AQQ *v* Comptroller of Income Tax
[2012] SGHC 249

Case Number : Income Tax Appeal No 1 of 2011

Decision Date : 18 December 2012

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Davinder Singh SC, Ong Sim Ho, Loh Hsiu Lien, Ong Ken Loon and Khoo Puay Pin Joanne (Drew & Napier LLC) for the appellant; Liu Hern Kuan and Joanna Yap Hui Min(Inland Revenue Authority of Singapore) for the respondent.

Parties : AQQ — Comptroller of Income Tax

Revenue Law – Income taxation – Avoidance – Section 33, Income Tax Act (Cap 134, 2008 Rev Ed

18 December 2012 Judgment reserved.

Andrew Ang J:

Introduction

1 This appeal raises important issues pertaining to the proper interpretation and application of anti-avoidance provisions in s 33 of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act"), matters which hitherto have not been considered by our courts.

2 In 2003, the [B] group decided to restructure. The appellant in this appeal, AQQ ("the Appellant"), was incorporated as part of the group's restructuring exercise. The Appellant acquired several subsidiary companies in Singapore after obtaining the funds to do so by issuing convertible notes to a bank. Under the notes, the Appellant was required to make periodic interest payments to the bank.

3 During the relevant years of assessment, the acquired subsidiaries paid out dividends to the Appellant, which constituted income chargeable to tax. These dividends carried tax credits arising from tax deemed deducted at source which could be set off against tax payable on the Appellant's chargeable income. At the same time, the Appellant duly paid the interest due under the notes to the bank. These interest payments constituted interest expenses which were deductible from the dividend income.

4 When tax for the relevant years of assessment came to be assessed, the Appellant in its tax returns claimed the deduction of the interest expenses from the dividend income as well as the benefit of the tax credits. The combined effect of claiming both was the precipitation of substantial tax refunds to the Appellant.

5 The respondent in this appeal, the Comptroller of Income Tax ("the Comptroller"), initially accepted the Appellant's tax computation and issued notices of assessment whereunder the Appellant was to receive tax refunds. Subsequently, the Comptroller formed the view that the Appellant had engaged in a tax avoidance arrangement and purported to exercise his powers under s 33(1) of the Act to disregard both the dividend income and the interest expenses. He therefore issued notices of additional assessments which effectively recouped the earlier tax refunds.

6 The Appellant appealed against the Comptroller's decision in Income Tax Appeal Nos 40–43 of 2008. The Income Tax Board of Review ("the Board") dismissed the appeals. Dissatisfied with the Board's decision in *AQQ v Comptroller of Income Tax* [2011] SGITBR 1 ("the Decision"), the Appellant now appeals to this court.

7 The central questions in this appeal are:

(a) whether the arrangement by which the Appellant incurred interest expenses which it set off against dividends from its subsidiaries constituted tax avoidance within the ambit of s 33; and

(b) whether the Comptroller was entitled to exercise his powers under s 33(1) in the manner that he did.

8 I now set out the material facts in some detail as they are essential for a proper understanding of the issues in the appeal.

The facts

The Appellant

9 The Appellant was incorporated in Singapore in May 2003 pursuant to a restructuring exercise, and is a wholly-owned subsidiary of B Berhad ("[B]"), a Malaysian public company listed on the Malaysian stock exchange. [B] also wholly owns C Sdn Bhd ("[C]"), a Malaysian company.

10 As a result of the restructuring exercise, the Appellant became the holder of all the issued shares in the following Singapore companies, these being the subsidiary companies first referred to above at [2] (collectively, "the Subsidiaries"):

(a) D (Singapore) Pte Ltd ("[D]");

(b) E (Singapore) Pte Ltd ("[E]"), now known as F (Singapore) Pte Ltd ("[F]");

(c) G Enterprise Pte Ltd ("[G]"); and

(d) H Shipping & Trading Co Pte Ltd ("[H]").

Background to the dispute

Before the restructuring exercise

11 In 1950, [B] was incorporated in Malaya. In 1967, [B] entered into a joint venture with R Berhad ("[R]") in Malaysia and Singapore. [note: 1] Pursuant to the joint venture, [B] *via* [D] acquired a 50% equity interest in [F]. The other 50% equity interest was held by the [R] group. The [B] group and the [R] group also held [G] and [H], in addition to other companies, in the same 50:50 ratio. [note: 2]

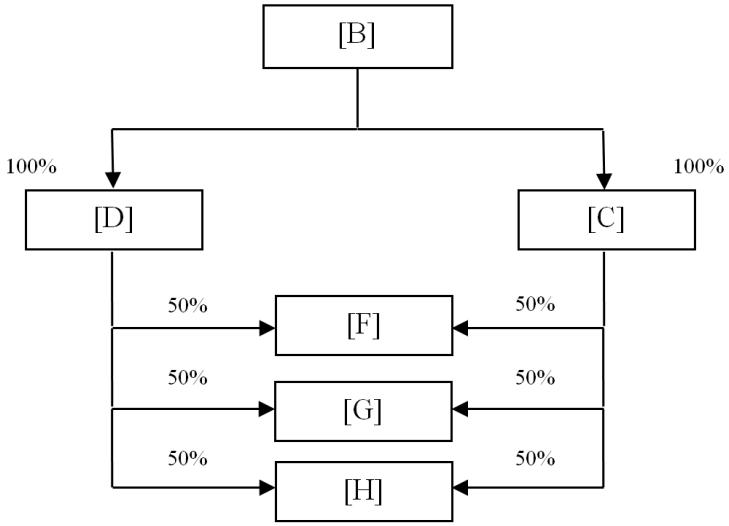
12 On 27 August 1998, [B] entered into various agreements with the [R] group to acquire the remaining 50% equity interests that it did not own in various companies, including [F], [G] and [H]. [note: 3] The vehicle used for the acquisitions was [C]. [note: 4] The result was that: [note: 5]

(a) [B] wholly owned [C] and [D];

(b) [C] held 50% equity interests in [F], [G] and [H]; and

(c) [D] held the remaining 50% equity interests in [F], [G] and [H].

The resultant corporate structure is diagrammatically represented below:



As can be seen, the interests in [F], [G] and [H] were held equally between [C] (a Malaysian company) and [D] (a Singapore company). This split in shareholding was what the later restructuring in 2003 sought to address.

Restructuring in 2003

13 Sometime in 2003, the [B] group decided to reorganise the corporate structure in Singapore according to various lines of business (namely, cement, readymix concrete, shipping and trading) and to mirror the group's operating structure in Malaysia. [note: 6] [F], [G], [H] and [D] were involved in the (a) cement; (b) shipping; (c) readymix concrete; and (d) trading and drymix businesses respectively. The various purposes of the restructuring will be canvassed later in this judgment.

14 On 31 May 2003, the Appellant was incorporated as part of the restructuring exercise. [note: 7] On 31 July 2003, [B] acquired the entire issued and paid-up share capital of the Appellant, which comprised two ordinary shares of $1 each. [note: 8]

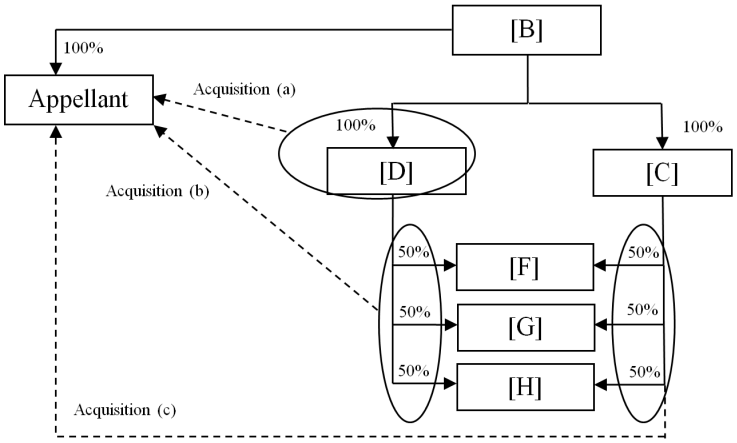
15 On 18 August 2003, the Appellant acquired the following equity interests:

(a) [B's] 100% equity interest in [D] for $75m; [note: 9]

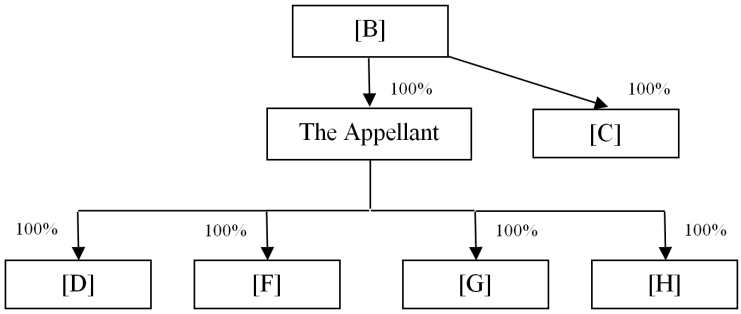
(b) [C's] 50% equity interests in [F], [G] and [H] for $75m; [note: 10] and

(c) [D's] 50% equity interests in [F], [G] and [H] for $75m. [note: 11]

The acquisitions made by the Appellant may be represented as follows:



16 The final result of the restructuring is that the Appellant holds 100% equity interests in the Subsidiaries. The Appellant is in turn held wholly by [B]. Hence, the interests in [F], [G] and [H] are now consolidated and held singly by the Appellant, which now also wholly owns [D]. The result of the restructuring may be represented as follows:



The financing arrangement

17 In connection with the acquisition of the Subsidiaries, the Appellant entered into a financing arrangement ("the Financing Arrangement") with [N Bank].

18 The Financing Arrangement involved the following transactions all carried out on the same day:

(a) On 18 August 2003, the Appellant issued $225m of fixed rate convertible notes ("the Notes") with a tenor of ten years at an interest rate of 8.85% *per annum* to the Singapore Branch of [N Bank] ("[N Bank Singapore]"). [note: 12] The Appellant then used the $225m facility from [N Bank Singapore] to finance its acquisition of the Subsidiaries.

(b) On the same day, [N Bank Singapore] detached and retained the interest coupons ("the Interest Coupons") from the Notes and sold the principal component of the Notes ("the Principal Notes") to the Mauritius Branch of [N Bank] ("[N Bank Mauritius]") by entering into a sale and purchase agreement (incorporating a Conditional Payment Obligation ("CPO1") and a forward sale) with [N Bank Mauritius]. Particulars are as follows: [note: 13]

(i) Pursuant to the sale and purchase agreement, [N Bank Singapore] sold $205m of the Principal Notes to [N Bank Mauritius] for $205m and, under CPO1, promised to pay [N Bank Mauritius] interest at 8.845% *per annum* provided that [N Bank Singapore] received the full interest from the Appellant under the Interest Coupons.

(ii) [N Bank Singapore] also entered into a forward sale agreement with [N Bank Mauritius] for delivery of the remaining $20m of the Principal Notes by a future date against payment for the same by [N Bank Mauritius].

(c) On the same day, [N Bank Mauritius] in turn sold the Principal Notes to [C] by entering into a sale and purchase agreement (incorporating a Conditional Payment Obligation ("CPO2") and a forward sale agreement) with [C]. Particulars are as follows: [note: 14]

(i) Pursuant to the sale and purchase agreement, [N Bank Mauritius] sold $205m of the Principal Notes to [C] and, under CPO2, promised to pay interest at 8.84% *per annum* to [C] if [N Bank Mauritius] received full payment from [N Bank Singapore] under CPO1.

(ii) [N Bank Mauritius] also entered into a forward sale agreement with [C] for delivery of the balance of $20m of the Principal Notes by a future date against payment for the same by [C].

19 Also on 18 August 2003, the following transactions were carried out to put [C] in funds to pay [N Bank Mauritius] for its purchase of the Principal Notes:

(a) [B] granted [C] an interest-free inter-company loan of $75m, that sum being the sale proceeds it received from the Appellant for its 100% equity interest in [D]. [note: 15]

(b) [D] granted [C] an interest-free inter-company loan of $75m, that sum being the sale proceeds it received from the Appellant for its 50% equity interests in [F], [G] and [H]. The loan was disbursed in the following manner: [note: 16]

(i) [D] on behalf of [C] transferred $55m of the $75m loan to [N Bank Mauritius]. [note: 17]

(ii) [D] on behalf of [C] placed the balance of $20m as an investment deposit with [N Bank Singapore] to secure payment by [N Bank Mauritius] for the $20m of the Principal Notes sold forward by [N Bank Singapore] to [N Bank Mauritius]. [note: 18]

20 The flow of funds pursuant to the Financing Agreement and the other transactions are as follows: [note: 19]

(a) After the Appellant received the sum of $225m from [N Bank Singapore], [note: 20] it paid: [note: 21]

(i) $75m to [F] (the designated collection agent of [B] [note: 22]) for the acquisition of [B's] 100% equity interest in [D];

(ii) $75m to [F] (the designated collection agent of [C] [note: 23]) for the acquisition of [C's] 50% equity interests in [F], [G] and [H]; and

(iii) $75m to [D] for the acquisition of [D's] 50% equity interests in [F], [G] and [H].

(b) [F] (the designated collection agent of both [B] and [C]) paid $150m to [N Bank Mauritius]

towards the purchase of the $205m of the Principal Notes. [note: 24]

(c) [D] (on behalf of [C]) paid $55m to [N Bank Mauritius] for the purchase of the $205m of the Principal Notes. [note: 25]

(d) [D] (on behalf of [C]) placed $20m as an investment deposit with [N Bank Singapore]. [note: 26]

(e) [N Bank Mauritius] paid $205m to [N Bank Singapore] for the purchase of the $205m of the Principal Notes. [note: 27]

21 On 18 November 2003, the following transactions and flow of funds took place with respect to the balance $20m of the Principal Notes: [note: 28]

(a) [D] (on behalf of [C]) withdrew the $20m investment deposit from [N Bank Singapore] and transferred $20m to [F] (the designated collection agent of [C]);

(b) [F] (as payment agent of [C]) paid the $20m to [N Bank Mauritius] which in turn paid the same to [N Bank Singapore]; and

(c) [N Bank Singapore] delivered the $20m of the Principal Notes to [N Bank Mauritius] in consideration of such payment and [N Bank Mauritius] in turn delivered the same $20m of the Principal Notes to [C] in consideration of payment made for the same by [F] (as payment agent of [C]).

Dividends and changes to the tax regime

22 Subsequent to the reconstruction, the Subsidiaries paid dividends to the Appellant. These dividends carried tax credits pursuant to the full imputation system. It is necessary, for an understanding of this case, to outline the workings of the full imputation system.

23 Before 1 January 2003, Singapore had in force the full imputation system for taxation of dividends. This system is succinctly described in Angela Tan, *Singapore Master Tax Guide Handbook 2009/10* (CCH Asia Pte Ltd, 28th Ed, 2009) as follows (at p 288):

> Up to 31 December 2002, Singapore [had] the *full imputation system* to regulate the distribution of corporate profits by companies resident in Singapore. This regulation is done through the provisions of sec 44.
>
> Under the imputation system, the tax paid by a resident company on its profits is passed on as a tax credit to its shareholders upon distribution of profits as dividends. When the shareholders receive the dividends, they are taxable on the dividends on a gross-up basis. However, the corporate tax that has been paid in relation to the dividends is "imputed" to the shareholders so that they can claim credit for the tax deducted at source under sec 46. Through the imputation system, the profits of the company are, in effect, taxed only once.
>
> [emphasis in original]

24 The full imputation system was implemented through the account mechanism under s 44 of the Act. Every resident company was required to maintain a s 44 account. Whenever a resident company

paid tax on its chargeable income, an amount equivalent to the amount of tax paid would be credited to its s 44 account. The resident company was entitled to use the balance in its s 44 account to frank dividends paid to its shareholders so that the gross amount of dividend attributable to the shareholder was the aggregate of the cash amount he actually received and the tax credited to him as having been paid. When the resident company paid franked dividends, the tax credited to each shareholder was debited from the company's s 44 account balance. When a shareholder received the franked dividends, he was entitled to set off the amount of tax credit carried by the franked dividends (which is essentially the same amount as the tax paid by the company on the gross dividends) against the tax payable on his chargeable income from all sources. Through this s 44 account mechanism, tax paid by a resident company on its chargeable income was passed on to its shareholder as a tax credit upon the payment of franked dividends by the company to the shareholder.

