

## Book Review

### THE LAW AND PRACTICE OF SINGAPORE INCOME TAX\*

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1 This is a vast book, both physically and in scope, on the technical aspects of income tax in Singapore. It starts conventionally with “Framework of Interpretation in Tax”<sup>1</sup> and ends, again conventionally, with “Income Tax Objections and Appeals”.<sup>2</sup> Nearly one-third of the book, however, is devoted to less well-trodden topics – but which relate to crucial aspects of Singapore’s income tax system and economic policy – including “Corporate Restructuring, Mergers and Acquisitions”, “Capital Market Transactions”, “Taxation of Hedge Funds and Private Equity Firms”, “Unit Trusts”, “Banking Operations”, “Financial Derivatives” and “Wealth Management for Individuals”.<sup>3</sup> In short, it is the breadth of coverage, together with the wealth of experience brought by the editors (each having decades of high level and high exposure practice in a “big 4 accounting firm” (Pok and Timms) and tax administration (Ng, a former Deputy Commissioner and current Senior Consultant with the Inland Revenue Authority of Singapore) (“IRAS”)), their team of expert authors (from the public sector, private practice and the Singapore Academy of Law), and the clear enthusiasm of the IRAS for the publication,<sup>4</sup> that makes *The Law and Practice of Singapore Income Tax* such a valuable resource for anyone interested in Singapore’s income tax law, practice and policy.

2 Given the number of authors (30) and chapter headings (24), it may be trite to initially observe that the length and coverage of individual chapters give the impression that the book aims to be more encyclopaedic in nature, rather than a concise practical guide to the law and practice of Singapore income tax. For instance, in “Framework of

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\* LexisNexis, 2011.

1 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) ch 1.

2 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) ch 24.

3 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) chs 8–11 and 13–15.

4 See the Foreword by the Commissioner of Inland Revenue.

Interpretation in Tax”<sup>5</sup> does the reader need to know how to parse a statute? If so, then one can be fairly confident that this person will not be studying the chapters on taxation of derivatives and other financial instruments. This presents a paradox, since an encyclopaedia is captive to its individual entries and, frustratingly, it is not easy to peruse the contents to discover certain basic information such as Singapore’s tax year (1 January to 31 December), let alone its jurisdiction to tax (source plus, in certain instances, remittance). For a Singaporean reader, these matters might be dismissed as simply too obvious. However, a short introductory chapter on the basic framework and key elements would be useful, certainly from the perspective of a comparative reader.

3 Yet, the encyclopaedic approach taken in many chapters of this book is often very satisfying. For instance, assume the reader is seeking guidance on the *source* of income from a business or trade. Singapore case law is notably lacking in this area (only two cases have been reported). However, “Case Law Guidance on Source of Business and Trade Income”<sup>6</sup> fills the gap by providing extensive analysis of comparative case law from common law jurisdictions including Hong Kong, Australia, India and South Africa, and concludes with the regularly stressed, but often forgotten, *caveat* that “similar [legislative wording] does not mean the same”.<sup>7</sup> Given the huge international interest (including the US<sup>8</sup>) in debating the merits of residence versus source taxation, it is instructive to ponder the conclusions reached in this chapter that: “[i]n the vast majority of cases, the source of the business income is located where the business is carried on, which is the natural home of the income”<sup>9</sup> and, accordingly, the opportunity for apportioning business profits between a Singaporean source and a non-Singaporean source for a person resident in Singapore “will be the exception rather than the rule”.<sup>10</sup> This raises the intriguing question of just how “pure” Singapore’s source jurisdiction to tax really is and whether concerns regarding this matter could be better analysed by reference to concepts of residence<sup>11</sup> or transfer pricing methodology?<sup>12</sup>

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5 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) ch 1.

6 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) ch 2.

7 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) at p 71. Although ch 2 deals with source rules and guidelines derived from the case law, it would have been useful to refer, at least in passing and by cross-referencing, to the statutory *deemed* source rules contained in s 12 of the Income Tax Act (Cap 134, 2008 Rev Ed), notwithstanding that this topic is covered extensively in ch 7, “Withholding Tax and Taxation of Non-Residents”.

8 See Joint Committee on Taxation, *Present Law and Issues in US Taxation of Cross-Border Income* JCX-42-11 (6 September 2011) available at <www.jct.gov>.

9 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) at p 74.

10 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) at p 77.

