24. REVENUE AND TAX LAW

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Introduction

24.1 The Supreme Court delivered eight decisions in 2017. Of the five cases concerning income tax, only one dealt with substantive issues of revenue law. The remaining cases involved different issues ranging from discovery of documents in tax cases and other procedural matters, to the exchange of information between tax authorities and to a taxpayer-company facing a winding-up application lodged by the tax authority. Of the two stamp duty cases, one considered the application of additional buyer's stamp duty where the buyer was a charitable purpose trust, while the other dealt with issues relating to admissibility of unstamped documents. Finally, in the last case the authors note the Court of Appeal made reference to previous revenue cases concerning statutory interpretation.

24.2 There are therefore, in the authors' view, eight cases for the year 2017 which had some relevance to revenue law:

Tax Type	High Court	Court of Appeal
Income tax	5	0
Stamp duty	1	1
Miscellaneous	0	1

Income tax

Discovery of documents

24.3 The High Court decided two cases (not strictly on issues of revenue law) arising in connection with *Comptroller of Income Tax v*

AQQ[1] ("*AQQ*").[2] In *Comptroller of Income Tax v ARW*[3] ("*ARW (No 1)*"), the High Court granted ARW discovery of three groups of documents of the Comptroller of Income Tax ("Comptroller"). Subsequently, in *Comptroller of Income Tax v ARW*[4] ("*ARW (No 2)*"), the High Court gave the Comptroller leave to file its request for further arguments in *ARW (No 1)* out of time. The High Court further granted the Attorney-General leave to intervene in *ARW (No 1)*.

24.4 Here are brief facts of *AQQ*. A Malaysian company, ARX, wholly owns AQQ (a Singapore company). Between 2005 and 2007, the Comptroller paid around $9.6m in tax refunds to AQQ. This arose from ARX's restructuring of its group of companies through a complex financing scheme ("scheme"). Subsequently, the Comptroller claimed the scheme was a tax avoidance arrangement under s 33 of the Income Tax Act[5] ("ITA 2008"). The Comptroller thus raised additional assessments to claw back the $9.6m he had paid AQQ. The Court of Appeal agreed with the Comptroller that the scheme was a tax avoidance arrangement. But the Court of Appeal ruled the Comptroller's additional assessments were *ultra vires*. Nevertheless, the Court of Appeal mentioned unjust enrichment as an alternative possibility for the Comptroller to claim back the $9.6m.[6]

24.5 Here are brief facts of the appeal in *ARX v Comptroller of Income Tax*[7] ("*ARX*"). The Comptroller subsequently filed a suit against ARX to claim the $9.6m under various heads: unjust enrichment, fraudulent misrepresentation, and conspiracy by unlawful means.[8] One issue was whether the Comptroller knew his claim was time-barred. An affidavit sworn on the Comptroller's behalf mentioned an advice from the Law Division of the Inland Revenue Authority of Singapore ("IRAS") on the matter. In response, ARX applied for discovery of the Law Division's advice. The Court of Appeal dismissed ARX's appeal. It held the advice was privileged and the Comptroller had not waived privilege to the advice.

1 [2014] 2 SLR 847.
2 *Comptroller of Income Tax v AQQ* [2014] 2 SLR 847 ("*AQQ*") was reviewed in (2014) 15 SAL Ann Rev 482 at 486–492, paras 24.19–24.40. *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 ("*ARX*"), arising from *AQQ*, was reviewed in (2016) 17 SAL Ann Rev 632 at 633–635, paras 24.3–24.14.
3 [2017] SGHC 16.
4 [2017] SGHC 180.
5 Cap 134, 2008 Rev Ed.
6 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [5] and [6].
7 [2016] 5 SLR 590.
8 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [7].

24.6 *ARW (No 1)* was an application by ARW (the same entity as ARX) for discovery of various categories of documents in the Comptroller's possession. One of these documents was the Law Division's advice in *ARX*. Following the Court of Appeal's decision in *ARX*, ARW dropped its application for discovery of the advice.[9]

24.7 The High Court (Aedit Abdullah JC, as his Honour then was) granted discovery of the following groups of documents (comprising 14 categories) to ARW:

> (a) documents relating to the Comptroller's decision to pay the tax refunds;
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> (b) documents relating to the Comptroller's discovery of the matters in his unjust enrichment suit; and
>
> (c) documents relating to the Comptroller's determination that ARW had made use of a tax avoidance arrangement, and the Comptroller's decision to invoke s 33 of the ITA 2008.[10]