25 The workings of the full imputation system may be illustrated as follows. Take, for example, a resident company that has a chargeable income of $100. Assume that the company's s 44 account balance is nil, and the prevailing corporate tax rate is 20%. The company duly pays the $20 tax. Hence, its s 44 account balance increases from nil to $20, and the cash in hand after tax is $80. Using its s 44 account balance, the company may pay to its shareholders a gross dividend of $100, made up of a net cash dividend of $80 franked with $20 worth of tax deemed paid by the shareholders. After such franking, $20 will be debited from the company's s 44 account balance, which will then revert to nil.

26 How does the company's shareholder compute his tax payable after receiving franked dividends from the company? For ease of illustration, assume that the same company has only one shareholder, and this same shareholder is not entitled to any tax relief or deductions against income and that his only source of income is the gross dividend paid by the company. Assume also that the tax rate applicable to him is 10%. When the shareholder is assessed to tax on his chargeable income (that being the gross dividend as there are no other sources of income), his tax liability will be $10, being 10% of $100. However, since the shareholder by reason of the tax credit is deemed to have paid tax of $20, he is entitled to set off the tax credit carried by the franked dividends (*ie*, $20 deemed paid at source) against his tax liability of $10. Hence, the overall result is that the shareholder is entitled to a tax refund of $10 (*ie*, $20 minus $10) from the Comptroller. The computation may be set out as in the table below:

	Amount ($)
Gross dividend income	100
Deductions and tax relief	Deemed nil
Chargeable income	100
Tax chargeable (at 10%)	10
Less: Tax deducted at source	20
Tax refundable	10 (*ie*, 20 – 10)

27 In the example above, the shareholder is entitled to a tax refund because his personal income tax rate of 10% is lower than the company's corporate income tax rate of 20%. *Per contra*, if the shareholder's applicable tax rate were higher than 20%, he would have to pay the Comptroller the difference between that higher tax and the tax credit of 20%.

28 Continuing with the example above, assume that the shareholder incurred an interest expense of $90 in respect of funds he had borrowed to acquire the company's shares. The interest expense of $90 is deductible against the gross dividend income of $100 so that the chargeable income is $10. The tax payable on the chargeable income is hence $1, being 10% of $10. The $20 of tax credit (*ie*, $20 deemed paid at source) carried by the franked dividends is then set off against the tax liability of $1, resulting in a tax refund of $19 to the shareholder. The computation may be set out as in the table below:

	Amount ($)
Gross dividend income	100
Less: Interest expenses	90
Chargeable income	10
Tax chargeable (at 10%)	1
Less: Tax deducted at source	20
Tax refundable	19 (*ie*, 20 – 1)

(As will be observed later in this judgment, the Appellant was initially able to claim massive amounts of tax refunds because it incurred large amounts of interest expenses on the Notes.)

29 On 1 January 2003, Singapore replaced the full imputation system with a one-tier corporate tax system. Under the one-tier corporate tax system, the tax paid by resident companies on their chargeable income constitutes a final tax and will not be imputed to shareholders who receive dividends from such companies. Correspondingly, shareholders will not be taxed on dividends received under the one-tier corporate tax system.

30 Resident companies with unutilised s 44 account balances as at 31 December 2002 were given an option to remain on the full imputation system (for a transitional period of five years from 1 January 2003 to 31 December 2007) to enable them to use up their s 44 account balances by paying franked dividends (if they were able so to do) before moving to the one-tier corporate tax system. Alternatively, they could move to the one-tier corporate tax system (in which case they may no longer pay franked dividends). Resident companies that chose to remain on the full imputation system would automatically move to the one-tier corporate tax system on 1 January 2008 after expiry of the transitional period. Hence, from 1 January 2008 onwards, all resident companies would be on the one-tier corporate tax system.

31 The crucial fact here is that the Subsidiaries chose to remain under the full imputation system during the transitional period. Hence, the Subsidiaries could continue to utilise their s 44 account balances by paying franked dividends during the transitional period. The Subsidiaries' s 44 account balances and accumulated profits as at 31 December 2002 before they were acquired by the Appellant were as follows: [note: 29]

Subsidiaries	**Section 44 Account Balance ($)**	**Accumulated Profits ($)**
[D]	17,916,948.66	40,000
[F]	7,354,359.65	16,456,824

[G]	1,952,523.91	1,044,536
[H]	1,391,292.12	165,920

As can be seen, the Subsidiaries had substantial s 44 account balances.

32 The Subsidiaries paid out franked dividends amounting to $83,173,945 to the Appellant for Years of Assessment ("YA") 2004 to 2007. [note: 30] As mentioned earlier, these franked dividends carried tax credits.

The tax dispute

33 The Appellant paid interest on the Notes to [N Bank Singapore] at 8.85% *per annum* amounting to $67,096,467 for YA 2004 to 2007. [note: 31]

34 As the Financing Arrangement enabled the Appellant to acquire the Subsidiaries and to receive the dividends paid out of the distributable profits of the Subsidiaries, the interest paid by the Appellant on the Notes was therefore claimed as a deduction against the dividend income of the Appellant. [note: 32] In its tax returns for YA 2004 to 2007, the Appellant claimed interest deductions [note: 33] totalling $67,096,467 for the interest it paid against the dividend income represented by the franked dividends amounting to $83,173,945. As a result, the Appellant claimed a total tax refund of $13,561,794.44 pursuant to ss 44A and 46. [note: 34]

35 Based on the Appellant's tax returns for YA 2004 to 2006, the Comptroller issued Notices of Assessment for YA 2004 to 2006 ("the Original Assessments") on 24 September 2004, 27 August 2005 and 8 November 2006 respectively which took into account the interest deductions claimed by the Appellant and dividend income received by the Appellant from the Subsidiaries. [note: 35] Consequently, tax refunds for YA 2004 to 2006 amounting to $9,589,816.84 were made to the Appellant under the Original Assessments.

36 However, on 7 April 2008, the Comptroller informed the Appellant that he was not satisfied that there was commercial justification for the Financing Arrangement and stated that the arrangement was for the main purpose of deriving a tax advantage. [note: 36]

37 Consequently, the Comptroller invoked s 33 and revised his earlier assessments. The Comptroller issued Notices of Additional Assessment for YA 2004 to 2006 ("the Additional Assessments") that disregarded the dividend income received by the Appellant from the Subsidiaries and the interest expenses incurred by the Appellant on the Notes issued to [N Bank Singapore], and assessed the Appellant to have a total overall net tax liability of $9,592,577.76 for YA 2004 to 2006. [note: 37]

38 On or about 31 March 2007, the Appellant filed its tax return and tax computation for YA 2007 which showed the receipt of dividend income from its holding of shares in the Subsidiaries and the incurring of interest expenses on the Notes issued to [N Bank Singapore]. [note: 38] Based on that tax return and tax computation, the Appellant should have received a further refund of $3,971,977.60.

39 Consistent with his stand with respect to YA 2004 to 2006, the Comptroller similarly invoked

s 33 and disregarded the dividend income and interest expenses for YA 2007 [note: 39] in his Notice of Assessment for YA 2007 dated 28 August 2008, [note: 40] with the result that the Appellant had a net tax liability of $11,565.80.

40 The Appellant objected to the Additional Assessments and the Notice of Assessment for YA 2007. The Comptroller refused to amend the same. The Appellant appealed to the Board.

Decision of the Board

41 Upholding the Comptroller's decision, the Board held that the Financing Arrangement had the purpose or effect of tax avoidance within the meaning of s 33(1). [note: 41] The Board found that the Financing Arrangement was contrived and artificial or was structured in a contrived and artificial way in order for the Appellant to obtain a refund of tax through the utilisation of tax credits; it was also not carried out for *bona fide* commercial reasons but had, as one of its main purposes, the avoidance or reduction of tax.

42 The Board essentially reasoned as follows:

(a) There was no real commercial justification for the loan given by [N Bank Singapore] to the Appellant, other than as part of an arrangement entered into to obtain or extract tax benefits, for the following reasons: [note: 42]

(i) The Appellant did not adduce minutes of meetings or other records of discussions by the directors of the Appellant and/or [B] regarding the commercial considerations justifying the loan.

(ii) Instead, there was an undated discussion paper of [N Bank] which revealingly indicated that the purpose of the Financing Arrangement as a whole and the loan in particular was to obtain or extract tax benefits.

(b) There was unsatisfactory treatment in the evidence at the appeal regarding how the sums to be paid by the Appellant for the acquisition of the equity interests in the Subsidiaries were arrived at. [note: 43]

(c) The manner in which the transactions in the Financing Arrangement had been entered into or carried out were "contrived", "artificial", "strained", "forced", "planned with ingenuity" and "out of the ordinary" because:

(i) all the transactions took place on the same day (*ie*, 18 August 2003), with the exception of the $20m of the Principal Notes, and there was no explanation why the restructuring had to be completed on the same day. [note: 44]

(ii) the Appellant effectively borrowed money from another company within the group, namely, [C], to acquire the Subsidiaries and [C] in turn borrowed money from [D] and [B] to acquire the Notes. Counsel for the Comptroller was right to point out that if the Appellant had wanted to borrow money, it could simply have borrowed from [C] without involving [N Bank] as an intermediary and that the Appellant was merely involved in a round-robin flow of funds. [note: 45]

(iii) the role of [N Bank] in the Financing Arrangement was merely facilitative and not

really that of a lender. It did not bear any risk as a lender of the $225m loan. [note: 46]

(A) The interest "earned" by [N Bank Singapore] would be returned to the [B] group in the form of conditional payments *(ie*, *via* CPO1 and CPO2) and [N Bank Singapore's] reward for participating in the arrangement was only in the form of the fee for structuring and arranging the Financing Arrangement.

(B) The interposition of [N Bank] as a facilitator was to help the [B] group to achieve the tax saving purpose mentioned in the discussion paper entitled "Fixed Rate Notes Financing Structure".

(iv) the interposition of [N Bank Mauritius] lacked commercial justification. There was no real commercial necessity for [N Bank Mauritius] to be also involved in the Financing Arrangement, other than to take advantage of the exemption of the interest payments from withholding tax. [note: 47]

43 The Board held that s 14 of the Act was not intended to apply in this case where the link between the loan and the dividend income was artificially created, and the Appellant was incorporated pursuant to an artificial and contrived financing arrangement in order to obtain the benefit of the s 44 credits for YA 2004 to 2007. [note: 48]

44 The Board also held that the interest payments were artificial because the interest paid by the Appellant to [N Bank Singapore] was in substance returned to the [B] group in the form of conditional payments.

45 The Board ruled that the full imputation system was not meant to be used in the manner the Appellant did. The tax credits available to shareholders under the full imputation system were not intended to be available to shareholders such as the Appellant who received dividends from the Subsidiaries that were acquired pursuant to an artificial or contrived arrangement. [note: 49]

46 The Board held that the Comptroller had the power and authority under s 74 of the Act to issue the Additional Assessments and assess the Appellant to additional tax. [note: 50]

47 The Board hence dismissed the appeal and issued its Decision on 12 April 2011. The Appellant appeals to this court under s 81(2).

The Appellant's case

48 Counsel for the Appellant contends that based on the evidence presented and the Board's own findings, the Decision was one which, because the Board misdirected itself on the law and the evidence, no reasonable body of members constituting an Income Tax Board of Review could have reached.

49 Counsel essentially argues that:

(a) The Board adopted the wrong approach towards s 33(1) when it asked whether the Financing Arrangement was "artificial" or "contrived".

(b) Instead, the Board should have examined the facts and evidence and determined whether the elements in sub-paras (*a*) to (*c*) of s 33(1) were met.

(c) The Financing Arrangement did not fall within sub-paras (*a*), (*b*) or (*c*) of s 33(1). Hence, s 33(1) was not even engaged.

(d) Even if the Financing Arrangement did fall within sub-paras (*a*), (*b*) or (*c*) of s 33(1), the Financing Arrangement was carried out for *bona fide* commercial reasons and did not have as one of its main purposes the avoidance or reduction of tax within the meaning of s 33(3)(*b*). In this respect, the Board reached a conclusion that no reasonable Income Tax Board of Review could reach on the evidence before it.

(e) Even if the Board was correct in finding that s 33(1) had been engaged and that the statutory exception in s 33(3)(*b*) did not apply, the Board erred in law when it failed to give effect to the relevant specific provisions of the Act (*ie*, ss 14(1)(*a*), 44, 44A and 46) which conferred upon the Appellant the entitlement to the tax refund.

(f) Even if s 33 applied, the Board was wrong to hold that the Comptroller was entitled to disregard both the dividend income and interest expenses, when the Comptroller should not have disregarded both.

(g) In any case, the Comptroller did not have the power under s 74 to assess the Appellant as to the additional amounts for YA 2004 to 2006, and hence the Additional Assessments were *ultra vires* and void.

50 The details of the arguments will be canvassed at the appropriate junctures in the course of this judgment.

The Comptroller's case

51 Counsel for the Comptroller essentially contends that:

(a) The Financing Arrangement falls within sub-paras (*a*), (*b*) or (*c*) of s 33(1). Hence, s 33(1) was engaged.

(b) The Financing Arrangement does not fall within the statutory exception in s 33(3)(*b*).

(c) The Appellant cannot rely on the relevant specific provisions of the Act (*ie*, ss 14(1)(*a*), 44, 44A and 46) to override the operation of s 33.

(d) The Comptroller had the power to disregard both the dividend income and interest expenses under s 33.

(e) The Comptroller had the power under s 74 or, alternatively, under s 33, to assess the Appellant as to the additional amounts for YA 2004 to 2006.

52 The details of counsel's arguments will similarly be dealt with at appropriate junctures in the course of this judgment.

Issues

53 The issues before me are as follows:

(a) Whether the Board adopted the right approach towards s 33;

(b) Whether the Financing Arrangement fell within any of the three limbs of s 33(1);

(c) Whether the Appellant could avail itself of the statutory exception under s 33(3)(*b*);

(d) Whether the Appellant could avail itself of the relevant specific provisions of the Act (*ie*, ss 14(1)(*a*), 44, 44A and 46) and override the operation of s 33;

(e) Whether the Comptroller was right to disregard both the dividend income and interest expenses under s 33; and

(f) Whether the Comptroller had the power to issue the Additional Assessments.

Approach towards appeals against decisions of the Board

54 Before proceeding to consider the issues, it is important to understand the approach that this court should adopt in appeals against decisions of the Board under s 81(2) of the Act.

55 Section 81(2) allows the taxpayer or the Comptroller to appeal from a decision of the Board to the High Court where, *inter alia*, the question arising in the appeal is one of law or one of mixed fact and law:

> **Appeals to High Court**
>
> **81.**—(1) Except as provided in this section, the decision of the Board shall be final.
>
> (2) In any case in which the amount of tax payable, tax to be refunded as a result of the operation of section 46 or notional tax benefit, as determined by the Board (excluding the amount of any costs awarded) exceeds $200, the appellant or the Comptroller may appeal to the High Court from the decision of the Board upon any question of law or of mixed law and fact.

There is hence no appeal on questions of fact alone (*HLB v Comptroller of Income Tax* [1974–1976] SLR(R) 135 at [1]; *NP v Comptroller of Income Tax* [2007] 4 SLR(R) 599 at [6] ("*NP v CIT*")).

56 Various formulations have been expressed as to the proper approach in appeals from decisions of the Board. The proper test to apply in appeals under s 81(2) is to ask whether the Board had misdirected itself in law, or had proceeded without sufficient evidence in law to justify its conclusion (*CBH v Comptroller of Income Tax* [1981–1982] SLR(R) 273 at [4]). Whilst the findings of fact made by the Board would generally be respected, the court is free to decide whether the conclusion reached by the Board is consonant with the facts found and to reject the Board's conclusions if the same are unreasonable (*NP v CIT*). To succeed in an appeal under s 81(2), the appellant must show that the Board erred in that no reasonable body of members constituting an Income Tax Board of Review could have reached the findings made by the Board (*Mount Elizabeth (Pte) Ltd v Comptroller of Income Tax* [1985–1986] SLR(R) 950 at [17]). These are all encapsulated within the oft-quoted statement of the law by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow and another* [1956] AC 14 where his Lordship held as follows (at 36):

> ... If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there

has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. ...

57 With these principles in mind, I now turn to the Decision to see whether the Board has erred in law or made findings that no reasonable Board could have reached.

