

The Uncertainty and Countermeasures of General Anti-Avoidance Clause

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Abstract

The Article 47 of the Enterprise Income Tax Law introduces the general anti-tax avoidance clause, and gradually constructs the general anti-tax avoidance rule system around the clause. General anti-tax avoidance provisions play an important role in making up for the deficiency of special anti-tax avoidance provisions in anti-tax avoidance. However, due to the unreasonable legislative provisions of general anti-tax avoidance provisions and the lack of judicial supervision of the administration-led anti-tax avoidance model, the tax authorities lack guidance in applying these rules, which leads to the uncertainty of the application of general anti-tax avoidance provisions. This article analyzes the causes of the uncertainty of general anti-tax avoidance provisions from the legislative, administrative and judicial aspects, and puts forward suggestions to solve the uncertainty caused by the legislation and application of general anti-tax avoidance provisions.

Keywords: uncertain legal concept, GAAR, Special Tax Adjustment

1. Introduction

Anti-tax avoidance legislation negates tax avoidance behavior, so defining tax avoidance becomes the premise of anti-tax avoidance legislation. In view of the complexity of tax avoidance, few tax laws of various countries can give a clear concept of tax avoidance. The superior concept of tax avoidance is the lawless behavior, that is, the behavior that violates the mandatory provisions of the law and the law cannot be applied according to the behavior that is not contained in the legal text. Therefore, tax avoidance belongs to the behavior of escaping the law in the tax law. It is a kind of behavior that takes advantage of the elements of the tax law, adopts the legal form with abnormal economic effect intended to achieve, so as to realize the economic purpose but exempt or reduce the tax burden. (Yang Xiaoqiang, 2002) Although tax avoidance does not violate the tax law in form, it hinders the realization of the purpose of the tax law in essence. (Liu Da-tian et al., 1989) The formulation of tax law rules includes lawmakers' consideration of achieving substantial fairness and other tax law purposes. The violation of the purpose of the tax law not only causes losses to the state finance, but also infringes on the interests of other taxpayers, makes the distribution function of the tax law futile and undermines the fair purpose of the tax law. Since the Constitution clearly stipulates that citizens have the duty to pay taxes according to law, the denial of tax avoidance has both the basis of tax law and the basis of Constitution. Since the emergence of tax avoidance, various countries have regulated and corrected tax avoidance by formulating special anti-tax avoidance clauses and general anti-tax avoidance clauses. As a legal rule, special anti-tax avoidance clauses have the characteristics of hysteresis. After these anti-tax avoidance clauses solidify the legislative intention and become the carrier of the legislative intention, with the development of time, the effectiveness of reflecting and regulating anti-tax avoidance gradually weakens in its stable regulatory range. In this way, by introducing general anti-tax avoidance provisions to distinguish legal tax planning and illegal tax avoidance gradually become the general law and trend of national legislation.

In 2008, the Enterprise Income Tax Law of the People's Republic of China (hereinafter referred to as "Enterprise

Income Tax Law”) introduced general anti-tax avoidance provisions, and subsequently, the Measures for the Implementation of Special Tax Payment Adjustment (for Trial Implementation) (hereinafter referred to as the Measures for Implementation) and the General Measures for the Administration of Anti-Tax Avoidance (for Trial Implementation) (hereinafter referred to as the Measures), which were implemented by the State Administration of Taxation in 2008 and 2015, clearly defined the characteristics and meaning of the “tax avoidance arrangement” denied by the general anti-tax avoidance provisions and detailed the specific procedures and operation methods; Article 120 of the Regulations for the Implementation of the Enterprise Income Tax Law of the People’s Republic of China (2019 Amendment) (hereinafter referred to as the “Implementation Regulations”) explains the provisions of the “Enterprise Income Tax Law” that “do not have reasonable commercial purposes”. As can be seen from the above provisions, after the general anti-tax avoidance provisions are stipulated in Chinese legislation, supporting measures of the general anti-tax avoidance provisions are gradually improved through administrative regulations, departmental rules and normative documents, and a four-level standard system of laws, administrative regulations, departmental regulations and normative documents is formed. Centering on the core concept of general anti-tax avoidance provisions in Article 47 of the Enterprise Income Tax Law, the judgment method of “reasonable business purpose” is gradually determined, and the judgment standard of “tax avoidance behavior” involved in general anti-tax avoidance provisions is formed. This method gradually improves the judgment standard of tax avoidance behavior, and shows the idea of finding and solving problems and gradually improving the level of anti-tax avoidance. However, due to the legislative, administrative and judicial application reasons, the general anti-tax avoidance provisions have great uncertainty, which violates the determination principle of the tax law and is not conducive to the progress of anti-tax avoidance. Therefore, it is of great theoretical and practical significance to reflect on the uncertainty of the general anti-tax avoidance provisions and take measures to deal with them.

2. Uncertainty Caused by Legislative Issues

General anti-avoidance provisions try to cover more tax avoidance activities, but only by clearly and reasonably defining tax avoidance activities, can general anti-avoidance provisions play the role of making up the legal loopholes of tax avoidance on the whole. Article 47 of the Enterprise Income Tax Law issued in 2008 defines tax avoidance. “An enterprise reduces its taxable income or income amount by implementing other arrangements that do not have a reasonable commercial purpose” constitutes tax avoidance. Therefore, “arrangements that do not have a reasonable commercial purpose” is the core of our general anti-tax avoidance provisions. This is explained in Article 120 of the Regulations on the Implementation of the Enterprise Income Tax Law of the People’s Republic of China. “Arrangement without reasonable commercial purpose” is an arrangement “with the main purpose of reducing, exempting or postponing the payment of tax”. In December 2014, the State Administration of Taxation issued the Measures for Administration (hereinafter referred to as the Measures), further clarifying the two conditions for tax avoidance, not having a reasonable commercial purpose and obtaining tax benefits. (Yan Feng, Zeng Lixin, & Wang Xiaokun, 2015) In 2018, the Individual Income Tax Law was amended to add an anti-tax avoidance clause in Article 8, but this article almost completely copies the expression of the enterprise Income Tax Law.

