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Taxing "all other income" in Singapore and Malaysia

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ABSTRACT
Section 10(1)(g) of the Singapore Income Tax Act is a ‘sweeping-up’provision which catches all income not falling under sections 10(1)(a)–(f). More than 50 years after its introduction, the application of section 10(1)(g) is still unclear despite the test laid out in IB v CIT. This article notes that the current jurisprudence is limited to cases involving gains or profits from the disposal of assets. It argues that the reliance on the Australian Myer Emporium test in IB vCIT was misplaced and that the section 10(1)(g) test should not have a sole focus on intention. Rather, it proposes a set of indicia of income drawn from the Badges of Trade, which it argues to be consistent with the existing jurisprudence. The article highlights that the tax consequences of receipts being assessed under sections 10(1)(a) or (g) are different and notes the importance of the receipts being assessed under the correct subsection.

1. Introduction

Section 10(1)(g) of the Singapore Income Tax Act 1947[1] (SITA) (in *pari materia* with section 4(f) of the Malaysian Income Tax Act 1967[2] (MITA))[3] contains a ‘sweeping-up’ provision that catches: ‘any gains or profits of an income nature not falling within any of the preceding paragraphs’. This article traces the history of the provision from the circumstances which arguably led to its enactment, examining the development of the jurisprudence over time establishing the scope of the provision. The article considers the test laid out by the Singapore Income Tax Board of Review in *IB v CIT*,[4] which provided that where a gain or profit is made from the disposal of an asset, if the asset was acquired with the intention of being held as a long-term investment, the gain or profit would be a capital gain; otherwise, it would be income.[5] It argues that such a test only applies in specific situations where gains or profits are made from the disposal of an asset. A comprehensive test capable of catching all instances of section 10(1)(g) income has not been proposed in the jurisprudence so far and the scope of this article is confined to discussing a test for section 10(1)(g) income applicable only in the specific situation where gains or profits are made from the disposal of an asset.

The article analyses the cases following *IB v CIT*, starting with *HZ v CIT*[6] which followed shortly after. In *GBU v CIT*,[7] the Income Tax Board of Review (ITBR) refined the *IB v CIT* test by clarifying that the concept of 'long-term investments' is merely a safe harbour, and that all facts and circumstances of the case must be considered in determining whether a gain or profit is section 10(1)(g) income.[8] However, the board did not provide any guidance as to what the other relevant facts and circumstances might be. In *GCA & GCB v CIT*,[9] the ITBR applied the *IB v CIT* test without any comment on the 'safe harbour' point mentioned in *GBU v CIT*. *GCA & GCB v CIT* was subsequently appealed to the High Court in *BQY v CIT*,[10] where once again there was no mention of the 'safe harbour' point. At present, *GBU v CIT* stands alone as the only case expressly stating that it is necessary to look beyond the intention of the taxpayer at the point of acquisition and whether he intended to hold the asset as a long-term investment.

The article argues that the ITBR's reliance on *Myer Emporium* in *IB v CIT* was misplaced due to the very different statutory framework under which the Australian case was decided. It submits that the test for 'intention to hold as a long-term investment' did not in fact come from *Myer Emporium*, but rather, was more likely to have originated from a line of Singapore property-trader cases decided some years before *IB v CIT*. It is submitted that consequently, 'intention' should only be one (albeit important) indicia amongst others in the section 10(1)(g) test.

It goes on to argue for a modified Badges of Trade test, where all the Badges of Trade (with the exception of 'frequency') would be applied in section 10(1)(g) cases and submits that such an approach would be consistent with the existing jurisprudence. Finally, the article cautions against a sole focus on intention in the section 10(1)(g) test and emphasises the differences between a receipt being assessed under section 10(1)(a) or (g).

2. The heads of charge

2.1. Overview

Sections 10(1)(a)–(g) of the SITA (and sections 4(a)–(f) of the MITA) lay out the six heads of charge, under which profits or gains are liable to tax in Singapore (and Malaysia):

(1) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;
(2) gains or profits from any employment;
(3) [Deleted by Act 29 of 65]
(4) dividends, interest or discounts;
(5) any pension, charge or annuity;
(6) rents, royalties, premiums and any other profits arising from property; and
(7) any gains or profits of an income nature not falling within any of the preceding paragraphs.

Profits or gains which do not fall within any of the heads of charge in these sections are not liable to tax. Section 10(1)(g) of the SITA is of particular interest for two reasons: firstly, unlike the other heads of charge, which were present from the inception of the statute, section 10(1)(g) was only subsequently added[11]; secondly, the enactment of section 10(1)(g) had some very significant consequences.