24.8 In this regard, the court held that all three groups of documents were relevant and necessary for the fair and efficient disposal of the matter.[11] Abdullah JC further found that legal professional privilege did not attach to the last two groups of documents. The documents were not created for the dominant purpose of litigation (although litigation was a reasonable prospect at the time). Hence, litigation privilege was not established. Similarly, the Comptroller did not show the documents were created for purposes of obtaining advice from lawyers. Thus, the Comptroller also failed to establish legal advice privilege for the documents.[12] In this regard, the Comptroller did not claim legal professional privilege over the first group of documents.

Application for leave to request further arguments out of time and Attorney-General's application to intervene

24.9 Subsequent to *ARW (No 1)*, the Comptroller applied for leave to request for further arguments out of time in *ARW (No 2)*. The further arguments related to (a) public interest privilege under s 126(2) of the Evidence Act,[13] (b) official secrecy under s 6(3) of the ITA 2008, and (c) legal professional privilege. The Comptroller also applied for leave to

9 *Comptroller of Income Tax v ARW* [2017] SGHC 16 at [8].
10 *Comptroller of Income Tax v ARW* [2017] SGHC 16 at [8] and [53].
11 *Comptroller of Income Tax v ARW* [2017] SGHC 16 at [19] and [20].
12 *Comptroller of Income Tax v ARW* [2017] SGHC 16 at [28].
13 Cap 97, 1997 Rev Ed.

adduce two further affidavits to support the application for further arguments.

24.10 At the same time, the Attorney-General applied to intervene in the discovery applications, related applications or appeals. The Attorney-General's primary concern was to be heard on the issue of public interest privilege under s 126(2) of the Evidence Act. Abdullah JC allowed the Attorney-General's application to intervene. The Attorney-General's duty to intervene for purposes of public interest privilege was part of his responsibilities contemplated by Art 35(7) of the Constitution of the Republic of Singapore.[14] No other person was in a position to perform this role.[15]

24.11 The court also partly allowed the Comptroller's application (for leave to request for further arguments out of time). Abdullah JC held that the delay of 15 days did not show such dilatoriness that the application should be refused on delay alone.[16] Moreover, the arguments under s 126 of the Evidence Act and s 6(3) of the ITA 2008 were not hopeless.[17] Finally, he could not see any material prejudice from such delay.[18]

24.12 To this end, he also granted leave for the Comptroller to adduce further evidence – but only in relation to s 126 of the Evidence Act and s 6(3) of the ITA 2008. The issue of public interest privilege was relatively novel and untested in Singapore. Moreover, inordinate delay to the proceedings was unlikely and there was no prejudice that could not be compensated by costs.[19]

24.13 However, the court refused the Comptroller's application to adduce further evidence to support the latter's application for further arguments on legal profession privilege. Unlike the issues on s 126 of the Evidence Act and s 6(3) of the ITA 2008, legal profession privilege had been fully argued in *ARW (No 1)*.[20]

24.14 The saga therefore continues and there may be further Supreme Court decisions arising from *AQQ* which would add to the legal jurisprudence, whether in revenue law or other legal areas.

14 1999 Reprint; *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [39].
15 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [40].
16 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [102].
17 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [104].
18 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [105].
19 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [116].
20 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [117].

Exchange of information – Singapore and Korea

24.15 *AXY v Comptroller of Income Tax*[21] ("*AXY*") was another case involving a request for information from the Comptroller by the National Tax Service of the Republic of Korea ("NTS"). The request was made pursuant to Art 25(1) of the Convention between the Republic of Singapore and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Convention"). In brief, NTS sought certain information concerning bank accounts about various individuals and companies in Singapore ("applicants"). Such information included periodic bank statements, copies of opening account contracts and transaction documents since 1 January 2003.[22]

24.16 The Comptroller requested clarifications from NTS and met NTS's staff regarding NTS's request. Subsequently, the Comptroller issued notices to three banks under ss 65B and 105F of the Income Tax Act[23] ("ITA 2014") requiring disclosure of the applicants' banking activities.

24.17 The applicants applied for judicial review of the Comptroller's decision to issue the notices. The applicants further applied for a stay of proceedings pending determination of their tax residency and/or tax liability in Korea by the National Tax Tribunal of the Republic of Korea.