Whether the Board adopted the right approach towards s 33

58 The Board in its Decision held that the Financing Arrangement had the purpose or effect of tax avoidance within the realm of s 33(1). [note: 51] In arriving at this conclusion, the Board found that the arrangement was contrived and artificial or was structured in a contrived and artificial way in order for the Appellant to obtain a refund of tax through the utilisation of tax credits, and also that the arrangement was not carried out for *bona fide* commercial reasons but had, as one of its main purposes, the avoidance or reduction of tax. The Board focused on and emphasised the point that the Financing Arrangement was artificial and contrived and lacked commercial justification. [note: 52]

59 Counsel for the Appellant argues that the Board adopted the wrong approach. [note: 53] He points out that there are two main parts to s 33. The first comprises the "three limbs" of s 33(1), which spell out the section's scope of application. The second part is the statutory exception in s 33(3)(*b*), which is applicable only where it is found that s 33(1) has been triggered. The correct approach is to first determine whether the arrangement falls within one or more of the three limbs of s 33(1). It is only when the arrangement falls within one or more of the three limbs that the question arises as to whether the statutory exception in s 33(3)(*b*) applies. The Board hence adopted the wrong approach. In determining whether the Financing Arrangement had as one of its main purposes tax avoidance or reduction, the Board erroneously conflated ss 33(1) and 33(3)(*b*).

60 Counsel for the Comptroller argues in reply that the Board has not adopted the wrong approach. [note: 54] In counsel's view, the Board was perfectly justified in taking into consideration artificiality and contrivance as factors in determining whether s 33(1) applied because it is consistent with Parliament's intention. Counsel referred to statements made by the Minister for Finance in his speech at the Second Reading of the Income Tax (Amendment) Bill 1988 ("the Second Reading") which suggest that artificiality and contrivance remain factors to be considered in applying s 33(1).

61 I agree with counsel for the Appellant on this point.

62 Section 33 of the Act provides as follows:

> **Comptroller may disregard certain transactions and dispositions**
>
> **33.** —(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly —
>
> (a) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;
>
> (b) to relieve any person from any liability to pay tax or to make a return under this Act;

or

(c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,

the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.

(2) In this section, "arrangement" means any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.

(3) This section shall not apply to —

(a) any arrangement made or entered into before 29th January 1988; or

(b) any arrangement carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.

63 Tax law is a creature of statute and interpretation of particular tax provisions must start from their express words: *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484 at [46] and [56] ("*JD Ltd*"). Looking squarely at the express words of s 33, one would notice that there is a clear two-part structure to s 33:

(a) Section 33(1) sets out three specific circumstances, at least one of which must be fulfilled before the Comptroller may exercise his powers under s 33(1). The purpose or effect of the arrangement in question must be to:

(i) alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;

(ii) relieve any person from any liability to pay tax or to make a return under the Act; or

(iii) reduce or avoid any liability imposed or which would otherwise have been imposed on any person by the Act.

(b) Section 33(3) sets out the two situations where s 33 cannot be applied. These are:

(i) where the arrangement in question was made or entered into before 29 January 1988; and

(ii) where the same was carried out for *bona fide* commercial reasons and had not, as one of its main purposes, the avoidance or reduction of tax.

64 Hence, the proper approach towards applying s 33 is as follows:

(a) The Comptroller must first determine whether the arrangement in question falls within any of the three limbs in s 33(1).

(b) If the arrangement does not fall within any of the three limbs in s 33(1), the Comptroller

cannot exercise his powers thereunder.

(c) If the arrangement does fall within any of the three limbs in s 33(1), it must further be determined whether either of the two statutory exceptions in s 33(3) applies to the arrangement in question.

(d) If either of the statutory exceptions applies to the arrangement in question, the Comptroller may not exercise his powers under s 33(1).

(e) Conversely, if neither of the statutory exceptions applies, the Comptroller may exercise his powers under s 33(1).

65 With respect, it would appear that the Board adopted the wrong approach. The Board seemed to have conflated the statutory exception under s 33(3)(*b*) with the elements of s 33(1). The Board should not have delved straight into asking whether the Financing Arrangement was artificial and contrived before considering whether any of the three limbs in s 33(1) was satisfied. This is not to say that it was altogether irrelevant to consider whether the Financing Arrangement was artificial or contrived, but merely that such consideration should have taken place only at the second stage when the question being considered was whether the statutory exception in s 33(3)(*b*) applied.

66 The previous incarnation of s 33(1) expressly included artificiality and fictitiousness as elements to be considered. The previous s 33 of the Income Tax Act (Cap 134, 1985 Rev Ed) provided as follows:

Comptroller may disregard certain transactions and dispositions

33. —(1) Where the Comptroller is of the opinion that *any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious* or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly.

(2) In this section, "disposition" includes any trust, grant, covenant, agreement or arrangement.

[emphasis added]

The present s 33 of the Act makes no specific reference to these elements. Counsel for the Comptroller points to a part of the Minister for Finance's speech at the Second Reading (which introduced the present s 33) in which the Minister said (*Singapore Parliamentary Debates, Official Report* (13 January 1988) vol 50 at col 358):

> In assessing whether a particular scheme would fall under the ambit of section 33, the Inland Revenue Department would, among other things, look for the presence of artificiality, the interposing of various intermediaries or transactions to reduce or avoid tax and transfer pricing. It should be stressed that the aim is to reduce blatant or contrived tax avoidance arrangements and is not intended to affect normal commercial transactions. I would also like to clarify that companies and individuals granted tax exemptions and concessions under specific incentive schemes would not be affected by the new section 33. They will continue to enjoy the tax concessions.

On the basis of these statements, counsel argues that the Board was right to consider artificiality and

contrivance as relevant factors in determining whether s 33(1) applied. I disagree. As I have stated, these factors are relevant only at the second stage when the enquiry is whether the statutory exception in s 33(3)(*b*) applies. Under the broader enquiry in s 33(3)(*b*) as to whether an arrangement was carried out for "bona fide commercial reasons", it is not irrelevant to ask whether it was "artificial", "fictitious" or "contrived". What the re-enactment of s 33 did was to do away with the need for the Comptroller to find that an arrangement was artificial or fictitious (or that any disposition was not in fact given effect to) in favour of a broader test, *viz*, whether the arrangement was carried out for *bona fide* commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.

67 It must be noted that even if the Board has adopted the wrong approach, it may be that the Board's ultimate conclusion that s 33 was properly invoked is correct. In this respect, to succeed in its appeal, the Appellant must not only show that the Board adopted the wrong approach, but also that applying the right approach, s 33 would not apply on the facts of this case.

68 Hence, I must further consider whether on the proper application of s 33 to the facts of this case, the Comptroller was ultimately justified in exercising its powers under s 33(1) in the manner that he did.

Whether the Financing Arrangement fell within sub-paras (*a*), (*b*) or (*c*) of s 33(1)

Interpreting s 33(1) – relevant principles

69 Before the Comptroller may exercise his powers under s 33(1), he must be satisfied that the "purpose or effect" of the Financing Arrangement is to achieve any of the three consequences set out in sub-paras (*a*), (*b*) and (*c*) of s 33(1).

70 At the Second Reading, the Minister for Finance stated that s 33 was similar to the Australian and New Zealand anti-avoidance provisions and that Australian and New Zealand case law interpreting those provisions might be useful in interpreting our own s 33 (*Singapore Parliamentary Debates, Official Report* (13 January 1988) vol 50 at cols 365–366):

> However, having said that, I think we have in the process of drafting this legislation *studied the anti-avoidance provisions of a number of countries before we finalized our draft, including countries such as Hong Kong, Australia and New Zealan*d. ...
>
> …
>
> Furthermore, there are *adequate safeguards provided under the amendment which are to be found in the judicial interpretations of legislations having similar wordings such as in New Zealand and Australia*, for there is a considerable body of case law on which we can rely for the purpose of construing the proposed section 33. ...
>
> [emphasis added]

71 In the leading case of *Lauri Joseph Newton and Ors v Commissioner of Taxation of the Commonwealth of Australia* [1958] 1 AC 450 ("*Newton*"), the Privy Council interpreted the phrase "purpose or effect" in s 240 of the Income Tax and Social Services Contribution Assessment Act, 1936–1951 (Cth), which was the Australian anti-avoidance provision then in force. Lord Denning opined (at 465–466):

> *... The word "purpose" means, not motive but the effect which it is sought to achieve – the end in view. The word "effect" means the end accomplished or achieved. The whole set of words denotes concerted action to an end – the end of avoiding tax.*
>
> ...
>
> The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every "contract, agreement or arrangement" (which their Lordships will henceforward refer to compendiously as "arrangement") which has the purpose or effect of avoiding tax. *In applying the section you must, by the very words of it, look at the arrangement itself and see which is its effect – which it does – irrespective of the motives of the persons who made it*. Williams J. put it well when he said: "*The purpose of a contract, agreement or arrangement must be what it is intended to effect* and that intention must be ascertained from its terms. Those terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect." *In order to bring the arrangement within the section you must be able to predicate – by looking at the overt acts by which it was implemented – that it was implemented in that particular way so as to avoid tax*. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. ...
>
> [emphasis in original underlined; emphasis added in italics]

72 Lord Denning's approach in *Newton* has since become known as the "predication principle". It requires the court to objectively determine the tax avoidance purpose or effect of the arrangement in question with reference to the terms of the arrangement and the manner in which it was implemented. The motives of the parties to the arrangement are irrelevant. The objective effect of the arrangement is paramount.

73 The Privy Council in *Sidney Boyd Ashton and another v Inland Revenue Commissioner* [1975] 1 WLR 1615 ("*Ashton*") applied the predication principle in relation to s 108 of the Land and Income Tax Act 1954 (New Zealand), which was the previous anti-avoidance provision then in force in New Zealand and had the same words "purpose or effect" as s 33. Viscount Dilhorne said (at 1621):

> Their Lordships agree. *If an arrangement has a particular purpose, then that will be its intended effect. If it has a particular effect, then that will be its purpose* and oral evidence to show that it has a different purpose or different effect to that which is shown by the arrangement itself is irrelevant to the determination of the question whether the arrangement has or purports to have the purpose or effect of in any way altering the incidence of income tax or relieving any person from his liability to pay income tax. ... [emphasis added]

Hence, "purpose" and "effect" are treated as synonymous. Academic commentators have acknowledged that the courts have interpreted these words synonymously: see, *eg*, John H Telfer, "General Anti-Tax Avoidance Provisions: the Singapore Position and Australasian Comparisons" (1990) 3 2 Mal L R 311 ("*Telfer*") at pp 314–315. The chief focus is on the objective effect of the arrangement in question.

74 The predication principle has since been applied in Australia in relation to the subsequent Australian anti-avoidance provisions broadly similar to s 33 which had the same words "purpose or

effect": see, *eg*, *Mobil Oil Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1966] AC 275 ("*Mobil Oil*"); *George Hancock v Federal Commissioner of Taxation* (1959–1961) 108 CLR 258; and *Peate v The Commissioner of Taxation of the Commonwealth of Australia* [1962–1964] 111 CLR 443 ("*Peate*"). For example, in *Mobil Oil*, the provision in question was s 260 of the Income Tax and Social Services Contribution Assessment Act, 1936–1960 (Cth), which was quoted as follows (at 292):

> 260. Contracts to evade tax void. — Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the ***purpose or effect*** of in any way, directly or indirectly — (*a*) altering the incidence of any income tax; (*b*) relieving any person from liability to pay any income tax or make any return; (*c*) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or (*d*) preventing the operation of this Act in any respect, be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose. [emphasis added in bold italics]

The same provision was interpreted and applied in *Peate*.

75 The predication principle has also been applied in New Zealand in relation to provisions that had the same words "purpose or effect" and were also broadly similar to s 33: see, *eg*, *Ashton*; *Owen Thomas Mangin v Inland Revenue Commissioner* [1971] AC 739; and *Europa Oil (NZ) Ltd v Inland Revenue Commissioner* [1976] 1 WLR 464 ("*Europa Oil*"). For example, the provision in *Ashton*, namely, s 108 of the Land and Income Tax Act 1954 (New Zealand), is as follows:

> Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void in so far as, directly or indirectly, it has or purports to have the *purpose or effect* of in any way altering the incidence of income tax, or relieving any person of his liability to pay income tax. [emphasis added]

The same section after amendment was considered in *Europa Oil* and is as follows:

> Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes in so far as, directly or indirectly, it has or purports to have the *purpose or effect* of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax. [emphasis added]

76 In my view, the predication principle should similarly apply to s 33(1) of the Act. At any rate, the phrase "purpose or effect" in s 33 itself suggests that an objective approach is required.

77 Hence, before the Comptroller may exercise his powers under s 33(1), he must be satisfied that the purpose or effect of the arrangement in question is one or more of the three consequences set out in sub-paras (*a*), (*b*) and (*c*) of s 33(1). He reaches this conclusion through an examination of the terms of the arrangement and the manner in which it is implemented, without reference to the motives of the parties involved.

Application

78 Applying the approach above, does the Financing Arrangement fall within any of the three limbs of s 33(1)? To succeed, the Comptroller must be able to predicate, by looking at the overt acts in the

Financing Arrangement, that it was implemented in that particular way so as to achieve one or more of the three consequences set out in sub-paras (*a*), (*b*) and (*c*) of s 33(1), *viz*:

> (*a*) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;
>
> (*b*) to relieve any person from any liability to pay tax or to make a return under this Act; or
>
> (*c*) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,

79 Naturally, counsel for the Appellant argues that the Financing Arrangement does not fall within any of the three limbs of s 33(1). His arguments are as follows. Section 33(1) requires that there be a liability to pay tax. This must refer to the *final amount computed to be payable* to the Comptroller after setting off the relevant s 44 tax credits against the tax payable on the dividend income. On the facts, the final tax payable is precisely zero, which means that there was *no liability to pay tax* within the meaning of s 33(1) in the first place. As such, s 33 cannot apply to the Financing Arrangement. Counsel for the Appellant relied on the cases of *Rowdell Pty Limited v The Commissioner of Taxation* [1962–1963] 111 CLR 106 ("*Rowdell*") and *The Commissioner of Taxation of the Commonwealth of Australia v Patcorp Investments Limited* [1976] 140 CLR 247 ("*Patcorp*") to show that there is *no tax liability* on the dividend income for the purposes of applying s 33(1). According to counsel, the position he advocates is also consistent with principle. Under the full imputation system, the tax on dividend income is already prepaid by the company which pays out the dividends and is deemed to have been paid by the shareholder receiving the dividends, such that there is no further tax payable on the dividend income. Here, tax on the dividend income received by the Appellant from the Subsidiaries has already been paid by the Subsidiaries, and there is no tax payable by the Appellant on the dividend income.

80 Counsel for the Comptroller on the other hand argues that all three limbs of s 33(1) are satisfied on the facts. There was tax liability on the dividend income pursuant to s 10(1)(*d*) of the Act. Section 46(1)(*a*) makes it clear that the dividend income must be chargeable to tax before the tax credits under the full imputation system may be set off against the tax charged on the dividend income. The Financing Arrangement involved the Appellant borrowing from [N Bank Singapore]. The Appellant incurred interest expenses which were claimed as deductions to reduce the tax liability on its dividend income. As such, all three limbs of s 33(1) were satisfied as the incidence of tax payable by the Appellant on its dividend income was altered, the Appellant was relieved from liability to pay tax on its dividend income and the Appellant reduced or avoided tax liability imposed on its dividend income.

81 In my view, the Comptroller was not wrong in determining that the Financing Arrangement fell within s 33(1), at least where s 33(1)(*c*) is concerned.

82 Section 33(1)(*c*) applies where the purpose or effect of the arrangement in question is "to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act". These are words of wide import, applying even where there is no pre-existing liability to pay tax. It was noted in Tan Wee Liang, "Tax Avoidance and Section 33 of the Income Tax Act" (1989) Mal L R 78 at p 93 that the words of the section "pre-empt any argument that an arrangement is only caught under the section where the arrangement avoids or displaces an existing tax liability". Such an argument was considered in *Newton*.

83 The Privy Council in *Newton* interpreted the words "liability imposed on any person" and

"avoiding" in s 260(*c*) of the Commonwealth of Australia Income Tax and Social Services Contribution Assessment Act, 1936–1951 (Cth). Counsel for the taxpayer, Sir Garfield Barwick, argued that the words "liability imposed on any person" meant a liability which had already accrued and the word "avoid" meant displace, and submitted that in order for an arrangement to be impugned under s 260(*c*), it had to be an arrangement which sought to displace a liability which had already come home to a taxpayer in respect of income which had already been derived by him. The Privy Council rejected the submission. Lord Denning said (at 464):

> ... Their Lordships cannot accept this submission. They are clearly of opinion that the word "avoid" is used in its ordinary sense – in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed". To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you. If the submission of Sir Garfield Barwick were accepted, it would deprive the words of any effect: for no one can displace a liability to tax which has already accrued due, or in respect of income which has already been derived. ...

The words "any liability … which would otherwise have been imposed" in s 33(1)(*c*) similarly preclude the sort of argument raised by Sir Garfield Barwick in *Newton*. Hence, s 33(1)(*c*) applies where an arrangement has the purpose or effect of reducing or avoiding any liability which is already accrued, yet to accrue, or would have accrued but for the arrangement.

