Comptroller of Income Tax v HY
[2006] SGCA 7

Case Number : CA 89/2005

Decision Date : 07 March 2006

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Liu Hern Kuan and Joyce Chee (Inland Revenue Authority of Singapore) for the appellant; Leon Kwong Wing and Sharma Sundareswara (KhattarWong) for the respondent

Parties : Comptroller of Income Tax — HY

Revenue Law – Income taxation – Jurisdiction – Whether gains from exercise of stock options amounting to income under s 10(5) Income Tax Act – Whether income deriving from or accruing in Singapore – Sections 10(1), 10(5) Income Tax Act (Cap 134, 1996 Rev Ed)

7 March 2006 *Judgment reserved.*

Yong Pung How CJ (delivering the judgment of the majority):

1 The central issue in this appeal is whether the gains obtained by an individual through his exercise of certain employee stock options are liable to be taxed in Singapore.

Background

2 The facts are undisputed and straightforward. The taxpayer was employed as the chief financial officer of Standard Chartered PLC in the UK on 26 April 1990. From August 1990 to March 1994, the taxpayer acquired seven options under the Standard Chartered Executive Share Option Scheme ("the Option Scheme") to acquire shares in his employer company. Under the Option Scheme, it was provided that the taxpayer would only be able to exercise the options: (a) three years after the date of grant; and (b) if he continued to be in employment within the Standard Chartered group of companies. Some months later in October 1994, the taxpayer was posted to the Singapore branch of Standard Chartered PLC where he has been employed since then.

3 In April 1997, about three years after he commenced employment in Singapore, the taxpayer decided to exercise the options and use the proceeds to purchase a house in Mauritius. On 28 April 1997, the taxpayer signed the notices of exercise of the options while he was in Singapore. In accordance with the rules in the Option Scheme, the notices of exercise, together with the option certificates and full payment for the shares which were the subject matter of the options, were then delivered to the registered office of Standard Chartered PLC in London. The taxpayer subsequently sold the shares on the London Stock Exchange. The sale proceeds were not remitted into Singapore.

4 The Comptroller of Income Tax ("the Comptroller") imposed tax on the gain that the taxpayer had derived in exercising the stock options, which amounted to $5,044,710 (being the difference between the price the taxpayer paid for the shares in question and the price of those shares on the London Stock Exchange at the time the options were exercised).

5 The taxpayer appealed against the Comptroller's assessment to the Income Tax Board of Review, which dismissed the appeal. On further appeal to the High Court, Choo Han Teck J ("the judge") allowed the appeal, taking the view that the taxpayer's gains from the exercise of the stock

options were not taxable in Singapore (see *HY v Comptroller of Income Tax* [2005] 4 SLR 315).

The decision below

6 It appears that the judge approached the issue of whether the taxpayer's stock option gains were taxable in Singapore by asking two questions: first, whether the gains qualified as "income" within the meaning of s 10(5) of the Income Tax Act (Cap 134, 1996 Rev Ed) ("the Act") which was the applicable provision at the material time; and second, if so, whether such income fell to be taxed by virtue of s 10(1) of the Act.

7 The relevant parts of the then s 10(5) provided as follows:

> Any gains … directly or indirectly derived by any person by the exercise … of a right … to acquire shares in a company shall, where the right … is obtained by that person by reason of any … employment held by him, be deemed to be income …

Section 10(1) states:

> 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*) …
>
> (*b*) gains or profits from any employment;
>
> …
>
> (*g*) *any gains or profits of an income nature not falling within any of the preceding paragraphs*.
>
> [emphasis added]

The parties were in agreement that, at the relevant time, gains derived from the exercise of a stock option fell within s 10(1)(*g*) and not s 10(1)(*b*).

8 The judge observed that s 10(5) did not state its territorial reach, there being no country specified or excluded. As a result, and because tax laws are territorial, in the judge's view, the scope of s 10(5) had to be restricted to Singapore. In particular, the judge seemed to have thought that the phrase "by reason of any employment" under s 10(5) had to therefore refer to employment in Singapore. He went on to hold that an essential requirement for stock option gains to amount to income caught by s 10(5) was that the person exercising the option had to be employed in Singapore at the time the stock option was granted to him. As such, since the taxpayer was not employed in Singapore when the stock options were granted to him, the gains that he derived from exercising the options were not liable to be taxed in Singapore.

9 Given the judge's conclusion that the taxpayer's gains did not qualify as income under s 10(5) of the Act, he did not, strictly speaking, have to go further to consider whether those gains had "accrued in" or were "derived from" Singapore under s 10(1) (or as the judge put it, whether there was a material connection between the gains and Singapore). Nonetheless, in the course of his judgment, the judge still dealt with this issue by considering the location where the stock options

were exercised by the taxpayer.

10 The judge was of the view that the place of exercise of the options had to be London and not Singapore. This was because the mere signing of the notices in Singapore was an incomplete act, and it was the act of delivering the notices together with payment to the Standard Chartered office in London which constituted the exercise of the options. As such, according to the judge, the gains in question had no material connection with Singapore and fell outside s 10(1)(*g*).