In this way, the composition of the general anti-tax avoidance provisions in China depends subjectively on whether it has a “reasonable commercial purpose” and objectively on whether it obtains tax benefits. As there are some problems in the connotation and application of “reasonable business purpose”, it leads to the uncertainty in the application of general anti-tax avoidance provisions, which affects the realization of the anti-tax avoidance culvert objective of the general anti-tax avoidance provisions legislation.

2.1 The Provision of “Not Having a Reasonable Commercial Purpose” Is Unreasonable

First of all, the expression of “not having reasonable commercial purpose” in Article 47 of the Enterprise Income Tax Law is inconsistent with its connotation. According to the provisions of Article 47 of the Enterprise Income Tax Law, where an enterprise reduces its taxable income or income by implementing other arrangements that do not have reasonable commercial purposes, the tax authorities shall have the right to adjust such arrangements in accordance with reasonable methods. The tax avoidance behaviors defined in the general anti-tax avoidance provisions are collectively referred to as “arrangements without reasonable commercial purpose”. From the perspective of the function of the clause, this article stipulates the application of the general anti-avoidance clause and defines the transaction or arrangement regulated by the general anti-avoidance clause. According to Article 120 of the Regulations on Implementation, the term “not having reasonable commercial purpose” as mentioned in Article 47 of the Enterprise Income Tax Law means that the main purpose is to reduce, exempt or postpone the payment of tax.

From the perspective of the relationship between the two, “taking the main purpose of reducing, exempting or postponing tax payment” cannot exclude the taxpayer from having “commercial purpose”, that is, the two are not exclusive. (Yan Feng, Zeng Lixin, & Wang Xiaokun, 2015) According to this interpretation, “the main purpose

of reducing, exempting or postponing tax payment” is taken as the criterion to judge whether the “commercial purpose” is “reasonable”. In other words, when it is proved that the taxpayer’s main purpose is to “reduce, exempt or defer the payment of tax”, it is deemed as “commercial purpose” is not “reasonable”. Therefore, according to the connotation of “not having a reasonable commercial purpose”, the “main purpose” in general anti-tax avoidance provisions is not the focus of “commercial purpose”, and whether “reasonable” should be determined according to the subjective purpose of “obtaining tax benefits”. “Not having reasonable business purpose” is only an “alternative expression” for the application of the general anti-tax avoidance provisions of the Enterprise Income Tax Law. However, this alternative expression can not summarize the scope of application of the general anti-tax avoidance legislation, but also causes obstacles to the understanding of the connotation, which should be amended.

Secondly, the understanding of “reasonable commercial purpose” as the subjective element of general anti-tax avoidance provisions is not in line with the development trend of general anti-tax avoidance legislation. The subjective element of the general anti-tax avoidance clause is to analyze the abnormal subjective purpose behind its adoption of the form of transaction through the taxpayer. By judging whether it is for tax benefit, while excluding other reasonable purposes, the transaction meets the subjective element of the general anti-avoidance clause. At the core of that element is the tax benefit. According to Article 120 of the Regulations, it should be considered that “not having reasonable commercial purpose” in Article 47 of the Enterprise Income Tax Law is the subjective element of the application of the general anti-tax avoidance provisions in China.

Some scholars believe that the concept of “reasonable commercial purpose” originates from the United States, which has a relatively early legislative practice on commercial purpose. The Gregory v. Helvering case is often regarded as the origin of the American commercial purpose principle. In that case, the justices held that the determination of federal tax liability could be based in part on the purpose for which the taxpayer engaged in a transaction that reduced his tax burden; In some cases, judges were inclined to exclude a taxpayer’s tax liability if the taxpayer could show that the transaction had a reasonable business purpose, rather than merely reducing the tax burden. The areas where this principle applies are mainly in the areas of corporate restructuring, corporate distribution, partnership entities, sales and sale and leaseback, but it seems to be more important in corporate restructuring cases than in other types of cases. (Xian Liwu, 2021) Because the purpose factor usually focuses on the motivation behind the transaction, rather than the effect of the transaction, tends to create difficulties for judges to argue; (Summers, Robert S., 1961; Bankman, J., 2000) And such purpose is easy to be used by taxpayers, further driving taxpayers to seek commercial purpose and weakening the effectiveness of the commercial purpose principle or clauses, therefore, the commercial purpose principle has been fiercely criticized in the United States, and some people even advocate giving up the principle. ^[1]The judiciary’s negative attitude towards the application of the commercial purpose principle has forced legislative changes.