2.2. The effect of section 10(1)(g)

Section 10(1)(g) is a 'sweeping-up' provision that catches: 'any gains or profits of an income nature not falling within any of the preceding paragraphs'. Before the enactment of section 10(1)(g), the specific tests for section 10 (1)(a)–(f) income would be applied to determine whether a receipt was income in nature. If a receipt could not be classified as income under any of the specific tests for the various heads of charge, it would simply not be taxable as income. Two kinds of receipts would thus not be subject to income tax: one, capital receipts; and two, income receipts which did not fall under sections 10(1)(a)–(f).

The enactment of section 10(1)(g) changed this position and rendered all income taxable, notwithstanding that it might not fit into any of the other heads of charge.[12] The effect was that all the heads of charge in section 10 (1) collectively cover all income, with the result that only gains or profits in the nature of capital gains are not liable to tax in Singapore. The stark contrast in tax treatment of income and capital gains has naturally made the classification of a profit or gain under either category an issue of great concern to both taxpayers and the Revenue authorities.[13]

3. Section 10(1)(g)

3.1. The history of section 10(1)(g)

While sections 10(1)(a)–(f) of the SITA can be traced back to the Model Income Tax Ordinance[14] which formed the basis of the income tax legislation of many of the British colonies at the time (and on which Singapore based its 1947 Income Tax Ordinance), section 10(1)(g) was only added to the SITA much later, in 1965. Khattar argues that it was the decision of the Singapore Court of Appeal in *DEF v CIT*[15] that led to the enactment of section 10(1)(g).[16]

3.1.1. DEF v CIT

In *DEF v CIT*, the taxpayer borrowed money to purchase a rubber estate and promptly resold it at a profit within three weeks. The question before the Singapore Court of Appeal was whether such an isolated transaction could fall within the ambit of section 10(1)(a). Section 10(1)(a) taxes 'gains or profits from any trade, business, profession or vocation'. In finding for the taxpayer, Buttrose J held that the terms 'trade', 'profession', 'vocation' and 'business' all 'connote habitual and systematic operations, a continuity or repetition of acts or similar operations'.[17] He went on to add that '[t]he term "business" as used in the section does not apply to one isolated act; it does not mean a "business transaction"'.[18] Ambrose J was of a similar view, holding that the fundamental idea behind the four activities listed in section 10(1)(a) was 'the continuous exercise of an activity'[19] and that a business must be 'carried on' for the profit generated to be taxable. In this context, Ambrose J held that 'carried on' implies a 'repetition or series of acts'.[20]

Following the decision in *DEF v CIT*, it was difficult to argue that a single isolated transaction constituted trading.[21] On the other hand, it might be possible to classify it as an adventure in the nature of trade.[22] However, under Singapore law (and Malaysian law before 1967), gains from an adventure in the nature of trade are not taxable.[23] It appears that this position was thought to be unsatisfactory in both Singapore and Malaysia, for section 10 (1)(g) was enacted in Singapore about five years after the decision.[24] Malaysia waited six years after the decision to enact its equivalent provision: section 4(f) of the MITA. However, the MITA went further by modifying the definition of 'business' to include a 'profession, vocation and trade and every manufacture, adventure or concern in the nature of trade'. As such, adventures in the nature of trade are taxable under section 4(a) (of the MITA) in Malaysia but not under section 10(1)(a) in Singapore.

3.2. The nature of section 10(1)(g)

Section 10(1)(g) is drafted in an exclusionary manner. It catches all income unless the income falls under any other head of charge in section 10(1). Conceptually, a test which is to accurately determine whether a gain or profit is in the nature of section 10(1)(g) income must therefore require one to first determine: first, whether a gain or profit is in the nature of 'General Income' (used here to refer to income as a general concept, not specifically classified as income falling under the different heads of income); and second, whether a gain or profit falls under any other head of charge in section 10(1). As will be seen from the existing jurisprudence on section 10 (1)(g), this is not the approach which the courts have adopted in Singapore, though it has been adopted by the Privy Council in the sole case decided at Malaysian law.

It is noted that all the cases on section 10(1)(g) decided in Singapore and Malaysia to date are cases involving the disposal of assets for a profit or gain. There is nothing in section 10(1)(g) that confines its application to such cases. However, this article will engage with the existing jurisprudence and confine its analysis of section 10(1)(g) to cases involving the disposal of assets for a profit or gain. While a comprehensive test capable of catching all instances of section 10(1)(g) income requires the determination of the two factors discussed above (General Income and the other heads of charge), a court considering the specific situation of the disposal of assets for a profit or gain does not have to apply the comprehensive test. There is a possibility that there may be a test that can catch section 10(1)(g) income in the context of the disposal of assets for a profit or gain that has a very different formulation. Indeed, such an alternative formulation appears to have been considered by the courts in Singapore and Malaysia.

Nevertheless, it is submitted that any such test cannot breach two fundamental principles as laid out in the express wording of section 10(1)(g): first, the test cannot catch gains or profits which are not income in nature; and second, the test cannot catch gains or profits which fall under any other head of charge in section 10(1).

