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PREMIER TAX EVENT OF THE YEAR  
**NATIONAL TAX CONFERENCE**  
**2018**

16 & 17 JULY 2018 | MONDAY & TUESDAY  
KUALA LUMPUR CONVENTION CENTRE

*“Taxation in a Changing Economy”*

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**DAY 2 : 17 JULY 2018**

**TOPIC : AGGRESSIVE TAX PLANNING –**  
**is there a clear dividing line**

Speaker : Koh Sai Tian

*Director*

Large Taxpayer Branch, IRBM

**Global Efforts in Combating ATP**

- AEOI
- BEPS
- Tax reforms

**Aggressive Tax Planning [ATP]**

- Definition
- Facts & Principles
- Practices

**ATP Schemes**

- Case Laws  
Local  
Foreign

**Legislation**

- GAAR
- SAAR



# ATP as defined by HMRC

- Tax Avoidance that involves bending the rules of the tax system to gain a tax advantage that Parliament never intended
- It often involves contrived, artificial transactions that serve little or no purpose other than to produce a tax advantage
- It involves operating within the letter – but not the spirit – of the law, which is not the same as tax planning

Reference : HRMC Guidance on Tax Avoidance: Introduction [Published 6 September 2016, Last updated 27 September 2016]



HM Revenue  
& Customs

# ATP as defined by ATO

- Australian tax authorities' view is similar: the difference between tax planning and tax avoidance largely comes down to intent
- Tax planning is organising your clients' tax affairs in the most tax effective way within the intent of the law. In contrast, tax avoidance schemes involve the deliberate exploitation of the tax system



**Australian Government**  
**Australian Taxation Office**



# General definition of ATP

Aggressive tax planning or tax avoidance is seen by tax regulators around the world as:

- bending the rules of the tax system to gain a tax advantage that Parliament never intended
- ignoring the spirit of the law
- deliberately exploiting loopholes in the tax system
- disguising business transactions to reduce payment of taxes

# Tax Avoidance

**TAX  
AVOIDANCE**

Permissible tax planning  
**[Tax mitigation]**

Aggressive tax planning

Legal form and tax  
benefit as intended  
by legislation

How to Pay

**Less  
TAX**

*Legally*

Legal form but  
no economic substance,  
unintended benefit,  
unethical and  
abuse of tax laws

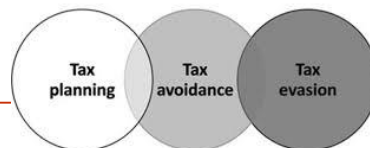
# Tax Avoidance vs Tax Evasion

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Try to find loopholes with the intention to pay less tax, even if technically legal, their actions may be against the spirit of the law and in this sense considered non-compliant



**Deliberately** misrepresent the true state of their affairs to the tax authorities to reduce their tax liability and includes dishonest tax reporting, such as declaring less income, profits or gains than the amounts actually earned, or overstating deductions



# Principles on Tax Planning

## Tax Planning

Using tax provisions in the spirit of the law

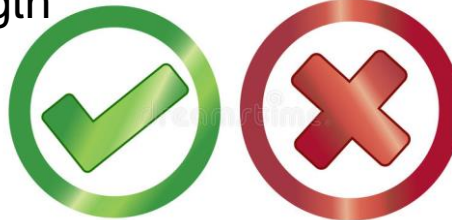
1. Investing in permissible avenues eligible for deductions
2. Selecting an appropriate business structure



## Aggressive Tax Planning

Using loopholes in the law for non-bona fide transactions

1. Offshore loans in tax havens / lower tax entities
2. Deemed interest costs while no interest payment was received by other entities
3. Prices for intra group transactions not at arms length



## Tax Evasion

Illegal measures like

1. Non disclosure of income
2. Fictitious expenses



# Anti-Avoidance Rules

1. SPECIFIC anti-avoidance rule



2. GENERAL anti-avoidance rule



# Examples of Specific Anti-Avoidance Rules – ITA 1967

## Section 44A(7) (wef 2006)

Group relief for companies – have to pass the 70% residual profits and residual assets test

## Section 140A (wef 2006)

Power to substitute the price and disallowance of interest on certain transactions

## Section 140B (wef 2008)

Loans or advances to directors

## Section 141

Powers regarding certain transactions by non-residents

# General Anti-Avoidance Rules - ITA 1967

## Section 140(1)

The Director General, where he has reason to believe that any transaction has the direct or indirect effect of –

