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24. REVENUE AND TAX LAW

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Introduction

24.1 The Supreme Court delivered six decisions in 2018. Of the five cases concerning income tax, three dealt with substantive issues of revenue law. The remaining case dealt with stamp duties.

24.2 There are therefore, in the authors' view, six cases for the year 2018 which had some relevance to revenue law:

Tax Type	High Court	Court of Appeal
Income tax	2	3
Stamp duty	1	0

Income tax

Gains from sale of properties

24.3 In *BQY v Comptroller of Income Tax*,[1] the issue was whether the taxpayers were liable to pay tax on profits made on selling three bungalows. The High Court dismissed the taxpayers' appeal. In so ruling, Choo Han Teck J disagreed with the taxpayers' submission that the gains arising from their sale were capital gains and were therefore not subjected to income tax under s 10(1)(*g*) of the Income Tax Act[2] ("ITA 2014"). Choo J did not see any error in the finding of facts by the

1 [2018] 4 SLR 1467.
2 Cap 134, 2014 Rev Ed.

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Income Tax Board of Review ("Board") and hence held that their findings ought not to be disturbed.[3]

24.4 Further, Choo J observed that out of the five properties purchased by the taxpayers in the years 1997 to 2012, in terms of chronology, the first was occupied as a residential home until June 2012 when they moved into the fifth property. The gains in issue arose from the sale of the second, third and fourth properties which were not occupied by the taxpayers at any time after their acquisition. These three properties were sold after being owned for only a short period (that is, between three and ten months). Their move into the fifth property occurred after the Comptroller had started asking questions in February 2012 concerning the three properties that were sold.[4] With "the whole picture" and seeing "the forest", the court did not think that the Board had erred when it found that the taxpayers' intention was to purchase the properties for resale with a view to making a profit.[5]

24.5 On the facts as reported, this is an uncontroversial decision which serves to illustrate how a purchaser's intention may be construed within the given factual matrix of the case, in order to determine whether a profit from a resale should be taxable.

Gains from employment

24.6 In *BRE v Comptroller of Income Tax*,[6] the High Court rejected the taxpayer's argument that tax should not be imposed on himself but on a company ("Subjunctive") that he had created and owned. Subjunctive had received payments from another company ("TGS") for his role as "Project Development Manager" of TGS. The taxpayer argued that the notices to pay tax should not have been served by the Comptroller on him. On the documents tendered in evidence, the court found that they "show[ed] plainly and unequivocally that TGS was employing [the taxpayer] as its project manager in Singapore".[7]

24.7 The taxpayer's counsel also raised the issue of illegality in obtaining the income, since the taxpayer's employment pass was issued to him as employee of Subjunctive and not TGS. The submission was that no tax should be payable for illegally obtained income. Choo Han Teck J dismissed the contention:[8]

3 See *BQY v Comptroller of Income Tax* [2018] 4 SLR 1467 at [9] and [13].
4 *BQY v Comptroller of Income Tax* [2018] 4 SLR 1467 at [12].
5 *BQY v Comptroller of Income Tax* [2018] 4 SLR 1467 at [10] and [12].
6 [2018] SGHC 77.
7 *BRE v Comptroller of Income Tax* [2018] SGHC 77 at [2] and [6].
8 *BRE v Comptroller of Income Tax* [2018] SGHC 77 at [8]–[9].

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> It is not disputed that BRE [the taxpayer] did not have an employment pass with TGS. It is therefore clear that he had been working illegally in that sense, but illegality is a garden of mixed fruit, and not all are forbidden to the tax authority. Unless BRE can show some ground that offends public policy, income earned by a resident is taxable even if that resident did not have the requisite licence for his work. This appeal is dismissed with costs to be taxed if not agreed.

Deductibility of interest expenses

24.8 In *BML v Comptroller of Income Tax*,[9] the taxpayer appealed against the decision of the High Court affirming the decision of the Board to dismiss the taxpayer's appeal.[10] The Court of Appeal dismissed the appeal.