The appeal

11 Before us, counsel for the Comptroller made two main submissions. First, he submitted that the judge had erred in finding that the gains derived by the taxpayer from the exercise of the stock options did not constitute income falling under s 10(5) of the Act. Second, he submitted that those gains of the taxpayer were "derived from" or had "accrued in" Singapore, and were therefore liable to be taxed under s 10(1)(*g*). Each submission will be dealt with in turn.

Whether gains amounted to income under section 10(5) of the Act

12 Both parties presented arguments in respect of s 10(5). It is convenient at the outset to dispose of some of these arguments which clearly lack merit. Counsel for the Comptroller argued that the judge had erroneously relied on the majority ruling in the House of Lords decision of *Abbott v Philbin (H M Inspector of Taxes)* [1961] AC 352 ("the *Abbott* case"), which determined that stock options were taxable at the point of grant as opposed to the point of exercise and that the tax imposed would be based on the value of the options at the point of grant. This argument is obviously flawed. It is evident that the judge had appreciated that tax is not to be imposed at the point of grant, and instead should be imposed on the gains that are obtained from the exercise of the options. In fact, the judge explicitly accepted this as a consequence of the enactment of s 10(5). He stated at [6] of his judgment:

> Consequent to the *Abbott* case, the English parliament amended their tax laws, and our Legislature did likewise in 1973, when it introduced the s 10(5) provision relied upon by the Comptroller in this case. Hence, as at 30 April 1997, *a share option would be taxed at the time it was exercised*. Thus, for income to be taxable under s 10(1)(*g*), it would be necessary to establish a connection between the appellant's exercise of his stock options and Singapore. [emphasis added]

It further appears to be common ground in this appeal that the minority holding in the *Abbott* case represents the correct position under s 10(5), and the Comptroller's arguments in this regard are hence of little relevance.

13 Turning to the arguments of the taxpayer, his counsel contends that the scope of s 10(5) was limited to stock option gains in Singapore. It is not exactly clear what is meant by such a contention. Counsel for the taxpayer referred to the following comment made by the then Minister of Finance Mr Hon Sui Sen during the Second Reading of the Income Tax (Amendment) Bill 1973 (*Singapore Parliamentary Debates, Official Report* (26 July 1973) vol 32 at cols 1244–1245):

> The Stock Exchange, which witnessed a lot of speculative activity last year, also saw the emergence of "share option schemes". Such share option schemes allow directors and employees to take an option to buy shares in the company at often a nominal price. Clause 3 of the Income Tax Act [which led to the insertion of s 10(5)] will make it clear beyond doubt that gains or profits from share option schemes are liable to income tax.

The argument appears to be that s 10(5) was created only to deal with stock option schemes relating to shares that are traded on the Singapore Stock Exchange. In addition, throughout the hearing before us and in his written submissions, counsel for the taxpayer maintains that this is a case involving stock options that were granted in the UK and that were *exercised in the UK*, in respect of shares traded on the UK stock exchange. Hence, it is argued, the option gains derived clearly fell outside the territorial limits of s 10(5).

14 The above arguments by counsel for the taxpayer are untenable. Firstly, the arguments assume that the stock options were exercised in the UK, when that is precisely a matter that is being disputed by the Comptroller. As for the contention that s 10(5) concerned only stock options in respect of shares traded on the Singapore Stock Exchange, it will suffice to refer to the following passages from the decision of the Income Tax Board of Review (*HY v Comptroller of Income Tax* [2004] SGITBR 4 at [28] and [29]) which rejected such a contention:

> [T]he words "benefit… to acquire shares in a company," when read in its grammatical and ordinary sense would include share options in any company wherever it is incorporated. This is in view of the statutory definition of "company" in s 2 of the Income Tax Act which reads that "company" means any company incorporated or registered under any law in force in Singapore or elsewhere. … Thus, section 10(5) would apply to share options for all companies, whether incorporated locally or outside Singapore. Hence, this would include share option schemes on any Stock Exchange, be it the Singapore Stock Exchange or on a Stock Exchange outside Singapore such as the London Stock Exchange.
>
> …
>
> There is nothing in the Minister's speech that categorically states that the scope of s 10(5) of the Income Tax Act was to be limited to address only those share options schemes that are on the Stock Exchange of Singapore or those similar schemes in Singapore. If it were so, the draftsman would have use [*sic*] much clearer language by inserting the words "listed on the Stock Exchange of Singapore" after the word "company" in subsection 10(5).

15 In our view, the real issue in relation to s 10(5) is whether, on a proper interpretation of the section, there was a requirement (as the judge had found) that the taxpayer had to be employed in Singapore at the point of grant of the options before what he earned from the exercise of those options could be regarded as "income" under the section. To this question, counsel for the taxpayer has unfortunately not made any submissions at all. Counsel for the Comptroller on the other hand contended that there could not have been such requirement as it was not expressly provided for under s 10(5). In support of this contention, he makes reference to the 2002 Budget Statement made by the Minister of Finance, Deputy Prime Minister Lee Hsien Long (as he then was) (see *Singapore Parliamentary Debates, Official Report* (3 May 2002) vol 74 at col 702), the salient extracts of which are:

> I have studied the proposals, and decided to *make the following changes*:
>
> (i) *To exempt from tax stock options granted for non-Singapore employment* even if they are exercised in Singapore.
>
> …
>
> **ANNEX 8: Changes to Tax Treatment of Stock Options**

Exempting from tax stock options granted for non-Singaporean employment

1. Currently, if an employee exercises his stock options while he is in Singapore or holding Singapore employment, he would be taxed on the gain from the exercise of his stock options, *even if the options were granted for employment elsewhere*.