In this regard, the United States has tried to clarify the differences in the application of general anti-tax avoidance provisions in different cases through legislation, so as to form a consensus, for example, Article 269 of the United States Internal Revenue Code (1954), which is broad and can be applied to more cases of company acquisition. However, since it is difficult to determine that the main purpose of corporate acquisition is to avoid tax, the application of this provision has some problems. Subsequently, the United States Congress enacted a non-subjective provision relating to general anti-avoidance provisions, Section 382, which provides that the availability of certain tax benefits for loss carry-over acquisitions shall take into account primarily the continuity of shareholder interests of the losing company. ^[2]At the same time, the American Law Institute drafted a flexible provision different from Section 269, Section 341 (b) (1), which provided that no investigation of the taxpayer’s motive or intent was required. Although attempts to strengthen the certainty and general applicability of the business purpose principle through legislation in the United States have not been successful, the business purpose principle has been subjected to more and more restrictions in anti-tax avoidance legislation, showing a trend of gradually being replaced by non-subjective elements. ^[3]

The judicial practice in various countries gradually develops into the general anti-tax avoidance judicial principle and legislative paradigm of objectivity standard and subjectivity standard. Take the United States as an example, the objective economic substance standard and the subjective commercial purpose standard together constitute the general anti-tax avoidance double applicable standard. The two are unified in the judicial “economic substance principle” in the United States, and eventually rise to legislation. Clause 1 of Economic Substance Principle in Article 7701 (O) of the Internal Revenue Code of the United States stipulates that when the criterion of economic substance principle is applied, the transaction shall satisfy the objective economic substance of the transaction and the subjective commercial motive behind it, which together constitute the application requirements of the economic Substance Principle of the United States. The two elements are interrelated and used to analyze whether the transaction has substance other than tax benefits, so as to judge whether the transaction complies with the provisions of the tax law. ^[4]

General anti-avoidance rules should have objective elements and subjective elements, the combination of the two as general anti-avoidance provisions for the application of conditions. The objective of taxpayers' subjective tax avoidance is highly concealed, and the standard of subjective elements is very vague, lacking the clarity of objective elements. Therefore, the combination of subjective elements and objective elements is conducive to overcoming the problem of unclear subjective elements, so as to enhance the certainty of general anti-tax avoidance provisions. China's general anti-tax avoidance legislation started late, drawing on the concept of "reasonable business purpose" from the United States, as the core concept of Article 47 of China's Enterprise Income Tax Law. As mentioned above, if the nature of the clause is understood in accordance with the applicable circumstances of the general anti-tax avoidance clause, "not having a reasonable commercial purpose" cannot be used as a substitute expression for the applicable circumstances. Or consider "not having a reasonable commercial purpose" as the subjective element, such expression is also inaccurate, and the subjective element should be understood as "tax avoidance purpose" according to its connotation. At the same time, this article lacks objective element statement, does not conform to the general development trend of anti-tax avoidance legislation. In any case, it will increase the uncertainty of general anti-avoidance provisions.

2.2 The Constitutive Requirements of Behavior in General Anti-Avoidance Rule Is Inconsistent

As mentioned above, the commercial purpose as the subjective factor and the economic substance as the objective factor is a relatively mature legislative example for the definition of tax avoidance in general anti-tax avoidance rules. From the perspective of our general anti-tax avoidance legislation system, "economic substance" constitutes an independent objective element. General anti-tax avoidance provisions are a system composed of many general anti-tax avoidance rules, including a complete legislative framework and constituent elements. As is clearly pointed out in the general anti-avoidance legislation of the United Kingdom; These part of the Rules are collectively referred to as the "General Anti-Abuse Rules". Therefore, to understand the constituent elements of our general anti-tax avoidance legislation, it should be understood by combining many specific provisions in a broad sense. (Wang Zongtao, 2016) According to Article 2 of the Administrative Measures, the Measures are applicable to "tax avoidance arrangements implemented by enterprises that do not have reasonable commercial purposes to obtain tax benefits", further clarifying the two features of this arrangement: one is to obtain tax benefits as the sole or main purpose; (Hou Zhuo, 2014) The second is to obtain tax benefits in a way that conforms to the provisions of the tax law in form but does not conform to its economic substance. This approach includes the concept of "economic substance", an objective element that defines general anti-tax avoidance behavior, and takes subjective purpose and economic substance as two features of this tax avoidance arrangement, indicating that they are in parallel. (Hou Zhuo, 2014) In addition, the State Administration of Taxation on the issuance of the "New Enterprise Income Tax Law Spirit Publicity Outline" (Guo Tax Letter [2008] No. 159) pointed out that the arrangement without a reasonable commercial purpose usually has the following characteristics: First, there must be an arrangement, that is, an artificially planned or a series of actions or transactions; Second, the enterprise must obtain "tax benefits" from the arrangement, that is, reduce the enterprise's taxable income or income; Third, the main purpose of the arrangement is for the enterprise to obtain tax benefits. The three characteristics focus on the analysis of the transaction steps and their economic effects. If the above three characteristics are satisfied, it can be inferred that the arrangement has constituted the fact of tax avoidance. According to the notice, the characteristics that "do not have a reasonable commercial purpose" include the non-subjective elements of the effect element and the objective element. (Yan Feng, Zeng Lixin, & Wang Xiaokun, 2015) The subjective elements mentioned in Article 47 of the Enterprise Income Tax Law are not independent judgment criteria for tax avoidance in general anti-tax avoidance rules.