24.9 At all material times, the appellant (a company) owned a mall and all its shares were held by two shareholder companies equally. The appellant carried out a securitisation exercise which raised $520m through a bond issue carried out by a special purpose vehicle, WM Limited. The bond issue was secured by, *inter alia*, an assignment to WM Limited of the appellant's rights over the tenancy agreements and rental income from the mall. The proceeds of $520m were used to refinance pre-existing borrowings, as working capital, and $333m in equal division was lent to the shareholders ("Shareholder Advances"). The Shareholder Advances enabled the appellant's shareholders to subscribe for subordinated junior bonds as part of the bond issue by WM Limited and for use as general working capital. Hence, the appellant derived two sources of income: rental income from the mall and interest income from the Shareholder Advances.[11]

24.10 The appellant also carried out a capital restructuring exercise. By capitalising a substantial sum of $325.3m and returning a sum of $333m to the shareholders, its share capital was reduced to $2.5m. However, in place of the debt of $333m, shareholder bonds ("Shareholder Bonds") were issued by the appellant in favour of its shareholders. Interest was paid by the appellant at 7.1% per annum ("Interest Expense"). The Shareholder Bonds would mature in 2011. In effect, the issuance of the Shareholder Bonds resulted in an equity-to-

9 [2018] 2 SLR 1009.

10 The High Court's decision was previously reviewed at (2017) 18 SAL Ann Rev 664 at 672–674, paras 24.32–24.41.

11 The facts relating to the securitisation exercise are set out in *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [3]–[9].

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debt restructuring of the appellant's capital by replacing the shareholder companies' equity with debt (via the Shareholder Bonds).[12]

24.11 The deductibility of the Interest Expense for the years of assessment 2005 to 2009, which amounted to some $95.7m, was the subject of contention in the appeal to the Board, the High Court and finally the Court of Appeal.[13]

24.12 The relevant provision was s 14(1)(*a*) of the ITA 2014 and the issue was whether the interest expense on the bonds was a:[14]

> … sum payable by way of interest … upon any money borrowed by that person [that is, the appellant] where the Comptroller is satisfied that such sum is payable on capital employed in acquiring the income.

In construing s 14(1)(*a*), the Court of Appeal applied the direct link test which it observed has found support in at least three Court of Appeal decisions,[15] *viz Andermatt Investments Pte Ltd v Comptroller of Income Tax*,[16] *JD Ltd v Comptroller of Income Tax*[17] ("*JD*") and *BFC v Comptroller of Income Tax*[18] ("*BFC*"). Simply put, the direct link test requires a direct link between the money borrowed and the income produced. On the facts of the appeal, this would require a direct link between the Shareholder Bonds and the rental income/interest from Shareholder Advances, before the Interest Expense is deductible.

24.13 The Court of Appeal disagreed with the appellant that the direct link test was not the exclusive test for s 14(1)(*a*). It held that:[19]

> … although the direct link test may apply in different ways to different sets of facts, it is a test of general application under s 14(1)(*a*) of the ITA 2014 and it applies also to the present case.

24.14 Before applying the direct link test to the taxpayer's case, the Court of Appeal considered the taxpayer's primary submission that "capital would be 'employed in acquiring the income' within the meaning of s 14(1)(*a*) if income-producing assets are *retained* and

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12 The facts relating to the capital restructuring exercise are set out in *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [10]–[15].
13 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [17].
14 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [33].
15 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [39]–[44].
16 [1995] 2 SLR(R) 866.
17 [2006] 1 SLR(R) 484. For a review of *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484, see (2005) 6 SAL Ann Rev 464 at 465–467, paras 20.5–20.16.
18 [2014] 4 SLR 33. For review of *BFC v Comptroller of Income Tax* [2014] 4 SLR 33, see (2014) 15 SAL Ann Rev 482 at 492–494, paras 24.41–24.57.
19 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [46].