24.18 The Attorney-General also applied to intervene in the applicants' application. His reasons were public interest in the construction of Art 25 of the Convention as well as the new provisions in ss 65B and 105D of the ITA 2014.

24.19 The High Court (Aedit Abdullah JC) briefly discussed the exchange of information ("EOI") regime. Among other things, the ITA 2014 had been amended in 2013 to remove the requirement for the Comptroller to obtain a court order before accessing confidential information from financial institutions. This was to streamline EOI administration.[24] The upshot was that since 2013, the court's role had changed. The court now examined the Comptroller's decisions "through the lens of judicial review, rather than [to] substantially assess the basis for the request of information itself".[25]

21 [2017] SGHC 42.
22 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [5].
23 Cap 134, 2014 Rev Ed.
24 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [18].
25 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [24].

24.20 To this end, the court found the applicants had *not* shown an arguable or *prima facie* case of reasonable suspicion that the Comptroller's issue of the notices satisfied any ground of judicial review. In particular, Abdullah JC held:

> (a) The Comptroller was entitled to take NTS's statements at face value to determine if the requirements in the Eighth Schedule of the ITA 2014 were satisfied. The Comptroller was not obliged to go behind the statements and second-guess their veracity.[26]
>
> (b) Article 25 of the Convention only permitted EOI if the information was "foreseeably relevant" to the administration or enforcement of the Convention or requesting state's tax laws. The court held the "foreseeably relevance" test meant "such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description".[27]
>
> (c) The "foreseeably relevant" test was a low threshold. The Comptroller should generally assess "foreseeable relevance" at the time of the request.[28]
>
> (d) As a corollary, the Comptroller was not barred from disclosing information to a foreign authority just because he could not determine if the information was in fact relevant at the time of the request. Actual relevance might only become clear subsequently.[29] The Comptroller could assess relevance on the face of the documents the foreign tax authority had provided.[30]
>
> (e) The Comptroller had properly directed his mind to the issue of "foreseeable relevance" and had made appropriate clarifications with NTS.[31]
>
> (f) It was neither practical nor appropriate for the local court or authority to assume the role of a foreign court or authority in respect of the proper construction of the foreign law.[32]

26 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [29].
27 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [35] and [39].
28 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [39] and [40].
29 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [41].
30 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [42].
31 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [47].
32 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [43].

(g) The Comptroller's decision was not irrational. There was nothing on the face of the request that seriously undermined or cast doubts on its validity.[33]

24.21 The High Court further discussed the Senior Minister of State for Finance's speech at the Second Reading of the Income Tax (Amendment) Bill 2013, which had said, "[even] though a court order is not required, IRAS will render EOI assistance only for clear, specific and legitimate requests".[34] He held that the words "clear, specific and legitimate" were not a distinct or separate legal requirement imposed on the Comptroller, nor an addendum to the Eighth Schedule. Instead, the words merely expressed an outcome in line with the satisfaction of the Eighth Schedule requirements.[35]

24.22 The court also refused the applicants' application to stay the proceedings pending final determination in Korea of the applicants' tax residency status and tax liability. There was no basis to make this order. Moreover, the information NTS had requested might assist these issues.[36] Finally, he held there should be no special judicial review test or standard for EOI regimes.[37]

24.23 This case reinforces the point that the courts now deal with such applications under the EOI regime on the basis of judicial review. It also illustrates how the court will deal with possible arguments in this type of applications.

Application to stay Comptroller's winding-up application as means to object to tax assessment

24.24 In *Comptroller of Income Tax v BLO*[38] ("*BLO*"), the High Court (Hoo Sheau Peng JC, as her Honour then was) considered the above-captioned issue. In brief, the Comptroller issued two notices of additional assessments to the defendant company for approximately $458,000 and $672,000 of additional taxes.

24.25 The Comptroller's officers and the defendant's sole director had several e-mail communications and telephone conversations. This led to

33 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [67].
34 *Parliamentary Debates, Official Report* (21 October 2013), vol 90 at p 39 (Mrs Josephine Teo, Senior Minister of State for Finance).
35 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [57].
36 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [70].
37 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [71].
38 [2017] 5 SLR 230.

the defendant arranging to pay $85,000 of the additional taxes, but the balance of over $1m remained unpaid.