84 Counsel for the Appellant submits that there was no relevant tax liability for the purposes of s 33(1) because of the way the full imputation system works (see above at [79]). In counsel's view, under the full imputation system, the shareholder who receives franked dividends is not liable to pay tax on the dividend income because the tax payable on the dividend income is already prepaid by the company which pays out the franked dividends and is hence deemed to have been paid by the shareholder. Hence, counsel concludes that the Appellant was not liable in the first place to pay tax on the dividend income generated by its receipt of the franked dividends.

85 With respect, counsel's view on this point is a distortion of the full imputation system and the tax collection process. Under the full imputation system, what was initially collected as tax from the company franking the dividends was *not a tax on dividend income* eventually declared and paid out to the shareholder, but rather tax on the company's *corporate profits*. This tax collected was then credited to the company's s 44 account as a tax credit. When the company eventually declared and franked dividends payable to the shareholder, the dividend income in the hands of the shareholder first became chargeable to tax. It was only *after* the dividend income had been charged to tax that, *for collection purposes*, the s 44 tax credits were set off against the tax charged on the dividend income. An examination of s 46(1) of the Act will bear this out.

86 Hence, applying the proper approach set out in the preceding paragraph, the correct reasoning and conclusion must be as follows. The Appellant was paid franked dividends by the Subsidiaries. Pursuant to s 10(1)(*d*), income tax was payable in respect of the dividend income received by the Appellant, less allowable deductions and allowances (if any). Hence, contrary to what counsel for the Appellant submits (see above at [79]), *there was relevant tax liability* for the purposes of s 33(1). It is only after tax has first been charged on the dividend income that s 46(1)(*a*) enables the Appellant to set off the s 44 tax credits against the income tax payable on the dividend income. The Appellant paid interest to [N Bank Singapore] in respect of the Notes issued pursuant to the Financing Arrangement. The interest expenses are claimed by the Appellant as deductions pursuant to s 14(1)(*a*)(i) against its dividend income. Without the interest expenses, the whole dividend income would be subject to tax. With the interest expenses, the dividend income less the interest expenses is subject

to tax, so that the amount of tax charged is lower. As such, by generating interest expenses which are claimed as deductions against dividend income, the Financing Arrangement had the purpose and effect of reducing or avoiding a liability imposed by the Act, namely, the total tax chargeable on the dividend income. Without the interest expenses, there would have been more tax charged on the dividend income.

87 In the light of the above, I am not inclined to follow *Rowdell* and *Patcorp*. The Court of Appeal in *JD Ltd* at [32] has cautioned against reliance on foreign decisions in interpreting local tax statutes and suggested that such reliance is appropriate only where the corresponding foreign tax statutes are identical or very similar. Both *Rowdell* and *Patcorp* involved Australian statutory provisions providing for tax rebates on dividends which have no direct local equivalent. While the broad mechanics of the dividend rebate system under s 46 of the Income Tax Assessment Act 1936 (Cth) ("ITAA") in *Rowdell* and *Patcorp* and the franking dividend system under s 44 of the Act are similar, the express words and structure of s 46 of the ITAA and s 44 of the Act are totally different. At best, the reasoning in *Rowdell* and *Patcorp* only supports the Appellant's entitlement to the franked dividends and the accompanying tax credits; it does not support the legitimacy of the Financing Arrangement. The courts in both cases did not have to engage in the application of s 260 of the ITAA with much rigour or depth, but instead focused on the proper scope and application of the other Australian statutory provisions relating to tax rebates. Importantly, the courts in both cases did not explicitly consider whether the transactions in question fell within any of the limbs of s 260(1) of the ITAA, which is the issue here in the context of s 33(1). The courts did not interpret any of the limbs of s 260(1) of the ITAA. At any rate, the facts of *Rowdell* and *Patcorp* are distinguishable from the facts of the present case.

88 Quite apart from reducing the total tax chargeable on the dividend income of the Appellant by incurring interest expenses, the Financing Arrangement also had the effect of avoiding another liability that would have been imposed but for the Financing Arrangement: namely, the liability of [C] to bear withholding tax for the interest payments that it received.

89 [C] is a non-resident company based in Malaysia. Interest that is earned by [C] under any loan provided by [C] to a person resident in Singapore (*eg*, the Appellant) would be Singapore-sourced income. Pursuant to s 10(1)(*d*) read with s 12(6) of the Act, tax is payable in respect of such interest income. The withholding tax provision under s 45 facilitates the collection of tax payable from non-residents on their Singapore-sourced interest income. Hence, pursuant to s 45, any person resident in Singapore who is liable to pay [C] any interest that is chargeable to tax (*eg*, under loans made by [C] to that person) would have to deduct withholding tax at the prevailing rates from the interest payable to [C] and pass that withholding tax over to the Comptroller.

90 Under the Financing Arrangement, [N Bank Singapore] subscribed for the Notes from the Appellant. [N Bank Singapore] then detached the Interest Coupons and sold the Principal Notes and paid interest under CPO1 to [N Bank Mauritius], after receiving interest payments from the Appellant under the Interest Coupons. [N Bank Mauritius] in turn sold the Principal Notes and paid interest under CPO2 to [C]. Ultimately, [C] bought the Principal Notes and received the interest payable under CPO2. However, since the payor of the interest was [N Bank Mauritius] and not a person resident in Singapore, s 45 of the Act did not apply; no withholding tax was ever deducted from the interest paid in a chain from the Appellant to [C] through [N Bank Singapore] and [N Bank Mauritius]. The key steps in the Financing Arrangement which allowed [C] to avoid liability to pay withholding tax were the detachment of the Interest Coupons from the Notes, the interposition of [N Bank Singapore] and [N Bank Mauritius] in the chain of interest payments and the use of CPO1 and CPO2.

91 Counsel for the Appellant strenuously emphasises that the splitting of interest and principal on

debt "has long been a normal aspect of commercial financing transactions", citing the Canadian Federal Court of Appeal's observation in *Lehigh Cement Limited v Her Majesty The Queen* [2010] FCA 124 at [30]. While I accept this general proposition, I am unable to agree with counsel's conclusion that the splitting of the interest and principal on the debt in the present case is fully legitimate and did not constitute tax avoidance. The fact is that the detachment of the Interest Coupons from the Notes allowed [C] to avoid withholding tax. If [N Bank Singapore] subscribed for the Notes but the Interest Coupons were not detached from the Notes before the Notes were sold onwards from [N Bank Singapore] to [C] through [N Bank Mauritius], the Appellant would have had to deduct withholding tax from the interest it had to pay under the Interest Coupons to [C]. Alternatively, if [C] had *directly* subscribed for the Notes from the Appellant, the Appellant would also have had to deduct withholding tax from the interest that it would have to pay to [C] under the Interest Coupons. The withholding tax so deducted would have been payable to the Comptroller. Hence, by interposing [N Bank Singapore] and [N Bank Mauritius], the Financing Arrangement had the effect of enabling [C] to receive the full interest payments without being liable to pay withholding tax at all.

92 Given that I find that the Financing Arrangement falls within s 33(1)(*c*), there is no need to determine whether ss 33(1)(*a*) and (1)(*b*) applied on the facts and I express no opinion on the same.

Whether the Financing Arrangement fell within the statutory exception under s 33(3)(*b*)

Interpreting s 33(3)(b) – relevant principles

93 To avail itself of the statutory exception under s 33(3)(*b*), the Appellant must show that the Financing Arrangement was "carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax".

94 From a plain reading of s 33(3)(*b*), it is clear that the taxpayer seeking to avail itself of s 33(3)(*b*) bears the onus of proving two elements. Firstly, it must prove that the arrangement in question was carried out for *bona fide* commercial reasons. Secondly, it must prove that the same arrangement had not as one of its main purposes the avoidance or reduction of tax.

95 Counsel for the Appellant argues that the first element is concerned with the subjective reasons of the taxpayer for entering into and carrying out the arrangement in question and supports his arguments by referring to various English cases that I will consider later in this judgment. In contrast, counsel for the Comptroller argues that both elements must be interpreted as importing objective tests such that the subjective motivations of the taxpayer are irrelevant. He rejects the suggestion that the first and second elements should be interpreted as subjective and objective respectively on the ground that it is difficult to read s 33(3)(*b*) as such and reconcile the subjective first element with the objective second element.

96 In determining the proper interpretation of s 33(3)(*b*), one must start from the plain and ordinary meaning of the words of s 33(3)(*b*). The first element refers to "bona fide commercial reasons". The word "reasons" is used, not "purpose" or "effect" as in s 33(1) which have already been interpreted to import an objective test (see above at [71]–[76]). The phrase "*bona fide*" is a Latin expression meaning "good faith" or "honest intention". Hence, the *prima facie* conclusion derived from a plain reading and construal of the ordinary meaning of the phrase "bona fide commercial reasons" must be that the taxpayer's subjective reasons are considered under the first element. With regard to the second element, the word "purpose" by itself *prima facie* suggests that an objective approach should be adopted.

97 Turning to the relevant foreign authorities, it should be noted that the Australian and New Zealand anti-avoidance provisions do not have statutory exceptions similar to s 33(3)(*b*).

98 However, s 33(3)(*b*) bears a resemblance to s 28 of the United Kingdom's Finance Act 1960 (c 44) (UK) ("the Finance Act 1960"), the relevant part of which is as follows:

> **28. —(1**) Where —
>
> (*a*) in any such circumstances as are mentioned in the next following subsection, and
>
> (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions,
>
> a person is in a position to obtain, or has obtained, a tax advantage, then *unless he shows* that the transaction or transactions were carried out either for *bona fide commercial reasons* or in the ordinary course of making or managing investments, *and that* none of them had as their *main object, or one of their main objects, to enable tax advantages to be obtained*, this section shall apply to him in respect of that transaction or those transactions: ...
>
> [emphasis added]

99 The House of Lords in *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 ("*Brebner*") interpreted and applied that provision. In *Brebner*, the taxpayer was a director of a company which had been supplying coal to trawlers at appropriate discounts for many years. An offer was made to acquire the shares of the company. The taxpayer and five other shareholders outbid the offer because they were interested in keeping the company under their control as it supplied coal to their trawlers at discounted prices which discount would cease if they lost that control. Their offer was accepted by the majority of the company's shareholders and, by borrowing money from a bank, the six of them carried through the purchase. Subsequently, the company's capital was reduced by making capital repayments to the taxpayer and the five shareholders who used these capital repayments to repay in part the loan from the bank. The cash thus extracted from the company was not liable to tax. A notice under s 28 of the Finance Act 1960 was served on the taxpayer and the five shareholders. In reaching their conclusion that the transaction was carried out for *bona fid*e commercial reasons and did not have as one of its main objects the obtaining of tax advantages, the House of Lords construed the word "object" in s 28(1) of the Finance Act 1960. Lord Pearce said (at 27):

> *The "object" which has to be considered is a subjective matter of intention*. It cannot be narrowed down to a mere object of a company divorced from the directors who govern its policy or the shareholders who are concerned in and vote in favour of the resolutions for the increase and reduction of capital. For the company, as such, and apart from these, cannot form an intention. Thus *the object is a subjective matter to be derived in this case from the intentions and acts of the various members of the group. And it would be quite unrealistic and not in accordance with the subsection to suppose that their object has to be ascertained in isolation at each step in the arrangements*.
>
> [emphasis added]

This dictum of Lord Pearce was subsequently applied by Goff J in *Addy v Commissioners of Inland Revenue* 51 TC 71 at 81 and Fox J in *Clark v Inland Revenue Commissioners* [1979] 1 All ER 385 at 395 ("Clark").

100 Lord Upjohn said in *Brebner* (at 30):

> ... I agree that *the question whether one of the main objects is to obtain a tax advantage is subjective, that is, a matter of the intention of the parties*, and, as Lord Greene M.R. pointed out in *Crown Bedding Co. Ltd. v. Inland Revenue Commissioners*, is essentially a task for the Special Commissioners unless the relevant Act has made it objective (and that is not suggested here).
>
> My Lords, in the First Division the Lord President, delivering the first judgment, with which the other Lords of Session agreed, put it in a nutshell when he said:
>
> > "The issue raised in the case is a pure question of fact and from the facts found proved by the Special Commissioners there was ample evidence on which they could find as they did. The question which the Special Commissioners had to determine was what was the object in the mind of the respondent in entering into the transactions in question, and this is essentially a matter of fact and of inference for the commissioners."
>
> With this I wholly agree.
>
> My Lords, I would only conclude my speech by saying, *when the question of carrying out a genuine commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out – one by paying the maximum amount of tax, the other by paying no, or much less, tax – it would be quite wrong, as a necessary consequence, to draw the inference that, in adopting the latter course, one of the main objects is, for the purposes of the section, avoidance of tax*. No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can. *The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence.*
>
> [emphasis in original underlined; emphasis added in italics]

101 Fox J made important observations in *Clark* (at 395):

> Now it is not in dispute that the transaction was, in every respect, bona fide. *The only issue is whether it was carried out for commercial reasons. In deciding that, one must, I think, look at the transaction in the context of all the circumstances which gave rise to it*. Looked at by itself, the reason for the sale of the Highland shares, from Robin's point of view, was simply to obtain money. But one cannot, I think, just look at the sale in isolation. It must be considered against the background of the facts which gave rise to it and, in particular, of the circumstances which set the whole matter in motion, which was Robin's intended purchase of Lower Penn Farm. [emphasis added]

This was adopted and applied by the Special Commissioner in *Trevor G Lloyd v Revenue and Customs Commissioners* [2008] STC 681, who observed (at [7]):

> The issues for me are first whether the Transaction was carried out for bona fide commercial reasons; it is not whether it was a bona fide commercial transaction, which is more objective. Secondly, whether its main object (or one of its main objects) was to enable the tax advantage to be obtained. *Reasons are subjective reasons why the Transaction was carried out; the object (which I equate with purpose) is what the Transaction hoped to achieve. In looking at these I am bound to look at the transaction in its context*. ... [emphasis added]

102 In the light of the above, I am of the view that s 33(3)(*b*) of the Act should be interpreted as importing a subjective test which requires an inquiry into the subjective reasons of the taxpayer for carrying out the arrangement in question. I appreciate that the particular provisions interpreted and applied in the English cases cited above are not identical to s 33(3)(*b*) even though they are broadly similar, and, in fact, the word "object" is used in s 28 of the Finance Act 1960 instead of the word "purpose" which is used in s 33(3)(*b*). Nevertheless, the English cases are helpful in that the adoption of their approach would advance what I consider to be the purpose of the local provision.

103 In my view, the above interpretation of s 33(3)(*b*) is consistent with both Parliament's intention and the structure and intended operation of s 33. At the Second Reading, the Minister for Finance repeatedly emphasised that s 33 is intended to only catch deliberate and blatant tax avoidance arrangements and is not meant to affect normal legitimate commercial transactions (*Singapore Parliamentary Debates*, *Official Report* (13 January 1988) vol 50 at cols 357–359 and 365–366):

> Section 33 of the Act is repealed and re-enacted by clause 7 to clarify and define instances whereby a transaction will be deemed as factitious for tax purposes. It empowers the Comptroller to disregard and make adjustments to certain arrangements which are carried out for the purpose of tax avoidance and not principally for bona fide commercial reasons.
>
> ...
>
> In assessing whether a particular scheme would fall under the ambit of section 33, the Inland Revenue Department would, among other things, look for the presence of artificiality, the interposing of various intermediaries or transactions to reduce or avoid tax and transfer pricing. *It should be stressed that the aim is to reduce blatant or contrived tax avoidance arrangements and is not intended to affect normal commercial transactions.* ...
>
> ...
>
> ... I would like to reiterate that *the sole objective of the amendment is to curb the proliferation of blatant tax avoidance schemes in Singapore and is not intended to affect normal commercial transactions*.
>
> ...
>
> ... I would first like to reassure Members and the public at large that *it is not the intention of this new amendment to penalize legitimate commercial transactions nor, for that matter, legitimate tax planning proposals put up by companies*. It is perfectly proper for a company to set up its accounts to reduce the incidence of taxes.
>
> *The objective is to give the Comptroller powers which he does not have at the moment – to stop blatant tax avoidance schemes*, the numbers of which have increased despite what the Member for Radin Mas has suggested that there have been hardly any cases in the last two decades. ...
>
> ...
>
> Furthermore, there are adequate safeguards provided under the amendment which are to be found in the judicial interpretations of legislations having similar wordings such as in New Zealand and Australia, for there is a considerable body of case law on which we can rely for the purpose of construing the proposed section 33. One of the principles which has emerged is that *the*

provision will not apply to bona fide transactions even if these result in tax savings where such savings are incidental to the transactions. On the other hand, the provisions will apply to transactions where payment of tax is avoided through deliberate and artificial tax avoidance arrangements.

