Singapore Journal of Legal Studies
[1995] 422 – 457

INCOME TAXATION OF THE HUSBAND AND WIFE

This article examines the income tax treatment of a married couple who are living together. The law requires the income of the wife to be aggregated to the income of her husband, upon which it is taxed as the income of one individual in the name of the husband. Although it is possible for the wife to opt for separate taxation, the default position is still based on income aggregation. This article examines the law, the possible reasons for it, and its consequences. The continued use of the income aggregation principle is questioned, and an alternative approach is suggested.

I. INTRODUCTION

THE principle that a woman should lose her legal personality upon marriage has long been abandoned.[1] Section 51(1) of the Singapore Income Tax Act (hereafter "Income Tax Act"),[2] which deems the income of a married woman to be the income of her husband, would seem at first blush, to be a curious relic of a past era. It provides:

> 51(1) Save as provided in subsection (4), the income of a married woman living with her husband shall, for the purposes of this Act, be deemed to be the income of the husband, and shall be charged in the name of the husband and not in her name nor in that of her trustee.

The aggregation of the income of a wife to that of her husband for tax purposes is, not surprisingly, objected to by married women. In theory, their husbands would also not welcome the provision with enthusiasm. While they do not acquire any rights over their wife's income (which of course they should not), they are nonetheless liable for the tax that is due on the aggregated income. The law could therefore also be seen as being unfair to married men. In the context of a marriage where the financial affairs

1 In Blackstone's *Commentaries* (i, 442) the common law position is stated thus: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband".

2 Cap 134, 1994 Rev Ed. References to provisions of legislation here will be to those within the Income Tax Act unless otherwise stated.

of both spouses are wholly integrated, it will be shown that the family unit can (but not always) be put at a financial disadvantage by this rule, and that the issue is not a simple question of discrimination against married women or men. Although the law now allows a married woman who is living with her husband to opt for separate taxation,[3] the option is not available to her husband, and income aggregation under section 51(1) remains the default position. This article examines the issues that arise from section 51. On a broader level, it deals with the question of whether marriage should have any impact on the tax liability of the partners.

II. Income Aggregation and Allowances

Married couples who are not living together are treated as two separate individual taxpayers, and both parties are treated "for all purposes of [the] Act" as unmarried.[4] This means that they will be taxed as two separate individuals, as if section 51 did not exist.

Only married couples who are living together come within the special tax regime of section 51.[5] Under section 51, a married woman is deemed to be living with her husband unless they are separated,[6] or she is and her husband is not resident in Singapore.[7] Ironically, while it may seem to insult the independence and personality of the wife, the husband effectively becomes liable for the tax on the income of his wife when it is added to his income for tax purposes.

A. *Liability of the Wife under Section 51(1)*

When a wife's income is deemed to be the husband's, the tax payable on such income would be the tax liability of the husband. A husband who pays his own tax bill would be discharging his own tax liability, not that of his wife. In general, the tax payable would be based on the combined income as if it had been earned by one individual. There is however, some

[3] S 51(4).

[4] S 51(2)(a).

[5] Non-resident individuals are taxed at a flat rate (s 43(1)(b)), without the benefit of personal allowances (s 39). From this, it would follow that even if s 51 were to be applicable to non-resident married couples the total tax payable would be the same. Most taxable income here would be collected at source (*eg,* see ss 44-45C).

[6] By an order of court, deed of separation (s 51(3)(a)), or under such circumstances that the separation is likely to be permanent (s 51(3)(b)). Separation is legally possible even though the couple live in the same house, if they are in effect under separate households: *Holmes* v *Mitchell* [1991] STC 25.

[7] S 51(3)(c).

scope for using tax credits due to the wife, for example, with respect to tax deducted from dividends and interest at source.[8]

The ITA does not deal expressly with the rights of the spouses *vis-à-vis* each other in terms of tax paid by the husband. The husband does not pay the additional tax as his wife's agent. There is therefore no legal right to reimbursement on agency principles. The amount of the additional tax also cannot be recovered from his wife in a restitutionary claim as her husband does not discharge her legal liability.[9]

An argument can be made that a benefit is conferred upon the wife when her husband pays any additional tax attributable to her income. This would be based on the *proviso* to section 51(1), which provides that some of the tax arising from the aggregation of the wife's income "may, *if necessary*, be collected from the wife, notwithstanding that no assessment has been made upon her". The *proviso* does not make the wife primarily or secondarily liable for the tax; neither does it establish joint liability. It is in fact arguable that the wife is under no liability until a demand is made by the Comptroller.

It would seem that the husband is legally liable for the full amount, but the wife *can* be made to pay the Comptroller the same proportion of the total tax bill of the husband as the ratio of her own assessable income to the combined assessable incomes.[10] The potential liability of the wife is therefore not based on the highest or lowest rates of tax applicable to the husband, and the combined income is effectively treated as one single income, and taxed as such.

If the husband were to be unwilling but able to pay, it may still not be "necessary" to recover the tax from the wife. "Necessary" is associated with necessity and not desirability, convenience or equity. The only obvious situation where it may be necessary to recover tax from the wife would be when the husband is unable to pay. Failure to recover the tax from the wife is not stated to reduce the tax liability of the husband.

Although the payment of any tax which could be recovered from the wife would reduce the potential amount that may be recovered from her, her husband would nonetheless still be discharging his own tax liability with no intention of benefiting his wife.

[8] S 46(1) gives a tax credit for these, and the tax credit can be used when the income is "included in the chargeable of *any* person", which would include a husband. See also s 50 which deals with tax credits generally.

[9] *Re Ward* [1922] 1 Ch 517. In modern restitutionary language, no benefit is conferred upon his wife, who cannot then be said to have been unjustly enriched. This is primarily because no liability of hers is discharged by the payment. The law in this area is considerably more complex than stated here. For a fuller statement, see Goff & Jones, *The Law of Restitution* (4th ed, 1993), Chs 12, 13 and 14.

[10] *Proviso* to s 51(1).

The position of the wife in relation to her husband could be made clearer. This would not be crucial in most cases, but when the marriage does run into difficulties, or if one spouse were to die, questions of primary responsibility and reimbursement may not be academic.

Under section 51(4), a wife (but not her husband) can opt for her income to be taxed separately. Section 51(4) will be discussed in detail later. When a wife does not opt for separate taxation, critics may ridicule the position by stressing that the husband can avoid future additional tax liability only by preventing his wife from earning income or by leaving her. However, the discriminatory nature of the option is not a problem in the vast majority of cases where both are living together. Within a marriage where the partners are living together, there is bound to be some pooling of resources, and it may not matter whose income is used to pay the tax, so long as the total amount of tax payable by both parties after marriage is the same as that before marriage.

B. *Tax Neutrality*

The practical effect of income aggregation is that marriage will not be tax neutral. Marriage would be tax neutral if the total tax liability of the parties is not affected by marriage. This is different from financial neutrality as expenses would no doubt change upon marriage. With income aggregation, the total amount of tax paid by both husband and wife before and after marriage will not be the same. While the actual tax position is more complicated because of a set of possible deductions, it could be said that generally, because of progressive taxation, the aggregation of the wife's income to the husband's would result in her income being effectively taxed at the highest rate of tax applicable to the husband, and if there is sufficient income to move the total income on to higher bands, the additional income would be taxed at even higher rates.[11] This would seem to place married couples at a grave disadvantage, even when their financial resources are fully integrated, because the wife's income would be taxed at lower rates if the income were taxed as her individual income.

Some countries may have a separate set of lower progressive rates for married couples. It is theoretically difficult to formulate a principle for reducing the rates for married couples. If that has to be done, it might be simpler to abolish income aggregation. In Singapore, the same set of rates for resident individuals in the Second Schedule of the ITA is applicable to aggregated incomes.[12]

[11] This applies to residents only. Non-residents are taxed at a flat rate under s 43(1)(b).

[12] See s 42.

Another possible approach to income aggregation is to compute the tax payable by splitting the total income equally between the spouses. The tax payable under such a scheme would be two times the tax payable by an individual taxpayer with such half income.[13] This could however, reduce the total tax payable when there is a significant disparity between the actual incomes, as part of the income from the spouse with higher income, that would otherwise have been taxed at a higher rate, would be notionally transferred to the other spouse and taxed at a lower rate.

C. *Deductions and Allowances*

There are other provisions in the ITA which have an impact upon marriage. Under the ITA, a taxpayer's total income for a year of assessment[14] is called his statutory income.[15] This income is subject to various deductions to arrive at his assessable income.[16] Various further deductions to the assessable income will produce his chargeable income,[17] upon which his tax liability is computed.[18]

The main part of section 51(1) simply refers to the wife's income and not her assessable or chargeable income. Although there is a reference to "charged", it does not refer to chargeable income, but to the fact that the income is to be taxed as the husband's. The wife's total income is therefore added to her husband's income without first being reduced on the basis of the allowed deductions from statutory income for determining assessable or chargeable income. These deductions would be available to the wife if she were not married or living apart from her husband.