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represented by the said capital" [emphasis added].[20] The taxpayer submitted that as long as capital is "represented" by income-producing assets, evidenced by the taxpayer's balance sheet, the requirements of s 14(1)(*a*) were satisfied. The Court of Appeal rejected this "test of representation" as:[21]

> … it appears to us that the test of representation is premised on the accounting equation that the total assets of a company are equal to the company's total liabilities and equity.

There was no justification for this test to take the place of the direct link test, or stand as an instance of satisfying the direct link test.[22] The court also noted that the test of representation does not seem compatible with the term "the income" in s 14(1)(*a*), and gives rise to a further concern:[23]

> The test of representation gives rise to a further concern that there would be undue reliance on the balance sheet of the taxpayer. While accounting practices and rules are relevant in tax law, they do not necessarily dictate tax consequences. As Andrew Phang JA observed in *ABD* ([31] *supra*), '[w]here ordinary accounting principles run counter to the principles of tax law, they must yield to the latter for the purposes of computing gains and profits for tax' (at [111]). The test of representation holds paramount the manner in which information is presented on the corporate balance sheet and does not appear to leave room for the tax authority to consider whether the requirements of s 14(1)(*a*) are satisfied. This could not have been the statutory intention when s 14(1)(*a*) expressly contemplates that the CIT must be 'satisfied that' the interest is payable on capital employed in acquiring the income.

24.15 The observation by the Court of Appeal on the interaction of tax law and accounting principles is important and worth remembering whenever the tax statute is being interpreted. This interaction of principles, including the *dictum* in *ABD Pte Ltd v Comptroller of Income Tax*,[24] has been previously discussed in a chapter in *The Law and Practice of Singapore Income Tax*.[25]

20 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [54] and [55]–[82].
21 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [59].
22 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [60].
23 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [65].
24 [2010] 3 SLR 609.
25 Tan Kay Kheng, "Relevance of Accountancy Principles and Practices in Taxation" in *The Law and Practice of Singapore Income Tax* (Pok Soy Yoong, Ng Keat Seng & Steven M Timms eds) (LexisNexis, 2nd Ed, 2013) ch 9 at pp 531–573.

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24.16 The foreign cases cited by the taxpayer were also closely analysed and then rejected by the Court of Appeal.[26] The court emphasised once again that:[27]

> … in the area of tax law, foreign jurisprudence has to be considered carefully before it is adopted as part of local law. This is because tax law is primarily a creature of statute and must respond to local regulatory concerns.

24.17 The other premise of the taxpayer's primary submission was the "test of retention" which "posits that capital is 'employed in acquiring the income' within the scope of s 14(1)(*a*) if the taxpayer's income-producing assets are preserved or retained by such capital". The Court of Appeal held that it was not necessary to lay down a general rule on the applicability of the test of retention as satisfying the direct link test, because even if it applied, the Interest Expense did not satisfy the test of retention. The court's tentative observations were, *inter alia*, that the test of retention was unjustifiably broad, and that it was unclear whether the test was consistent with the statutory language in s 14(1)(*a*).[28]

24.18 In applying, therefore, the direct link test and dismissing the appeal, the Court of Appeal did not agree that the test was satisfied merely by the fact that the Shareholder Bonds were said to "represent" or appear on the same balance sheet as the mall and the Shareholder Advances. The court also held the view that the Shareholder Bonds could not be said to have retained or preserved the taxpayer's income-producing assets, as there was no material risk of the assets being sold.[29] The court also noted some additional factors relevant to the direct link test, which pointed against the taxpayer's case, such as the absence of any observable change in the taxpayer's rental or interest income after the issuance of the Shareholder Bonds.[30]

24.19 An interesting *dictum* that was mentioned by the Court of Appeal relates to *BFC*:[31]

> *The interaction between ss 14(1), 14(1)(a) and 15(1)(c) is an important but perplexing issue.* The High Court and this court have discussed this issue in several decisions including *T Ltd v Comptroller of Income Tax* [2005] 4 SLR(R) 285 (which was the High Court decision) and *T Ltd v Comptroller of Income Tax* [2006] 2 SLR(R) 618 (which was the Court of Appeal decision). Based on this court's decision in *BFC*

26 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [66]–[80].
27 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [76].
28 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [81]–[82].
29 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [83]–[87].
30 See *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [88].
31 See para 24.12 above and *BML v Comptroller of Income Tax* [2018] 2 SLR 1009 at [37].