11 For example, ch 13.

12 An area addressed in detail in ch 18.

4 The comparative and encyclopaedic themes noted above permeate this book. For instance, “Capital and Revenue Divide – Receipts”<sup>13</sup> contains a detailed discussion of the common law authorities (taken mainly from the UK and Australia) on the meaning of “trade”, “business”, “ordinary income” and “capital gain”. Occasionally, however, the discussion is overly punctuated by lengthy quotations from both local cases<sup>14</sup> and overseas cases.<sup>15</sup> This has a role in a cases and materials publication, but its limitations are obvious when little or no commentary is given to topics that would seem contentious (such as the applicability of *Sharkey v Wernher*<sup>16</sup> in Singapore, which could operate to tax unrealised gains even when the general anti-avoidance provision<sup>17</sup> did not apply).

5 Other important features of the book include the extended commentary given to local case law (for example, ch 3 dealing with the dichotomy between receipts on capital and revenue account), IRAS practice (for example, ch 6 dealing with capital allowances, which sets out the guidelines adopted by the IRAS as to what constitutes “plant” and ch 12 on the IRAS’ views on the meaning of “research and development” for the purposes of obtaining concessionary tax treatment) and its interdisciplinary nature (for example, ch 5 dealing generally with the relevance of accounting principles and practices in determining taxable income and chs 15 and 16 analysing, respectively, the impact of relevant accounting standards on the tax treatment for financial derivatives, and financial instruments commonly held by insurance companies).

6 It is pleasing to report that this book is up to date. For example, details and commentary are provided of the legislative changes proposed in the 2011 Budget to allow business taxpayers to deduct pre-commencement revenue expenses, and to enhance the Productivity and Innovation Credit scheme.<sup>18</sup> Another example, on this occasion comparative in nature, is the taxation of so-called “indirect share transfers” which is the subject of continuing controversy in several Asian countries, including China, India, South Korea and Australia.<sup>19</sup> Interestingly, this development is mirrored by the increased scrutiny given by the IRAS before it will issue a certificate of residence for the

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13 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) ch 3.

14 For example, *HT v Comptroller of Income Tax* [1998] SGITBR 3 (in *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) at pp 124–126).

15 For example, *Sharkey v Wernher* [1956] 1 AC 58 (HL) (in *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) at pp 131–133) and *Whitfords Beach* (1982) 150 CLR 355 (HCA) (in *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) at pp 167–170).

16 [1956] 1 AC 58 (HL).

17 Income Tax Act (Cap 134, 2008 Rev Ed) s 33.

18 For example, “Capital and Revenue Divide – Expenditures” ch 4, at nn 106 and 151–152, respectively, and “Taxation of Intellectual Properties” ch 12, at p 625.

19 “Taxation of Hedge Funds and Private Equity Firms” ch 10, at pp 568–570.

purpose of assisting companies to access Singapore's extensive double tax treaty network.<sup>20</sup> All in all, a great deal of research has been undertaken by the authors to produce a work of this length and quality.<sup>21</sup>

7 Despite the lack of internal cross-referencing between related topics, several individual chapters can be read on a "stand alone" basis, for example, ch 7 deals comprehensively with taxation of non-resident taxpayers and the application of, and exemptions from, withholding tax, ch 8 explores the tax issues associated with corporate restructuring and merger and acquisition transactions, and ch 14 examines the taxation of income from banking operations. Furthermore, several chapters provide practical explanations and structuring considerations for industry specific operations, for example, chs 11 and 12 respectively explain the reasons for structuring, and tax treatment emanating from, typical infrastructure trust projects and real estate investment trusts, and the exploitation of intellectual property rights.

8 Another user-friendly aspect of this book is illustrated by the structure adopted in many chapters, for example, chs 8 and 9, which consists of initially providing an explicit statement of exactly what is covered (generally contained in an Introduction), with each sub-topic following sequentially and highlighted by clear headings, sub-headings and paragraph numbering. It would be helpful to see this format adhered to in all chapters.

9 As one would expect, the use and design of tax incentives (another defining characteristic of Singapore's tax system) figures prominently. However, perhaps due to the sheer volume of those incentives, no single chapter is devoted to this topic. Rather, it is covered in various chapters, including, for example, chs 9 to 15 (dealing

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20 *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011) ch 10, at pp 570–571 and ch 17, at p 966.