[emphasis added]

As shown above, the Minister's concern was that s 33 might impugn legitimate and normal commercial transactions. This supports a subjective approach towards s 33(3)(*b*).

104 Looking at the structure of s 33, it is clear that s 33(3)(*b*) was meant to be a statutory exception and a counterweight to the potentially wide-ranging application of s 33(1), which has already been interpreted to import a purely objective test (see above at [76]). If full effect is to be given to s 33(3)(*b*) as a statutory exception against the potential overreach of s 33(1), s 33(3)(*b*) should be interpreted as importing a subjective test. I believe that this interpretation of s 33 strikes a proper balance between the rights and concerns of taxpayers and the Comptroller.

105 To summarise, a taxpayer seeking to avail itself of the statutory exception under s 33(3)(*b*) must prove two elements. Firstly, it must prove that the arrangement in question was carried out for *bona fide* commercial reasons. The taxpayer's reasons for carrying out the arrangement is a subjective matter of fact that is determined by drawing the appropriate inferences and reaching the appropriate conclusion after considering all the relevant evidence, which includes but is not limited to the relevant contemporaneous documents, the manner in which the arrangement was carried out and the testimonies of the relevant witnesses on the stand. Secondly, it must prove that the same arrangement had not as one of its main purposes the avoidance or reduction of tax. Whether any of the main purposes of the arrangement was to avoid or reduce tax is a subjective matter of intention to be determined after a consideration of all the relevant evidence, which includes but is not limited to those examples cited earlier. For both elements, all the relevant circumstances of the case are considered, and the arrangement is considered in the context of those circumstances. For example, the testimony of a witness might be that the arrangement in question was carried out for *bona fide* commercial reasons and not for the purpose of avoiding or reducing tax, but the manner in which the arrangement was carried out and the contemporaneous documents for the various transactions within the arrangement might lead one to disbelieve the witness and reach the opposite conclusion. Everything depends on a holistic evaluation of all the relevant evidence.

106 I now turn to apply these principles to the present case.

Whether the Financing Arrangement was carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax

107 The Appellant's position is that the Board failed to give the appropriate weight to the evidence before it, which clearly supported the view that the Financing Agreement was carried out for *bona fide* commercial reasons and had not as one of its main purposes the avoidance or reduction of tax. Counsel for the Comptroller argues conversely that the Board had more than sufficient evidence to reach its finding that the Financing Arrangement was not carried out for *bona fide* commercial reasons and had as one of its main purposes the avoidance or reduction of tax.

108 The Board concluded that the Financing Arrangement was "artificial" and "contrived" and was not carried out for *bona fide* commercial reasons and had as one of its main purposes the avoidance or reduction of tax. [note: 55] It did so on the basis of a different interpretation of s 33(3)(*b*). It seems that the Board interpreted s 33(3)(*b*) as importing a fully objective test (see the Decision at

[96]–[99]), in contrast to the proper approach canvassed above. That being the case, I need to consider whether, on a proper interpretation and application of s 33(3)(*b*), the evidence before the Board nevertheless leads to the reasonable conclusion that the Financing Arrangement was carried out for *bona fide* commercial reasons and did not have as one of its main purposes the avoidance or reduction of tax.

109 The affidavit and testimony of [L], the chief financial officer and a director of [B], the holding company of the Appellant, must be the starting point as they are crucial in determining whether the Appellant carried out the Financing Arrangement for *bona fide* commercial reasons and not with a main purpose of avoiding or reducing tax.

110 Counsel for the Appellant points out [note: 56] repeatedly that [L] stated in his affidavit that the primary purpose of consolidating the Subsidiaries under the Appellant was to restructure and streamline the previously cumbersome holding structure for the Subsidiaries, [note: 57] so as to reduce operational inefficiencies, reorganise the Subsidiaries according to their lines of businesses [note: 58] and let the Subsidiaries avail themselves of group relief. [note: 59] Counsel also referred to [L's] testimony on the stand that the previous group structure was cumbersome in that, for example, [F], [G] and [H] had to pay one Singapore company and one Malaysian company whenever they decided to pay dividends. [note: 60] Counsel also referred to the announcement made by [B] to the Kuala Lumpur Stock Exchange where the same was said regarding the purpose of the restructuring, namely, that it was to put in place a simpler corporate structure and allow the Subsidiaries to obtain group relief. [note: 61] On this basis, counsel argues that the Board was wrong to conclude that the Financing Arrangement was not carried out for *bona fide* commercial reasons on the evidence adduced.

111 I am unable to agree with counsel. The evidence referred to by counsel only serves to prove what is not in dispute: namely, that the *restructuring* of the [B] group was done for *bona fide* commercial reasons, which include streamlining the corporate structure and taking advantage of group relief. There is nothing wrong *per se* with the restructuring. The Board itself noted the legitimacy of the restructuring in its Decision at [104]. Indeed, the Comptroller does not and cannot dispute this. What the Comptroller sought to impugn was the *Financing Arrangement*, which involves [N Bank Singapore] and [N Bank Mauritius] in the restructuring. The Financing Arrangement is separable from the restructuring exercise of the [B] group. It would be wrong to conflate both of them and attribute the *bona fide* commercial reasons for the latter to the former. It must be noted that the evidence referred to by counsel does not prove that the Financing Arrangement, as distinct from the restructuring of the [B] group itself, was done for *bona fide* commercial reasons. Counsel for the Appellant has failed to prove that the Financing Arrangement was carried out for *bona fide* commercial reasons.

112 In this regard, counsel for the Comptroller refers to various parts of [L's] testimony on the stand which, I agree, show that the Appellant did not carry out the Financing Arrangement for *bona fide* commercial reasons.

113 [L] stated in his affidavit that the [B] group already had the money to buy back their own "bonds", [note: 62] (*ie*, the Notes issued by the Appellant to [N Bank Singapore]). Under cross-examination, [L] confirmed that the group was capable of financing the restructuring and it was not necessary to involve [N Bank Singapore] and [N Bank Mauritius] in the restructuring through the Financing Arrangement: [note: 63]

Q [L], I'm going to bring you now to paragraph 43 of your affidavit.

A My affidavit?

Q Yes.

A Sure. Okay.

Q In paragraph 43, you stated that:

[Reads] "... we had the money to buy back our own bonds"---I---so bonds here refer to the fixed rate notes---"from internal funds within the [B] group"---as there was---"as there were not suitable investment opportunities in cement and related industries at that time."

Do you agree with me that the [B] group, based on this statement that you have made actually had the funds to buy back the fixed rate notes?

A *Er, yes*, in---in any reorganisation, Your Honour, you know, er, we will be transferring the investment, er from one company to another. And also some of the companies will then be the one making payment into another---another company within the group. And the other company will then be, er, the company that receive the funds. So, you know, and so those company that receive the funds into the organisation then will have the funds to invest elsewhere.

Q So you had the funds, you could have financed the---technically I put it to you that you could have financed the whole reorganisation without involving [N Bank Singapore]?

A That, well, I---I think that how the organisation---how the--- the Singapore investment is structured, er, there are---there are obviously, er, different ways to---to structure the--- the organisation. And as I have said, you know, so---and we decided to---to, er---go, to use the [N Bank] proposal. It's because it's actually, er, meets the three objectives, er, which is the restructuring of the---of the, er, legal structure, it is Singapore legal structure, they enable us to claim the [group] tax relief and also to enable the tax asset to be returned to the ultimate shareholder.

Q No, [L], I'm actually asking you, because you mention that you had money to buy back your own fixed rate notes from internal funds within the group, right. Technically the group itself could have financed the whole Singapore reorganisation without the involvement of [N Bank]. I mean, I know that they---I mean, [N Bank]--- I mean, there--- there are three objectives that [N Bank] has presented that you'll be able to achieve but based on this statement, do you agree that you---there was actually technically no need to involve [N Bank] because you could have [done] the financing yourself within the group?

A Well, technically there---there are, er, many ways of doing it.

Q Yes. So do you agree with me?

A I mean, this---this---these were one of the---the---well, you---you can say that---that---that technically that can be one of the ways that we can do it.

Q *So you would also agree with me that it was not necessary to involve [N Bank Singapore] in*

the Singapore reorganisation?

A But it---there---there can be many ways of how---how---and many ways how you want to reorganise the---

Q [L], I just need a yes or no answer from you. I---

A *Yes, yes.*

[emphasis added in italics]

114 As suggested in the excerpt set out immediately above, [L] had previously testified during his examination-in-chief that there were three objectives in carrying out the restructuring and the Financing Arrangement, namely:

(a) to simplify the corporate structure;

(b) to claim group tax relief; and

(c) to have the "tax assets" residing in the Subsidiaries returned to [B]. [note: 64]

When further questioned by the Chairperson of the Board, [L] actually admitted that [N Bank] was involved in the restructuring mainly to achieve the third objective, *ie*, to return the "tax assets" represented by the tax credits in the s 44 accounts of the Subsidiaries to their ultimate holding company, [B]: [note: 65]

Chairperson: May I just ask a question? How would involving [N Bank] serve these three objectives? Maybe can you explain?

Witness: Er, Your Honour the---because this---the [Appellant], er, well, is the holding company, right. And this holding company---

Chairperson: You're talking about the appellant, right? The H is appellant. H is appellant.

Witness: No, I--- H is the appellant, yes, yah.

Chairperson: Yes.

Witness: H is appellant.

Chairperson: Okay.

Witness: You know, the---the---the appellant will be the company, er, where all the Singapore subsidiaries be housed under [the Appellant]. And so for [the Appellant], er, er, to be able to acquire those investment, he needs funds. Yah, you need to have the funds to---to acquire all these Singapore investments. So, er, or one of the way then is for [the Appellant], er, to---to borrow---to borrow money to acquire this investment. *So when you borrow money to acquire the investment then [the Appellant], er, will in---in the process of borrowing the money as in being able to incur, er, the interest expense, you know. So, er, er---and so that when [the Appellant] received the dividend from the investments, you know, then the interest expenses may be set up against the dividend and that's where the---er, the---the tax asset that I was saying will then be able to return, er, ultimately, er, to, er, [B], you know, which is the ultimately shareholder of all these Singapore investments*.

Chairperson: *So essentially it's to serve this, the third objective, is it?*

Witness: *That's correct, yes.*

Chairperson: It doesn't serve---

Yap: Your Honour, may I cont---

Chairperson: It doesn't serve the other two objectives, right, which is to simplify the structure. And the second objective is to enable Singapore companies to obtain tax relief on any of the companies.

Witness: Well---

Chairperson: *It doesn't serve those two---it doesn't serve those two objectives, right? Only the third objective?*

Witness: *Yes, this*---

Chairperson: *Am I correct?*

Witness: Specifically you---you---yah, *you'll be correct to say that, er, Your Honour.*

[emphasis added]

115 Counsel for the Appellant argues that counsel for the Comptroller took [L's] evidence in the above excerpt out of context and was wrong to say that [L] had admitted that the Financing Arrangement was entered to avoid or reduce tax when in fact, in the opinion of counsel, the excerpt merely confirms [N Bank Singapore's] role, which was to lend the funds needed for the Appellant to acquire all the Subsidiaries and a consequence of this lending was the incurring of interest expenses which could be set off against the dividend income. I am unable to accept counsel's interpretation of the evidence here. It is clear from the excerpt above that the Chairperson was focusing on whether the main objective of the Financing Agreement was for the extraction of the tax credits in the Subsidiaries' s 44 accounts. In response, [L] admitted in no uncertain terms that the main objective of the Financing Arrangement was indeed to extract the tax credits in the Subsidiaries' s 44 accounts.

116 Counsel for the Appellant also points [note: 66] to various parts of [L's] evidence which suggest that the restructuring would have taken place anyway regardless of the changes to the tax regime in Singapore through the introduction of group relief and the transition from the full imputation system to the one-tier corporate tax system. [L] did state the same in his affidavit, [note: 67] cross-examination

[note: 68] and re-examination. [note: 69] However, once again, this evidence only shows that the *restructuring* might not have been done solely because of the need to obtain group tax relief and tax benefits under the full imputation system, and can shed little if any light on the reasons underlying the Financing Arrangement (in this regard, see also above at [111]). I am unable to appreciate the significance of this evidence in determining whether the *Financing Arrangement* was entered into for *bona fide* commercial reasons.

117 In fact, in the very same excerpt from [L's] re-examination cited by counsel for the Appellant in support of his point that the restructuring would have gone ahead without the changes in the tax regime in Singapore, [L] effectively said that he chose to enter into the Financing Arrangement in order to "recover the tax asset" represented by the tax credits in the Subsidiaries' s 44 accounts: [note: 70]

> Q Yes. And then we come to the point that's, you know, the question of your three objectives. Briefly, one was the reorganisation, two was the group tax relief and third was the section 44. Can you tell the Board, you know, the sequence of how these things affected your thinking?
>
> A Okay. Your Honour, I---I just want to make the point that, you know, it's---it's not like, er, you know, we---we did not even think about the reorganisation, did not even have on our mind that there's a need to do reorganisation. And then [N Bank] came to us, "We have proposal to---to---to save---to extract tax credit", it was done like that, you know. *So we---it's already at our---in---in---in my mind that we had to do this reorganisation, you know, with or without this change to single tier system, you know.* And because I have said, you know, the---the---*the first thing that I want to do because of this history which resulted in such a---a---a structure of 50-50, one in Malaysia and one in Singapore but I have to do it, you know. So I can do it---I can do it later, you know, based in the terms of reorganisation*. But---so---so that's why I did the other part earlier and this Singapore reorganisation *I did not work on---work on it until in 2003. Now why 2003? It's because the Singapore Government introduced the group tax relief but I couldn't wait any longer.* Because if the minute I wait any longer and, like I said this morning, if any of the subsidiaries suffered losses then, er, I will be asked the question, "Why you did not do it, you know, because you did not do the reorganisation, you are not able to claim the group tax relief", you know. So in terms of sequence, this is---this is what happened, you know. *Then, er, with these two reasons, I have to then start to explore what is the best way to do the reorganisation.* Now, I could have, er, you know, do it in a way, for example, er, inject the assets into [the Appellant] by way of, er, share issue, right. That means there's no cash to be involved, just---just inject the assets in [the Appellant] and then issue shares to---to, er, [B]." Or I could do a---a inter-company loan, right, from [B] and then the---and---and then the---adjust in the interest bearing, er, alone [*sic*] [loan] and then I could still claim the---claim the interest deduction. *But the, er, [N Bank's] proposal, you know, er, allows us, er, to achieve all the three objectives which is, as I said, the reorganisation, if we do group tax relief and then, er, enable to recover the tax asset that's sitting in this Singapore investments, you know. That's why, er, we have chosen, you know, this---this, er---the---the---the proposal from [N Bank] compared to the various options that we---that we---we may have.*
>
> Q What---what was your thinking with regard to this tax asset that was in the---in the subsidiaries? What---what---
>
> A Well, I---the---the---

Q I mean, it was an asset there for you to be used. I mean, it was---

A Yah, yah, and also, I mean, so my---*my understanding is that, you know, the, er, the tax credit, er, er, it was came about because when the subsidiary companies make a profit so they pay a tax, right, so, you know, there's a tax credit and so that actually belong to the company and---and, er, and that's where when---when we, er, sought the tax opinion and so on, it---it basically means that the, er, you know, er, we should---we should, er, try to recover the tax credit*. Now, as a CFO, er, of the company, if I know that there's such a tax asset in the Singapore investment holding company, if I chose the structure that actually, er, basically, you know, er, not doing anything to recover the tax asset then I were told I would have failed in my duty as a CFO.

[emphasis added]

118 In the above excerpt, [L] was asked for his train of thought in relation to the three objectives mentioned earlier (see above at [114]) which led him to decide to enter into the Financing Arrangement with [N Bank]. [L] said that he would have done the restructuring with or without the change from the full imputation system to the single-tier corporate tax system. The first objective for the restructuring that came to him was to get rid of the previous cumbersome corporate structure where [F], [G] and [H] were held in equal shares by one Malaysian company and one Singaporean company. When group tax relief was introduced in 2003, that provided him with the second objective for the restructuring and the impetus from this led him to seriously explore the best way to carry out the restructuring. He considered several ways to do the restructuring, but chose to accept [N Bank's] proposal because it could not only achieve the first two objectives, but also a third objective, which was to recover the "tax asset" sitting in the Subsidiaries.