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([21] *supra*) at [37]–[42], the *current position* is that capital expenditure is generally not deductible under s 15(1)(*c*) of the ITA. This is so even if the general deduction formula under s 14(1) is satisfied, since s 14(1) is not an exception to s 15(1)(*c*). However, since s 14(1)(*a*) is an exception to s 15(1)(*c*), an interest expense will be deductible so long as s 14(1)(*a*) is satisfied even if it is capital in nature. *We appreciate that there has been some concern with the approach taken in* BFC. However, the difficulties with the proper interaction of s 14(1)(*a*) and the other provisions do not arise in this case, which concerns primarily the scope and factual application of s 14(1)(*a*) of the ITA. In any event, neither party saw the need to challenge any of the principles in *BFC*. Therefore, we will proceed on the basis of the principles in *BFC* for present purposes. [emphasis added]

24.20 It is to be welcomed that the court recognises that some concern has been raised about the approach taken in *BFC*, although the need to address this did not arise in *BML*.[32] Hopefully, another opportunity would arise in future for the Court of Appeal to reconsider *BFC* and clarify how ss 14(1), 14(1)(*a*) and 15(1)(*c*) ought to interact.[33]

Discovery of documents, application for leave to request further arguments out of time and Attorney-General's application to intervene

24.21 The Court of Appeal dealt with these issues in *ARW v Comptroller of Income Tax* ("*ARW 2018*").[34] This appeal is not strictly on revenue law and is also reported in Administrative and Constitutional Law[35] and Civil Procedure.[36] Hence, it will not be analysed in detail. To help explain the background to this case, the authors will first touch on three earlier cases briefly:

(a) *Comptroller of Income Tax v AQQ*[37] ("*AQQ*");

(b) *ARX v Comptroller of Income Tax*[38] ("*ARX*"); and

(c) *Comptroller of Income Tax v ARW*[39] ("*ARW (No 1)*").

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32 See para 24.8 above.

33 The first-named author of this chapter was the taxpayer's counsel in *BFC v Comptroller of Income Tax* [2014] 4 SLR 33.

34 [2019] 1 SLR 499, appeal from *Comptroller of Income Tax v ARW* [2017] SGHC 180; see review in (2017) 18 SAL Ann Rev 664 at 664–666, paras 24.9–24.14.

35 See para 1.3.

36 See paras 8.128–8.133, 8.150–8.151 and 8.156–8.157.

37 [2014] 2 SLR 847. See (2014) 15 SAL Ann Rev 482 at 486–492, paras 24.19–24.40.

38 [2016] 5 SLR 590. See (2016) 17 SAL Ann Rev 632 at 633–635, paras 24.3–24.14.

39 [2017] SGHC 16. See (2017) 18 SAL Ann Rev 664 at 666–667, paras 24.3–24.8.

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Brief facts of AQQ

24.22 A Malaysian company ("ARX") wholly owned AQQ (a Singapore company). Between 2005 and 2007, the Comptroller paid around $9.6m in tax refunds to AQQ. This arose from ARX's restructuring of its group of companies through a complex financing scheme. Subsequently, the Comptroller claimed the scheme was a tax avoidance arrangement under s 33 of the Income Tax Act[40] ("ITA 2008"). The Comptroller thus raised additional assessments to claw back the $9.6m he had paid AQQ.