3.3. Determining the scope of section 10(1)(g)

For a long time, the exact scope of section 10(1)(g) of the SITA was a matter of speculation, with no fewer than four authors in Singapore writing on this issue.[25] While the first case on section 10(1)(g) of the SITA would only be heard in 2004, the Malaysian equivalent, section 4(f) of the MITA, was judicially considered in 1985, when the case of *M v DGIR*[26] came before the Privy Council.

3.3.1. M v DGIR

The case involved a taxpayer engaged in the business of cultivating oil palms. To develop land into an oil palm plantation, it was necessary to clear the land of timber, which the taxpayer duly sold. The question before the Privy Council was whether the receipts from the sale of timber were in the nature of income.

Their Lordships rejected the finding of the Special Commissioners that there had been two separate and distinct activities, the extraction and sale of timber from the land and the development of the land as a palm oil plantation.[27] Further, they held that the taxpayer was not carrying on a business of timber operators.[28] Finally, in considering the applicability of section 4(f) of the MITA, the Privy Council held that:

> [T]he receipts in question are properly to be regarded as having a capital and not an income character. The timber … was part of a capital asset which the taxpayer acquired by payment of a capital sum. It expended further capital sums on the development of the land, and in mitigation of that expenditure it realised and disposed of timber which formed part of its original capital asset.[29]

Unfortunately, this decision of the Privy Council sheds very little light on the scope of section 4(f) of the MITA. The test applied by their Lordships was drawn from precedents[30] which dealt with the distinction between trade/business income and capital gains. There was therefore no specific guidance on how a test for section 4(f) income might be applied.

However, it is submitted that the Privy Council did get the fundamental concept of the mechanism of section 4(f) right. As noted above, given the nature of section 4(f) as a sweeping-up clause, in order to be assessed under section 4(f), the receipts must not fall under any other head of charge. The Privy Council addressed the possibility that the receipts were trade/business income (it being obvious that the receipts could not fall under any other head of charge).[31] Having determined that the receipts could only either be section 4(f) income or capital in nature, they then applied a test to classify the receipts.[32] As noted above, the test applied by the Privy Council was not a general test for section 4(f) income, but merely a specific test for the situation where there was a disposal of assets for a profit or gain.

3.3.2. IB v CIT

In Singapore, the first application of section 10(1)(g) arose in *IB v CIT*. The case involved an individual who had purchased and sold three properties within a year, with the gains being assessed to tax under section 10(1)(g). The taxpayer argued that given the 'mischief' which section 10(1)(g) was enacted to counter, it should apply to transactions that would otherwise be regarded as adventures in the nature of trade.[33] The Revenue authorities, on the other hand, submitted that section 10(1)(g) should not be so restrained, citing the speech of the Minister at the Second Reading of the Bill that introduced section 10(1)(g) as follows: 'the new provision is introduced to enlarge the scope of charging provisions, rendering liable to tax miscellaneous form of income in respect of which no specific provision now exists'.[34] The ITBR clarified the position, holding that there was 'nothing in the Parliamentary materials to suggest that section 10(1)(g) was enacted solely to address the outcome in *DEF v CIT*', and instead endorsing a literal reading of the section.[35] As such, there was no need for the ITBR to address the question of whether the taxpayer's actions in this case amounted to an adventure in the nature of trade.

As noted above, the plain language of section 10(1)(g) does not confine its application to cases of the disposal of assets for a gain or profit. This is in line with the ITBR's similar finding that the section should not be so confined. However, it should be noted that the case before the ITBR in *IB v CIT* was one of the disposal of assets for a gain or profit. Thus, there is a need to carefully analyse the test applied by the honourable Board to see if it is capable of general application in catching all instances of section 10(1)(g) income, or whether it can only apply in cases where there has been the disposal of assets for a gain or profit.

4. The test in *IB v CIT*

4.1. A comprehensive test for section 10(1)(g) income?

In *IB v CIT*, the ITBR started off by considering one of the key factors for a comprehensive test for section 10(1)(g) income that would apply in all situations: the test for General Income. This was not an easy task, for it has never been easy to pin down a precise definition of 'income'. In fact, the term may be somewhat of a moving target; as explained by Jordan CJ in *Scott v COT* as follows:

> The word 'income' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind.[36]

As it happened, the ITBR defined 'income' as encompassing 'the amount of money or its equivalent received during a period of time in exchange for labour or services, from the sale of goods or property, or as profit from financial investments'.[37]

While conceptually, the ITBR was correct to start off with setting out the concept of income, the definition given was more a list of some common categories of income than an actual comprehensive definition of General Income. With great respect to the honourable Board, the definition is unfortunately both under and over-inclusive. At first glance, it is apparent that the categories of income cannot be so confined. For instance, rents arising from property (as caught by section 10(1)(f)) do not seem to be caught by this definition. In fairness to the ITBR, it did use the term 'encompassing', making it clear that the definition was by no means exhaustive.