119 It is hence apparent that before [L] explored the various ways to implement the restructuring, he knew that he would have gone ahead with or without the changes in the full imputation system, and at the time when he started exploring the options, he had basically *two objectives* in his mind for the restructuring, which was to streamline the corporate structure and obtain group tax relief. However, when [N Bank] came to him with the proposal for the Financing Arrangement, he realised that it could allow him to achieve not only those two objectives but a *third objective*, *ie*, to recover the "tax assets" sitting in the Subsidiaries which are the tax credits in their s 44 accounts, and this was the reason why he chose to carry out the Financing Arrangement instead of the various other options. Hence, it seems that the Appellant chose to enter into the Financing Arrangement for the purpose of recovering the tax credits.

120 I now turn to examine the contemporaneous documents. The "proposal" referred to by [L] in his re-examination was a paper titled "[B] Fixed Rate Notes Financing Structure" ("the [N Bank] Discussion Paper"). [note: 71] The Board relied upon it to hold that there was no commercial justification for the Financing Arrangement apart from the obtaining of tax benefits. Counsel for the Appellant argues that the Board should not have relied upon the [N Bank] Discussion Paper because it was prepared by [N Bank] and does not shed light on the reasons or motivations of the Appellant or the [B] group in entering into the Financing Arrangement and instead only reflected [N Bank's] intentions and objectives. [note: 72]

121 With respect, I am unable to agree with counsel for the Appellant on this point. I do not think that the Appellant and the [B] group can distance themselves from the [N Bank] Discussion Paper. The [N Bank] Discussion Paper clearly states that "[B] has approached [N Bank] to assist in the debt financing required for the proposed restructuring exercise" and [N Bank] has "set out [its] understanding of [B's] proposed restructuring steps" and a "financing structure that [it] believe[s] the

[B] group may find attractive". [note: 73] Furthermore, [L] testified that [N Bank] was a relationship bank of the group which conducted regular meetings with the group to discuss the group's financing needs and mergers and acquisitions activities. [note: 74] [L] testified that it was at one of such meetings that the group revealed their restructuring plans for the Singapore operations to [N Bank], which subsequently returned with a proposal for the financing of the restructuring represented by the [N Bank] Discussion Paper. Importantly, [L] also revealed that the [B] group deliberately chose and accepted [N Bank's] proposal [note: 75] (see above at [117]). Hence, the [N Bank] Discussion Paper is clearly very relevant to the determination of the Appellant's reasons for entering into the Financing Arrangement.

122 In fact, the [N Bank] Discussion Paper is crucial given the absence of any evidence of the Appellant's or the [B] group's discussions on the commercial feasibility of the Financing Agreement. As rightly noted by the Board, the [N Bank] Discussion Paper does not explain how the way in which the Financing Arrangement was structured helped [B] achieve what was stated in the [N Bank] Discussion Paper to be the main objective of the restructuring, which was to streamline its operations in Singapore through a "flatter" corporate structure. [note: 76]

123 Instead, the [N Bank] Discussion Paper pointedly states that "[the Appellant] should be able to derive savings amounting to more than S$17.9million" and provided a tabular breakdown of the potential tax savings and benefits. [note: 77] It may be inferred that when the Appellant accepted the proposal in the [N Bank] Discussion Paper, it also agreed with the rationale behind the proposal, namely, the extraction of tax benefits.

124 To buttress this, as noted by counsel for the Comptroller, [note: 78] the announcement made by [B] to the Kuala Lumpur Stock Exchange dated 30 July 2003 [note: 79] broadly describes the Financing Arrangement and states that "the issue of the Notes will not have any impact on the consolidated net borrowings of the [B] Group". This shows that [B] never expected the Financing Arrangement to result in the group overall owing money to [N Bank], *viz*, for the group to truly borrow money from [N Bank]. Counsel for the Appellant refers to a section of the same announcement which states the rationale for the restructuring (*ie*, to simplify the corporate structure and allow the Subsidiaries to avail themselves of group tax relief) to support the Appellant's argument that the Financing Arrangement fell within s 33(3)(*b*). With respect, counsel is making the same error already addressed at [111] above. This section only demonstrates that there were good commercial reasons for the restructuring, as distinct from the Financing Arrangement.

125 Turning to the manner in which the Financing Arrangement was carried out, there are many features of the Financing Arrangement which lead one to reasonably conclude that the Financing Arrangement was not carried out for *bona fide* commercial reasons and had as one of its main purposes the avoidance or reduction of tax. The Board noted many of these features in its Decision at [107]–[114].

126 The valuations at which the Appellant bought the Subsidiaries invite comment. As the Board rightly pointed out, the [N Bank] Discussion Paper did not disclose how the sums paid for the Subsidiaries were arrived at and no valuation was carried out. [L] gave evidence [note: 80] that the valuations were approximately the same as those used in the group's acquisitions in 1998 from [P], a related company of [R], and opined that "the acquisitions in December 1998 were at arm's length with an independent third party on a willing buyer willing seller basis". With respect, [L's] evidence here constitutes mere averments and is not supported by concrete evidence. As the Board noted, there is no evidence that the valuations in 1998 amounted to $225m or thereabouts. There is also no

evidence how this valuation was computed and arrived at. Assuming it is true that the valuations used for the Financing Arrangement approximated those used in 1998, they are outdated by five years. Counsel for the Appellant argues that [L's] evidence was unchallenged and that the Board was wrong to conclude that the valuations were unreliable on the basis that [P] was not a truly independent third party, because [R] was merely [B's] joint venture partner.

127 The dispute over whether the valuations made in 1998 were at arm's length with an independent party is a red herring. The real question here is whether paying $225m for the Subsidiaries was reasonable on a consideration of all the evidence. If it is not, there is then reason to doubt that there were *bona fide* commercial reasons for the Financing Arrangement and that a main purpose of the Financing Arrangement was not the avoidance or reduction of tax.

128 In this respect, I agree with the Board that the evidence strongly suggests that the Appellant grossly overpaid for its interests in the Subsidiaries.

129 The financial statements of the Subsidiaries for the year ended 31 December 2002 show that the net asset values of the Subsidiaries are as follows: [note: 81]

Subsidiaries	**Total Asset ($)**	**Total Liabilities ($)**	**Net Asset Value ($)**
[D]	21,079,000	1,039,000	20,040,000
[F]	60,039,912	23,583,088	36,456,824
[G]	2,221,986	27,450	2,194,536
[H] [note: 82]	2,184,734	18,814	2,165,920
Total:	**85,525,632**	**24,668,352**	**60,857,280**

Given the lack of concrete evidence as to how the valuation of $225m for the Subsidiaries was arrived at, the net asset value of the Subsidiaries is a reasonable, albeit rough, approximation of the value of the Subsidiaries in 2003.

130 The Appellant's financial statements for the financial year ended 31 December 2003 show that the Appellant acquired the Subsidiaries for the following costs: [note: 83]

Subsidiaries	**Costs ($)**
[D]	$75,000,000
[F]	$102,000,000
[G]	$45,500,000
[H]	$2,500,000
Total:	**$225,000,000**

131 The difference between the net asset values of the Subsidiaries and the amounts paid for the Subsidiaries may be represented as such:

Subsidiaries	Costs ($)	Net Asset Value ($)	Difference ($)
[D]	75,000,000	20,040,000	54,960,000
[F]	102,000,000	36,456,824	65,543,176
[G]	45,500,000	2,194,536	43,305,464
[H]	2,500,000	2,165,920	334,080
Total:	**225,000,000**	**60,857,280**	**164,142,720**

132 Hence, it may be seen that the Appellant acquired the Subsidiaries at a cost that greatly exceeded the approximate value of the Subsidiaries. The total amount paid for the Subsidiaries (*ie*, $225m) greatly exceeded the total net asset value of the Subsidiaries (*ie*, $60,857,280). The amount paid is more than 360% the net asset value of the Subsidiaries. The great difference between the total amount paid and the total net asset value of the Subsidiaries was noted in the affidavit of Ms Christina Ng ("Ms Ng"), [note: 84] the Comptroller's witness and a Group Tax Specialist with the Corporate Tax Division (Large Corporations Branch) of the Inland Revenue Authority of Singapore, and was undisputed by the Appellant.

133 One may ask why the Appellant paid so much money for the Subsidiaries. The reason is not hard to find: the larger the amount paid for the Subsidiaries the more the borrowing *via* the issuance of the Notes. If the Appellant paid more interest under the Financing Arrangement to [N Bank Singapore], the Appellant would have more allowable deductions thereby reducing the tax on the dividend income. Ultimately, that would lead to more tax refunds from the Comptroller.

134 Another questionable feature is the interest rate for the Notes. There is no satisfactory evidence adduced by the Appellant to show that the interest rate was commercially arrived at. It is significant to note that although the Interest Coupons fixed the interest rate at 8.85% *per annum*, the benefit of such high interest did not go to [N Bank Singapore] or [N Bank Mauritius] (each of whom only earned "interest" of 0.005%); instead it ultimately went to [C] which earned interest at 8.84% *per annum*. As [C] is part of the [B] group, payment of such high interest would have no financial impact on the [B] group whatsoever. The other significant point to note is that under the Financing Arrangement, [C] would not be liable to withholding tax, its interest income being derived offshore from [N Bank Mauritius] under CPO2 (see also above at [88]–[91]). Thus, while the Appellant would enjoy deduction of the high interest paid under the Notes, [C] would suffer no tax on the interest it received.

135 The loans made by [D] and [B] also invite comment. In order to put [C] in funds to pay [N Bank Mauritius] for the Principal Notes, [D] and [B] each made an interest-free inter-company loan of $75m to [C]. It was not explained in the evidence why [D] and [B], as profit-oriented commercial entities, made such substantial loans without interest. However, the reason, again, is not hard to find. Had [D] and [B] loaned $150m with interest to [C], [D] and [B] would have been liable to pay tax on the interest income that each of them would have received from [C]. By making interest-free loans to [C] and thereby enabling [C] effectively to loan these moneys to the Appellant through [N Bank Singapore] and [N Bank Mauritius], [D] and [B] avoided the tax which would otherwise have been payable on interest income arising had the loans been made with interest to [C]. Moreover, as earlier stated, [C] was able to effectively receive without withholding tax interest payments equivalent to those under the Notes (less the 0.005% each of [N Bank Singapore] and

[N Bank Mauritius] earned) without having to pay Singapore tax.

136 Even if, as counsel for the Appellant submits, it is common and legitimate for companies within a group to provide intercompany loans (with interest or otherwise) to each other, the Appellant failed to explain why [D] and [B] had to loan indirectly a total of $150m through [C] to the Appellant by first lending the sum to [C] which then effectively loaned the same amount to the Appellant when it bought the Principal Notes through [N Bank Mauritius] and [N Bank Singapore]. [D] and [B] could well have loaned the $150m directly to the Appellant, interest-free and without the circular involvement of [N Bank Singapore], [N Bank Mauritius] and [C]. Alternatively, they could have charged the Appellant interest on such loans. However, neither way would have achieved the tax benefit that the Appellant sought. If no interest was paid, the Appellant would not have been entitled to deductions for interest paid. The result would have been that the tax refund which could have been obtained (had such interest been paid) would be lost. On the other hand, if [D] and [B] had charged the Appellant interest, they would have had to pay tax on such interest income. From the [B] group's perspective, any tax refund to the Appellant precipitated by the incurring of such interest would have been neutralised by such tax liability. Of course, had [D] and [B] (together with [C]) lent directly to the Appellant, the latter would have had the funds to pay $225m for the Subsidiaries, and there would have been no need for the Appellant to issue the Notes. The fact that [D], [B] and [C] opted not to directly loan the total sum of $225m interest-free to the Appellant but instead chose to carry out the circuitous steps of the Financing Arrangement (without which the tax refunds would not have been precipitated) further supports the view that the Financing Arrangement was entered into to generate large interest expenses and consequently precipitate large tax refunds for the Appellant.

137 At risk of repetition, it is useful to recount what happened under the Financing Arrangement. The Notes were issued by the Appellant to [N Bank Singapore], which then sold it on to [N Bank Mauritius]. [N Bank Mauritius] in turn sold it on to [C]. All of the parties involved paid the same principal amount for the Notes (*ie*, $225m), which passed from the Appellant through [N Bank Singapore] and [N Bank Mauritius] to [C]. All these happened on the same day. [C] obtained the $225m required to buy the Notes by getting loans amounting to $150m from the very companies from which the Appellant bought its shares in the Subsidiaries (*ie*, [B] and [D]) and combining these loans with the $75m it received from the Appellant for its original interest in the Subsidiaries. The $225m essentially flowed in a circle from [N Bank Singapore] to the Appellant to the related parties (*ie*, [D], [B] and [C]) to [N Bank Mauritius] and then back to [N Bank Singapore].

138 A similar pattern may be observed in relation to the interest payments under the Interest Coupons. The Appellant paid [N Bank Singapore] interest under the Interest Coupons, which triggered CPO1. [N Bank Singapore] then paid [N Bank Mauritius] interest under CPO1, which in turn triggered CPO2. [N Bank Mauritius] then paid [C] the interest under CPO2. The relevant amounts of interest paid under the Interest Coupons, CPO1 and CPO2 were similar save for the interest at 0.005% *per annum* that [N Bank Singapore] and [N Bank Mauritius] each retained. The interest paid by the Appellant essentially flowed in a loop from the taxpayer through [N Bank Singapore] and [N Bank Mauritius] to [C]. (The interest flowed from one member of the [B] group to another member.) By leaving [C] to earn all the interest, the desired tax benefit was that [C] would not have to pay tax, the reasoning being that the interest was received by [C] (a non-resident) from a foreign source (*ie*, [N Bank Mauritius]).

139 There was in substance no real loan made by [N Bank] to the Appellant. Counsel for the Appellant characterised the "loan" of $225m made by [N Bank] as a "bridging loan". I am unable to agree. If [N Bank] was truly lending money to the Appellant, it would have taken on risk, which it did not. Instead, the Notes were sold onwards on the same day back to the [B] group. If the Appellant had wished to borrow money from a fellow subsidiary in the [B] group, it could have done so directly

instead of taking a circuitous route involving [N Bank], particularly when it had the money to fund the restructuring (see above at [113]). Counsel for the Appellant's insistence that the loans and Notes were all "real", that "actual" interests were paid and that "actual" funds were transferred [note: 85] misses the point. There is no allegation that the transactions here were shams or legally invalid. The Comptroller has never asserted so. The evidence clearly shows that there were actual transfers of funds in accordance with the Financing Arrangement. However, these do not go to prove that for tax purposes there was in substance a real loan made by [N Bank]. The Board was right to look at the substance of the matter. The most important fact is that the funds under the Financing Arrangement essentially flowed in a loop back to the [B] group on the same day. The Board was right to conclude that there was in substance no actual credit risk incurred by [N Bank] whose role was actually that of a facilitator. This view is further supported by the fact that what [N Bank Singapore] and [N Bank Mauritius] each earned under the Financing Arrangement was only 0.005% *per annum* on $225m (or, $11,250 *per annum*). In summary, [N Bank Singapore] and [N Bank Mauritius] were interposed in the Financing Arrangement in order that the Appellant would be able to obtain the tax refunds without the interest it bore being taxed in the hands of [C]. The Board was not wrong to have arrived at the conclusion that the Financing Arrangement was not carried out for *bona fide* commercial reasons but had, as one of its main purpose, the avoidance of tax.

140 Counsel for the Appellant points out that the Comptroller took no objection to various public listed companies paying their shareholders franked dividends with the proceeds of heavily discounted rights issue for the express purpose of passing on the benefit of their s 44 account credits to their shareholders. [note: 86] Counsel points to various parts of Ms Ng's testimony on the stand to the effect that she found nothing wrong with these schemes. Counsel argues that what the Appellant did here is no different from what those companies did. It seems to me that counsel is clutching at straws when he attempts to equate the two. Of course, in both cases, franked dividends were paid in order to pass on s 44 tax credits. There is nothing wrong with that in itself. Nor is there anything wrong with the companies funding the franked dividends with the proceeds of the right issues. However, in the present case, high interest expenses were artificially incurred to precipitate tax refunds, and this is the material difference, not to mention the other features of the Financing Arrangement which failed to qualify under s 33(3)(*b*).

141 For the reasons above, I am of the firm view that the Board was well entitled to find that the Financing Arrangement was not carried out for *bona fide* commercial reasons and that it had as one of its main purposes the avoidance or reduction of tax, with the result that the Appellant failed to qualify within the statutory exception under s 33(3)(*b*).

Whether the Appellant could avail itself of the relevant specific provisions of the Act and override the operation of s 33

142 Counsel for the Appellant argues that even if s 33 applies to the Financing Arrangement, this court should give effect to the relevant specific provisions of the Act (*ie*, ss 14(1)(*a*), 44, 44A and 46) and override the operation of s 33.

