ACC *v* Comptroller of Income Tax
[2010] SGHC 316

Case Number : Originating Summons No 510 of 2009 (Summons No 3885 of 2009)

Decision Date : 25 October 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Leung Yew Kwong and Tan Shao Tong (WongPartnership LLP) for the applicant; Jimmy Oei and Usha Chandradas (Inland Revenue Authority of Singapore) for the respondent.

Parties : ACC — Comptroller of Income Tax

Revenue law

25 October 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 This was an application by ACC ("the Applicant") under O 53 r 5 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) for an order quashing the determination issued by the Comptroller of Income Tax ("the Respondent") dated 6 February 2009 that withholding tax applied to payments made by the Applicant to its overseas subsidiaries. Leave to apply was granted on 10 July 2009 pursuant to O 53 r 1 (see *ACC v CIT* [2010] 1 SLR 273), which decision was upheld by the Court of Appeal on 2 February 2010 (see *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189).

Background facts

Aircraft leasing arrangements

2 The Applicant is a company incorporated in Singapore which engages in the business of aircraft leasing together with its subsidiaries, most of which are special purpose companies (referred to collectively as "SPCs" and individually as an "SPC") incorporated in the Cayman Islands and are not "resident in Singapore" within the meaning of s 2(1) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("ITA").

3 As is typical of most aircraft leasing companies, each SPC owns only one aircraft and enters into separate loan agreements with offshore banks to finance the purchase of its aircraft. Such a "one company-one aircraft" business structure is a usual requirement of the bank providing financing as it serves the purpose of ring-fencing risks. The SPCs lease their aircraft to airline companies. These leases may stipulate a "floating rate" rent or a "fixed rate" rent. If the aircraft is leased on a "floating rate" rent, the rental charged by the SPC fluctuates with the floating interest rate charged by the offshore bank financing the purchase of the aircraft; the SPC therefore will not be exposed to risks in the movement in interest rates.

4 In the case of "fixed rate" rent, however, the rental that an SPC charges the airline is fixed while the interest the SPC pays on the loan from the offshore bank fluctuates with the prevailing

interest rate charged by the bank. This exposes the SPC to potential risks in the fluctuation in interest rates. To minimise such risk exposure, the SPCs hedge the interest rate exposure on their floating interest rate loans by entering into interest rate swap agreements.

Interest rate swap agreements

5 Before a company can enter into a swap arrangement with a bank, it is required to put in place an International Swaps and Derivatives Association ("ISDA") agreement, which has been described in the following terms in Graham Roberts, *Law Relating to International Banking* (Woodhead Publishing Ltd, 1998) at para 9.2.2:

> The ISDA agreement is a single Master Agreement, which the parties enter into ideally when they agree their first swap. This master agreement is intended to regulate the legal relationship between the parties; it is a detailed document governing most of the aspects of the relationship. Attached to the Master Agreement is a Schedule, in which the parties can add, amend or vary the details of the Master Agreement. The detailed economic features of each transaction separately are then recorded in a separate document, the confirmation. In addition, ISDA has drafted a booklet containing definitions of various economic terms, such as calculation of floating and fixed amounts, etc. These definitions can be incorporated into the confirmation, thereby keeping each confirmation relatively short.

Typically, a company would put in place ISDA agreements with several banks so that it has a menu of banks to choose from.

6 If each individual SPC were to enter into an ISDA agreement with a bank, the bank would require the Applicant to provide a guarantee for each ISDA agreement since the SPC would have a relatively weaker balance sheet compared to its parent company. For commercial convenience, rather than having to manage the administrative burden of each SPC's entering into several ISDA agreements with various banks and the Applicant's provision of guarantees for each ISDA agreement, the SPCs and the Applicant decided that the Applicant would enter into swap arrangements with Singapore banks or Singapore branches of foreign banks (referred to collectively as "Onshore Banks" and individually as an "Onshore Bank").

