# T Ltd v Comptroller of Income Tax
# [2006] SGCA 13

**Case Number** : CA 78/2005

**Decision Date** : 30 March 2006

**Tribunal/Court** : Court of Appeal

**Coram** : Chao Hick Tin JA; Tay Yong Kwang J; Yong Pung How CJ

**Counsel Name(s)** : K Shanmugam, SC and Nand Singh Gandhi (Allen & Gledhill) for the appellant; Liu Hern Kuan, David Lim and Usha Chandradas (Inland Revenue Authority of Singapore) for the respondent

**Parties** : T Ltd — Comptroller of Income Tax

*Revenue Law – Income taxation – Deduction – Taxpayer company seeking to claim as deduction interest on loans for purchase of land on which shopping centre to be built – Whether interest incurred on capital employed in acquiring income – Sections 14(1)(a), 15(1)(c), 37(2)(a) Income Tax Act (Cap 134, 1999 Rev Ed)*

*Revenue Law – Income taxation – Deduction – Taxpayer company seeking to claim as deductions expenses incurred prior to grant of temporary occupation permit and have such expenses carried over as losses – Whether expenses incurred prior to commencing of business – Whether expenses incurred in production of income – Sections 10(1)(a), 14(1), 37(2)(a) Income Tax Act (Cap 134, 1999 Rev Ed)*

30 March 2006

**Tay Yong Kwang J (delivering the judgment of the court):**

1 Prior to the grant of the temporary occupation permit ("TOP") for a shopping mall, the taxpayer company ("the taxpayer") incurred certain expenses and sought to have those expenses deducted and carried forward as losses. The Comptroller of Income Tax ("the Comptroller") refused to allow the deduction and to treat the expenses as losses. The taxpayer appealed to the Income Tax Board of Review ("the ITBR") which upheld the decision of the Comptroller. The taxpayer then appealed to the High Court in District Court Appeal No 14 of 2004 where Andrew Ang J ("the judge") affirmed the ITBR's decision but disagreed with it on one of two issues. The taxpayer then appealed to the Court of Appeal. We dismissed the appeal with costs and now give the reasons for our decision.

**The Agreed Statement of Facts**

2 The appeal before the ITBR, as was the appeal before the judge and before us, was based on an Agreed Statement of Facts dated 25 September 2002 which stated as follows (the taxpayer is referred to therein as "T Ltd" and particulars which would identify it have been omitted in order to preserve its anonymity):

> 1. The appellant, T Ltd ("the Company"), is a company incorporated in Singapore.
>
> 2. The Company was incorporated by a firm of lawyers on 24 July 1989 as a private limited company. It had a $2 paid-up capital and did not carry on any business. In 1992 it was acquired by the D Land Group upon which its name was changed to T Ltd and its first object to:
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> > (a) To purchase, take on lease or otherwise acquire from the Housing and Development Board the land described as Land Parcel P4, Tampines in the Republic of Singapore and any

estate or interest in and any rights connected with such land.

(b) To carry on the business of constructing or otherwise developing a building on Land Parcel P4, Tampines, for the purpose of owning, managing and operating a property letting business.

On 24 June 1998, the Company was converted to a public company.

3. The Company was awarded the land from the HDB on 6 June 1992. It signed a building agreement with the HDB on 1 December 1992 under which it undertook to develop the land. The proposed development project was described as a "comprehensive retail complex with 3 basements (2 for carparks and 1 for shops and supermarket), a 4-storey shopping podium … and two towers …".

4. The purchase of the land was funded by share capital and interest-bearing shareholders' loans. Subsequently, and during the construction phase, part of the shareholders' loans was converted to share capital and part (but not all) replaced by external borrowing which bore interest.

5. The Company submitted plans on 16 December 1992 to develop the complex and obtained provisional planning approval on 6 February 1993. The chronology of significant events from then on was:

Date of award of main building contract: 19 October 1993

Date of commencement of superstructure works:2 November 1993

Date of Temporary Occupation Permit ("TOP"): 15 November 1995

Date when first tenancy commenced: 15 November 1995

6. In the accounts for 1990 and 1991, the principal activity of the Company was described in the Directors' Report as that of "investment in and development of properties. Such activities, however, have not commenced since the date of incorporation of the company." In the accounts for 1992 (the year in which the land was acquired) to 1995, the principal activity was described as "property investment and development".