However, this definition of 'income' appears to be capable of catching capital gains as well. A gain from the sale of a property may in some circumstances be considered to be in the nature of capital gains. Yet, following this definition of 'income' such a gain would appear to be considered to be 'income' regardless of the circumstances of its realisation. While the ITBR in *IB v CIT* stated that 'the words 'gains or profits of an income nature' would preclude capital gains arising from the disposal of long-term investments from being taxed under section 10 (1)(g)',[38] the definition of 'income' as being capable of including categories of gains that would traditionally be considered to be in the nature of capital gains means that no such preclusion can be implied. It is thus humbly submitted that the definition of 'income' propounded by the honourable Board cannot serve as a comprehensive definition of income.

It does not appear, however, that the ITBR relied on its definition of income when determining the case in *IB v CIT*. Nor did it consider whether the gains or profits in question were capable of falling under any of the other heads of charge in section 10(1). It would thus seem that the ITBR did not apply a comprehensive test for section 10(1)(g) income that would apply in all situations.

4.2. A specific test for section 10(1)(g) income?

The test which the ITBR did eventually apply in *IB v CIT* appears to be one that is specific to the context of disposal of assets for a gain or profit. The honourable Board laid out the test as follows: 'gains from 'extraordinary' isolated transactions may constitute income where the taxpayer had the requisite intention to make a profit or gain before entering into the transaction'[39] (first limb). Further, the ITBR stated that '[o]n the facts of [that] case, unless the Appellant proves that the gains were made by him on the disposal of properties that were acquired with the intention of being held by him as long-term investments, this appeal fails'[40] (second limb).

4.2.1. Analysing the specific test

4.2.1.1. The wording of the test. It is necessary to read the test very carefully. With respect to the first limb, while the ITBR clearly placed great importance on the intention of the taxpayer, it did not state that intention was to be the sole factor to be considered. Rather, the ITBR stated that 'gains from 'extraordinary' isolated transactions may constitute income where the taxpayer had the requisite intention to make a profit or gain before entering into the transaction'.[41] The couching of the test in terms of the possible rather than the absolute suggests that other factors may yet displace the finding that the gains are income in nature, even if the taxpayer had the requisite intention.

With respect to the second limb, the requirement for the taxpayer to provide that he intended to hold the properties as long-term investments needs to be read in context. The ITBR did state that

> [o]n the facts of [that] case, unless the Appellant proves that the gains were made by him on the disposal of properties that were acquired with the intention of being held by him as long-term investments, this appeal fails.[42]

The use of the qualifier at the start of the sentence suggests that this statement was specific to the case and not intended for general application. Read carefully in this manner, it appears that the ITBR was not setting out these two statements as the conclusive tests for section 10(1)(g) income. Rather, the first limb established the primacy of intention over other factors (which were not listed). The second limb is less a test than a conclusion on the facts of the *IB v CIT* case that given the evidence before the ITBR, only proof that the properties were intended to be held as long-term investments would convince the Board that the gains were not in the nature of income.

The need to read the test in *IB v CIT* carefully becomes apparent when we consider the arguments of counsel for the Revenue authorities in *GBU v CIT*, where it submitted that the test for section 10(1)(g) income:

> is two-pronged: first, if the Appellant had an intention to profit from the transaction at the time the transaction was entered into, the gain derived from the transaction would *prima facie* be taxable under section 10(1)(g) of the Act; and second, only if the Appellant satisfied the Board that the acquisition was intended to be held as a long-term investment, the gain would then be considered a non-taxable capital gain.[43]

Further, in *GCA & GCB v CIT*, the parties agreed that 'the core issue in these appeals is whether the Appellants had at the time of the acquisition of each of the Properties an intention to derive a gain or profit from the disposal of each of the Properties'.[44] These statements appear to suggest that the test for section 10(1)(g) is predominantly (if not exclusively) based on the intention of the taxpayer, whereas a careful reading of *IB v CIT*, which these statements are purportedly based on, makes no claim that the section 10(1)(g) test should be so limited.

4.2.1.2. Subsequent application of the test. It was submitted above that the statements on the taxpayer's intention laid out by the ITBR in *IB v CIT* and *HZ v CIT* are not conclusive tests for section 10(1)(g) income, but rather parts of a wider test. Support for this proposition can be derived from *GBU v CIT*, where the ITBR clarified that:

> Although the cases of *IB* and *HZ* only identify the concept of 'long-term investments' as being an exception to the rule, we do not take this to mean that if the Appellant is unable to prove that the acquisition is for the purposes of a long-term investment, it must necessarily mean that the gain derived from the subsequent sale is a taxable income gain … the second stage of the test must be broader than merely long-term investments to also encompass 'other capital purposes depending on the context'.[45]