[emphasis added]

Counsel for the Comptroller also refers to the Minister's speech during the Second Reading of the Income Tax (Amendment) Bill in Parliament on 25 November 2002 (*Singapore Parliamentary Debates, Official Report* (25 November 2002) vol 75 at col 1531):

(o) To further enhance our share option incentive scheme, I announced the *following changes* to the tax treatment of stock option[s] …:

(i) *Gains from stock options granted in respect of overseas employment will not be taxed*. Correspondingly, gains from stock options granted in respect of Singapore employment will be taxed no matter where the stock options are exercised; …

[emphasis added]

16 The above ministerial statements are relied upon by the Comptroller to imply that the position before the amendments in Act No 37 of 2002 had to be that gains from stock options were subject to tax in Singapore no matter where they were granted, as long as they were exercised in Singapore. The Comptroller's argument is that if the position had been that the person exercising the options had to be employed in Singapore at the point of grant, the legislative amendments would have been redundant.

17 It is true that s 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) allows us to have recourse to parliamentary speeches in interpreting statutory provisions. It must also be noted that s 9A(3) specifically provides that the speeches made by a Minister during the Second Reading of a Bill can be relied on in the interpretation of a provision contained *in that Bill*. In the present case, the Comptroller is seeking to rely on a Minister's speech delivered during the Second Reading of an Amendment Bill made some 30 years after the enactment of the previous Bill in which the provision in question is to be found, to imply what the position ought to have been under the previous Bill.

18 In relation to the Budget Statement, as pointed out by counsel for the taxpayer, the Minister could merely be describing the then existing practice that was being adopted by the tax authorities, the legality of which is precisely being challenged and which falls to be determined in this appeal.

19 We think that the proper approach to decide whether s 10(5) was restricted to cases where the option holder had been employed in Singapore at the point of grant should be to examine the framework of our tax legislation and the basis for taxation in Singapore. Income is only taxable in a country if it falls within its tax jurisdiction. While each country is free to decide how wide its tax net should be, limits are usually placed because the country must be able to enforce the tax within its net. In Singapore, such restrictions come in two forms. First, income will only be liable to tax if it is derived from or accruing in Singapore. This is known as the territorial basis of taxation. Second, income is taxable if it is received in Singapore from outside Singapore. This is known as the remittance basis. Both bases of taxation are found under s 10(1). As such, s 10(1) is the charging provision that sets the limits of Singapore's tax jurisdiction. On the other hand, s 10(5) was merely a deeming provision which included gains from the exercise of stock options as income. With respect, the judge

therefore erred in thinking that there was a separate or additional jurisdictional hurdle to be crossed under s 10(5). Any question of the territorial or geographical scope of Singapore's tax jurisdiction is only to be found in the test under s 10(1). Section 10(5), being in its nature just a deeming or definitional provision, simply told us that a particular type of gain (*ie*, gains from exercise of stock options) qualified as income under our tax laws, without necessarily saying whether or not such an income in any particular case in fact fell to be taxed in Singapore. Accordingly, "by reason of employment" under s 10(5) did not refer to employment *in Singapore* or in any particular country.

20 Therefore, it matters not that the taxpayer was employed in the UK and not Singapore when the stock options were granted to him. Given that there is no dispute that the gains in question were clearly obtained by the taxpayer from his exercise of the stock options which were granted to him by reason of his employment, the gains are caught as income under s 10(5). We move on to consider whether such income was derived from or accruing in Singapore.

Whether income "derived from" or "accruing in" Singapore

21 It has been held by the Privy Council that the word "derived" bears no special meaning and can be treated as synonymous with "arising" or "accruing": *Commissioner of Taxation v Kirk* [1900] AC 588 at 592. In *Chandos Pte Ltd v Comptroller of Income Tax* [1987] SLR 287, L P Thean J held that the words "derived from" connoted the concept of the *source* of the income. He explained at 295–296, [24] that:

> [S]ource is not a legal concept but something which *a practical man would regard as a real source of income*, and the ascertaining of the actual source is *a practical hard matter of fact*. [emphasis added]

Thean J further adopted the following elaboration on the notion of "source" in *Commissioner for Inland Revenue v Lever Brothers & Unilever Ltd* (1946) 14 SATC 1 at 8:

> [T]he source of receipts, received as income, is not the quarter whence they come, but the *originating cause* of their being received as income and that this originating cause is *the work which the taxpayer does to earn them* … [emphasis added]

22 In *Commissioner of Inland Revenue v Hang Seng Bank Ltd* [1991] 1 AC 306, the Privy Council at 322–323 explained that the general approach in determining the originating source of the profit that is sought to be taxed is to examine what the taxpayer had done to earn that profit:

> [T]he question whether the gross profit resulting from a particular transaction arose in or derived from one place or another is always in the last analysis *a question of fact depending on the nature of the transaction*. It is impossible to lay down precise rules of law by which the answer to that question is to be determined. The *broad guiding principle*, attested by many authorities, is that one looks to see *what the taxpayer has done to earn the profit in question*. If he has rendered a service or engaged in an activity such as the manufacture of goods, the profit will have arisen or derived from the place where the service was rendered or the profit making activity carried on. [emphasis added]

23 In *Commissioner of Inland Revenue v HK-TVB International Ltd* [1992] 2 AC 397, the taxpayer company acquired certain films and their rights of exhibition, and exploited those rights to make profits by granting sub-licences to overseas customers. In deciding whether those profits accrued in or were derived from Hong Kong, the Privy Council held that the proper approach was to ascertain what the operations which produced the profits were and where those operations took

place. Since the acquisition and exploitation of those film rights by the taxpayer company took place in Hong Kong, even though the rights were only exercisable by the sub-licensees overseas, the profits that the taxpayer company made were still regarded as having accrued in or been derived from Hong Kong.

24 As is clear from the above authorities, in deciding whether income was derived from or accruing in Singapore, one must look to the originating source of those gains or profits. This is essentially a question of fact to be determined based on a scrutiny of the circumstances in each individual case. It is impossible to lay down fixed legal rules or tests, and a practical approach based on what a practical man would regard as the real source of income is to be adopted. The broad guiding principle is to focus on what the taxpayer had done which earned him the gains or profits in question, and then to identify the location where those activities that he had engaged in or the work he had done took place. This may be a difficult inquiry, bearing in mind that the gains or profits may typically be derived from a series of activities which may take place in more than one country.

25 Reverting to the present case, the parties, realising that the income in question constituted gains that resulted from an exercise of stock options, seek to answer the question of whether that income originated from Singapore by trying to ascribe a locality to the exercise of those options. The Comptroller places emphasis on the fact that the notices of exercise of the stock options were signed by the taxpayer in Singapore, and that the taxpayer had done all that he was legally and procedurally required to do in the Option Scheme to exercise the options while he was in Singapore. On the other hand, the taxpayer contends that it was the act of delivering the notices accompanied with payment to the registered office of Standard Chartered PLC in London that constituted the act of exercising the options. The judge appears to have agreed with the taxpayer's analysis and held that the options were hence exercised in the UK and not in Singapore.

26 However, it seems to us that none of the above factors relied upon by the respective parties should be determinative of the place of accrual or derivation of income. After all, the exact procedure to exercise the stock options, such as where the option certificates and payment are to be delivered to, will very much depend on the terms of the particular option in question, which may be different in each case. As for the place where the notices of exercise are signed, it could be purely fortuitous as well. Indeed, it seems difficult to come up with a test to ascertain the place of exercise of stock options. We would hesitate to follow the lead of our learned colleague, Chao Hick Tin JA, who, in his dissenting judgment, appears to adopt a general rule that the place of exercise is determined by the prescribed location where the notice of exercise and payment are delivered. To our minds, the answer, if it can be found, will have to turn on the particular terms and conditions of the option scheme in each individual case.

27 We can however put aside these difficulties in deciding the place of exercise of the options. In our view, the proper approach to ascertaining the place of accrual of the gains should be to examine the activities or work that the taxpayer had engaged in which earned him the right to exercise the stock options. The location where those activities were carried out will give us the true source or origin of the gains that he obtained from the exercise of those options.

28 It will be recalled that the taxpayer was employed at the Standard Chartered office in the UK when he had acquired the seven stock options in question. Following that, the taxpayer worked in the Singapore office of Standard Chartered for three years before he exercised the options. It is important to bear in mind that the taxpayer's continued employment with Standard Chartered PLC was a prerequisite for the exercise of the options.

29 The question to be decided is whether it was: (a) the taxpayer's initial employment in the UK

at the point of grant of the options; or (b) his subsequent employment in Singapore leading up to the exercise of the options, which earned him the right of exercise. Applying a practical approach, and bearing in mind that we are concerned with the exercise of the options and not their initial grant, the real source of the stock option gains was in Singapore and not the UK. Even though the taxpayer was employed in the UK at the point of the grant, this does not necessarily mean that the subsequent gains that he obtained from the exercise of those options some years later (when he was already based in some other country) can be said to have originated from the UK. A practical man would regard the taxpayer's continued employment in Singapore in the three years leading up to the exercise of the stock options as the real source of the gains. It was the work that the taxpayer had done during the three years in Singapore which enabled him to exercise the stock options. Singapore and not the UK should be regarded as the country that contributed to the accrual of the gains.

30 On the other hand, our learned colleague Chao JA chooses to focus on the point of crystallisation of the stock options in deciding the place of accrual or derivation of the gains. Each of the seven options was granted to the taxpayer at different dates. As noted earlier, it was a term in the Option Scheme that the options could only be exercised three years after they were granted, *ie*, effectively the options had a maturity period of three years. Five out of the seven stock options had only matured or crystallised after the taxpayer was posted to work in the Singapore office of Standard Chartered PLC. In comparison, for the first two stock options, these had already matured when the taxpayer was still being employed in the UK and before his posting to Singapore. Since the first two options had crystallised when the taxpayer was still working in the UK, Chao JA takes the view that the gains derived from the subsequent exercise of these two options must accordingly also be regarded as having been derived from the UK. As for the other five options that crystallised in Singapore, Chao JA is prepared to hold that the gains derived from their exercise are taxable in Singapore.