7. The Company's intention in developing the building was for long-term investment by letting out to various tenants.

8. The Company incurred interest and other expenses such as administrative, marketing and advertising expenses from 28 October 1993 to 15 November 1995, the date of the granting of the TOP. The amount of these pre-TOP expenses brought forward to the year of assessment 1997 (the subject year of this appeal) was $5,213,184, comprised as follows:

| | |
|---|---|
| Interest | $4,825,015 |
| General and administrative expenses | $ 86,401 |
| Advertising and promotion expenses, | |
| agency fees and marketing expenses | $ 301,768 |

9. The Company claimed these expenses ("the said expenses") as deductions under section 14 of the Income Tax Act and sought to carry forward the excess of the said expenses over income as losses under section 37 of the Act.

10. The Comptroller of Income Tax refused to allow the deductions of the said expenses (and hence the carry-forward of the losses) incurred prior to the date of the granting of the TOP.

11. The Company applied to the Comptroller under section 76(2) of the Act, for the said assessment to be reviewed and revised.

12. On 20 October 2000 the Comptroller issued a Notice of Refusal to Amend in respect of the said assessment and the Company on 20 October 2000 filed with the Comptroller and the Clerk to the Board of Review a Notice of Appeal under section 79(1) of the Act.

**The relevant statutory provisions**

3 The arguments centred on whether the expenses set out in the Agreed Statement of Facts were deductible under the general formula in s 14(1) of the Income Tax Act (Cap 134, 1999 Rev Ed) ("the Act") and, where the interest was concerned, whether it was deductible specifically under s 14(1)(*a*). As the inclusionary provisions in s 14 are subject to the exclusionary provisions in s 15 of the Act, the arguments then flowed to whether the interest was disallowed as a deduction under s 15(1)(*c*) in any event. If the deductions were allowed, they would reduce the taxpayer's assessable income pursuant to s 37. The said provisions, including s 10 on "Charge of income tax", read:

> 10 (1) Income tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of —
>
> (a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised; …
>
> 14 (1) For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Act (referred to in this Part as the income), there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of the income, including —
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> (*a*) except as provided in this section, any sum payable by way of interest upon any money borrowed by that person where the Comptroller is satisfied that the interest was payable on capital employed in acquiring the income;
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> …
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> 15 (1) Notwithstanding the provisions of this Act, for the purpose of ascertaining the income of any person, no deduction shall be allowed in respect of —
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> …
>
> (*c*) any capital withdrawn or any sum employed or intended to be employed as capital except as provided by section 14(1)(*h*);

…

37 (1) The assessable income of any person from all sources chargeable with tax under this Act for any year of assessment shall be the remainder of his statutory income for that year after the deductions allowed in this Part have been made.

(2) There shall be deducted —

(*a*) the amount of a loss incurred by that person during any year preceding the year of assessment in any trade, business, profession or vocation which, if it had been a profit would have been assessable under this Act, and which has not been allowed against his statutory income of a prior year[.]

**The decisions of the ITBR and the High Court**

4 The parties proceeded on the basis of two issues compendiously identified as the "Pre-Commencement Issue" and the "Capital Expenditure Issue". It was agreed that expenses were not deductible under s 14 of the Act if there was no business in existence at the time the said expenses were incurred. Under the first issue, the ITBR was of the view that the said expenses of the taxpayer were incurred before the commencement of the business of letting out the shopping mall in question as that business commenced only when the TOP was granted. In respect of the second issue, the ITBR held that the interest paid, being capital in nature, was specifically disallowed under s 15(1)(*c*) of the Act.

5 The judge agreed with the ITBR on the pre-commencement issue but disagreed with its decision on the capital expenditure issue. He was of the opinion that the interest incurred was of a revenue nature and would therefore have been deductible if not for his decision on the pre-commencement issue. However, since the taxpayer had to succeed on both issues, the judge dismissed the appeal accordingly.

**The appeal**

6 Before us, the taxpayer contended that the judge had erred in his determination of the pre-commencement issue. The taxpayer also submitted that even if its appeal failed before us, each party should bear its own costs here and below as this was a test case and the Comptroller had succeeded on only one of the two issues in contention.

