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FOREIGN SOURCED INCOME – THE RECEIVED BASIS OF INCOME TAXATION

Unlike many countries, Singapore residents are taxed on a territorial (as opposed to a world-wide or global) basis. Income is taxed when it accrues in, or is derived from or is received in Singapore. There is much uncertainty over how income will be received for tax purposes. This article explores the received basis of income taxation.

UNDER section 10 of the Income Tax Act[1] ('the Act') Singapore taxes income received in Singapore from outside Singapore. This basis of taxation is commonly referred to as the 'received' basis of income taxation. In the 15 November 1991 edition of *The Straits Times* Corporate Taxation Series, a director of an international accounting firm opined, "except in a clear cut situation it is not always clear when and in what circumstances foreign sourced income is treated as received in Singapore for tax purposes." Indeed, the only one clear situation where the "received" basis does not apply is when income arising outside Singapore is received by individual (as opposed to corporate) non-residents in Singapore.[2] In a further article in *The Straits Times* of 12 September 1992, a partner in an international accounting firm commented that "The expression 'received in Singapore' is not defined in the Income Tax Act. Nor has its meaning been considered by the Singapore Courts." It is clear from the above that there is much uncertainty over the scope of the charge to tax under the "received" basis of taxation.

This article examines the cases dealing with the receiving of foreign income and considers whether useful principles can be derived therefrom in the interpretation of local tax legislation. *Prima facie,* income received by a resident taxpayer in Singapore is subject to tax. The received basis becomes specially important where the taxpayer remits income earned in a country which does not have a double tax treaty with Singapore. The income may be taxed twice over – once in the foreign country in which the income was earned and the second time when it is received in Singapore.

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1 Cap 134, 1992 Rev Ed.

2 Section 13(3) of the Act states as follows, "There shall be exempt from tax for any year of assessment any income arising from sources outside Singapore and received by any individual who is not resident in Singapore in that year of assessment." "Resident" is defined in section 2 and the definition to a large extent incorporates UK common law. See *MY* v *CGIR* [1972] 2 MLJ 110.

It is the writer's view that for there to be a taxable receipt there must be some *income* of the taxpayer's which is *received* by him. There are, therefore, two requirements for tax to be chargeable – something must be received, and that something must be income. These concepts will be discussed in the light of United Kingdom ('UK') and Indian decisions, which sometimes lay down different and inconsistent rules. It should be noted at the outset that the charging provisions in the UK and India are very different from Singapore's section 10. Foreign cases should therefore be treated with caution. Yet, the general principle of chargeability to tax is similar – tax is chargeable on income *received* by a taxpayer. In Singapore and the UK, a further requirement is that income must be received from outside Singapore or the UK. This is not the case for India where income can be received for tax purposes from one locality to another locality within India.

While legislation to clarify the situation is not compelling[3] the writer will argue that this is desirable to give some direction to tax practitioners. This article will first discuss briefly the wording of the different charging provisions with a view to recognising the extent to which one can rely on UK and Indian cases. It will then explore the concept of 'receipt' and then the concept of 'income'. It will then discuss two other connected issues – first, the issues which arise when foreign funds are used to discharge local debts and, second, the avoidance of tax on foreign earned income, before concluding.

The differences in the wording of the UK and Indian charging provisions should first be noted.

Under the UK Income and Corporation Taxes Act 1988 ('the ICTA'), the received basis (or remittance basis as is commonly referred to in the UK) applies only in respect of income arising from (a) securities and possessions and (b) employment.[4] Since it does not apply in respect of other

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[3] This is because Singapore has Double Tax Treaties with most of the countries with whom its residents do business, and these treaties have the effect of reducing tax payable so that the net effect is that the taxpayer pays tax in only one country. When income has been earned in a foreign country before being received in Singapore, tax will have already been paid in the foreign country prior to receipt in Singapore. It is usual in double tax treaties to give a credit against Singapore tax for the foreign tax paid. Section 49(2) of the Act sets out the types of arrangements which can be made.

[4] Under Schedule D, Case 4 which relates to taxation of securities outside the UK, tax is computed "on the full amount, so far as the same can be computed, on the sums received in the United Kingdom in the year preceding the year of assessment, without any deduction or abatement." Under Schedule D, Case 5, which relates to 'possessions' outside the UK, tax is computed "on the full amount of the actual sums received in the UK in the year preceding the year of assessment from remittances payable in the UK or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property money

forms of income, the scope of tax charged under the remittance basis is much narrower. Furthermore, in the case of securities and possessions, the remittance basis will only apply if another basis of assessment, the "arising" basis, does not apply.[5] This will be the situation where the taxpayer is not domiciled in the UK, or being a British subject or citizen, is not ordinarily resident in the UK. For employment income, the remittance basis will apply to emoluments "received in" the UK. Emoluments will be "received" in the UK if they are "paid, used or enjoyed in, or in any manner or form transmitted or brought to the UK."[6]

Section 5(1)(a) of the Indian Act on the other hand charges to tax "all income from whatever source derived which (a) is received or is deemed to be received in India ... by or on behalf of such person...." Explanation One to section 5 tells us that "Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance-sheet prepared in India." This is a statutory confirmation of the principle in *Gresham Life Assurance Society* v *Bishop*.[7] Explanation Two declares that "income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India." This explanation effectively draws a distinction between the two different bases of taxation in India and rules out double taxation where income has already been charged on the arising or accrual basis.

The following points are noted. First, the scope of charge to tax under the UK ICTA is more restricted than under the Singapore or Indian Act. The UK remittance basis only applies to certain forms of income, but the received basis under the Singapore and Indian Acts applies to all types of income. Secondly, the UK charging provisions are very differently worded from Singapore's section 10. There are three separate charging provisions covering the three different situations when the remittance basis applies. While this is not the case for India, it is noted that India's section 5 is not *in pan materia* with Singapore's provisions. Also, the Singapore and UK provisions only charge to tax income which has been received by the taxpayer from abroad. This is not so for the Indian provision. The third

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or value brought or to be brought into the UK, without any deduction or abatement other than is allowed under the provisions of the Income Tax Acts in respect of profits or gains charged under Case 1 of Schedule D." Schedule E, Case 3 applies to emoluments from an office or employment "received in" the UK and includes those emoluments "paid, used or enjoyed in, or in any manner or form transmitted or brought to, the UK".

5 See section 65(4) and (5) of the ICTA.

6 Section 132(5), ICTA.

7 [1902] AC 287, discussed *infra.*

comment relates to the context in which the received basis applies in the Singapore, Indian and UK systems of taxation. While Singapore taxes income on a territorial basis, tax is generally charged on residents under the UK and Indian Acts on a world-wide basis. This means that a UK or Indian resident is taxed on income no matter where it arises, unlike the case for Singapore residents under the Singapore Act. It follows that the received basis is most significant for non-residents under the UK and Indian Acts. In contradistinction, under section 13(3) of the Singapore Act, non-residents under the Singapore Act are not subject to tax on the received basis.