31 We find ourselves unable to agree with such an approach that draws a distinction in tax treatment based on where the taxpayer happened to be employed at the time when the respective stock options matured. The place of employment at the point of crystallisation of each stock option does not necessarily reflect the location where the taxpayer had earned the right to exercise it. It follows that where the taxpayer was employed when the stock option crystallised cannot be determinative of where the gains from a subsequent exercise of that option are derived from. Furthermore, Chao JA's approach ignores the fact that the taxpayer was working in the Standard Chartered office in Singapore for three years before he exercised the two stock options in question. The taxpayer's continued employment with Standard Chartered PLC, which had taken place in Singapore, was a prerequisite for the exercise of the stock options, even in respect of these first two of the seven options. There is nothing fortuitous about the result we have arrived at. The taxpayer's gains are taxed in Singapore precisely because he had spent a substantial period of time working in Singapore, earning him the right to exercise the seven stock options.

32 As a result, we find that the gains obtained from the exercise of all the seven options had accrued in or were derived from Singapore, and were liable to be taxed in Singapore.

33 For the above reasons, we allow this appeal with costs. The security deposit will be released to the appellant.

Chao Hick Tin JA (delivering the dissenting judgment):

34 This appeal raises the question as to whether certain gains made by an individual pursuant to the exercise of stock options are liable to tax. The respondent in this appeal is the taxpayer. The Comptroller of Income Tax ("the Comptroller") assessed the gains to tax under s 10(1)(*g*) read with

s 10(5) of the Income Tax Act (Cap 134, 1996 Rev Ed) ("the Act"). The taxpayer's appeal against the assessment failed before the Income Tax Board of Review, but succeeded in the High Court. This is the Comptroller's appeal.

35 The following are the agreed facts. On 26 April 1990 the taxpayer was engaged by the Standard Chartered PLC ("SCB" or "the employer" as may be appropriate) in the UK as its chief financial officer of the Treasury Department. Between June 1990 and October 1994, when he was so employed, he was granted seven options to acquire shares of SCB as follows:

Date option granted	Quantity
17 August 1990	72,000
12 September 1991	64,000
21 April 1992	32,000
11 September 1992	28,000
7 April 1993	20,000
22 October 1993	20,000
11 March 1994	20,380

36 In October 1994, the taxpayer was posted to serve at the Singapore branch of SCB. He has to date been so employed in Singapore. On 30 April 1997, while so employed in Singapore, the taxpayer exercised the seven options by "delivering to Standard Chartered PLC at its registered office in London a prescribed form of notice accompanied by the option certificates and payment in full of the subscription price of the shares".

Relevant statutory provisions

37 The relevant parts of s 10(5) of the Act (as it stood at the material time) ("s 10(5)"), which rendered gains obtained through the exercise of share options to be gains of an income nature, read:

> Any gains or profits directly or indirectly derived by any person by the exercise … of a right … to acquire shares in a company shall, where the right … is obtained by that person by reason of any … employment held by him, be deemed to be income …

The subsection then proceeded to provide how the gains were to be determined.

38 Section 10(1) of the Act ("s 10(1)"), which is the charging provision, reads:

> Income tax shall … be payable at the rate or rates specified … upon the income of any person

accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of —

…

(*b*) gains or profits from any employment;

…

(*g*) any gains or profits of an income nature not falling within any of the preceding paragraphs.

[emphasis added]

It was common ground that the gains derived by the taxpayer from the exercise of the share options did not fall within s 10(1)(*b*) but s 10(1)(*g*).

39 It is also not disputed that for the gains of the taxpayer to be taxable, they must fall within the scope of both ss 10(5) and 10(1).

Section 10(5)

40 From the arguments of the taxpayer, the first issue that requires determination is the construction of the expression, "right is obtained … by reason of any employment", in s 10(5). Following from the basic premise that tax laws, and I would say of any other law, shall *prima facie* only have territorial effect, the judge below, Choo Han Teck J, came to the view that the term "any employment" in the provision had therefore to mean employment in Singapore and that for a stock option to fall within the provision, the option must have been granted to an employee by his employer when the former is employed in Singapore. He explained (at [7] of his judgment reported at [2005] 4 SLR 315):

> [Section]10(5) … imposed a tax liability in respect of gains derived from the exercise of a right obtained by reason of an employment held by him. No country or place was specified or excluded, and thus, the only country of relevance is Singapore because tax laws are territorial.

41 During the Second Reading of the Income Tax (Amendment) Bill 1973 and when commenting on the provision which later became s 10(5), the Minister for Finance said (*Singapore Parliamentary Debates, Official Report* (26 July 1973) vol 32 at cols 1244–1245):

> The Stock Exchange, which witnessed a lot of speculative activity last year, also saw the emergence of "share option schemes"? Such share option schemes allow directors and employees to take an option to buy shares in the company at often a nominal price. Clause 3 of the Income Tax Act [which led to the insertion of s 10(5)] will make it clear beyond doubt that gains or profits from share option schemes are liable to income tax.