The board then went on to characterise the concept of 'long-term investments' as a 'safe harbour which would satisfy the Board that the gain was capital in nature, but does not automatically render a gain derived without the intention to hold the purchase as a long-term investment as being an income gain'.[46] This clarification manifestly accords with common sense, given that most, if not all, people who make investments intend to someday realise them at a profit.[47] While this is a welcome clarification, it should be noted that these statements of the ITBR are strictly *obiter dicta*, given that the decision did not turn on the legal test to be applied. Rather, the key question before the Board was whether the taxpayer intended to hold the shares as long-term investments.[48] The clarification in *GBU v CIT* does not provide any authoritative guidance on what the full test for section 10(1)(g) income is. At most, it acknowledges that the test for section 10(1)(g) is broader than merely the intention of the taxpayer.

No further mention of the clarification of the ITBR in *GBU v CIT* was made in the subsequent case of *GCA & GCB v CIT*, nor in its appeal before the High Court in *BQY v CIT*. However, if indeed the case, as will be submitted below, that the 'intention to hold as a long-term investment' concept has its origins in the Singapore case law on property traders, then the clarification of the ITBR in *GBU v CIT* is likely to be correct. In all three property trader cases (discussed below), the ITBR clearly stated the need to take into account all the surrounding circumstances.[49] The 'intention to hold as a long-term investment' test was not the sole determinative factor of whether the profits from the sale of the assets were income in nature.

4.3. The origins of the specific test

4.3.1. A detour down under

That the specific test in *IB v CIT* makes reference to the intention of the taxpayer is rather curious; after all, nowhere in section 10(1)(g) is the intention of the taxpayer expressly referred to. Looking carefully at the reasoning of the ITBR in *IB v CIT*, it appears that the Australian case of *Myer Emporium*[50] was the source of this reference to the intention of the taxpayer. In fact, the ITBR in *IB v CIT* cites a portion of the *Myer Emporium* judgment, in particular emphasising that:

> if circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the taxpayer's business.[51]

4.3.1.1. It was incorrect to apply the reasoning in **Myer Emporium.** It is necessary to understand the context in which the judgment of the Full High Court of Australia in *Myer Emporium* was made. Australia does not have an exact equivalent to Singapore's section 10(1)(g). Rather, the *Myer Emporium* decision was made based on an interpretation of section 26(a) of the Australian Income Tax Assessment Act 1936 (Cth) (AITAA), which reads as follows:

> The assessable income of a taxpayer shall include- (a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profitmaking by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme.

The focus in *Myer Emporium* on the intention of the taxpayer can be attributed to the language of section 26(a) of the AITAA, which makes reference to the concept of 'purpose'. As such, the decision in *Myer Emporium* was arguably reached through the application of an Australian statutory provision rather than a common law principle. The ITBR's reliance on the *Myer Emporium* decision does appear misplaced since section 26(a) of the AITAA and section 10(1)(g) of the SITA are not *in pari materia*.

It is noted that the AITAA does have a 'sweeping-up' provision in section 25 (1), which provides that: 'The assessable income of a taxpayer shall include: (a) where the taxpayer is a resident: the gross income derived directly or indirectly from all sources whether in or out of Australia … ' Section 25(1) of the AITAA differs from section 10(1)(g) of the SITA in that, unlike the latter, the former catches all income without expressly excluding income taxable under another head of charge. Thus, under the AITAA, income could be exigible to tax under either section 25(1) or section 26(a). Indeed, this was the conclusion reached by the Australian Full High Court in *Myer Emporium*, which held that:

> What we have said leads to the conclusion that the amount in question formed part of the income of Myer under s. 25(1) of the Act. A similar chain of reasoning would have led to the conclusion that the amount constituted assessable income under the second limb of s. 26(a) … we consider that the amount in question in the present appeal constituted income of the taxpayer both pursuant to ss. 25(1) and 26(a).[52]

It thus appears that the Australian Full High Court first decided whether the income was exigible to tax under a generalised tax provision (section 25(1) of the AITAA), before considering whether the income would alternatively be taxable under an overlapping charging provision (section 26(a) of the AITAA). Quite apart from the fact that the statutory framework under the AITAA seems to be very different from that under the SITA, there is no reference to 'purpose' or 'intention' in section 25(1) of the AITAA, which would arguably be the provision in the AITAA most similar to section 10(1)(g) of the SITA.

But even if section 10(1)(g) of the SITA and section 26(a) of the AITAA were *in pari materia*, there are difficulties with applying the principle laid down in *Myer Emporium* to the interpretation of section 10(1)(g). Tang has noted that 'none of the three key Australian cases leading up to, and including, *Myer Emporium* were concerned with a taxpayer who would come within the purported scope of section 10(1)(g)'.[53]

It is submitted that conceptually, we can distinguish between two kinds of situations. In the first, there is an existing business, but a gain is made outside the normal operation of such existing business. In the second, a gain is made where there is no other business or trade activity to speak of. Crucially, in *Myer Emporium*, the taxpayer was carrying on a business and made a gain that was not in the ordinary course of business.[54] In other words, it falls within the first situation and was not at all like the situations in *IB v CIT* and *HZ v CIT*, where the taxpayers did not carry on any other business from which the gain arose.