These differences, which relate to the wording, scope, and the context of the charge to tax on the received basis, indicate that the UK and Indian cases should be treated with caution.

I. Meaning of Receipt

A physical bringing into Singapore of income monies will quite clearly amount to a receipt of income in Singapore. However, 'receipt' for tax purposes means more than just physical receipt. Some form of actual receipt[8] is required though not necessarily of money *in specie.* The starting point of a discussion on the common meaning of "receipt" is the *dictum* of Lord Lindley in *Gresham Life Assurance Society* v *Bishop* who stated:

> a sum of money may be received in more ways than one, *eg,* by the transfer of a coin or a negotiable instrument or other document which represents and produces coin and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass;[9] and I am not prepared to say that what amongst businessmen is equivalent to a receipt of a sum of money which is not a receipt within the meaning of [the Act].[10]

According to Lord Lindley, therefore, receipt of a cheque or other negotiable instrument[11] or any document that could be regarded as money

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[8] Lord Dunedin in *Scottish Widows' Life Assurance Society v Farmer* (1909) 5 TC 502 at 508 said,"... nothing less than actual receipt will do. Now, actual receipt of money, it seems to me, can only be effected in one of two ways. Either the money itself must be brought over *in specie,* or the money must be sent in the form which, according to the ordinary usages of commerce, is one of the known forms of remittance."

[9] Payment and receipt can be effected by set-off of mutual obligations. See *Trinidad Lake Asphalt Operating Ltd v Trinidad and Tobago Income Tax Comrs* [1945] AC 1.

[10] [1902] AC 287 at 296.

[11] However, a promissory note issued by the debtor given to the creditor is not a payment since all that the debtor would be doing would be giving the creditor a document attesting his promise to pay at a later date. A debtor could, however, give the creditor a promissory note of a third party; *eg,* a Bank of England banknote (which is a promissory note issued

by businessmen would be deemed a receipt of money. There is authority that if a businessman would regard the receipt of something as the equivalent of a receipt of money, this would be one factor pointing towards a taxable receipt.[12]

One point to note from the *Gresham Life Assurance* case is that income is not received if it is merely taken into account in the drawing up of one's accounts. In that case the taxpayer was a life assurance society which carried on business in the UK and outside the UK. The taxpayer's balance sheet and accounts were prepared in London and interest income from the taxpayer's foreign securities were entered in the taxpayer's accounts. The interest was not actually brought into the UK but the UK Revenue authorities argued that it was taxable on the received basis. The House of Lords unanimously held that the interest monies were not received in the UK. The Earl of Halsbury LC said, "I do not think any amount of bookkeeping or treatment of these assets... will be equivalent to or the same thing as receiving the amount in this country."[13]

The case can also be said to be authority for the proposition that any other form of receipt other than an actual receipt is not recognised. The House rejected the argument that a constructive receipt will suffice to attract tax. Lord Brampton said:

> it was argued that if not actually, it was 'constructively' so received in the accounts of the society. I confess I do not like that expression, nor do I quite understand what it means. If a 'constructive' receipt is the same thing as an actual receipt, I see no reason for the use of the word 'constructive' at all. If it means something differing from or short of an actual receipt, then it seems to me that a constructive receipt is not recognised by the statute, which, in using the word 'received' alone, must be taken to have used it having regard to its ordinary acceptation.[14]

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by the Bank of England). See Mackinnon LJ in *Cross v London & Provincial Trust* (1938) 21 TC 705 at 721-722.

[12] Lord Radcliffe's idea of 'bringing in' of income in *Thomson* v *Moyse* [1961] AC 967 at 994 is related to "whatever means the agencies of commerce or finance may make available for that purpose", and Lord Cohen's reliance on "ordinary commercial practice prevailing among business men" at 1001 in the same case in considering if there was a taxable receipt, both point to a 'businessman' test in deciding if there was a taxable remittance. This case, however, is a doubtful precedent as the discussion *infra* will demonstrate.

[13] *Supra,* note 10, at 292. Indian cases also support this proposition. See, *eg, CIT* v *Toshoku Ltd* (1980) 125 ITR 525 which suggests that accounting entries made on the earnings basis of assessment are irrelevant. In that case, it was held by the Indian Supreme Court that the making of entries in the books of a taxpayer as amounts credited in the taxpayer's credit could not amount to a taxable receipt. See also the judgment of Shah J in *In Re The Aurangabad Mills, Ltd* (1921) 1 ITC 116.

[14] *Supra,* note 10, at 294.

Where it is found that foreign sourced income is transmitted to the head office of a Bank or a Company and thereafter paid out as dividends, there may be a taxable receipt by that head office. This is necessarily a finding of fact. In *Nedungadi Bank Ltd, Calicut* v *CIT (Mad),*[15] income of the taxpayer bank's foreign branches (which were treated as separate entities from the taxpayer bank for tax purposes) was transferred to the head office accounts and all expenditure chargeable against revenue was similarly transferred to the head office accounts without any distinction between capital and revenue monies. The High Court found that the sums had been amalgamated with the net profits of the Bank and out of that amalgamated sum dividends were paid and directors remunerated. Consequently the Court held that monies had been received by the head office and were taxable.

A receipt by an agent is considered a receipt by his principal and hence taxable as the principal's income. If the agent was only involved in the mere preparation of accounts or the mere transmission of income (as opposed to receiving income) then there would be no tax liability on the principal. On the other hand, once the income is under the control of the taxpayer's agent the income is considered received by the taxpayer. This is consistent with principles of agency law. In *Pondicherry Railway Company* v *CIT (Mad)*[16] the taxpayer's agent was also agent for another party, the South Indian Railway Company ('SIRC'). The agent's duties included receiving monies from SIRC and apportioning these monies received between the taxpayer and SIRC. The Privy Council held that the agent's activity far transcended the mere mechanical act of transmitting income to the taxpayer and that the agent could not be regarded as an "animated post office". The Privy Council found that the agent was "the paid Agent at Trichinopoly of the Pondicherry Company, carrying on their agency in an office bearing their name, and he is entrusted with ... important duties on their behalf...."[17] When the agent commenced apportioning the monies he was acting on behalf of the taxpayer and hence the taxpayer received, for the purposes of tax, those income monies at that time.

