TAX JURISDICTION OF SINGAPORE

A COUNTRY'S power or ability to impose tax determines its tax jurisdiction. Within its own legal and fiscal framework, there are no restrictions on the power of a country to cast its tax net.[1] There are no restrictions imposed by international law on a country to cast as wide a tax net as it chooses.[2] However the imposition of tax would only be effective if a country is in a position to enforce it; for there is a rule of international law that no country would enforce the claims or judgments by a foreign state for revenue.[3] For a country to effectively impose tax therefore, "... requires some link, some nexus or minimum connection, between the country asserting the jurisdiction and the taxpayer or the income sought to be taxed."[4]

Depending on the minimum connection used, the tax systems in the world can be divided into the Global or Unitary Systems and the Schedular systems.[5] Under the Global system the minimum connection is the status of the taxpayer, for example tax may be imposed on citizens or residents regardless of where their incomes are derived from. Under the Schedular system the connection is the source of the income *i.e.,* income which arises within the country is taxed regardless of the status of the taxpayer.

Similar principles apply with regard to taxation of corporations. Under the Global system, the connection may either be incorporation of the corporation or the location of the seat of management.

The justification for the Global system, at least where residence is used as the connecting factor is that residents consume governmental services and therefore should contribute to the costs of such services; also the resident enjoys the benefit of the laws of the country for the protection of his property.[6] It is much more difficult to justify citizenship as a connecting factor. One can possibly say that as citizens of a country, protection may be accorded in a foreign state, but this is probably too tenuous.

The justification for the Schedular system is that the country where the income is derived has contributed to its accrument and that in respect of his property within the jurisdiction, the taxpayer enjoys the benefit of the protection of the law.[7]

1 This was the major thesis of Norr's article, "Jurisdiction To Tax and International Income", 17 Tax L. Rev. 431 (1962).
2 See I Hyde, International Law 674 (2d rev. ed. 1945) III Hackworth, Digest of International Law 594 (1942).
3 See *In re Visser* [1928] 1 Ch. 877.
4 *Supra* n. 1 at p. 432.
5 For a more detailed discussion, see Norr's article *supra* n. 1.
6 *Per* Lord Wrenbury in *Whitney* v. *I.R.C.* [1926] A.C. 37.
7 *Id.*

Most countries use a mixture of these two systems and Singapore is no exception. Under Section 10(1), which is the charging provision of the Income Tax Act,[8] (hereinafter referred to as "the Act"), tax is imposed on any income, "accruing in or derived from Singapore or received in Singapore from outside Singapore."

It has been said that these words, "accrued" "derived" and "received" maybe taken in their ordinary meaning and derive no special meaning from the Income Tax Act.[9] The Oxford English Dictionary defines "accrue" as "to fall as a natural growth or increment; to come … as an accession or advantage." It defines "derive" as "obtain or have from a source; be descended from." And it defines "receive" as "to accept delivery of; to take in one's hand, or into one's possession." The use of these three phrases have given rise to two bases of taxation in Singapore viz. territorial and remittance.

I. TERRITORIAL BASIS

This is based on the fact that the income must have accrued in or be derived from Singapore. What is the difference, if any between "accruing in" and "derived from"? The Privy Council in *C.I.R.* v. *Chunilal Mehta*[10] was of the view that the word "accruing" in its ordinary meaning seems "… to require a place to be assigned as that at which the result of trading operation comes whether gradually or suddenly, into existence." So while "accrue" seems to aim at the place where the income arose, "derive" seems to be directed at the place where the source of the income is located.

In this regard, it would appear that, although the word "source" does not appear in section 10, unlike the charging provisions of other jurisdictions,[11] if one can show that the source of an income is in Singapore, the income is in fact "derived from" Singapore. The Supreme Court of South Africa in *C.I.R.* v. *Lever Bros. And Another* stated that the concept of source in income tax refers to "… the originating cause of [the gains] being received as income and this originating cause is the work which the taxpayer does to earn them,"[12] this may be a business, trade or an activity.

The distinction between "accruing in" and "derived from" may be illustrated by examining *Chunilal Mehta's* case itself. In this case the taxpayer had been trading in Bombay for several years as a broker and speculator in cotton, silver and other commodities. He had his office in Bombay only. The taxpayer was involved in dealings with future delivery contracts, where orders were given to agents in New York, London and Liverpool to buy or sell commodities, in which no

8 Chapter 141, Singapore Statutes, 1970 Revised Edition, reprinted in 1984.

9 In *C.I.T.* v. *Chunilal Mehta* [1938] I.T.R. 521 the Privy Council thought that the phrase "accruing or arising in British India" should be given its ordinary dictionary meaning.

10 *Ibid.,* at p. 527. Although the Privy Council was concerned with a section which imposes tax on "Profits … accruing or arising in British India", the Board seemed to attach the same meaning to both words.

11 See for example s. 7 of Income Tax of South Africa, Act 31 of 1941, which defines "gross income" to mean the total amount which has been received by or which has accrued to a taxpayer from a source which is within the Union or which is deemed to be within the Union.

12 (1946) 14 S.A.T.C. 1, 7.

delivery was ever taken or given. The issue was whether profits from these contracts were gains which accrued in India. The Privy Council expressed the view that, "It is difficult indeed to see that the place at which he makes a decision to do something in New York or to ask someone to do something for him in New York is the place at which arises the profit which results from the action taken in consequence of the decision."[13]

However, the Privy Council also opined that, "That the profit may be casually [sic] attributed to the assessee's decision is reasonable enough... it is, in the chain of causation, the link which most deserves the attention of anyone who desires to explain the success of the transaction."[14] In other words, although Bombay was not the place where the results of the operations arose, it might have been the place where the originating cause of the results was located.

It should however be noted that the Privy Council in another case has expressed the view that no special meaning is to be attached to the word "derived", and it should be treated as "synonymous with arising or accruing."[15] It is submitted that even taking the ordinary meaning of the three words, they bear different meanings, and are not synonymous. However the basis of taxation arising from the use of the phrase "accruing in", if it is indeed different from that arising from the use of the phrase "derived from", has seldom been resorted to for the imposition of tax. The most important concept with regard to jurisdiction to tax is the source concept, which as has been mentioned, is a result of the use of the phrase "derived from".

Source

Let us now examine the concept of source in greater detail. As may be expected there is no definition of source in the Act, in fact the word is not even used in the charging provisions but its relevance arises from the use of the phrase "derived from". The approach to determine whether the source of an income is in Singapore actually involves a two-step process. First, one has to determine the activities of the taxpayer that earn the income and secondly one has to locate these activities in order to decide whether or not they took place within Singapore.[16]

However it is by no means an easy matter to determine the activities which earned the income or to locate these activities. This is especially so when the gains or profits of the taxpayer are derived from a series of activities, some of which may take place in one country, and some in another country.

It may be inelegant to say so, but it has been said by the highest authority that, "... the ascertainment of the actual source of given income is a practical, hard matter of fact."[17] As a result very much depends on the facts of each case.

13 *Supra,* n. 9 at p. 527.
14 *Id.*
15 In *Commissioner of Taxation* v. *Kirk* [1900] A.C. 588, 592.
16 This approach was suggested by the Supreme Court of South Africa in *C.I.R.* v. *Lever Bros. And Another, Supra,* n. 12. It has also been used by Griffith C.J. in *Commissioners of Taxation (N.S.W.)* v. *Meeks* (1915) 19 C.L.R 568, 579.
17 *Per* Isaacs J. in *Nathan* v. *F.C.T.* (1918) 25 C.L.R. 183, 190. This view has been echoed by the Privy Council in *Liquidator Rhodesia Metals Ltd.* v. *C.I.T.* [1940] A.C. 774, 789.

In addition, income earning activities or sources of income have been classified in section 10 under six "heads". And for the gains or profits to be liable to tax, not only must the activities that earned them be located here, but the activities must fall within one of this list of "heads".

These six "heads" of activities maybe broadly re-classified as:

1. Business Income
2. Employment Income
3. Investment Income
4. Income arising from Property

The location of these activities will now be discussed in turn.

1. *Business Income*

Under section 10(l)(a) gains or profits from a trade or business which are derived from Singapore are taxable. It has been suggested by a commentator, based on some English cases that, "If there is 'trading in' the country the source of the trade or business is in that country. If the trader is 'trading with' the source is not in that country".[18]

It is submitted that the English cases on this point have no relevance in Singapore because the wording of the relevant sections are different. The English Act has for many years imposed tax upon profits from a trade exercised within the United Kingdom,[19] whereas there is no such requirement under section 10(l)(a). Under section 10(l)(a) tax is imposed on gains or profits derived from or accrued in Singapore from a trade or business. So while the English Act requires a trade to be exercised in the United Kingdom, section 10(1)(a) requires the source of the income from the trade to be located in Singapore. Higgins J. in the High Court of Australia, after noting a similar distinction between the Income Tax Acts of Queensland and New South Wales (the former being similar to the English provisions and the latter to the Singapore provisions) commented that,

> The source from which income is derived, or the place where it is earned, is, of course, not necessarily identical with the place where the business is carried on.[20]

Clearly, just because a business or trade is carried on within Singapore does not necessarily mean that all profits from that business or trade are derived from Singapore. In fact it is not even clear what the commentator meant by a trade being carried on within Singapore. Clearly, it is not envisaged that all activities with regard to that business took place in Singapore, for then the test is a mere surplusage.

[18] Sat Pal Khattar's essay on "The Concept and Determination of Sources of Income: Income from Trades, Businesses, Professions or Vocations", published in Proceedings of the Singapore Concise Tax programme, Oyez Longman pp. 5, 6.

[19] See *e.g.,* Income and Corporation Taxes Act 1970 Schedule D. Case 1, section 109(2). And see cases like *Grainger and Son* v. *Gough* (1896) 3 T.C. 462, *Macline & Co.* v. *Eccott* (1926) 10 T.C. 481 and *Firestone Tyre & Rubber Co.* v. *Llewellin* (1957) 37 T.C. 111. The Privy Council in *Chunilal Mehta, supra,* n. 9 at p. 531 has expressed a similar view as to the irrelevance of the observations of English Judges on this issue with regard to the Indian Act, which in this regard is similar to the Singapore Act.

[20] In *Mount Morgan Gold Mining Co. Ltd.* v. *Commissioner of Income Tax* (1922-23) 33 C.L.R. 76, 93.