7 The Comptroller did not file a cross-appeal but urged us to dismiss the taxpayer's appeal on the pre-commencement issue and to overturn the judge's ruling on the capital expenditure issue. He sought the second order on the basis of O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) which permits a respondent in an appeal who, not having appealed from the decision of the High Court, but desiring to contend on appeal that the said decision should be affirmed on grounds other than those relied upon by that court, to do so by stating the grounds of that contention in its Case. The Comptroller also submitted that there was no good reason why the costs order sought by the taxpayer should be made in this case.

**The decision of the Court of Appeal**

***Issue 1 – The pre-commencement issue***

8 The judge framed this issue in the following manner (see [2005] 4 SLR 285 at [10]):

> Was the appellant carrying on business at the time it incurred the said expenses? If it was not, the expenses are not allowable, being pre-commencement expenses.

In our view, in order to ascertain whether the taxpayer had commenced business, we have to enquire what that business was: *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 84 FCR 541 at 557. Both the taxpayer and the Comptroller agreed that the taxpayer's business included the management of the shopping mall and the generating of rental income from letting out the various units therein. Their positions diverged on the issue of whether the business extended to matters that had occurred at any time before the grant of the TOP.

9 The taxpayer argued that its business extended to the acquisition of the land on which the shopping mall was subsequently built as well as the construction of the shopping mall. If that was the correct position, the taxpayer's business would have commenced from the time it committed itself financially. It accepted that a mere mental commitment to purchase the land was not sufficient. On 4 July 1992, it paid 25% of the price for the land and on 4 September 1992, it paid the balance. It was seeking to deduct only the expenses incurred after the superstructure works had commenced and not the costs of construction.

10 The taxpayer sought to characterise its business by reference to the objects enumerated in its memorandum of association (see para 2 of the Agreed Statement of Facts). Relying on the words of Pollock MR in *Inland Revenue Commissioners v Westleigh Estates Company, Limited* [1924] 1 KB 390 at 409, it argued that if a company's objects were business objects and were in fact carried out, then the company should be regarded as carrying on business. Since its objects encompassed the purchase of land and the construction of the shopping mall, the very things that it proceeded to carry out, it submitted that its business must extend to such purchase and construction.

11 While the objects clause in a company's memorandum of association could provide some useful guide as to the nature of its business, it has to be noted that many companies have very broadly defined objects in a wide range of businesses in their memoranda. Indeed, some may seek to have invisible boundaries by having all-encompassing clauses such as "and such other lawful businesses and activities as may be decided by the directors from time to time". It was therefore for good reason that Lord Diplock in *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1979] AC 676 at 683 observed that Pollock MR's words in the case cited above should be read in the context of a company carrying out one of its principal objects and that not every isolated act authorised by its memorandum of association necessarily qualified as the carrying on of a business. Similarly, in *Mitsui-Soko International Pte Ltd v The Comptroller of Income Tax* (1998) MSTC 7,349 at 7,352–7,353 ("*Mitsui-Soko*"), Warren Khoo J in the High Court cautioned against adopting Pollock MR's words as a statement of a rule or principle because the practice of having widely worded memoranda of association often obfuscated the purpose for which a particular company was formed, and a literal application of Pollock MR's *dictum* might result in almost every economic activity undertaken by a company as constituting the carrying on of business.

12 The inquiry should therefore focus on what a company actually carries on rather than what it professes to carry on in order to know what its true business is (*The Commissioners of Inland Revenue v The Hyndland Investment Company, Limited* (1929) 14 TC 694 at 699; *Mount Elizabeth (Pte) Ltd v Comptroller of Income Tax* [1986] SLR 421). The facts of each case should then be examined to determine whether the activities in issue are merely preparatory acts or whether they constitute the carrying on of that business. We agree that a commonsensical and pragmatic approach, as advocated in *Mitsui-Soko*, ought to be adopted. We also agree with the following observation made by the judge below ([8] *supra* at [18]):

In tax cases where the issue was whether the taxpayer company was either investing or dealing in property, the courts have not been timorous to disregard objects which they considered to be self-serving and to look instead at the operations of the company to determine what its true business was. It should be no different where the enquiry is into the date of commencement of a company's business as such enquiry will bring in tow the question what the business of the company is. Each case will have to be examined on its facts.

