TAX AVOIDANCE AND SECTION 33 OF THE INCOME TAX ACT

This article discusses section 33 of the Income Tax Act, introduced by the Income Tax (Amendment) Act 1988, repealing the old section. This is the new general anti-avoidance provision. This provision empowers the Comptroller of Inland Revenue to disregard, vary, or make such adjustments he deems appropriate to tax avoidance arrangements and has far-reaching implications for tax-planning. The article discusses the manner in which the section may operate in the light of case-law from other jurisdictions which have similar provisions.

I. INTRODUCTION

THE recent Income Tax (Amendment) Act[1] introduced a new anti-avoidance provision in place of the old provision in section 33 of the Income Tax Act.[2] By this move, Singapore joined the ranks of nations with wider anti-avoidance provisions. Prior to this amendment, it could be said that it was possible for an individual to order his affairs so as to minimise his tax liability.[3] The situation before this amendment was itself unclear as there had been a blurring of the distinction between tax evasion and tax avoidance.[4] It could then be generally said that an arrangement reducing the amount of tax payable by any person, not amounting to tax evasion, would not be caught under the old section 33 unless it was one which in the opinion of the Comptroller of Income Tax ("Comptroller") was artificial or fictitious or not in fact given effect to. All other tax avoidance schemes were acceptable provided they were not affected by specific anti-avoidance provisions.[5] However, after this amendment, regarded as controversial and engendering much discussion, the line between what is acceptable or unacceptable tax avoidance is even less clearly defined.

Anti-avoidance provisions are a recent development in most countries reducing the freedom individual taxpayers had in arranging their affairs so as to minimise their tax liability. This freedom was enunciated by the House of Lords in *I.R.C.* v. *Westminster*.[6] The various provisions

1 Act No. 1 of 1988.
2 Cap. 134, 1985 (Rev. Ed.).
3 This was the effect of many decisions, among which one of the most notable was the decision of the House of Lords in *I.R.C.* v. *Duke of Westminster* [1936] A.C. 1.
4 See B.J. Soin, *Singapore Master Tax Guide* (7th ed., 1986).
5 See sections 20 (1), 23 (2), 33A, 37 (5)-(7), and 37A of the Income Tax Act.
6 See above, n. 3.

usually fall into the four categories classified by the Carter Commission in Canada:[7]

(i) the "sniper" approach,
(ii) the "shotgun" approach,
(iii) the "transaction not at arm's length" approach, and
(iv) the "administrative control" approach.

In the "sniper" approach as opposed to the "shotgun" approach, the anti-avoidance provisions are specific and precise as to what situations are being dealt with. The "shotgun" approach is broader and relies on wide and general definitions of tax avoidance schemes. The "transaction not at arm's length" approach imposes tax on the transaction by treating it as having taken place at arm's length , which means that in some instances the market price would replace the price agreed by the parties. Under the "administrative control" approach the official or authority in charge of tax or another body is vested with wide powers to deal with tax avoidance transactions. These provisions achieve what the English courts have recently sought to do, namely to exorcise "the ghost of the Duke of Westminster"[8] from revenue law; in other instances the provisions restrict certain visitations of the ghost by specifying which tax avoidance schemes are prohibited. The old and new section 33 are manifestations of a combination of two approaches: the "shotgun" approach and the "administrative control" approach. In both sections the type of transactions dealt with are not specifically defined and the Comptroller is vested with discretion in deciding whether transactions come within their scope. The overall approach of the legislators has been to place emphasis on the purposes and effects of the arrangements, and to define widely the arrangements that may be caught.

II. The New General Anti-avoidance Provision

A. *The position under the old section 33*

In order to better appreciate the situation it is proposed to take a brief look at the old section 33 and the manner in which it operated. This will reveal why some felt more at ease with the *status quo* before the amendment. It will also form the background for comparison and contrast. The old section 33[9] empowered the Comptroller to disregard certain transactions or dispositions which have the effect of reducing the amount of tax payable. These are "artificial or fictitious" transactions and dispositions which have not in fact been given effect to. The words "artificial" and

7 Carter Report (Canada) Vol.3 Appendix A, p. 552 cited by Dr. Barry Spitz, *International Tax Planning* (1983), p. 34, n. 10.

8 Lord Roskill in *Furniss* v. *Dawson* [1984] A.C. 474, at p. 515.

9 See Appendix 1 which embodies both the old and new sections for purposes of easy comparison; for a commentary on the old section 33, see Soin, above, n. 4, at pp. 654-6.

"fictitious" have been held to refer to different transactions.[10] "Artificial" referred to transactions which were out of the ordinary or abnormal in the business sense, such as the sale of an asset at a price less than the market price. The word "fictitious" referred to sham transactions.

Where the Comptroller was of the opinion that the transactions were either artificial or fictitious, he could disregard any such transaction or disposition. The old section 33 was silent as to the consequences once the transactions had been disregarded. In the only decision in Singapore involving the old section, *C.E.C.* v. *Comptroller of Income Tax*,[11] Winslow J. held that the old section 33 was an 'annihilating section' like section 260 of the Australia Income Tax Assessment Act 1936 and section 108 of the Land and Income Tax Act 1954 of New Zealand (which was the predecessor section to the current anti-avoidance provision, section 99 of the Income Tax Act 1976). He referred to the Privy Council decisions which had interpreted the Australian and New Zealand sections.[12] Under the old section 33, the Comptroller was to disregard or annihilate or destroy the transactions. The taxpayer would then be assessed for tax on the transactions that remained. The Comptroller was not permitted to vary the transactions so as to impose tax on the taxpayer. This annihilating effect is to be contrasted with the effect under a provision permitting the Comptroller to reconstruct the transactions. If one considers the example of a taxpayer who leases property to another person at less than the market rate in an attempt to avoid tax, the Comptroller who has powers of reconstruction may assign to the lease a rental at the market rate and impose tax on the taxpayer for it. In contrast, under the old section 33 the Comptroller may only annihilate the transaction, he can only disregard the lease and the rental income, and impose tax on the remaining income.

B. *Background to the new section 33*

Section 33 is as follows:

> (1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly —
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> (a) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;

10 See the Malaysian decision of *Comptroller of Income Tax* v. *A. B. Estates Ltd.* [1967] 1 M.L.J. 89 and Soin, above, n. 4 for a list of the other decisions. The Malaysian decisions are relevant as the old section 33 is in *pari materia* with section 29 of the then Income Tax Ordinance 1947. The Income Tax Ordinance 1947 was repealed by the Income Tax Act (Act No. 53 of 1967). The only local decision on the old section 33 was *C.E.C.* v. *Comptroller of Income Tax* [1971] 2 M.L.J. 43, a decision on appeal from the Income Tax Board of Review to the High Court, but Winslow J. who decided the case did not wish to be drawn into a discussion of the definition of "artificial or fictitious" (p. 55 of the judgment). By adopting the Board's decision that the transaction was not artificial but fictitious Winslow J. can be said to have tacitly approved the distinction drawn by the Board: see K.C. Loke, "Singapore Income Tax Act: The Enigma of Section 33" (1972) 14 Mal. L.R. 209, at p. 211.

11 See above, n. 10.

12 See *Newton* v. *Commissioner of Taxation* (1956-1958) 7 A.I.T.R. 298 and *Mangin* v. *I.R.C.* [1971] A.C. 739.

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

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

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

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

(3) This section shall not apply to —

(a) any arrangement made or entered into before the commencement of the Income Tax (Amendment) Act 1988; or

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

The reason given by the Minister for Finance ("the Minister") for the new section was the need to strengthen the powers of the Comptroller to deal with tax avoidance schemes which were depicted as "getting complex and are becoming 'tailor-made' to suit specific clients".[13] It was felt that under the old section 33 the Comptroller was powerless against these schemes; the Minister said the Comptroller "was without teeth".[14]

There were representations from the public expressing apprehension concerning the introduction of the new provision. Apprehension was also expressed in Parliament at the second reading of the Amendment Bill.[15] One of the doubts raised in opposition to the introduction of the new section was the seriousness of the mischief which the amendment was to address. It was pointed out that in the last two decades of the Act's operation there were hardly any cases of tax avoidance brought to court.[16] Apprehension concerning the necessity for the introduction of the new section 33 centred on the uncertainty and width of the powers granted to the Comptroller. However, the legislators prevailed.

Apparently to allay fears, it was revealed that the draftsmen had studied the anti-avoidance provisions of a number of countries to ensure that adequate safeguards were provided in the new section. The Inland Revenue Department echoed the Minister's words in Parliament[17] saying

[13] See Singapore Parliamentary Debates, (1988) vol. 50. col. 358.
[14] See Singapore Parliamentary Debates, above, n. 13, col. 365.
[15] See Singapore Parliamentary Debates, above, n. 13, col. 361 — 363.
[16] See Singapore Parliamentary Debates, above, n. 13, col. 361 where the honourable Mr. Chng Hee Kok, Member of Parliament (Radin Mas) pointed to the dearth of cases on the old section 33.
[17] See Singapore Parliamentary Debates, above, n. 13, col. 366.

that the "safeguards provided under the amendment are to be found in the judicial interpretations of legislation having similar wordings such as New Zealand and Australia. For this, there is considerable body of case law on which we can rely for the purpose of construing the proposed Section 33."[18] The Inland Revenue Department also mentioned that they had avoided having wide provisions as in Malaysia and Hong Kong. In the extract of the reply from the Inland Revenue Department to enquiries from the then Singapore Society of Accountants[19] on the new section at a meeting with representatives of the Inland Revenue Department reproduced in a circular of the Society, the Department said:

> "Unlike the provisions adopted by some countries, we have deliberately avoided sweeping and 'catch all' clauses. For instance,
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> (a) in Malaysia, the provisions allow the Director-General, if he has reason to believe that any transaction will result generally in altering the incidence of tax, reducing the tax or avoiding tax, to disregard such transactions and make necessary adjustments;
>
> (b) in Hong Kong, transactions which have the effect of conferring tax benefits, having regard to certain criteria (such as the manner in which the transaction was carried out and the change in the financial position of the relevant person from the transaction), would be deemed to have been designed solely for the purpose of tax avoidance."[20]

The case-law from these two countries would not be relevant in the light of that comment. Further, Malaysian case-law may not be relevant because the Malaysian judges have a different approach to cases involving the anti-avoidance provision.[21] The Malaysian judges have interpreted the Malaysian anti-avoidance provision in the light of the Malaysian constitution and without reference to the developments in other taxing jurisdictions which may have identical provisions, and without reference even to Privy Council decisions which might be considered relevant in Singapore. The anti-avoidance provisions of the various jurisdictions which the draftsmen have considered are set out in an appendix to this article.[22]

18 From the extract of the reply from Inland Revenue Department on section 33 in the Singapore Society of Accountants Circular No. A 10/99, dated 2 March 1988 (S.S.A. Circular), entitled "Matters Arising From Income Tax (Amendment) Bill".