If what is meant is that the place of direction or control is Singapore, then the test is not accurate. The Privy Council in *Chunilal Mehta* expressly rejected this view that, the source of the profit of a business "… is the business as a business, and that the ultimate and total profit of the business must be regarded as accruing or arising at the place of direction or control".[21] In fact the Privy Council on a separate occasion has expressed the view that, "… income can quite plainly be derived from more than one source even where the source is business."[22] At the same time, if a taxpayer's business is directed or controlled from without, that does not mean that profits from that trade cannot be derived from Singapore.

It should be stated that the Privy Council in *Lovell & Christmas Limited* v. *Commissioner of Taxes,*[23] a case on appeal from New Zealand, whose charging provisions have similar effect as section 10(l)(a) thought that although, "The language of the English Income Tax Acts and that of the New Zealand Act are not identical but there is sufficient similarity in substance to make the English decisions authoritative as the principles to be applied to the interpretation of the Colonial Act."

As a result, the Privy Council applied a principle based on English cases,[24] to the effect that where,

> the trade or business... consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on … so as to render the profits liable to income tax.[25]

Apportionment Of Taxable Income

This case involved an issue which has given rise to some controversy and difference of judicial opinions in Australia. The issue is, if a taxpayer carries on a trade which involved several operations, which take place in different countries, how is the source of the profits that ultimately arise to be determined? Is the place where the profit arose to be assigned as the place where the source is situated, or is it the place where the contract to sell is made, or is it permissible to apportion the income among the various activities and locate the source according to the activities?

In this case the taxpayer company carried on the business of selling goods on commission in London. Dairy produce was sent to the company in London from all parts of the world and sold by the company on commission. For the purpose of their business they had in New Zealand a salaried officer, and each year they sent out a servant to New Zealand. These two officers attended meetings of the different butter and cheese factories and tried to persuade the directors to consign their season's output to the company to be sold in London on commission and offered to make advances against produce. The issue was

21 *Supra,* n. 9 at p. 528.
22 *Liquidator Rhodesia Metals, Ltd.* v. *Commissioner of Taxes, supra,* n. 17.
23 [1908] A.C. 46.
24 For example *Grainger* v. *Gough, supra,* n. 19 *Erichsen* v. *Last* 8 Q.B.D. 414 and *Sulley* v. *A.G.* 5 M. & N. 711.
25 *Supra,* n. 23.

whether the commission received was liable to tax in New Zealand as income derived therein.

Although one of the operations in the earning of the profits took place in New Zealand *i.e.,* soliciting of offers and purchasing of the dairy products in New Zealand, the Privy Council held that none of the income was liable to tax in New Zealand, as having been derived there.

This case would seem on first sight to be inconsistent with the decision of the Privy Council in *Commissioners of Taxation* v. *Kirk,*[26] which is the leading case on this point. There the company carried on the business of mining in New South Wales. A certain portion of the crude ore extracted from the mine was treated by the company in their works. No contracts of sale were made in New South Wales, but only in London and Melbourne, and profits were made by the sales. The question raised was whether the companies had *any* income in New South Wales. The Supreme Court of New South Wales followed a previous decision of the same court in *In re Tindal*[27] which decided that where a company makes all its contracts outside New South Wales this is (considered) a decisive factor excluding the whole of its income from local taxation.

The Privy Council reversed the Supreme Court in the immediate decision and overruled *In re Tindal.* Their Lordships were of the opinion that there were four processes in earning or producing the income in question, viz.,

1. the extraction of the ore from the soil;
2. the conversion of the crude ore into a merchantable product, which is a manufacturing process;
3. the sale of the merchantable product;
4. the receipt of the moneys arising from the sale.

It was thought that, "All these processes were necessary stages which terminated in money and the income is the money resulting less the expenses attendant on all the stages."[28]

Since the first two processes took place in New South Wales, the income which related to them was earned and arose and accrued in New South Wales. Therefore some parts of the income were earned in New South Wales.

This decision has been interpreted in two ways. First, it has been suggested by some [29] that in *Kirk's* case, the Privy Council divided the earning of the profits into four processes and held that the company was only liable to New South Wales income tax on the profits made on the processes followed in that State. This view can be justified by the fact that although the Privy Council only discussed two of the

26 *Supra,* n. 15.
27 18 N.S.W.L.R. 378.
28 *Supra,* n. 26 at p. 592.
29 See *Commissioners of Taxation (N.S.W.)* v. *Meeks, supra,* n. 14 at p. 582, where Isaacs J. clearly thought that *Kirk's* case decided that income may be apportioned according to the activities which were involved in earning the income. See also Rydge, Commonwealth Income Tax Acts.

four processes, this was because the question that was presented to them was whether *any* income and not whether *all* the income was derived from New South Wales. Further it would follow from the decision that since the other two processes took place outside New South Wales, the income that related to them was not derived from New South Wales.

Second, Solomon C.J. of the Supreme Court of South Africa, has expressed the view that *"Kirk's* case... did not decide that, wherever any process in the earning of profits was carried on, some portion of the income was taxable in the country in which the process was carried on."[30] The reason for his Lordship's view was because the Privy Council "... did not lay down that only a portion and not the whole of the income was earned in New South Wales."[31] With due respect, as noted earlier, this is a necessary implication of that decision.

If one accepts the first interpretation of *Kirk's* case (as this writer does) then it is in this regard inconsistent with *Lovell's* case. It should also be noted that the Privy Council in the former case, seemed to disapprove of the Supreme Court of New South Wales referring and applying English cases in *In re Tindal;*[32] this is also different from the approach in *Lovell's* case. It is interesting to note that although *Kirk's* case was cited in arguments in *Lovell's* case it was not referred to in the judgment of the Privy Council,

Kirk's case therefore can be taken as authority that income earned as a result of various activities taking place in several countries may be apportioned accordingly and subsequent cases would seem to have accepted this.[33] But before discussing these cases, there is a possible ground of distinction between *Kirk's* case and *Lovell's* case, and this was suggested by Isaacs J. of the High Court of Australia in *Commissioners of Taxation (N.S.W.)* v. *Meeks.*[34] His Lordship took the view that the effect of *Lovell's* case is that,

> where a business is carried on of which contracts are "the essence", then you look to the place where those contracts are made. And if antecedent operations whether manufacture, or purchase, or requests, are not part of 'the essence' of the business carried on, but preparatory only, then, however necessary they may be to the very existence of the business they are not part of it, in the sense at all events required for income tax purposes.[35]

It can be argued therefore that, there was no apportionment in *Lovell's* case because the fact situation gave rise to the conclusion that, "... the business which yields the profit is the business of selling goods on commission in London".[36] And that the earlier arrangements entered into in New Zealand were responsible only for bringing the goods from New Zealand within the net of the business to yield a profit.[37] If the

30 In *Millin* v. *C.I.R.* 3 S.A.T.C. 170, 180.
31 *Ibid.,* at p. 177.
32 *Supra,* n. 15 at p. 593.
33 See *Commissioners of Taxation* v. *Meeks, supra,* n. 16 and *Mount Morgan Gold Mining Co. Ltd.* v. *Commissioner of Income Tax, supra,* n. 20.
34 *Ibid.*
35 *Ibid.,* at p. 588.
36 Supra, n. 23 at p. 52.
37 *Ibid.,* at p. 53.

taxpayer company had also been involved in the manufacturing of the dairy produce, then the situation would have been similar to *Kirk's* case and the income should then be apportioned.

The distinction is brought out in *Meek's* case itself. There an English company had an office in Melbourne, and conducted its operations of mining and treating ore in New South Wales. The company in London agreed to sell a quantity of concentrates produced in New South Wales, giving delivery in that State. Pursuant to the contract the purchasers paid a sum of £63,000 in advance, but before any concentrates were delivered they defaulted in further payments which had become due. The contract of sale was cancelled and the company was to keep the £63,000 as compensation. The issue was whether this sum of money was derived in New South Wales and thus liable to tax.

The court held that the sum of money should be treated as profits from the business of mining and treating and smelting ore which was carried on by the company mainly, if not altogether, in New South Wales and therefore was liable to tax. Isaacs J. thought that the sum must be apportioned between New South Wales and any other places outside New South Wales, where the business was carried on. This was because the contract of sale was only the final stage of the business, the other stages being equally essential to the business and were not merely preparatory steps to the entry of the company's business. Griffith C.J. on the other hand was content to leave it to the taxpayer company to establish a case for apportioning the income before the Commissioners.

Meek's case has been followed in another High Court of Australia decision in *Mount Morgan Gold Mining Co. Ltd.* v. *Commissioner of Income Tax*[38] by two judges, who were willing to permit apportionment of the income.[39]

It is submitted that apportionment of income of a business, where the activities that gave rise to the income took place in different countries is a viable concept and seems to be the most equitable and logical solution. Otherwise the court may be left with the difficult task of arbitrarily assigning a place as the location of the source using some fictional legal rule, such as the place where the contract was formed or the place where the profit arose.

In the Singapore context apportionment in such a situation would seem to be recognized but only with regard to a non-resident. The burden is on the taxpayer to show that certain parts of the income were earned by activities done outside Singapore. This would appear to be the result of section 12(1) which provides as follows,

> Where a non-resident person carries on a trade or business of which only part of the operations is carried on in Singapore, the gains or profits of the trade or business shall be deemed to be derived from Singapore to the extent to which such gains or profits are not directly attributable to that part of the operations carried on outside Singapore.

38 *Supra,* n. 20.
39 Rich and Starke JJ. *ibid.,* at pp. 105 and 112.

It is not clear why this statutory provision for apportionment is applicable only to non-residents. It is submitted that this should not affect the common law rule of apportionment as established by the Privy Council, where residents are involved.

However nowhere in the Act, is there a suggestion as to how apportionment is to be carried out. In New South Wales, there is a provision for apportionment based on the proportion which the assets of the business of the State bear to the total assets of the business.[40]

In this regard the cases are not very helpful either. Rich J. for example merely suggested in *Mount Morgan Gold Mining Co. Ltd.'s* case that, apportionment should take into account the apporpriate "legal considerations and business facts."[41] However, the cases are agreed that this matter is not for the appellate Court but must be decided by the first tribunal.[42] Although from such a determination there may be an appeal, it would be very rare for an appellate court to reverse a finding of the first tribunal as it would probably be a finding of fact.[43]

It may be that in solving a question such as apportionment, it would not be wise to lay down any fixed criteria, unless the legislature deems fit. It may be better to leave the matter to the first tribunal. Some of the guidelines that may be used are

1. distribution of the assets of the business
2. identifying and locating the activities that earned the income
3. relative importance of these activities
4. location of the management and control of the business.