The deductions include business losses as well as personal and earned income reliefs.[19] The personal and earned income reliefs are available under section 39(1), and they total a maximum of $4,000 for a healthy individual aged 55 or less, who has at least $1,000 of earned income.[20] Losses are

[13] *Eg*, in France and Germany. See James and Nobles, *The Economics of Taxation* (4th ed, 1992), 134 and *The Taxation of Husband and Wife* (Cmnd 8093, 1980), para 61. This is sometimes referred to as the quotient system, which is used by some States in the USA.

[14] Tax is generally levied on a preceding year basis. The taxpayer's income in 1994 would be taxed in the the year of assessment 1995. See ss 2 and 35.

[15] S 35.

[16] S 37.

[17] Ss 38 and 39.

[18] This is basically by reference to tax rates: s 42(1)(a), on a progressive basis, for resident individuals; s 43(1)(b), for a non-resident individual, on a flat rate of 27% from the year of assessment 1994.

[19] See ss 37 and 39(2) for other deductions that would be available.

[20] $3,000 in personal relief and $1,000 for earned income relief. The earned income relief increases with age and incapacity.

deducted under section 37, from the statutory income of a person if they are a "loss incurred by *that person*". Any past trading losses of the wife are therefore not deductible against the income of the husband when her income is added to his. As the relevant chargeable income is that of the husband (with his wife's income added), a married couple taxed under section 51(1) would only have one set of personal and earned income reliefs based on the circumstances of the husband. They would collectively lose one set of personal and earned income reliefs on marriage, and the wife's income will effectively be taxed at higher rates.

The only obvious tax related gain to the husband would seem to be "wife relief", which is available when a husband has a wife "living with *or* maintained by him".[21] This is available under section 39(2)(a), and the maximum amount is $1,500, even if there is more than one lawful wife.[22] This would hardly alleviate the effect of higher tax rates and the loss of an average of $4,000 in personal and earned income reliefs.[23]

With income aggregation, the total amount of tax payable will be higher than if the two incomes were taxed separately. If this happens, it can be said that additional tax is payable because of marriage. This is sometimes referred to as the tax penalty of marriage. When the law provides for a tax penalty upon marriage, it could be said that the couple would be better off, from the tax point of view, if they cohabited without marrying.

In theory, the tax penalty could be negative, in that the total amount of tax payable after marriage may actually be less. In Singapore, this would depend on various factors, including the allowances or deductions available. It could occur for example, with a woman who has no income both prior to and after marriage. No income would then be added to the husband's income but the husband would have an additional deduction for maintaining a wife, and his chargeable income would be reduced. If the husband were to maintain his wife's parents and siblings, the reduction would be even greater as there are additional allowances for them.[24]

As far as marriage *per se* is concerned, the law would generally produce a positive tax penalty if separate taxation is not opted for by the wife. This would be due to income aggregation and the loss of one set of personal and earned income reliefs, with limited mitigation from wife relief. If other allowances that may be claimed are taken into account, it becomes more difficult to generalize. These deductions depend on other requirements, and they cannot be claimed on the basis of the fact of marriage alone.

[21] Emphasis added. The requirements are disjunctive, and are based on facts in the year preceding the year of assessment.

[22] *Proviso* to s 39(2)(c). This limitation also applies to a married man who is paying alimony to a former wife. The maximum deduction is $1,500.

[23] There is an additional relief of $3,500 for maintaining an incapacitated spouse: s 39(2)(ca).

[24] Ss 39(2)(f) and (g).

For married couples, there are several other possible deductions that can have an impact on their tax position. These are mainly in sections 39(2) and (7), and they include deductions for maintaining an unmarried child (child relief);[25] deductions for premiums paid on life policies of the husband or wife;[26] and deductions for maintaining some dependents of the husband and wife.[27] Child relief can also be claimed if the couple are divorced or separated.

Within the ITA, there are several other provisions based on a desire to promote specific social policies, which allow for very generous deductions and tax rebates. These provisions can have a very significant effect on some families. For example, in order to encourage the birth of more children, a very generous tax package was devised.

Multiple $20,000 tax rebates are available in some situations under section 42A, basically to married couples for having second, third and fourth children. $20,000 alone is more than the yearly income of many people in Singapore. In theory, for a top rate taxpayer with enough income above the top band who can make full use of a $20,000 tax rebate in one year, it could be equivalent to a massive single income deduction of up to $66,666. The potential benefits here dwarf the deductions and allowances described earlier.

Some of the tax rebates can be divided between the spouses, for example, tax rebates for having a second, third and fourth child in a family. Under section 42A(1)(a), a $20,000 tax rebate is possible with respect to a second child if the mother is below 28 years of age at the time of the birth.[28] This can be apportioned between the spouses in such proportions as they may agree, or in the absence of such agreement, as appears to the Comptroller to be reasonable. Under section 42A(2), with respect to a third or fourth child, there are similar tax rebates (but without any age requirement) that can also be divided between spouses;[29] together with an additional tax rebate equal to 15% of a woman's assessed earned income. The additional tax rebate can only be enjoyed if the wife were to opt for separate taxation,[30] and it would not be worth anything unless the wife has sufficient income to incur tax liability.

Some other benefits cannot be divided, and they can effectively only be enjoyed by a wife who opts for separate taxation, and who has enough

[25] S 39(2)(d); other details of which are in the Fifth Schedule, ITA.

[26] S 39(2)(e). This is subject to cash limits.

[27] Ss 39(2)(f) and (g).

[28] The rebate varies with age: $15,000 if aged below 29 at the time of birth, $10,000 if below 30 and $5,000 if below 31.

[29] S 42A(2)(a).

[30] S 42A(2)(b).

income to absorb them. For example, paragraph 7 of the Fifth Schedule allows a married woman whose income is assessed separately, to claim additional deductions if she has passed at least there subjects at General Certificate of Education or higher level. Section 39(7)(a) allows a wife who is separately taxed to enjoy a deduction equal to twice the amount of levy imposed under the Employment of Foreign Workers Act paid in respect of one domestic servant.[31]

Some of these provisions can produce a substantial negative tax penalty. In fact, couples who are within the section 42A requirements and who have significant incomes may not have to pay any income tax for a few years. However, it is important to point out that marriage alone does not trigger these allowances. They are also not designed to alleviate the implications of a positive tax penalty, and are primarily instruments for promoting national social policy, namely, to encourage those who can afford it to have more children. In particular, they target women with at least a certain level of education, and those with high income, to work and to have more children while they are relatively young.[32] Such incentives in the form of tax rebates and deductions are probably chosen over direct cash grants and assistance.[33] Unlike simple deductions for maintaining unmarried children under section 39(2)(d), some of these generous tax rebates cease to be available upon divorce or the annulment of the marriage.[34]

D. *Deemed Income from Property*

There is one other tax provision that can place a married taxpayer at a tax disadvantage. Under section 10(1A), the "net annual value of property used by or on behalf of the owner for residential purposes" (and not for the purposes of gain or profit) is deemed to be a profit arising from property under section 10(1), the basic charging provision of the ITA. This means that when the requirements are satisfied, the owner is assumed to receive a notional income for income tax purposes, with tax being payable on income that was never earned. In theory, this would tax income that *could* have

[31] Cap 91A, 1991 Ed. This effectively means that a wife who does not work is less likely to be able to absorb the deduction. It is also equivalent to a discount on the levy for those families where the mother is employed, with the actual cash value of the discount increasing with her income.

[32] In general, they encourage married women to work, and to have more children. The allowances can be carried forward, not indefinitely, but for different fixed periods, which can even be cumulative, depending on the circumstances: s 42(2A)(3).

[33] A $20,000 tax rebate is equivalent to a $20,000 direct cash grant when the relevant income can fully absorb it. It is worth progressively less to those with less chargeable income, and nothing to those with no chargeable income.

[34] S 42A(3)(e). See s 42A(3)(d) for the effect of adoption of the child.

been earned by leasing the property instead of using it for residential purposes. This provision is independent of property tax under the Property Tax Act,[35] which imposes tax on the basis on of the annual value of the property.[36]

It is clear that an owner who chooses to live in a property that he owns would fall within its scope as it would be "used by ...the owner for residential purposes". Although "used ... on behalf of the owner for residential purposes" is not as clear, it is assumed to cover situations where someone else is allowed to live in the property. This is an unusual use of the English language as a good friend or parent living in one's property would not, in ordinary usage, be said to be using it on one's behalf. However, the thrust of the provision does seem to be directed at forgone rent, and no other sensible interpretation can be offered.

A property that is left empty would not be "used by or on behalf of the owner for residential purposes", and there will be no deemed income under section 10(1A). If the property were to be used rent-free by a friend for non-residential purposes, there would also not be any deemed income because it would not be used for "residential purposes".[37]

The application of section 10(1A) is subject to an important qualification. One property which is occupied for residential purposes by the owner is exempted, by a *proviso*, from the basic deeming provision in section 10(1A)(a). This is however, subject to a limit of $75,000,[38] and if the net annual value of such a property is greater, the difference would be deemed income under section 10(1A)(a).