24.26 As a result, the Comptroller sent a statutory demand to the defendant under the Companies Act[39] for the unpaid tax. The demand stated that the Comptroller would commence winding-up proceedings against the defendant if the defendant did not pay, secure or compound the debt to the Comptroller's satisfaction. The defendant did not respond to the Comptroller's statutory demand. Consequently, the Comptroller filed an application to wind up the defendant. The defendant, in turn, applied to stay the winding-up application.

24.27 The court refused to stay the winding-up application. Hoo JC found there was no substantial and *bona fide* dispute over the underlying debt.[40]

24.28 First, she held the tax assessed was payable under s 85(1) of the ITA 2014 even if there was an objection to or appeal against an assessment.[41] Section 85(1) provides:

> 85.—(1) Subject to section 91, *tax* for any year of assessment levied in accordance with the provisions of this Act shall, *notwithstanding any objection or appeal against the assessment* on which the tax is levied, *be payable* at the place stated in the notice given under section 76 within one month after the service of the notice. [emphasis added by the High Court in *BLO*]

24.29 Secondly, it was common ground the defendant had not followed the statutory process to review tax assessments under the ITA 2014. The process in brief was as follows:[42]

> (a) The taxpayer must send a written notice of objection to the Comptroller under s 76(2).
>
> (b) If the Comptroller refuses to amend the assessment, the taxpayer can then appeal to the Income Tax Board of Review ("Board") under s 78.
>
> (c) An appeal lies to the High Court against the Board's decision under s 81.

24.30 Ultimately, the court held that the defendant could not "by-pass" the statutory procedure to challenge the additional assessments in these winding-up proceedings. Hence, she rejected the

39 Cap 50, 2006 Rev Ed.
40 *Comptroller of Income Tax v BLO* [2017] 5 SLR 230 at [27].
41 *Comptroller of Income Tax v BLO* [2017] 5 SLR 230 at [18].
42 *Comptroller of Income Tax v BLO* [2017] 5 SLR 230 at [19].

defendant's arguments to stay the winding-up proceedings based on an intention to object or appeal against the Comptroller's tax assessments.[43]

24.31 This case is a salutary reminder that taxpayers should follow the statutory process enacted in the ITA 2014 if they wish to object to a tax assessment by the Comptroller. We should add that s 81(2) states that an appeal to the High Court from the Board's decision must be on a question of law or a question of mixed law and fact. The Comptroller or taxpayer can also appeal to the Court of Appeal against the High Court's decision. Taxpayers should also not wait till the Comptroller has instituted enforcement proceedings to collect unpaid tax (or interest and penalties) before they raise an objection to the tax assessments. By such time, the statutory timeline for filing an appeal to the Board would usually have lapsed.

Deductibility of interest expenses

24.32 In *BML v Comptroller of Income Tax*[44] ("*BML*"), at all material times, the appellant owned a mall and had two shareholders (Company A and Company B) with 50% shareholding each. The appellant obtained a bank loan of $520m, the proceeds of which were used to refinance its borrowings and the balance lent to the shareholders as interest-bearing loans.

24.33 As the shareholders were not able to obtain dividend payments from the appellant, they then converted a significant portion of their equity holding into a debt-based investment. This was essentially achieved through a capital reduction, and instead of a return of cash to the shareholders, they subscribed for fixed rate subordinated bonds amounting to $333m.[45] The interest paid on the bonds was the subject of the tax appeal which was dismissed by the Board. On further appeal to the High Court, Choo Han Teck J also dismissed the appeal.

24.34 The relevant provision was s 14(1)(*a*) of the ITA 2014 and the issue was whether the interest expense on the bonds was a "sum payable by way of interest … upon any money borrowed by that person [that is, the appellant] where the Comptroller is satisfied that such sum is payable on capital employed in acquiring the income".[46] The court considered the recent deduction cases in *BFC v Comptroller of Income*

43 *Comptroller of Income Tax v BLO* [2017] 5 SLR 230 at [27].
44 [2017] SGHC 118.
45 For the court's summary of the facts, see *BML v Comptroller of Income Tax* [2017] SGHC 118 at [2]–[3].
46 *BML v Comptroller of Income Tax* [2017] SGHC 118 at [7].

Tax[47] ("*BFC*"), *T Ltd v Comptroller of Income Tax*[48] ("*T Ltd*") and *Comptroller of Income Tax v IA*[49] ("*IA*")[50] and also its seminal case in *Andermatt Investments Pte Ltd v Comptroller of Income Tax*[51] ("*Andermatt*").