However, a subsequent UK case has suggested that under the 'received' basis, for tax to be chargeable all that is necessary is that the taxpayer be entitled to the income when it arrives in the UK. In *Timpson's Executors* v *Yerbury*[18] Lord Wright MR observed that actual physical receipt "would I think be too narrow a condition of chargeability... the test that the taxpayer should be entitled to the income...whether she actually receives it or not appears to me to be in accordance both with the language and intent of

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[15] (1926) 2 ITC 243 (Mad).
[16] (1931) 54 ILR 691.
[17] *Ibid,* at 703-704.
[18] [1936] 1 KB 645.

the [Act]."[19] Tax becomes chargeable when "actual sums of the taxpayer's income should at least come to this country, under such circumstances that the taxpayer, if he does not actually receive them, is entitled to them...."[20] These conditions were fulfilled in *Timpson's* case. The taxpayer in *Timpson's* case was resident in the UK and was entitled to income from an estate in America. The taxpayer directed the trustees of the estate to pay monies from the estate to her children in the UK. The Court of Appeal held that the bank drafts sent to the UK in respect of the allowances did not become the children's property until they had been cashed and that although the taxpayer could not be said to have received the payments she was 'entitled' to the income when it reached England. The income was therefore assessable to income tax.

On the other hand, the English Courts have ruled, that for the purposes of tax liability under Schedule D, Case 3 of the UK ICTA (which requires interest income to be 'received' before it can be subject to tax), the money must be at the *disposal* of the taxpayer. 'Received' in the context of interest income under Schedule D, Case 3 means 'right to dispose'. In *Parkside Leasing Ltd* v *Smith*[21] the High Court held that the receipt of a cheque was not a receipt of interest income. Scott J held that a "receipt of a cheque is merely a first step in the process that may lead to actual receipt, in the sense that I have mentioned,[22] of the proceeds."[23] The case has, however, been criticised[24] as not deciding when income is received – is income received when the cheque is presented or when honoured? The authority of this case is also unclear since it can quite obviously be distinguished on the fact that it was a decision on a different aspect of tax law – that of the receiving of interest income under the ICTA; a situation which has no parallel in the Singapore Act.

First Receipt

This issue usually arises when considering whether there is a taxable receipt. Indian cases have ruled that when income has been received by the taxpayer, it can no longer be taxed under the received basis. In India, the meaning of receipt is related to the taxpayer's control of the income. If the taxpayer has control over the income, then he would have received the income. In *Keshav Mills* v *CIT,*[25] the majority of the Indian Supreme Court held that

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[19] *Ibid,* at 661.
[20] *Supra,* note 18, at 662.
[21] [1985] STC 63.
[22] *Ie,* that money must be at the disposal of the taxpayer before income can be said to be received.
[23] *Supra,* note 21, at 68.
[24] See J Tiley, "More on Receivability and Receipt" [1986] BTR 152.
[25] (1953) 23 ITR 230.

the receipt of income "refers to the first occasion when the recipient gets the money under his control and that what is chargeable is the first receipt of moneys and not a subsequent dealing by the assessee with the said amount. In the event that they are brought over [to India] by the assessee as his own moneys which he has already received and has control over they cease to enjoy the character of income, profits or gains."[26] The Supreme Court of India had also in *Sundar Das* v *Gujarat*[27] followed two ordinary dictionary meanings and held that "the word 'receive' implies two persons – the person who receives and the person from whom he receives."[28] A person therefore cannot be said to receive income from himself if the same had been previously 'received' by him outside the country.

UK cases, in contrast, take a different approach. In the first place, money received by the taxpayer overseas (and hence in the 'control' of the taxpayer thenceforth) and, subsequently, remitted to the UK will attract tax. In *Thomson* v *Moyse*[29] the taxpayer who was resident in the UK was entitled to income from the estates of his mother and father. The income was paid into the taxpayer's bank account in New York. The taxpayer drew cheques in dollars on his New York bank account and sold them to his English bankers in London whereupon he was paid immediately the sterling equivalent of the dollars in the cheque. The taxpayer's English bankers then sent the cheques to New York for encashment and collection there. The question was whether the taxpayer had 'received' monies in the UK. The House of Lords held that monies had been brought into the UK. It was immaterial that the taxpayer had already received income from the estates of his mother and father in his New York account.

Second, even investment of income monies for some time abroad may not convert its income nature into capital. In *Walsh* v *Randall,* Wrottesley J said that "if a man resides here he cannot, by investing for the time being his income abroad, change its character vis-à-vis the Income Tax collector."[30] Therefore, income earned and, subsequently, invested abroad and later received in the UK will still be taxable under the received basis. Even though income invested abroad would be in the control of the taxpayer at the time of the investment, (and, hence, deemed 'received' by the taxpayer and taxable under Indian case law) this first receipt concept has no application under UK law. In *Patuck* v *Lloyd*[31] the taxpayer, upon receiving his income in a bank account in India, instructed his bankers in India to purchase investments with his income. The investments were later resold and the

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[26] *Ibid,* at 242.
[27] [1922] ILR 3 Lah 349.
[28] *Ibid,* at 355, *per* Sir Shadi Lal CJ.
[29] *Supra,* note 12.
[30] (1940) 23 TC 55 at 61.
[31] (1944) 26 TC 284.

proceeds brought back to the UK. The taxpayer argued that no tax was chargeable in respect of these sums, though he did not suggest that those sums represented anything else but his income. The Court of Appeal held that the proceeds were taxable as having been received in the UK. Lord Greene MR, with whom the other two members of the Court of Appeal agreed, stated, "[t]he measure of your income is the amount which you have brought in during the previous year, no matter what its year of origin was."[32] Clearly therefore the first receipt concept is alien to UK tax law.[33]

Is the first receipt concept applicable in Singapore? This is an important question to be addressed since it relates to the scope of Singapore's tax jurisdiction. It is submitted that the first receipt concept has no place in Singapore. It has been suggested that as income tax is charged on income "received in Singapore*from outside Singapore"* a taxpayer would be within the ordinary meaning of this phrase if having received income outside Singapore he arranges it to be sent back to Singapore and receives it in Singapore.[34] The writer respectfully agrees. In fact from the plain meaning of the phrase, all that is necessary for tax to be chargeable is that income is received from outside Singapore. With respect to the Court in *Sundar Das,* there is no presumption that the word 'received' implies two persons. It may be argued in response to the Indian Supreme Court in *Sundar Das's* use of the dictionary meaning of the word "received" that it is also within the dictionary meaning of "receive" to say that one receives one's income from one's own funds overseas. The words "from outside Singapore" appearing immediately after the word "receive" only suggest that the income must be received from abroad, not that it must be received from a person other than the recipient. In contrast, section 5(1) of the Indian Income Tax Act defines income of a taxpayer as including "all income...which is received or is deemed to be received in India...." There is no requirement in section 5(1) that income must be received from *outside* India – income can be "received" in India from within India itself.[35] The scope of the "received" basis of tax in India therefore is very different. Indeed it may be contended that since there is no requirement for the income to be received from outside

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[32] *Ibid,* at 291.