Section 10(1A) would not be relevant here if not for a stipulation that for the purposes of the proviso, "any property of a married woman living with her husband shall be deemed to be owned by the husband."[39] This is similar in tone to section 51(1). The wife who is living with her husband would therefore never be able to qualify for the exemption herself, and her husband can have, as any other individual, only one property within the exemption. The result is that between a husband and wife who are living together, only one property can be subject to the exception, even if for

35 Cap 254, 1985 Rev Ed.

36 Under s 9 of the Property Tax Act, owner-occupiers would enjoy a lower rate of tax. Under para 5 of the Property Tax (Rate for Owner-Occupied Residential Premises) Order (S 216/90), the preferential rate shall, when the owners are married, "apply only to one owner-occupied dwelling house whether it is owned jointly by the owners or separately by either one of them." There are exceptions to this, in para 6, which include cases where a man has more than one lawful spouse.

37 *Eg*, for the storage of goods. There would however, still be property tax.

38 This is the current limit: see S 303/81. The limit is subject to review by the Minister.

39 This is from the year of assessment 1980. The s 51(3) definition of a married woman living with a husband is for the purposes of the Act, and it would therefore apply here.

example, both parties owned separate properties prior to marriage, and they choose to keep both as residences for the marriage.

While the drafting of section 10(1A) does not state so expressly, any deemed income would be the deemed income of the owner of the property. Under the scheme, the property of the wife is deemed to be that of her husband only for the purposes of the *proviso*, and not the whole section 10(1A). The *proviso* does not therefore, deem the notional income of the wife to be the income of her husband for tax purposes. Section 10(1A)(a) would operate on the property of the wife and the deemed income would be the income of the wife. However, any such deemed income of the wife could become deemed the income of her husband under section 51. Section 51 refers to the "income of a married woman", and there is nothing to prevent deemed income of the wife from coming within these words.

The *proviso* to section 10(1A) does not require the property which is occupied by the owner for residential purposes to be the owner's only or exclusive residence. Therefore, in theory, a couple who cohabit outside of marriage at two separately owned properties could have two properties exempted by the *proviso*. This would seem to penalize marriage from a tax point of view. It will of course only have an impact on individuals who are considerably wealthy.

There is some convenience in the deeming rule when property is jointly owned by husband and wife, but the deeming provision goes beyond such a situation. The basic idea behind section 10(1A) today is difficult to appreciate, especially when there is property tax based on parallel principles. A full examination of it would be beyond the scope of this article. In addition, a discussion of it would not be complete without a discussion of property tax as well.

III. Relationship with Year of Assessment

The ITA does not directly deal with the position of marriage in relation to taxation on a preceding year basis. This can be a problem because a taxpayer's status, in terms of being a married woman living with her husband, may change within the basis year and the year of assessment. For example, issues can arise in relation to (1) a person who is a married woman living with her husband at the time of assessment, in respect of income earned when the person was not a married woman living with her husband (*eg,* before marriage); and (2) a person who is not a married person living with her husband at the time of assessment, in respect of income earned when she was a married person living with her husband (*eg,* before separation).

In the first case, the income would have been earned by an unmarried woman, but in the relevant year of assessment, the taxpayer is a married

woman.[40] In the latter case, the income is earned by a married woman, but she is not a married woman in the relevant year of assessment. In addition, if she were to die in the following year, there will be no possibility of an option for separate taxation.

Section 51 refers to the income of a "married woman", and it is deemed to be the income of "her husband" to be charged in the name of her husband. The basic question is whether the references to status are to the facts when the relevant income was earned or the time of assessment.

Prima facie, section 51 should speak from the time of assessment, when income is actually charged. The deeming provision is for no other purpose, and the husband acquires no right over the income when it is earned. Under this interpretation, once the woman is a married woman living together with her husband at the time of assessment, her income in the preceding basis year would be aggregated to her husband's. However, this has the possibly unusual result that income earned when the woman was not married would be deemed to be her husband's, although the deeming only occurs when she is in fact a married woman living with her husband. At the other end, for example after separation, income earned in the year when the couple was still living together would fall outside the deeming provision. This would be due to her not being a married woman living with her husband at the time of assessment. The results would be quite sensible if administrative convenience were the main consideration, but might perhaps be the opposite of what one might expect if tax avoidance were the primary consideration.[41] However, the rule would be relatively easy to apply under this interpretation. There is also another positive result here in that a woman will not be able to pass a tax bill (or at least a legal problem) to her estranged husband by not opting for separate taxation. This interpretation also has the benefit of not creating a problem for the husband if his wife were to die as he would cease to be liable for her income tax on her death.

If the section were to refer to status when the income is earned,[42] the position is more complicated, and requires a splitting of some years into two parts. In the first year of assessment after marriage (or living together), the income of the previous year would need to be split up. The woman's income prior to marriage (or living together *etc*.) would not be deemed the husband's, but income after the marriage would be deemed the husband's. This is complicated as the wife's income would have to be separated into two parts by a specific date, but it may be sensible, depending on one's

[40] For the sake of brevity, the language used in this discussion is based on married and unmarried women. The discussion also applies to a married woman who is not living with her husband.

[41] *Infra*, Part VI.

[42] See Pok & Hong, *Singapore Taxation* (2nd ed, 1989), at 271-2.

justification for income aggregation. At the other end, the income splitting approach is required again. The wife's income after separation would be outside the scope of section 51. Income earned prior to the separation or death would be income earned by a married woman, and therefore deemed the husband's even when taxed in the year when they are separated. Here, the wife could create a legal problem for her estranged husband by refusing to opt for separate taxation. Also, should the wife die, the husband would still be liable in the next year of assessment for income earned by her prior to her death. It is not clear if the wife's representatives can opt for separate taxation or if the Comptroller should seek the wife's share of the tax from her estate directly.

In terms of simplicity and potential fairness, the interpretation based on reference to married status at the time of taxation (*ie,* at the time of assessment), is to be preferred. It will be seen later that this can be reinforced by the fact that most of the possible policies behind section 51(1) are in fact avoidable by separate taxation at the option of the wife.

IV. Tempering the Aggregation Principle

It does not need to be strenuously argued that under present social values, section 51(1) would be unacceptable if it applied without exception. In fact, it was observed in England as early as 1947, that such a scheme would not have been possible had there not been a history of the wife's subordination to the husband.[43] Income aggregation can work unfairly, and couples with substantial individual incomes would be better off in tax terms if they were to cohabit outside of marriage, whether or not they integrate their financial affairs and resources.

A. *Former Law: Old Section 51(4)*

Not surprisingly, the effect of the aggregation rule has been tempered by legislation which allows the wife's income to be taxed separately. Under separate taxation, the wife becomes personally liable for the tax on income that is assessed in her own name, and such income would not be aggregated to her husband's. This was first achieved by optional separate taxation, provided for by sections 51(4) and 51(5) (hereafter "old section 51(4)"):

> 51(4) A married woman living with ther husband may elect to be chargeable in her own name on her earned income and on her investment income (that is to say, income other than earned income) if the

[43] G Williams, "Legal Unity of Husband and Wife", (1947) 10 MLR 16, at 29.

> Comptroller is satisfied that such investment income is attributable to assets and investments acquired by her from her earned income.
>
> (5) For the purpose of subsection (4), the earned income of a married woman shall include all income earned by her from any trade, business, profession or vocation carried on by her separately from her husband, and also all income earned by her in the exercise of her profession as a duly qualified accountant, advocate and solicitor, architect, dentist, engineer, medical practitioner or pharmacist, and any other profession approved by the Minister and notified in the *Gazette*, whether as an employee or partner of her husband, but save as so provided shall not include any income derived by a married woman, whether as an employee or not, from any trade, business, profession or vocation carried on by her husband either on his own account or as a partner.

Under these subsections, separate taxation is at the option of the wife only. The option generally only extends to income that the wife earns herself (*ie,* "earned income", or income other than investment income),[44] whether as an employee or by exercising a trade, business, profession or vocation. Investment income can be separately taxed only if it is derived from capital formed by her own earned income. The onus is on the wife to convince the Comptroller of this, and if the salaries of the two spouses were to go into a joint account or be mixed in some other way, it will be very difficult to trace her income to specific assets.

There cannot be separate taxation of any income derived by a married woman from any trade, business, profession or vocation carried on by her husband either on his own account or as a partner, except when it is with respect to a profession that is listed in subsection 5. The impact of this limitation can be significant when a wife is in business with her husband, or is employed by her husband's business or firm. Any renumeration to the wife from the such business cannot be separately taxed, even if they are no higher than market rates. It would not help to take earnings by way of higher dividends (as a shareholder) because it would be investment income, which cannot be separately taxed unless the capital investment were purchased with the wife's earned income.[45]

The old section 51(4) encourages some separation of financial assets, as well as separate bank accounts. A married couple would also be encouraged to keep part of their financial affairs separate. If the husband's highest marginal rate of tax is higher than his wife's, there is a subtle

44 Defined in s 2.
45 There may of course also be tax avoidance within the meaning of s 33.

incentive to draw on the husband's bank account first, in order to preserve the wife's earned income as capital. Windfalls like lottery winnings, and capital gifts to the wife which subsequently produce income or are deemed to do so under section 10(1A), are not within the option, and subsequent income from such cannot be separately taxed. This would be difficult to defend as they may have no connection whatsoever with the husband. A literal reading of subsection 4 would also require income bearing assets that are owned by the wife prior to marriage to be "acquired by her from her earned income" if income from such are to be separately taxed.