It should be noted that there are statutory provisions for apportionment of income for certain special businesses such as shipping and air transport, cable and wireless undertaking and insurance company. They will be discussed below together with the statutory source rules which apply to them.

Special Business Income

There are certain businesses which operate on an international level. Such businesses usually involve activities in many countries. If the determination of the source of profits from such business is left to the common law rules there may be great uncertainty. Thus there are usually statutory provisions to deal with the source of income from such businesses. In Singapore there are statutory source rules with regard to shipping and air transport and cable or wireless undertakings. These are found in section 12(2) and (3) which provide as follows:

S.. 12(2) Where a non-resident carries on either —

(a) the business of shipowner or charterer; or

(b) the business of air transport,

40 New South Wales Acts 1912-1914 section 19.

41 In *Mount Morgan Gold Mining Co. Ltd.* v. *Commissioner of Tax, supra,* n. 20 at p. 105.

42 See *Mount Morgan's case, ibid,* and *Meek's* case, *supra,* n. 16.

43 For a discussion of when an appellate court would reverse a court of first instance, see *Edwards* v. *Bainstow & Harrison* 36 T.C. 207.

and any ship or aircraft owned or chartered by him calls at a port, aerodrome or airport in Singapore, his full profits arising from the carriage of passengers, mails, livestock or goods shipped, or loaded into an aircraft, in Singapore shall be deemed to accrue in Singapore:

Provided that this subsection shall not apply to passengers, mails, livestock or goods which are brought to Singapore solely for transhipment, or for transfer from one aircraft to another or from an aircraft to a ship or from a ship to an aircraft.

(3) Where a non-resident carries on in Singapore the business of transmitting messages by cable or by any form of wireless apparatus, his full profits arising from the transmission in Singapore of any such messages, whether originating in Singapore or elsewhere, to places outside Singapore shall be deemed to accrue in Singapore.

If these provisions are given full effect, it may be unduly harsh on the businessmen, especially if the full rate of 40 per cent is imposed on the profits.[44] This is because, another country in which he operates may also impose tax on his profits. As a result a concession is made in section 27 to a non-resident shipowner or charterer. This concession is similarly made available to a non-resident person carrying on the business of air transport and cable and wireless undertaking by section 28.

Under section 27, the non-resident shipper or charterer has an option. If he produces a certificate showing the ratio of his profits to the total sum receivable in respect of the total carriage and the certificate complies with the requirements of section 27(3), then he will be taxed in Singapore based on section 27(2)(a); which provides that,

… the profits accruing in Singapore from the business for that period shall be deemed to be a sum bearing the same ratio to the sums receivable in respect of the carriage of passengers, mails, livestock and goods shipped in Singapore as the total profits for that period bear to the total sum receivable by him in respect of the carriage of passengers, mails, livestock and goods as shown by the certificate.

What this paragraph means is that if the taxpayer's total profits bear a ratio of say 1:2 to his total receipts from carriage, then this ratio will also be applied to his receipts from carriage of passengers and goods shipped in Singapore in order to determine the profits that are deemed to accrue in Singapore. An illustration may make it clearer. If the total receipt of a non-resident shipowner or charterer is, say, one million dollars and his profits amount to half a million dollars, then this ratio of 1:2 will be applied to his receipt in respect of the carriage of passengers and goods in Singapore to arrive at his deemed income which will be half of the receipt.

However if he does not produce a certificate then section 27(4) provides that,

… the profits accruing in Singapore shall be deemed to be a sum equal to five per cent of the full sum receivable on account of

44 Section 43 (b) imposes a forty per cent tax on non-residents.

the carriage of passengers, mails, livestock and goods shipped in Singapore.

There are also statutory provisions determining the source of profits of insurance companies. Section 26(2) provides a formula for the imposition of tax on an insurance company (other than a life insurance company) which has gains or profits accruing in part outside Singapore. Tax for such an insurance company is imposed on the difference between premiums, interest and other income received or receivable in Singapore and deducting therefrom a reserve for unexpired risks and agency expenses in Singapore and a fair proportion of the expenses of the head office of the company.

In the case of life insurance companies, it is provided in section 26(3) that taxable income shall constitute investment income and gains or profits from the sale of investments. This clearly excludes from taxable income the premiums paid by policy holders. Of more relevance to the present discussion is the proviso to the sub-section, which states that where a life insurance company receives premiums outside Singapore, then the taxable income would be the same proportion of the total investment income of the company and the total gains or profits realised from the sale of its investments as the premiums received in Singapore bore to the total premiums received. This proviso is merely an attempt to allocate the source of the income of a life insurance company where there is a foreign element involved viz., the receipt of premiums overseas. It has an effect similar to that of section 27, which governs profits from a non-resident shipper or charterer, and has been discussed earlier.

2. *Employment Income*

There seems to be little doubt that gains from personal exertion like exercising an employment or profession are derived where the employment or profession is exercised. Section 12(4) reinforces this by providing that,

> The gains or profits from any employment exercised in Singapore shall be deemed to be derived from Singapore whether the gains or profits from such employment are received in Singapore or not.

3. *Investment Income*

Investment income as used here includes dividends and interests. The source rules with regard to these gains, as laid down by the cases are extremely confusing. There has not been a test which has been consistently adhered to, this is especially so with regard to interest payments. Fortunately, in Singapore this problem has to a great extent been alleviated by statutory source rules provided under section 12. But the problem of determining the source of investment income remains, where the conditions required for the application of section 12 are not fulfilled.

The ambit of section 12(6) (with regard to deemed source of interest payments) is very wide, and so there are very few situations which would fall outside its scope. In fact to be outside the scope of section 12(6) requires that the debt be borne by a non-resident and the interest payments must not be deductible against any Singapore source income. However it is still worthwhile examining the common

law rules for the determination of the source of interest payment, for it may still apply, albeit within a narrow confine, and it provides a contrast and perhaps a reason for the statutory rules. In contrast with interest payments, there are no statutory source rules with regard to dividends, so the full rigour of the common law rules remain.

Several possible sources of investment income have been suggested. These are *viz.,*

1. The capital which produces the profit and this capital is located where it was employed.[45]
2. The activities which earned the funds, out of which the investment income is paid.[46]
3. In the case of interest, it has also been argued that the debt is the source of the interest payments[47] and a debt is located where the debtor is.

(1) *The Location of the Employment of the Capital*

Since it is the income of the investor that is sought to be taxed, the employment of capital must refer to its employment by him *i.e.,* either in the purchase of shares or the provision of loan or credit facilities to the borrower. This is to be contrasted with the use of the capital by the debtor or the company. Although the cases did not expressly make this distinction, it seems clear that this must be so and in fact, the cases implicitly accept that the relevant employment of capital is that of the investor.

In *Overseas Trust Corporation Ltd.* v. *C.I.R.*[48] the taxpayer company had been formed to take over the interests of one L. Among the assets acquired from L were certain shareholdings in companies which had formerly carried on business in South-West Africa but had been placed in liquidation prior to the formation of the taxpayer company. At that date however, there were further amounts due to shareholders which were in the hands of the Custodian of Enemy Property; these amounts represented dividends declared but not distributed during the war period. These amounts were subsequently paid to the taxpayer company by the Custodian. The revenue authorities sought to tax these amounts and one of the issues was whether they were received from a source within the Union. The Supreme Court of South Africa held that under the circumstances, they were. The court quoted from Menzies Murray's Income Tax Act Annotated to the effect that, "the source of any income may be said generally to be the location of the business, capital, or service which produces the income"[49] and added that "... capital which produced profit was located where it was employed."[50]

45 See Menzies Murray, Income Tax Act Annotated p. 35 quoted by Innes C.J. in *Overseas Trust Corporation* v. *C.I.R.* [1925] A.D. 444, 2 S.A.T.C. 71. See also *C.I.R.* v. *Lever Brothers, supra,* n. 12.

46 See *Nathan* v. F.C.T. (1918) 25 C.L.R. 183.

47 The Special Commissioners in *C.I.R.* v. *Viscount Broome Executors* 19 T.C. 667, 677 seemed to have proceeded on the basis that the debt is the source of the interest. See also the arguments of counsel in *C.I.R.* v. *Lever Bros,* which appeared to have been accepted by the dissenting judge, Schreiner J.A. *supra,* n. 12.

48 [1925] A.D. 444, 2 S.A.T.C. 71.

49 At p. 35.

50 *Supra,* n. 48 at p. 76.

The court was of the view that, the shares were merely instruments which entitled the taxpayer to the dividends which were declared earlier and paid to and held by the Custodian. In the court's view, "... the resulting profit sprang neither from business nor service, but from the employment within the Union of the capital expended in the acquisition of the shares. . . ."[51]

It would appear that the court was of the view that the employment of capital is in the purchase of the shares and the location of the source is the place where the acquisition of the shares took place.

In contrast, in another South African case of *Boyd* v. *C.I.R.*,[52] the court held that the source of a dividend is the share and a share is situated in the country where the shares are registered.[53] This is because the register is the evidence of title to the share and where the shares are registered is where they can be effectively dealt with. This approach is preferable to that in *Overseas Trusts Corporation Ltd.'s* case, because it makes locating the source more certain and easily ascertainable. Also there will be a degree of permanence in locating a share where it is registered, instead of the location of the share changing, depending on where it is acquired.

In *Commissioner of Taxes* v. *William Dunn*[54] the Supreme Court of South Africa held to a similar effect with regard to interest payments. In this case, the taxpayer company was registered in England and carried on business in London. The taxpayer entered into agreements with three firms carrying on business in the Union of South Africa. Under these agreements, the taxpayer would purchase goods for the South African firms. The taxpayer purchased these goods in its own name, becoming responsible to the sellers, invoiced and shipped the goods to the South African firms. The taxpayer would then debit the accounts of these firms with the cost and commission. Where there was a balance due to it, the taxpayer would charge the firm interest at 5 per cent per annum. The issue was whether these interests were derived from a source within the Union, and thus be liable to tax.