7 An interest rate swap is essentially a contractual swapping of anticipated cash flows. Each party to an interest rate swap agreement is known in the industry as a "counter-party". In *Hazell v Hammersmith and Fulham London Borough Council* [1990] 2 QB 697 ("*Hazell*"), Woolf LJ explained the nature of interest rate swaps in the following manner (at 739–740):

> A swap is an agreement between two parties by which each agrees to pay the other on a specified date or dates an amount calculated by reference to the interest which would have accrued over a given period on the same *notional principal sum* assuming different rates of interest are payable in each case. For example, one rate may be fixed at 10 per cent. and the other rate may be equivalent to the six-month London Inter-Bank Offered Rate ('LIBOR') [*ie*, a floating interest rate]. If the LIBOR rate over the period of the swap is higher than 10 per cent. then the party agreeing to receive 'interest' in accordance with LIBOR will receive more than the party entitled to receive the 10 per cent. *Normally neither party will in fact pay the sums which it has agreed to pay over the period of the swap but instead will make a settlement on a 'net payment basis' under which the party owing the greater amount on any day simply pays the difference between the two amounts due to the other*. [emphasis added]

8 Neither counter-party to a swap transaction makes any loan to the other so as to give rise to

an obligation on the part of the other to pay interest. The quantum of periodic payments each counter-party makes to another is computed as a product of a *notional* principal amount, an applicable rate and a time period, expressed in a formula thus: Periodic payment = notional amount × applicable rate × time period. In practice, however, as noted by Woolf LJ in *Hazell* (see [7] above), the amounts payable by the counter-parties are set off against each other so that on each payment date only the difference between the two amounts is paid. Depending on the relationship between the fixed and floating interest rates over the whole period of the swap agreement, the payments between counter-parties could flow either way. An interest rate swap agreement of this nature is known in the industry as a "plain vanilla" interest rate swap: see, *eg*, John C Hull, *Fundamentals of Futures and Options Markets* (Pearson Prentice Hall, 6th Ed, 2008) ("*Hull*"), at ch 7.

9 From October 2006 onwards, the Applicant and each SPC entered into a swap arrangement mirroring the swap agreements that the Applicant has entered into with the Onshore Banks. Where the swap agreement between the Applicant and an Onshore Bank indicated the Onshore Bank as the floating rate payer and the Applicant as the fixed rate payer, the corresponding swap agreement between the Applicant and the SPC would indicate the Applicant as the floating rate payer and the SPC as the fixed rate payer. In this back-to-back arrangement, the same fixed and floating rates are employed in both sets of swap agreements. In this way, in a situation where the floating interest rate is higher than the fixed interest rate, as between the Onshore Bank and the Applicant, the net payment will be from the Onshore Bank to the Applicant and flow through from the Applicant to the SPC. If the reverse situation materialises, the net payment will be from the SPC to the Applicant and flow through from the Applicant to the Onshore Bank. From this description, it can be readily deduced that the Applicant acts as a middleman between the SPC and the Onshore Bank with net payments flowing through it in either direction.

10 As the net payments or receipts were amounts due to or from the SPCs, these amounts were recorded in the Applicant's accounting books as "Amount owing to/by subsidiary" and were also correspondingly recorded in the SPCs' books.

The Respondent's determination

11 In October 2008, the Applicant wrote to the Respondent to confirm that withholding tax was not applicable to the payments made by the Applicant to the SPCs for the period October 2006 to March 2008 ("the SPC Payments"). In a letter dated 6 February 2009, the Respondent indicated its determination that based on s 12(6) read with s 45 of the ITA, withholding tax applied to the SPC Payments ("the Determination"). The same letter also stated that the Applicant was required to account for the amount of tax that should have been withheld and would be liable for a penalty for non-compliance with the withholding tax requirement. Dissatisfied, the Applicant instituted these proceedings to obtain a quashing order against the Determination. Meanwhile, the Applicant paid under protest the amount of withholding tax, but not the penalties, determined by the Respondent.

The parties' cases

12 In its submissions, the Applicant sought to show that:

(a) On a general level, s 12(6)(*a*) of the ITA did not extend to interest rate swap payments; and

(b) Even if interest rate swap payments did fall within s 12(6)(*a*), on the facts of the case, where the Applicant has acted on behalf of the SPCs in the swap transactions with the Onshore Banks, the sums credited by the Applicant to the accounts of the SPCs were not interest rate

swap payments and did not fall within the provisions of s 12(6)(*a*).