19 The Singapore Society of Accountants has been reconstituted as the Institute of Chartered Public Accountants of Singapore under the recent amendment to the Accountants Act Cap. 2A, 1988 (Rev. Ed.).

20 See above, n. 18.

21 See *SBP Sdn. Bhd. v. D.G.I.R.* (1986) M.T.C. 177 and K.K. Wong, "Aspects of Tax Avoidance Legislation in Malaysia", paper delivered at the A.P.T.I.R.C. 3rd Annual Tax Programme July 1988. However, see also Tec Keang Sood, "Tax Avoidance: The Scope and Effect of Section 140 of the Income Tax Act 1967" (1982) 9 J.M.C.L. 75 continued in (1983) 10 J.M.C.L. 153, who refers to the Australian and New Zealand decisions in his discussion of the Malaysian section.

22 See Appendix 2. These jurisdictions are Australia, New Zealand, Hong Kong and Malaysia.

C. *Comparisons with other similar provisions*

The section has been drafted very widely and loosely.[23] The Comptroller has been given wide powers to deal with arrangements which have the purposes or effects listed in section 33. If he is satisfied that an arrangement has one of the stated purposes he may disregard it. His power also extends to making adjustments to the arrangements. He may exercise his powers to counteract any tax advantage that may have been obtained or be obtainable under the arrangements. In short, the Comptroller has powers of reconstruction. The arrangements have been identified in section 33 (1) (a) to (c) by way of their purposes or effects, to which reference will be made later. The Comptroller is vested with the discretion to decide whether any arrangement has as its purpose one of the "prohibited" purposes.

The interpretation of this section is of crucial importance as the future of tax planning hinges on knowing when the scheme or transactions adopted will be caught by the section, provided, of course, that the Comptroller is aware of the facts and chooses to take action.

The Inland Revenue Department has clearly indicated that decisions from Australia and New Zealand are of relevance.[24] Had it not done so, a perusal of the general anti-avoidance provisions in Appendix 1 would have revealed that the new section 33 is based on the Australian section 260 and the New Zealand section 99.

Section 260 of the Income Tax Assessment Act (Australia)

This section is brief compared with sections 33 and 99. One similarity between this section and section 33 is the identification of the arrangements which are subject to the sections. Section 260 also identifies the arrangements by virtue of their purpose or effect. Four purposes or effects are listed in section 260 (1) (a) to (d) out of which the purposes listed in section 260 (1) (a) to (c) correspond with those listed in section 33 (1) (a) to (c). Section 260 (1) (d), which deals with the prevention of the operation of the Australian Income Tax Assessment Act in any respect, has no equivalent in section 33. The presence of this additional purpose in section 260 appears to accord it a wider scope than section 33. Section 260, like sections 33 and 99, provides that the purpose or effect may be attained directly or indirectly.

Unlike section 33, which uses the word "arrangement", section 260 refers to "contract, agreement, or arrangement". Both sections 33 and 99 define "arrangement" to include all steps by which an arrangement is carried out, whilst section 260 does not. However, the meaning of the word "arrangement" in section 260 has been defined widely by case-law to include a plan and also all the transactions by which the plan is carried into effect, whether they are conveyances, transfers or anything else, so

23 See Singapore Parliamentary Debates, above, n. 13, col. 362, (Dr. Toh Chin Chye (Rochore)).
24 S.S.A. Circular, above, n. 18.

there is no significant difference.[25] However, the definitions of "arrangement" in sections 33 and 99 appear to be wider than the Australian position.[26] Section 260 does not have a provision corresponding to section 33 (3) (b) excluding bona fide commercial transactions. However, a similar limitation has been developed in the case-law. If an arrangement can be explained on the grounds of ordinary business or family dealings, section 260 will not apply.[27]

Section 260 operates whenever a particular transaction comes within the scope of the section. It does not depend on the formation of an opinion by the Commissioner unlike section 33 which depends on the satisfaction of the Comptroller.[28] It depends on the facts of the transaction — whether it is one to which section 260 applies. Another difference between section 260 and section 33 (and section 99 as well) is the annihilating effect of the section. Sections 33 and 99 permit the tax authorities to vary the arrangement and make adjustments so as to counteract any tax advantage obtained.

Section 99 of the Income Tax Act (New Zealand)

The Australian section 260 shared its historical development[29] with section 108 of the Land and Income Tax of 1954, the predecessor to section 99 of the Income Tax Act 1976 of New Zealand.[30] Sections 260 and 108[31] were identical having the same parent in section 82 of the Land and Income Tax Assessment Act 1900 of New Zealand. Section 99 replaced section 108 in 1974 and until the very recent Privy Council decision in *Commissioner of Inland Revenue* v. *Challenge Corporation Ltd.*[32] there were no decisions interpreting the section.

A closer examination of the three sections, sections 33, 260 and 99, will reveal that section 33 has the greatest degree of similarity with section 99. It can be observed that section 33 is modelled on section 99 but drafted with greater economy of language. Of the three sections, section 260 is the most economic in language. The concept of "arrangement" and the criteria of "purpose"[34] bear similarities though they are by no means identical. The definition of "tax avoidance" in section 99 (1) corresponds to section 33 (1) (a) to (c), though in section 99 the matters discussed in the three sub-subsections of the new section 33 are grouped under a heading of "tax avoidance".

[25] *Newton* v. *Commissioner of Taxation,* above, n. 12, p. 304, *per* Lord Denning M.R..
[26] See discussion below under the heading "Any arrangement".
[27] See *Newton* v. *Commissioner of Taxation,* above, n. 12, at pp. 304-305.
[28] See *e.g. Peate* v. *Commissioner of Taxation* [1967] A.C. 308 where it was held that section 260 applied though the Commissioner was of the opposite opinion.
[29] See *Mangin* v. *I.R.C.,* above, n. 12, at pp. 753-4.
[30] See *Mangin* v. *I.R.C.,* above, n. 12, at p. 753.
[31] Section 108 was amended and replaced by a more extensive general anti-avoidance measure in the Land and Income Tax Amendment Act (No. 2) 1974 but the same section number was retained. Section 108, as amended in 1974, was reproduced as section 99 in the Income Tax Act of 1976, which was a consolidating statute.
[32] [1987] 1 A.C. 155.
[33] Section 33 (2) and section 99 (1) of the New Zealand Act.
[34] Section 33 (2) (b) corresponding with section 99 (2) (b).

There are differences between the two sections. Section 33 (1) (b), for instance, refers to "or to make a return under this Act" which is absent from section 99 (1).[35] Section 33 does not include the postponement of liability to income tax, which is found in section 99 (1) (c), as one of the purposes or effects. Another difference in wording lies in the reference in the new section 33 to the satisfaction of the Comptroller, whereas section 99 refers to agreements purporting to alter the incidence of tax. It would thus appear that the basis for the operation of section 99 is similar to section 260. It does not depend on the exercise of discretion by the Commissioner of Inland Revenue as is the case under section 33. However, it has been pointed out, despite the claim by the Commissioner to the contrary, that the Comptroller would be exercising a choice or a discretion when answering the question whether the taxpayer's action amounts to tax avoidance within section 99.[36] In fact, if the Comptroller does not take action, it is difficult to see how section 99 can be used against the taxpayer. If this argument is correct there is little difference between section 33 and section 99 in this respect.

III. SCOPE OF SECTION 33

A. *"Where the Comptroller is satisfied"*

As pointed out earlier, section 33, unlike sections 260 and 99, gives the Comptroller the discretion whether or not to invoke the section. In the realm of administrative law words of a similar nature placing decisions in the discretion of an official of the government or some other authority have been held to be subject to review by the courts.[37] It is submitted that though the section may state that the Comptroller may be subjectively satisfied, his decision is open to review. In Australia it has been held by the courts that the decisions of the Commissioner under such provisions are subject to review in some situations.

The effect of these decisions is that the decision of the Comptroller may be reviewed if he does not address himself to the question which the subsection formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some fact which should affect his determination.[38] The burden of proof is on the taxpayer and this would be a difficult task for he needs to know the reasons for the Comptroller's decision. Where the Comptroller states his reasons, the task for the taxpayer is made easier. Where no reasons are given, the decision need not go against the taxpayer for it may be possible to show that the decision of the Comptroller could only be justified on the ground that the Comptroller was misconceived.[39]

[35] The additional words in section 33 (1) (b) do not appear to contribute to the extension of the previous phrase - "to relieve any person from any liability to pay tax" — except as a specific instance of how such relief from tax liability may be attained.

[36] See "Tax Avoidance and the Inland Revenue Department" (1987) 31 *New Zealand Current Taxation* 329.

[37] See J.M. Evans, *De Smith's Judicial Review of Administrative Action* (4th ed., 1980), Chapter 6.