21 For example, when discussing the deemed source rules relating to interest and royalty and similar payments in the Income Tax Act (Cap 134, 2008 Rev Ed) ss 12(6) and 12(7) respectively, the authors of ch 7 consider: the meaning of all key legislative words and phrases by reference to both local and comparative case law, the effect of Singapore's tax treaties in allocating taxing rights, characterisation issues (royalty *versus* rent *versus* service fee) involving payments made for exploiting intellectual property rights (including an analysis of the OECD position on e-commerce transactions) as well as IRAS practice; and in ch 8, after considering common corporate structures and the methods of corporate restructuring and mergers and acquisitions available in Singapore, the authors set out the tax framework for corporate amalgamations and undertake a detailed analysis – from the perspectives of both buyer and seller – of the tax considerations relating to share *versus* asset acquisitions. Both chapters are excellent examples of topics which are handled in a self-contained, holistic manner and provide a focal point for a reader who knows what he or she is looking for.

respectively with capital market transactions, taxation of hedge funds and private equity firms, unit trusts, research and development concerning the creation and acquisition of intellectual property, wealth management for individuals, banking operations, and financial derivatives (nearly all of which are intended to spur the development of Singapore as a financial centre)).

10 Taxation of individuals is not neglected as “Source of Employment Income” (ch 19), “Employee Stock Options and Share Schemes” (ch 20) and “Wealth Management for Individuals” (ch 13) illustrate. Indeed, it is pleasing to note that, in combination, the main aspects of personal income tax in Singapore are covered. However, it is confusing and unnecessary to find significant overlap between the chapters relating to taxation of gains or profits from share options and awards.<sup>22</sup>

11 Clearly, *The Law and Practice of Singapore Income Tax* is not intended for the sole use of domestic tax practitioners or readers. Several chapters cover cross-border and international aspects of Singapore’s income tax system, including ch 17 (tax treaties, which usefully outlines various key departures from the OECD Model Tax Convention on Income and On Capital that Singapore wishes to include in its treaties) and ch 18 (transfer pricing, which, unfortunately, does not fully incorporate the 2010 OECD Transfer Pricing Guidelines).<sup>23</sup>

12 Arguably, transfer pricing is *the* international tax issue of the 21st century, but green taxation is one of the most interesting and it is gratifying to see “Taxation and Non-Taxation Measures for Sustainable Development in Singapore” (ch 21) devoted to this important topic.

13 Another vital topic “Tax Avoidance” (ch 22) is accorded special consideration. In view of the paucity of local case law on Singapore’s general anti-avoidance rule (“GAAR”),<sup>24</sup> the history of the enactment of

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22 The overlap is not *de minimis*: pp 1011–1015 are devoted to this topic in ch 19 (without any cross-referencing to the more detailed ch 20, and *vice versa*).

23 Although, to be fair, the 2010 OECD Transfer Pricing Guidelines are referenced at n 12. The first third of ch 18 examines the 1995 Guidelines, but it is not until p 978 that reference is made to the 2010 Guidelines, which changed the earlier version in significant ways, including abandoning the hierarchical approach in choosing an appropriate transfer pricing method. It would be interesting to know the authors’ views on whether the revisions will alter Singapore’s approach to transfer pricing which, to date, has largely endorsed the earlier OECD methodology (at p 977, para 18.52).

24 The chapter only considers s 33 and the so-called *Ramsay* doctrine (*WT Ramsay v IRC* [1982] AC 300). In future editions, this commentary could usefully be expanded to reference the specific anti-avoidance provisions contained in the Income Tax Act (Cap 134, 2008 Rev Ed).

s 33 of the Income Tax Act<sup>25</sup> makes it understandable that Australian and New Zealand case law on their respective GAARs figures prominently in the commentary. However, the prominence given to the very contentious and older “choice” and “predication” principles is troubling. Indeed, if recent experience in Australia and Hong Kong is anything to go by,<sup>26</sup> these so-called principles are essentially ignored in modern case law and recourse to them in Singapore would seem to be a backward and confusing step. The contentious issues that are engaging the courts in Australia and Hong Kong is the problem of the alternative hypothesis – what would the taxpayer have done if the transaction under attack were disregarded? And how is the tax benefit quantified?<sup>27</sup> These questions could easily arise in Singapore. They deserve analysis and commentary.