13 The Respondent's contention was that the SPC Payments made by the Applicant to its SPCs were interest rate swap payments that were caught by the current version of s 12(6)(*a*) and fell within s 12(6)(*a*)(i) of the ITA in particular because the SPC Payments were "any other payment", made in connection with a loan or indebtedness, which were borne by the Applicant.

Statutory provisions

14 The withholding tax requirement stems from s 45(1) of the ITA which provides:

> **Withholding of tax in respect of interest paid to non-resident persons**
>
> **45**. — (1) Where a person is liable to pay to another person not known to him to be resident in Singapore *any interest which is chargeable to tax under this Act*, the person paying the interest shall —
>
> (a) deduct therefrom tax —
>
> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> on every dollar of the interest; and
>
> (b) immediately give notice of the deduction of tax in writing and pay to the Comptroller the amount so deducted,
>
> and every such amount deducted shall be a debt due from him to the Government and shall be recoverable in the manner provided by section 89.
>
> [emphasis added]

15 By virtue of s 10(1)(*d*) of the ITA, income *derived from Singapore* in respect of "interest" is chargeable to income tax. Under s 12(6)(*a*)(i), the following are *deemed to be derived from Singapore*:

> (a) any *interest*, commission, fee or *any other payment in connection with any loan or indebtedness* or with any arrangement, management, guarantee, or service relating to any loan or indebtedness which is —
>
> (i) *borne*, directly or indirectly, *by a person resident in Singapore* or a permanent establishment in Singapore except in respect of any business carried on outside Singapore through a permanent establishment outside Singapore or any immovable property situated outside Singapore; ...
>
> [emphasis added]

16 From a literal reading of these relevant provisions in the ITA, if the SPC Payments are characterised as "interest, commission or fee or any other payment in connection with any loan or

indebtedness" which is borne directly or indirectly by the Applicant (a person resident in Singapore), they would be deemed to be derived from Singapore. The Applicant, as the person "paying the interest" to a non-resident person (*ie*, the SPCs), would thus be obliged under s 45(1) to withhold tax on every dollar of the interest paid. The crux of this application therefore lies in whether the SPC Payments fall within the meaning of s 12(6)(*a*)(i).

Whether the SPC Payments fall within the meaning of s 12(6)(*a*)(i)

Purposive interpretation

17 In construing a statute, s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act") requires the court to adopt an interpretation that would promote the legislative purpose or object underlying the statute. In order to ascertain the purpose or object underlying s 12(6)(*a*) of the ITA, one should start by examining its legislative origins.

Legislative history

18 Section 12(6) was introduced via an amendment under the Income Tax (Amendment) Act 1973 (Act 26 of 1973). The first version of s 12(6) read as follows:

> (6) Any income derived from *loans* where –
>
> (*a*) the *interest* is borne directly or indirectly by a person resident in Singapore or a permanent establishment in Singapore; or
>
> (*b*) the funds provided by such loans are brought into or used in Singapore,
>
> shall be *deemed to be derived from Singapore*.
>
> [emphasis added]

In *Singapore Parliamentary Debates, Official Report* (26 July 1973) vol 32 at col 1245 (Hon Sui Sen, Minister for Finance), the Minister explained that the intention behind the insertion of s 12(6) was to:

> ... make it clear that *interest paid by a local borrower to a foreign lender* and interest on a loan, the funds from which are brought into or used in Singapore, are taxable in Singapore *irrespective of where the loan agreement is made*. [emphasis added]

19 In 1977, s 12(6) was amended under the Income Tax (Amendment) Act 1977 (Act 5 of 1977) to add the element of "indebtedness" into s 12(6)(*a*) (see current version at [15] above). In *Singapore Parliamentary Debates, Official Report* (29 June 1977) vol 37 at col 72 (Chua Sian Chin, Minister for Home Affairs and Education (for the Minister for Finance)), the reason for the addition was provided by the Minister at the second reading of the Income Tax (Amendment) Bill 1977 (Bill 8 of 1977) ("the 1977 Bill") as follows:

> *The present definition of source of income does not cover interest accruing from suppliers' credit or deferred payments for the sale of goods*, royalties and other payments for the use of movable property, management fees, payments for the use of scientific, technical, industrial or commercial knowledge or information, and rents or payments under agreement for the use of movable property. Clause 4 provides that where *these* are paid directly or indirectly by a Singapore resident or a permanent resident in Singapore, or are deductible against income accruing in Singapore, the source is deemed to be in Singapore and therefore liable to income

tax. [emphasis added]

20 In order to set the Minister's explanation in context, cl 4 of the 1977 Bill should be set out in full:

> **4**. Section 12 of the principal Act is hereby amended by deleting subsection (6) thereof and substituting therefor the following subsections:—
>
> '(6) There shall be deemed to be derived from Singapore —
>
> (a) any interest, commission, fees or any other payments in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness which is —
>
> (i) borne directly or indirectly by a person resident in Singapore or a permanent establishment in Singapore except in respect of any business carried on outside Singapore through a permanent establishment outside Singapore or any immovable property situated outside Singapore; or
>
> (ii) deductible against any income accruing in or derived from Singapore; or
>
> (b) any income derived from loans where the funds provided by such loans are brought into or used in Singapore.
>
> (7) There shall be deemed to be derived from Singapore —
>
> (a) royalty or other payments in one lump sum or otherwise for the use of or the right to use any movable property;
>
> (b) any payment for the use of or the right to use scientific, technical, industrial or commercial knowledge or information or for the rendering of assistance or service in connection with the application or use of such knowledge or information;
>
> (c) any payment for the management or assistance in the management of any trade, business or profession; or
>
> (d) rent or other payments under any agreement or arrangement for the use of any movable property,
>
> which are borne directly or indirectly by a person resident in Singapore or a permanent establishment in Singapore (except in respect of any business carried on outside through a permanent establishment outside Singapore) or which are deductible against any income accruing in or derived from Singapore.'

21 It is clear from the wording of s 12(7) (see [20] above) that it covers "royalties and other payments for the use of movable property, management fees, payments for the use of scientific, technical, industrial or commercial knowledge or information, and rents or payments under agreement for the use of movable property". Thus, the words "any interest, commission, fee or any other payment in connection with any loan or indebtedness" in s 12(6)(*a*) should be interpreted in the light of the Minister's explanation that the aim of the expanded definition of source of income under s 12(6) was to include "interest accruing from suppliers' credit or deferred payments for the sale of goods".

Deeming provision

22 The Applicant submitted that as s 12(6) is a *deeming* provision, it necessarily employs a statutory fiction and should therefore be construed strictly. In *Federal Commissioner of Taxation v Comber* (1986) 64 ALR 451, it was held that (*per* Fisher J at 458):

> ... deeming provisions are required by their nature to be construed strictly and only for the purpose for which they are resorted to (*Ex parte Walton* (1881) 17 Ch D 746 per James LJ at 756). It is improper ... to extend by implication the express application of such a statutory fiction. It is even more improper so to do if such an extension is unnecessary, the express provision being capable by itself of sensible and rational application. ...

The Applicant also referred to another maxim of revenue law which states that the taxpayer is not to be taxed unless the taxing statute unambiguously imposes the tax on him: see *Russell (Inspector of Taxes) v Scott* [1948] 1 AC 422, *per* Lord Simonds at 433. In similar fashion, Lord Buckmaster observed in *Greenwood v FL Smidth & Company* [1922] 1 AC 417 at 423:

> It is, I think, important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer.

23 The Respondent contended that the Minister's speech at the second reading of the 1977 Bill highlighted the limits of the scope of the original version of s 12(6) which could not be applied to a diverse array of payments from business activities involving Singapore. Thus, it submitted, the intention of Parliament was to widen the scope of the deemed source rule in s 12 of the ITA and that the "interest accruing from suppliers' credit or deferred payments for the sale of goods" were just two examples of scenarios where the limited original version of s 12(6) would not apply.