24.23 The Court of Appeal agreed with the Comptroller that the scheme was a tax avoidance arrangement. But the court ruled the Comptroller's additional assessments were *ultra vires*. Nevertheless, the court mentioned unjust enrichment as an alternative possibility for the Comptroller to claim back the $9.6m.[41]

Brief facts of ARX

24.24 The Comptroller subsequently filed a suit against ARX to claim the $9.6m under various heads: unjust enrichment, fraudulent misrepresentation, and conspiracy by unlawful means.[42] One issue was whether the Comptroller knew his claim was time barred. An affidavit sworn on the Comptroller's behalf mentioned an advice from the Law Division of the Inland Revenue Authority of Singapore ("IRAS") on this question. In response, ARX applied for discovery of the Law Division's advice.

24.25 The Court of Appeal dismissed ARX's appeal. It held the advice was privileged. The Comptroller had not waived privilege to the advice.

Brief facts of ARW (No 1)

24.26 Following the ARX decision, ARW (same entity as ARX) applied for discovery of various categories of documents in the Comptroller's possession (but not discovery of the advice). In *ARW (No 1)*,[43] the High Court granted ARW discovery of three groups of the Comptroller's documents.

40 Cap 134, 2008 Rev Ed.
41 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [5] and [6].
42 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [7].
43 See para 24.21 above.

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ARW 2018

24.27 As a result of the High Court giving discovery in *ARW (No 1)*, the Comptroller applied for leave to file his request for further arguments out of time. The Attorney-General ("AG") also applied to intervene in these applications. In *Comptroller of Income Tax v ARW*,[44] the High Court:

(a) granted the Attorney-General leave to intervene in *ARW (No 1)*;

(b) granted the Comptroller's application for leave to request for further arguments out of time relating to (i) public interest privilege under s 126(2) of the Evidence Act[45] ("EA"); and (ii) official secrecy under s 6(3) of the ITA 2008; and

(c) admitted two further affidavits in respect of these two issues.

24.28 ARW appealed against the High Court's decision in *ARW 2018*.[46] The Court of Appeal dismissed ARW's appeal.

Joining the Attorney-General

24.29 The Court of Appeal held that the Attorney-General's standing to intervene arose from his position as the guardian of the public interest (and not on Art 35(7) of the Constitution of the Republic of Singapore[47] read with s 126 of the EA).[48] The Attorney-General could raise public interest in his own right under common law, even if the Comptroller could also raise this public interest privilege under s 126(2) of the EA.[49]

24.30 To this end, the Court of Appeal accepted that it was *necessary* for the Attorney-General to be joined in the proceedings.[50] The Attorney-General could present a perspective distinct from either party. The Attorney-General would also take into account confidential information and considerations to which other persons (including the Comptroller) were not privy.[51]

44 [2017] SGHC 180.
45 Cap 97, 1997 Rev Ed.
46 See para 24.21 above.
47 1999 Reprint.
48 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [16] and [18].
49 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [23].
50 Under O 15 r 6(2)(*b*)(i) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
51 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [42].

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24.31 The Court of Appeal similarly held it was *just and convenient* to allow the Attorney-General to be joined.[52] There was a question or issue involving the Attorney-General which related to an existing question or issue (that is, availability of public interest privilege under s 126(2) of the EA) between existing parties (that is, the Comptroller and ARW).[53] Any prejudice to ARW could be adequately compensated by costs.[54]

Extension of time

24.32 The Court of Appeal granted the Comptroller an extension of time to request for further arguments under s 28B(1) of the Supreme Court of Judicature Act.[55] The four factors to be considered whether to grant the extension were (a) length of the delay; (b) reasons for the delay; (c) merits of further arguments; and (d) prejudice to ARW if the extension were granted. They were not to be applied mechanically but balanced amongst each other, having regard to all the facts and circumstances of the case concerned.[56] On the facts, the Court of Appeal held it should not disturb the High Court's discretion in granting the extension.[57]

Further evidence

24.33 The Court of Appeal likewise upheld the High Court's decision allowing the Comptroller to admit the two further affidavits. The Court of Appeal held that further evidence may be allowed to support *new* arguments, but not to support or strengthen *previously raised* arguments.[58] However, even taking ARW's case at its highest (that the test for admitting further evidence should be the same as in an interlocutory appeal), the Comptroller's two affidavits would still have met the test for admission.[59]

24.34 In this regard, the Court of Appeal found that admitting the two affidavits would not cause inordinate delay. Neither would their admission cause ARW prejudice that could not be compensated by costs.[60]

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52 Under O 15 r 6(2)(*b*)(ii) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
53 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [46] and [47].
54 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [45] and [49].
55 Cap 322, 2007 Rev Ed.
56 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [67] and [81].
57 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [82].
58 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [87].
59 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [98].
60 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [107].