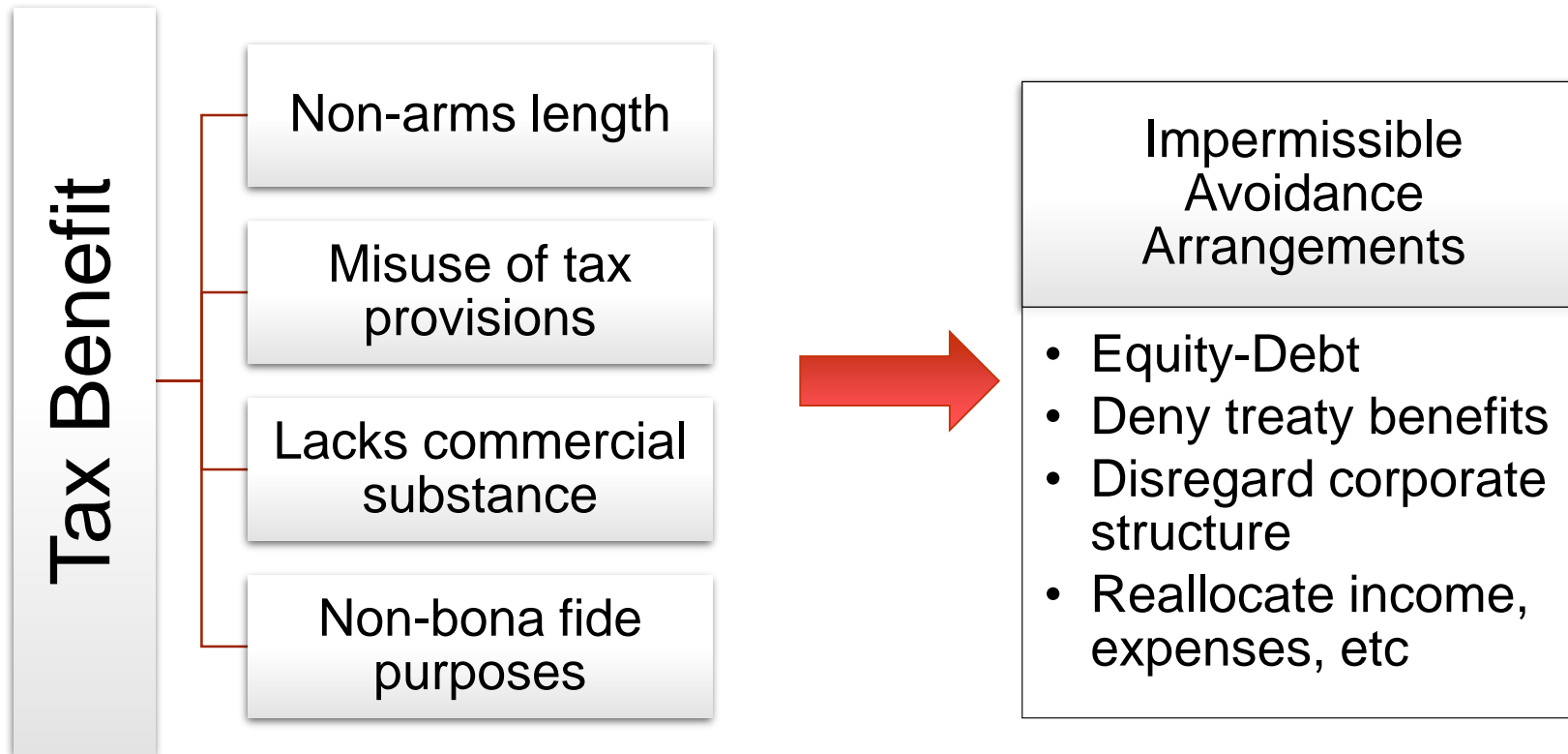
- (a) altering the incidence of tax.....
- (b) relieving any person from any liability which has arisen.....
- (c) evading or avoiding any duty or liability which is imposed.....
- (d) hindering or preventing the operation of this Act