24 While I agree with the Respondent that the 1977 amendments to s 12(6) were intended to widen the scope of the deemed source rule in s 12, I am of the view that that widening should be construed according to a purposive reading of the literal wording of s 12(6). I note that in *ABB v Comptroller of Income Tax* [2010] 2 SLR 837, Chao Hick Tin JA held (at [54]) that s 9A(1) of the Interpretation Act applies to all written law and "effectively displaces the common law principle that tax statutes should be interpreted strictly in favour of the taxpayer". I do not understand Chao JA as holding that purposive interpretation mandates that tax statutes must be read *widely in every case*. Rather, he was laying down the principle that in construing tax legislation, the court should accord paramount consideration to the purpose or object underlying the statute instead of relying solely on common law principles of interpretation such as the strict construction rule. As an application of the dictates of s 9A(1) of the Interpretation Act to tax legislative provisions, this must be right. In that case, Chao JA cited the following passage in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 ("*Low Kok Heng*") at [41]:

> Section 9A(1) of the Interpretation Act requires the construction of written law to promote the purpose or object underlying the statute. In fact, it *mandates* that a construction promoting legislative purpose be preferred over one that does not promote such purpose or object: see Brady Coleman, 'The Effect of Section 9A of the Interpretation Act on Statutory Interpretation in Singapore' [2000] Sing JLS 152 at 154. Accordingly, any common law principle of interpretation, such as the plain meaning rule and the strict construction rule, must yield to the purposive interpretation approach stipulated by s 9A(1) of the Interpretation Act. *All* written law (penal or

otherwise) must be interpreted purposively. Other common law principles come into play *only* when their application coincides with the purpose underlying the written law in question, or alternatively, when ambiguity in that written law persists even after an attempt at purposive interpretation has been properly made. [emphasis in original]

Thus, while the court should not have reference *exclusively* to the common law principle of strict construction in favour of the taxpayer, that common law principle may be applied when such application coincides with the purpose underlying the statutory provision in question or when ambiguity persists even after purposive interpretation has been properly attempted.

"Interest, commission, fee or any other payment"

25 It was common ground between the parties that the SPC Payments are not "commission", "fee" or even "interest". With regard to the meaning of "interest", in *Chng Gim Huat v Public Prosecutor* [2000] 2 SLR(R) 360, Yong Pung How CJ observed (at [36]):

> The following guiding principles can be distilled from the above authorities. Firstly, the label attached to the payment is not conclusive of its true legal nature. Whether or not a particular payment constitutes 'interest' depends on the substance of the transaction. Nomenclature does not alter the character of the payment if it is not in fact 'interest' and vice versa. Secondly, the essence of 'interest' is compensation for the deprivation for the use or delayed payment of money by another. Thirdly, there must be a principal sum of money by reference to which the interest payment is to be ascertained, which sum of money must be due to the person entitled to the interest.

I agree that the SPC Payments should not be construed as "commission" or "fee" (as these terms are used in common parlance) as they were not paid in consideration of any service rendered by the SPCs to the Applicant. Properly construed, the SPC Payments were also not "interest" under s 12(6)(*a*) because (a) they were not intended to compensate the SPCs for the deprivation for the use or delayed payment of money by the Applicant; and (b) there was no principal sum of money which was owing to the SPCs, by reference to which the SPC Payments were to be ascertained. Quite rightly, the Respondent dropped its earlier insistence that the SPC Payments were "interest".

26 Therefore, the Respondent contended, but the Applicant denied, that the SPC Payments were "any other payment" that fell within the meaning of s 12(6)(*a*). In its submissions, the Applicant relied on the *ejusdem generis* principle in order to ascertain the meaning of "any other payment" in the context of s 12(6)(*a*). In *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th Ed, 2008) ("*Bennion*"), at p 1231, the *ejusdem generis* principle is described as such:

> The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words.
>
> ...
>
> The *ejusdem generis* principle stems from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context. It may be regarded as an instance of ellipsis, or reliance on implication. The principle is presumed to apply unless there is some contrary indication.

