

27 JUN, 2021

AGGRESSIVE TAX PLANNING IN M'SIA

Sunday Star, Malaysia

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ALTHOUGH tax planning appears to bear similar perceptions to other forms of planning - such as corporate, financial, family and even economic planning - it can be easily abused.

In this way, tax planning can result in substantial loss in tax revenue for the Government, said Universiti Tun Abdul Razak Prof Emeritus Dr Barjoi Bardai.

The extreme form of tax planning is termed 'wilful evasion' in Section 114 of the Income Tax Act 1967.

It is defined as the act of wilfully and intentionally evading or assisting any person to evade tax by omitting a return of any income; making a false statement or entry in a return; giving a false answer; preparing or maintaining false books of accounts or records; falsifying books of accounts or records; or making use or authorising the use of any fraud, art or contrivance.

Dr Barjoi explained that tax evasion occurs when taxpayers illegally escape paying taxes by concealing the true state of their financial affairs from tax authorities - be it not reporting income; keeping business off the books by dealing in cash or other devices with no receipts; hiding money, shares, or other assets in offshore bank account; misreporting personal expenses as tax-deductible business expenses or using company property for personal use without valid business reasons.

Legal tax avoidance

The tax evasion provision, however, still leaves open the possibility of planning in the form of a tax avoidance scheme, as can be seen in the 1999 case of the Inland Revenue Board (IRB) director-general versus Rakyat Berjaya Sdn Bhd, where the Federal Court judge clearly expressed, "Everyone is trying his best within the law to pay as little tax as possible. All kinds of schemes are thought of."

"No commercial person in his right sense is going to carry out commercial transactions except on the footing of paying the smallest amount of tax involved. There is nothing wrong at all for a company to organise their affairs in such ways as to minimise tax."

Hence, tax avoidance is regarded as a legal method to minimise the amount of income tax owed by an individual or a business, said Dr Barjoi.

He stressed that tax avoidance as a term can easily be abused, with activities of extreme avoidance termed aggressive tax planning.

This is defined as activity that actively pushes the limits of what is allowed in terms of the law, stretches the definition of terms in the legislation to access loopholes, or dressing up an arrangement so that it appears to be something else, or to arrange financial affairs so as to minimise taxes.

"This is normally done in three basic ways, namely reducing taxable income, increasing deductions and taking advantage of tax credits," he shared.

Anti-tax avoidance

After numerous tax cases by the IRB to define various activities as tax evasion, the Government amended the 1967 Income Tax Act and added section 140 - the 'anti-tax avoidance' - that gives the 'power to disregard certain transactions' applied where the director-general has reason to believe that any transaction has direct or



Gradual perception change: More sustainable efforts to address the issues of aggressive tax planning should be done through tax education.



Combating aggressive tax planning: Tax authorities are initiating an aggressive audit programme, investigation and forensic audit work.

indirect effect of altering the incidence of tax payable by any person; relieving any person from any liability; evading or avoiding any duty or liability imposed; or hindering or preventing the operation of the Act in any respect.

Dr Barjoi explained that the landmark case of Sabah Berjaya in 1999 capitalised on the section when the Special Commissioner used the test of 'substance over the form' (Ramsay Doctrine) to evaluate the overall transaction, where the holding company and subsidiary were regarded as the same entity.

The Court of Appeal judge never-theless applied the Westminster Doctrine of 'form over substance' - by evaluating each of the entity as a separate 'person' without regard of the relationship that exist between them - and concluded that the company had actually incurred expenses and losses, by contributing donations to the holding company instead of paying dividends.

"This is seen as a 'mitigation scheme' and not a 'tax avoidance' scheme," he pointed out.

The judge decided that section 140 only covered tax avoidance and evasion schemes, while tax

mitigation is not covered by the provision of the section.

He added, "The court specifically highlighted the term tax mitigation, where the tax benefit is only obtained when the taxpayer is able to reduce tax liability after the specific incurrence of expenses and losses."

"Whereas in tax avoidance, the benefit is obtained when the taxpayer could reduce the tax liability without incurring expenses or losses. This may be used as the guideline on the limit of tax planning activities in the future."

Thus, the dilemma remains: How can we spell out exactly what aggressive tax planning is?

According to Dr Barjoi, aggressive tax planning is a means of increasing or accelerating tax relief in ways not intended by legislators. This is practiced in the form of generating artificial losses; shifting profits between subsidiaries in different jurisdictions to book profits in low tax jurisdictions; transferring assets (such as intellectual property) from a subsidiary in a high-tax jurisdiction to one in a low-tax jurisdiction; using shell companies to serve as vehicles for transaction flows or accounting



Nation-building aspect: Education on tax is necessary to cultivate a society that views tax as contribution towards nation-building and Malaysia's future, said Dr Barjoi.



Taking firm action: IRB is looking into the areas of aggressive tax planning by kickstarting internal action and working with reputable international bodies, said Dr Sabin.

purposes; lending money from a low tax regime to subsidiary in high-tax regime and debt repayments and interest expenses offset against corporation tax in the high-tax regime to reduce tax payments. "Many aspects of aggressive tax planning originated with the conscious intent to escape from paying tax," he stressed.

Changing perceptions

What's clear, though, is that the status quo cannot continue, especially with OECD's prediction that there will be more extensive aggressive tax planning in the near future involving base erosion profit shifting (BEPS), earnings stripping rules, taxation for e-commerce, cryptocurrency as well as other technological and digital disruptions that are reshaping business models - and subsequently the tax landscape.

IRB chief executive officer Datuk Seri Dr Sabin Samitah said in a national tax conference that the tax authorities are looking into the matter, adding, "We are addressing the issue of aggressive tax planning by initiating an aggressive audit programme, investigation and

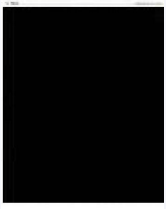
forensic audit work.

"[We are also] collaborating with other reputable international bodies like OECD in finding the best or the most suitable methods to tackle issues relating to the digital economy, sharing economy, cryptocurrency, technologies used for delivering goods and services across different platforms and storing business documents using cloud technology."

Issuing specific tax procedures to address such issues arising from aggressive tax planning may also create some clear rules on the limit of tax planning activities, noted Dr Barjoi.

He concluded, "More sustainable efforts to address the issues of aggressive tax planning should be done through tax education, in order to cultivate the culture of viewing tax not as an expense, but as contribution towards nation-building to ensure the future development and survival of taxpayers."

"Paying tax should actually be seen as a means of creating and maintaining a conducive business environment for companies to operate and generate profit in the future."



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SUMMARIES

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