Objective elements "economic substance" from the taxpayer's unconventional transactions to analyze the complex means of trading. Through the analysis of transactions, the relationship between the economic substance of such transactions and the tax benefits is determined. The positive conclusion drawn from the objective element "economic substance" forms the basis for presuming the subjective purpose of the taxpayer to avoid tax (the purpose of tax avoidance). From the perspective of the relationship between objective elements and subjective elements, the objective element "economic substance" occupies a more important position. In addition, from the Angle of legal application logic, the application of general anti-tax avoidance provisions is also a reasoning process from objective behavior to subjective purpose (tax avoidance purpose). According to the objective element "economic substance" can overcome the disadvantages of unclear subjective elements, and then enhance the certainty of general anti-tax avoidance provisions.

From the general anti-tax avoidance legislation as a whole, the provisions of the Enterprise Income Tax Law are inconsistent with the subjective and objective elements of the general anti-tax avoidance legislation system. However, Article 47 of the Enterprise Income Tax Law, which is at the highest level of general anti-tax avoidance legislation, only contains subjective elements (tax avoidance purpose). According to the conflict rules of legal rank, the upper law should be followed when the lower law is inconsistent with the upper law. This will lead to the exclusion of the objective element "economic substance". The general elements of anti-avoidance

provisions are the conditions that define tax avoidance. The inconsistent provisions of the constituent elements will not determine the scope of the tax avoidance behavior in the general anti-tax avoidance provisions, nor can it provide a clear standard for the application of law, thus hindering its application to the general anti-tax avoidance provisions. In the case of unclear standards, the applicable law is difficult to apply general anti-tax avoidance provisions, or apply according to different standards, which enhances the uncertainty of general anti-tax avoidance provisions, and will hinder the realization of the purpose of general anti-tax avoidance legislation.

2.3 The Principle of “Substance Over Form” Has a Low Legal Status

The principle of substance over form is an important system of anti-tax avoidance. Economic material analysis is carried out through transactions to regulate tax avoidance behaviors of taxpayers. Specifically, the principle of substance over form explains the facts of taxation from the perspective of objective economic substance, identifies the facts of taxation violating the tax law norms beyond the taxpayer's transaction form, and denies the transactions that the taxpayer meets the meaning of the tax law but violates the essence.

The principle of “substance over form” comes from the judicial practice of anti-tax avoidance in the United States, which serves as the basis for anti-tax avoidance in the absence of general anti-tax avoidance rules. In American judicial practice, there are many cases in which taxpayers' transactions without economic substance are regulated by this principle, such as *Knetsch v. United States* case in 1960 and *Frank Lyon Co. v. United States* case in 1978. Similarly, the United Kingdom also established an anti-tax avoidance principle similar to the “substance over form principle”—the Ramsay principle was established in *W. T. Ramsay Ltd. V. IRC* case in 1982. However, in civil law countries, the similar concept of the principle of substance over form in the field of anti-tax avoidance can be corresponding to the principle of substantial taxation, and has a similar proposition to the principle of substance over form. The principle of “substance over form” is incorporated into the general anti-tax avoidance legislation system in Article 93 of China's Measures for Implementation. The Measures are normative documents aimed at guiding tax authorities to examine whether enterprises have tax avoidance arrangements. This regulation is consistent with the legislative and judicial principles and concepts of general anti-tax avoidance adopted by major countries, as well as the trend of international general anti-tax avoidance legislation.

The principle of substance over form emerged from the American judicial case Gregory case, which later derived many anti-tax avoidance sub-principles and developed into the basic principle of American judicial anti-tax avoidance. The principle of commercial purpose and the principle of economic substance are derived from the core idea of Gregory case. They are the sub-principles of “substance over form principle”. Article 47 of China's Enterprise Income Tax Law applies to the concept of “reasonable commercial purpose”, which is derived from the commercial purpose principle and the principle of “substance over form”. (Bankman, J., 2000) However, the principle of “substance over form” in our anti-tax avoidance legislation is stipulated in departmental normative documents as an applicable method, which is mainly used to judge whether the transaction arrangement of enterprises has economic substance. This kind of legislative arrangement enhances the uncertainty of the general anti-tax avoidance legislation.

First of all, general anti-avoidance legislation includes two types of anti-avoidance rules and principles. The principle of “substance over form” belongs to the principle. There is a difference between the general anti-tax avoidance principle clause and the rule clause. “Substance over form principle” does not set a strict logical structure, there is no general anti-tax avoidance specific rights and obligations content, so the lack of clarity. As the superior principle of other general anti-tax avoidance principles, the principle of “substance over form” is the basic principle of anti-tax avoidance legislation and a guiding principle with universal significance for general anti-tax avoidance legislation, judicature and implementation. From the perspective of function, the principle only plays the functions of the code of conduct and judgment in the absence of specific norms, while our country takes the “substance over form principle” as the action guide for tax authorities to decide economic, which is inconsistent with the applicable conditions of the principle.

Secondly, due to the unclear problems in the application of the principle clause, there are various restrictions on its application in practice. Take the United States as an example, the application of the principle of substance is more important than the principle of form in judicial practice, because of the lack of a unified guiding standard for the judgment of economic substance, resulting in the uncertainty of judicial anti-tax avoidance. In our anti-tax avoidance legislation, the subject of application of this principle is the tax authority, compared with the American judicial departments under the conditions of demonstration and reasoning, which leads to the uncertainty of judicial anti-tax avoidance. As a method of law application, it is stipulated in departmental regulations to guide the anti-tax avoidance work of administrative organs. Combined with the items listed in this article, the administrative organs should consider comprehensively, such as the form and substance of arrangement, the time of arrangement and the execution period, the way of arrangement realization, etc.

However, it is still too abstract and general to provide consistent guidance.