[38] *Avon Downs Pty. Ltd.* v. *F.C.T.* (1949) 74 C.L.R. 353, *per* Dixon J., at p. 360.

[39] See *Avon Downs Pty. Ltd.* v. *F.C.T.,* above.

One suggested means of obtaining information of the reasons which the taxpayer should be entitled to is to call the Comptroller as a witness.[40]

B. *"Any Arrangement"*

The section is wide in its scope since it covers any arrangement and the word "arrangement" has been given an extensive definition. It includes a "scheme". This word "scheme" would appear to correspond with the word "plan" in the definition of "arrangement" in section 99 of the New Zealand Income Tax Act. This implies that the arrangements caught by the section need not be contractual in nature. They could be informal arrangements between parties which are pre-ordained[41] but which fall short of being binding agreements. The wording of the section also indicates that it does not simply contemplate situations where individuals engineer the arrangements so as to derive the benefits for themselves, but also includes situations where the benefit accrues to a third party. This is because the section covers the effects of the arrangement on the tax liability of "any person".[42] Thus the section would encompass arrangements where the beneficiary agreed to participate in a tax avoidance scheme and unilateral arrangements where the intended beneficiary of a scheme is a unaware of the scheme's existence.

In contrast, under section 260, an arrangement must involve two or more parties. The Privy Council in *Newton* v. *Commissioner of Taxation* held that an arrangement is "something in the nature of an understanding between two or more persons".[43] The definition of arrangement in section 99 is of wider scope as it includes a "plan" which does not conceivably require the participation of another party. There is scope under section 99 for the Commissioner to use the section against steps taken by a taxpayer alone to affect his or someone else's tax liability. It is submitted that a "scheme" included in the definition of an arrangement in section 33 corresponds with "plan" in section 99 and the Comptroller would be able to act against arrangements where only one taxpayer is involved.

C. *"All steps by which it is carried into effect"*

By including all the steps by which an arrangement is carried into effect, the legislators have avoided the problems faced by the English courts confronted with complex tax avoidance schemes involving more than one transaction or step. The English courts felt hampered by the decision of *I.R.C. v. Westminster*[44] which held that the court would respect the form of a taxpayer's transactions provided they were genuine — where the document or transaction is genuine, the Court cannot go, as it were, "behind the veil" to see its underlying substance. The House of Lords in a series of decisions has distinguished the principle in *Westminster* and

[40] See *F.C.T* v. *Brian Hatch Timber Co. (Sales) Pty. Ltd.* (1971) 2 A.T.R. 295.
[41] Borrowing the phrase used by Lord Brightman in *Furniss* v. *Dawson,* above, n. 8, p. 527.
[42] Section 33(l)(a) to (c); see discussion below.
[43] Above, n. 12, *per* Lord Denning, at p. 304.
[44] See above, n. 3.

enunciated a doctrine known as the fiscal nullity doctrine. The principles in this doctrine are tentative as the law in this area is still undergoing development. In essence, the House of Lords distinguished the *Westminster* decision on the basis that it dealt with a single transaction where there was only one step and not a case of a series of transactions or a single transaction with multiple component steps.[45] Under the doctrine, where a composite transaction or a series of transactions is pre-ordained the court could disregard the steps or transactions entered into by the taxpayer which have no commercial purpose apart from the avoidance of a liability to tax.[46] Such arrangements would appear to come within the definition of arrangement in section 33.

D. *"Purpose or Effect"*

The purpose or effect of an arrangement is an important factor in the operation of section 33 because the inclusion or exclusion of any arrangement from the section depends on its purpose or effect. Section 33 (1) (a) to (c) details three purposes or effects which bring arrangements within the scope of the section. In section 33 (3) two categories of arrangements are excluded. The first category is arrangements entered into before the commencement of the Income Tax (Amendment) Act 1988. The second category consists of arrangements carried out for bona fide commercial reasons and which did not have as one of their main purposes or effects the avoidance or reduction of tax. This further augments the importance of the purpose or effect of an arrangement since it necessitates a differentiation between main and incidental purposes.

Determination of the Purpose of an Arrangement: Interestingly, though the operation of the section is dependent -on the determination of the purpose or effect of an arrangement, the section is silent on various matters such as the difference between purpose and effect, the relevance of motive, and the manner in which the purpose of an arrangement is to be determined. The section only provides that the purpose or effect of the arrangement may be direct or indirect.[47]

(1) Purpose or effect: One question that has to be dealt with is whether "purpose" is different from "effect". Section 33 (1) refers to "purpose or effect" whereas section 33 (3) (b) refers only to "purpose". It would appear that the terms "purpose" and "effect" are synonymous. The plain reading of the section would seem to point in that direction since the purpose of an arrangement can best be seen from its effects or end-results. This would be consistent with the Australian and New Zealand decisions.

The Privy Council decision in *Newton* v. *Commissioner of Taxation*[48] is the leading authority in both Australia and New Zealand. The Privy Council in *Newton* was interpreting section 260 of the Income Tax Assessment Act of Australia. Lord Denning said:

[45] *W.T. Ramsay Ltd.* v. *Inland Revenue Commissioners* [1982] A.C. 300.
[46] *Furniss* v. *Dawson,* above, n. 8.
[47] Section 33(1) refers to arrangements where the effect is direct or indirect.
[48] Above, n. 12.

"The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every 'contract, agreement or arrangement'... which has the purpose or effect of avoiding tax. In order to bring an arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented — that it was implemented in that particular way so as to avoid tax. If you cannot so predicate but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing without necessarily being labelled as a means to avoid tax then the arrangement does not come within the section."[49]

It follows from this that the section looks to the end-result of an arrangement. The motives of the taxpayer are not relevant. However, explanations supplied by the taxpayer showing that the arrangement may have been entered into for purposes other than tax avoidance may be relevant. An example would be the case of a taxpayer providing evidence and reasons to support his claim that an arrangement was in essence an ordinary business dealing.[50]

(2) The Predication Principle: Lord Denning's *dictum* above gave rise to the test of the determination of the purpose or effect of an arrangement — whether it is possible to predicate that it was implemented so as to avoid tax. Hence it became known as the predication principle.[51] The Privy Council in another decision on appeal from New Zealand, *Mangin* v. *C.I.R.,* elaborated and interpreted Lord Denning's *dictum* thus:

"In their Lordships' view this passage, properly interpreted, does not mean that every transaction having as one of its ingredients some tax saving feature thereby becomes caught by a section such as section 108. If a bona fide business transaction can be carried through in two ways, one involving less liability to tax than the other, their Lordships do not think section 108 can properly be invoked to declare the transaction wholly or partly void merely because the way involving less tax is chosen. . . . The clue to Lord Denning's meaning lies in the words 'without necessarily being labeled as a means to avoid tax'. . . . Their Lordships think that what this phrase refers to is, to adopt the language of Turner J in the present case, 'a scheme . . . devised for the sole purpose, or at least the *principal purpose,* of bringing it about that this taxpayer should escape liability on tax for a substantial part of the income which, without it, he would have derived.'"[52] (Italics added)

49 Above, n. 12, at pp. 304-305.

50 See *Loader* v. *Inland Revenue Commissioner (N.Z.)* (1974) 4 A.T.R. 341.

51 Public Information Bulletin 163, May 1987 in (1987) 31 *New Zealand Current Taxation* 254, at p. 257.

52 Above, n. 12, at p. 751.

It is after *Mangin* that the test is also known in New Zealand by its other name, the principal purpose principle. The court objectively looks at the overt acts by which the arrangement is to be carried out.

(3) The New Test of Tax Mitigation: The predication principle as laid down in *Newton* and *Mangin* may have been modified or replaced by another test suggested in a recent Privy Council decision in *C.I.R.* v. *Challenge Corporation Ltd.*[54] This Privy Council decision was fairly well-known before news of the Income Tax (Amendment) Act though many were not overly concerned since there was no indication that the old section 33 was about to be amended, and it was then not similar to section 99. Interest in it renewed when the Income Tax (Amendment) Act was in the offing.

The Challenge Corporation, the parent company of the Challenge group of companies, used section 191 of the Income Tax Act of New Zealand to reduce the tax liability of its group. It acquired a loss company from the Merbank group of companies. The company had a tax deductible loss in the year of assessment. Upon acquisition of the company Challenge gave notice of election under section 191 transferring its loss to the two other companies in the group. Section 191 permits a group of companies to elect by notice for any loss to be deducted from the assessable income of another company or of all the other companies in the group. Challenge paid a fee to the Merbank group which comprised a sum of $10,000 and half of the tax advantage to be gained by Challenge. If all had gone as planned, Challenge would have saved paying the Commissioner a sum of $2.85 million, half of which it would have shared with the Merbank group. However, the Commissioner "threw a spanner in the works" invoking section 99 to reject the joint assessment of the group.

