit children, and section 33, do not apply because section 49 says the treaty prevails over any written law. But "fiscal nullity" is not a written law. Rather it is a common law doctrine. It is arguable that it might apply. Another example is a transaction between Singapore and another treaty country which is deliberately routed, as to flow of funds, through a third, intermediate, treaty country. Profit might be left in the intermediate country, and hence less taxable income derived in Singapore. Section 49 may prevent the application of section 33.

To some extent this odd result may be a product of how Singapore incorporates tax treaties into its law. Other countries use methods different from section 49. In the United Kingdom, whether and to what extent a treaty overrides domestic law is determined according to each treaty.[53] In Canada there is a specific implementing statute for each treaty.[54] In India, gazettal provision is made for each treaty.[55] The New Zealand and Australian positions contrast with each other. In New Zealand, treaties are paramount,[56] which may produce the same problems as the Singaporean section 49. In Australia, treaties override all the provisions of the Tax Act *except* certain specified provisions, including the general anti-avoidance provision.[57] Thus, in Australia, for transactions with tax treaty countries the anti-avoidance provisions apply, so "fiscal nullity" does not.

In practice the I.R.D. in Singapore may tend to attempt to attack tax avoidance transactions with treaty countries in various ways, including use of information exchange provisions in treaties. The theoretical legal basis of this may be not section 33, but the "fiscal nullity" doctrine.

[53] See U.K. Tax Act 1988, s.77 and Oliver in 1970 B.T.R. 388.
[54] See *e.g.,* S.C. 1976-7, Ch. 29.
[55] 1961 I.T.A., s.90.
[56] 1976 I.T.A., s.294.
[57] Income Tax (International Agreements) Act 1953, s.4(2).

HI. CONCLUSION

The evolution of the "fiscal nullity" doctrine will not be of direct relevance to Singapore, except perhaps in relation to transactions with tax treaty countries. However, it is likely that section 33 will be considered many times by the I.R.D., the practising tax profession and ultimately the judiciary. The interpretation of section 33 cannot be regarded as fixed as of the moment of its enactment, and attitudes to the section's meaning will develop and change over time.

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