3. Uncertainty Caused by the Application of Law to Tax Authorities

3.1 Uncertainty of "Economic Substance" Identified by Tax Authorities

In Article 4 of the Administrative Measures, the definition of tax avoidance includes two elements, and the second paragraph uses the concept of "economic substance" as an objective component. The objective elements have a very important position. The tax authorities' argument for a general anti-avoidance rule that "has as its primary purpose the reduction, exemption or deferral of tax payment" rests on an analysis of objective "economic substance", which is the basis for drawing the line between legitimate tax planning and abusive tax avoidance. At the same time, the results of the tax authorities' analysis of "economic substance" constitute the basis for demonstrating the subjective purpose of the general anti-avoidance rule. For example, tax authorities first determine whether each part of the transaction has the purpose of tax avoidance by analyzing the economic substance of each part of the transaction, and then judge whether the whole transaction has the purpose of tax avoidance according to the results of the partial analysis. Take Canada's *McClarty* case as an example, the judge recognized that the subjective purpose of the whole transaction could be determined by judging the subjective purpose of a series of transactions.

Tax authorities judge whether the transaction is "economic substance" with uncertainty, mainly including two factors. First of all, tax authorities apply different criteria to determine whether the taxpayer has economic substance over form principle. The relationship between the principle of "substance over form" and the listed consideration content, according to its expression "and take the following contents into comprehensive consideration", indicates that these contents should logically first meet the requirements of the principle of "substance over form", and tax authorities are not limited to the consideration of the listed content according to the principle of "substance over form". This kind of regulation provides a more flexible approach for tax authorities to apply the general anti-avoidance rules, but it lacks of constraints on tax authorities. In addition, in the long-term practice of anti-tax avoidance, tax authorities mostly apply special anti-tax avoidance rules. When applying such rules, tax authorities regulate tax avoidance according to special anti-tax avoidance rules with clear conditions and clear operating procedures. Different from the special anti-tax avoidance provisions, general anti-tax avoidance rules only provide abstract standards, tax authorities handle each case situation is different, lack of similar practical experience for reference, resulting in the uncertainty of treatment results is inevitable.

Secondly, due to the asymmetry of information required by anti-tax avoidance investigation and the need to save costs, taxpayers need to undertake the cooperation obligation of anti-tax avoidance investigation. Although the performance of taxpayers' cooperation obligation provides information convenience to the investigation, it is necessary and convenient, but at the same time, the performance of taxpayers' assistance obligation is also a kind of defense, and does not constitute a sufficient requirement for determining the economic substance. (Tang Jieyin, 2019) Therefore, the information asymmetry hinders the tax authorities' anti-tax avoidance fact investigation, which constitutes the difficulty of its identification of "economic substance". However, according to Article 11 of the Administrative Measures, tax authorities shall have the right of decision to identify evidential materials and other materials provided by taxpayers. The authority of tax authorities to identify evidentiary materials is too large and lack of constraints, which will easily lead to the identification of tax avoidance facts due to insufficient data, resulting in the arbitrary identification of tax authorities in the "economic substance".

3.2 Tax Authorities Demonstrate the Uncertainty of the Taxpayer's Subjective Purpose

According to the analysis of the first part of this paper, although Article 47 of the Enterprise Income Tax Law contains the subjective elements of the general anti-avoidance provisions, the tax authorities' argument of the subjective purpose of the taxpayer by applying the general anti-avoidance rules is easy to become a mere formality.

Tax authorities carry out anti-tax avoidance, with active characteristics. Tax authorities apply general anti-tax avoidance provisions to anti-tax avoidance investigation, and have already made a preliminary judgment on tax avoidance arrangements. On the basis of the preliminary judgment, the tax authorities must take active actions to prove that the taxpayer meets the constituent elements of the general anti-avoidance provisions. According to Article 47 of the Enterprise Income Tax Law and Article 120 of the Regulations for its Implementation, "General anti-tax avoidance refers to the arrangement for enterprises to obtain tax benefits without reasonable commercial purposes." Requiring the tax authorities to judge whether the enterprise has the purpose of obtaining tax benefits is contradictory with the logic of the tax authorities' preliminary judgment of the enterprise has the purpose of obtaining tax benefits. In other words, the tax authority's application of general anti-avoidance provisions by the tax authority is inevitably subjective. (Tang Jieyin, 2019) The application effect of general anti-tax avoidance provisions is to prevent taxpayers from escaping from the law, and to adjust the effect of escaping from the law to prevent them from avoiding the consequences of mandatory norms. Tax authorities apply general anti-tax

avoidance provisions to restore the legal effect of tax law, in order to prove the constituent elements of general anti-tax avoidance provisions, and adopt a variety of methods to determine the economic arrangement of taxpayers is a behavior of escaping the law. It not only requires tax authorities to regulate more anti-tax avoidance behaviors through the legal application of general anti-tax avoidance provisions, but also requires them to demonstrate objectively and fairly. (Zhou Wei, 2013) Tax authorities are both executor and judge, which is obviously not conducive to their objective and fair application.