The court affirmed the view that regard must be had "... to the place where the capital was employed which produced the profits sought to be taxed."[55] But the court rather incomprehensively went on to suggest that, "In order to ascertain where the capital was employed to earn the profits sought to be taxed, we must have regard to the source from which they were derived. And that source... was the company's English business."

If what was suggested was that it was the taxpayer company business which was the source of the interest, this, it is submitted is an erroneous view. The company business in performing the services for the three South African firms, entitled it to payment, but by providing and giving credit to the three firms, the company became entitled

51 Supra, n.48 at p. 77.
52 17 S.A.T.C. 366.
53 In another South African case of *Lamb* v. *C.I.R.* 20 S.A.T.C. 1, it was decided that where there is more than one register of shares, the relevant location is the place where the principal register is kept.
54 [1918] A.D. 607.
55 *Ibid*., at p. 614.

to the interest. It is submitted therefore, that it is the provision of credit which is the source of the interest and not the business.

Support for this view can be found in *C.I.R.* v. *Lever Brothers* where Watermeyer C.J. declared that "... this provision of credit is the originating cause or source of the interest by the lender."[56] Provision of credit is one way in which the creditor can provide capital to the debtor. Others include, a direct transfer of funds to the debtor.

The difficulty that we are now confronted with is that it is by no means easy to determine the location of the place where credit has been provided, which ultimately is what has to be done in order to determine whether the interest has a Singapore source or not. This difficulty could well be responsible for the court going astray in *William Dunn's* case

The problem is that the provision of credit has no corporeal existence and consequently it cannot be located in a physical sense. In this way, it is different from a loan, where there is a flow of funds, either physically *e.g.* where there is a transfer of money or metaphysically by providing overdraft facilities. Therefore in the case of a loan, if the creditor has made the funds available within a jurisdiction, that will be the location of the source. However the same cannot be said of a provision of credit. It has been suggested that the place where credit is supplied is the situation of the source.[57] But how is one to determine such a place. For example, if a Singapore trader purchases goods from a Malaysian supplier, who grants him credit with regard to the payment of the price, with interest; is the credit provided where the goods are supplied; or where the purchase price should have been paid?

It is submitted that one solution is to create a legal fiction and determine the situation of the source by legal rules. One possibility is to assign the place where the agreement giving rise to the credit was made. There is some judicial support for this.

To return to *Lever Bros'* case, the taxpayer company carried on business in England. It entered into an agreement with a Dutch company, whereby the Dutch company acquired certain assets from the taxpayer company and became indebted to it for the sum of £11,000,000, upon which it agreed to pay interest. As security, the Dutch company lodged with a company in England, as trustee, shares in an American company. Subsequently a series of agreements were entered into by the Dutch company with a company in the Union of South Africa, the result of which was to vest in the South African company all the interests of the Dutch company's indebtedness and to place the South African company in the position of the Dutch company as regards its rights and liabilities under the original trust agreements. The South African company paid interest to the taxpayer company under the agreement out of moneys received by it as dividends from the American company.

The issue was whether the interest was derived from a source within the Union of South Africa. Watermeyer C.J. after stating that the

56 *Supra,* n. 12 at p. 10.
57 Silke, *South African Income Tax,* Juta & Company Limited, 1982 Tenth Edition, at p. 245.

provision of credit was the source, subsequently suggested that, "… it was the making and carrying out of the agreement relating to the £11,000,000 by the taxpayer, which earned the income for him, rather than the existence of the debt resulting from that agreement."[58] Presumably this is because it was the agreement which gave rise to the credit.

Further support for the view that the source is located where the credit is granted may be found in the decision of the High Court of Australia in *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation*[59] In this case, an American company carrying on the business of a manufacturer and vendor of cars entered into an agreement to sell cars to a company incorporated in New South Wales. Under the agreement the Australian company was given five months from the date of the arrival of the cars in Australia within which to pay for the cars, but if time was taken for payment, interest was chargeable on the amount shown in the particular invoice.

The High Court reversed the decision of the Supreme Court of New South Wales and held that the interest did not arise from a source within New South Wales. One of the grounds of the Supreme Court's decision was that the interest arose in New South Wales because of the exercise of the option in New South Wales to withhold payments in consideration of interest. This was rejected by the High Court on the ground that, "The obligation to pay and the right to receive the interest flowed from the agreement made in America."[60]

It should be pointed out that this view that the source of investment income is the productive employment of capital, is not universally shared. Lord Atkin, for example, thought that it does not really help define the situation. His Lordship hypothesised the difficulty to the fact that the capital might be productively employed in more than one place. He inquired as follows,

> Is capital productively employed in the place where it purchases stock which is profitably sold elsewhere? or in the place where the stock which now represents the capital is sold? or, for purposes of the test, must both purchases and sales occur in the same place? or is it sufficient that the place of the direction of the employment of the capital in purchasing or selling should denote where the capital is productively employed?[61]

With respect the writer does not share the ambivalence of his Lordship. In the writer's view the second possibility is not tenable as it merely represents the recovery of the capital and not the employment of the capital. Again the third possibility does not pose a serious contention as the direction or decision to employ the capital, is not the same, as the employment itself.[62]

58 *Supra,* n. 12 at p. 15.
59 (1921) 29 C.L.R. 225.
60 *Ibid*., at p. 233.
61 In *Liquidator Rhodesia Metals Ltd.* v. *Commissioner of Taxes, supra,* n. 17 at p. 789.
62 Also, it may be argued that this view has been rejected by the Privy Council in *Chunilal Mehta, supra,* n. 9, see *infra,* with regard to the analogous situation, where direction was given in Bombay to carry out profit earning activities, elsewhere, was held insufficient to amount to this direction being considered the source of the income from those activities.

To summarize the position at this stage, it would appear that at common law the location of the source of dividends is the place where the shares, for which the dividends were received were registered. And the location of the source of interest is the place where the agreement for the provision of capital to the debtor was made.

(2) *The Location of the Activities which earned the Funds out of which the Investment Income was paid*

This is another possibility that has been suggested. Based on this principle the source of dividends is the activities of the company that earned the fund out of which the dividends were declared, and likewise the source of interest is the activities of the debtor which earned the fund out of which the interests were paid.

The strongest endorsement of this view is the High Court of Australia decision in *Nathan* v. *F.C.T.*[63] In this case the taxpayer was the shareholder of three companies, incorporated in England and managed and controlled there. These companies carried on business and made profits in Australia and England. The taxpayer received dividends from these companies which were paid out of profits derived by the companies in Australia.

The issue in this case was once again whether the dividends were derived from a source in Australia, so as to be liable to tax. Isaac J. who delivered the judgment of the court rejected the view that the share is the source of dividends because, "The share in the capital is not the 'source', but the *measure* of the dividend he is to receive."[64] He thought that the fund of the company is the source of dividends received and it follows that if "... the fund is derived from various sources, some of which are within Australia and some outside Australia, he is according to the provisions of the Act, liable or not liable to taxation in respect of it accordingly."[65]

This view seemed to be shared by Innes C.J. in *Overseas Trust Corporation Ltd.* v. *C.I.R.*, where as was noted, the court held that the source of the dividends paid to the shareholder by a Custodian, who was holding the dividends declared earlier and paid to it by the companies, which subsequently went into liquidation, was the employment of capital in the acquisition of the shares. But Innes C.J. also expressed the view that,

> ... had these companies been going concerns engaged in mining operations in South West Africa there would be much to be said for the view that the shareholders drew their dividends from the same source as the companies;[66]

In addition, Watermeyer C.J. in the *Lever Brothers'* case also seemed to suggest that, although the "theoretical lawyer" may deem the source of interest as the agreement providing the credit facilities, a practical man would probably consider the source to be "... the operations of the American Companies which produced the money out of which the interest was paid."[67]

63 *Supra,* n. 46.
64 *Supra,* n. 46 at p. 196.
66 *Supra,* no. 46 at p. 198.
66 *Supra,* n. 48 at p. 76.
67 *Supra,* n. 12 at p. 16.

This view presents several difficulties. First, from a practical point, in a situation like *Nathan's* case, it may not be easy to trace the dividends declared by the company to any particular fund earned by the company's activities in some country. This is especially so, if the company mixes profits earned from activities in various countries.

Second, as Watermeyer C.J. himself pointed out, this principle "... seems to have brushed aside the legal idea of a company being a separate *persona* distinct from its shareholders and to have dealt with the shareholder as if he were a partner in the activities of the company, thus deriving his income from the same source as that from which the company derived its income."[68]

Third, it is submitted that this view is attributing too remote a cause as the source of the investor's income, and it should be remembered that it is his income that is sought to be taxed, not his debtor's or the company's income.

In this regard *Nathan's* case may be explained on the ground that the relevant section involved imposed a tax on income which is "derived directly or indirectly" within Australia. The court felt that this was of great importance, as in situations where the material words were simply "derived from", it has been held that this meant "directly derived"[69] In Singapore where the material words take the latter form, one may argue that the view that the source of investment income is the same as that of the company's or debtor's income is too remote.

(3) *The Location of the Debt*

It was sometimes thought that the source of interest is the debt resulting from the loan of money, and following the House of Lords decision in *English, Scottish and Australian Bank Ltd.* v. *I.R.C.*,[70] a debt is located where the debtor resides. Therefore it was thought that the place where the debtor resides is the location of the source of interest. However there is some disagreement with regard to the location of a debt. There are some who think that a debt is located where it is properly recoverable or can be enforced.[71] Although this would be so at the place where the debtor resides, the debt may also be enforced elsewhere. If this wider principle is followed a debt may be located in more than one place and therefore it is not suitable to be used as a source of interest. For this and other reasons, this view is now generally discredited.[72] But as we shall see, under section 12(6)

68 *Supra,* n. 12 at p. 13.

69 The Privy Council in *Lovell & Christinas Ltd.* v. *Commissioner of Taxes, supra,* n. 23 at p. 52. See also *Boyd* v. *C.I.R.* 17 S.A.T.C. 366 where the South African Appeallate Court refused to follow *Nathan's* case.

70 [1931] All E.R. 212.

71 See Pollock M.R. in *New York Life Assurance Co.* v. *Public Trustee* [1924] 2 Ch. 101, adopted by Watermeyer C.J. in *C.I.R.* v. *Lever Brothers, supra,* n. 12 at p. 15.