143 Whether the Appellant succeeds depends on the extent to which what came to be termed as the "choice principle" in Australia applies. Counsel for the Appellant argues that the choice principle should be adopted and applied in Singapore. Counsel for the Comptroller argues that the New Zealand approach as established in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 ("*Ben Nevis*") should be adopted and applied instead.

144 The central issue here is the proper relationship between s 33, the general anti-avoidance provision of the Act, and the specific provisions in the Act that provide various tax benefits. If a

taxpayer orders his affairs so as to fall within any specific provision of the Act which affords a tax benefit, can s 33 be invoked to allow the Comptroller to deny the taxpayer such a tax benefit? When does taking advantage of a specific tax provision conferring a tax benefit amount to tax avoidance within the meaning of s 33? In *Ben Nevis*, Tipping and McGrath JJ succinctly encapsulated the tension (at [12]):

> ... Taxpayers enter into many transactions which have been structured with the purpose of taking advantage of specific provisions in order to reduce tax. While the general anti-avoidance provision is expressed broadly, its purpose cannot be to strike down arrangements which involve no more than appropriate use of specific provisions. On the other hand, strict compliance with the requirements of specific provisions cannot have been intended to immunise all arrangements involving their use against being categorised as tax avoidance arrangements, which it was the purpose of the general provision to avoid.

145 The Australian and New Zealand courts have had to contend with the same problem in relation to their own tax legislation. I now turn to consider the respective positions developed in these jurisdictions.

The Australian position – the choice principle

146 The choice principle was articulated in *W.P. Keighery Proprietary Limited v Federal Commissioner of Taxation* [1956–1957] 100 CLR 66 ("*Keighery*"). Dixon CJ, Kitto and Taylor JJ said in their joint judgment (at 92–93):

> Whatever difficulties there may be in interpreting s. 260, one thing at least is clear: the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them. It is therefore important to consider whether the result of treating the section as applying in a case such as the present would be to render ineffectual an attempt to defeat etc. a liability imposed by the Act or to render ineffectual an attempt to give a company an advantage which the Act intended that it might be given.

147 *Keighery* was subsequently applied in *The Commissioner of Taxation of the Commonwealth of Australia v Casuarina Pty. Limited* [1970–1971] 127 CLR 62 and *Mullens v The Commissioner of Taxation of the Commonwealth of Australia* [1975–1976] 135 CLR 290 ("*Mullens*"). In *Mullens*, Barwick CJ said (at 298):

> ... If the transaction, being effective and not in breach of the Act, reduced the amount of tax which the taxpayer otherwise would pay, it did not alter in any relevant sense the incidence of tax. An intention to enter such a transaction so as to obtain the statutory benefit would not relevantly be an intention to alter the incidence of tax. The Court has made it quite plain in several decisions that a taxpayer is entitled to create a situation to which the Act attaches taxation advantages for the taxpayer. Equally, the taxpayer may cast a transaction into which he intends to enter in a form which is financially advantageous to him under the Act. *W. P. Keighery Pty. Ltd. v. Federal Commissioner of Taxation* and *Federal Commissioner of Taxation v. Casuarina Pty. Ltd.* amply demonstrate this and are, in my opinion, very relevant to the resolution of this case. ...

Stephen J said (at 318):

> Section 260 is concerned with instances in which there exists a purpose or effect of altering the

incidence of tax, of relieving from liability to pay tax, of defeating, evading or avoiding liability imposed by the Act or of in any respect preventing its operation. The transaction here in question does not supply any such instance unless indeed purposefully to take advantage of a deduction offered by the legislation is enough to attract the section. That it is not is now well established. The principle in *W. P. Keighery Pty. Ltd. v. Federal Commissioner of Taxation* is not to be confined to cases where the Act offers to the taxpayer a choice of alternative tax consequences either of which he is free to choose; it was there held that merely because the taxpayer chose, quite deliberately, the alternative most advantageous to it from a tax standpoint it did not thereby attract s. 260. So, too, if no question arises of a choice between two courses of conduct but, instead, the Act offers certain tax benefits to taxpayers who adopt a particular course of conduct; the adoption of that course does not establish any purpose or effect such as is described in s. 260. Instead, an assessment which reflects the tax consequences of the course of conduct which the taxpayer has in fact adopted will then represent a due and proper incidence of tax, there will be no relief from, or defeating of, liability to tax and the Act will have the very operation which the legislature intended. As the Chief Justice has said in *Federal Commissioner of Taxation v. Casuarina Pty. Ltd.*, there is no room for the application of s. 260 where the taxpayer has become liable for the amount of tax "appropriate under the terms of the Assessment Act to the state of affairs obtaining" at the relevant date; "steps taken to bring about that state of affairs" do not operate to attract s. 260.

148 The choice principle was affirmed again in several later cases (in particular, *The Commissioner of Taxation of the Commonwealth of Australia v Gulland* [1985–1986] 160 CLR 55, which was the last case heard by the High Court of Australia that provided substantial guidance on the application of the choice principle), but the foregoing suffices for a comparison with the New Zealand approach.

The New Zealand position – the scheme and purpose approach

149 In *Ben Nevis* ([143] *supra*), the Supreme Court of New Zealand comprehensively reviewed the case law in New Zealand and noted that the courts had decided the cases on a "scheme and purpose" approach. In essence, the courts considered the scheme and the purpose of the tax statute as a whole as well as any specific provisions relied on by the taxpayer in determining whether the anti-avoidance provision applied.

150 The majority in *Ben Nevis* provided guidance on how the general anti-avoidance provisions should be applied and the interaction between the general anti-avoidance provisions and the specific provisions relied upon by taxpayers (at [103]–[109]):

> [103] *We consider Parliament's overall purpose is best served by construing specific tax provisions and the general anti-avoidance provision so as to give appropriate effect to each. They are meant to work in tandem.* Each provides a context which assists in determining the meaning and, in particular, the scope of the other. *Neither should be regarded as overriding. Rather they work together*. ...
>
> [104] Parliament must have envisaged that the way a specific provision was deployed would, in some circumstances, cross the line and turn what might otherwise have been a permissible arrangement into a tax avoidance arrangement. Ascertaining when that will be so should be firmly grounded in the statutory language of the provisions themselves. ...
>
> ...
>
> [106] Put at the highest level of generality, *a specific provision is designed to give the taxpayer*

a tax advantage if its use falls within its ordinary meaning. That will be a permissible tax advantage. The general provision is designed to avoid the fiscal effect of tax avoidance arrangements having a more than merely incidental purpose or effect of tax avoidance. Its function is to prevent uses of the specific provisions which fall outside their intended scope in the overall scheme of the Act. Such uses give rise to an impermissible tax advantage which the Commissioner may counteract. The general anti-avoidance provision and its associated reconstruction power provide explicit authority for the Commissioner and New Zealand courts to avoid what has been done and to reconstruct tax avoidance arrangements.

[107] When, as here, a case involves reliance by the taxpayer on specific provisions, *the first inquiry concerns the application of those provisions. The taxpayer must satisfy the court that the use made of the specific provision is within its intended scope*. *If that is shown, a further question arises based on the taxpayer's use of the specific provision viewed in the light of the arrangement as a whole. If, when viewed in that light, it is apparent that the taxpayer has used the specific provision, and thereby altered the incidence of income tax, in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provision, the arrangement will be a tax avoidance arrangement*. ...

[108] *The general anti-avoidance provision does not confine the court as to the matters which may be taken into account when considering whether a tax avoidance arrangement exists. Hence the Commissioner and the courts may address a number of relevant factors, the significance of which will depend on the particular facts*. The manner in which the arrangement is carried out will often be an important consideration. So will the role of all relevant parties and any relationship they may have with the taxpayer. The economic and commercial effect of documents and transactions may also be significant. Other features that may be relevant include the duration of the arrangement and the nature and extent of the financial consequences that it will have for the taxpayer. As indicated, it will often be the combination of various elements in the arrangement which is significant. A *classic indicator of a use that is outside parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way.* It is not within Parliament's purpose for specific provisions to be used in that manner.

[109] In considering these matters, the courts are not limited to purely legal considerations. They should also consider the use made of the specific provision in the light of the commercial reality and the economic effect of that use. *The ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision in a manner that is consistent with Parliament's purpose.* If that is so, the arrangement will not, by reason of that use, be a tax avoidance arrangement. If the use of the specific provision is beyond parliamentary contemplation, its use in that way will result in the arrangement being a tax avoidance arrangement.

[emphasis added]

151 The approach in *Ben Nevis* was subsequently applied in *Commissioner of Inland Revenue v Penny* [2010] 3 NZLR 360 and *BNZ Investments Limited & Ors v The Commissioner of Inland Revenue* HC WN CIV 2004-485-1059 [15 July 2009] and referred to as the "scheme and purpose" approach.

152 The scheme and purpose approach essentially resolves the tension between the general anti-avoidance provisions and the specific provisions as a matter of purposive statutory interpretation. Whether an arrangement constitutes tax avoidance will depend on whether the taxpayer's use of the specific statutory provision is consistent with Parliament's purpose, determined by an objective

analysis of the overall scheme and purpose of the tax legislation.

153 Under the scheme and purpose approach, there are essentially two steps in determining whether a particular arrangement runs afoul of the general anti-avoidance provision:

(a) Firstly, the court must ask whether the use of the specific provision is within its intended scope. This involves interpretation of the specific provision alone to see if the arrangement in question falls within the literal meaning of the specific provisions.

(b) Secondly, if the use of the specific provision is within its intended scope, the court must further ask whether the taxpayer has used the specific provision in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provision. This involves a broader inquiry. The court must engage in a purposive interpretation of the specific provision in the context of the legislative scheme as a whole.

154 In determining whether a tax avoidance arrangement exists, the court may take into account a number of relevant factors, the significance of which will depend on the particular facts of the case. These factors include the manner in which the arrangement was carried out, the role of all relevant parties and any relationship they may have with the taxpayer, the economic and commercial effect of documents and transactions, the duration of the arrangement, and the nature and extent of the financial consequences that the arrangement has for the taxpayer. A classic indicator of a use that is outside parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way.

What approach should be adopted in Singapore?

155 In my view, it is unnecessary to choose between the Australian and the New Zealand approaches, although, if I had to, I would prefer the New Zealand approach for its conceptual clarity. The same role that the Australian choice principle and the New Zealand scheme and purpose approach play in protecting taxpayers from the over-extensive application of the respective Australian and New Zealand anti-avoidance provisions is already performed in Singapore by the statutory exception under s 33(3)(*b*) in relation to s 33.

156 It is significant to note that both the Australian and New Zealand approaches developed in the context of legislative provisions that did not have the corresponding equivalent of our statutory exception under s 33(3)(*b*). Unlike in Singapore, there is no similar defence available to the taxpayer in Australia or New Zealand. Since Singapore already has the statutory exception under s 33(3)(*b*), there is no need to adopt either the Australian or the New Zealand approach.

157 I am of the view that it is consistent with Parliament's intention that neither the Australian nor the New Zealand approach should be adopted. In support of his argument that the choice principle should apply, counsel for the Appellant refers [note: 87] to a part of the Minister for Finance's speech at the Second Reading (*Singapore Parliamentary Debates, Official Report* (13 January 1988) vol 50 at col 366), where the Minister said that Australian and New Zealand cases interpreting legislation with similar wordings may be relied upon to provide adequate safeguards against the over-extensive application of s 33. This part has already been reproduced above at [70]. It should be noted that the Minister said that Australian and New Zealand cases are helpful when they interpret legislation with *similar wordings*. As already mentioned above at [156], the choice principle and scheme and purpose approach were developed in the absence of any statutory exception similar to s 33(3)(*b*). Hence, in this regard the Australian and New Zealand cases do not interpret legislation similar to s 33(3)(*b*).

158 Ultimately, the question is whether a proper balance is struck between the rights and interests of taxpayers and the Comptroller in interpreting and applying s 33. I believe that a proper balance is struck by interpreting s 33(1) as importing an objective test, while allowing taxpayers to avail themselves of the statutory exception under s 33(3)(*b*) which, as I have held, should be interpreted as importing a purely subjective test.

Whether the Comptroller was right to disregard both the dividend income and interest expenses under s 33

159 Given the finding that the Financing Arrangement is caught by s 33(1), and that the Appellant cannot avail itself of the statutory exception under s 33(3)(*b*), the question arises as to the extent to which the Comptroller may exercise his powers under s 33(1).

160 The Comptroller purported to exercise his powers under s 33(1) to disregard *both* the dividend income and interest expenses under the Additional Assessments and the Notice of Assessment for YA 2007. Counsel for the Appellant argues that the Comptroller should not have disregarded both the dividend income and interest expenses. Counsel for the Comptroller argues that the burden is on the Appellant to show that the Comptroller was wrong and maintains that there is no difference in result between disregarding both the dividend income and interest expenses and disregarding only the interest expenses.

161 To resolve this question, I start by examining the relevant words of s 33(1), which are as follows:

> ... the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.

162 From a plain reading of s 33, it is clear that the Comptroller's power to "disregard or vary the arrangement and make such adjustments as he considers appropriate" is to be exercised to "counteract any tax advantage obtained or obtainable by that person from or under that arrangement". The Comptroller's powers under s 33(1) must be exercised in a manner that is fair and reasonable (see *Telfer* at p 316) in order to achieve the purpose of counteracting the tax advantage obtained or obtainable from the arrangement. He must exercise his statutory discretion reasonably and treat taxpayers fairly: see *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 651 ("*National Federation*") and *R v Inland Revenue Commissioners, ex parte Preston* [1983] 2 All ER 300 at 306–307. I can do no better than to quote Lord Scarman in *National Federation* (at 651):

> ... Notwithstanding *Reg. v. Lords Commissioners of the Treasury*, I am persuaded that *the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims*. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect. [emphasis added]

163 Hence, the question before me is whether the Comptroller acted reasonably and fairly in exercising its powers under s 33(1) by disregarding both the dividend income and interest expenses.

164 There is no problem with the Subsidiaries paying franked dividends to the Appellant and the Appellant receiving the same and getting the benefit of the tax credits – indeed, this was the whole point of having the full imputation system and the s 44 account mechanism (see above at [23]–[24]). In fact, Ms Ng, the Comptroller's Group Tax Specialist, had admitted during re-examination that *the Comptroller had no objections to the dividend income*; instead, what the Comptroller objected to was the *Financing Arrangement*: [note: 88]

> Q So how is---how is this arrangement an abuse of the imputation tax system?
>
> A I think Mr Ghandi's point is that, er, before and after the reorganisation, these are still belonging to the same group of entity---I mean it's under the same group before or after. So to him, it's more like you're returning, er, you know, what is belonging---belonging to the group back to the same person, why should there be an objection? *And I think, er, what---you see, if the four subsidiaries simply pay frank dividend---I mean frank the dividend and pay it to the shareholders, there's no objection if there is no, er, arrangement in between to---to---to get that, er, refund.* Because you see as we already heard prior to the restructuring, the [C], the Malaysian holding company and the [D], the Singapore holding company, the two companies that holding that three subsidiaries, they have funded their investment in these three Singapore subsidiary which are the [F], [D] and the [G], right, funded by equi---er, equity. So whatever dividend that they receive from these three subsidiary up, it will be dividend income received by them. Like in [D], the Singapore subsidiary, when we look at the---er, [D], er, the Singapore holding company, if we look at their book, what it will happen is that they receive the dividend income from the three subsid that is the dividend income. *Tax on the dividend income, less tax credit. There's no refund because they have – prior to their restructuring that is – financed by equity so that is the end of the story. So had they just simply pay back, used their section 44 if they have the reserve, if they pay up to the original holding company ([D]), no issue, right.* That's---that---I mean that's---that is, er---that's it, there's no refund. But what we have seen here really is then, they then do the restructuring and they say, er, it's for three, er, objective which is the group relief, the streamlining of the operation and extracting credit. *But when we look at the financing, right, then the financing comes in*. So, er, I think we've said that, how does the financing scheme then achieve that three objective, right. *We already say you---you can restructure without this financing because finally, really, they got the money to finance as they---they said that at the end of the day, it's [C] that is the one that provided the financing back to the group, you know. If they don't charge interest, no issue. If they charge interest, then there will be this withholding tax because it's a---appellant, a Singapore company paying to a non-resident, er, that's [C], then there will be this withholding tax*. So if they had done a straightforward loan, the money actually borrowed, they incurred interest expenses on the actual funds borrowed, we would also have allowed the deduction. No issue. *But what has happened in this case is they then enter into the---it is the financing arrangement that we---we object because in this financing arrangement, they actually interposed [N Bank Singapore], [N Bank Mauritius] to avoid that withholding tax and the lender – like what Mr Ghandi has said – in actual fact, he said the lending was from [C].* Fine, if the lending was from [C], the interest ought to have been paid by the appellant to [C]. Why went round? *Why have all these intermediaries? I think that is really the artificiality that we don't accept* and it's also what we have said. If you interpose intermediaries, why? Why do that? So it's---it's that---it's---it's that that we are objecting to. And I think, er, one point to---to---to---I think what Mr Ghandi is also trying to, er, say here that we are not giving back the credit. *Actually, the---the issue is not really, er, er, the credit per se. We are saying that it is the interest deduction that reduced the taxable*

dividend income, so they have a lower tax liability on the dividend income. And because the dividend came with the imputation credit, there's this difference, that's what they are claiming back the credit. So by using the---claiming the interest deduction, that means this refund of the credit arose wholly from the interest deduction. And that, we---we don't accept and we've---we have made the adjustment to disallow the interest and denying the refund of that credit. ...