[33] Interestingly, Lord Lindley in the *Gresham Life Assurance* case, *supra,* note 10, at 296 said, "There must be a person to receive and a person from whom he receives, and something received by the former from the latter." This dicta must be considered to have been superseded by *Thomson* v *Moyse, supra,* note 12, since the taxpayer in *Thomson's* case could receive for tax purposes money from his bank account abroad.

[34] Soon Choo Hock, "Tax Jurisdiction of Singapore" (1985) 27 Mal LR 29 at 57.

[35] Though it must be conceded that the income would in the first instance be subject to tax under the 'accruing or arising' basis under India's section 5. See Kanga and Palkhivala's *The Law and Practice of Income Tax* (8th ed, 1990), at 218 which suggests that "accrue" and "arise" are used in contradistinction to the word "receive" and indicate a right to receive. A right to receive would normally arise before actual receipt.

India this may lend to the interpretation that receipt means the first receipt and not a subsequent receipt of income. If the first receipt concept were applicable in Singapore then tax could be avoided on almost every receipt of income. This will be the case because the taxpayer could simply arrange for his income to be received in his bank account or by an agent abroad before transmitting it to Singapore. He would thus be deemed to have received it twice under Indian case law – once, when money is received in his bank account or by his agent abroad and, the second time, when received in Singapore. His subsequent receipt in Singapore would not therefore be taxable in Singapore. Unless there are indications to the contrary (and the writer is not aware of any), it is difficult to suppose that this was the intention of the legislature to allow for such an application of the 'received' basis.[36]

In summary, the writer's view of the legal position on the meaning of receipt is as follows. An actual receipt is required. The receipt may not necessarily be of income monies *in specie* – a receipt of something which a businessman would regard as money would suffice. Actual physical receipt is not necessary; as long as a taxpayer becomes entitled to the income he is deemed to have received it. A taxpayer would be entitled to income if it were at his disposal. Finally, it is unlikely that the Indian first receipt concept is applicable in Singapore.

II. INCOME

Receipt *per se* would not attract tax. The receipt must be a receipt of income of the taxpayer before tax is chargeable. We will now move on to discuss the concept of 'income', the second component to be established for there to be a taxable receipt.

It is trite law that income tax is charged only on income received.[37] Tax cannot therefore be charged on a capital receipt. The difference between capital and income is often a difficult distinction to draw in practice.[38] In

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[36] As stated by Lord Greene MR of the English provision in *Patuck* v *Lloyd, supra,* note 31, at 291: "All [the taxpayer] would have to do would be to leave it abroad ... and then bring it back and he would never have to pay a penny of tax upon it. It is perfectly clear that is not the effect of the section, and if it were the effect of the section, it would be a particularly futile section for the legislature to have enacted.... The measure of your income is the amount which you have brought in during the previous year, no matter what its year of origin was."

[37] Lord MacNaughten in *London County Council* v *Attorney General* [1901] AC 26 at 35 stated, "Income tax, if I may be pardoned for saying so, is a tax on income." 'Income' has not been defined in the Act; in the words of Jordan CJ in *Scott* v *COT* (1935) 35 SR (NSW) 215 at 219, income "must be determined in accordance with the ordinary concepts and usages of mankind...."

[38] It has been said in respect to the relationship between the two, that income refers to the fruit while capital refers to the tree. To quote Mr Justice Pitney of the Supreme Court of the United States in *Eisner v Macomber* (1919) 252 US 189 at 207, "The fundamental

STU v *CIT*[39] the taxpayer was carrying on a business in Shanghai in December 1942 and fearing an outbreak of war, he bought gold bullion and transferred the gold to Hong Kong. Through the passage of time the taxpayer acquired more gold which was kept in a Hong Kong bank. Between 1948 to 1949 all the gold which was held by the Bank was sold and the proceeds received in Hong Kong. These proceeds were subsequently remitted to Singapore. Tan Ah Tah J held:

> It is clear that the remittances arose out of property which was originally in Shanghai and which was remitted or transferred to Hong Kong. They were then sent from Hong Kong to Singapore. The remittances are therefore capital in nature and cannot be taxed as income.[40]

While it is certainly correct to rule that a receipt of capital is not taxable, it is submitted that the reasoning in this decision is unsatisfactory. Tan J, while believing the evidence of the witnesses, did not appear to have addressed the issue as to whether the receipt was of an income or capital nature, but merely ruled that as the proceeds had passed from Shanghai through Hong Kong, they were not income. Three comments can be made. First, UK decisions have ruled that mere investment of income before it is received will not convert the income into capital.[41] *A fortiori,* the converting of income in the form of money to gold bullion and the subsequent transfer to Singapore via Hong Kong cannot convert its income character to capital. Secondly, the question whether a receipt is a capital or a revenue receipt is always a difficult one, especially in borderline cases, and involves a full consideration of the activities of a taxpayer in every case. There is no one single test to determine the issue. It is submitted therefore that Tan J should have devoted a more substantial part of his judgment to explaining the basis for his decision that capital monies instead of income monies were ultimately received in Singapore. Thirdly, it is noted that the first receipt concept was not examined; it could certainly have been argued for the taxpayer that the taxpayer having received the income in Hong Kong would no longer be subject to tax in respect of the remittances to Singapore.

Another case where the taxpayer was successful in arguing that what was remitted was capital is *Kneen* v *Martin.*[42] In this case the taxpayer, who owned American securities and shares, sold them and remitted the

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relation of capital to income has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop...."

39 [1962] MLJ 220. This is the only reported local case on the received basis.

40 *Ibid,* at 221.