72 See for example Watermeyer CJ.'s judgment in *C.I.R.* v. *Lever Bros. And Another,* supra, n. 12, p. 8. See also Finlay J. decision in *C.I.R.* v. *Viscount Broome Executors* 19 T.C. 667, where the judge seemed to think that the principle of looking to the *situs* of the debt as the location of the source may be confined to corporations and cannot be applied to individuals. The judge also seemed to suggest that the debt is not really the source of income because he held that, in this case the interest payments were situated within the United Kingdom, not just because, the debtor was resident within the United Kingdom but also because the payment was "out of a source here" (at page 679). It is not clear exactly what this meant, but what seems clear is that the debt is not the source of the interest.

one of the rules with regard to the deemed source of income is that if the debtor resides here, then the interest payments are deemed to be derived here.

The difficulties in locating a source of investment income, are caused by the court's insistence in the not unattractive view that "source means not a legal concept but something which the practical man would regard as a real source of income. The ascertaining of the actual source is a practical hard matter of fact."[73]

In truth, if a practical man were asked what was the real source of income, he probably would not know and if pressed would give as varying an answer as there are practical men. And if the court tries to answer the question on behalf of the practical man, the answer as the cases show, again varies as much with the judges involved. So, although this view provides flexibility, it creates too much uncertainty. It would be better to prescribe legal rules to fix the source of each particular type of income. The loss of flexibility from this approach is outweighed by the certainty that is achieved, which to be fair to taxpayers, enable some amount of tax planning to be done.

(4) *Statutory Source Rules for Interests*

We have seen that the source rules with regard to investment income, as laid down by the cases, are not as clear as may be desired; this is especially so with regard to interest payments. The legislature has to some extent alleviated these problems by enacting section 12(6), which upon satisfaction of one of two conditions deems the interest to be derived from Singapore. Section 12(6) provides as follows:—

> 12.(6) There shall be deemed to be derived from Singapore:—
>
> (a) any interest, commission, fees or any other payments in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness which are —
>
> (i) borne directly or indirectly by a person resident in Singapore or a permanent establishment in Singapore except in respect of any business carried on outside Singapore through a permanent establishment outside Singapore or any immovable property situated outside Singapore; or
>
> (ii) deductible against any income accruing in or derived from Singapore; or
>
> (b) any income derived from loans where the funds provided by such loans are brought into or used in Singapore.

It seems clear therefore that if either paragraphs (i) or (ii) is satisfied, the interest payments are deemed to be derived from Singapore and taxable as such. It seems that the exception provided under paragraph (i) for any loan borne by a Singapore resident with regard to immovable property situated outside Singapore is part of an effort to narrow the ambit of section 12(6).

[73] *Per* Isaacs J. in *Nathan* v. *F.C. of Taxes, supra,* n. 17 adopted by De Villiers J.A. in *Rhodesia Metals Ltd.* v. *Commissioner of Taxes* 1938 A.D. 282 and Lord Atkin in the Privy Council's judgment in the same case *supra,* n. 17.

Prior to the amendment in 1977, which brought about the present section 12(6), it used to read as follows,

> 12(6) Any income derived from loans where:
>
> (a) the interest is borne directly or indirectly by a person resident in Singapore; or
>
> (b) the funds provided by such loans are brought into or used in Singapore, shall be deemed to be derived in Singapore.

This version of section 12(6)(a) would for example, result in tax being imposed on interest payable to a mortgagee in, say, the United Kingdom, by a Singapore resident with regard to the purchase of a house in the United Kingdom. This it was felt was too wide.[74]

However, the present section 12(6) is still considered by some to be too wide in ambit.[75] As a result a press statement was released by the Minister of Finance, to clarify doubts which had arisen "on the scope and amount of payments to non-residents subject to tax."[76] This statement states that where three categories of services are "performed outside Singapore by persons outside Singapore for or on behalf of residents or permanent establishments in Singapore or even between associated companies, and such transactions are at arm's length and not with intent of siphoning off Singapore income" then they will be considered to be outside the ambit of section 12. Two of the three categories deal with section 12(7) and will be discussed later. The ruling which affects section 12(6) is to the effect that,

> Where the arrangement, management, guarantee or service, [relating to any loan] is performed outside Singapore, the payments for such arrangement, guarantee, management or service are hereby treated as not covered by the provisions of section 12(6)(a).

The ambit of section 12(6)(a) is thus narrowed. There was never much doubt about the kinds of payments that are covered by section 12(6)(a). The same cannot be said of section 12(6)(b) and in this regard, the press statement does not deal with the problems of interpreting this sub-section.

The main problem is, what meaning is to be attached to the phrase "any income derived from loans". Two interpretations are possible. First, 'income' in the sub-section may be interpreted to cover income of the creditor or payments in connection with the loan or arrangements with regard to the loan. So interpreted, this sub-section covers the same sort of payments as paragraph (a), and thus provides a third situation where such payments would be deemed to be derived from Singapore *viz.*, where the funds provided by such loans are brought into or used here.

74 This example is drawn from Sat Pal Khattar's essay on "The Concept and Determination of Sources of Income: Income from Trades, Businesses, Professions or Vocations" *supra,* n. 18 at p. 9.

75 See Khattar's essay *id.* and Andrew Ang's essay on "Some Tax Implications in Financing Arrangements: An examination of the Singapore Position". This essay was presented at the Singapore Conferences on International Business Law, Conference 2 on "Current Issues in International Financial Law". The Conference Proceedings will be published soon.

76 This statement has been reproduced in, the Handbook of Singapore Tax Statutes by Peter Owyang Gim Mong and Leonard Van Hien, Butterworths 1983, at p. 121.

This interpretation has been criticised as being far too wide.[77] It would result in interest payments being liable to tax even where the loans are made abroad to non-residents abroad merely because the funds provided by such loans are remitted to Singapore. Such a situation has been criticised as an "unwarranted... extra-territorial reach on non-resident(s)."[78] Aside from the undesirability and unfairness of such extraterritorial imposition of tax, it may also be ineffective as there would appear to be no link or nexus with Singapore.[79]

Aside from this, such an interpretation would only serve to discourage capital being brought into Singapore. Further, if this interpretation was in fact what the draftsman intended, there seems to be no reason why the same words as in paragraph (a) were not used, but instead the rather more ambiguous phrase "income derived from loans" was employed.

In fact, one would have thought that the use of a different wording in an immediately following paragraph within one section, must have been intended to have different meanings. This lends support to the second interpretation that, "income derived from loans" refer to gains and profits derived by the debtor from the use of the funds provided by the loans. It has been suggested that this construction is unsatisfactory for three reasons.[80] First it was thought that if this was the intention of the legislature, it would have been more appropriate if the section has been worded thus,

> income derived from funds provided by loans brought into or used in Singapore.

With respect it is difficult to see how this formula is different from or might give rise to an interpretation different from the present section 12(6)(b) which reads,

> income derived from loans where the funds provided by such loans are brought into or used in Singapore.

Surely, the removal of the word 'loans' does not radically alter the meaning of the paragraph nor makes it any clearer as to whether it is intended to apply to income derived from the use of the funds by the borrower.

Secondly, it was thought that such an interpretation would be redundant, since it is "merely declaratory of existing law". Although the commentator did not explain explicitly what he meant, it is probable that he had in mind section 10(1). The author probably meant that if money is brought into Singapore and used to earn profits, then these profits under existing law would be liable to tax, probably because they accrued in or are derived from Singapore.

Although in many situations this would indeed be so, there is no rule of law that profits obtained from employment of funds in Singapore are necessarily derived from or accrued in Singapore. It will depend on how the funds are employed. If the funds are employed for invest-

77 See Andrew Ang's essay, *supra,* n. 75.
78 *Ibid.*
79 See *infra,* introductory discussion on tax jurisdiction,
80 See Andrew Ang's essay *supra,* n. 75.

ment purposes, then profits obtained are probably derived here and liable to tax. However if the funds are employed in a business venture, then profits from this venture are not necessarily derived from or accrued here. Much may depend on the business activities; at least as we have seen when dealing with business income, there is considerable difficulty in locating the source of business income. Therefore it is arguable that, this interpretation of section 12(6) will relieve the court of the difficulty in determining the source in such situations, as it is deemed to be derived from Singapore. For this reason alone, this interpretation of section 12(6)(b) does not make it redundant or "merely declaratory of existing law".

Finally, it was thought that, "... in contrast to the use of funds it is difficult to see how the mere bringing of the funds into Singapore could give rise to income."[81] This criticism, it is submitted, missed the point with regard to the paragraph. Nowhere in the paragraph, is there a suggestion that the mere bringing of funds into Singapore would automatically give rise to income, nor is income deemed to arise from the mere bringing in of funds. It is clear that the paragraph envisages, the funds which are brought in being used here, and such use if it gives rise to income, the income will be deemed to have a Singapore source.

It is submitted therefore that to make sense of section 12(6) and yet not to impose too wide an ambit of tax jurisdiction, the second interpretation should be followed. It seems that, in practice, the revenue authorities have refrained from invoking section 12(6)(b).[82] If this is because of uncertainty as to its scope, then an amendment is certainly desirable or at least some clarification of the revenue authorities' stand should be made.

4. *Income arising from Property*

The common law rules for determining the source of income arising from the use of property are complex. Fortunately, as in the case of interest payments, the problem has to a great extent been alleviated by section 12. Generally speaking the common law rules need only be considered, with regard to royalty or other payments for the use of any movable property, knowledge or information, where the payments are not borne by a resident and had not been deducted against any Singapore source income; otherwise section 12(7) will govern the situation.

Before considering section 12(7), it is useful to consider the common law rules because they may still be applicable and they provide a useful contrast to section 12(7).

Property itself does not give rise to profits or gains, it is the use of the property that does so. It is not surprising therefore that the general rule is that the situation of the source of income from property is where it is used and this would also normally be the place where the property is located. In *Commissioner of Taxes* v. *British United Shoe Machinery (S.A.) (Pty) Ltd.*,[83] the taxpayer company was registered

[81] *Ibid.*
[82] *ibid.*
[83] 26 S.A.T.C. 163.

in South Africa and dealt in machinery used in the manufacture of footwear. It leased a number of machineries to manufacturers in Rhodesia. The period of the lease varied from five to ten years. The issue before the court was whether the rental from these machineries was derived from a source in Rhodesia. The court held that, "… the source of the income is because someone is using the machines, the property of the [taxpayer]"[84] and the source is located where the property is used.