24.35 That there was a need for a *direct link* between the money borrowed and the income acquired was not disputed by the parties. The appellant's submission that the direct link test was satisfied as long as the original assets representing the capital continued to exist and income was acquired was not accepted by the court. The enquiry regarding the original assets as argued by the appellant was too narrow a reading of *Andermatt*, and did not comport with the statutory scheme that there had to be a closer relationship between the money borrowed and the income produced. This relationship "requires more than a look at the company's balance sheet".[52]

24.36 In considering the factors to determine whether there was a direct link, the court affirmed that the Comptroller had the discretion to determine whether he was satisfied that the direct link exists, and therefore "this is not entirely a matter for the courts". The court went on to consider the three matters that the appellant argued were irrelevant considerations and yet they were taken into account by the Comptroller.[53]

24.37 First, the court agreed with the Comptroller that it was relevant to consider whether the money borrowed had an observable effect on the income against which deduction is sought. The court observed that "[where] there is no ostensible effect on income, no acquisition of any new assets and the only perceptible change caused by the transaction is the capital structure of the company, one wonders whether the money borrowed was truly to produce income or one step removed from the income-earning operation". The court accepted that refinancing might point to a direct link but in this case the amount of $333m was largely capitalised from the company's asset revaluation reserve and comprised

47 [2014] 4 SLR 33.
48 [2006] 2 SLR(R) 618.
49 [2006] 4 SLR 161.
50 For previous reviews of *BFC v Comptroller of Income Tax* [2014] 4 SLR 33, *T Ltd v Comptroller of Income Tax* [2006] 2 SLR(R) 618 and *Comptroller of Income Tax v IA* [2006] 4 SLR 161 in the SAL Ann Rev, see (2014) 15 SAL Ann Rev 482 at 492–494, paras 24.41–24.57, (2006) 7 SAL Ann Rev 403 at 406–408, paras 21.16–21.26 and (2006) 7 SAL Ann Rev 403 at 408–411, paras 21.27–21.39, respectively.
51 [1995] 2 SLR(R) 866.
52 *BML v Comptroller of Income Tax* [2017] SGHC 118 at [9]–[19].
53 *BML v Comptroller of Income Tax* [2017] SGHC 118 at [20]–[21].

unrealised capital gains from the mall's appreciation in value, in contrast to the small paid-up capital of $10.2m.[54]

24.38 Second, the court disagreed with the appellant that the purpose of the money borrowed was irrelevant. Whether a direct link existed between the money borrowed and the income produced was not determined solely on the taxpayer's intention. But the intention was a consideration as part of the wider context of the bonds to see what the overall role and purpose of the bonds were. The intention to restructure the equity holding by the shareholders in the appellant to a debt-based investment made it reasonable for the Board to hold that the reasons were completely distinct from the continued earning of rental income from the mall.[55]

24.39 Third, the court did not accept the appellant's contention that it was necessary to issue the bonds in order to replenish the lost capital and not sell its income-earning asset, and therefore deduction should be allowed. The appellant had to, but failed to, show "something more". The court noted that it was artificial to regard the capital reduction and bond issue as two separate events, rather than as part of a plan of restructuring which was entered into "for commercial expediency, after they had *already obtained* the requisite working capital to own and operate" [emphasis added] the mall via the bank loan.[56]

24.40 In the premises, since the matters were not irrelevant, the court would not intervene in how the Comptroller had satisfied himself on the direct link test. The court noted that these matters posed "a few problems" for the appellant in seeking a deduction, and the Comptroller had exercised his discretion correctly in denying the deduction.[57]

24.41 The decision of the court is being appealed to the Court of Appeal and at the time of writing no decision by the Court of Appeal has been reported.

54 *BML v Comptroller of Income Tax* [2017] SGHC 118 at [22]–[27].
55 *BML v Comptroller of Income Tax* [2017] SGHC 118 at [28]–[32].
56 *BML v Comptroller of Income Tax* [2017] SGHC 118 at [33]–[38].
57 *BML v Comptroller of Income Tax* [2017] SGHC 118 at [39]–[40].