41 See *Patuck* v *Lloyd, supra,* note 31.

42 [1935] 1 KB 499.

proceeds to the UK. The Court of Appeal upheld both the decisions of the Special Commissioners of Income Tax and Finlay J in the High Court who found that the taxpayer had merely realised her capital investments and as such the remittance of the proceeds was a receipt of capital and, hence, not taxable. It was found that the securities were purchased out of accumulations of income but when they were sold, the proceeds were paid into a capital account. It was held that the proper inference was that the proceeds were capital.[43]

Whether foreign sourced monies or money-in-kind is of an income nature or not is determined by the laws of the country of the source.[44] In *Rae* v *Lazard Investment Co Ltd,*[45] the taxpayer received, under its rights as shareholders in an American Company shares in another company pursuant to a distribution in 'partial liquidation'. Under English law, the receipt of shares from a company in the UK would be a receipt of income in the hands of the taxpayer shareholder unless it was a distribution in a liquidation or a repayment in respect of a reduction of capital or an issue of bonus shares.[46] However, as it was a receipt of shares from abroad the House of Lords held that it was necessary to find, as a matter of fact, whether under the law of Maryland the distribution was a capital or revenue distribution. It was the nature of the taxpayer's right to the property under foreign law which was crucial. Since under the law of Maryland the shares distributed were capital in the hands of a shareholder the receipt was not taxable.[47]

One related issue is whether the receipt of a benefit in a form other than money, *ie,* money's worth, is a taxable receipt. In the UK a receipt is taxable only when actual sums of money are received. This is clear from the reading of the UK remittance provisions.[48] In *Scottish Widows' Fund Life Assurance* v *Farmer*[49] for example, the Scottish Court of Session held that the receipt of bearer bonds which were marketable securities was not a taxable receipt.

It is submitted that the position in Singapore is different. The sole requirement is that income must be *received.* Indian cases recognise that

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[43] It is probable that if monies are shown to be paid into a capital account this can tip the scales in favour of a taxpayer. But mere paying of monies into the taxpayer's designated capital account will clearly not change the income nature of the money.

[44] See generally Cheshire & North, *Private International Law* (11th ed), Ch 7.

[45] (1963) 41 TC 1.

[46] See *IRC* v *Reid's Trustees* [1949] AC 361. In Singapore, see *CIT* v *AB* [1960] MLJ 55.

[47] Another case illustrating the same point that foreign law is relevant in determining whether what is received is income is *Archer-Shee* v *Garland* [1931] AC 212.

[48] Lord Radcliffe in *Thomson* v *Moyse, supra,* note 12, at 995. See, *supra,* note 4 for the provisions. Actual sums must be received for income taxable under Cases IV and V of Schedule D and not Schedule E of the UK's ICTA.

[49] *Supra,* note 8.

income can be received under the 'received' basis in kind – in money's worth as well as in cash. The Privy Council in *Raghunandan Prasad* v *CIT* stated that for tax purposes, "Their Lordships fully recognise that income may be received in kind as well as in cash and that the receipt of an equivalent of cash may be a receipt of income."[50] In that case, one issue was whether the taxpayer moneylender in accepting a fresh mortgage in their favour in the discharge of principal and interest under an earlier mortgage, could be said to have received income from their debtors, *ie,* whether the receipt of a fresh mortgage in consideration of the discharge of the earlier mortgage was payment of principal and interest under the earlier mortgage, and hence income in the hands of the taxpayer moneylender. Lord Macmillan after considering three UK cases[51] which involved taxpayers realising assets[52] held that it was plain from those cases that "there must be an actually realised or realisable profit" for there to be a taxable receipt under the Indian Income Tax Act.[53] Lord Macmillan further held that, "what happened was that the assessees received a new and substituted security for an existing debt. To give security for a debt is not to pay a debt. If the assessees had received payment in kind of the amount outstanding on the original mortgage in the shape, say, of realisable shares or bonds, the case would have been different but they merely received further and better security for their debt."[54]

We will now move on to discuss two issues central to the received basis of tax.

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[50] [1933] ITR 113 at 118.

[51] *Californian Copper Syndicate* v *Harris* (1904) 5 TC 159, *Royal Insurance Co* v *Stephen* (1928) 14 TC 22, *Westminster Bank Ltd* v *Osier* (1933) 17 TC 381.

[52] The taxpayers were realising their assets in the sense that profits were received in the hands of the taxpayers after the assets had been disposed of by the taxpayers. To attract tax the assets must be of an income nature. Realisation of capital assets will not attract tax. A taxable realisation can take place when there is an exchange of shares: *Royal Insurance Co Ltd* v *Stephen* (1928) 14 TC 22, or an exercise of an option to purchase: *Westminster Bank* v *Osier* (1933) 17 TC 381.

[53] A profit on realisation of assets can be taxable. In the *Californian Copper Syndicate* case, *supra,* note 51, at 165, 166, Lord Justice Clerk Macdonald stated, "It is quite a well settled principle in dealing with questions of assessment of income tax, that the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out of a business." See also *Punjab Cooperative Bank Ltd, Amritsar* v *COT(Lah)* [1940] AC 1055 where a bank was said to be carrying on banking business when it realised shares at a profit to meet withdrawals of its depositors.

[54] *Supra,* note 49, at 119.

III. Foreign Funds Used to Discharge Local Debts[55]

A difficult situation that English courts have faced is where a taxpayer utilises foreign income to discharge debts incurred in the UK. Would there be a taxable receipt? In the words of Lord Radcliffe in *Thomson* v *Moyse,* could a taxpayer "take the debt over to the income instead of bringing the income to the debt?"[56] In *IRC* v *Gordon*[57] the taxpayer was a partner in a firm in Ceylon. The partnership had a bank account in Ceylon with N Bank which had its head office in London. The taxpayer opened a bank account with the head office and was allowed to overdraw his bank account; whenever his overdraft reached £500 it was transferred to the Colombo branch which debited the taxpayer's Colombo account with the equivalent in rupees of the transfers. The question was whether there was a taxable receipt of income in the UK. The House of Lords held that there was no receipt. Lord Cohen, who delivered the leading judgment, held that the agreement effectively allowed the debt created in London to be repaid in Colombo, and stated:

> It is plain that the moneys he received in London [from N Bank] were advances of capital. There is no finding that those advances were made on credit or on account in respect of income in Ceylon which it was intended should be brought to London. On the contrary, the parties expressly agreed that the debt should be discharged in Ceylon, it was so discharged, and there is no evidence that the rupees which the bank received in Ceylon were ever remitted to London.[58]

The UK Parliament reacted by enacting in 1953, section 24 of the Finance Act 1953[59] to counteract *IRC* v *Gordon.*[60] Generally, under section 24 income arising outside the UK used to discharge, outside the UK, debts incurred in the UK would constitute a taxable receipt. So in *Thomson v Moyse,*[61] the facts of which have already been outlined earlier, a four-member House of Lords held that *Gordon's* case was no longer of importance because

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[55] See J Tiley ed, *Butterworths UK Tax Guide 1991-92* at paragraphs 34:17-34:20 for a discussion on the position in the UK.

[56] *Supra,* note 12, at 999.

[57] [1952] 1 All ER 866.

[58] *Ibid,* at 874. See *Hall* v *Marians* (1935) 19 TC 582, a very similar case which was decided in favour of the taxpayer and which Lord Cohen found difficult to distinguish from *Gordon's* case on the facts.