42 While s 10(5) did not expressly provide that the share option must relate to shares traded on the Stock Exchange of Singapore ("SES"), the rationale for the provision clearly had shares traded on the SES in mind. Nevertheless, it is important to note that the term "company" is defined in the Act to mean a company incorporated in Singapore or elsewhere. So the question is, was Choo J correct in holding that for a stock option to fall within s 10(5), it must have been granted to the employee while he was in employment in Singapore.

43 The taxpayer supported the view of Choo J, relying on the principle that the Act is territorial in scope. However, the Comptroller contended otherwise, and argued that there was no such restriction in s 10(5). In this regard, the Comptroller relied on two statements made by the Minister for Finance in Parliament. First, in the 2002 Budget Statement, the Minister for Finance said (*Singapore Parliamentary Debates, Official Report* (3 May 2002) vol 74 at col 702):

> I have studied the proposals, and decided to make the following changes:
>
> (i) To exempt from tax stock options granted for non-Singapore employment even if they are exercised in Singapore. …

In Annex 8 to the Minister's speech was the following statement:

> Exempting from tax stock options granted for non-Singaporean employment
>
> 1. Currently, if an employee exercises his stock options while he is in Singapore or holding Singapore employment, he would be taxed on the gain from the exercise of his stock options, even if the options were granted for employment elsewhere.

44 The second statement was on the occasion when the Minister made the Second Reading speech on 25 November 2002 on the Income Tax (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (25 November 2002) vol 75 at col 1531):

> (o) To further enhance our share option incentive scheme, I announced the following changes to the tax treatment of stock option[s] … :
>
> (i) Gains from stock options granted in respect of overseas employment will not be taxed. Correspondingly, gains from stock options granted in respect of Singapore employment will be taxed no matter where the stock options are exercised; …

45 These speeches of the Minister for Finance made in 2002 are clearly irrelevant to determining the intention of Parliament in enacting s 10(5) in 1973. My learned brethren have, in their majority judgment, pointed out why those speeches could not have assisted us in determining the intention of Parliament in enacting s 10(5) in 1973. A practice of the Comptroller could hardly constitute a proper basis to determine how a statutory provision should be construed. Of course, if it is treated purely as a view of the Comptroller for the consideration of the court, that is another matter altogether.

46 I agree that, as a general rule, a statutory provision should be construed to have only territorial effect. However, this is not to say that Parliament may not enact laws which will have extra-territorial effect. Parliament may express such an intention either explicitly or by necessary implications. Parliament has indeed, in s 10(1), provided expressly that incomes earned abroad are chargeable to tax if those incomes are "received in Singapore". In this regard, a useful comparison would be to refer to the source of income described as "gains or profits from any employment" in s 10(1)(*b*). Like in s 10(5), the word "employment" in s 10(1)(*b*) is not qualified or restricted to employment in Singapore. If it is correct to say that employment incomes under s 10(*b*) should be confined to Singapore employment, then it must also follow that the other sources of income specified in ss 10(1)(*a*), (*d*), (*e*) and (*f*) should be similarly qualified. If foreign incomes of whatever sources do not come within s 10(1), why would Parliament in the same provision enact that foreign incomes, if received in Singapore, are liable to tax? The court should not construe that Parliament intended to enact in vain. Quite clearly, the reason why Parliament had provided that foreign incomes, if remitted to Singapore, would be taxable, would be because the foreign incomes would fall within one of the

sub-paras of s 10(1). If the foreign incomes do not fall within any of the sub-paras of s 10(1), they would remain non-taxable even if remitted to Singapore. Therefore, incomes from employment abroad, if remitted back to Singapore, are taxable in the hands of a resident.

47 In the result, I agree with my learned brethren that the term "employment" in s 10(5) should not be construed to mean only employment in Singapore.

Section 10(1)

48 I now turn to consider the charging provision. Under s 10(1), for income under any of the sources specified in sub-paras (*a*) to (*g*) to be liable to tax, the income must be "accruing in or derived from Singapore or received in Singapore". There is a distinction between income earned in Singapore and those earned abroad. For the latter income, it must be remitted here to be liable to tax.

49 In an affidavit which the taxpayer filed in these proceedings, he deposed that in the last week of March 1999 he and his wife, a Mauritian, bought a property in Mauritius. It was in early April 1999, while vacationing in Phuket, that they decided to exercise the options, sell the shares and use the net proceeds to pay for the house they were designing and building in Mauritius. On 28 April 1999, he signed the notices of exercise on the option certificates in Singapore. He made arrangement with DHL to have the notices delivered to the Mayfair and Regent Street branch of SCB at Park Lane, London. He also made arrangements with the same branch to give him an overdraft to pay for the shares which he would be purchasing on exercising the options.