The Privy Council decided the matter against Challenge, who had previously succeeded in both the High Court[56] and the Court of Appeal[57] of New Zealand, holding that a "clearer case for the application of section 99 cannot be imagined".[58] The main question before the Privy Council was the applicability of section 99 to the arrangement. Challenge argued that it should not be applied because the arrangement involving the transfer of tax loss was a transaction expressly permitted in section 191. It was argued that section 99 should not apply to transactions approved by another section of the Act, particularly since there was already a specific anti-avoidance provision in section 191 itself. The majority[59] of the Board (Lord Oliver dissenting) held that on the interpretation of the two sections and in the light of their legislative history, section 99 applied to section 191.[60] They need not have ventured further. However, Lord Templeman who delivered the Board's decision went on to elaborate on what would not be included in section 99. Lord Templeman held that section 99 applied

53 *Hollycock* v *F.C.T.* (1971) 2 A.T.R. 601.
54 See above, n. 32.
55 Section 191 (5).
56 (1984) 6 N.Z.T.C. 61,807.
57 (1986) 8 N.Z.T.C. 5,001.
58 Above, n. 32, at p. 164.
59 The majority of the Privy Council comprised Lord Keith of Kinkel, Lord Brightman, Lord Templeman and Lord Goff of Chieveley. Lord Oliver of Aylmerton dissented.
60 For an account of the legislative history in question see Lord Oliver's judgment, above, n. 32, at pp. 172-3.

to all instances of tax avoidance but not tax mitigation. He defined this concept of tax mitigation thus:

> "Income tax is mitigated by a taxpayer who reduced his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an "arrangement" but from the reduction of income which he accepts or the expenditure which he incurs."[61]

In so doing, a new test for determining the purpose or effect of an arrangement may have been promulgated in this concept of tax mitigation. There is tax mitigation when the arrangement involves the acquisition of a tax advantage by (i) reducing one's income or (ii) incurring expenditure in circumstances in which the statute permits relief or a reduction in tax liability.[62] Lord Templeman specifically excluded from the expenditure which qualifies as tax mitigation the costs of devising and implementing the arrangement which leads to the tax advantage. He highlighted this as a distinguishing mark of tax avoidance from tax mitigation — in "tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement)".[63] Hence, all efforts by the taxpayer to lessen tax liability are classified as either tax avoidance or tax mitigation.

If Lord Templeman's *dictum* is applied, whether an arrangement is caught by section 99 will be answered by engaging in an economic analysis of the transactions. The difference between the predication principle and the one suggested by *Challenge* is a change in focus. Previously, the quest was to see if the arrangement could have been explained by other purposes, of which ordinary business and family dealings were prominent. The *Challenge* test focuses on the economics of the arrangement: where the taxpayer in his arrangement has suffered any expenditure or loss in the sense referred to by Lord Templeman, the arrangement is not caught by section 99.

Lord Templeman drew authority for this distinction from *I.R.C.* v. *Duke of Westminster*,[64] which many[65] have all along considered to have enunciated the principle that a person has the freedom to organise his affairs to his best advantage where tax liability is concerned. By introducing the new concept of tax mitigation, Lord Templeman added a gloss on Lord Tomlin's oft-quoted words:

> "Every man is entitled if he can to order his affairs so as that tax attaching under the appropriate Acts is less than it otherwise would

[61] Above, n. 32, p. 167.
[62] Above, n. 32, p. 168.
[63] Above, n. 32, p. 169.
[64] See above, n. 3.
[65] Some English commentators have modified their views in the light of the developments in the fiscal nullity cases. See, *e.g. Butterworths UK Tax Guide 1988-1989* (1988, J. Tiley ed.) para. 1.04; Peat, Marwick & Mitchell, *Practical Tax Planning* (1983, M. Squires ed.), pp. 10-11; *1989 New Zealand Master Tax Guide,* above, n. 31, para. 2103; *1988 Australian Master Tax Guide* (CCH Tax Editors 1988), para. 31-040; and Sidney Rolt, *Tax Planning Strategies for Companies in South-East Asia* (1984), p.4.

be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he can not be compelled to pay the increased tax."[66]

This distinction was not present in *Duke of Westminster* nor in any decisions prior to *Challenge.* It is superimposed by Lord Templeman on the wording of section 99 which in itself does not reveal such a distinction. It might even be argued that since section 99 has a definition of tax avoidance such a distinction as that proposed by Lord Templeman is not in order. On the assumption that tax mitigation is applicable, there are two questions which are presently unanswered: whether the *Challenge* test has displaced the previous test; if not, how do the two tests co-exist — does one prevail over the other?

The New Zealand tax authorities have taken two different views on this development, which to a certain extent answer the two questions just highlighted. The first is that the tax mitigation test is "subsidiary to the predication principle" in *Newton.* The second is that the observations made by the Privy Council on tax mitigation in *Challenge* should be rejected as *obiter dicta* and that the *ratio decidendi* of the majority of their Lordships was to be found only in the earlier part of the judgment. The first view deals with the priority between the predication principle and the *Challenge* test. The second view denies the validity of the *Challenge* test.

The first view was contained in a public information bulletin issued by the Commissioner of Inland Revenue of New Zealand on the *Challenge* decision.[67] Under the heading "Implications of the decision", the Commissioner wrote:

"The test for determining 'purpose' remains the objective 'predication' test taken from the Privy Council's decision in *Newton* v. *F.C.T.* [1958] 98 CLR 1.

The new concept of 'tax mitigation' is subsidiary to the predication principle."

The second view of the Commissioner was voiced when he argued in *Cockburn* v. *C.I.R.,*[68] a recent decision of the High Court of Wellington, that the relevant part of the majority judgment in *Challenge* was the earlier portion of the judgment before the discussion of the concept of tax mitigation. Not only did the Commissioner have reservations concerning *Challenge,* so did the judge concerned, Quilliam J.

Cockburn involved an appeal by the Commissioner against the decision of a Taxation Review Authority concerning the claim by a taxpayer for a rebate for the interest component of certain mortgage instalment payments. In the appeal the Commissioner raised three arguments, the last of which was that the payment of the interest in question was void as

66 *I.R.C* v. *Duke of Westminster,* above, n.3, p.19.
67 Public Information Bulletin 163, above, n.51, p.257.
68 (1987) 9 N.Z.T.C. 6,163, at p. 6,166.

against the Commissioner for income tax purposes pursuant to section 99. Quilliam J. had decided the matter against the Commissioner on his first two arguments and felt that, though in the normal circumstances he would "say something" about the section 99 argument, he would not since this would necessitate a discussion of *Challenge.* The reason he had for not embarking on a discussion of *Challenge* was as follows:

> "The judgment of the majority in that case presents some real difficulties because their Lordships have embarked upon a discussion of the concept of 'tax mitigation' as a matter possibly distinct from 'tax avoidance'. This is something which was not raised or argued by counsel before their Lordships and the observations made in the judgment appear to conflict with the long-standing approach under sec. 108 of the former Act that the purpose or effect of a transaction is to be ascertained in accordance with *Newton* v. *FC of T* [1958] AC 450 and subsequent cases."[69]

The Commissioner apparently tried to persuade the learned judge to rule on section 99 by contending that the *ratio decidendi* of Challenge did not lie in the part of the judgment concerning "tax mitigation". Quilliam J. was not so persuaded but decided that it should be left for consideration in a subsequent case since it was not a matter of necessity requiring his decision.

The first view that the tax mitigation test is subsidiary to the predication principle, appears to be correct since section 99 (2) (a) is aimed at arrangements which have as their *purpose* tax avoidance. Furthermore, it is possible to consider the Privy Council as merely supplying an answer to the question of what does not amount to tax avoidance — namely, that tax mitigation does not amount to tax avoidance. Thus, the chief means of identifying tax avoidance is to identify its purpose. However, the Commissioner may have another reason for holding a different view from the Privy Council since adopting the doctrine of tax mitigation would give taxpayers some leeway to escape the clutches of section 99. The ideal position for the Commissioner is to have a wide, general anti-avoidance provision operating without any restrictions.[70] This may, perhaps, be the reason for the second of the Commissioner's views that the comments on tax mitigation in *Challenge* were *obiter.* It is from this perspective that one can understand and reconcile both views which are inconsistent. From the two views it is obvious that the Commissioner is not in favour of the concept of tax mitigation.

If both the Commissioner's views are rejected, the *Challenge* test will be the primary test for determination of purpose. An arrangement will be caught by section 99 if it is not an instance of tax mitigation. If it does not qualify as tax mitigation it is tax avoidance. The predication principle would still be material to arrangements not considered to be cases of tax mitigation. The principle would be relevant in determining whether the intention to avoid tax was an incidental purpose or a primary one in cases

[69] Above n. 68.
[70] The New Zealand Commissioner has denied that section 99 vests discretion in him but this denial has been doubted: (1987) 31 *New Zealand Current Taxation* 129.

relying on the exception in section 99 (2) (b). Therefore, the first question would be whether the arrangement is tax mitigation or not. If the answer is in the negative, it is tax avoidance. Even so, section 99 will not apply if tax avoidance is an incidental purpose.

Whether the predication principle, as modified by what seems to be the new test in *Challenge,* is applied in Singapore under section 33, and whether the new test supersedes the predication principle remains to be seen. A plain reading of the words of section 33 does support the application of the predication principle.

E. *Section 33 (1) (a) to (c)*

The three limbs of subsection (1) are fairly clear and they correspond to section 99 (1) (a) to (c). They identify the arrangements which are subject to section 33. If "the purpose or effect of any arrangement is directly or indirectly—

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

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

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

the arrangement will be subject to the section if the Comptroller chooses to act.

The words "any person" are common to all three limbs and imply that the beneficiary of the arrangement could be the taxpayer who perpetrated the arrangement or a third person. There are words indicating future liability to tax in the first and third limbs. The words are "or which would otherwise have been payable" in section 33 (1) (a) and "or which would otherwise have been imposed" in section 33 (1) (c). These words pre-empt any argument that an arrangement is only caught under the section where the arrangement avoids or displaces an existing tax liability. The purport of such an argument is that the tax liability has to be existing. The effect would have been that an arrangement would seldom be caught by the section since in most instances the arrangement seeks to avoid future tax liability. This argument has been used in Australia and New Zealand against the operation of sections 260 and 108 (the predecessor to section 99) as all three sections (260, 108 and 99) do not include words referring to future liability. The Privy Council in *Newton and Mangin* rejected the argument. In *Newton,* Lord Denning held that the meaning of the words "avoid a liability imposed" in section 260 referred to steps being taken to "get out of the reach of a liability which is about to fall" on the taxpayer.[71] The Privy Council in Mangin stated that section 108 is not limited to

[71] See above, n. 12, pp. 303-4.

accrued liabilities to tax.[72] There are no words referring to future liability in the second limb for the obvious reason that relief of tax liability can only refer to prospective liability to tax.