As was explained in [25] above, each of the preceding terms "interest", "commission" and "fee" are commonly understood to be payments made by the payor to the payee *in consideration* of the forbearance in collecting the principal sum loaned, or services or work performed, by the payee. Applying the *ejusdem generis* principle, the words "any other payment" should be construed as some form of consideration accruing to the payee in return for some benefit conferred by the payee to the payor, following the genus of the preceding terms. In order to determine what kind of benefit is relevant here, one must ascertain the meaning of the other requirements in s 12(6)(*a*).

"In connection with any loan or indebtedness"

27 The expression "in connection with" could describe a range of links, but the court must look closely at the surrounding words and the context of the legislative scheme: see *Revenue and Customs Commissioners v Barclays Bank plc* [2008] STC 476, *per* Arden LJ at [18]. In the context of a statutory provision which deems to be derived from Singapore payment borne by a person resident in Singapore in order that tax is chargeable on such sums paid, it is even more important to construe the provision carefully, having regard to the legislative purpose behind that provision.

28 As an illustration, in the context of impugning financial assistance in connection with the purchase of a company's shares under s 76(1)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed), Andrew Phang J in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd* [2006] 4 SLR(R) 451 rejected a broad construction of the words "in connection with", observing that (at [69] and [71]):

> 69 ... a broad reading of the phrase 'in connection with' in s 76(1)(*a*) of the Act (which I have rejected), whilst linguistically possible, is (at best) an academic exercise. The provisions of the Act in general and s 76(1)(*a*) thereof in particular exist in order to promote (rather than stifle) commerce in a real world setting. Whilst nice linguistic arguments have their proper place in a stimulating intellectual discussion, they have, with respect, no place whatsoever in a practical context, where they are both irrelevant and apt to confuse rather than enlighten. ...
>
> ...
>
> 71 ... I have, in fact already referred to the fundamental importance of the concept of purpose in s 76(1)(*a*) of the Act. And the importance of this concept hinges on the *mischief* that is sought to be avoided, as set out above. That mischief does *not* include transactions, the sole or primary purpose of which is to give effect to the *bona fide* commercial interests of the company *other than* in the giving of financial assistance in order to assist in the purchase of the company's shares. If so, then the phrase 'in connection with' must be given a meaning that is consistent with the context and intention underlying s 76 of the Act itself. In the circumstances, I would reject a broad reading of 'in connection with' and hold that that phrase must be read consistently with the phrase 'for the purpose of'. ...
>
> [emphasis in original]

29 The original version of s 12(6) referred only to income derived from *loans* where the *interest* is borne by a person resident in Singapore. The scope of payment caught under s 12(6)(*a*) has since been expanded not only in terms of the *type* of payment borne (*ie*, not only "interest" but also "commission", "fee", or "any other payment") but also the reason for that payment. The payment borne by the person resident in Singapore can be in connection with not only a "loan", but also with other forms of "indebtedness". Apart from a loan made to the person resident in Singapore, such indebtedness could arise, for instance, through an extension of credit or other forms of deferred

payment such as overdue trade accounts, by a non-resident supplier of goods or services to the taxpayer resident in Singapore. If payment is borne by that person *in consideration* for the benefit of such form of deferred payment, such payment is "in connection with" that indebtedness. The obligation to make payment *arises out of* the indebtedness. That is the connection between the payment and the indebtedness.

30 It follows that the loan or indebtedness referred to in s 12(6)(*a*) should not include any loan or indebtedness owed by the non-resident payee to a third party. Such unrelated loan or indebtedness does not give rise to the payment and the payor should not have to withhold tax thereon on account of a dubious "connection" between the payment and the loan or indebtedness. Indeed, the resident payor might not even be aware of such loan or indebtedness.

Whether interest rate swap payments fall within s 12(6)(a)

31 As I have noted at [8] above, in an interest rate swap agreement between two counter-parties, there is no subsisting loan (or indebtedness) between them. Instead, an interest rate swap agreement is an agreement between two counter-parties to "exchange cash flows in the future"; the agreement defines the dates when the cash flows are to be paid and the way in which they are to be calculated (see *Hull* ([8] above, at p 153). Typically, the quantum of the cash flows is calculated based on a *notional principal amount*, but it bears emphasising that no such principal amount has been passed under a loan (or other indebtedness) from one counter-party to the other.