Under the scheme for separate taxation, the wife would be treated as an individual, with the full benefit of allowances like personal and earned income reliefs. However, the wife relief of $1,500 which is available to the husband would be reduced by the amount of the income charged in the wife's own name.[46] So if $1,500 or more were to be charged in the wife's name, there would be no wife allowance for the husband.

The reference is to income "chargeable in the wife's own name". This would seem to be refer to chargeable income[47] rather than statutory income[48] or assessable income.[49] However, the wording does not actually refer to the chargeable income of the wife, and it actually mirrors that part of section 51(4) which refers to the income of a wife which is allowed, at her option to be charged or taxed in her own name. It therefore refers to the sum of the income of the wife which is separately taxed under section 51(4). On this interpretation, the wife relief is reduced by the amount of income which is taxed separately under section 51(4). So for example, a wife with $1,000 in total income, who opts for separate taxation, would not have any chargeable income as defined by section 38 because her personal allowance of $3,000 would allow it to be received tax free. However, $1,000 would be "charged" in the wife's name under section 51(4), and the wife relief for the husband would be reduced to $500. As $1,500 is not a large amount of income for one whole year, many cases of separate taxation will result in the complete loss of the $1,500 wife relief for the husband.

The generally assumed interpretation of section 51(4) is that the option is for each year of assessment, and there will be income aggregation in the following year if the wife does not opt for separate taxation again. This interpretation can be supported because income tax is charged yearly. Also, there is no provision for the revocation of an option, and it is very unlikely that an option could be intended to be irrevocable.

[46] S 39(2)(a).
[47] S 38.
[48] S 35.
[49] S 37.

Even with separate taxation, some income of the wife may still be aggregated, and there could still be a tax penalty upon marriage. The penal effect of progressive taxation would however, be avoidable, but only to the extent of earned income.

On the old section 51(4), one could conclude that those without financial advice or personal knowledge of the law could pay more tax than necessary. This is not a desirable state of affairs for a law of wide application to ordinary people.

B. *Present Law: New Section 51(4)*

From the above discussion, it is clear that the old section 51(4) was not entirely satisfactory. This would not only be from a feminist point of view as the overall nett income of the family could be affected. In his budget speech for the financial year 1993, the Minister for Finance announced a proposal for the "separate assessment for women on all incomes".[50] The Income Tax (Amendment) Act of 1993[51] gives effect to many of the proposals in the budget speech, including the reform of the tax treatment of the income of married women. The reform was not achieved by the abolition of the aggregation rule altogether, but by extending the restricted set of income that a woman could elect to be separately charged or taxed to all "her income", with no distinction between earned income and investment income. Sections 51(1), (2) and (3) were not amended. Instead, subsections (4) and (5) of section 51 were deleted by the amending legislation, and a new subsection (4) substituted.[52] The new subsection (hereafter "new section 51(4)") provides as follows:

> 51(4) A married woman living with her husband may elect to be chargeable in her own name on her income, including any profits arising from any property owned by her which is deemed to be owned by her husband under the proviso to section 10(1A); and where she so elects all her income shall be so chargeable.

Under the old section 51(4), the income charged in the wife's own name may not be her full statutory income. Under the new section 51(4), there are no restrictions, and it would now cover her full statutory income. Although

50 *Straits Times,* 27 Feb 1993, at 8.

51 Act 26/93.

52 S 34, Income Tax (Amendment) Act 1993, with effect from the year of assessment 1994 (s 1(5)). Income tax is generally levied on the income of the preceding year. Income earned in 1993 would be taxed in the year of assessment 1994.

all the wife's income can now be separately taxed, the basic default scheme of income aggregation in section 51(1) remains.

Since all the wife's income can now be separately assessed if she were to opt for separate taxation, one could also describe the current tax position of married couples who are living together as being based on either (1) separate taxation at the option of the wife; or (2) income aggregation at the option of the wife. This is because choosing not to elect for separate taxation could be an "option" for the default scheme of income aggregation. This combination of optional approaches is unusual as the mere abolition of income aggregation alone would have produced a simpler scheme. It should be questioned why married women should still be required to opt for separate taxation at all.

If the effect of marriage alone were considered (*ie*, ignoring other allowances that may be available on other factual requirements), marriage could be largely tax neutral, but only at the option of the wife.

The distinction between earned income and unearned income is still relevant even though section 51(4) does not now refer to them. References to the earned income of a wife in provisions like section 42A and paragraph 7 of the Fifth Schedule of the ITA, as indeed the definition itself in section 2, remain as before.

The position with respect to section 10(1A) is indirectly affected by the amendment. Section 10(1A) itself was not amended, and the wife's property remains deemed (for the purposes of the proviso to section 10(1A)), as being owned by the husband. There can therefore, as between a married couple living together, still only be one property exempted from the deemed income from property rule. The amendment only allows any deemed income (under section 10(1A)(a)) of the wife to be taxed, at her option, as her own income and not that of her husband. As argued earlier, it is section 51 which deems the deemed income of the wife to be that of the husband, so the reference to section 10(1A) in the new section 51(4) is strictly unnecessary. The new section 51(4) mitigates the effect of progressive taxation only if the wife were to opt for separate taxation, but even then, it does not make up for the loss of up to an effective deduction of $75,000 under the *proviso* to section 10(1A). Relief for two properties would be possible only if the couple were to separate or divorce. The amendment therefore does not remove all the obvious tax disadvantages arising from marriage. The income aggregation principle is still the basic default principle. On the whole, the amendment does rather less than some may have hoped for.

V. The Choices

For most married taxpayers who are living together, the foremost consideration would not be an abstract insult to the independence of the wife, but the minimization of overall (and not individual) tax liability. It is common for married couples who are preparing their first income tax return to be puzzled by the law, and to seek advice on whether or not to opt for separate taxation. There is no single income level past which all wives should opt for separate taxation. It is far from ideal for a taxpayer to be asked to choose in such circumstances.

Under the ITA, the married couple have to first consider whether the wife should opt for separate taxation. Then they have to consider whether some of the available allowances should be claimed wholly by one party or by both parties; and if by both, the respective shares if permitted. The decisions are not clearly separable as some allowances are defined in such a way that they cannot be enjoyed without separate taxation.

A. *Separate Taxation*

If most of the other situation specific allowances were to be ignored, the decision would revolve around the relationship between the $1,500 wife relief[53] and the personal and earned income reliefs.[54] At this stage, a taxpayer's tax threshold is assumed to be defined by the sum of his or her personal and earned income reliefs.

From what has been set out so far, it would seem that income aggregation under section 51(1) would generally be disadvantageous to the married couple, and that separate taxation should usually be beneficial. While this is true if both the husband and wife are working, it is not necessarily so when only one party is working, and when both have very low incomes.

If the husband has no income at all, income aggregation could actually be beneficial as there will be a full $1,500 deduction in the form of wife relief.[55] Only the wife's income would be effectively taxed, and it will be reduced by one set of personal reliefs[56] plus an additional $1,500. The chargeable income of the husband will be less than if the wife were taxed separately.[57] It will also not be taxed at a higher rate than if she were taxed

53 S 39(2).

54 S 39(1).

55 The husband cannot be said to be maintaining his wife here, but under s 39(2)(a), the allowance is available when the husband has a wife "living with or maintained by him".

56 Assuming that both spouses would have the same amount of personal and earned income reliefs.

57 The position is more complicated if the sum of the wife's personal and earned income reliefs is higher than her husband's.

separately. Separate taxation would not be beneficial here if the wife has income above her own threshold because the wife relief would be useless to the husband, and cannot be transferred to the wife. This example of a negative tax penalty is however, an uncommon fact situation as the husband would have higher income in most cases in Singapore.

If the husband has income which is lower than his own tax threshold, income aggregation will not mean additional tax liability so long as the sum of the income of both spouses does not exceed the tax threshold of the husband by more than $1,500. This is because an excess of up to $1,500 can be effectively neutralized by the wife relief. In such a case, there would still not be any tax liability upon aggregation. Once above this level, income aggregation would mean tax liability. Whether separate taxation would be beneficial will depend on the wife's income. If the wife's income is below her own tax threshold, there will be no tax liability under separate taxation. If she has income above her tax threshold, it would be reduced by her own personal and earned income reliefs under separate taxation, and the tax rates applicable can be no higher than if it were taxed as the husband's income.

The discussion from here focuses on situations where the husband has more income than his own tax threshold. Lone references to income are to the income of the wife.

If the wife has no income, the husband would enjoy the benefit of an additional $1,500 allowance in the form of wife relief whether or not there is separate taxation as the wife relief would not be reduced or lost even under separate taxation. This is because zero income will be charged in the wife's name and the wife relief will be reduced by zero even under separate taxation.