The first limb refers to an arrangement having the purpose of altering the incidence of any tax. This limb would include a situation where the tax, which would otherwise be borne by the taxpayer, is borne by another person as a result of the arrangement.[73] Such an arrangement is an income splitting arrangement, and is quite commonly used in tax planning.

The second limb deals with arrangements relieving any person from any liability to pay tax or to make a return under the Act. The section has included relieving any person from any liability to make a return, which is not present in the New Zealand section. The Malaysian anti-avoidance provision, section 140, does include this in sub-section (1) (b). In this respect, section 33 is wider than section 99.

The third limb, which deals with arrangements with the purpose or effect of reducing or avoiding any tax liability, does not include the element in section 99 (1) (d) of "postponing any liability to income tax". The rationale for this is not clear. Perhaps the draftsmen are not concerned about the postponement of tax liability since postponement of tax liability through certain devices is permitted under the Income Tax Act.

The Comptroller's task under the new section is made easier with these three limbs. He no longer needs to prove that the arrangement was "fictitious" or "artificial". The requirements under the three limbs are definite and ascertainable subject to the application of the predication principle and the *Challenge* test. If neither the predication principle nor the *Challenge* test are applicable, it would seem that the Comptroller need only establish from the overt acts that the end-result of an arrangement was any one of the three purposes.

F. *Assessment of Tax when Section 33 Applies*

The old section 33 was an annihilating provision. Under the old section the Comptroller could only assess the taxpayer for tax if there were other facts exposed, when the transactions were disregarded, upon which the other charging sections could be employed. This was one of the deficiencies discovered in Australia and New Zealand with section 260 and section 108.

In *Mangin*[74] Lord Wilberforce enumerated a number of deficiencies in section 108 among which was the problem caused by the annihilating effect of the section — it did not inform the Commissioner of what hypothetical state of affairs could be assumed to exist after the tax avoidance aspect of an arrangement had been destroyed. It is noteworthy that

72 Above, n. 12, p. 749.
73 The Australian decision of *De Romero* v. *Read* (1932) 48 C.L.R. 649 illustrates how this subsection may operate.
74 Above, n. 12.

Lord Wilberforce described the section as "a rusty instrument which breaks in our hands and is no longer capable of repair". Section 108 was replaced in 1974 by section 99 which seeks to overcome the deficiencies in the previous section and amongst other improvements empowers the Commissioner to reconstruct a new set of facts when an arrangement is within the scope of the section. In Australia section 260 still remains on the statute books but may soon be of historical interest only. Its deficiencies have been overcome by new legislation which applies on and after 28 May 1981 to all situations previously within its domain. Section 260 only applies to all arrangements made or entered into before that time. The new legislation is Part IVA of the Income Tax Assessment Act. The new legislation was introduced when it was discovered that section 260 was becoming less effective against sophisticated tax schemes. The key improvement was to give the Commissioner authority to reconstruct the arrangements. It would also appear that the Minister's remark that the Comptroller is powerless to counter any tax avoidance schemes under the old section 33 was preceded by similar remarks in Australia and New Zealand. One might conjecture that his remarks had their source from that quarter especially since the Comptroller has powers to reconstruct under the new section.

The adjustments he is empowered to make include the computation or recomputation of gains or profits, or the imposition of liability to tax. This is an improvement on the old section bestowing on the Comptroller the power to impose tax directly or indirectly through the variation of the arrangement so as to counteract the tax advantage. The power to vary and make adjustments now makes it possible for the Comptroller to "reconstruct" the actual scenario before the arrangement took effect. There is a restriction on what he can do. He is to "counteract any tax advantage obtained". Such adjustments by him need not be made in every instance since the section states that he "may" do so. This differs from the position under section 99 in New Zealand, where there is doubt whether the Commissioner is under an obligation to make the relevant adjustment whenever he applies section 99, because the operative word in section 99(3) is "shall". This difference in wording is of little practical significance for the Comptroller is unlikely to invoke section 33 if he does not wish to make the necessary adjustments.

The expression "tax advantage" in the subsection is not defined as is the case in section 99. However, in section 99 (3) (a) and (b) two matters are listed for the Commissioner's consideration when adjusting the assessable income to the taxpayer to counteract any tax advantage obtained. The Commissioner "may have regard to such income as, in his opinion, either—

(a) that person would have, or might be expected to have, or would in all likelihood have, derived if that arrangement had not been made or entered into; or

(b) that person would have derived if he had been entitled to the benefit of all income, or of such part thereof as the Commissioner considers proper, derived by any other person or persons as a result of that arrangement."

Although these two considerations are absent in section 33, it is submitted that the determination of the tax advantage would involve a comparison of the income of the taxpayer with and without the arrangement. It may also involve a consideration of the benefit which is derived by the beneficiaries of the arrangement if other persons are involved. Where there is no tax advantage gained by the taxpayer as a result of the arrangement, it would seem that the Comptroller will not make the adjustment because the section refers to "any tax advantage". The absence of any tax advantage should be a limit to the assessment of tax on the taxpayer concerned.

IV. LIMITS TO THE OPERATION OF SECTION 33

Foremost on the minds of taxpayers who wish to plan their affairs to minimise their tax liability would be the question of the limits to section 33. The scope of section 33 is very wide. The three purposes in section 33 (1) encompass all conceivable avenues of tax minimisation. Will all attempts to plan one's activities with the minimisation of tax liability in mind, apart from those arrangements excluded by section 33 (3), be caught by section 33? What are bona fide commercial transactions? Is an arrangement exempt from section 33 if it comes within any other section in the Income Tax Act, such as reliefs?

A. *"Any arrangement carried out for bona fide reasons"*

Subsection (3) (b) excludes bona fide commercial arrangements which do not have as their main purpose the avoidance or reduction of tax. Although the subsection only refers to the avoidance or reduction of tax, it is submitted that this exclusion is not confined to arrangements which are covered in subsection (1) (c) but to all the three limbs of section 33. There are two conditions to this exclusion.

The first condition is a modification of the exclusion laid down by Lord Denning in *Newton* and the exclusion in section 99 (2) (b). Both Lord Denning and section 99 (2) (b) used the words "ordinary business or family dealings", extending the category of excluded arrangements to family dealings, whilst the exclusion in section 33 is confined to arrangements for "bona fide commercial reasons". Since family dealings are not mentioned in section 33, the Australian and New Zealand decisions are only helpful in explaining ordinary business dealings. The cases in Australia and New Zealand seem to indicate that "ordinary" dealings, whether of a business or family nature, need not be conducted in the manner which similar transactions or transactions of that type are usually carried out.[75] There is allowance for variations or improvements in the methods of attaining the objectives of the transaction. Whether an arrangement is a bona fide commercial one and excluded from section 33 will be a question of fact. An argument that minimising tax liability and hence tax avoidance is a bona fide commercial reason for an arrangement is unlikely to succeed.

[75] See the judgment of Wilson J. in *Govan* v. *Commissioner of Inland Revenue* [1968] N.Z.L.R. 163, at pp. 165 *et seq.*

The second condition is that the arrangement must not have as its main purpose the reduction or avoidance of tax. It is submitted that this will be determined using the predication principle laid down in *Newton* as modified by the *Challenge* test of tax mitigation if they both apply. If tax avoidance or reduction is an incidental purpose, section 33 will not apply. This condition is present in both Australia and New Zealand. Section 99 provides that an arrangement is outside the section if tax avoidance is an incidental purpose. In Australia the cases have held that for an arrangement to be caught by section 260 it must be a main or essential purpose.[76]

B. *Tax Mitigation as a Limit*

Tax mitigation, if applicable in Singapore, is also a limit to the operation of section 33. Aspects of tax mitigation relating to the expenditure and loss of income that is required have earlier been examined. It is proposed to examine tax mitigation further, for an understanding of tax mitigation would help in defining the limits of section 99 and in turn section 33. In his judgment Lord Templeman gave the following illustrations[77] of what he considered to be tax mitigation. The five illustrations involved:

1. the gift of income under a deed of covenant, if the covenant exceeds six years and satisfies certain conditions;

2. the gift of property by the taxpayer by way of a settlement which, if it is irrevocable and satisfies certain conditions, would reduce the taxpayer's income since he has disposed of income-earning property;

3. the payment of premiums on certain qualifying insurance policies;

4. the incurring of export expenses on the part of a taxpayer, or capital or other expenditure, for which there is tax relief provided for under the Act; and

5. the situation envisaged under section 191.

In his examples he referred to certain conditions without elaborating what these were because the relevant statutory provisions pertaining to the examples were apparently not supplied[78] to the Board. Thus the examples do not refer to specific New Zealand provisions and serve only to give a general idea of what is envisaged. Without attention being drawn to the specific New Zealand provisions it is difficult to determine the equivalent Singapore provisions. However, a perusal of the New Zealand Act may give some indication.

The first two examples are deeds of covenant and settlements. When investments are transferred to trustees the transaction is properly called a

[76] See *Peate* v. *Commissioner of Taxation,* above, n.28; *Hollycock* v. *Federal Commissioner of Taxation,* (1971) 2 A.T.R. 601.
[77] Above, n. 32 at p. 168.
[78] Above, n. 32, at p. 171.

settlement. When a person covenants to pay periodic sums to another person or for his benefit *(i.e.* through a trustee) the transaction is properly called a deed of covenant.[79] The relevance of deeds of covenant and settlements in taxation lies in the fact that there are provisions designed to make it more difficult for a taxpayer to divest himself of income in favour of others, in particular his family or charities.[80] Settlements have been recognised as one means by which the settlor may divert his income or capital to a beneficiary. Under a covenant the taxpayer may make a payment out of his taxed income to another, who perhaps has no other source of income and who can relieve the income he receives against any reliefs or allowances under the taxing statute.[81] There is only one section in the New Zealand Act which directly refers to settlements: section 96. It also covers deeds of covenant for "covenants" are included in the definition of "settlement". This definition has extended the meaning of the word "settlement". Section 96 seems to be the section Lord Templeman is referring to since there is a prescribed period of not less than seven years.