13 As found by the judge, the letting out of the shopping mall was the only regular activity and the primary source of the taxpayer's income. The business of the taxpayer was therefore the letting out of the shopping mall. Since this was the business of the taxpayer, it followed that its business could not have commenced before the TOP was granted for the shopping mall as it would not have been able to embark on its income-generating activity, which was the taking in of tenants. It was only upon the grant of the TOP that the shopping mall was capable of producing income and the taxpayer company was ready to begin its ordinary business operations. The purchase of the land and the construction works were preparatory steps taken towards the ultimate object of owning, managing and operating the business of letting out. Although this court said in *Pinetree Resort Pte Ltd v Comptroller of Income Tax* [2000] 4 SLR 1 at [47] that in determining whether the nexus between the incurrence of an expense and the production of income in s 14 is present, "the business has to be looked at *as a whole set of operations* directed toward producing income, in which case an expenditure which is not capital expenditure is usually considered as having been incurred in gaining or producing income" [emphasis added], that statement was made in the context of a business which had already commenced and was producing income. It was not meant to be a statement on when a business could be said to have commenced.

14 The Indian decision in *Commissioner of Income Tax, Gujarat I v Saurashtra Cement and Chemical Industries Ltd* [1973] 91 ITR 170 does not assist the taxpayer as the facts there were exceptional, apart from the peculiarities of Indian revenue law pointed out by the judge below (at [41] of his judgment, that there was a distinction between "setting up" of a business and "commencement of business" in Indian revenue law). In that case, the taxpayer was in the business of manufacturing and selling cement. The three activities in issue were the extraction of limestone, the manufacture of cement and the sale thereof. The parties there agreed that the extraction of limestone did not constitute a distinct and independent business of the taxpayer. The court there concluded that the business commenced when the company started to quarry limestone and not at the later time when it commenced the manufacture of cement. It was held that all three activities constituted the business of the taxpayer and that the business could not be carried out without any one of them. The extraction of limestone, although not forming the core of the business, was a regular or continuous exercise in the day-to-day operations and was such an indivisible or intrinsic part of the business that it could be said that the business commenced with the extraction of limestone. In the present appeal, the taxpayer's purchase and development of the land was a one-off activity and, as we have indicated, its business could not have commenced before it was in a position to let out the various spaces available in the shopping mall.

15 The judge's decision certainly did not imply that a business could never commence unless it turned in profits. If it were otherwise, s 37(2)(*a*) of the Act would be rendered otiose. Indeed, it is common for many a business to be making losses in the initial stages of its operations. However, this is different from a business which produces no income because it is not yet in a position to generate any. For a business to commence in a situation like the present case, the taxpayer must have established an income-generating asset or income-earning structure. In this case, that would be the shopping mall upon the grant of the TOP. The taxpayer could not invoke s 37(2)(*a*) because it was unable to show that the expenses constituted a loss incurred in "any trade, business, profession or vocation". It was unable to do that as it did not have in place at the material time the business of

letting out of the shopping mall and therefore could not come within the terms of s 14(1).

16 We therefore agree with the judge's decision on the pre-commencement issue and, like him, would hold that the expenses in issue were not deductible under s 14 of the Act. On this ground alone, the appeal ought to be dismissed.

***Issue 2 - The capital expenditure issue***

17 In this case, there was no dispute that the loans taken out were applied to the purchase of the land and that such loans were capital expenditure. The issue was whether the interest incurred on such loans was deductible. Applying ss 14(1)(*a*) and 15(1)(*c*) to the facts of this case, the Comptroller argued that interest on the loans before the grant of the TOP was of a capital nature or was "in respect of … any sum employed … as capital" and should therefore be disallowed as a deduction. The taxpayer contended that interest was inherently of a revenue nature and that the interest incurred was not caught by the prohibition in s 15(1)(*c*).

18 On this capital expenditure issue, the judge was of the view that s 15(1)(*c*) was worded differently from its equivalent in the UK tax legislation and that case law on the latter, which held that the nature of interest depended on the nature of the underlying loan, was therefore inapplicable here. He reasoned as follows ([8] *supra* at [54] to [58]):