As the wife's income increases from zero towards $1,500, the wife relief would decrease accordingly with separate taxation. However, every dollar of reduction in the wife relief will not mean more tax for the husband because every dollar that is taxed separately in the wife's name will cease to be taxed as the husband's income. Put another way, it can be said that the first $1,500 of income from the wife which is aggregated to her husband's will not result in additional tax liability because it will be offset by the wife relief. Income of up to the full $1,500 would not result in tax liability for the wife under separate taxation as it would be below her own tax threshold. This means that for income up to $1,500, it does not matter whether there is separate taxation or not.

For income above $1,500 and below the wife's tax threshold, the position is different. Every additional dollar aggregated to the husband's income will be taxed at his highest tax rate and beyond. It will not be offset by wife relief, which would already have been exhausted. This is income that would not result in tax liability if it were taxed as the wife's income because it is still below her tax threshold. Consequently, every dollar that is

aggregated between $1,500 and the wife's tax threshold would result in tax liability that could be avoided altogether by opting for separate taxation. A wife with income above $1,500 but below her own tax threshold should therefore opt for separate taxation.

For income above the wife's tax threshold, income aggregation would result in tax liability at the husband's highest rate and beyond. Separate taxation would result in tax at the rates applicable to the wife, which can be no higher than that applicable to the husband with incomes aggregated. Consequently, any income past the wife's tax threshold would result in at least as much tax (more tax if the husband is already past the first 2.5% tax band), than if it were taxed as the income of her husband. Separate taxation would therefore result in less overall tax liability. The greater the husband's own income, the higher the tax rate that will be applied to the wife's income because her income is effectively taxed upwards from the highest rate of the husband. Considerably more tax than necessary would be paid if separate taxation is not opted for.

The above analysis does not cover all the possible scenarios. It shows that it is not possible to give any single piece of advice to everyone other than to compare the tax payable with income aggregation to that under separate taxation. However, in general, when both spouses have income above their own tax thresholds, less overall tax would certainly be payable under separate taxation. Also, in most situations, separate taxation would be either neutral or beneficial, with income aggregation being disadvantageous. A relatively low monthly income will bring one past the tax threshold. As far as individuals who are likely to consult an accountant or lawyer are concerned, it is very unlikely that income aggregation would be beneficial.

The financial cost of opting for separate taxation in the wrong circumstances is likely to be relatively small. However, substantially greater tax liability could be incurred if separate taxation is not opted for when it would be beneficial.

The actual position for specific couples is potentially much more complicated. The tax threshold has so far been confined to personal and earned income reliefs, but there are actually many other allowances.

B. *Allowances*

Some allowances are personal while some others can be shared by mutual agreement.[58] Some can only be claimed by one individual, and the parties would have to decide who should make the claim.[59] From the financial point

[58] *Eg*, s 39(2)(da).
[59] *Eg*, ss 39(2)(f) and (g).

of view, these should be assigned in the most tax efficient manner, basically to the party who would otherwise have greater chargeable income.

Sharing deductions that can be shared may seem fair to some from the point of view of equity, but it may not achieve overall tax minimization.[60] It is not inconceivable that even intelligent people would specify an equal share for each when asked to do so in their returns.

There are also allowances that can only be claimed by a wife, which would be lost if she does not opt for separate taxation.[61]

To complicate matters, some deductions like child relief, can be split between spouses, not by agreement but at the discretion of the Comptroller, in such proportion as appears to him to be "reasonable".[62] This power is extremely difficult to define from a conceptual point of view. As tax liability is involved, what is reasonable may vary, depending on the perspective. To the taxpayers, it would be reasonable if it results in the lowest possible tax bill. What would be reasonable for the Comptroller, whose main duty is to assess and collect tax under the ITA,[63] is more difficult. A cynical view would require the Comptroller to ensure maximum tax revenue. However, it is important to point out that the Comptroller may have to apportion some deductions for couples who are divorced or not living together, and who may not be on speaking terms. In such cases, "reasonable" would probably mean equal sharing if there is sufficient income on both sides to benefit from them. In the case of a married couple who are living together, there should be no problem in maintaining that it should be reasonable to allocate the deduction in a manner that would best benefit the couple collectively. This can be illustrated with the example of an uneducated married couple who would otherwise have chargeable incomes of $4,000 and $25,000 respectively, with a potential allowance of $3,000 from two children ($1,500 each). If each spouse were to be taxed separately and given half of each $1,500 allowance, the total reduction in tax would be $202.50 ($37.50 + $165). If the allowances were to be given only to the spouse with higher income, the tax reduction would be $330. This is because the other spouse is at a much higher 11% tax band than the 2.5% applicable to a chargeable income of $4,000.

[60] Tax rebates under s 42A are different. The ability to fully absorb the rebates within the maximum allowed time should be considered. This can be important especially when there is a possibility of the mother not working for a few years as it would mean no income and therefore tax liability to absorb the rebates. Once again, the law can be seen as being difficult for lay people to make the most tax efficient choices.

[61] *Eg*, see Fifth Schedule, para 7, ITA and s 39(7)(a).

[62] Examples include relief for unmarried children under s 39(2)(d) as defined in para 5, Fifth Schedule, ITA (qualified by para 6); and relief for maintaining a dependent under s 39(2)(g).

[63] S 5(5).

Some allowances, for example, for maintaining an aged parent, may apply to both husband and wife, but only one party may claim an allowance for each aged parent.[64] If there are two aged parents in the same household within the allowance criteria, there is a potential allowance of $7,000 (2 x $3,500). Taking the same married couple again as an example, it is clear that in order to maximize the tax reduction, the party with higher income should claim both allowances as the resulting tax reduction will be $710. If each party claimed one allowance each, the total reduction would only be $472.50 ($87.50 + $385).

C. *Reporting and Choices*

Relevant allowances can effectively raise an individual's tax threshold. In addition, across the board tax rebates that are given from time to time by the Government can also affect the picture. Considering everything discussed so far, a fully considered tax minimizing choice is not likely for many ordinary people.

As this is a basic law which affects very ordinary people, this is not the ideal approach. It may not be satisfactory to maintain that people will learn after the first year, that friends will be able to advise, or even that it is quite a simple choice as most will benefit or be no worse off under separate taxation. The ideal situation must be that which only requires a married couple who are living together to simply fill in the relevant details, with the law fashioned in such a way that they do not need to make any choices, especially with technical terms and potentially complicated permutations.[65] Under the current system, it is common for newly married couples to ask friends what they should do.

Although most married couples who are living together would be more concerned about their overall tax liability, it is possible that some may see the option as an assertion of their independent status from their husbands. From a psychological point of view, the law may also be seen by some as distinguishing women who are dependent and women who are not dependent on their husbands. None of these can be described as even being remotely intended by the legislature, but it cannot be doubted that these possible effects are not desirable.

[64] S 39(2)(f).

[65] This argument applies to the taxation of most individuals generally, who would only have employment income and a small amount of investment income.

VI. RATIONALE

It would be profitable to examine the reasons for the aggregation principle, which still survives in Singapore. The aggregation principle itself can be traced back to ancient English legislation. In 1799, when income tax was introduced in England, a married woman's income was directed to be "stated and accounted for by her husband".[66] In 1806, the aggregation of income rule was established by a provision that the profits of a married woman living with her husband "shall be deemed the profits of the husband".[67] This is the same basic formula used in the ITA.

These developments took place within a social environment in Europe where women had a very different role from today. Yet the basic structure survived, even in the UK until very recently. The issues have been raised many times, and the legislative responses from time to time have not satisfied all critics at each turn.[68] Without a detailed examination of the issues, many would undoubtedly wonder why spouses should not simply be taxed as two separate individuals.

In the United Kingdom, complete separate assessment was announced in 1988 and implemented only in the tax year 1990-91. This was basically achieved by effectively repealing the legal provision that deemed a wife's income to be that of her husband for income tax purposes.[69]

The taxation of husband and wife has also been a problem in other countries, including the United States, where various solutions have been proposed and attempted.[70] Changes have usually been driven by prevailing social views. For political reasons, some reforms have been structured to prevent existing taxpayers from becoming worse off. There is probably no single solution that will satisfy everyone. A safe approach is to reform the

[66] See "The Taxation of Husband and Wife" (Cmnd 8093, 1980), 58. Appendix 2 sets out the historical development of the legal position in England.

[67] *Ibid.*

[68] See "The Taxation of Husband and Wife", *supra*, note 66, at 58 for the history until 1980. There were various changes through the years, including Royal Commissions in 1920 and 1954. In 1977, the Equal Opportunities Commission asked for reform. In 1986, "The Reform of Personal Taxation" (Cmnd 9756) was published, which led to the most recent changes in 1988 in the form of the Finance Act 1988 which by s 32, effectively abolished the aggregation rule in s 279 of the Income and Corporation Taxes Act 1988. These changes took effect in the year of assessment 1990-91. For a comment, see [1988] BTR 224.

[69] S 32 UK Finance Act 1988, which states that s 279 of the UK Income and Corporation Taxes 1988 (which aggregates a wife's income to that of her husband if she is living with him), shall not have effect from the year 1990-91 and subsequent years of assessment.