The relevant section in the Income Tax Act is section 33A. There is a similar definition of the word "settlement" which includes covenants in section 33A (7). It has been noted that section 33A is an anti-avoidance provision.[82] Although there is no requirement that the period of the settlement should not be less than seven years in section 33A, the operation of the section is similar to that envisaged in Lord Templeman's example. To qualify as a settlement (using the term in the sense defined in both sections 96 and 33A) in the manner mentioned by Lord Templeman, a settlement must avoid being caught by section 96, and the six year rule is one of the conditions listed in the section. One type of settlement which is excluded from section 96 is where the income is payable to or applied for any person during the whole of his life. This is provided for in section 95 (5). Similarly, under section 33A, if the settlement is not caught by section 33A (1), (2) and (3) it would have its effect as intended. So a settlement not caught under section 33A results in the taxpayer divesting himself of his investments. This would be an instance of tax mitigation, though it results in a tax advantage to him.

The next two examples are generally reflected in the Singapore Act. Where Lord Templeman refers to expenditure for which there is tax relief provided for under the Act, it would appear that generally this expenditure must be of an income nature and not capital expenditure, since expenditure of a capital nature will not normally be deductible under the New Zealand Act unless permitted by a specific provision.[83] This would correspond with our provisions on deductions and capital allowances. The relevant New Zealand provision concerning qualifying insurance policies appears to be section 59. Premiums for qualifying insurance policies find their corresponding provisions in the provision for relief for life insurance under the Singapore Act.

79 See generally G.B. Graham, *Covenants, Settlements and Taxation* (3rd ed., 1965).
80 *Ibid.*
81 D. Robinson, *Deeds of Covenants* (1987), p. 1.
82 Pok and Hong, *Singapore Taxation* (1987), p. 386.
83 See, *e.g.* sections 104 and 106 (1) (a); the Singapore equivalent is section 15 (1) (b).

There is no equivalent in Singapore to the last example, section 191. A provision that may be similar in some respects is section 37 (5) which deals with the carrying-forward of loss in the case of companies subject to the conditions in section 37.

If one were to consider the concept of tax mitigation solely on the basis of the general terms stated by Lord Templeman it would appear to be difficult to know for certain whether an arrangement is tax mitigation or not. However, the illustrations seem to suggest that the fact that a taxpayer qualifies under one of the reliefs or deductions, similar to the examples cited by Lord Templeman, may mean qualification as tax mitigation. In fact, taking the argument further, there is no reason for the reliefs or deductions to be confined to those similar to the illustrations used by Lord Templeman since he was using the illustrations to indicate the manner in which tax mitigation will work. At its widest extent, tax mitigation will encompass arrangements where there is the accompanying expenditure or loss of income discussed earlier. Within those perimeters, it would appear that all arrangements relying on reliefs or deductions in a taxing statute would qualify as tax mitigation. This appears to be the conclusion one could draw from his illustrations. It is difficult to insist that this conclusion is correct because his Lordship rejected an argument that an arrangement satisfying other provisions in the Act should be excluded from the scope of section 99. This will be considered in the next section.

V. THE RELATION BETWEEN SECTION 33 AND THE OTHER PROVISIONS IN THE ACT

The question here is whether an arrangement which qualifies under some other section in the Income Tax Act is therefore exempted from section 33. If such an arrangement were exempt from section 33, the other sections of the Income Tax Act would be additional limits to its operation. Different answers are provided by the cases in Australia and New Zealand.

A. *The Australian Position*

In Australia the answer is provided by a principle developed by the courts called the "choice principle". The choice principle laid down in *W.P. Keighery Pty. Ltd.* \ *EC. of T.*[84] stated that section 260 cannot apply in cases where an arrangement satisfies some other provision of the Income lax Act, since these provisions implicitly hold out a choice. The taxpayer, who chooses to arrange his affairs so that they come within the purview of these provisions, is entitled to be governed by them to the exclusion of section 260. The facts of *Keighery* are illustrative of the working of the principle.[85] The case involved a private company whose shares were own-

[84] (1957) 100 C.L.R. 66.

[85] The exact provisions of the Australian Income Tax Assessment Act that were involved in the decision will not be referred to as they are not relevant to the discussion.

ed by Mr. Keighery, his wife and his son. As a private company certain tax consequences followed, whereas as a non-private company under Division 7 of the Act there are more advantageous tax consequences. With a view to qualifying as a non-private company, a second company was incorporated which in turn bought all the shares in the first company. The second company then took the requisite steps under the Act to qualify as a non-private company. The steps involved the issuance of preference shares. These shares were issued to friends and acquaintances. The Commissioner invoked section 260. The court said:

> "Whatever difficulties there may be in interpreting s. 260, one thing at least is clear; the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them."

The Commissioner tried to have this principle abrogated but the principle was affirmed by subsequent decisions. It gained approval in a Privy Council decision on appeal from New Zealand.[86] In fact, the scope of the principle has been extended.[87] Mason J. in *Cridland* v. *EC. of T.* said:

> "The principle is not confined to cases in which the Act offers two alternative bases of taxation; it proceeds on the footing that the taxpayer is entitled to create a situation by entry into a transaction which will attract tax consequences for which the Act makes specific provision and that the validity of the transaction is not affected by sec. 260 merely because the tax consequences which it attracts are advantageous to the taxpayer and he enters into the transaction deliberately with a view to gaining that advantage."[88]

So the fact that a taxpayer has chosen a course of action, which will not expose him to liability to tax in preference to one that would, does not mean that section 260 comes into operation, even if the Act does not offer a choice between alternatives.

B. *The New Zealand Position*

The present New Zealand position on the relationship between section 99 and the other sections in the Act is to be found in the *Challenge* decision. In *Challenge* a key issue of contention was the relation between section 99 and the other provisions of the Income Tax Act. Before the Privy Council it was argued that section 99 did not apply once the conditions in section 191 were satisfied.[89] It was also argued that section 99 did not apply to

[86] *Europa Oil Ltd.* v. *I.R.C.* (1970) 1 A.T.R. 737.

[87] See Beaumont J. in *Tlipicoff* v. *F.C. Of* 84 A.T.C. 4,851 at p. 4,863, where he refers to the extended form of the choice principle. The choice principle was extended in *Mullens Investments Pty. Ltd. v. F.C. of T.* 76 A.T.C. 4288 (see Stephen J.'s judgment at *p.* 4303) and the extended form was explained by Mason J. in *Cridland* v. *F.C. of T.* 77 A.T.C. 4538, at p. 4541.

[88] Above, n. 87.

[89] Above, n. 32. The arguments are summarised and addressed by Lord Templeman at pp. pp. 164-70 of the judgment; the arguments are also reproduced at pp.157-9.

other provisions in the Act which provided reliefs or exemptions, once the conditions for the reliefs or exemptions were satisfied. In essence, it was argued that arrangements altering the incidence of tax in a manner contemplated by the Act should not constitute tax avoidance under section 99.[90] Secondly, it was contended that even if such reliance on the reliefs or deductions amounted to tax avoidance under section 99, the wording of section 191 indicated that section 99 was not to apply to it. Thirdly, it was argued that section 99 should not be interpreted widely so as to catch all transactions — "[t]he legislature cannot have intended that a whole range of transactions which have a business purpose but which also have tax consequences should be struck down by section 99."[91] The New Zealand position is seen in the Privy Council's response to these arguments.

Tax mitigation was the reply given by Lord Templeman to the third argument.[92] The Privy Council dealt with the second argument on the basis of legislative history. Section 99 (previously section 108) applied to all the other provisions in the Income Tax Act including section 191 (previously section 141). A special anti-avoidance provision was introduced into section 191 later. Lord Templeman considered this provision to be merely a specific manifestation of section 99 and not an extension of its scope indicating its prior inadequacy. His Lordship went on to suggest two possible explanations for the overlap between section 99 and section 191 (1) (c) (i). The two explanations were legislative indifference or intentional overlap with the result that section 191 (1) (c) (i) is subject to section 99.[93]

The legislative history and interpretation, though interesting, are not relevant to the understanding of the relation between section 33 and the other sections in the Income Tax Act, since section 33, being a recent amendment, came last in time. This would support an argument that the new section 33 renders all the provisions in the Income Tax Act subject to it.

The manner in which the Privy Council dealt with the first argument is relevant to the discussion, because the first argument, although it was not directly referred to as such, is the choice principle. The choice principle was raised by counsel in the lower courts.[94] The applicability of the choice principle in New Zealand prior to *Challenge* was uncertain. Until *Challenge* only the Privy Council's comments in *Europa Oil Ltd.* v. *I.R.C.*,[95] in the face of other decisions to the contrary,[96] indicated that the choice principle was applicable. Lord Templeman rejected the first argument saying:

> "Tax avoidance schemes largely depend on the exploitation of one or more exemptions or reliefs or provisions or principles of tax legislation. Section 99 would be useless if a mechanical and meticulous

90 Above, n. 32, p. 156.
91 Above, n. 32, p. 159.
92 Above, n. 32, pp. 166-7.
93 Above, n. 32, p. 165.
94 See *e.g.* the decision of the Court of Appeal, above, n. 57 at p. 5,010.
95 See above, n. 86.
96 *SeeMangin* v. *I. R.C.,* above, n. 12; and *McKay* v. *Commissioner of Inland Revenue* [1973] 1 N.Z.L.R. 592.

compliance with some other section of the Act were sufficient to oust s. 99."[97]

Lord Oliver, who dissented, was of the view that section 99 did not apply to sections in the Act which permitted taxpayers to order their affairs so as to claim relief or deductions, to obtain a tax advantage or pay less tax in some fashion permitted under the Act.[98] He said that section 99 has to be read as subject to the implied limitation that its operation is subject to other provisions of the Act, which authorise transactions of a particular type and which also prescribe the tax consequences of such transactions,[99] because these transactions had certain consequences deliberately bestowed on them by statute. As an illustration of his point, he cited the example of a deed of covenant used as a device to reduce the donor's income and which has the effect of entitling both the donor and the donee (if it is a charity) to tax relief. Treating the consequences of the deed as avoided by the *ex facie* unlimited terms in which section 99 is expressed, he said, "would result in the absurdity that a statutory code provided by the legislature expressly for the purpose of relieving the donated income of tax would be effectively deprived of any sensible sphere of operation".[1] Lord Oliver's approach makes things clearer for taxpayers and tax planners. It offers an alternative approach and lends support to the choice principle. However, it is doubtful if Lord Oliver's approach or the choice principle would be applied in Singapore. Furthermore, it is unlikely that the Comptroller of Income Tax in Singapore would be as gracious as the Commissioner in New Zealand who was prepared to concede that section 99 had to be "read subject to some limitation as regards transactions permitted or authorised by other legislative provisions if it is not to produce results that are absurd".[2] It is more likely the Comptroller will attach significance to Lord Templeman's rejection of the argument.