Stamp duty

Additional buyer's stamp duty – Purchase by charitable purpose trust

24.42 In *Zhao Hui Fang v Commissioner of Stamp Duties*[58] ("*Zhao Hui Fang*") the High Court (Abdullah JC) considered the issue of whether a charitable purpose trust purchasing residential property had to pay additional buyer's stamp duty (commonly termed "ABSD"). The court helpfully summarised the ABSD regime for future ease of reference.[59]

24.43 We now turn briefly to the facts. Under a will, a testator provided for his residential property to be made available to surviving family members including his wife as their personal residence during their lifetimes, and if they did not wish to use it, the property could be sold and the proceeds would be paid to the Chew How Teck Foundation ("Foundation"). The Foundation was a charitable purpose trust registered under the Charities Act.[60] The executors of the estate subsequently obtained a court order to sell the property and purchase another residential property ("subject property") as a substitute, with the excess balance of the sale proceeds to be paid to the Foundation. A sale and purchase agreement ("SPA") was executed in relation to the subject property and the purchase price was $6.56m. The Commissioner of Stamp Duties ("Commissioner") assessed the SPA as liable for buyer's stamp duty of $191,400 and ABSD of $984,000. ABSD was assessed on the basis that the legal and beneficial ownership of the subject property resided in the Foundation. The appellants, the trustees of the Foundation, disputed the ABSD assessment only. A case stated was therefore filed in the High Court.[61]

24.44 While the relevant provisions are s 4(1) read with Art 3(*bf*)(viii) of the First Schedule of the Stamp Duties Act[62] ("SDA"), the crucial issue turns on the interpretation of Art 3(*bf*)(viii). That article provides for ABSD to be payable in relation to the purchase of residential property "if the grantee, transferee or lessee [of the property], or any of 2 or more joint grantees, transferees or lessees is a foreigner or an entity". The phrase "grantee, transferee or lessee" is defined under Art 3(2)(d) in relation to a trust as referring to the beneficial owner of the property.[63]

58 [2017] 4 SLR 945.
59 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [36]–[41].
60 Cap 37, 2007 Rev Ed.
61 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [2]–[14], where the case stated is set out.
62 Cap 312, 2006 Rev Ed.
63 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [14].

24.45 In the event, the court held that as a charitable purpose trust, the beneficial interest in the Foundation was held "in suspense" and not extant. It was a trust with "simply no ascertained or ascertainable beneficiary".[64] The court rejected the Commissioner's arguments that the beneficial owners would be the persons who would benefit from the Foundation, the trustees and the public.[65] The court's findings were based on a consideration of case law and legal principles relating to charitable purpose trusts. It followed that there was nothing to which ABSD might attach under Art 3(*b*)(viii) read with other relevant provisions.[66] The court also found that there was no liability for ABSD under other provisions (namely, Art 3(2)(d)).[67]

24.46 This case is of interest, not because the taxpayer/applicant won, but rather in light of the observations by the court on tax policy and statutory interpretation. On tax policy, the court made it clear that:[68]

> [There] is nothing in [legal] principle for or against having ABSD apply to transactions over residential properties by charities … There just needs to be stated clear imposition under the relevant statutory instrument … The desirability of [the Commissioner's] position as a matter of policy falls outside the province of the courts.

24.47 This affirmation – that the making of tax policy falls outside the province of the courts – must be correct. Tax policies must be embodied in clearly drafted legislative provisions made by Parliament if they are to be effectively implemented. The courts' task, as always, is only to interpret the legislative provisions. Whether or not the tax policy is made clear in the legislative provisions, particularly on the basis of a purposive interpretation, would circumscribe the tax authority's ability to impose or collect taxes. This would accord with the view expressed by the Court of Appeal in *Comptroller of Income Tax v BBO*:[69]

> The imposition of tax is solely within the purview of Parliament through the enactment of *clear tax legislation* which is to be interpreted by the court or relevant tribunal using principles developed incrementally by case law … [emphasis added]

24.48 On statutory interpretation, the court applied the well-settled purposive approach and also proceeded on the settled position as to how foreign case law should be handled, as judicially settled in past

64 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [87].
65 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [32].
66 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [87].
67 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [101]–[103].
68 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [114]–[115].
69 [2014] 2 SLR 609; *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [45]. For a review of *Comptroller of Income Tax v BBO* [2014] 2 SLR 609, see (2014) 15 SAL Ann Rev 482 at 483–486, paras 24.5–24.18.

revenue cases.[70] What is helpful are the court's remarks on relying on materials in aid of statutory interpretation:[71]

> (a) Press statements, being "generally prepared post-enactment", must be "warily used in statutory interpretation".[72]
>
> (b) Tax guides by the tax authority are not preparatory materials and "should not generally control or influence the interpretation of statutory provisions". There exists "the risk of modifying the language of the statute post-enactment".[73]

24.49 These observations by the court should be borne in mind, lest such materials be elevated and given undue weight when construing the tax statutes.