> 54 In the UK, the provision corresponding to our s 15(1)(c) prescribes that:
>
>> [N]o sum shall be deducted in respect of … any sum employed or intended to be employed as capital …
>
> In *The European Investment Trust Co Ltd v Jackson (Inspector of Taxes)* (1932) 18 TC 1 ("*European Investment Trust*"), the Court of Appeal in England apparently decided that whether or not interest was of a revenue or capital nature depended on whether the loan itself (which gave rise to the interest) was employed as capital in the business. This view was widely criticised and subsequently abrogated by legislation. In *Beauchamp (Inspector of Taxes) v F W Woolworth plc* [1988] STC 714 ("*Woolworth*"), the English Court of Appeal had occasion to consider its earlier decision in the *European Investment Trust* case. Nourse LJ who delivered the judgment of the court described it as "a very curious case". He then went on to say (at 717–718):
>
>> Having read and re-read the report of *The European Investment Trust Co Ltd v Jackson* several times, I have come to a clear conclusion that it can only be explained on the footing that it was conceded throughout that the status of the interest as a deductible item was governed by the status of the advances, and that that concession was made because it was assumed that the words 'in respect of' were the equivalent of 'in connection with' or the like. Perhaps the words of the 1842 Act had been forgotten. If that assumption is made, I can well see that it can be said that the interest on the advances would be sums in respect of the advances and thus no more deductible than the advances themselves. However, a concession on that point is not the equivalent of a binding decision. Indeed, it is no decision at all. So I think that we are free to disregard that case so far as it related to interest, although its authority would no doubt be unimpeachable in regard to the advances themselves.
>
> Although the decision of the Court of Appeal in the *Woolworth* case was reversed by the House of Lords, there is nothing in the House of Lords' judgment delivered by Lord Templeman which detracts from the Court of Appeal's criticism of this aspect of the *European Investment Trust*

case ([54] *supra*).

55 So much then as to how the UK provision was construed in the *European Investment Trust* case. Should the Singapore provision be interpreted likewise? Although counsel for the appellant argued cogently why it ought not be likewise construed, he may have been a little generous in conceding that the language of the Singapore provision is close to its UK counterpart. As noted, the UK provision prescribes that:

> [N]o sum shall be deducted in respect of … any sum employed or intended to be employed as capital …

In other words, "no sum … in respect of any sum employed as capital …" is to be deducted.

56 As framed, it is possible to construe the "sum" first referred to as separate and distinct from the second. On this basis, it did no violence to the language of the UK provision for the *European Investment Trust* case ([54] *supra*) to construe the first sum as being referable to interest while the second referred to the principal amount on which the interest accrued.

57 The Singapore provision is differently worded. It states:

> [N]o deduction shall be allowed in respect of … any sum employed or intended to be employed as capital.

The provision makes no mention of any sum other than the sum employed or intended to be employed as capital. Whereas the words "in respect of" in the UK provision could be read to mean "in connection with" without doing violence to the statutory provision, the same words "in connection with" could not, in my view, comfortably substitute for "in respect of" in the Singapore provision. It would immediately invite the question "Deduction of what?" To my mind, the words "in respect of" in the Singapore provision is the equivalent of "for" or "on account of". Thus, what is prohibited is the deduction of the sum employed or intended to be employed as capital.

58 It is inconceivable that the legislature would provide in unambiguous terms in s 14(1)(a) for the deduction of "interest upon any money borrowed … where … the interest was payable on capital employed in acquiring the income" and then in the very next section prescribe in s 15(1)(c) that interest on any sum employed as capital is not deductible. Neither was this the position taken by Revenue before the decision in *Wharf Properties Ltd v Commissioner of Inland Revenue (Hong Kong)* [[1997]] STC 351 ("*Wharf*").

19 The judge then went on to consider *Wharf* (a Hong Kong tax case which went before the Privy Council) and the High Court of Australia's decision in *Steele v DFC of T* 99 ATC 4242 ("*Steele*"). He concluded that *Steele*, which held by a 4:1 majority that interest outgoings were not of a capital nature, accorded more with the conventional and well-known distinction between revenue and capital expenditure and was to be preferred to the reasoning in *Wharf*. In *Wharf*, the issue before the Privy Council was whether interest on loans, taken out for the purchase of a train depot to redevelop it as a commercial complex, was deductible for tax purposes. The judge reasoned in the following manner before arriving at his conclusion that s 15(1)(*c*) was never intended to apply to interest on loans ([8] *supra* at [58] to [70]):

58 … The relevant provisions of the Inland Revenue Ordinance (Cap 112) (Hong Kong) are as follows:

(a) Section 16(1)(a) provides that:

> … there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits … including –
>
> (a) … sums payable … by way of interest upon any money borrowed by him for the purpose of producing such profits …

(b) Section 17 then contains a list of expenditures for which no deduction is allowed. It includes:

> (c) … any expenditure of a capital nature.