# GENERAL ANTI AVOIDANCE RULES




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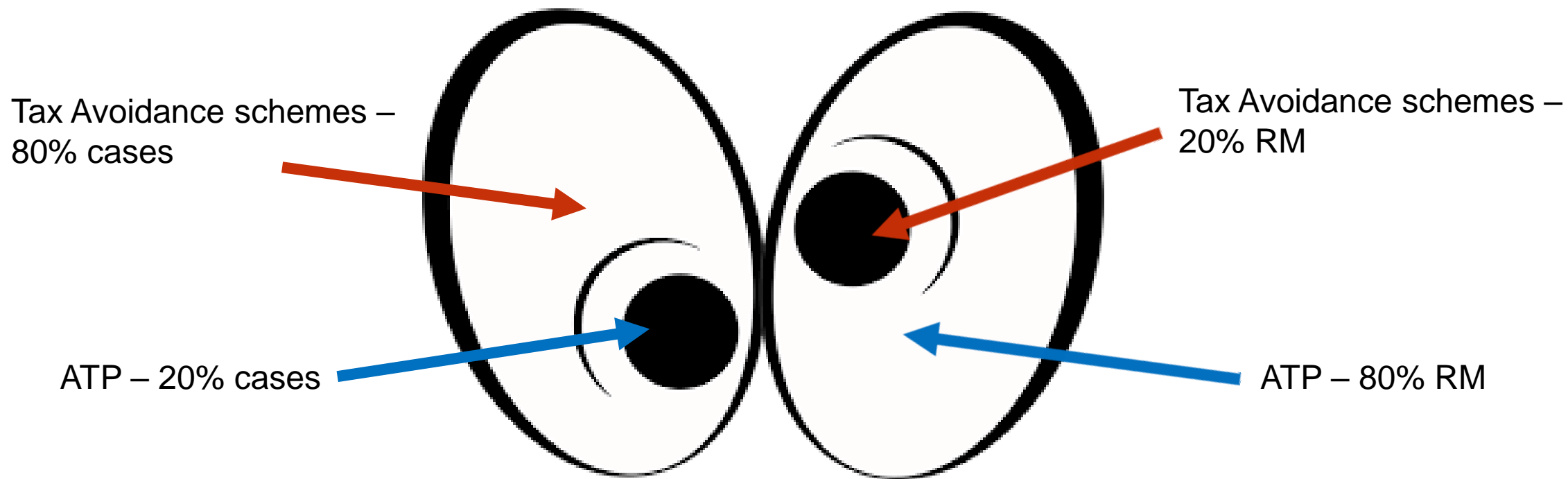


# Tax Benefit

1. Obtaining a relief or deduction against profits or gains
  2. Obtaining a repayment or refund of tax
  3. Avoiding or reducing tax chargeable or assessable
  4. Deferring any payment of tax
  5. Avoiding obligation to deduct or account for tax
- 

# Statistics of ATP cases in Malaysia

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## ATP schemes

1. Using, exploiting or abusing a relief
2. Finding a gap or loophole in the Act
3. Corporate loss utilization involving corporate reorganizations, financial instruments and non-arm's length transfer pricing
4. Mismatch arrangements involving differences in tax treatment between entities on transfers affecting two or more countries
5. Unnatural assets or transactions (developing assets or transactions such as dividend stripping, purely to manipulate the tax rules)
6. Pre-ordained transactions
7. Dodgy offshore schemes



# Case laws

## Local

- Sabah Berjaya Sdn Bhd v KPHDN
- Port Dickson Power Bhd v KPHDN
- Syarikat Ibraco-Peremba Sdn Bhd v KPHDN
- Ensco Gerudi (M) Sdn Bhd v KPHDN

## Foreign

- Mc Dowell & Co Ltd vs CTO [1985] 154 ITR 148 (SC)
- Vodafone International Holdings vs Union of India & Anr [2012] 341 ITR 1 (SC)
- CIR v Willoughby [1995] STC 995
- Eclipse Film Partners (No 35) LLP v HMRC [2015] EWCA Civ 95
- W. T. Ramsay Ltd v IRC [1982] A.C. 300
- IRC v Burmah Oil [1982] STC 30



# Global efforts to combat tax avoidance through improved transparency

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Co-operative compliance and exchange of information on ATP, detection methods and response strategies through;

## 1. Disclosure initiatives

- mandatory disclosure rules
- reporting obligations on ATP schemes
- ruling regimes

## 2. Measures on base erosion and profit shifting

- harmful tax practices
- treaty abuse
- country by country reporting
- dispute resolution mechanisms

## 3. Capacity building on technical assistance to help develop and implement equitable and effective tax systems

Business Tax Planning  
Income Tax Act  
**Tax Audit**  
Compliance  
Assessment  
Opinion





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