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Postscript and comments

24.35 During the course of the hearing, the Court of Appeal suggested an alternative solution to the parties – to suitably redact the Comptroller's documents to which ARW had sought discovery. The court indicated that appropriate redaction might achieve the objectives of (a) ARW obtaining the information it sought as to the date on which IRAS had received relevant information showing the Comptroller had a cause of action to recover the tax refunds made to ARW; and (b) ensuring official secrets were not divulged.[61] It remains to be seen if there will be other Supreme Court decisions on these "satellite proceedings"[62] arising from *AQQ*.[63]

Exchange of information – Singapore and Korea

24.36 *AXY v Comptroller of Income Tax*[64] ("*AXY*") involved the National Tax Service of the Republic of Korea ("NTS") requesting information from the Comptroller under an exchange of information ("EOI") arrangement.[65] In brief, the first to fourth appellants were a family of Korean nationals living in Indonesia. The first appellant owned several companies that had subsidiaries in Korea and Indonesia.[66]

24.37 NTS was investigating five individuals (including the first, second and fourth appellants) for tax evasion. Among other things, NTS suspected these five individuals and 51 implicated companies were using bank accounts in Singapore to conceal unreported income and evade taxes.[67]

24.38 In September 2013, NTS requested the Comptroller for information and documents relating to Singapore bank accounts of these five persons and 51 companies. NTS's request was pursuant to Art 25(1) of the Convention between the Republic of Singapore and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.[68]

24.39 The Comptroller requested clarifications from NTS and met NTS staff regarding NTS's request before issuing production notices to

61 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [111].
62 *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [112].
63 See para 24.21(a) above.
64 [2018] 1 SLR 1069.
65 The High Court's decision was reported in [2017] SGHC 42; see (2017) 18 SAL Ann Rev 664 at 668–670, paras 24.15–24.23.
66 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [5].
67 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [6].
68 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [7].

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three Singapore banks. The five individuals and 51 companies were *not* notified of NTS's request before the Comptroller issued the notices to the banks.

24.40 After learning of NTS's request and that the Comptroller had issued production notices, the appellants applied for a prohibition order and quashing order against the Comptroller's decision.[69] The High Court dismissed their application and the appellants appealed. The Court of Appeal dismissed their appeal.

Standard for assessing EOI requests

24.41 The Court of Appeal summarised the standard for, and Comptroller's role in, assessing requests from a foreign tax authority under an EOI regime as follows:[70]

> (a) The standard for assessing EOI requests remains the standard of "foreseeable relevance".
>
> (b) The Comptroller must be satisfied that the foreign tax authority has provided the information specified in the Eighth Schedule to the ITA 2014 (unless he waives any of these requirements).
>
> (c) If the Comptroller's assesses that the EOI request amounts to a fishing expedition, he should not provide the requested information.
>
> (d) The Comptroller has a wide discretion in dealing with EOI requests. In general, he is not expected to go behind a foreign tax authority's assertions made in an EOI request (for example, to establish the veracity of the foreign tax authority's statements).
>
> (e) If the Comptroller has any doubts as to whether the Eighth Schedule requirements have been satisfied and/or whether the EOI standard of foreseeable relevance has been met, he should clarify them with the foreign tax authority. The Comptroller need not embark on a substantive inquiry as to the correctness of any explanation the foreign tax authority has given.
>
> (f) Each EOI request is generally assessed at the time it is made. At the material time, there need only be a *reasonable possibility* that the requested information will be relevant.

69 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [21].
70 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [84].