[70] See Bittker, "Federal Income Taxation and the Family" (1975) 27 Stan L Rev 1389; "The Case for Mandatory Separate Filing by Married Persons" (1981) 91 YLJ 363; Petersen, "The Deduction for Two-Earner Married Couples – The Solution to the Marriage Penalty?" (1982) 9 Ohio LR 321.

law in such a way as not to prejudice anyone. However, when reform is guided by a desire to ensure that no one is worse off, the purpose of the reform may not be fully realized.

A. *Total Neutrality*

There is no incontrovertible rule that marriage should be totally tax neutral. If the family unit is to be encouraged and supported by the State, deductions tailored to assist in the financial aspects of the maintenance of a family should be welcomed and supported. The exact levels of these allowances would of course be debatable, but the existence of some reliefs would find broad support in Singapore. However, such allowances would not support a positive tax penalty.

Any such allowances must of course be seen as only part of a larger set of measures to support the family. Tax-based reliefs would not reach all families.

If the effect of marriage alone were considered, there is much in the view that a couple should not be better off, from a tax point of view, by cohabiting outside of marriage; or be worse off by marrying. Also, under current social views, many who have sufficient income to come within the tax net, may feel that both spouses should be taxed as two separate individuals. This would not prevent special allowances from being made available to support the family unit. Features of the present system which tend towards a positive tax penalty are difficult to justify, and they should be examined carefully. These specifically include income aggregation and the loss of one set of personal reliefs when there is a failure to opt for separate taxation.

B. *Administrative Convenience*

There is a high degree of administrative convenience if, in the case of married couples who are living together, only one tax return is required, and the tax is accounted for by one party.[71] This extends beyond merely having to deal with only one party. The State as a whole would benefit from lower administrative costs. As will be seen later, it may sometimes also be convenient for the taxpayer, and there are some practical administrative advantages in dealing with possible tax avoidance schemes involving spouses.

The advantages are however, not sufficient to justify the loss of allowances like personal and earned income reliefs, and certainly not the

[71] See Part X, ITA, for the provisions on tax returns. G Williams has suggested that the UK rule was originally for the convenience of collection ((1947) 10 MLR 16, at 29).

effect of progressive taxation. Administrative convenience can be achieved by allowing or requiring the returns of the separate incomes of both spouses who are living together to be submitted on one single form. Income aggregation is not necessary to achieve this.

C. *Taxpayer Convenience*

One argument that may be advanced is that the default position of section 51(1) is tailored to fit the position of many married couples, who would not be worse off with income aggregation. Those outside of the norm are assumed to have higher incomes, and would know what to do if necessary, namely, to opt for separate taxation.

In a family with one working husband, where the wife is a housewife with little or no income at all, the default scheme does indeed provide a convenient result. The husband, and therefore the couple collectively, would have the benefit of wife relief. The loss of one set of personal reliefs would not mean much if anything since it would not otherwise be absorbed anyway. If the wife has some income, it would be negated by wife relief. Only the husband will need to deal with the tax return, and the wife need not concern herself. The default scheme is therefore convenient for many single income families.

In the the past, a scheme of income aggregation may not have been a problem for the vast majority of families. The present economic profile is different and changing, with more married women returning to work. However, while the position of women in general has improved over the years, the typical family still has the husband as the main income earner and head of the household. It is probably true that if all families were to choose a representative for tax purposes, husbands would be chosen in more cases than not. As explained earlier, the wife relief of $1,500 is sufficient to negate the effect of income aggregation up to $1,500. This is sufficient to cover most cases where the wife is not working, but who has some investment income. It is not sufficient when the wife is working as an income of a mere $125 a month will exhaust the relief.

The convenience argument should not be under appreciated. Under section 51(1), there is no need for married taxpayers, particularly at the lower tax bands, to deal with two sets of correspondence, or to learn about how to fill in the tax returns. However, one cannot but be tempted to think that many would not fully understand the basic statement which has to be conveyed under the present law: for income tax purposes, the income of a married woman who is living with her husband is deemed to be that of her husband and taxed as his income, but she can opt for the separate assessment of all her income if she so wishes, and from the year of assessment 1994, there is no restriction on the type of income that she can opt to be

taxed separately. It must take some time for most people to fully appreciate the statement. Even those who understand the basic statement would wonder about the consequences, and those who do not really need to do anything because the default scheme is tailored to fit them may not know that.

While the general convenience argument is not without merit, it does not make up for the inconvenience and other problems that arise from a scheme based on an option for separate taxation. In particular, it does not justify income aggregation and higher tax liability. Even when there can be an option to prevent income aggregation, taxpayers may be unnecessarily puzzled, and may not act wisely from a financial point of view.

D. *Economic Reasons*

There are some economic reasons which justify special rules for a husband and wife. They centre around the family as a special unit.[72] They do not swing the balance firmly in a single direction.

A basic argument is that marriage should not have any impact on tax liability. This would lead to totally separate taxation. But married couples are able to live more cheaply than two separate individuals. Also, marriage can generate non-pecuniary income in the form of household services, which would be paid for and taxed by a single person. There is also an argument that different married couples with the same total income should pay the same total amount of tax. Finally, there is scope for tax avoidance as between spouses, and the ability to do so should be limited. Any steps taken to recognise the position of a marriage are however, likely to produce some effect on tax neutrality.[73]

The economies of scale argument can be used to justify the loss of one set of personal reliefs under sections 39(1)(a) and (b). Since two people can live more cheaply, they should not get twice the level for an individual, and the "wife relief" of $1,500 could be seen as a discounted personal allowance. This would however, assume that the personal reliefs are structured along the lines of living costs. The $3,000 deduction under section 39(1)(a) for each individual cannot realistically be seen as achieving this because it is worth a very small amount. At the lowest tax band of 2.5%, it is worth $6.25 per month. In any case, the advantages of economies of scale can be met by reduced personal allowances, and the progressive taxation of an aggregated income would not be justified.

The deduction for earned income under section 39(1)(b) is $1,000 for most individuals. This seems to reward income earning through personal

72 *Eg*, see James & Nobes, *The Economics of Taxation* (4th ed, 1992), at 132-5.
73 *Ibid*, at 134.

efforts rather than through investment.[74] If so, there is no reason why a wife who works should lose it simply because she is married and living with her husband. On the whole, the personal reliefs are more likely to be a device to set the tax threshold, past which an individual becomes an income taxpayer.

The argument based on economies of scale and convenience, as well as that which strives for all married couples with the same total income to pay the same tax, can also be applied to complete households containing several income earners. This would include extended families who live together, and the argument would also be equally applicable to couples who live together without marrying. Few would argue that such families or couples should be treated as one tax unit, especially with progressive taxation.[75] However, if they are not so treated, couples who do marry would seem to be placed at a disadvantage by income aggregation.

Even when it is conceded that a married couple should not be taxed as two separate individuals, it does not follow that income aggregation with the same tax rates as individuals would be justified. If anything, the solution would move things much too far to the other side, and more than take away any advantages there might be. The use of different tax rates or larger deductions may help to alleviate the harshness of aggregation, but as argued earlier, a simpler and more sensible solution may be not to aggregate the incomes at all.

E. *Tax Avoidance*

Tax avoidance is the major modern consideration in the taxation of husband and wife. This arises from the progressive nature of income tax and the close relationship between a husband and wife. A classic way to avoid tax is to channel income or income earning opportunities to another party with less income, who would be subject to lower tax rates and therefore lower tax liability. Another way is to transfer capital assets with income earning potential to another party who will also pay less income tax on the same income. Such channelling or transfer is not an option unless there is a third party with less or no income, and who can be completely relied upon. It

[74] The value of the deduction here is too low to have any impact. In some jurisdictions, investment income is taxed at a higher rate than earned income.

[75] A Hindu joint family is treated as a tax entity under the ITA: see ss 39(1), 42(1)(a) and 61. While other families are not treated as a single tax unit, s 51, s 10(1A) and s 33A combined can come close to doing so. There is no rule which deems all the income of a child as the income of the parents, but s 33A (in particular s 33A(1)) could deem much of income due to an infant as the income of his parent. The most typical case being money invested by a parent for an unmarried child, which would fall within s 33A(1). The upper age limit used by the section is 21.

would not require much thinking to identify a spouse as an ideal partner in this respect.

In Singapore, women generally earn less then men, and many are subordinate to men. Many married women are housewives, who would usually not have any significant income of her own besides interest from a savings account. Quite apart from subordinate wives and deliberate tax avoidance schemes, any honest married couple with some savings in cash may consider it quite natural to deposit the money in the wife's name if it can result in lower tax on the interest. Within many ongoing marriages, the actual legal ownership of assets may not mean very much as between spouses, and it can be expected, especially among those with high incomes, that property would be transferred or shared in any way that produces tax efficiency. Even a non-subordinate wife would be attracted by any legal scheme which would maximize the nett income of the family through minimum overall tax liability.

An examination of the Singapore legislation would lead one to conclude that tax avoidance is indeed the major consideration in the shaping of section 51 and section 10(1A). Income aggregation with the consequential progressive taxation prevents any advantage from shifting income or capital. The same is true of the effect of section 10(1A), as there is nothing to be gained from transferring a property to a wife in order to receive relief for two properties.