In any case, the test for the first situation appears to have been laid out by the Singapore Court of Appeal in the case of *BBO v CIT*.[55] In that case, an insurance company had acquired certain 'core shares' as part of their 'corporate preservation strategy'. The core shares were acquired with the intention of holding them indefinitely so as to preserve the corporate structure of the group of companies it was a part of and afford a defence mechanism against any potential hostile takeover of any of the companies in the group. Eventually, the group accepted a takeover offer, following which they sold the core shares. The question for the courts was whether the gains made from the sale of the core shares were in the nature of income. At the High Court,[56] Lai Siu Chiu J held that: 'the factors relevant to the analysis of whether the Core Shares are capital assets, and, hence, whether any gains from the disposal of the Core Shares are capital and not income in nature, understandably overlap with some of the factors listed as the "badges of trade"'.[57] Lai J's general approach was affirmed by the Court of Appeal, which came to the same conclusion that the gains from the disposal of the shares were capital gains.[58] Crucially, in *BBO v CIT*, the courts were of the view that the gains from the disposal of the shares, if income in nature, would be section 10(1)(a) and not section 10(1)(g) income.

It is submitted that there are similarities between *BBO v CIT* and the *Myer Emporium* line of cases in Australia. In each case, it was not possible to establish that the activity outside the normal operation of an existing business which generated the gains or profits was a separate trade in itself. However, it was clear that some link between those gains or profits and the core business could be established. As *BBO v CIT* is a Singapore Court of Appeal decision, it is submitted that it is untenable to apply the *Myer Emporium* test any longer. It is admitted that this is a novel reading of *BBO v CIT* and that further research might profitably be done in this area, though that is beyond the scope of this article. In any case, it is submitted that the clear differences between section 10(1)(g) of the SITA and section 26(a) of the AITAA are sufficient to establish that it was incorrect to apply *Myer Emporium* in *IB v CIT*.

4.3.2. Intention to hold as a long-term investment: taxation of isolated property transactions in Singapore

While the ITBR in *IB v CIT* and *HZ v CIT* cited *Myer Emporium* in support of the test they applied,[59] there seems to be considerable differences between section 26(a) of the AITAA and the test applied by the ITBR. Rather, the language of the test laid out by the ITBR has an uncanny similarity to a line of Singapore property-trader cases decided some years before *IB v CIT* and

HZ v CIT. Liu has analysed three such cases[60] and submitted that the common factor in the cases was the finding of the ITBR that the taxpayers had no intention of holding the properties as long-term investments.[61] He goes on to conclude that the three cases establish that:

> [T]axability of gains arising from property transactions will depend on whether the property was sold soon after purchase and whether the seller had the intention, at the time of purchase, to hold the property as a long term investment or not. If the seller did not have this intention, the property would be subject to tax chargeable under section 10(l)(a).[62]

If one considers that the concept of 'intention to hold as a long-term investment' is present in both the case law relating to property traders and that of section 10(1)(g), and the similarity of the assets involved and activities of the taxpayers in both kinds of cases, one might quite reasonably surmise that the ITBR in *IB v CIT* drew on the Singapore case law relating to property traders when crafting the section 10(1)(g) test. However, it must be noted that the property traders' cases involved the assessment of section 10(1)(a) income and that therefore, the Badges of Trade test applied. The section 10(1)(g) test must therefore be read in the context of the application of the Badges of Trade test, as being only one (albeit important) indicia amongst others. Even if we accept that section 10(1)(a) and section 10(1)(g) are different, it is hard to think of a good conceptual reason for focusing on the intention of the taxpayer at the point of acquisition of the asset and ignoring all the other Badges of Trade.

It must be emphasised that the honourable Board in *IB v CIT* delivered an exceptional judgment which has provided subsequent Boards with a (reasonably) practical test. As noted above, the definition of 'income' is notoriously difficult to pin down and the honourable Board should be lauded for offering a definition that is substantially correct in the majority of situations. It should be remembered that in an adversarial system, the courts largely have to work with the authorities submitted by counsel, and in this case there was a complete absence of any directly applicable authorities, local or otherwise.

4.3.3. The context of the IB v CIT decision

It should be noted that in *IB v CIT*, the taxpayer had refused to testify before the ITBR, resulting in the non-admission of his affidavit of evidence.[63] Given that the burden of proving that an assessment is excessive is on the taxpayer,[64] the taxpayer failed to discharge his burden and the Revenue authorities won the case. Given that the case was essentially determined on an issue of the burden of proof, it is perhaps unsatisfactory from an academic perspective, for it does not strongly affirm any legal principle.