32 Certainly, at the date stipulated for payment or settlement, one counter-party has to pay the other counter-party, depending on which direction the net cash flow is in. On that payment date, one counter-party "owes" the other a net payment of cash flow under the interest rate swap agreement. This is of course true of any payment of any kind from one party to the other, but that does not mean that there is of necessity any *subsisting* loan or indebtedness between the paying party or the receiving party. Indeed, depending on how the floating interest rate fluctuates, the net payment could be in either direction, *ie*, from the fixed rate payer to the floating rate payer or *vice versa*. At the point of entry into the interest rate swap agreement, it cannot be ascertained which of the counter-parties is "indebted" because it is not until the payment or settlement date that the counter-parties can determine which direction the net payment should be in.

33 In my view, therefore, there being no loan or indebtedness involved in an interest rate swap agreement, payment made pursuant to such an agreement would *not* be "in connection with any loan or indebtedness". Interest rate swap payments should, ordinarily, fall outside the meaning of s 12(6)(*a*) of the ITA.

34 I should mention that one of the arguments that the Applicant made to explain why interest rate swap payments are not covered by s 12(6)(*a*) was that when the amendments were introduced in 1977 to include payments for trade indebtedness, interest rate swaps were not known even in developed financial centres since they were first entered into in 1981. The Applicant argued, further, that had s 12(6)(*a*) been intended to cover interest rate swaps, Parliament would have inserted the words "interest rate swaps" in s 12(6)(*a*) as it did in the cases of ss 10(2A), 14J(6) and 43N(1)(*c*) of the ITA. It is, however, a settled principle that a statutory provision should be construed in a manner which will take into account new situations which may arise and which were not within contemplation at the time of its enactment: see *AAG v Estate of AAH, deceased* [2010] 1 SLR 769 at [30]. Thus, in so far as these arguments attempt to side-step rather than engage in elucidating the words of s 12(6)(*a*), they do not assist the construction of that statutory provision. An attempt at applying s 12(6) should be made not only in relation to facts in existence at the time it came into force but also to circumstances which may surface in the future.

Treatment of the SPC Payments under s 12(6)(a)

35 The Respondent contended that the SPC Payments were payments borne by the Applicant in connection with the loans *between the SPCs and offshore banks*. It justified its contention on the basis that Parliament had intended s 12(6) to be given a wide interpretation so as to frustrate tax avoidance schemes which evolved with the myriad ways that business can be conducted.

36 To my mind, interpreting the words "any loan or indebtedness" in such a way as to include loan or indebtedness *not* involving the resident taxpayer would be stretching the meaning of the statutory provision far beyond the purpose underlying it. In *Low Kok Heng* ([24] *supra*], V K Rajah JA cautioned that (at [52]):

> [m]ore importantly, it is crucial that statutory provisions are not construed, in the name of a purposive approach, in a manner that goes against all possible and reasonable interpretation of the express literal wording of the provision.

As I have explained at [29]–[30] above, it would not be reasonable to require the resident taxpayer to withhold tax on payments purportedly "in connection with" a loan or indebtedness that did not give rise to the payment. The loan agreements between the non-resident SPCs and the offshore banks simply do not concern the resident taxpayer.

37 Indeed, the SPC Payments were clearly not made in consideration for the loan between the offshore banks and the SPCs. They were payments made pursuant to the interest rate swap agreement between each SPC and the Applicant, which agreement the offshore banks were not privy to. Under that agreement, there was no subsisting loan or indebtedness owing from the Applicant to the SPC. Therefore, the SPC Payments were not made in consideration for "any loan or indebtedness" and are not caught under s 12(6)(*a*). They should not be deemed to be derived from Singapore under that provision.

38 According to the Applicant, the interest rate swap agreements between the Applicant and the Onshore Banks were entered into *on behalf of* the SPCs. Consequently, the sums received from and paid to the Onshore Banks under the swap agreement with the Applicant were sums received or paid by the Applicant "on behalf of" the SPCs. Therefore, the moneys received or paid by the Applicant were due to or payable from the SPCs and consequently were *not* interest rate swap payments. In this sense, the Applicant was in fact acting as *agent* for the SPCs in entering into the interest rate swap agreements with the Onshore Banks.