The Privy Council held that the interest was of a capital nature and, therefore, not an allowable deduction to the taxpayer. Apparently, as a result of this decision, the Revenue in Singapore changed their interpretation of s 15(1)(c) despite the fact that s 17(c) of the Hong Kong legislation is in terms much wider than s 15(1)(c), disallowing, as it does, deduction for "any expenditure of a capital nature".

59 Further support for the appellant's construction of s 15(1)(c) may be found in the history of the Singapore legislation. The Singapore Income Tax Ordinance was introduced in 1948, some 16 years after the *European Investment Trust* case ([54] *supra*). In his report to the Governors of the Malayan Union and Singapore in 1947, the draftsman, R B Heasman, a tax expert from the UK, had this to say about the draft legislation (in which our present s 14 was cl 11):

> 42. **Part IV – Ascertainment of Income** – Clause 11 gives authority in general terms for the deduction of all outgoings and expenses wholly and exclusively incurred in earning the income. Certain deductions are mentioned specifically, e.g*.,* interest on borrowed money used in the business; rent payable by a trader in respect of land and buildings occupied by him for business purposes; bad and doubtful debts; contributions under the Widows & Orphans' Funds; and contributions to pension, provident or similar funds approved by the Commissioner.

Note the simple formulation to describe the coverage of s 14(1)(a): "interest on borrowed money used in the business". Counsel for the appellant submitted that that is what s 14(1)(a) was intended to cover and how it should be read. If so, then specific provision was already made in the Singapore Income Tax Ordinance from its inception to overcome the effect of the decision in the *European Investment Trust*. That this was the intention is reinforced when it is remembered that at that time s 15 was subject to the express provisions of s 14. Thus an item of interest expense qualifying for deduction under s 14 could not be disallowed by the general provisions of s 15(1)(c) ("… any sum employed or intended to be employed as capital"). The *European Investment Trust* case, therefore, was inapplicable to Singapore as long ago as 1948.

60 Prior to 1979, s 15(1) commenced with the words "subject to the provisions of this Act". However, the relationship between the two sections was regarded as one where the specific disallowances in s 15(1) would override the general deduction provision of s 14(1), but that if an item of expenditure passed the general positive test in s 14(1), it would not be disqualified under a general disallowance under s 15(1), especially s 15(1)(b). As counsel for the appellant pointed out, this made sense as the legislature could not have intended that an item of expenditure which qualified under the general test in s 14(1) should be disqualified under what was the

reverse of the same test in s 15(1)(b).

61 The Malaysian Federal Court in *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 endorsed this view of the relationship between the equivalent Malaysian sections (the Malaysian and Singapore income tax legislation both originating from the same colonial model):

> Section 39(1)(b) disallows "any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of producing the gross income." If we substitute the words "for the purpose of" for the word "in" the wording would then be the same as that of "the wholly and exclusively" test in section 33(1). On the basis that the Taxpayer's interest payments pass that test and are deductible under section 33(1), they will not be disallowed under section 39(1)(b).
>
> [*per* Lee Hun Hoe CJ (Borneo) at 254]

62 As matters stood before 1979, if the general allowance provision in s 14(1) was not overridden or qualified by the general disallowance provision in s 15(1)(b), even less would a specific allowance provision such as s 14(1)(a).

63 Counsel for the appellant correctly pointed out that this was but an application of the maxim of statutory construction *generalia specialibus non derogant*, *ie*, general provisions will not abrogate special provisions. As was stated in *Craies on Statute Law* (Sweet & Maxwell, 7th Ed, 1971) at p. 378, quoting the Privy Council in the case of *Barker v Edger* [1898] AC 748 at 754:

> When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision *unless it manifests that intention very clearly*. [emphasis added]

64 In 1979, the Act was amended by the Income Tax (Amendment) Act (No 7 of 1979). A new paragraph was added to s 15(1) to disallow expenses in respect of a motor car which was not a business service passenger vehicle (or "Q-plate" car). The words "Subject to" in s 15(1) were replaced by "Notwithstanding". In order to preserve the deductibility of some of the specific items under s 14(1) which would otherwise obviously run foul of the general disallowances in s 15(1), exceptions were carved out of some of the paragraphs in s 15(1).