4. Uncertainty Caused by the Judicial Application of the Court

4.1 The Absence of Justice Is Not Conducive to the Improvement of General Anti-Tax Avoidance Legislation

Under the tax legislation pattern dominated by The State Council, the tax department has also dominated the power of interpretation of tax law norms. At the same time, due to the lack of restriction of the administrative department's power of interpretation, its interpretation content not only has consistency problems, but also often conflicts with the upper law. The lack of judicial application of general anti-tax avoidance provisions is not conducive to the judicial organs to play a role in improving general anti-tax avoidance legislation and standardizing the interpretation of tax law norms. (Zhou Wei, 2013) In theory, there is a positive interaction between legislative anti-tax avoidance and judicial participation. Good anti-tax avoidance legislation is conducive to improving the efficiency of judicial anti-tax avoidance, and the practice of judicial anti-tax avoidance provides a practical test for the perfection of general anti-tax avoidance legislation, which is conducive to the materialization of abstract concepts of anti-tax avoidance legislation and the elaboration of anti-tax avoidance rules. By observing the judicial practices of other countries, it can be found that the western countries have abundant anti-tax avoidance judicial practices. Judicial organs have formed a series of judicial anti-tax avoidance principles through individual rulings, including economic substance theory, commercial purpose theory and so on. Especially in common law countries with traditional case law, the anti-tax avoidance principles formed by judicial precedents play a role in anti-tax avoidance legislation. As the legal basis for tax authorities in countries with unwritten law, they have universal legal binding force. The participation of judicial organs establishes a good bridge between legislation and law application, making a virtuous cycle between tax legislation and judicature.

Although our current general anti-tax avoidance rules refer to the related concepts of American judicial anti-tax avoidance, there is a lack of judicial practice of general anti-tax avoidance provisions in our practice because we belong to an administration-oriented anti-tax avoidance model. Since 2008, when general anti-tax avoidance clauses were introduced, there are only three judicial cases concerning the application of general anti-tax avoidance clauses in our country up to now, namely, case of Tax administration Collection Dispute between Children Investment Fund and Hangzhou Xihu District National Tax Bureau, Italy Taofarlono Holding Company and Zhifu National Tax Bureau in Yantai City, Shandong Province. And Lin Mouqin and Putian Local Tax Inspection Bureau, Fujian Provincial Local Taxation Bureau tax processing decision and administrative reconsideration dispute case.

There are many reasons for the lack of judicial participation in anti-tax avoidance practice in China. On the one hand, judicial anti-tax avoidance is more passive than legislative and administrative anti-tax avoidance. This is determined by judicial neutrality and conservatism. If tax authorities and taxpayers dispute tax avoidance, both parties do not resort to the judiciary, the judiciary can not take the initiative to start the anti-tax avoidance function. On the other hand, the professional of tax collection and anti-tax avoidance is strong, and our judicial organs lack the professional business ability of tax authorities, and lack the advantages in the judgment of the elements of the application of general anti-tax avoidance provisions and the adoption of special tax adjustment. Moreover, the series of rules related to general anti-tax avoidance provisions are currently administrative rules and even administrative normative documents, and tax authorities are the primary subject of anti-tax avoidance collection and management. Taking into account the efficiency factor, the application of general anti-tax avoidance provisions often lead to the end of the fact, so the lack of judicial intervention.

General anti-tax avoidance provisions are abstract and general, and their legal application has great uncertainty. However, judicial practice can provide more specific standards for the identification of general anti-tax avoidance, which is conducive to enhancing the certainty and clarity of general anti-tax avoidance legislation. The judicial organs participate in anti-tax avoidance, through the application of law to complete the accumulation of practice for the legislative improvement, and finally improve the anti-tax avoidance legislation to achieve the goal of more effective regulation of anti-tax avoidance behavior.

4.2 The Judicial Organs Have Not Played a Supervisory Role in the Application of Laws to Administrative Organs

Tax avoidance disputes arising from the application of general anti-tax avoidance provisions belong to "justice in tax payment", and tax payment is the pre-procedure of administrative litigation, and it is the same after

administrative reconsideration. The purpose of setting up the pre-procedure is to correct the application of law and improve the administrative efficiency through the internal administrative system. However, it is difficult to guarantee the actual effect of correcting errors through the internal procedures of the administrative system. At the same time, such setting also hinders the possibility of judicial participation. Taxpayers will not seek judicial relief again due to or fear of retaliation from tax authorities or insufficient practice of judicial participation in anti-tax avoidance cases after experiencing complex administrative processing procedures. (Tang Jieyin, 2022)

But it is undeniable that the judicial supervision tax authorities have advantages in the application of anti-tax avoidance laws. The judicial application has the natural neutrality, and the ruling of anti-tax avoidance cases is more conducive to realizing the fairness of the application of general anti-tax avoidance rules. Only tax authorities participate in the application of general anti-tax avoidance rules, and the establishment conditions of subjective and objective conditions can not guarantee the certainty of the application of law. Taking “economic substance” as an example, the applicable authorities need to consider various relevant factors comprehensively. On the premise of forming reasonable doubt, tax authorities must collect a lot of relevant information to demonstrate the rationality of applying general anti-tax avoidance provisions. The information provided by taxpayers also tends to protect their own interests and cover up adverse information. In order to prevent the general anti-tax avoidance rules from becoming a tax avoidance tool for taxpayers, balance the interests of taxpayers’ trust and the interests of the state tax revenue, and overcome the subjective disadvantages of the tax authorities in the application of law, the judicial organs, as independent and neutral subjects, participate in the process. Compared with the tax authorities, the judicial organs can guarantee the fairness of the application of law. It can supervise the application of laws by tax authorities and safeguard the legitimate rights and interests of taxpayers. On the contrary, when the judicial application of general anti-tax avoidance provisions is insufficient, it is not conducive to the tax authorities to play a supervisory role in the application of general anti-tax avoidance provisions.