50 On 30 April 1997, the taxpayer exercised the options by having his agent in England deliver the certificates, notices of exercise and payment in full of the subscription price for the shares to SCB at its registered office at 1 Aldermanbury Square, London. Subsequently, between that date and 29 May 1997, the taxpayer sold all the shares he purchased on the London Stock Exchange, repaid the overdraft extended to him by the Mayfair and Regent Street branch of SCB, plus interest, and utilised or invested the balance outside Singapore. No gains thereby obtained on account of the exercise of the share options were remitted to Singapore. The aforesaid facts were not disputed by the Comptroller.

51 I next move to consider the terms governing the grant of the share options to the taxpayer. Subject to certain exceptions which do not concern us here, rule 6(1)(a) of the Option Scheme provides that an option "shall not be exercisable before the third anniversary of the Date of Grant". Rule 6(3) provides that if an option holder "ceases to be employed within the [SCB] Group any Option granted to him shall lapse and not be exercisable" except where he ceases to be so employed by reason of:

(i) injury,

(ii) disability,

(iii) redundancy within the meaning of the Employment Protection (Consolidation) Act 1978,

(iv) his employment is in a company of which the Company ceases to have Control or the business in which he is employed is transferred to a person who is neither an Associated Company nor a company of which the Company has Control, or

(v) retirement at normal retirement age under his contract of employment (or earlier at the

discretion of the Board).

52 The effect of these terms is that the taxpayer must remain in the employment of the SCB group for a period of three years after each grant in order for him to acquire the rights to purchase the specified shares in the grant. It would also appear that an option, unless exercised, will lapse if the option holder ceases to be an employee. Thus, an employee must remain an employee to be able to exercise the option which has become crystallised.

53 As of the date the taxpayer was posted to Singapore, the first two of the options grant had crystallised and could be exercised by him. The last five options crystallised on diverse dates after the taxpayer had commenced his employment in Singapore.

54 Under s 10(5) a share option was to be taxed at the time of its exercise and the gains determined as at that date. The Income Tax Board of Review was of the view that by signing the notices, the taxpayer had done all he could to exercise his rights under the options. Choo J said that this view is erroneous and I agree. He said (at [6]):

> The mere signing of the notices is an incomplete act. A person could have signed the notices and not deliver them at all; in which event, the option rights cannot be said to have been exercised. The jurisdiction in which he signed the notices could also have been fortuitously chosen. He could have signed a notice on a plane while in Singapore before falling asleep, waking to sign the next notice in Kuala Lumpur.

55 The steps which the taxpayer described that he took to exercise the share options are consistent with the common practice on how "share options" or "rights issues" are in general exercised. There are three essential steps to complete the exercise of an option:

(a) to sign the exercise notice;

(b) to effect payment for the same in the prescribed manner; and

(c) to have both (a) and (b) delivered to the prescribed office.

I should add here that in relation to (c), rule 6(4) of the Option Scheme provides that the required documents and payment must be "delivered to or sent by pre-paid post to the Company at its Registered Office or at such other place as the Board [of Directors] shall prescribe".

56 While steps (a) and (b) are essential to a valid exercise, it is the final step (c) which completes the transaction and compels SCB to issue the subscribed quantity of shares to the taxpayer at the specified price. If the taxpayer had taken steps (a) and (b), but had failed (*eg*, due to oversight) to deliver the same to the prescribed office, there could be no exercise of the option. Steps (a) and (b), while essential, could be taken in any part of the world. It could even be in London, say while the taxpayer was taking his vacation there. But step (c) is immutable. The required documents duly executed, together with the required payment, must be delivered to the prescribed office. In my opinion, the options were exercised in London. However, that does not necessarily mean that the option gains may not be liable to tax in Singapore.

57 It is not in dispute that the taxpayer made substantial gains upon the exercise of the options. For these gains to be taxable, they must be shown to be "accruing in or derived from Singapore" or "received in Singapore". As the gains were never remitted to Singapore, there could be no question of receipt in Singapore. To be liable to tax, it must be shown that the option rights, and

in turn the gains were accrued in or derived from Singapore.

58 The question whether an income accrued in or was derived from Singapore came up for consideration in the case of *Chandos Pte Ltd v Comptroller of Income Tax* [1987] SLR 287 ("*Chandos Pte Ltd*"). There, the lender and borrower, who were based in Singapore, took a short trip to Johor Baru, Malaysia and executed the loan agreement there. The cheques representing the loan were handed over to the borrower in Johor Baru. The question that arose for consideration was whether the interest earned on the loan was derived from Singapore. It was contended by the lender that the interest was not derived from Singapore. This argument was rejected by L P Thean J who said (at 295–296, [24]):

> Such a finding of the source of the interest is much too superficial and also artificial; it looks only at the formal or symbolic side of the transaction and ignores other salient facts surrounding it. In finding the source of interest in this case I echo the oft-quoted dictum of Isaac J in *Nathan v Federal Commissioner of Taxation* (1918) 25 CLR 183 that source is not a legal concept but something which a practical man would regard as a real source of income, and the ascertaining of the actual source is a practical hard matter of fact.