65 Counsel for the appellant submitted that it was never envisaged that a specific deduction for interest on borrowed capital (provided for in s 14(1)(a)) was required to be saved from the general words of s 15(1)(b) or (c) because the accepted view was that the interest mentioned in s 14(1)(a) was of a revenue and not capital nature. I would go further to say that on the construction which I have placed on the words in s 15(1)(c), what is disallowed is a deduction in respect of the loan or advance and not the interest thereon. Accordingly, no saving words were required to be carved out of s 15(1)(c).

66 Counsel for the appellant's contention that the opening words "Subject to" were replaced by "Notwithstanding" to confer primacy on the disallowance for non Q-plate cars appears to be borne out by the Explanatory Memorandum to the Income Tax (Amendment) Bill (No 9 of 1979) and the Singapore Parliamentary Debates, Official Reports (30 March 1979) that sets out the speech of the Minister for Finance at the Second Reading of the Bill.

67 The entire explanation in the Explanatory Memorandum on the clause amending s 15(1)

reads:

> Clause 5 amends section 15 of the Act to disallow deduction of expenses incurred in respect of a motor vehicle which is not registered as a business service passenger vehicle.

> 68 The Minister's speech is similarly confined to an exposition of the "anomalous situation" being targeted:
>
> > A sole proprietor or a partner of a professional firm can register his car as a private vehicle, use it in connection with his business, and claim tax deduction for expenses under section 14 of the Income tax Act without having to pay the double road tax and Area Licence Fees applicable to business vehicles. To rectify this anomaly, clause 5 of the Bill seeks to amend section 15 of the Act to restrict the deduction for expenses only to motor cars which are registered as business service passenger vehicles.
>
> 69 Counsel for the appellant therefore submits that the legislature did not intend that the general disallowance provisions of s 15(1)(c) were a limit or interference with the specific allowance under s 14(1)(a). I accept that but more because, in my view, s 15(1)(c) was never intended to apply to interest.
>
> 70 On the basis of this construction of s 15(1)(c), the *Wharf* case would have no application in Singapore. …

20 With the greatest respect to the judge, we do not think the different sentence structures adopted in our s 15(1)(*c*) and in the UK equivalent were meant to convey different meanings. In our view, the two provisions were effectively stating the same thing. The word "deduction" in our s 15(1)(*c*) appears to us to refer to the same thing as the first "sum" in the UK provision. The phrase "in respect of" has been said to be the widest of any expressions intended to convey some connection between two related subject matters (*Nowegijick v The Queen* 83 DTC 5041 at 5045). A plain reading of s 15(1)(*c*) does not compel us to exclude interest expenditure from its scope. The said provision applies to all capital expenditure. Interest in respect of a capital purpose is capital expenditure and is therefore incurred as a "sum employed or intended to be employed as capital" within the meaning of s 15(1)(*c*).

21 Reading s 15(1)(*c*) in the way we have indicated above need not result in a conflict with s 14(1)(*a*). For the provisions to conflict, it would have to be assumed that s 14(1)(*a*) allows the deductibility of all interest, including interest in respect of sums employed as capital, which is what s 15(1)(*c*) would prohibit if it does apply to interest. However, s 14(1)(*a*) allows the deductibility of interest payable on a loan only if it was "payable on capital employed in acquiring the income". Where a taxpayer has borrowed money for investment and incurred interest on the loan, the investment must produce income for the interest expense to be deductible under the Act (*Andermatt Investments Pte Ltd v Comptroller of Income Tax* [1995] 3 SLR 451 at 460, [27] ("*Andermatt*"); *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484 at [48] ("*JD Ltd*")). If the loan is applied towards an accretion of capital, the interest incurred thereon is not a deductible item. This means, in the context of this appeal, that only the interest incurred after the grant of the TOP qualifies for deduction under s 14(1)(*a*). The operative provision that excludes interest on loans taken out for the acquisition of capital is therefore s 14(1)(*a*) and there is no need to resort to s 15(1)(*c*).