5. Suggestions to Improve Our General Anti-Tax Avoidance System

5.1 Improve the General Anti-Tax Avoidance Legislation

Firstly, Making clear the constituent elements of general anti-tax avoidance clauses, and define the relationship between subjective elements “reasonable commercial purpose” and objective elements “economic substance”. Article 47 of the current legislation “Enterprise Income Tax Law” emphasizes the subjective requirement of “not having a reasonable commercial purpose” as the defining element to define whether the tax arrangement of an enterprise is legal. The subjective elements need to be determined by objective economic substance, and its importance is self-evident. On the basis of the subjective judgment in Article 47 of the Enterprise Income Tax Law, the Administrative Measures summarizes the characteristics of “tax avoidance arrangement” in general anti-tax avoidance provisions, adds the constitutive requirement of “economic substance”, takes economic substance judgment as one of the characteristics of tax avoidance behavior in general anti-tax avoidance provisions, and goes beyond the scope of subjective requirement “not having reasonable commercial purpose”. Form the general anti-tax avoidance provisions to define the independent elements of tax avoidance behavior, form a unified subjective and objective requirements of the applicable standards. Based on the relevant provisions of Article 47 of the Enterprise Income Tax Law, Article 120 of the Implementation Regulations of the Enterprise Income Tax Law and Chapter 10 of the Implementation Measures (State Tax Law [2009] No. 2) of the State Administration of Taxation, the constituent elements of the general anti-tax avoidance rules should be clearly defined so as to keep them consistent in the system. According to the analysis of a series of articles, it is difficult to exclude the reasonable status of “economic substance” as an objective condition. However, Article 47 of the Enterprise Income Tax Law ignores the objective elements, and as a superior law, the applicable standards of the law are more authoritative and stable than administrative regulations and administrative normative documents. Therefore, the determination of the subjective and objective elements of general anti-tax avoidance should be unified in the Enterprise Income Tax Law. So as to reduce the uncertainty of the application of administrative regulations and administrative department rules in the general anti-tax avoidance elements. Article 47 of the Enterprise Income Tax Law should also add “economic substance” content to the expression of general anti-tax avoidance provisions, and the subjective elements. It should not take “not having a reasonable commercial purpose” as a single general expression, and should be amended according to the connotation of “not having a reasonable commercial purpose” to “an arrangement for the sole or primary purpose of obtaining tax benefits”.

Secondly, the scope of application of the principle of “substance over form” in Article 93 of Chapter 10 of the Measures for Implementation should be clarified, and the legal rank of abstract concepts in the general anti-tax avoidance legislation system should be adjusted. The nature of this principle tends to be a working principle or method of tax authorities. Article 93 of the Special Measures for the Implementation of Tax Adjustment (Trial) stipulates that “tax authorities shall examine whether an enterprise has” tax avoidance arrangements “in

accordance with the principle of substance over form". The determination of enterprise "tax avoidance arrangement" depends on the determination of the subjective and objective elements of general anti-tax avoidance provisions. This article obviously applies to the determination of "economic substance", and the principle of "substance over form", as the principle of judging "tax avoidance arrangement", is not limited to the judgment of "economic substance" of objective elements, but also should include subjective elements. According to the above analysis of the relationship between the applicable conditions of general anti-tax avoidance provisions and the prerequisite conditions for tax authorities to adopt "reasonable adjustment" according to this article, the judgment of economic substance and its quantification directly affect the tax authorities to take "special tax measures", and the "principle of substance over form" is inevitably not limited to the principle of tax authorities applying administrative normative documents. But should be the principle of the application of general anti-tax avoidance provisions. The legal level of the Measures is too low and should be stipulated in the Enterprise Income Tax Law as an overall guiding principle.

Thirdly, it is an important path and way for judicial organs to make up for the defects of general anti-tax avoidance legislation through judicial interpretation. There are no special judicial interpretations of tax law in our country. Through the Supreme People's Court issued an explanatory document applicable to the general anti-tax avoidance rules, to explain and clarify the connotation of abstract concepts in the general anti-tax avoidance rules, such as "economic substance" and "substance over form principle". The judicial interpretation of the general anti-tax avoidance legislation is conducive to standardizing the application of laws by tax authorities, improving the certainty of the application of laws and enhancing the consistency.

5.2 To Standardize the Tax Authorities' Application of General Anti-Tax Avoidance Rules

Firstly, normative documents such as implementation rules and operating procedures for general anti-avoidance shall be promulgated to provide operable methods for tax authorities to apply anti-avoidance rules. In order to enhance the consistency of application, tax authorities should be consistent in their operation of general anti-tax avoidance, so as to reduce the arbitrariness of their judgment of "economic substance" in general anti-tax avoidance provisions and maintain the trust interests of taxpayers. If the tax authorities in the application of too much freedom, the lack of operating guidelines, or the supporting system is not perfect, will inevitably lead to the judgment of "economic substance" criteria confusion, damage taxpayers' rights and interests. Our country can learn from the practices of other countries. For example, the Australian Taxation Office issued the operating rules on the application of general anti-tax avoidance provisions in 2005, which provided procedures and steps for the application of general anti-tax avoidance provisions for tax authorities. Therefore, administrative normative documents should be adopted to refine the legal application of general anti-tax avoidance provisions, refine should follow the applicable legal habits of tax authorities, provide professional implementation rules and operating procedures, equipped with supporting measures for legal application. (Tang Jieyin, 2022) Tax authorities should enhance the maneuverability of the application of the general anti-tax avoidance rule system according to this kind of rules.