59 Having reviewed the material facts of the case Thean J came to this conclusion (at 296–297, [24]–[25]):

> Given all these facts, it just cannot possibly be argued that a practical man would regard the source of income in respect of the interest as not being in Singapore. Such a practical man would also regard as highly artificial the selection of Johore Bahru as a place for execution of the loan agreement and handing over of the cheque, and would find it difficult to accept that the source can be affected by the ceremonial acts performed there: the execution of the loan agreement and handing over of the cheque. In respect of such acts which, to use the words of Turner J, were all really merely embroideries, but which of course the parties were entitled to carry out, I can do no better than quote the following passage from the judgment of Rich J in *Tariff Reinsurances Ltd v Commissioner of Taxes* (1938) 59 CLR 194 at p 208:
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> > … We are frequently told, on the authority of judgments of this court, that such a question is a hard, practical matter of fact. This means, I suppose, that every case must be decided on its own circumstances, and that screens, pretexts, devices and other unrealities, however fair may be the legal appearance which on first sight they bear, are not to stand in the way of the court charged with the duty of deciding these questions. But it does not mean that the question is one for a jury or that it is one for economists set free to disregard every legal relation and penetrate into the recess of the causation of financial results, nor does it mean that the court is to treat contracts, agreements and other acts, matters and things existing in the law as having no significance.
>
> I am not disregarding the fact that the parties had executed the loan agreement and certainly the loan agreement must be given its full effect, but the selection of Johore Bahru for executing the loan agreement and the handing over of the cheque there, could have no consequence in determining the source of the interest paid on the loan; it could not have any pretension to Johore Bahru as a place where the source of the interest was. On these facts I have no hesitation in coming to the conclusion that the interest on the loan was derived from Singapore .

60 While the Comptroller recognised that the facts in *Chandos Pte Ltd* were different from those of the present case, he submitted that the same approach should be adopted in the present. I have no problem with accepting the same approach. However, it is important to note that in *Chandos Pte*

Ltd, the parties who had no connection with Johor Baru decided to carry out the arrangement there. For their own reasons, everything was done in Johor Baru. With respect, I agree that Thean J was quite correct to describe the whole arrangement as artificial. But, in the present case, there was nothing in the share options granted to the taxpayer which was artificial. Indeed, at the times the various options were granted to the taxpayer, he was still serving in London. Unlike the arrangement in *Chandos Pte Ltd*, the options were granted *bona fide*. The object of the grants had all to do with giving incentives to a good employee, nothing to do with taxation. Whether the benefits derived from the grants would be liable to tax would have to be left to the laws of the applicable jurisdiction. The same cannot be said of the arrangement in *Chandos Pte Ltd*. Thus, the considerations that were material in *Chandos Pte Ltd* were wholly absent here.

61 I appreciate that the last five options granted to the taxpayer had not yet crystallised when he was posted to Singapore. The taxpayer served the remaining of the three-year period in respect of each option in Singapore. Does that render the gains obtained on account of the exercise of each of these options to be gains "accruing in or derived from Singapore"? I must confess I find this question a difficult one. It was clear that such a remaining period of service could be in London or anywhere else in the world where the SCB group has an office and where SCB was disposed to posting the taxpayer. Of course, if he were posted to another country, then there would be no question of him being liable to Singapore tax. It cannot be doubted that the grant of each of the five options was on account of his service in London. But, the taxpayer's rights under the options crystallised in Singapore. The taxpayer's rights to subscribe for the shares only crystallised while he was serving in Singapore. Until he completed the three-year service while in Singapore, the rights he acquired under each option were inchoate. While I acknowledge that the taxpayer did not acquire the crystallised rights wholly on account of his service in Singapore, the rights did crystallise while he was serving here. Accordingly, it is my view, though not without some hesitation, that the rights under the five options, and in turn the gains obtained upon exercising the rights, were "derived" from Singapore. For this purpose, the fact that the exercise of the options had to be effected in London is immaterial. As an illustration, a person who works in Singapore with a foreign company and is given a share option to subscribe for shares in the company would have derived the rights in Singapore even though to exercise the option, all the necessary things must be delivered to the registered head office abroad.

62 Turning to the gains obtained from the exercise of the first two options, in my judgment, the position there is quite different because by the time the taxpayer was posted to Singapore his rights under the two options had crystallised. He could have exercised them at any time before his posting out of London. He could have been posted out to any of SCB's global offices. His posting here was entirely fortuitous and such a fortuitous act could not have rendered a right derived in London to be one derived in Singapore. I do not think a practical man would regard the gains on the two options as having been derived from Singapore. He had already earned the rights, and in turn the benefits, under the two options before being posted to Singapore. Of course these gains would be liable to tax if they had been remitted to Singapore. But as they were never remitted to Singapore, there would be no basis for the Comptroller to assess them to tax under s 10(1).

63 I would add that the approach I have taken with respect to the first two options would not render entirely superfluous what the Minister for Finance said in the 2002 Budget speech (see [43] above), *ie*, exempting from tax share options granted for non-Singaporean employment. It would mean that if presently a taxpayer were to have made gains in the same situation like the taxpayer in the instant case in relation to the first two options, he could safely remit the gains to Singapore without fear of them being liable to tax.

64 In the result, for myself, I would allow the appeal of the Comptroller only to the extent of the gains obtained by the taxpayer in relation to the last five options. However, my learned brethren think

that all the gains under the seven options are liable to tax.