The old section 51(4), which allowed the separate taxation of earned income and investment income only if derived from assets acquired from the wife's earned income, would confirm a great concern with tax avoidance by shifting capital assets to a wife. In addition, the narrow definition of earned income in section 51(5) seems to strike at inter-spousal business relationships which lead to wives being paid more than they would be in the open market, with the purpose of minimizing overall tax liability. The listed professions are presumably those where the risk of tax avoidance was considered smaller or and where it would be possible to use market rates to make comparisons.

On the whole, the law could be seen as acknowledging the unfortunate reality of the average economic relationship between married men and women. The obvious problem with the tax avoidance approach is that it is plainly over-inclusive, as it can negatively affect those who are not trying to reduce tax liability by making use of the legal rules. The old section 51(4) allowed income shifting between spouses to be tackled without requiring any proof of tax avoidance as it was not drafted as an anti-avoidance device. The old section 51(4) and (5) can therefore be described as crude anti-avoidance devices, which were probably fairly effective against inter-spousal tax avoidance schemes, but only by assuming that

all married couples are trying to avoid tax, and treating them all in the same manner.

The usual anti-avoidance techniques are not particularly effective in the context of income and capital shifting between spouses, and this may be the main reason for the sweeping approach in the old section 51(4). Section 33, the infamous general anti-avoidance rule in the ITA may sometimes be applicable. This is especially so when the exception for transactions carried out for bona fide commercial reasons does not apply to bona fide family or personal reasons.[76] Although it is extremely widely drafted, it is difficult to see the Comptroller wielding it at couples who, for example, transferred savings to an account in the name of the spouse with the lower income. Other examples where section 33 may literally apply would be when a wife is made a business partner or given valuable shares in a company. If the husband were to swear that the wife is a competent business partner or that the shares are gifts, it is not easy to see the Comptroller invoking section 33 even if it could be applied. Any transfer of property would of course not be a sham as far as the spouses are concerned, but within a marriage that is working, actual ownership may not be all that important. Any mutual understandings between spouses are not likely to be disclosed. Section 33 could also be used to counteract high salaries for wives in business with their husbands, but that would require a case by case examination, which may not always be practical, particularly in respect of family-run businesses where mutual trust and confidence are very important. In addition, section 33A, which strikes at income arising from settlements, although also widely drafted, would not cover all the possible types of tax avoidance actions.

The new section 51(4) allows separate taxation of the wife on "her income, including any profits arising from any property owned by her which is deemed to be owned by her husband under the *proviso* to section 10(1A)". In order to come within the option for separate taxation, the income must be the *income of the wife*. With respect to deemed income arising from the operation of section 10(1A), the property must be *owned* by her. The change does not in theory, allow a couple to automatically shift income or capital at will to the party with lower income in order to pay less overall tax.

In theory, it would be possible, without reliance on section 33, for the Comptroller to dispute what constitutes the actual income of the wife, and the ownership of the property in the wife's name. Trusts may exist under the coverings of legal ownership, and a husband may really have a share

[76] S 33(3)(b). The present form of the section is much broader than it was prior to an amendment in 1988, but it was fairly wide even then.

in property that is in the wife's name, although it is also possible for a spouse to enjoy income from property owned by the other without any legal or equitable rights over the property. In practice, it has to be accepted that looking beyond the legal ownership at the surface is not likely to be the norm. There would be too many transactions to examine individually, and predictable answers can be expected to any questions on ownership and intention that may be put to spouses. These answers will not be easy to contradict because substantial gifts to a spouse are not inherently improbable. The new section 51(4) is therefore a significant change if not relaxation in the attitude towards potential tax avoidance by spouses.

One issue that will probably require some attention is that of joint income and income from joint property. The law of contract and the law of property would determine, depending on the undertaking in question, the respective share of each spouse. Under both, there is some scope for mutual agreement to determine the share, regardless of actual contribution in terms of effort or financial burden borne. It will be interesting to see how the Comptroller would treat these and other joint business ventures involving spouses where a large share is directed to a spouse with lesser overall income, whether in the form of direct profits, or a share in a company.

Depending on the experience in the next few years, there may be a need for specific tax avoidance rules to deal with husband and wife transactions. As far as expense deductions are concerned, something along such lines already exists in section 14(2) which limits the deduction of such payments to immediate family members to "a reasonable amount having regard to the services performed by that employee". The test is noticeably not based on a comparison with market rates.

VII. Alternatives

A. *Income Aggregation with Gender Neutral Language*

The general nature of the mechanism used in sections 51 and 10(1A) would understandably invoke ideas of discrimination against women. So long as section 51(1) remains in its present form, any such associations are unavoidable.

Such associations can be minimized by the use of gender neutral language. For example, under section 10(1A), a limitation of one property for each married couple who are living together would achieve the same result, with a lower likelihood of misunderstanding.[77]

[77] Alternatively, two properties could be allowed within the exception, but with the maximum of $75,000 still applying, or one property with a doubled limit of $150,000. These would have revenue implications.

The same can be said of section 51. Instead of treating the wife's income as the husband's, it is possible to achieve the same result by requiring the combined income of a husband and wife to be taxed as the income of one tax entity, under a clear scheme of joint taxation. The rights and obligations of both spouses would have to be clearly spelt out, but the result for the State could be largely the same, without any sex discrimination baggage. Finally, options for separate taxation will appear more neutral if they can be made by either spouse, or only by both spouses.

There are various possible approaches to alleviate the problem of the tax penalty while retaining the basic default scheme of income aggregation. None of these, like special tax rates and allowances, would be entirely satisfactory. The wife allowance could be renamed, and increased to a high level, so that most married couples would not be affected by the effects of progresive taxation. There could also be special tax rates or tax rebates. These can be supported in one way or another, but they will not fully neutralise the effect of progressive taxation, which ironically, might even have been brought about to neutralise some other advantages.

On the whole, the preferred approach is separate taxation.

B. *Compulsory Separate Taxation*

Convenience and tax avoidance are probably the major reasons for section 51 in the modern context. However, once separate taxation on all income is allowed, any defensible conceptual principle for section 51(1) becomes effectively optional. It is necessary to consider why section 51(1) should be retained, especially when the economies of scale argument and the tax avoidance consideration would be effectively avoidable at the option of the wife. It would seem obvious that it might be better to simply repeal the section, and to tax married couples as two individuals, with any special allowances that may be desirable.

While it is true that there would then be some advantages to a married couple who enjoy economies of scale with two full sets of personal and earned income reliefs, there is really no way of dealing with the advantages in a manner which would find unanimous acceptance. Unmarried couples could enjoy the same advantages, and it is far from obvious why an obviously over-neutralizing solution should be employed. Few in Singapore have voiced the economic arguments that other jurisdictions have had to accommodate.

The new section 51(4) does indeed solve the problem of those who faced a genuine financial disadvantage as they can now opt for separate taxation of all incomes. However, if the taxation of married couples were to be discussed afresh, it is unlikely that the discussion would result in the present form of section 51.

There is no obvious conceptual reason for the retention of section 51(1). The possible reasons are all pragmatic, and the present position is a balance between different groups of taxpayers. While separate taxation may now seem logical, there are taxpayers who are familiar and comfortable with the existing system. Also, more correspondence and administrative work will be required under a basic scheme of separate taxation. Not only will there be more correspondence, the same set of procedures may be required in respect of housewives with little or no income of their own. Some may think that there is nothing to be gained in sending separate forms to these people and then to maintain separate correspondence with them. It is possible to waive the need for a written return from spouses with income below the tax threshold, but it will make it more difficult to compare the income sources of spouses in order to identify potential tax avoidance.

Convenience is therefore a possible reason for retaining section 51. Amending section 51 to only deal with the identified problem would leave those who have no problem with the provision in the same position, with no need for them to understand or adapt to a change of the law.

Some other provisions within the ITA are drafted on the basis of the existence of section 51(1) and 51(4). A repeal of section 51 would require amendments to all of them. Also, some allowances are intended only to benefit wives who work, and a repeal of section 51 might lead to the need to rethink and possibly redraft them to allow for apportionment between husband and wife. Many of these are based on separate questions of social policy. In addition, some allowances and rebates can be claimed over a period of time, and any overall change would require transitory measures to preserve them.

There is another consideration here which arises from share ownership. Under section 44, income tax due on dividend income can be deducted at source by the company paying the dividend. The tax can be deducted at a flat rate of 27 per cent. This is also the tax rate applicable to non-residents under section 43, and it effectively settles the tax liabiliy of non-residents. As far as residents are concerned, there is a progressive scale of tax rates in the Second Schedule of the ITA. Although the maximum rate is 30 per cent., most taxpayers are not in this bracket, and the effective tax rate for most will be substantially lower. When tax has been deducted at source under section 44, there is a tax credit under section 46(1). Under the same provision, the tax credit is also available when the income from which the tax has been deducted is included in the chargeable income of any person. The husband can therefore make use of the tax credit when his wife's dividend income is aggregated to his income. If there were to be separate taxation and the wife were to have less or no taxable income of her own, there would have to be a tax refund to the wife. Although

section 46 does not mention refund, the withheld tax would be effectively appropriated otherwise.