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(g) If an interested person has not been given notice of the EOI request and only becomes aware of the request after the Comptroller has made his decision on it,[71] the interested person should have the opportunity to raise concerns to the Comptroller regarding the validity of the request within a reasonable time. The Comptroller should reconsider his initial decision in the light of these concerns if they appear legitimate. If necessary, the Comptroller should consult and seek the views of the foreign tax authority on any doubts which may arise from the interested person's representations.

Eighth Schedule requirements were complied with

24.42 Turning to the facts of the case, the Court of Appeal held that the requirements in paras 7 and 8 of the Eighth Schedule[72] had been complied with after considering the four objections of the appellants. The first was that the appellants claimed they were not tax residents of Korea and that their tax status remained in dispute. The Comptroller had thus issued the production notices under a mistake of fact. On this, the Court of Appeal found that:

(a) the appellants had not yet disputed their tax residency when the Comptroller issued the production notices;[73]

(b) the tax residency dispute was still pending in the Korean courts at the time of this appeal;[74]

(c) the appellants' tax residency was irrelevant because NTS was seeking information on suspicion the first appellant was involved in tax *evasion*;[75] and

(d) NTS had re-confirmed that its request was in conformity with Korea's domestic law and practices. Hence, the

71 This was such a case.

72 Paragraphs 7 and 8 of the Eighth Schedule to the Income Tax Act (Cap 134, 2014 Rev Ed) require a competent authority to include the following information when making a request to the Comptroller under an EOI arrangement:

7. A statement that the request is in *conformity with the law and administrative practices* of the country of the competent authority, and that the competent authority is authorised to obtain the information under the laws of that country or in the normal course of administrative practice.

8. A statement that the country has pursued *all means available* in its own territory to obtain the information *except those that would give rise to disproportionate difficulties*.

[emphasis added]

73 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [91].

74 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [92].

75 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [93].

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Comptroller was entitled to accept NTS's assertions at face value.[76]

24.43 The appellants' second objection was that their tax liability from 2003 to 2007 was time barred under Korean law. Consequently, NTS's request seeking information from 1 January 2003 onwards was not in "conformity with Korean law and administrative practices" as stipulated in para 7 of the Eighth Schedule.[77] To this, the Court of Appeal held:

(i) Any possible time bar could arise only *after* the Comptroller had issued the production notices. The purpose of the EOI regime would be defeated if an interested person could subsequently object that the EOI request had subsequently become time barred and therefore invalid.[78]

(ii) The time bar argument conflated *investigation* with *prosecution*. Even if NTS was time barred from prosecuting the appellants for tax evasion in certain years, the information for those years could still be relevant to NTS's investigations into suspected tax evasion for *other* years. Moreover, NTS had confirmed it still required the information sought in its request for its investigations.[79]

24.44 Thirdly, the appellants argued that NTS had never requested the appellants for the information. NTS had, therefore, not pursued "all means available" as required under para 8 of the Eighth Schedule. The Court of Appeal decided this was not necessarily the case. In particular, NTS had previously requested the appellants for documents on previous occasions to assist its tax investigations but to no avail. NTS had also expressed concerns that the appellants might destroy relevant evidence.[80] Moreover, para 8 is subject to the qualifier that excludes means that would give rise to "disproportionate difficulties".[81]

24.45 Fourthly, NTS had obtained a search and seizure warrant in Korea against the offices of the first appellant four days after its request to the Comptroller. This showed there were other measures open to NTS at the time of its request and NTS had not complied with para 8 of the Eighth Schedule. To this, the Court of Appeal interpreted para 8 to mean that NTS must have taken all available steps *within its jurisdiction* to obtain the information sought in its EOI request. However, the search

76 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [94].
77 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [88].
78 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [95].
79 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [96].
80 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [100].
81 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [99].