22 Is s 15(1)(*c*) therefore redundant? It may be said that ss 14(1)(*a*) and 15(1)(*c*) approach the issue of interest expenditure from different angles and mirror each other in effect. However, s 15(1)(*c*) still operates to preserve the exception (to the capital expenditure rule) embodied in s 14(1)(*h*)

(which permits capital expenditure in respect of mines or other sources of mineral deposits of a wasting nature to be deducted according to the rules made under s 7), thereby ensuring that s 14(1)(*h*) does not lose all effect after s 14 was made subordinate to s 15 by the legislative changes to the Act in 1979 (see [64] of the judge's judgment quoted above for the said changes).

23 In so far as reliance was placed on the Australian decision of *Steele* ([19] *supra*), we note that the Australian tax position has already been shown to be different from ours in that the former requires a weaker link between deductible expenses and the source of income (see *Andermatt* and *JD Ltd*). We also note that the three judges (Gleeson CJ, Gaudron and Gummow JJ) in *Steele* who made the remarks at [29] of that case quoted by the judge here ([8] *supra* at [72]), also said (at [27] and [33]) that the distinction between capital and revenue expenditure was not a critical one in Australian tax law:

> 27 … An example of the difference between the British and Australian systems is provided by the *European Investment Trust Co Ltd v Jackson*, a case decided eight years before Dixon J's observation, where Finlay J said that in the British system it was "thoroughly well established by a long line of cases that [interest] is not deductible if it is in truth the interest on capital". In that case, a distinction was drawn between a sum expended in order to earn profits, which formed a valid deduction in arriving at the profits, and a sum expended to obtain capital. That has never been the critical distinction in Australia.
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> …
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> 29 As was explained in *Australia National Hotels v FC of T*, interest is ordinarily a recurrent or periodic payment which secures, not an enduring advantage, but, rather, the use of the borrowed money during the term of the loan. According to the criteria noted by Dixon J in *Sun Newspapers Ltd and Associated Newspapers Ltd v FC of T* it is therefore ordinarily a revenue item. This is not to deny the possibility that there may be particular circumstances where it is proper to regard the purpose of the interest payments as something other than the raising or maintenance of the borrowing and thus, potentially, of a capital nature. However, in the usual case, of which the present is an example, where interest is a recurrent payment to secure the use for a limited time of loan funds, then it is proper to regard the interest as a revenue item, and its character is not altered by reason of the fact that the borrowed funds are used to purchase a capital asset. …
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> …
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> 33 … In particular, the distinction between acquiring a capital asset and holding it as an income-producing investment, which may be related to the concept of calculating the profits of a business activity, is not one upon which the Australian legislation turns.

24 Interest is derivative in nature. It owes its existence to a loan. Whether it is a capital or a revenue expense depends on the purpose for which the loan is employed. If the loan is used for developing a capital asset, the interest payable on that loan is not deductible for tax purposes. If the loan is employed in acquiring income, the interest thereon becomes deductible under s 14(1)(*a*). We therefore agree with the following statements made by the Privy Council in *Wharf* ((1997) MSTC 11,025 at 11,028 and 11,029):

> Thus, while the question of whether money is intended to be used for a capital or revenue purpose is inconclusive as to whether its receipt is a revenue receipt or an addition to the company's capital, the purpose of the loan during the period for which the interest payment was

> made is critical to whether it counts as a capital or revenue expense.
>
> …
>
> Each payment of interest must be considered in relation to the purpose of the loan during the period for which the interest is paid. Once the asset has been acquired or created and is producing income, the interest is part of the cost of generating that income and therefore a revenue expense.

Accordingly, we respectfully disagree with the judge that the interest incurred is inherently revenue in nature. As the loans in question were used to purchase and develop a capital asset in this case, the interest incurred thereon could not qualify as a deductible under s 14(1)(*a*) as it was a capital expense. It would naturally also be disallowed under s 15(1)(*c*). We would therefore uphold the decision of the ITBR on this second issue as well.

**Costs**

25 As indicated earlier, should we uphold the decision of the judge, the taxpayer urged us to order that each party bear its own costs because the Comptroller had succeeded on only one of the two grounds of appeal before the judge and since this was a test case. In the light of our decision above, the first basis for this submission has disappeared. On the second basis, this was a test case only in the sense that the taxpayer had decided to challenge established legal norms. The pre-commencement issue could hardly be said to be a novel point of law and the factual situation of the taxpayer was certainly not unique.

26 We saw no reason why costs should not follow the event in this appeal. We therefore dismissed the taxpayer's appeal with costs. The deposit for the appeal is to be paid out to the Comptroller as part of his costs.