[59] This section is now re-enacted as section 65 of the UK's ICTA.

[60] *Supra,* note 57.

[61] *Supra,* note 12.

of section 24.[62] However, it has been noted[63] that *Thomson's* case is "shocking" especially since it appears from the law report itself that the remittances in *Thomson's* case were all made before section 24 came into force[64] and all the more so since at that time the House of Lords was bound by its own decisions.[65] It is submitted that the situations in the two cases are practically indistinguishable since in *Gordon's* case the taxpayer used foreign income to satisfy his overdraft with a bank; in *Thomson's* case, the taxpayer encashed cheques representing foreign income with his bank – in both cases the banks collected money from the taxpayer's bank accounts from abroad and the taxpayers obtained some benefit in the form of a discharge of a debt or an acquisition of local currency. It could not therefore be correct for the House of Lords in *Thomson's* case to brush aside the *Gordon's* case simply on the basis of subsequent legislation which was arguably inapplicable.

In Singapore, where there is no equivalent of UK's section 24, it would certainly be arguable that, on the facts of *Gordon's* case, tax is not chargeable as the remittances would be capital receipts. Yet if one were to examine *Thomson's* case it would be clear that the House of Lords was also developing the UK received basis of taxation and its decision that the income was taxable was not made solely on the basis of section 24. *Thomson's* case could, therefore, be read not as an overruling of *Gordon's* case, but rather as a judicial development of the received basis of tax in the UK. This is because to the four members of the House of Lords in *Thomson's* case, receipt for tax purposes meant more than physical receipt. For example, in the opinion of Lord Reid the physical bringing in of money was not necessary.[66] In *Thomson's* case, the taxpayer had received a sum in the UK with a corresponding diminution of the amount of the taxpayer's accrued income abroad.[67] To Lord Reid, therefore, where a banker collected income monies for a customer abroad there would be a taxable receipt.[68] To Lord Radcliffe, the taxpayer had emptied one pocket of dollars

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[62] See Lord Reid, *supra,* note 12, at 989, Lord Radcliffe at 999, Lord Cohen at 1001, Lord Denning at 1006.

[63] *Supra,* note 55, at paragraph 34:19.

[64] The remittances were made in the 1949-50,1950-51 and 1951-52 years of assessment, before the predecessor of section 65, section 24 of the Finance Act 1953, was enacted on 31 July 1953.

[65] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. In fact Tiley, *supra,* note 55, at paragraph 34:19 makes the point that the House of Lords turned a prospective provision of the legislature into a retrospective decree of the judiciary!

[66] *Supra,* note 12, at 986, he said, "But there is nothing in Case IV requiring that money should be brought into the UK, and this requirement is only attached to one head of Case V which does not apply to the present case." Lord Radcliffe decided to the same effect at 995.

[67] *Supra,* note 12, at 989.

[68] *Ibid.*

in order to fill another with sterling – this was money brought in for tax purposes. The bringing in of a person's income meant "nothing more than the effecting of its transmission from one country to the other by whatever means the agencies of commerce or finance may make available for that purpose."[69] It was not important that cheques were written out and signed in London and encashed there, as long as the direct result of the mechanism employed was to turn the taxpayer's income in one country into money or value in the other. Lord Cohen who delivered the leading judgment in *Gordon's* case agreed with Lord Radcliffe. After stating that the decision in *Gordon's* case was irrelevant because of the amendment of the law by the legislature, he expressed the desire that his dictum[70] in *Gordon's* case "will receive from your Lordships as sudden a death as was given to the decision in *Gordon's* case by section 24 of the Finance Act 1953."[71] The fourth member of the House of Lords in *Thomson's* case, Lord Denning, held that the bank received payment by the dollar cheques in England and the cheques were payable out of the taxpayer's New York account with the taxpayer's authority. Alternatively, the sterling was a 'sum received' by the taxpayer; it was only received by cheques which depleted his New York account by a corresponding amount. It was directly referable to his New York income. On these two alternative strands of reasoning Lord Denning held that the income was received and hence taxable.[72]

It follows that on the basis of the above statements that there would have been a taxable receipt in *Gordon's* case. This would certainly be the case if one followed Lord Radcliffe's (with whom Lord Cohen agreed) and Lord Reid's reasoning. It is also clear from the above that it cannot be argued that *Thomson's* case is irrelevant in the Singapore context on the basis that *Thomson's* case was a decision based solely on UK's section 24 which has no equivalent here. *Thomson's* case, however, represents the law in the UK and has already been followed in preference to *Gordon's* case.[73] The position is, therefore, unclear if the facts *of Gordon's* or *Thomson's* case were to arise in Singapore. In the writer's view the decision in *Thomson's* case is correct though the reasoning of the court is open to doubt. The receipts there ought to be subject to tax since the law should keep pace with advances in banking transactions and procedures so that not just an actual physical receipt of money will attract tax, but also income received via modern banking transactions.

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[69] *Supra,* note 12, at 994.

[70] *Supra,* note 58, at 874 as reproduced earlier on.

[71] *Supra,* note 12, at 1002.

[72] However, he preferred to regard the dollar cheque received by the bank as the sum received. See *supra,* note 12, at 1005.

[73] In *Harmel* v *Wright* [1974] 1 All ER 945.

IV. AVOIDANCE

If the taxpayer's income is alienated so that at the time of receipt it is not the taxpayer's income, then the income is not taxable.[74] For the purposes of alienation, the income monies could, for example, be gifted to someone else before being received into Singapore. No tax would be chargeable both in the hands of the taxpayer (since it is not his income) nor the third party (since a gift is not income).[75]

In *Carter* v *Sharon*[76] the taxpayer sent her daughter in England an allowance in the form of a banker's draft. The allowance was sent by post from the taxpayer's bank account in San Francisco and the question was whether the taxpayer who was in England had received the income. Evidence was given that under Californian law the gift of the allowance was complete and irrevocable at the very latest when the banker's draft was posted in California. The High Court held that the receipt was not taxable, the gift having been completed before arrival in the UK. It follows that to avoid chargeability under the "received" basis a gift has to be made and completed before arrival in Singapore. Whether the gift is completed is of course a question of law.

There are other ways of divesting income to avoid tax. These methods must of course be recognised by foreign law as being complete and effective to dispose of income. If foreign law relating to the divesting of property is the same as Singapore law then, it is submitted, the taxpayer could, apart from making an outright gift of income to a third party, also declare himself to be a trustee, or he could direct trustees to hold the income on trust for the third party.[77] The income could then be remitted to Singapore after the trust is settled. However, the courts have been slow to find a trust arising where there is a receipt of monies from abroad. Lord Wright MR in *Timpson's Executors* v *Yerbury*[78] stated that "the idea of a trust of the remittance is foreign to the nature of a commonplace banking transaction performed in the usual way to remit funds from one country to another and to a payee in the latter. To constitute a trust pro *tanto* of [the taxpayer's] equitable interest in her income there must have been evidence of intention to create such a trust: see *Richards* v *Delbridge.*"[79]

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[74] See, *eg,* Lord Reid, *supra,* note 12, at 989.