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warrant was unlikely to have applied to documents pertaining to bank accounts in Singapore.[82]

Comptroller had complied with IRAS's internal decision-making process when assessing NTS's request

24.46 Firstly, the appellants questioned whether NTS's request had even been reviewed by an EOI review committee.[83] This was because NTS had provided clarification to the Comptroller at the meeting in Korea on 21 January 2014 and the Comptroller had issued the first production notice on the same day. The Court of Appeal held there were ample means for people in different countries to work and communicate with one another virtually instantaneously.[84]

24.47 Secondly, the appellants alleged that the Comptroller had not received satisfactory responses to clarifications he had sought. The Comptroller should, therefore, not have issued production notices in respect of companies to which he had not obtained satisfactory responses. However, the Court of Appeal accepted that the Comptroller had made his decision based on the totality of all information (including other information and further documents) he had received from NTS. This was over the course of several months between the date of NTS's request and the date he had issued the production notices.[85]

Comments

24.48 The Court of Appeal has comprehensively spelt out the applicable standards and the Comptroller's obligations when assessing EOI requests. In particular, the court has stated the Comptroller's duties if an interested person were to only become aware of an EOI request after the Comptroller has issued a production notice. The Court of Appeal's guidance on these matters is to be greatly welcomed and should lead to greater certainty and clarity in future EOI applications.

82 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [101].
83 The Comptroller had affirmed an affidavit that all exchange of information ("EOI") requests were reviewed by an EOI committee: *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [64].
84 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [107].
85 *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at [109] and [111].

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Stamp duty

Whether Commissioner must state a case – Additional buyer's stamp duty

24.49 In *Asia Development v Commissioner of Stamp Duties*[86] ("*Asia Development*"), the High Court (Choo Han Teck J) had to decide whether the appellant could require the Commissioner to state a case to the High Court under the Stamp Duties Act[87] ("SDA").

24.50 The appellant was in the business of property development. It purchased a property for development. The appellant was granted a remission from paying additional buyer's stamp duty ("ABSD") on condition that it completed the development and sale of the property by 5 August 2015. (As this is an ABSD case, it may be inferred that "the property" here refers to all the residential units which were being developed for sale. All references to "the property" in the judgment should be understood accordingly.) Subsequently, the Commissioner granted the appellant an extension to finish developing the property by 31 October 2015, but he did not extend the original deadline requiring the appellant to complete the sale of the property by 5 August 2015.

24.51 The appellant failed to meet both deadlines to develop and sell the property and had to pay ABSD with interest.[88] The appellant made six requests to extend the deadlines which were all turned down. To pursue the matter further, the appellant requested the Commissioner to state a case under the SDA as to why the Commissioner had declined to extend the deadlines for the appellant to develop and sell the property. The Commissioner refused to state a case on the grounds that it was the Minister (and not the Commissioner) who had refused the appellant's request for an extension of time.[89]

24.52 The sole issue was who had made the decision refusing to extend the deadlines. If it had been the Commissioner, the appellant's request to the Commissioner to state a case would have had been properly made.[90]

86 [2018] SGHC 41.
87 Cap 312, 2006 Rev Ed.
88 *Asia Development v Commissioner of Stamp Duties* [2018] SGHC 41 at [5].
89 *Asia Development v Commissioner of Stamp Duties* [2018] SGHC 41 at [6].
90 *Asia Development v Commissioner of Stamp Duties* [2018] SGHC 41 at [7].

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24.53 From the evidence, it was the Commissioner who had refused every extension request except the last, which was refused by an officer from the Ministry of Finance (authorised by the Minister).[91]

24.54 Choo J granted the appellant's application for the Commissioner to state a case. He highlighted some problems about the alternative remedy of a judicial review application. These included that a judicial review application might not answer questions as to:

(a) who was empowered to make a decision to approve or reject the application for an extension of time; and

(b) who in fact made the decision in this case.[92]

24.55 There may be another Supreme Court decision dealing in full with the issues raised in the case stated if parties should proceed further.

91 *Asia Development v Commissioner of Stamp Duties* [2018] SGHC 41 at [13].
92 *Asia Development v Commissioner of Stamp Duties* [2018] SGHC 41 at [16].

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