It is necessary at this juncture to consider the earlier conclusion drawn in the discussion of tax mitigation as a limit to the operation of section 33. It was suggested earlier that Lord Templeman's illustration of what qualified as tax mitigation led to the conclusion that all arrangements relying on reliefs or deductions in a taxing statue would qualify as tax mitigation. It was also pointed out that this is inconsistent with Lord Templeman's rejection of the choice principle. If the earlier conclusion is correct, the question then arises whether there is a real difference between the positions taken by Lord Templeman and Lord Oliver. It is also noteworthy that both Lord Templeman and Lord Oliver used the deed of covenant to support their different views.

There are two possible bases to reconcile the seeming inconsistency. The first is that Lord Templeman did not wish to restrict the categories of arrangements which are excluded from section 99 to those which relied on deductions and reliefs provided by the Act. However, this would ignore completely the lengthy discussion of tax mitigation, its definition and

97 Above, n. 32, p. 165.
98 Above, n. 32, p. 172.
99 Above, n. 32, p. 171.
1 Above, n. 32, p. 172.
2 Above, n. 32, p. 171.

differentiation from tax evasion and avoidance. The second view is that Lord Templeman did not wish to confine arrangements excluded from section 99 to those relying on reliefs and deductions, but to all arrangements whether relying on reliefs and deductions, or other statutory provisions, provided the element of expenditure incurred or loss of income required to satisfy tax mitigation is satisfied. It is submitted that this second view is that intended by Lord Templeman. Lord Templeman's view is thus wider than Lord Oliver's and at the same time provides a check on schemes which seek to capitalise on any statutory provisions or loopholes.

In the light of the preceding paragraph, the Comptroller might distinguish *Challenge* altogether. It is possible to distinguish it on its facts — the deduction of losses from the income of a group of companies. Another way of distinguishing the decision is to restrict it to instances where a specific anti-avoidance provision is involved. The argument follows that *Challenge* is not applicable because section 191 of the New Zealand Income Tax Act is not *in pari materia* with any local provision in the Income Tax Act. Section 37 (5) of the Income Tax Act deals with the deduction of losses of a company from its assessable income, as contrasted with the deduction from the income of a company or companies in a group, or a group of companies under section 191. Furthermore, there is no express specific anti-avoidance provision in section 37 (5). However, it is possible to argue that a section, such as section 37 (5), is an implied specific anti-avoidance provision. The difference between an express and an implied anti-avoidance provision would then be a reference to the purpose of the arrangement to avoid tax, as in section 191 (1) (c) (i) where the Commissioner is empowered to "disregard any alteration ... which, in his opinion, is of a temporary nature". In section 37 (5) the implied specific anti-avoidance arises in the conditions to be satisfied before the losses can be deducted. This has been called the shareholders continuity test,[3] that is, the shareholders of the company seeking to deduct its loss must be substantially the same on the two dates designated in the section.

VI. THE FISCAL NULLITY DOCTRINE AND SECTION 33

The fiscal nullity doctrine was referred to earlier in the discussion of the steps in an arrangement. The doctrine is relevant as it is a creature of case-law and deals with the manner in which a court may treat the facts before it. The principles in this doctrine are not easily encapsulated and more problems have been raised about the doctrine than answers supplied.[4] This is because the House of Lords seems to be laying down a broad doctrine not dissimilar to the "neighbour principle" in negligence.[5] Hence the doctrine has been left vague because the House of Lords intends the law to develop from case to case.[6] Should the doctrine apply to Singapore

[3] Pok and Hong, above, n. 82, at p. 212.

[4] See Michael Squires, above, n. 4, pp. 10-12, for formulations of the doctrine; there are

[5] John Tiley, "An Academic Perspective on the Ramsay/Dawson Doctrine" in *Recent Tax Problems* in the series *Current Legal Problems* (1985, Jacqueline Dyson ed.).

[6] See Michael Squires, above, n. 4, pp. 10-12, for formulations of the doctrine; there are recent developments in the English courts which indicate that the doctrine itself is being restricted.

it would imply that over and above section 33 there is a judicial doctrine which the courts may apply to disregard any attempts to avoid tax liability.

As the doctrine unfolded with each of the succeeding House of Lords decisions, the question whether this doctrine applies to Singapore awaited the outcome of its treatment in other jurisdictions. Hopes rose after the Canadian courts, followed by the Australian courts, decided that it did not apply for then there was scope for arguing that the doctrine, being a case-law development in one jurisdiction, would not be applicable in another taxing jurisdiction where there existed a statutory enactment in the form of the old section 33. In Canada the Supreme Court in *Stubart Investments Limited* v. *M.N.R.* was of the view that the fiscal nullity doctrine "reflect[s] the role of the court in a regime where the legislature has enunciated taxing edicts in a detailed manner but has not superimposed thereon a general guideline for the elimination of mechanisms designed and established only to deflect the plain purpose of the taxing provision".[7] The Federal Court of Australia followed suit soon after in *Oakey Abattoir Pty. Ltd. v F.C.T.* expressing the view that,

> "The presence of s. 260 makes it impossible to place upon other provisions of the Act a qualification which they do not express for the purpose of inhibiting tax avoidance. In other words, it is not permissible to make an application which does what s. 260 fails to do in preventing the avoidance of tax."[8]

The key reason for rejecting its application was the fact that the doctrine is one developed in England, where there is no provision aimed generally at tax avoidance.

The question which arises from the Canadian and Australian cases is whether there is room for the judicial avoidance doctrine in the face of the statutory anti-avoidance provision in section 33. It would appear that the doctrine has no application in Singapore. Section 33 is wide enough to encompass the tax avoidance schemes which the fiscal nullity doctrine was devised to counter. However, the discussion would not be complete if one failed to mention that in New Zealand, though there is a general anti-avoidance provision in section 99, the Privy Council seems to have applied the fiscal nullity doctrine in *Challenge.* It has been suggested by a commentary on the New Zealand Income lax Act that after *Challenge* the doctrine is applicable in New Zealand. It was stated that *Challenge* was "notable also because the Privy Council referred to and adopted the principles outlined in the English 'fiscal nullity' cases which to date had not been applied to income tax cases".[9]

The assertion that the Privy Council had adopted the fiscal nullity principles is not tenable, since there was no express adoption of the

[7] (1984) 15 A.T.R. 942S, at p. 954, *per* Estey J. See John Tiley, "An Academic Perspective on the Ramsay/Dawson Doctrine", above, n. 5, where he comments on the *Stubart* decision and mentions that much of the jubilation in some circles may prove misplaced because it was perfectly possible to read the guidelines, given by Estey J. as to the application of tax legislation, as something close to the recent House of Lords decisions.

[8] (1984) 15 A.T.R. 1059, at p.1067.

[9] *Butterworths Taxation Library* (1976) Vol. 1, para. 1199, p.1221.

principles. The Privy Council in *Challenge* did not refer to the *Ramsay* approach nor to the fiscal nullity doctrine. It must be conceded that the reasoning in *Challenge* is reminiscent of the *Ramsay* approach as was observed by one commentator.[10] However, it is submitted that applying reasoning, which is at most reminiscent of that in *Ramsay,* does not necessarily imply the adoption of the doctrine.

It would be fruitful to examine Lord Templeman's two references to *W.T. Ramsay Ltd* v. *I.R.C.*[11] The first instance was when he was emphasising the economic substance and not the form of the arrangements. Lord Templeman said,

> "In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the cost of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax."

Then he referred to various English case examples, among which was *W.T. Ramsay.* He said,

> "In *W.T. Ramsay Ltd.* v. *Inland Revenue Commissioners* . . . the taxpayer attempted to avoid capital gains tax by making a deductible loss matched by a non-chargeable gain and setting off the loss against a pre-existing chargeable gain. In reality the taxpayer did not make any loss. The taxpayer attempted to obtain a tax advantage over other taxpayers who paid capital gains tax on chargeable gains."

The second reference to the decision was at the end of the list of examples of tax mitigation just mentioned, where he said,

> " Most tax avoidance involves a pretence: see the analysis in *W.T. Ramsay Ltd.* v. *Inland Revenue Commissioners* .... In the present case the taxpayer and its taxpayer subsidiaries pretend that they suffered a loss when in truth the loss was sustained by Perth and suffered by Merbank. In New Zealand section 99 would apply to all the cited English cases of income tax avoidance."