Secondly, the establishment of tax authorities anti-tax avoidance case guidance system. Tax authorities in the application, the formation of new types of anti-tax avoidance cases, for special anti-tax avoidance legislation to provide a practical basis, reduce the application of general anti-tax avoidance rules pressure. At the same time, the same application of similar cases can ensure the uniformity of the application of general anti-tax avoidance rules.

Thirdly, the compulsory information disclosure system should be improved. The absence or insufficiency of information in tax collection and administration is the main reason for tax avoidance. China has not yet established a mandatory tax information disclosure system. The current tax information disclosure system mainly focuses on the accounting information of enterprises and listed companies. The content of such tax information under the tax information disclosure system is scattered and the form is single, which has little effect on anti-tax avoidance. The information content targeted by the mandatory disclosure information system is highly professional in taxation and integrates various tax planning and arrangement information of enterprises. (Huang Dongliang & Fang Jing, 2008) The mandatory information disclosure system provides knowledge and information basis for tax authorities' general anti-tax avoidance, as a relevant supporting system to ensure the effective application of general anti-tax avoidance provisions. (Huang Dongliang & Fang Jing, 2008) Specifically, this system is consistent with the logic of tax authorities' identification of enterprise "economic substance" in general anti-tax avoidance, and mandatory information disclosure should also be disclosed in advance, which is helpful to enhance the objectivity of tax authorities' identification of "economic substance", so as to help identify taxpayers' behavior for the purpose of tax avoidance in planning schemes. In this process, the system alleviates the contradiction of information asymmetry between tax authorities and taxpayers, and reduces the cost of obtaining anti-tax avoidance information.

At present, many countries have introduced mandatory information disclosure systems, such as the United States,

Canada and the United Kingdom. Among them, the United States took the lead in introducing the mandatory information disclosure system in 1984 and improved it through legislation, forming a relatively complete mandatory tax information disclosure system. China can learn from the experience of other countries' mandatory information disclosure system, and determine the overall system framework of mandatory information disclosure system, involving the subject of disclosure, information items to be disclosed, consequences of non-disclosure, etc., so as to provide support for tax authorities to apply general anti-avoidance rules and anti-avoidance. (Yu Min, 2012) First of all, we should determine the disclosure obligor. Learn from the practice of the United States, require both the taxpayer and the planner to undertake the obligation of information disclosure, and set up different obligation content. Taxpayers should bear the main obligation of disclosure. Secondly, the specific types of transactions to be disclosed should be determined and the list of information should be set up so that the taxpayer can fully fulfill the disclosure obligation. Moreover, penalties for non-compliance with information disclosure should be introduced. Learning from the practice of the United States, the taxpayer who does not perform the disclosure behavior shall be fined according to a fixed proportion of the tax payable on the transaction, and the penalty amount shall be set up within the range. The tax authorities assume the discretion to impose fines depending on the type of taxpayer's transaction. At the same time, learn from the UK practice of imposing a second penalty on taxpayers who have not fulfilled the first penalty.

5.3 Setting up a Tax Court

The establishment of tax court is the appropriate path of tax judicial specialization. In addition, it also includes the establishment of tax collegiate panel, tax court two ways. Tax court is the best form of tax judicial specialization, with the highest degree of specialization. The other two methods have higher requirements on individual judges and high cost of setting up tax courts, but they inevitably have inconsistent application of law because they are set up separately in different court regions. (Hou Zhuo, 2018) Compared with the other two approaches, the establishment of tax court can improve the professionalism of the ruling of tax law cases and ensure the consistency of the ruling results of cases. The establishment of tax courts in China is conducive to overcoming the lack of expertise of the judicial organs in tax cases and centrally handling tax cases. At the same time, the establishment of tax courts meets the requirements of the Supreme People's Court's Opinions on Comprehensively Deepening the Reform of the People's Courts on "promoting the regularization, professionalization and professionalization of court personnel".

China can learn from the judicial practice experience of the United States, Canada, Germany and other countries, as well as the domestic construction experience of special courts such as the intellectual property court in jurisdiction setting, department setting and judge selection, so as to establish a tax court system to hear tax disputes. To be specific, the jurisdiction is different from that of the ordinary courts, and is separated from the administrative division to set up the tax jurisdiction area. This method is conducive to overcoming the inconsistency of tax case rulings caused by the overlapping of judicial and administrative regions, and to ensure that the rulings of tax law cases provide consistent guidance to the subject of law application. In terms of the scope of accepting cases, the system should not be different from that of civil, criminal and administrative, so as to avoid the adverse impact of system difference on judicial efficiency. At the same time, the establishment of tax courts requires a talent base. In general, the application of anti-tax avoidance rules needs compound financial and tax legal talents. The selection and appointment of judges should set up special selection conditions for tax cases and pay attention to the cultivation and reserve of professional talents.

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¹ *Prunicr v. Commissioner*, 248 F.2d 818(1st Cir. 1957), and see comment in *Northup v. United States*, 240 F.2d 304, 307(2d Cir. 1957).

² R. REP. No.1337, 83d Cong., 2d Sess. 32(1954); S. REr. No.1622, 83d Cong., 2d Sess. 39(1954).

³ ALI FED. INCoME Tax SrAT.secs. X550-52(Tent. Draft No.7, 1952). See MacLean, Collapsible Corporations—The Statuie and Regulations, 67 HARV. L.REv.55,88(1953)

⁴ *ACM Parnership v. Commissioner*, 157 F.3d 247-248(3rd Cir. 1998)

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