39 In my view, such a disingenuous argument does not pass muster. On its own case, the Applicant itself entered into swap agreements with the Onshore Banks and the SPCs entered into swap agreements with the Applicant *mirroring* those swap agreements with the Onshore Banks. If the Applicant was indeed the SPCs' agent, there would have been no need to enter into its own interest rate swaps with the SPCs. As agent, it would have been its duty to simply pass on the money it received from the Onshore Banks to its principals the SPCs, or to pass the money in the other direction, depending on the net cash flow. Further, as the SPC Payments were payments made pursuant to the terms of the interest rate swap agreements between the Applicant and the SPCs, they clearly were interest rate swap payments. The Applicant's attempt to characterise the SPC Payments as merely sums that "rightly belonged to those SPCs" was wholly unnecessary. They "rightly belonged to those SPCs" in consequence of the interest rate swap agreements between the Applicant and the SPCs, not through any principal-agent relationship between the two.

Wide interpretation widely accepted?

40 The Respondent made the further argument that the wide interpretation of s 12(6) that it forwarded in these proceedings has been accepted by tax advisors, practitioners and businesses. This was disputed by the Applicant, which suggested that:

> 42. The reality, insofar as we can tell, is that where counterparties feel that their transactions may be within the Respondent's wide interpretation, they may simply avoid Singapore as the place of doing interest rate swap businesses as it does not make economic sense to do so. ...

Owing to the connectivity amongst the major financial centres in the world, it is easy to arrange any derivative transaction, including interest rate swap transactions, with financial institutions all over the world, bypassing Singapore in the process. This would inevitably occur when the transactions do not fall within the scope of remission or exemption by the Respondent as the relevant parties desirous of utilising interest rate swap transactions to their benefit would enter into such transactions with banks or other counterparties in other financial centres.

41 Quite apart from the commercial realities, this further argument does not assist very much in the construction of s 12(6)(*a*). In *Comptroller of Income Tax v GE Pacific Pte Ltd* [1994] 2 SLR(R) 948, Yong Pung How CJ opined (at [35]) that the practice of the Comptroller with regard to s 24 of the ITA "does not in any way illuminate the question of whether this *should* be the practice of the Comptroller" since practice is *not* law. Lord Neuberger of Abbotsbury made similar observations in *Maco Door and Window Hardware (UK) Ltd v Revenue and Customs Commissioners* [2008] 1 WLR 1790 at [66]:

> ... the fact that, for a substantial period, the commissioners interpreted a particular provision in a taxing statute in a certain way is normally of limited assistance as to the provision's meaning. The interpretation of legislation is, of course, ultimately a matter for the judiciary, not the executive. ...

To echo Lord Neuberger's words of caution, one should be watchful of invocations of current practice of the executive to justify an interpretation of legislative obligations, in particular, under tax provisions. It is the duty of the judiciary to ensure that taxpayers are taxed only under a proper construction of the legislative provisions, not under the continuing misapprehension of the same on the part of the executive.

42 As part of its justification for its wide interpretation of s 12(6)(*a*), the Respondent pointed to the Income Tax (Exemption of Interest and Other Payments for Economic and Technological Development) Notification 2000 (S 411/2000) ("the Notification"), which exempts from tax any interest rate swap payment by a financial institution to a non-resident payee, as an indication of response by the Ministry of Finance to feedback from relevant industry players to continue to make Singapore an attractive and viable business and financial hub. I do not think that the content of such subsidiary legislation, made by the Minister pursuant to powers conferred under s 13(4) of the ITA, can be taken to be a guide as to what Parliament intended by the language used in the Act, particularly if the Notification postdated the 1977 amendments by some 13 years.

Conclusion

43 Having regard to all the relevant considerations, I find that the SPC Payments were not payments in connection with any loan or indebtedness borne by the resident Applicant to the non-resident SPCs. In consequence, the requirement to withhold tax under s 45 does not apply to the SPC Payments. The application for an order to quash the Determination is granted in terms. Costs for this application as well as the costs in relation to the leave application are awarded in favour of the

Applicant.