14 What happens when you have done the wrong thing, or as “Issues in Tax Investigations and Tax Audits” puts it at p 1123: “[When faced with the prospect of imprisonment] he sorely regretted being greedy”? With apologies to Warren Zevon, ch 23 provides an answer: “[h]e reached for his phone to call his lawyer”, who then proceeds to explain what offences may have been committed, what penalties may lie, and how they might be mitigated. This is sound and necessary advice and is, of course, set out in detail in the text. However, the abiding interest and importance of this chapter lays in its discussion of the tax compliance environment in Singapore and the IRAS audit and investigation processes. This analysis is crucial to an understanding of any modern taxation system and its emphasis in this chapter is laudable. And, in the absence of any wrongdoing, what remedies are available when there is a legitimate dispute between a taxpayer and the Commissioner? “Income Tax Objections and Appeals” (ch 24) provides answers in terms of the rules and procedures that taxpayers must follow in pursuing their rights. Pleasingly, other avenues of relief outside the objection and appeals regime in the Income Tax Act (although rarely successful) are then discussed, including judicial review and restitution, as well as the more common ground of error or mistake relief.<sup>28</sup>

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25 Cap 134, 2008 Rev Ed.

26 Both GAARs are considered sufficiently relevant to Singapore to be reproduced at pp 1120–1121 of *The Law and Practice of Singapore Income Tax* (LexisNexis, 2011).

27 See Graeme Cooper, “Australia’s GAAR Comes Alive in the Courts” (2011) 62 *Tax Notes International* 559; for Hong Kong, see *Commissioner of Inland Revenue v Tai Hing Cotton Mill (Development) Ltd* FACV 2/2007 (CFA) and *HIT Finance Ltd v CIR* FACV 9 and 17/2007 (CFA).

28 For future editions, this discussion could be expanded to consider whether the remedy of legitimate expectation is available in Singapore: see generally, *The Delicate Balance: Tax, Discretion and the Rule of Law* (Chris Evans, Judith Freedman & Richard Krever eds) (IBFD, 2011), particularly Freedman and Vella at pp 102–108.

15 In conclusion, *The Law and Practice of Singapore Income Tax* is a well-designed and conceived work, it provides comprehensive coverage, is well written, and justifies its claim of being an authoritative source to explain (and occasionally critique) Singapore's income tax system. Tax professionals from both the private and public sectors, comparative tax scholars, students and, indeed, all those interested in taxation of income in Singapore, will find this book a rich source of information and insight.

16 It would be remiss not to note that the book was apparently completed within a short project time line. From this viewpoint, it may be considered a massive success given the plurality and number of authors involved and the diversity of topics covered.

17 Let us now turn to the future. Ownership of this work has been assigned by the authors of the individual chapters to the Tax Academy of Singapore. This augurs well for enhancement of the book (the Preface informs us that new chapters will be added in subsequent editions), since an organisational structure exists not only to oversee improvement of the book (hopefully in some of the ways suggested in this review) but to also ensure its longevity.

18 I very much look forward to seeing future editions and enhancements of this work and conclude by offering a reader's plea to the editors and the publisher respectively: there needs to be better integration of the individual chapters into the book as a whole (there is hardly *any* cross-referencing between related chapters), overlaps and repetition can and should be reduced, a basic introductory chapter setting out the key elements of Singapore's income tax system would be useful, the index is, at best, eclectic and simply needs to be redone,<sup>29</sup> and an electronic version (easily searchable) would add enormously to the book's utility. In the meantime, does *The Law and Practice of Singapore*

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29 Three of many such examples suffice to illustrate this point. First, the entries relating to Hong Kong case law on source of employment income are primarily referenced under the heading "Hong Kong" – this is eclectic since there is no index heading for other jurisdictions such as "Australia" or other comparative jurisdictions which are referred to in the text; it is also unhelpful since no reader would search the term "Hong Kong" when looking to see what rules apply in Singapore to determine the source of employment income. Moreover, if indexing "Hong Kong" was appropriate, then it is incomplete since other Hong Kong cases analysed in the text, including those concerning source of profits and the relevance of accounting standards in determining taxable income, to name but a few, are not indexed under this heading. Second, and more importantly, there are no index headings for Singapore's jurisdiction to tax, neither "source [of income or profits]" nor "remittance" appears. Third, there is no heading for "tax incentives" even though they are referred to, and carefully analysed, in many chapters.

*Income Tax* have a place in a good library of Singapore, Asian, or comparative taxation? Definitely.

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