[75] An unsolicited gift made purely for personal reasons and unconnected with any income generating activity will not be income.

[76] [1936] 1 All ER 720.

[77] These are established ways of creating trusts found in trusts textbooks. See, *eg,* Pettit, *Equity and the Law of Trusts* (6th ed, 1989) Ch 6 and see also Romer LJ in *Timpson's Executors* v *Yerbury, supra,* note 18, at 664.

[78] *Supra,* note 18.

[79] *Supra,* note 18, at 659.

Another method would be for the taxpayer to assign the right to his income over to third parties before it is received in Singapore.[80] The intention to assign will also have to be clearly expressed when income monies are received from abroad for "[The court] cannot see how it can properly be said in a simple case like this that instructions to draw and remit a cheque constitute an assignment of money."[81] Subject to the assignment not being a sham transaction, the taxpayer's income could, for instance, be assigned to his wife or close relative who could then bring the money into Singapore free of tax on the 'received' basis.

Further the word 'income' is not defined in the Act, and it has already been stated earlier that the question whether something is an income or capital receipt is a mixed question of fact and law depending on the circumstances. It has been suggested[82] that money be kept in two separate bank accounts abroad – one for capital and another for income as was the case in *Kneen* v *Martin*[83] where the taxpayer successfully convinced the Court of Appeal that what was remitted was from a capital account and hence capital. If the funds are required in Singapore then the monies in the capital account can be remitted to Singapore and a case could be made for the taxpayer that the monies received in Singapore are of a capital and not income nature. As regards income monies abroad, the taxpayer could legitimately use the monies to discharge business expenses incurred abroad.

A more interesting situation would be where the taxpayer uses his overseas income to purchase business assets (for example plant and machinery used in the taxpayer's business to produce income) and brings these assets into Singapore. In order to tax the receipt the Revenue would have to show that there is an income receipt and this would be difficult since plant and machinery are generally regarded as capital.[84]

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[80] The assignment could, *eg,* be made under a foreign equivalent of section 4(6) of the Civil Law Act (Cap 43, 1985 Rev Ed). Not all rights are of course assignable. See, *eg, Norman* v *FCT* 13 ATD 13, a decision which the learned authors of *Ryan's Manual of the Law of Income Tax in Australia* (7th ed, 1989) suggest at 42 as establishing the proposition "that a shareholder cannot effectively assign his right to receive dividends on shares so as to relieve himself of income tax liability." See also *FCT* v *Everett* (1980) 10 ATR 608, a leading Australian case on assignments by professionals to their spouses of income from a partnership.

[81] *Supra,* note 18, at 659.

[82] Stanley & Clarke, *Offshore Tax Planning* (1986), at paragraph 22, based on the decision of *Kneen* v *Martin, supra,* note 42.

[83] *Supra,* note 42.

[84] Assuming that the Income Tax Board of Review's decision in *X* v *CIT* [1977] MLJ xi that tax is chargeable on benefits in kind whether they are convertible (*ie,* can be turned/converted into money or not) is followed by the courts.

A question central to avoidance is whether the general anti-avoidance provision, section 33, would apply to arrangements made overseas to reduce liability to tax. There is nothing in section 33 and in the Act to suggest that the Revenue is not permitted to take cognisance of transactions carried out abroad in deciding whether it should invoke section 33. Section 33 is so widely drafted that from a plain reading, all that is required for it to apply is that a taxpayer's liability to tax is reduced or negated as a result of some action initiated by the taxpayer. The obvious defence is section 33(3)(b) – that the taxpayer was carrying out a *bona fide* transaction. If a transaction were capable of being explained as a genuine business transaction and not for the purpose of tax avoidance, then section 33 would not apply to allow the Revenue to impose tax or counteract any tax advantage. Section 33 has not been applied by the courts and it is difficult to predict how the courts will apply it. Australian and New Zealand courts have in the application of their anti-avoidance provisions turned their back on the plain reading rule of statutory interpretation and have propounded their own guiding principles.[85] This is because the Australian and New Zealand general anti-avoidance provisions are so generally worded that they could easily apply to many transactions which would not usually be for the purpose of or have the effect of avoiding tax. However, with the presence of section 33(3)(b) it is unclear how the courts would interpret section 33. If the plain meaning is taken, the taxpayer who would *prima facie* be liable under section 33(1) would have to plead the defence of *bona fide* transaction under section 33(3)(b) and the burden would be on him to show that there is a *bona fide* transaction on the facts. It remains to be seen, therefore, whether the Revenue will invoke section 33 against a taxpayer who arranges his affairs such that what he receives in Singapore is deemed not taxable in the ordinary course of events, and how the courts will rule.

Quite obviously, if the word 'received' is read widely enough by the courts, then it is submitted that many avoidance schemes can be caught without the Revenue having recourse to section 33. In this regard *Thomson's*

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[85] One principle is that where there is a choice open to the taxpayer in taking two different courses of action, one of which exposes him to a tax while the other does not, his choice of the second course will not always amount to tax avoidance. This is the choice principle -see, *eg, Clarke* v *FCT* (1932) 48 CLR 56 at 77. Another principle is that in order to bring an arrangement within the anti-avoidance 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." *per* Lord Denning in *Newton* v *FCT* (1958) 58 CLR 1 at 8. This is the predication principle. From Lord Templeman's judgment in *CIR* v *Challenge Corporation Ltd* (1986) 8 NZTC 5001, it would appear that the predication principle is the more likely to be applied in preference to the choice principle. See also *FCT* v *Gulland; Watson* v *FCT; Pincus* v *FCT* (1985) 85 ATC 4765 for the different views expressed on the applicability and relationships between the choice and the predication principles.