Significantly, the court thought that a distinction may be drawn between hiring of property, where the emphasis is on the property itself for example the machinery in question and the "… hire of smaller things for a more limited period, for example, motor-cars, it is rather the business of the lessor than the property leased which is the source."[85] In which case, "… the location of the source would probably be the location of the profit-producing activities, and the occasional use of property in another country would probably be ignored."[86]

The determination of the source of incorporeal property, presents greater difficulty than that of corporeal property. Incorporeal property in this context is used to include copyright and patent. The author of a musical, artistic or literary work and an inventor of some secret process or product may derive profit either by retaining the copyright or the patent to the work and receive royalties by authorising others to use or publish the work under the copyright, or by licensing the manufacturing of the articles under the patent. Alternatively, he may derive profit by selling and transferring the copyright or the patent outright to another. The way he chooses to make profits may well determine the taxability of the profits[87] and the source of that profit.

We are here concerned only with the source of the profits. The one case where this was directly discussed is the South African case of *Millin* v. *C.I.R.*[88] In this case the taxpayer's wife was a novelist and certain royalties derived by his wife from the sale of works of fiction published in England were included in his income in accordance with the provisions of the South African Income Tax Act, 1925 whereby the income of the wife is deemed for purposes of taxation to be part of the income of the husband. The taxpayer's wife resided in South Africa, where she had written the works in question. By a contract entered into in London by an agent she granted to certain publishers in England the sole right of printing and publishing her work in book form for a certain period of years. They undertook to pay her a percentage of the published price by way of royalty. The issue in this case was whether the royalty was liable to tax as having been derived from a source within South Africa.

84 *Ibid*., at p. 167.
85 *Id.*
86 *Id.*
87 It may be argued that if he disposes of the copyright or the patent, then the receipt obtained is of a capital nature and is thus not taxable; unless the sale or disposal is by way of trade. A trade can be established only if he has dealt with his work in this fashion on a regular basis so as to constitute a trade. See *Nethersole* v. *Withers* 28 T.C. 501. *Mackenzie* v. *Arnold* 33 T.C. 363, is a case which decided to the contrary but it is submitted that this case was wrongly decided.
88 3 S.A.T.C. 170.

The court held that the royalty was in fact derived from a source in South Africa. The court applied the principle, which has been discussed earlier that in determining the source of income, regard must be had to the place where the capital had been employed which produced the profits. In this case it was thought that, "… the exercise of her wit and labour… must be regarded as her capital, that produced the royalties. That capital was employed in the Union...."[89] It is submitted that this test is not appropriate to works of labour. It is only appropriate to investment income derived from the use of capital, in the usual sense *i.e.*, sums of money or other funds.

The court rejected the argument of the taxpayer to the effect that, in writing the book, the wife produced a capital asset *viz.*, the copy of the book and the royalties which she received from the use made by her of this capital asset, therefore the source of the income must be taken to be the place where this capital was employed *viz.*, London. This argument was rejected because the "… copyright was … not capital but income".[90] This is contrary to the opinion of the House of Lords in *Nethersole* v. *Withers,*[91] where the House clearly treated a copyright as property and Lord Porter referred to it as a capital asset.[92]

It is submitted that the court is confusing the distinction between royalties from copyright and proceeds from the sale of the copyright. This is obvious from the example given by the court of an authoress who produces a novel a year and sold the copyright outright, the court felt that there was no doubt that "… that amount… would represent the income of her business...."[93] This is certainly true, but that only means that the authoress has disposed of the copyright in the course of trade or business and the copyright is her stock in trade. This does not preclude a copyright being a capital asset to another taxpayer.

It is submitted therefore that the source of royalties from copyright and proceeds from the sale of the copyright (other than in the course of business) is the copyright itself. And since copyright is a form of property, it is located where it is used or employed. The only exception may well be where the taxpayer disposes of the copyright in the course of a business or trade, then the source of the proceeds would be the business of the taxpayer and the location of the source would be the location of the profit-producing activities.

Similarly, with a patent, which is also a species of incorporeal property. However to be effective a patent has to be registered in a

89 *Ibid.*, at p. 176.
90 *Ibid.*, at p. 175.
91 *Supra,* n. 87.
92 See Viscount Simon's judgment at p. 517, and Lord Porter's judgment at p. 519. The United Kingdom Copyright Act 1911, treats copyright as a form of property which can be assigned or the owner may grant a licence to use the copyrighted matter. This Act has effect in Singapore.
93 *Supra,* n. 88 at p. 175.

country.[94] Therefore a patent is necessarily "used" in the place where it is registered.[95]

The Australian case of *Commissioner of Taxation of the Commonwealth of Australia* v. *United Aircraft Corporation*[96] provides an interesting illustration of the source of income, obtained by a taxpayer in providing designs, know-how or information which has not been patented. In this case the taxpayer company, a manufacturer of aircraft engines and spare parts, was incorporated and carried on business in the United States. The company entered into an agreement with an Australian company to license the latter in the manufacture and sale of certain aircraft engines and spare parts in Australia and New Zealand. In fact the taxpayer company had no patent for any invention in Australia. The Australian company paid royalties to the taxpayer company in New York. The issue in this case was whether the royalties were liable to tax as income derived from a source in Australia.

The High Court of Australia held that the royalties were not derived from a source in Australia and therefore were not liable to tax. The court thought that the agreement was nothing more than an agreement to communicate information which would facilitate the manufacture of the engines in Australia. There was no transfer of property to Australia and the taxpayer therefore did not own any property in Australia or derive any income from any property in Australia. The court decided that the source of the royalties was "... the making of the agreement in America and the acts done by the American corporation in the performance of the agreement in America....[97]

It is possible for one to take issue with this case on the basis of the court's decision that information and knowledge are not property. A majority of the House of Lords decided in *Evans Medical Supplies* v. *Moriaty*[98] that know-how in the form of secret process may be treated as a capital asset. And if the company supplies information or know-how to another, it may be licensing the manufacture of the articles concerned.[99] If so, one can argue that the source of the royalty

94 In Singapore the Registration of United Kingdom Patents Act Cap. 199, Singapore Statutes 1970 Revised Edition, provides for registration in Singapore of patent granted in the United Kingdom.

95 In Silke, *South African Income Tax, supra,* n. 57 at p. 250, the author considered that the source of royalties from patent rights is the application of the inventor's wits, labour and resources. And the location of the source will be where they are employed. This view was based on *Millin's* case, although the author also thought that "the act of registering patent rights in a country merely provides protection for the holder and is not the real source of the royalty." It is submitted with respect that this is not an accurate view of the transaction, for if a patent is not protected then if a party manufactures the article involved he cannot be sued for infringement of the patent. In fact it is because the patent is registered that an unauthorised manufacture of an article is unlawful. And it is for this reason that royalties are paid. Therefore, the source of the royalties is the registration of the patent.

96 2 A.I.T.R. 458.

97 *Ibid*., at p. 476.

98 37 T.C. 540. See Viscount Simonds' judgment (with whom Lord Tucker concurred) at p. 579 and Lord Merton. See also *P.S.W. Ltd.* v. *D.G.I.R.* [1982] 1 M.L.J. 295.

99 Another view of a transaction where information is supplied, is that there is a sale of the information. See Lord Keith's judgment in *Evan's* case, *ibid*., at p. 583. However, this view has encountered some resistance, see for example Lord Denning in *Evan's* case at p. 589. See also Viscount Simonds in *Jeffrey* v. *Rolls Royce Ltd.* 40 T.C. 443, 490 and Viscount Radcliffe in *Musker* v. *English*

payments is this property or asset and the location is where the information is used.

Statutory Source Rules for Royalties

One can see therefore, that the determination of the source of income from property under the common law is not that clear or certain, especially with regard to royalties. In this regard section 12(7) has gone a long way to alleviate these difficulties. Section 12(7) provides as follows,

> 12.(7) There shall be deemed to be derived from Singapore —
>
> (a) royalty or other payments in one lump sum or otherwise for the use of or the right to use any movable property;
>
> (b) any payment for the use of or the right to use scientific, technical, industrial or commercial knowledge or information or for the rendering of assistance or service in connection with the application or use of such knowledge or information;
>
> (c) any payment for the management or assistance in the management of any trade, business or profession; or
>
> (d) rent or other payments under any agreement or arrangement for the use of any movable property,
>
> which are borne directly or indirectly by a person resident in Singapore or a permanent establishment in Singapore (except in respect of any business carried on outside Singapore through a permanent establishment outside Singapore) or which are deductible against any income accruing in or derived from Singapore.

The scope of section 12(7) is certainly very wide. It is obviously intended to cover royalties from copyright and patent, but the wording of the sub-section is rather awkward for this purpose. Paragraph (a) refers to royalty from the use of "movable property". It is certainly unusual to refer to incorporeal property such as copyright and patent as movable property. The concept of movable property is normally used in contrast with immovable property and it is submitted that it is inappropriate if patent and copyright are intended to be covered.

Further, to use paragraph (b) to deal with royalties from copyright and patent would raise a nice question as to whether the royalties arise from the incorporeal property *i.e.* the patent or copyright or from the use of the knowledge or information which is thus protected. As the cases stand the former is probably the correct answer, in which case paragraph (b) may not be appropriate to cover royalties from copyright or patent.

If a court is faced with such an issue it is most probable in view of the obvious intention of Parliament, that it will decide that such

Electric Co. Ltd. 41 T.C. 556, 585. Subsequent cases like *Jeffery* and *Musker* have not used this approach of sale but simply decided that the taxpayer has used or supplied the know-how or information. This latter approach to the transaction makes it easier to determine the source and its location, being the place where the information is used. It is much more difficult to determine the source, if the information is treated as being sold to another party.

royalties are covered by either paragraph (a) or (b), but it will probably have to do so with a rather dubious interpretation of the words used. Therefore, it is desirable that paragraph (a) be amended to make it more appropriately applicable to royalty from copyright, patent or other incorporeal property.