5. A need for a new test?

5.1. A modified badges of trade test

If, as argued above, the specific test in *IB v CIT* rests on shaky foundations, the question remains as to what should replace it. This article argues for the adoption of a modified version of the Badges of Trade. The Badges of Trade are a set of indicia that help one to determine the existence of a trade. Crucially, they are applied in situations where the disposal of assets results in profits or gains (or, inversely, losses). It might then be argued that a modified version of the Badges of Trade might similarly shine some light on whether, in the specific context of disposal of assets, the resultant profits or gains are in the nature of General Income. Conceptually, this involves removing from the Badges of Trade all factors that are indicators of trade which are not also independently indicators of income.

It is argued that of the Badges of Trade, it is only the frequency of transaction which is a factor which is solely used to determine the presence of a trade, but is not necessarily indicative of income. For example, as has been discussed in several cases,[65] a single isolated transaction may give rise to a gain or profit in the nature of income. Therefore, frequency of transaction may be an indicator of trade but it is not also independently an indicator of income. In other words, the modified Badges of Trade are almost exactly the same as the Badges of Trade, with the exception of 'frequency', which is not present in the former. If frequency is the only factor distinguishing trade income from general income, it may be argued that income in this context (of gains or profits from the disposal of assets) can exhaustively be divided into income from trade and income from adventures in the nature of a trade.[66] This may go some way to explaining why Malaysia, which taxes income from adventures in the nature of a trade, has had only one reported case involving section 4(f) of the MITA.

5.2. Fitting the test into the existing jurisprudence

A modified Badges of Trade test need not necessarily be incompatible with the existing jurisprudence. The specific test thus far has focused on 'intention' but it would appear that the analysis need not be so confined. Indeed, the

ITBR in *GBU v CIT* noted that the section 10(1)(g) test as it currently is may be incomplete. It stated that '[a]ll the facts and circumstances of the case must be considered'.[67] In the consideration of such 'facts and circumstances', a framework (the modified Badges of Trade) may well be a useful tool for the courts. A common framework would have the additional benefit of expressly laying out the factors to be considered in all cases, enabling parity of treatment in that each case coming before the ITBR would be decided based on the same set of factors. This too was one of the reasons listed in the Royal Commission Report for the Badges of Trade.[68]

Of all the section 10(1)(g) cases decided in Singapore so far, it appears that exactly half of the cases make reference to some factors which are present in the Badges of Trade. In *HZ v CIT*[69] and *GBU v CIT*,[70] the ITBR considered the method of financing and the length of the period of ownership as relevant factors in applying the section 10(1)(g) test. *IB v CIT* and *GCA and GCB v CIT* focus solely on the intention of the taxpayer and do not refer to any of the Badges of Trade.

The clearest indication that the Singapore courts apply some of the Badges of Trade can be found in *BQY v CIT*, where Choo J held as follows:

> The matter is to be decided by a determination of the buyer's intention at the time he purchased the property. But how does one ascertain his intention? When parties disagree as to what the true intention of a person was, the court as a finder of fact, can only look at the action or conduct of that person and see on the balance of probabilities, whether the conduct was more consistent with one intention or the other.[71]

It would thus appear that the Singapore courts, on some occasions at least, have found it difficult to directly ascertain the intention of the taxpayer and have resorted to applying some Badges of Trade factors in an attempt to assist them in ascertaining such intention. It seems that in such cases, the courts ultimately still determine the taxpayer's intentions and decide the case on that finding. However, application of some of the Badges of Trade do assist the courts in arriving at that finding of fact.

This arguably means that the modified Badges of Trade test might fit nicely into the existing jurisprudence. If the Singapore courts have been willing to apply some of the Badges of Trade to determine the intention of the taxpayer (the original purpose of the Badges of Trade) in section 10(1)(g) cases, there is nothing inconsistent with going a step further and recognising that the Badges of Trade (with the exception of 'frequency') may all be applied (where appropriate) to determine if gains or profits from the disposal of assets are in the nature of section 10(1)(g) income.

6. A different interpretation of the specific test

While it may be argued that the modified Badges of Trade test might be consistent with the existing jurisprudence, that is contingent on the courts being willing to accept that the specific test is broad enough to allow for the use of some of the Badges of Trade to help determine the intention of the taxpayer. If the courts continue to solely focus on the intention of the taxpayer when testing for section 10(1)(g) (which, it is humbly suggested, is untenable in light of the foregoing discussion), then there will be major implications for how capital and income receipts are classified.

