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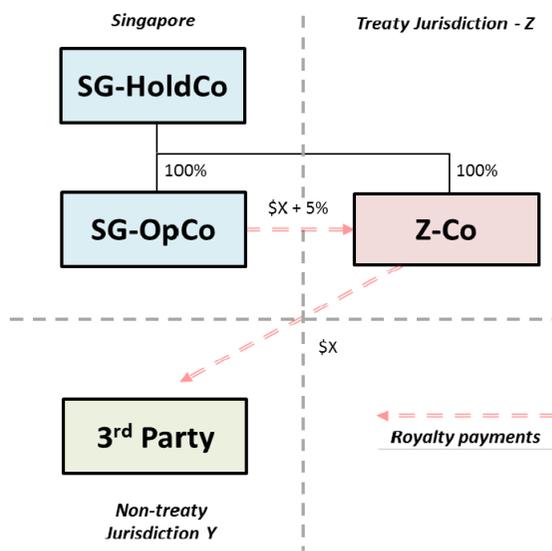
Income Tax: The General Anti-Avoidance Provision and its Application (Second Edition)

On 31 March 2023, the Inland Revenue Authority of Singapore (IRAS) updated its e-Tax guide "[Income Tax: The General Anti-Avoidance Provision and its Application \(Second Edition\)](#)" to include:

- two new examples of arrangements which will be regarded as being caught within the ambit of the general anti-avoidance provision under section 33 of the Income Tax Act 1947 (ITA); and
- how the surcharge is to be imposed under section 33A on the tax or additional tax arising from an adjustment made by the Comptroller of Income Tax (CIT) if an arrangement falls within the ambit of section 33.

Two new categories of tax avoidance arrangements

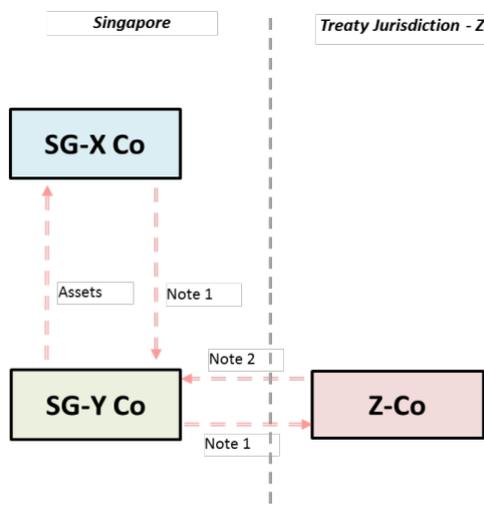
- (i) Setting up of a conduit entity to obtain treaty benefit for the purpose of avoiding withholding tax:



In the above example, a conduit (Z Co) was set up in jurisdiction Z to take advantage of treaty benefits as well as to claim inflated deductions in Singapore. Please refer to paragraphs 6.7 to 6.11 of the e-Tax Guide for more details.

As CIT regarded this to be a tax avoidance arrangement, the CIT will deny the deduction for the 5% mark-up on royalty expenses and subject the royalty payments to withholding tax. CIT however did not comment on whether the withholding tax imposed on the royalty payments is with or without the 5% mark-up.

- (ii) Assigning debt securities to an offshore jurisdiction for the main purpose of obtaining tax advantage



The above situation involves the use of a related company (Z Co) in a low(er)-tax jurisdiction to permanently defer/avoid paying tax in Singapore on the interest income (from Note 1). Please refer to paragraphs 6.12 to 6.16 of the e-Tax Guide for more details.

The CIT has viewed this arrangement to be tax avoidance and in this regard, CIT will disregard the transactions involving Z-Co and tax the interest income in SG-Y Co.

In assessing whether such back-to-back licensing arrangement/financing structure amounts to tax avoidance arrangement, CIT may consider, among others, the following factors: -

- whether there are genuine commercial reasons for such arrangements;
- whether Z-Co has sufficient “economic substance” (i.e., real economic activities backed with commercial rationale);
- whether Z Co is the “beneficial owner” of the income received (i.e., whether Z Co has unconstrained right to use and enjoy the income received or is it obliged to pass on the income to another person); and
- whether the terms and conditions of such arrangements are reflective of those as would be expected between independent parties in comparable transactions and comparable circumstances (i.e., arm’s length principle and transfer pricing considerations).

A new section on section 33A surcharge

To recap, [Income Tax \(Amendment\) Act 2020](#) had provided for a surcharge under section 33A to deter tax avoidance arrangements.

Following the above legislative changes, a new section (i.e., section 9) has been inserted in the e-Tax Guide on the section 33A surcharge which would apply with effect from Year of Assessment (YA) 2023. The surcharge under section 33A will apply if an arrangement falls within the provisions of section 33 and the CIT makes an adjustment to counteract the tax advantage resulting in any tax or additional tax being assessed on the taxpayer. The surcharge is equal to 50% of the tax or additional tax arising from a tax adjustment made under section 33 of the ITA. Where a section 33 adjustment made in YA 2023 or subsequent YA results in any tax or additional tax payable by that person for any year of assessment, the surcharge would apply. In other words, the surcharge under section 33A will be applicable to tax avoidance arrangements entered into before the basis period for YA 2023. However, the surcharge will only be imposed on any tax or additional tax arising from adjustment made under section 33 for YA 2023 and any subsequent YA.

Based on the clarification, IRAS appears to be saying that Section 33A is also capable of applying to tax avoidance schemes entered into before YA 2023, albeit that the surcharge will only be imposed on YA 2023 and subsequent YAs. For example, a tax avoidance scheme may have been entered into on YA 2020 and resulted in payment of reduced taxes in YA 2021, YA 2022 and YA 2023. CIT subsequently makes Section 33 adjustment for all YAs resulting in tax or additional tax payable. The Section 33A surcharge will only be applicable to the tax or additional tax imposed for YA 2023.

Notably, section 33 will only apply where an arrangement is regarded to be a tax avoidance arrangement under the ITA. In other words, there is no omission or understatement of income and no tax undercharged on an arrangement if CIT does not invoke section 33. Section 33 essentially empowers the CIT to disregard what is otherwise a legitimate and proper arrangement.

Should the CIT invokes section 33 to deny treaty benefits (withholding tax exemption/reduction), the tax payable/additional tax payable would be subject to the section 33A surcharge (unless full remission applies). Presumably, the taxpayer should not be subject to late payment penalties for non-compliance of withholding tax requirements under section 45(4) as withholding tax was not payable in the first place had the CIT not invoked Section 33 to disregard or vary the arrangement.

Under the remission framework, IRAS will consider granting a partial remission to taxpayers who come forward to the IRAS with self-initiated (voluntary) disclosure (i.e., before receipt of IRAS’ notification on the commencement of

audit, review, or investigation) of possible tax avoidance transactions or arrangements.

- If the self-initiated (voluntary) disclosure is made **within two years** from the tax return filing due date, IRAS may grant remission of up to 50% of the surcharge.
- If the self-initiated (voluntary) disclosure is made **after two years** from the tax return filing due date, IRAS may grant remission of up to 20% of the surcharge.

Please refer to section 9 of the e-Tax Guide for more details.

Closing remarks

In light of the ongoing international tax changes and the resulting stricter enforcement of domestic anti-avoidance rules, it may be timely for taxpayers to review previously adopted/implemented structures or arrangements and if necessary, take appropriate action to better manage risks, including considering voluntary disclosure programs.

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Should you have any comments or questions arising from this newsletter, please contact either the listed contacts below, or any member of the [Singapore Tax & Legal team](#).

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