Admissibility of unstamped document

24.50 In *Cheong Kok Leong v Cheong Woon Weng*,[74] the dispute involved a private property registered in the appellant's name. The respondent had sued the appellant on the ground that the appellant held the property on trust for himself and the respondent. One of the issues before the Court of Appeal was whether the respondent could rely on a written collateral agreement that was not stamped. The respondent had also relied on an oral agreement in presenting his case. The Court of Appeal held that the oral agreement was admissible as evidence in support of the respondent's case. On the written agreement and the relevant provisions of the SDA, the court expressed the following opinion:[75]

> [There] was no need for us to consider the argument by the Appellant that the Collateral Agreement could not be admitted as evidence because it was an instrument chargeable with stamp duty that had not been stamped pursuant to ss 52(1) and 4 read with paras 3 and 4 of the First Schedule of the SDA. Nevertheless, and in any event, s 52(2) of the SDA provides for an unstamped instrument chargeable with stamp duty to 'be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof'. Hence, once the requisite stamp duty (and any applicable penalty) has been paid on the Collateral Agreement, it would become admissible. The Appellant offered no reason to the contrary, beyond a mere assertion that the payment of the stamp duty 'has not been done to-date, and the Court should not allow the Respondent to circumvent the statute'. *Given the*

70 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [78] and [89].
71 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [105]–[113].
72 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [109].
73 *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] 4 SLR 945 at [113].
74 [2017] SGCA 47.
75 *Cheong Kok Leong v Cheong Woon Weng* [2017] SGCA 47 at [14].

> *belatedness with which the Appellant took the objection as to the admissibility of the Collateral Agreement, we would have been minded to give the Respondent an opportunity to make good any deficiency in the stamping of the Collateral Agreement.* But in light of our finding that the Oral Agreement sufficed to establish the Respondent's interest in the Property, there was no need to [do] so. [emphasis added]

24.51 This case illustrates the discretion that the courts have in deciding whether to allow one party to make good the lack of stamping of a document so that it becomes admissible in evidence. However, the court's *dictum* should not be read as necessarily implying that the objection as to the admissibility would likely have succeeded *but for* the delay in raising it. In this regard, reference may also be made to the earlier High Court case of *Mohamed Amin bin Mohamed Taib v Lim Choon Thye*,[76] where Woo Bih Li J said:[77]

> I was of the view that Mr Rai had misapplied s 52(1) [of the SDA]. It does not render an unstamped document which ought to be stamped void *ab initio*. It merely stipulates that such a document is not admissible in evidence until the appropriate stamp duty is paid. This is reinforced in s 52(2) which provides for the admissibility of such a document on payment of the stamp duty and any penalty. That rule is a rule of evidence and does not affect the validity of such an unstamped document. As is obvious, the situation could have been rectified at any time upon payment of the appropriate stamp duty and penalty. Furthermore, even if a document were to be invalid in the sense that, for example, it was forged, that does not defeat the jurisdiction of the court to hear and decide on matters based on that document.

Miscellaneous

Statutory interpretation

24.52 In *Attorney-General v Ting Choon Meng*[78] ("*Ting Choon Meng*"), the Court of Appeal had to interpret certain provisions found in the Protection from Harassment Act.[79] It may be of interest to note that the approaches on statutory interpretation discussed in some previous revenue cases were cited in both the majority and minority judgments,

76 [2009] SGHC 216.
77 *Mohamed Amin bin Mohamed Taib v Lim Choon Thye* [2009] SGHC 216 at [15]. For a review of this case, see (2009) 10 SAL Ann Rev 455 at 462–463, paras 22.23–22.24.
78 [2017] 1 SLR 373.
79 Cap 256A, 2015 Rev Ed.

namely, *BFC v Comptroller of Income Tax*;[80] *Chief Assessor v Van Ommeren Terminal (S) Pte Ltd*;[81] and *Comptroller of Income Tax v GE Pacific Pte Ltd*.[82]

80 [2013] 4 SLR 741, cited in *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [18].

81 [1993] 2 SLR(R) 354, cited in *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [34].

82 [1994] 2 SLR 690, cited in *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [67].