Gains Not Assessable To Tax

The position in Singapore and in Australia

S Y N O P S I S

The judicial distinction between an income gain and a capital gain is important in all tax jurisdictions. This is because an income gain is often taxed differently from a capital gain.

In Singapore capital gains are not assessable to tax except for gains from short-term real property transactions. In Australia only capital gains arising from thirty-eight CGT (Capital Gains Tax) events are assessable to tax. These gains are taxed through separate charging provisions that include qualifying discounts, cost-base indexation, deductions for capital losses and other rules of computation not applicable to ordinary assessable income. It may make a significant difference to the Australian taxpayer's final tax payable whether his gain is taxed as a chargeable income or as a chargeable capital gain.

In the Singapore and Australia tax jurisdictions, and indeed in most tax jurisdictions, "income" is not defined in the tax statutes.

The purpose of this paper is to examine the circumstances when a gain may be defended as not assessable to tax in Singapore and in Australia. The common arguments are that the gain is broadly a "capital gain" or more narrowly the gain is "not an income assessable to tax".

For the purpose of this paper I have adopted the definition of "capital gains" set by Stan Ross and Philip Burgess : "Generally, in legal terminology, capital gains, or realisations of capital as they are often called, is the term used to describe the broad range of gains that do not fall into the judicial concept of income."

This paper will *not* deal with the specific categories of income and capital gains assessable to tax as set out in the tax statutes of both countries, and their detailed charging rules and provisions. This paper will also *not* deal with gains, receipts or income specifically exempt from tax in the tax statutes.

Instead, we will examine the common law precedents of both countries and their guiding principles in respect of those *grey areas in taxation* where the tax authorities often seek to assess gains which the taxpayers assert as not chargeable to tax. These will include gains from isolated transactions, gains from a hobby, windfall gains, gains from the realisation of a capital asset, gains arising from the conversion of rights to a stream of income into a lump sum receipt, gains that are extraordinary and are not “ordinary income”, and gains which are not attributable to the carrying on of a business, trade or vocation.

Invariably, the courts have to consider the judicial interpretation of what constitutes “the carrying on of a business, trade or vocation”. Singapore and Australia both tax “business income” and it is settled law that income from a business, trade or vocation is not capital gains. When can it be said that the taxpayer is carrying on a business?

This paper will discuss these issues and compare the judicial precedents applied by the courts of the two countries. As a preliminary matter, we will need to discuss briefly the tax legislation of both countries.

SINGAPORE'S INCOME TAX ACT

Income tax was first introduced in Singapore under the 1947 Income Tax Ordinance. The Ordinance became the Income Tax Act 1964 when Singapore was part of Malaysia, and became the Singapore Income Tax Act 1965 when Singapore separated from Malaysia. The Ordinance was based on the 1922 Model Colonial Territories Income Tax Ordinance used for all British colonies at that time.

As a result, the tax legislation of Singapore, Malaysia, South and East Africa, Australia, and New Zealand have common roots. Whilst the judicial precedents of these countries, and of the United Kingdom, are not necessarily binding, they provide useful references in the interpretation of the provisions of the Singapore Income Tax Act.

Singapore (and Australia) follows most tax jurisdictions in that taxes cannot be imposed except under the authority of statutes. Article 143 of the Singapore Constitution provides that : “No tax or rate shall be levied by, or for the purpose of Singapore except by or under the authority of law.” The Singapore taxpayer can therefore rely on the charging provisions of the Singapore tax statutes to argue his case as to whether an amount is assessable to tax.

SUMMARY

At page 11 of this paper, I have set out the arguments normally advanced by taxpayers to defend an amount as not assessable to tax. These arguments were considered in the cases discussed in this paper by the courts in Singapore and Australia.

Remarkably, there seems to be common guiding principles in these judgements, for instance the decision in *DEF* was supported by the *Myer* decision. Nevertheless, the courts have arrived at different judgements on facts that superficially look similar, for instance the Australian case of *Whitfords Beach* contrasted with the Singapore case of

DEF.

The issues that were considered in the cases in Singapore and Australia point to the principal conclusion whether a gain is an income receipt or an accretion to capital can only be decided on the facts of each case. Whether a receipt is itself an income has to be decided on the facts of the case.

Both tax jurisdictions share common judicial precedents and the courts in both countries were guided by several landmark cases on the issue of when a receipt is assessable to tax, in particular *California Copper Syndicate v Harris, Leeming v Jones, Edwards v Bairstow & Harrison,* etc.

If there is one single underlying test set by the courts of both countries it would be that an amount is not an income assessable to tax only if the amount is not derived from a transaction entered into with a profit motive. Many other arguments advanced by the taxpayer could not be sustained in the face of the judicial precedents.

This is not the full LLM Paper.
Dated: 9 October 2001