With growing share ownership, particularly after the massive public issue of Singapore Telecom shares, many married women who have little annual income may be receiving dividend income. There is therefore the potential problem of a large amount of administrative work on relatively small refunds. However, many small investors in such public issues would have used money from their Central Provident Fund (CPF) accounts, and refunds arising from such shares will be made directly to the CPF accounts of the investors. In addition, Singapore Telecom have announced that it has an arrangement with the Revenue to pay some dividends without deduction of tax. Administrative arrangements can therefore help to minimize, if not avoid the problem.

On the whole, the convenience and "no one should be worse off" arguments cannot be taken too far. They do not justify the long term retention of section 51, especially when many more future generations of married couples will be asked to choose between income aggregation and separate taxation. Some of these may not even understand the meaning of an option for separate assessment on all incomes, let alone the effect of income aggregation. A change would of course require some adjustment on the part of many existing taxpayers.

Non-optional separate taxation does not preclude special allowances and other arrangements for married couples who are living together. For example, on the convenience argument, it would not be difficult, with suitably drafted provisions, to allow or require returns from husband and wives to be submitted on a single form, with different columns for each spouse that end with a space for a signature by that spouse. Correspondence could be addressed to both husband and wife in one envelope. Any adjustment by those who find the current system convenient could then be minimized. For those who would like some privacy in financial matters from their spouses, separate forms could be allowed on special request, which should then be dealt with under separate correspondence.

The question of financial privacy between spouses does not seem to be an issue in Singapore now, but it should not be surprising if it were to be one in the near future. At present, mainly due to the increase of the personal allowance from $2,000 to $3,000 and other measures to establish a Goods and Services Tax, the income tax base is quite narrow. Those who are income taxpayers would have relatively higher incomes, and a desire for some privacy can be expected to grow. Although it may reflect a less open marriage than many might expect, it would be going too far to reject such expectations as undermining the family unit. Even at the lower income ranges, there is no obvious argument against allowing a wife to keep some

savings from her husband's knowledge other than in a tax free Post Office Savings Bank account.

As argued earlier, the preferred approach is one that does not require any understanding of the law, which does not include any option (whether for separate taxation or for the sharing of allowances), and which only requires facts to be reported to the Revenue. If some form of option were to be retained, it should be an option that the average taxpayer would be able to fully appreciate without the need for the legal position and consequences to be explained, and certainly not any mathematical calculations. This state of affairs can be achieved, but it will require the redrafting of several provisions, particularly those that involve allowances.

C. *Allowances*

The repeal of section 51 itself would solve the problem of choice between income aggregation and separate taxation. However, decisions with respect to allowances would remain. How far these can be simplified depends on the scope for changing the allowance provisions. The scope would depend on potential revenue implications and political acceptability.

Allowances involving spouses require a basic approach on how they can be shared, if at all. The task is somewhat complicated by the fact that some of the allowances, for example for maintaining children, have to be available whether the couple are living together or not. Separation and divorce do not make the maintenance of children any less relevant.

The existing law has several different approaches. Some can only be claimed by one party, some can be shared by agreement, others can be shared only in proportions determined by the Comptroller. While the sharing of allowances applicable to couples who are separated or divorced may be unavoidable, the same is not necessarily true of married couples who are living together. There is a general problem with married couple being able to fully appreciate the consequences of any choices. Most couples will prefer the most financially sensible outcome, *ie,* lowest overall tax liability, and it may be preferable for the law to provide for that result without the need for any formal choices to be made.

The least disruptive approach, in terms of the number of provisions to be amended, would involve an option for efficient taxation. This can be put to the taxpayer as a single option for the exercise of any available options (including the allocation of allowances as between spouses) in a manner that will result in the lowest total tax liability. Allowances that can be shared can be split or allocated wholly or in part to the party that can make "better" use of it. This approach, although not ideal, is to be preferred over the present option for separate taxation with further personal decisions on allowances.

Rational spouses who are living together would opt for minimum overall tax liability. The law could be drafted to provide for the obvious result by default. This can be achieved under separate taxation with redefined allowances. But it will be difficult to ensure that no one will become worse off as a result of the changes.

In theory, all the relevant allowances will have to be individually examined. Some general suggestions can be made. As stated earlier, most of the problems that may arise revolve around potential revenue loss and prejudice to existing taxpayers.

A simple approach for allowances that can be shared would be to stipulate for fixed allowances to be given to those entitled to them, without any sharing. The main concern here would be the amount of the respective allowances as using the same amount as now (which may be shared), may mean a revenue loss. Another approach is to reduce or halve the existing levels so that the same total amount would be deducted when both parties claim them. This could however, prejudice existing taxpayers who are enjoying the full allowance, who would not be able to absorb both halves under two separated incomes.

Another approach, which is more complicated, is to provide for allowances to be automatically allocated to one party to the marriage, and for any unused balance to be available to the other party. It might be sensible to first target the husband, who usually earns more and can therefore make better use of the allowance. However, not all may understand or agree with this, especially when it is likely to be the husband. An alternative fully tax efficient approach would be to provide for the allocation of allowances to the party with higher income. If necessary, this should be done repeatedly until the balances of the two incomes are the same, after which any other allowances are shared equally if possible.

The main concern here has been with decisions that make financial sense. When spousal finances are separated, it may be still logical to say that overall tax minimization would be sensible as financial adjustments could be made between the spouses. However, it will not be easy for most couples to make accurate adjustments in terms of any "reimbursement" or financial contribution to be made to the other party as a result of efficient allocation. This is because it will not be easy for most taxpayers to calculate the cash value of sacrificed allowances. Although this can be a problem, the argument should not be carried too far with respect to married couples who are living together. It is necessary to bear in mind the inconvenience caused to all others in order to satisfy a small group.

The wife allowance under a scheme of separate taxation without any options requires separate treatment. A logical course of action would be to change it to become a true dependent's allowance, to be available only

if a spouse (and just a wife) is in fact maintained by the taxpayer. There would be no question of sharing such a relief. In order to prevent doubts as to actual dependency, it could be defined on the basis of an income ceiling for the dependent spouse past which the allowance will not be available. This technique is already used in the ITA. For example, under section 39(2)(ca), there is a $3,500 allowance for maintaining an incapacitated spouse, which is not available if the spouse has an income that exceeds $1,500. The actual amount of the ceiling may be debatable, but $1,500 would appear low as even sedentary work can bring in more than $125 a month.

The value of the allowance for maintaining a spouse would of course also be debatable, but $1,500 would also seem low when compared to the other maintenance allowances. It should perhaps be closer to the $3,500 allowance for maintaining an aged parent[78] than the $1,500 allowance for maintaining a first child.[79]

An alternative to a spouse maintenance allowance is an allowance that is shared by the husband and wife. This would effectively be an allowance for married couples. A married couple's allowance may be used to encourage couples to marry instead of setting up households outside of marriage, but this is not necessary in Singapore. A more important consideration is whether there should be some financial assistance to married couples through the tax machinery. Most single people live with their parents, and marriage usually means setting up a separate household with many new and additional expenses that may not be compensated for by any advantages in economies of scale. An allowance may therefore be helpful, although it is not likely to be effective unless it were significantly high. For those who have already established their homes, there would still be running costs as well as occasional replacement capital expenses.

However, this may not be fair to single people who live alone, and it should be remembered that there will be two sets of personal reliefs under separate taxation. There are also separate allowances for maintaining children and some relatives.

From a practical point of view, a married couple's allowance will have to be given to one or both parties. In today's social climate, it would be difficult to make it available to only one spouse. Whether or not that could be done, questions of transfer to the other spouse are bound to arise when it cannot be fully utilised by one party. This would lead back to devices to facilitate sharing and choices, whether in the form of automatic transferable allowances or not. On balance, a spouse maintenance allowance would be easier to justify and administer.

[78] S 39(2)(f).

[79] Fifth Schedule, para 1, ITA.

VIII. CONCLUSION

Whatever the approach in terms of allowances, a strong case can be made for removing the current optional system, and replacing it with a system that taxes both spouses as separate individuals. Under such a scheme, special administrative arrangements and allowances can be provided for. It would be possible to provide for the tax returns of husband and wife to be made on the same form.

The position of allowances is more difficult, but the need for choices to be made by married couples who are living together should be minimized where possible. An allowance for maintaining a spouse should replace the existing wife relief that is available only to a husband.

The overall gain will be a simpler and easier to understand system. This is indisputably a major objective in any area of taxation that affects ordinary people. The law would be better if an ordinary married couple only have to be told that they have to report their income together on a single form, to fill in any information requested, and to certify the accuracy of the information. While it may not always be possible to simplify every aspect of income taxation, this is one area where it can be done. There will be nothing to prevent one spouse from doing the necessary for the other, save of course for the final act of certification.

SOH KEE BUN*

* LLB (NUS); BCL (Oxon); Advocate & Solicitor (Singapore); Senior Lecturer, Faculty of Law, National University of Singapore.