[emphasis added]

165 Given that it is the Financing Arrangement alone that offends s 33, the Comptroller should not have disregarded the dividend income. Indeed, his power under s 33(1) is to disregard or vary only the impugned arrangement.

166 Crucially, it is also clear from the above excerpt that the specific aspect of the Financing Arrangement that the Comptroller objected to was the artificial *incurring of the interest expenses* so as to enable the Appellant to obtain tax refunds without the ultimate recipient of the interest, [C], being liable for withholding tax.

167 Counsel for the Appellant emphasised that [C] in substance made a $225m loan to the Appellant (a proposition accepted by the Board in its Decision at [112] and the Respondent in this appeal), and that there was hence no reason for the Comptroller to disregard any of the interest expenses. Counsel points to Ms Ng's admission during cross-examination that the Comptroller would not have disregarded the interest expenses had the loan been made by [C] directly to the Appellant. [note: 89]

168 However, one needs to be clear about exactly who loaned what and to whom. It is misleading to say that [C] in substance provided the entire $225m loan to the Appellant. Out of the $225m, [C] in substance only provided $75m, that being the same amount it received from the Appellant for the sale of its interests in [F], [G] and [H]. [C] obtained the rest of the $225m (*ie*, $150m) through interest-free loans provided to it by [D] and [B].

169 As previously observed (at [136] above), [D] and [B] could easily have loaned the $150m directly to the Appellant interest-free without the involvement of [N Bank Singapore], [N Bank Mauritius] and [C]. The circuitous arrangement was chosen so as to enable [C] to charge interest ultimately to the Appellant through interposing [N Bank Singapore] and [N Bank Mauritius]. The Comptroller was therefore justified in disregarding the interest expenses attributable to $150m of the Notes, which is exactly two-thirds of the total interest expenses.

170 As for the $75m loaned by [C] to the Appellant and the interest expenses that arose from this loan, counsel for the Appellant's argument that a "real" loan with actual interest payments was made by [C] to the Appellant stands on firmer ground. [C] received $75m for its interests in [F], [G] and [H] from the Appellant. [C] then in effect loaned this same amount with interest to the Appellant by buying the Notes issued by the Appellant and receiving the interest payments under the Notes from the Appellant through CPO1 and CPO2. There was in substance a loan of $75m with interest made by [C] to the Appellant, and the interest payments arising from the loan of $75m which were subsequently paid out by the Appellant should have been allowed as deductible interest expenses in assessing the overall tax liability of the Appellant. In fact, the Comptroller accepted that had [C] loaned moneys directly to the Appellant, the interest deductions on such loans would have been allowed, for the key was for there to be "actual" borrowing from [C]. [note: 90]

171 However, as already observed above at [88]–[91], the crucial factor here is the interposition of

[N Bank Singapore] and [N Bank Mauritius] in the flow of interest payments from the Appellant to [C]. This had the effect of allowing [C] to avoid being liable for withholding tax on the interest payment it ultimately received, despite the fact that, in substance, [C] provided a loan of $75m with interest to the Appellant. Had [C] directly provided the loan to the Appellant, the Appellant would have had to deduct withholding tax from the interest payments that it had to pay to [C], and to account to the Comptroller for the same. This point on the avoidance of withholding tax should have been (but was not) stressed by counsel for the Comptroller. [note: 91] There is a strong case here for the Comptroller to charge withholding tax on the interest payments attributable to $75m of the Notes which eventually flowed to [C]. In fact, the evidence of Ms Ng suggests that the Comptroller was aware of the avoidance of the withholding tax. [note: 92]

172 In my view, the Comptroller should not have disregarded the interest expenses attributable to the $75m loan made by [C] to the Appellant. Instead, the Comptroller should have required the Appellant to account to it for the withholding tax that ought to have been paid by [C] on interest payments borne by the Appellant arising from the $75m loan.

173 In summary, the Comptroller did not exercise his powers under s 33(1) fairly and reasonably when he disregarded both the dividend income and the interest expenses. For this reason, the Additional Assessments for YA 2004 to 2006 and the Notice of Assessment for YA 2007 ought to be discharged. The Comptroller should not have disregarded the dividend income as the Appellant was entitled to it under the Act. He should not have disregarded *all* the interest expenses. Instead, he should have disregarded *only* the interest expenses borne by the Appellant attributable to the $150m lent by [D] and [B] to [C] (*ie*, two-thirds of the total interest expenses incurred by the Appellant). The Comptroller should have allowed the interest expenses arising from the $75m loan made by [C] to be deductible expenses in assessing the Appellant to tax (*ie*, one-third of the total interest expenses incurred by the Appellant), but, at the same time, he should have required the Appellant to account to it for the withholding tax that ought to have been paid on interest payments arising from the $75m loan. Had the Comptroller exercised his powers under s 33(1) in the manner I have described, the Comptroller would have specifically counteracted the exact tax advantage obtained by the Appellant under the Financing Arrangement with a scalpel rather than a cleaver.

174 It might be thought that, as the same end result would appear to be achieved either way, I am being overly exacting in requiring that the Comptroller's Additional Assessments and Notice of Assessment for YA 2007 should have been done differently. However, for two reasons, the ends do not justify the means. Firstly, as I have pointed out, the Comptroller exceeded his statutory power when he disregarded the dividend income despite the fact that only the Financing Arrangement was impugned. Secondly, the issuance of the Additional Assessments for YA 2004 to 2006 raises the question of the Comptroller's competence to do so under s 74 of the Act.

Whether the Comptroller had the power to issue the Additional Assessments for YA 2004 to 2006

175 Section 74(1) of the Act provides as follows:

> **Additional assessments**
>
> 74. —(1) Where it appears to the Comptroller that any person liable to tax has not been assessed o r *has been assessed at a less amount than that which ought to have been charged*, the Comptroller may ... assess that person at such amount or additional *amount as* according to his judgment ought to have been charged.

[emphasis added]

Counsel for the Appellant submits that the Comptroller acted *ultra vires* when he issued the Additional Assessments under s 74(1). This is because in each of them the Comptroller assessed the Appellant to less tax than that under the Original Assessments. For purposes of illustration, let us compare the Original Assessment for YA 2004 with the Additional Assessment for the same year.

176 The Comptroller initially issued the Notice of Assessment for YA 2004 dated 24 September 2004, stating as follows:

	Amount ($)
Dividend income	4,902,092.00
Interest income	5,185.00
Total income	4,907,277.00
Tax assessed (calculated at the prevailing tax rates)	1,078,745.36
Less: Tax deducted at source	
Tax repayable:	2,712,449.00
	1,633,703.64

An examination of the income tax return filed by the Appellant for YA 2004 reveals that the "dividend income" of $4,902,092 indicated in the Original Assessment for YA 2004 was arrived at by deducting, *inter alia*, the interest payments made by the Appellant under the Notes during YA 2004 (*ie*, $7,419,452) from the amount of franked dividends paid out by the Subsidiaries to the Appellant during YA 2004 (*ie*, $12,329,315). [note: 93] The interest income indicated in the same was derived from another source, the identity of which is of no concern in this appeal. As can be seen, tax amounting to $1,078,745.36 was assessed on the Appellant's total chargeable income of $4,907,277 for YA 2004, before the amount of tax credit carried by the franked dividends (*ie*, $2,712,449) was set off against that amount. The result was that the Appellant was entitled to tax refunds amounting to $1,633,703.64 for YA 2004.

177 When the Comptroller decided to invoke s 33, he issued a Notice of Additional Assessment for YA 2004 dated 7 April 2008 that disregarded both the dividend income and interest expenses stating as follows:

	Amount ($)

Dividend income	*Nil*
Interest income	5,185.00
Total income	5,185.00
Tax assessed (calculated at the prevailing tax rates)	285.12
Less: Tax deducted at source	
Tax payable	*Nil*
Less: Previous Assessment	285.12
Additional tax payable as per this Assessment:	1,633,703.64
	1,633,988.76

As the Comptroller disregarded all the dividend income and interest expenses for YA 2004, the Appellant's total chargeable income decreased greatly to $5,185 and the amount of tax assessed on the same was consequently greatly reduced to $285.12. Since all the dividend income was disregarded, the Appellant could not set off any tax credits carried by the franked dividends against the amount of tax assessed on its total chargeable income, and the ultimate amount of tax payable for YA 2004 should have been $285.12.

178 However, the Comptroller went on to recoup the exact amount of tax refunds that the Appellant was earlier deemed to be entitled to under the Original Assessment for YA 2004 (*ie*, $1,633,703.64), and assessed the Appellant to "Additional tax payable as per this Assessment" amounting to $1,633,988.76. Counsel for the Appellant argues that under s 74(1), the Comptroller could only raise an additional assessment if the taxpayer "has been assessed at a less amount than that which ought to have been charged". Since the "tax assessed" under the Original Assessment for YA 2004 was $1,078,745.36 and therefore greater than the tax of $285.12 sought to be assessed under the Additional Assessment for YA 2004, the latter assessment was *ultra vires* and void.

179 Counsel for the Appellant argues that the $1,633,988.76 "Additional tax payable as per this Assessment [*ie*, the Additional Assessment for YA 2004]" was not the "tax assessed" to be used for comparison with the tax originally assessed. The same argument applied to each of the Additional Assessments for YA 2004 to 2006. I accept the Appellant's arguments. Accordingly, the Additional Assessments for YA 2004 to 2006 should be discharged.

180 Had the Comptroller exercised his powers under s 33(1) in the manner I indicated earlier (at [173] above), the notices of additional assessments issued on such a basis could not have been challenged. This is because the Appellant would have been assessed to tax under such additional assessments in each year at a greater amount than that which was originally charged. Under such additional assessments, all the dividend income would be recognised but only one-third of the interest expenses would be deductible against the dividend income (with two-thirds of the interest expenses being disregarded). As such, tax assessed under each of the additional assessments would have been greater than that under the corresponding Original Assessments. The additional assessments would therefore not be *ultra vires*.

Conclusion

181 For the reasons above, this appeal is allowed. I will hear the parties on costs.

[note: 1] Record of Appeal ("ROA"), Vol III, Part A, pp 84-85.

[note: 2] ROA, Vol III, Part A, p 86.

[note: 3] ROA, Vol III, Part A, p 86.

[note: 4] ROA, Vol III, Part A, p 87.

[note: 5] ROA, Vol III, Part A, p 89.

[note: 6] ROA, Vol III, Part A, pp 101-102.

[note: 7] Decision at [6].

[note: 8] ROA, Vol III, Part A, pp 297-298.

[note: 9] ROA, Vol III, Part A, pp 355-357.

[note: 10] ROA, Vol III, Part A, pp 359-361.

[note: 11] ROA, Vol III, Part A, pp 363-365.

[note: 12] ROA, Vol III, Part A, pp 305-318 and 320-353.

[note: 13] ROA, Vol III, Part A, pp 371-387.

[note: 14] ROA, Vol III, Part B, pp 389-407.

[note: 15] ROA, Vol III, Part A, pp 282-290.

[note: 16] ROA, Vol III, Part A, pp 300-303.

[note: 17] ROA, Vol III, Part A, p 367.

[note: 18] ROA, Vol III, Part A, p 369.

[note: 19] ROA, Vol III, Part B, p 411-421.

[note: 20] ROA, Vol III, Part B, p 411.

[note: 21] ROA, Vol III, Part B, p 412.

[note: 22] ROA, Vol III, Part B, p 413.

[note: 23] ROA, Vol III, Part B, p 415.

[note: 24] ROA, Vol III, Part B, p 420.

[note: 25] ROA, Vol III, Part B, p 418.

[note: 26] ROA, Vol III, Part B, p 421.

[note: 27] ROA, Vol III, Part B, p 419.

[note: 28] ROA, Vol III, Part B, pp 425-430.

[note: 29] ROA, Vol III, Part B, pp 465-470 and 474-553.

[note: 30] ROA, Vol V, Part B, pp 2633, 2648, 2664 and 2684.

[note: 31] Decision at [39]; ROA, Vol III, Part B, pp 434-442.

[note: 32] ROA, Vol III, Part B, p 557.

[note: 33] ROA, Vol V, Part B, pp 2631-2632, 2646-2647, 2662-2663 and 2682-2683.

[note: 34] ROA, Vol V, Part B, pp 2631-2632, 2646-2647, 2662-2663 and 2682-2683.

[note: 35] ROA, Vol V, Part A, pp 2161 and 2167-2170.

[note: 36] ROA, Vol V, Part B, p 2530.

[note: 37] ROA, Vol V, Part B, pp 2531-2534.

[note: 38] ROA, Vol V, Part B, pp.2682-2683.

[note: 39] ROA, Vol V, Part B, p 2593.

[note: 40] ROA, Vol V, Part B, pp 2594-2595.

[note: 41] Decision at [103].

[note: 42] Decision at [105]-[106].

[note: 43] Decision at [107]-[109].

[note: 44] Decision at [111].

[note: 45] Decision at [112].

[note: 46] Decision at [113].

[note: 47] Decision at [114].

[note: 48] Decision at [116].

[note: 49] Decision at [118].

[note: 50] Decision at [124]-[126].

[note: 51] Decision at [103].

[note: 52] Decision at [103]-[114].

[note: 53] Appellant's Case ("AC") at paras 83-102.

[note: 54] Respondent's Case ("RC") at paras 92-100.

[note: 55] Decision at [103].

[note: 56] AC at paras 151-157.

[note: 57] ROA, Vol III, Part A, p 89.

[note: 58] ROA, Vol III, Part A, pp 101-105.

[note: 59] ROA, Vol III, Part A, p 91.

[note: 60] ROA, Vol III, Part D, pp 1092-1093.

[note: 61] ROA, Vol V, Part A, p 2229.

[note: 62] ROA, Vol III, Part A, p 109.

[note: 63] ROA, Vol III, Part D, pp 1073-1075.

[note: 64] ROA, Vol III, Part D, pp 1063-1064.

[note: 65] ROA, Vol III, Part D, pp 1075-1076.

[note: 66] AC at paras 160-163.

[note: 67] ROA, Vol III, Part A, p 91.

[note: 68] ROA, Vol III, Part D, pp 1072-1073.

[note: 69] ROA, Vol III, Part D, pp 1095-1097.

[note: 70] ROA, Vol III, Part D, pp 1095-1097.

[note: 71] ROA, Vol V, Part A, pp 2173-2178.

[note: 72] AC at paras 188-191.

[note: 73] ROA, Vol V, Part A, p 2173.

[note: 74] ROA, Vol III, Part D, pp 1064 and 1098.

[note: 75] ROA, Vol III, Part D, p 1096.

[note: 76] Decision at [106].

[note: 77] ROA, Vol V, Part A, pp 2177-2178.

[note: 78] RC at para 55.

[note: 79] ROA, Vol V, Part A, pp 2227-2229.

[note: 80] ROA, Vol III, Part A, p 106.

[note: 81] ROA, Vol III, Part B, pp 471-553.

[note: 82] ROA, Vol III, Part A, p 257.

[note: 83] ROA, Vol V, Part B, p 2701.

[note: 84] ROA, Vol III, Part A, pp 257-259.

[note: 85] AC at paras 221-242.

[note: 86] ROA, Vol III, Part A, pp 117-120 and 189-233.

[note: 87] AC at para 276.

[note: 88] ROA, Vol III, Part D, pp 1259-1261.

[note: 89] ROA, Vol III, Part D, p 1192.

[note: 90] ROA, Vol III, Part D, p 1192-1194.

[note: 91] ROA, Vol III, Part D, p 1389.

[note: 92] ROA, Vol III, Part D, pp 1215-1216 and 1261.

[note: 93] ROA, Vol V, Part B, p 2631.