It has also been suggested by a commentator that paragraph (a) has the effect of subjecting, "lump sum payments to compound a long term recurrent payment obligation by the payment of a lump sum (which is clearly not royalties as normally understood)..."[1] to tax. Thus it was felt that, "By this masterly stroke the distinction between, capital and revenue in *Evans* case as compared with *Rolls Royce* case... would appear to have been done away with."[2]

This statement is confusing on several counts. First, *Evans Medical Supplies* v. *Moriaty* and *Jeffrey* v. *Rolls Royce Ltd.*,[3] are concerned with the question of whether payment for the supply of information, knowledge and know-how is of a capital or income nature; if it is the former then, it is not taxable and if it is the latter, then it would be liable to tax. Therefore, this issue does not at all pertain to section 12(7), since the sub-section is concerned with source of the payment and not its nature.

Second, following from the above, it means that section 12(7) has not done away with the distinction between capital and revenue receipts. If a payment is caught within the sub-section, that only means that the payment is deemed to be derived from Singapore. It still leaves the nature of the payment open for decision. It has to be remembered that section 12(7) is not a charging provision; it does not impose tax on the payment merely because it may come within its ambit.

Third, even with regard to the determination of the source of the payment made in a situation as in *Evans* and *Rolls Royce,* this would be more appropriately determined under paragraph (b) rather than paragraph (a).

Finally, the proposition that "lump sum payments to compound a long term recurrent payment obligation" are not royalties is not as clear or certain as the commentator seems to suggest. However, it is not within the scope of this article to deal with this point.[4]

Aside from these uncertainties, it seems clear that payment of management fees by a Singapore resident would result in the payment

1 See Sat Pal Khattar's essay *supra,* n. 18 at p. 10.
2 *Id.*
3 *Ibid.*, n. 97.
4 The result of the cases on this point seemed to suggest that whether lump sum payments in lieu of long term recurrent payment for the use of patent and copyright is of a capital or revenue nature depends on the nature of the lump sum payment *viz,* whether it is in substance, a total of the royalties combined in which case it is of a revenue nature and taxable (see *Constantines Co.* v. *The King* 11 T.C. 730 and *Mills* v. *Jones* 14 T.C. 769) or in fact a lump capital sum in lieu of royalties, in which case it is a capitalisation of royalties and therefore is not taxable, (see *Desoutter Bros. Ltd.* v. *J.E. Marger & Co. Ltd.* [1936] 1 All E.R. 535). The test to determine this, "...must depend on particular facts which in the particular case, may throw light upon its real character, including, of course, the terms of the agreement under which the licence is granted." *(Per* Lord Greene in *Nethersole* v. *Withers* 28 T.C. 501, 512 approved by the House of Lords in the same case at p. 518.).

having a Singapore source. Further, under paragraph (d), charter fees payable by a Singapore resident, for the charter of a ship, would also be deemed to have a Singapore source and is liable to tax. This, as has been rightly pointed out is adverse to Singapore's status as a centre of shipping activities and operations. As a result, it seems that the revenue authorities have tempered the full effect of paragraph (d) by "fixed reduced rate".[5]

There is no doubt that the ambit of section 12(7) is rather wide and to soften its impact, the Commissioner of Inland Revenue has ruled that with regard to section 12(7)(b),

> Where the assistance or service is performed outside Singapore, the payment for such assistance or service is hereby treated as not covered by the provisions of section 12(7)(b). This does not refer to royalty which has always been subject to tax even before the 1977 Income Tax Amendment.

And with regard to section 12(7)(c) it was ruled that,

> Reimbursement or allocation of administrative expenses incurred by head office outside Singapore and claimed by a branch in Singapore is governed by the provisions of section 14 as before. This also applies to reimbursement or allocation of expenses between associated companies. Both are not affected by the provisions of section 12(7)(c). Payments to persons outside Singapore not associated to the payers in Singapore are hereby treated as not covered by the provisions of section 12(7)(c).[6]

It can be seen from the above discussion that it is not easy to locate the source of an income. The difficulty is due to the fact that the matter is treated as "a practical hard matter of fact", as a result of which practical men and judges can have differing views. Further, difficulties are created because when the question as to the source of an income has to be decided the two-step process that is involved is not often differentiated from one another. The first problem is to determine what is the source *(i.e.*, the originating cause) from which the income is received and when that has been done, the second problem is to locate the source in order to determine whether or not it is within the jurisdiction concerned.[7] Some of the difficulties involved have been alleviated with the enactment of statutory source rules, which though they present some problems of interpretation, are certainly to be welcomed.

Withholding of Tax

It has been mentioned earlier that for a country to effectively impose a tax, there must be some nexus between that country and the taxpayer. Where the nexus is based on the source of the income, the tax may be imposed on non-residents, in which case for effective enforcement and administrative convenience, the tax will usually be collected at source. This is done through the process of withholding, which involves deduction of tax at source, so that the taxpayer only receives his after tax entitlement, instead of receiving the gross amount and

5 See Sat Pal Khattar's essay *supra,* n. 18 at p. 10.
6 Press Statement Issued By The Minister of Finance, *supra,* n. 76.
7 See *C.I.T.* v. *Chunilal Mehta, supra,* n. 9 at p. 449.

paying the tax himself. In Singapore, although tax is assessed and paid on the income of the preceding year,[8] there is no general provision for withholding of tax. The revenue authorities depend on a degree of thrift from taxpayers to save for the payment of tax. In some countries, *e.g.*, the United States there is a general withholding of tax for wages paid to employees.[9]

In Singapore, however, there are provisions for withholding of tax for certain income to be paid to non-residents. Two of these, sections 45 and 45A relate rather closely to section 12. It is provided in section 45(1) that, where a person is liable to pay interest which is chargeable to tax under the Act to a person not known to him to be resident in Singapore than the person paying the interest must deduct tax from the interest at the rate of forty per cent.

Therefore, where interest is deemed under section 12(6) to be derived from Singapore, it will be chargeable to tax and the person paying the interest must withhold the tax. Similarly, section 45A lays down the same procedure with regard to payment of royalties.

II. REMITTANCE BASIS

If income is taxed on the remittance basis, it is taxed when it is received in Singapore, regardless of when or where it arose. But the income must be from a foreign source, and be received by a resident.

Income earned abroad may be received in Singapore in various forms. The money itself may be received here in specie *i.e.*, in coins or dollar notes or it maybe received in forms recognized by commercial men such as bills of exchange, cheques or promissory notes.[10] It is clear that in these two situations, the income is liable to tax in Singapore. It has also been suggested that the income need not be received by the taxpayer himself to be liable to tax. It is sufficient if it is received in Singapore by some third person by his authority.[11]

The House of Lords, in *Thomson* v. *Moyse*[12] held that income could be "received" in a place without any money being brought into the place. In this case, the taxpayer had income in a New York bank account. He drew cheques on that account in favour of two English banks. This was treated as a sale of the cheques to those banks for the sterling equivalent which he was paid immediately. The English banks send the cheques to New York and cashed them collecting the dollars there.

The House of Lords held that the sterling equivalent received by the taxpayer in London were taxable on the remittance basis. It was argued by the taxpayer that the sums paid to him in New York were never brought into London, To which Lord Reid responded that "... it is immaterial that no money was in fact brought into this country in the course of or in connexion with the transaction.... From the point of view of the taxpayer, his income has been brought into

8 See section 35(1).
9 See the Current Tax Payment Act of 1943 section 3401.
10 See *Thomson* v. *Moyse* [1960] 3 All E.R. 684, 697.
11 *Id.* See also *Timpson's Executors* v. *Yerbury* [1936] 1 K.B. 645.
12 *Supra,* n. 10.

the United Kingdom. He had, but no longer has, money in a bank abroad; he now has an equivalent amount of money in his hands in this country."[13]

If this interpretation of "received in" is followed (and there appears to be no reason why is should not be) then where a customer employs a banker to collect, by means of a foreign cheque, money held abroad which is part of his income, the sum which the customer receives in this country is "income... received in Singapore from outside Singapore". But it is clear from section 10 itself, that income on a remittance basis would not be taxed if it is from a source that would not have been taxed if the source is located in Singapore.

The English courts tend to adopt a rather wide interpretation of the phrase "received in". In contrast, the Indian courts would appear to take a more restricted interpretation.[14] One major restriction is the view that receipt of income refers to the first occasion when the taxpayer gets the money under his own control. In other words, once an amount has been received as income by the party entitled to it, any subsequent remittance of the amount to another place would not amount to a receipt.[15] This is because it was thought that, "... the word 'receive' implies two persons, namely, the person who receives and the person from whom he receives. A person cannot receive a thing from himself."[16] Although there are no English cases on this point, it would appear from the approach taken in cases such as *Thomson* v. *Moyse* that the English courts would not take such a stand.

It is submitted that the interpretation placed by the Indian courts, although impliedly approved by the Privy Council[17] is unduly restrictive, because it would confine liability to tax on the remittance basis to the situation where the foreign source income is sent directly to the taxpayer within the jurisdiction. Further it may be argued that the wording of section 10(1) excludes this interpretation. Income is only taxed if it is *"received in Singapore* from outside Singapore" (emphasis added). This raises the implication that, even though the income might have been received once before by the taxpayer outside Singapore, if he sent the income back to Singapore, he has received it in Singapore. And there seems to be nothing out of the ordinary with this interpretation of "received". For instance, if one buys goods abroad and received them there, and subsequently sent the goods back to Singapore, it would not be incorrect to say that one has received them in Singapore when they arrived.

It has also been argued that, gains which have been received as income outside Singapore, may lose their character as income and be treated as a capital receipt. This is especially so when they are remitted in a lump sum, rather than periodically when they accrue and all the

13 *Supra,* n. 10 at p. 689.

14 The cases on this issue arose at a time when parts of India were under British rule and subject to income tax liability and where the taxpayer earned his income from the areas where the Income Tax Act did not apply but brought the income into an area with income tax liability. See *Sundar Das* v. *Collector of Gujrat* [1922] I.L.R. 3 Lah. 349, *Board of Revenue* v. *Ripon Press* [1923] I.L.R. 46 Mad. 706, *Saiyid Ali Imam* v. *C.I.R. Bihar & Orissa* [1924] 1 I.T.C. 402.

15 *Ibid.*

16 *Per* Sir Shadi Lal C.J. in *Sundar Das* v. *Collector of Gujrat*, ibid., at p. 355.

17 See *C.I.T.* v. *Mathias* 7 I.T.R. 48, 55.

more so, if the source of such income has by then ceased to exist.[18] It is clear from *S.T.U.* v. *Comptroller of Income Tax*[19] that remittances into Singapore must still be in the nature of income to be taxable.