In this writer's opinion, there is room for arguing that the Privy Council did not endorse the application of the doctrine to a jurisdiction where there is a statutory anti-avoidance provision. There was actually only a reference to the first of the fiscal nullity cases, *Ramsay,* by Lord Templeman who mentioned the decision twice for reasons, which taken in their context in the judgment, in no way indicated that the doctrine or its reasoning was applied. First, it was referred to in the justification for the

[10] See *1988 New Zealand Master Tax Guide* (CCH Tax Editors 1988), para. 2117, at p. 5724. This view has been altered in the 1989 edition of the Master Tax Guide, where at the same paragraph it is said that the Privy Council in *Challenge* "based its decision on the interpretation of sec. 99 by reference to *Ramsay* and related English cases".
[11] Above, n. 32, at p. 169.

distinction of tax mitigation from tax avoidance, as part of a string of English cases illustrating the fact that normally in an arrangement of tax avoidance, the financial position of the taxpayer is unaffected, save for the costs of devising and implementing the arrangement. Second, to emphasise the point that most tax avoidance involves a pretence. It is therefore arguable that the Privy Council did not adopt the doctrine of fiscal nullity, especially as Lord Templeman noted that section 99 would apply to all the English cases of avoidance cited, including *W.T. Ramsay.* From this can be drawn the inference that the doctrine was not applied in section 99 and the reference to *W.T. Ramsay* was illustrative.

VII. CONCLUSION

The criticism of the new section 33 whilst it was being discussed as a part of the amendment bill — that it only makes for uncertainty for the taxpayer — seems to be an accurate assessment.[12] From the perspective of the taxpayer, or even a person sitting on the fence and trying to be the proverbial reasonable man, the section, as appears from the study just embarked upon, is fraught with uncertainty. The uncertainty stems from the conflicting guidance in the Australian and New Zealand decisions on some major issues. One major issue would be the application of tax mitigation. Another example is the applicability of the choice principle, to which the answer is yes, if one follows the Australian decisions and no, if one follows the New Zealand authority in *Challenge,* provided that is the conclusion one draws from the judgment. Yet another example is the applicability of the fiscal nullity doctrine. The Australian decisions have held that it does not apply, whereas *Challenge* may be interpreted as having held that it did. In this writer' opinion such a doctrine is inapplicable, since section 33 has provided for the multi-step arrangements which the doctrine was intended to counter in the first place. Although section 33 is closer in wording to section 99, it is not possible simply to advocate a preference for the New Zealand decisions over the Australian decisions.

The uncertainty is compounded by the fact that the safeguards referred to by the Minister and the Inland Revenue Department were not specified. It would be fair for a taxpayer to assume that the safeguards are consistently applied in both Australia and New Zealand. However, that is not the case in view of the conflicting views highlighted above. Furthermore, sections 260 and 99 are no longer identical, and it is yet to be seen whether the Australian and New Zealand courts consider decisions in each other's jurisdictions, whether decided by the Privy Council or not, as authority.

It is certain that the work of the Comptroller against tax avoidance is made easier. What is noticeable on a first reading of section 33 is the power held by the Comptroller of Inland Revenue. Effectively, whether an arrangement is one of tax avoidance is in his hands. The decision to bring an arrangement within section 33 is his. Though this decision is subject to

[12] There have been at least two articles highlighting the uncertainty under the new section 33: E. Lim, "The Future Tax Avoidance - A Matter Of Certainty" [1988] 2 M.L.J. ci and H. B. Low, "Tax Avoidance and Tax Evasion" [1988] 3 M.L.J. cxliii.

review, evidence of his state of mind and other considerations are not readily available.

The section has certainly attained its objective of arming the Comptroller with a set of "dentures", borrowing the Minister's imagery of the Comptroller without teeth. It is obvious the "dentures" have an excellent bite. The question is whether the size of the bite may have disadvantageous repercussions on commercial endeavours as well as on the arena of tax planning. The scope of permissible tax avoidance is left to be seen. Many are probably hesitating in engaging in any adventurous tax planning. Some may have cautiously ventured along the lines suggested by the Minister during his speech where he said —

> "Additionally, I would like to suggest that financial institutions and other companies approach the Monetary Authority of Singapore and the Economic Development Board respectively for assistance in the event of any uncertainty. The MAS and EDB would assist companies in their consultation with the Inland Revenue Department to determine whether their proposed schemes or transactions fall within the ambit of the new section 33.[13]

There is also the question whether there is scope for tax planning. The proposal that the Inland Revenue Department should occasionally announce illustrations of arrangements which would be subject to section 33 has been followed. There has been the one instance so far. An extract of the reply from the Inland Revenue Department to the then Singapore Society of Accountants has been published to the members of the Society. Two examples were cited by the Inland Revenue Department in this reply. However, unlike the Hong Kong Commissioner of Inland Revenue or the Commissioner in New Zealand,[14] the Inland Revenue Department did not publish the reply in the form of a public bulletin nor did it include the interpretation of section 33 the department will adopt. In Hong Kong, the Commissioner publishes *Departmental Interpretation & Practice Notes,* which do not have binding force, but which do provide some concrete guidance in contrast to the reply from the Inland Revenue Department. Perhaps the Inland Revenue Department would adopt the New Zealand practice of having advance rulings, which are binding and which also provide an indication of how they would interpret section 33. This would help to lessen the uncertainty, for it will be some time, considering the number of decisions on the old section 33, before a decision on section 33 will be heard in the courts.

Ultimately, it seems that section 33 is here to stay unless there are obvious disadvantages from the application of the section.[15] Even then the promise is that the future application of the section could be modified

[13] Singapore Parliamentary Debates, above, p. 81 n. 13, col. 359.
[14] *Departmental Interpretation & Practice Notes No. 15* dated 1 May 1986, reproduced in *Hong Kong Law* (1987, P.G. Willoughby ed.); Public Information Bulletin 163, above, n. 51.
[15] Singapore Parliamentary Debates, above, p.81 n. 13, col. 365.

and not that it would be removed from the statute-books. Who knows? Section 33 might just be another enigma[16] like its predecessor, but an enigma with bite.

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[16] K.C. Loke, above, p. 80 n. 10.

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APPENDIX I

The Old and New Section 33 of the Singapore Income Tax Act

The Old Section 33

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

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

The New Section 33

(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly —

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

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

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

(3) This section shall not apply to —

(a) any arrangement made or entered into before the commencement of the Income Tax (Amendment) Act 1988; or
(b) any arrangement carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.

APPENDIX II

General Anti-Avoidance Provisions Considered by the Draftsmen

The Malaysian Provision

Section 140 of the Income Tax Act 1967

(1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of —

(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;
(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
(d) hindering or preventing the operation of this Act in any respect,

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction.

The Australian Provision

Section 260 of the Income Tax Assessment Act 1936

(1) Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly —

(a) altering the incidence of any income tax;
(b) relieving any person from liability to pay any income tax or make any return;
(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
(d) preventing the operation of this Act in any respect,

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

(2) This section does not apply to any contract, agreement or arrangement made or entered into after 27 May 1981.

The New Zealand Provision

Section 99 of the Income Tax Act 1976

(1) For the purposes of this section —

"Arrangement" means any contract, agreement, plan, or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect:

"Liability" includes a potential or prospective liability in respect of future income:

"Tax avoidance" includes —

(a) Directly or indirectly altering the incidence of any income tax:
(b) Directly or indirectly relieving any person from liability to pay income tax:
(c) Directly or indirectly avoiding, reducing, or postponining any liability to iome tax.

(2) Every arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes if and to the extent that, directly or indirectly, —

(a) Its purpose or effect is tax avoidance; or
(b) Where it has 2 or more purposes or effects, one of its purposes or effects (not being a merely incidental purpose or effect) is tax avoidance, whether or not any other or others of its purposes or effects relate to, or are referable to, ordinary business or family dealings, - whether or not any person affected by that arrangement is a partly thereto.

(3) Where an arrangement is void in accordance with subsection (2) of this section, the assessable income … of any person affected by that arrangement shall be adjusted in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that person from or under that arrangement, and, without limiting the generality of the foregoing provisions of this subsection, the Commissioner may have regard to such income as, in his opinion, either —

(a) That person would have, or might be expected to have, or would in all likelihood have, derived if that arrangement had not been made or entered into; or
(b) That person would have derived if he had been entitled to the benefit of all income, or of such part thereof as the Commissioner considers proper, derived by any other person or persons as a result of that arrangement.

The Hongkong Provisions

Sections 61 and 61A of the Inland Revenue Ordinance, Cap. 112 of the Laws of Hong Kong 1986 (Rev. Ed.)

Section 61

Where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.

Section 61A

(1) This section shall apply where any transaction has been entered into or effected after the commencement of the Inland Revenue (Amendment) Ordinance 1986 (other that a transaction in pursuance of a legally enforceable obligation incurred prior to such commencement) and that transaction has, or would have had but for this section, the effect of conferring a tax benefit on a person (in this section referred to as "the relevant person"), and, having regard to —

(a) the manner in which the transaction was entered into or carried out;
(b) the form and substance of the transaction;
(c) the result in relation to the operation of this Ordinance that, but for this section, would have been achieved by the transaction;
(d) any change in the financial position of the relevant person that has resulted, will result, or may reasonably be expected to result, from the transaction;
(e) any change in the financial position of any person who has, or has had, any connexion (whether of a business, family or other nature) with the relevant person, being a change that has resulted or may reasonably be expected to result from the transaction;
(f) whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length- under a transaction of the kind in question; and
(g) the participation in the transaction of a corporation resident or carrying on business outside Hong Kong, it would be concluded that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit.

(2) Where subsection (2) applies, the powers conferred upon an assessor under Part X shall be exercised by an assistant commissioner, and such assistant commissioner shall, without derogation from the powers which he may exercise under that Part, assess the liability to tax of the relevant person -

(a) as if the transaction or any part thereof had not been entered into or carried out; or
(b) in such other manner as the assistant commissioner considers appropriate to counteract the tax benefit which would otherwise be obtained.

(3) In this section —

"tax benefit" means the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof;

"transaction" includes a transaction, operation or scheme whether or not such transaction, operation or scheme is enforceable, or intended to be enforceable, by legal proceedings.