case is authority for a wider reading of 'receipt' under the received basis of tax. It will be recalled that the Court there held that receipt for tax purposes was more than just the mere physical bringing in of monies. In *Timpson's* case, the entitlement to monies within the jurisdiction would attract tax liability. Another authority for a wider reading of 'receipt' is *Harmel* v *Wright.* In *Harmel* v *Wright*[86] the taxpayer was domiciled in South Africa and employed by two South African companies at a substantial salary. He arranged for his salary to be invested into a company he owned which issued shares to him in consideration of his investment. This company then lent the money received from the taxpayer to a second company which in turn lent the borrowed money to the taxpayer in the UK. While the taxpayer was the director and shareholder of the first company, he was not a director and shareholder of the second. It was found by the High Court that there was no legal obligation on the taxpayer to invest in the first company, nor for the first company to lend to the second, nor for the second company to subsequently lend money to the taxpayer in the UK. The Court held that the money lent to the taxpayer in the UK was a taxable receipt. Templeman J held that it was not necessary "to strip aside the corporate veil if you find that emoluments, which mean money, come in at one end of a conduit pipe and pass through certain traceable pipes until they come out at the other end to the taxpayer."[87] Applying Lord Radcliffe's test in *Thomson's* case, the question was whether the sums of money received in the UK have been derived from the application of the taxpayer's income in South Africa to achieve the necessary transfers which led to his receiving money from the second company. Since this question could only be answered in the affirmative, the money was taxable. It is submitted that the effect of this decision is that if the income in the hands of a taxpayer can be *traced* to an overseas source of income (which has been diminished as a result of transactions carried out by the taxpayer) then that income is received and taxable.

CONCLUSIONS

The crux of the problem is one of definition – if the 'received' basis covers more than just physical receipt of income (and there is no reason to suppose that it should not) then what is the scope and applicability of the received basis of tax? As was stated earlier, if receipt is connected with control then Indian cases have more precedent value to the Singapore courts. It is submitted that Lord Lindley's view in *Gresham Life Assurance Society* v

[86] ***Supra,* note 73.**
[87] ***Supra,* note 73, at 951.**

Bishop[88] that receipt of something equivalent to or treated as money is a useful starting point for definition. However, if this is so, would the decisions in *Harmel* v *Wright*[89] and *Thomson's* case[90] which construe very widely the meaning of 'received' be persuasive? If the facts in these two cases were to arise in Singapore how and on what basis would the courts decide? As discussed earlier, differences in the wording of the UK and Indian charging provisions indicate that one should seek guidance from UK and Indian cases with some caution.

One way to clear the existing doubts on the scope and applicability of the received basis of tax is for the Inland Revenue Authority of Singapore (IRAS) to issue press statements or other clarifications defining the Revenue practice and their reading of the Act.[91] Taxpayers could on the basis of these Revenue statements arrange their affairs accordingly. This has been done before, in the case of section 12(6) and section 12(7) of the Act, where a press statement was issued on 20 December 1977 by the Ministry of Finance. The Inland Revenue Department has also made many clarifications of tax matters to the Singapore Society of Accountants. In practice, Revenue statements are very helpful because they clarify the scope of tax provisions and allow for more accurate tax planning. The writer recognises the immense difficulties faced by the Revenue in administering the Act which cannot in practice cover all situations that the legislature intended to charge to tax. Furthermore, Revenue statements also have the advantage of giving the Revenue a quick response time to queries from the public. Indeed, it is noteworthy that some Revenue authorities in countries with income tax legislation more comprehensive than Singapore's also issue a greater number of Revenue statements than the IRAS – two obvious examples are the UK and Australia.

One question which could arise is the legal status of these statements. Are these Revenue statements binding on the courts, the taxpaying public and the Revenue themselves? While the Comptroller is empowered under section 5(1) of the Act to duly administer the provisions of the Act, the effect of some of these statements extend beyond what would normally be considered as due administration of the Act. An obvious example would be the press statement on sections 12(6) and 12(7) which define the scope

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88 *Supra,* note 10.

89 *Supra,* note 73.

90 *Supra,* note 12.

91 See *The Sunday Times,* 1 November 1992 and *The Business Times,* 3 November 1992 where it was reported that the Revenue would begin to issue practice statements more regularly to clarify doubtful areas of tax law. The Revenue has begun publishing a newsletter, the *IRAS COMPASS* (the first issue was published on 25 February 1993) which contains, *inter alia,* Interpretation and Practice Notes and administrative statements. These contain the Revenue's interpretation of provisions of tax statutes and administrative requirements of the Revenue.

of these provisions which in turn affect the scope of withholding tax.[92] Where this is the case, it is submitted that these statements will not have the force of law but that they merely reflect the Commissioners of Inland Revenue's views on its scope and applicability of sections 12(6) and 12(7) and the way they are to be administered. As such, these statements cannot form the basis of any submissions to the courts. It is not surprising therefore that English courts have frowned on extra-statutory concessions and Statements of Practices issued by the UK revenue authorities. For example, in *CIR* v *Bates*[93] the House of Lords was faced with a situation where from the plain reading of the statutory provisions a sum would be taxed five times over. Lord Upjohn said, "It is regrettable ... that it has not been thought fit to amend this section. Instead, the Commissioners of Inland Revenue, realising the monstrous result of giving effect to the true construction of the section, have in fact worked out what they consider to be an equitable way of operating it which seems to them to result in a fair system of taxation. I am quite unable to understand upon what principle they can properly do so....",[94] Lord Radcliffe in *IRC* v *Frere* stated that he "never understood the procedure of extra-statutory concessions in the case of a body to whom at least the door of Parliament is opened every year for adjustment of the tax code."[95] The basis of these dicta is founded, it is submitted, on the principle that the executive's province is to enforce laws and not to define its scope which is the province of the legislature. This principle is clearly applicable in the Singapore context.

From the point of legal theory, however, it would certainly be more appropriate to legislate if it is felt necessary that the law should be clarified. This will be a difficult task as it will involve delicate considerations of both economic[96] and political interests since any change of scope of jurisdiction to tax will not only have fiscal implications but also impinge on existing tax treaty arrangements with other countries.

One policy articulated in the 1991 Budget statement is for Singapore businesses to go global and repatriate income earned abroad – hence, the exemption from tax for dividends paid out of foreign income under section 13E of the Act.[97] This has been reinforced in the 1993 Budget where the Minister of Finance has expressly declared the Government's intentions

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92 See sections 45 and 45A of the Act.

93 (1966) 44 TC 225. See also the cases cited in Booth, *Residence, Domicile and UK Taxation* (1986) at paragraph 119.

94 *Ibid,* at 268.

95 (1964) 42 TC 125 at 154.

96 The enquiry here is what Singapore's current economic objectives and priorities are and how the Government, through tax legislation can further these objectives and priorities.

97 See section BE, inserted in the Act by the Income Tax (Amendment) Act 1992 (Act No 2 of 1992).

to externalise the Singapore economy. Tax legislation clarifying the scope of the "received" basis of income tax would certainly be a step towards further implementation of the policy for Singapore companies to globalise since taxpayers would have a clearer picture when overseas income would be taxable when received in Singapore and, therefore, would be able to plan their globalisation efforts accordingly.

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