Relevance Of Residence In Determining Tax Liability

It was stated earlier that income from a foreign source received in Singapore is only taxable in the hands of a resident. This is the necessary result of section 10(1) read with section 13(3). The latter was recently amended and now reads,[20]

> There shall be exempt from tax for any year of assessment any income arising from sources outside Singapore and received by any individual who is not resident in Singapore in that year of assessment.

To appreciate the significance of the new amendment, it is useful to set out the old wording of the sub-section which was as follows.

> There shall be exempt from tax any income arising from sources outside Singapore and received therein by any person who is in Singapore for some temporary purpose only and not with any intent to establish his residence therein and who has not actually resided in Singapore at one or more times for a period equal in the whole to six months in the year of assessment.

The Minister of Finance during the Second Reading of the Amendment Bill stated that the amendment was only "a drafting amendment to section 13(3) of the Act to make clear that the section applies only to individuals and not companies."[21]

As would be obvious even on a cursory reading, the final result is considerably wider. If all that was intended was to make it clear that the sub-section is only intended to cover individuals and not companies, then all that was needed to be done was to replace the word 'person' with 'individual'. Even this would have been arguably *ex abundanti cautela* for although 'person' is defined in section *2* of the Act to include a company, the context of the old section 13(3) made it inappropriate to include a company within the use of the word 'person'. The residence of a company is usually determined with reference to either control and management or incorporation. And a company is either resident or not resident in a country, it cannot be in a country for a temporary purpose, with no intention of establishing a residence.

More significantly, the amendment would seem to have effected a change in the remittance basis of tax in Singapore. Prior to the amendment, income from a foreign source is exempt from tax under section 13(3) if the income is received by one who was referred to as a "temporary resident" in the marginal notes. And to show that one is a temporary resident is not the same as showing that one is not

18 See Sat Pal Khattar, "Tax Systems And Laws of Singapore" [1981] 2 M.L.J. xlvii, xlviii.
19 (1962) 28 M.L.J. 220.
20 See the Income Tax Amendment Act, No. 13 of 1984, Clause 3(d).
21 See the Parliamentary Debates of Singapore, Official Report, Volume 43, No. 18, Column 1913.

within the definition of a resident under section 2 of the Act. Now under the new amendment, the exemption avails anyone who is "not resident in Singapore". This would refer to the definition of resident in section 2.

It may be useful to discuss the concept of resident under section 2 by way of contrast with the old section 13(3) and the common law concept. For this purpose the definition of resident in section 2 is set out below. A resident is defined as,

> … a person who, in the year preceding the year of assessment, resides in Singapore except for such temporary absences therefrom as may be reasonable and not inconsistent with a claim by such person to be resident in Singapore, and includes a person who is physically present or who exercises an employment (other than as a director of a company) in Singapore for 183 days or more during the year preceding the year of assessment;

The most obvious difference between the two sections is that the relevant physical presence under section 2 is the year preceding the year of assessment, whereas under the old section 13(3) it is in the year of assessment itself. This is so even under the amended version.

More important is that the qualitative test in both sections seems to be different. The qualitative test in section 2 is circular in so far as it defines a resident as one who "resides". "Reside" is defined in the Oxford English Dictionary (which definition has been accepted judically)[22] as "to dwell permanently or for a considerable time, to have one's settled abode, to live in or at a particular place." It has been said that, "… this definition must… subject to any modification which may result from the terms of the Income Tax Act… be accepted as an accurate definition of the meaning of the word "reside"."[23]

The definition of 'resident' in section 2 seems to require some physical presence in the country during the relevant period. This requirement seems to be fortified by the fact that the secondary and quantitative test deems a person to be a resident where there is actual physical presence or exercise of an employment for 183 days or more.

If this is so, then it is submitted that the definition in section 2 of resident is narrower than the common law or dictionary definition. The distinction seems to be between residing and maintaining a residence. A person who lives in Singapore all his life but is absent from Singapore for the whole of a relevant year may still be regarded as dwelling permanently or for a considerable time here or still maintains his settled abode here; but it is submitted that such a person is not a resident as defined in section 2 for the relevant year of assessment, since he was not physically present at all for the relevant year. In other words, he might have maintained a residence here for that year but he did not reside here.

This distinction was also drawn in the English case of *Turnbull* v. *Foster*.[24] In this case the taxpayer merchant who carried on a business

22 See *Levene* v. *I.R.C.* [1928] A.C. 217, 222.
23 Per Viscount Cave L.C. *id.*
24 (1904) 6 T.C. 206.

in Madras and had his usual residence there visited the United Kingdom in nearly every year prior to the year of assessment but did not at all visit the United Kingdom during that year. The court held that he did not reside there in that year. Lord Trayner pointed out that tax is imposed on a person "residing in the United Kingdom" and this is not the same as having a residence there.

Aside from the presumption of residence, which arises if one is physically present for 183 days or more, it is not clear, however, how long the physical presence must be before one is considered to have resided here. Further, the taxpayer is allowed "such temporary absences therefrom as may be reasonable and not inconsistent with a claim of residence." To determine whether absence from Singapore is temporary and not inconsistent with a claim to be a resident, both the purpose and the period for the absence must be considered. Judicial and academic commentaries lay more emphasis on the purpose rather than the period of absence.[25]

However, if the temporary absences are to be considered and related to the relevant year (as the definition seems to require) then it is submitted that the length of absence should have a more significant impact. If the common law concept of residence *viz*., "the place where one dwells permanently or for a considerable time, where one has one's settled or usual abode or the particular place at which one lives",[26] is under consideration, absence of say nine or ten months in a year, especially for a good reason (like study abroad or for health purposes) may not be inconsistent with a claim that the absence is temporary. But considered in relation to that year, it is difficult to maintain that an absence of nine or ten months in a year is temporary. To so argue is not to detract from the established principle that the taxpayer's conduct in other years may be examined to determine whether he resides here for the relevant tax year.

If this construction of the definition of 'resident' is accepted then the principle based on the House of Lords decisions in *Levene* v. *I.R.C*,[27] and *I.R.C.* v. *Lysaght*[28] may not be applicable here. This principle is to the effect that a person who visits the United Kingdom substantially and habitually, (substantial here meaning that the average annual period amounts to about three months) is to be considered a resident in the United Kingdom.[29] But as argued earlier, such a person may not come within the definition of "resident" in section 2, because his absences are not temporary.

This construction is however not supported by the Malaysian case of *M.Y.* v. *Comptroller General of Inland Revenue*.[30] In this case, the taxpayer who was born in India first came to Malaysia in 1952 to study and be acquainted with the business of his mother. From 1952 to 1970 (except for three years) he spent more than four months a year in Malaya. For the years in question *i.e*., 1966 and 1967, he

25 See *N.Y.* v. *Comptroller General of Inland Revenue* [1972] 2 M.L.J. 110 and Soin, Singapore Master Tax Guide, Fifth Edition, CCH 3.
26 *Supra,* n. 23.
27 *Supra,* n. 22.
28 [1928] A.C. 234.
29 Revenue Rule (3). See Tiley on Revenue Law at p. 623.
30 *Supra,* n. 25.

stayed for 132 days in 1966 and 141 days in 1967. The Federal Court held that he was resident in Malaya (the definition was in *pan materia* with section 2), because he had substantial business interests in Malaya and his visits cannot be said to be for a temporary purpose. Further, the court felt that his absences were temporary and transient because, he always came back to Malaya. They were also thought to be reasonable because his mother was sick and she wanted him by her side. The court expressed the view that length of time is not the only consideration of the reasonableness of the temporary absence, the reason for the absence is an important factor.

It is submitted that the court relied too much on the English cases and did not pay enough attention to the language of the Act. It is submitted that the definition of resident in section 2 suggests a narrower ambit than the ordinary meaning or the common law meaning of the word.

The distinction suggested above between 'reside' and having a 'residence' is also relevant to the old section 13(3). It was suggested that in section 2, "reside" requires some physical presence while it is submitted that under the old section 13(3) the concept involved is that of having a residence. If an individual has lived in Singapore all his life, he has a residence here, if he leaves the country for say one full year, he has clearly not abandoned his residence here, if his absence is for a good reason. If so, such a person does not qualify as a temporary resident under the old section 13(3), since he is not a person who does not intend to establish his residence here.

The practical significance of this distinction before the amendment was that if he received income in Singapore from a foreign source, this income was not exempt from tax because he is not within the ambit of section 13(3). Not only that, if the argument that he was not a resident as defined in section 2 is accepted, he would be taxed on a higher rate for this income.[31] With the new amendment, in the situation hypothesised above, his foreign source income would not be taxed since he is not a resident within the definition of section 2.

One can observe from the above discussion that residence is not a very important factor in determining tax liability in Singapore. This is unlike the situation in many countries. Residence, however also determines the tax rate payable on taxable income.[32]

CONCLUSION

It should be noted that jurisdiction to tax only determines the power of the country to impose tax. It does not follow that tax will actually be imposed. In Singapore, there are provisions for exemption of income from tax under section 13. Of particular interest is section 13(l)(t) which exempts from tax, interest on moneys held on deposit in an approved bank, payable to a non-resident individual and section 13(1)(v) similarly exempts interest received from Asian Dollar Bonds, payable to a non-resident individual. Section 13(7) also gives the Minister a power to exempt from tax foreign source income which is received in Singapore by a resident.

[31] See sections 42 and 43.
[32] See sections 40, 40B, 40C, 42, 43 and 43B.

In addition, where the gains or profits are liable to tax in Singapore and another jurisdiction, consideration must be given to double taxation treaties, if one exists. Double taxation treaties will make provisions for one of two countries which could have asserted tax jurisdiction to impose tax in certain situations, in which case the other country will either have to exempt the income from tax or give a credit to the taxpayer. Currently Singapore has tax treaties with Australia, Bangladesh, Belgium, Canada, Republic of China, Denmark, Finland, France, West Germany, India, Israel, Italy, Japan, Korea, Malaysia, the Netherlands, New Zealand, Norway, the Philippines, Sir Lanka, Sweden, Switzerland, Thailand and the United Kingdom.

Aside from treaty provisions, section 48 of the Act also provides relief for a taxpayer whose income is already subject to tax in another Commonwealth jurisdiction. These are all situations, where even though the income earned is within the Singapore tax net, the government has voluntarily refrained from imposing a tax for reasons of fairness to the taxpayer and international comity.

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