6.1. Against a sole focus on intention

It is somewhat counterintuitive that there are at least six commonly applied Badges of Trade (Teo has proposed another five)[72] for testing for section 10 (1)(a) income, while it seems, only one indicium (which is intention) for testing for section 10(1)(g) income. In practice, the sole focus on intention in section 10(1)(g) is likely to deprive the court of a framework on which to determine the intention of the taxpayer. The availability of a framework for the courts has the benefit of encouraging parity of treatment in each case coming before the ITBR.[73] Further, it has already been noted above that of all the section 10(1)(g) cases decided in Singapore so far, it appears that exactly half of the cases make reference to some factors which are present in the Badges of Trade. Thus, arguably, the Singapore courts would appear to have, on some occasions at least, found it difficult to directly ascertain the intention of the taxpayer and have resorted to applying some of the Badges of Trade in an attempt to assist them in ascertaining such intention.

As the onus lies on the taxpayer to prove that an assessment is excessive,[74] the practical effect of a sole focus on intention will be that the taxpayer will have to prove, without the aid of any framework, that he did not intend for the assets to be acquired as trading stock. The Revenue authorities' case is made even easier to make out if the second limb of the specific test is applied in isolation from the first limb. In effect, the taxpayer has the burden of proving something which can be very difficult to show indeed; that he acquired the assets with the intention of holding them as long-term investments.

6.2. Other consequences: section 10(1)(a) v section 10(1)(g)

A sole focus on intention in the specific test has an additional consequence of making it even more important that receipts are assessed under the correct head of charge: section 10(1)(a) or section 10(1)(g). As mentioned above, the Revenue authorities enjoy certain advantages if the assessment is made under section 10(1)(a): the taxpayer has no framework on which to prove intention, and the taxpayer has to show that he acquired the assets with the intention of holding them as long-term investments.

Apart from issues of evidence and proof, it is noted that while both sections 10(1)(a) and (g) income are taxable, there is a difference in the applicable tax restrictions. As the Singapore Court of Appeal noted in *JD v CIT*:

> [C]ertain tax restrictions are not visited on section 10(1)(a)-sourced income. For instance, only section 10(1)(a) assessment (see s 37(3)(a)), and unabsorbed section 10(1)(a) losses can be carried forward for set-off against statutory income of future years of assessment upon satisfying certain criteria in s 37(5). For non-section 10(1)(a) sources, s 14(1) requires a source-by-source concept to be applied, whereby the expenses incurred in the production of each source of income must be scrupulously matched against the source.[75]

Further, where a taxpayer is assessed under section 10(1)(a), it may deduct capital allowances against its assessable income, whereas it will be unable to do so if assessed under section 10(1)(g).

It should not be possible for the Revenue authorities to choose to assess the taxpayer under section 10(1)(a) or (g). The language of section 10(1)(g) makes it exceedingly clear that it is mutually exclusive from the other subsections in section 10(1). In other words, it can only apply where none of the other subsections can apply to the gain in question. Indeed, as seen above, this was the approach of the Privy Council in *M v DGIR*, where their Lordships expressly addressed the possibility that the receipts could fall under any other head of charge before proceeding to determine whether they were section 4 (f) income.[76]

6.3. Knowing when to apply each sub-section

In practice, however, the line between cases where section 10(1)(a) applies and where section 10(1)(g) applies may not be quite so easy to draw. By way of illustration, consider the three cases of *BQY v CIT*,[77] *NP v CIT*[78] and

GCH v CIT,[79] which may be said to be similar in many respects. The transactions entered into by the taxpayers followed a simple pattern of the purchase of several properties, followed by a sale of those properties at a profit. The gains in *BQY v CIT* were assessed under section 10(1)(g), while those in *NP v CIT* and *GCH v CIT* were assessed under section 10(1)(a). There were three property transactions in the first case, while there were seven and five transactions respectively in the latter two cases. As the facts of the cases are substantially similar, one might surmise that the main difference between the cases is the number of transactions involved. However, it is by no means clear what the 'threshold' is for 'crossing over' from section 10 (1)(g) to section 10(1)(a). Things are complicated by the fact that in none of the section 10(1)(g) cases was it submitted that the gains should be assessed under section 10(1)(a) instead. The applicable section not being an issue before the courts, the classification of cases as involving sections 10(1)(a) or (g) based on the numbers of properties sold are the result of agreement between the Revenue authorities and various taxpayers, and by no means representative of any legal principle.

But the number of transactions, viewed in isolation, cannot be determinative. In the case of a company, there seems to be a presumption that it is trading once it engages in a single transaction.[80] For an individual, the general rule appears to be that one or two isolated transactions is insufficient,[81] except in the case of one who has intended to engage in a trade.[82] It would thus appear that frequency is not the sole factor which separates section 10(1)(a) from section 10(1)(g). It is more likely that the primary determinant is intention. However, at the present moment, it is difficult to see any clear principles laid down by the courts that would aid us in distinguishing situations where section 10(1)(a) applies and those where section 10(1)(g) applies.

Yet this is a profoundly unsatisfactory situation, given that in order to determine whether a receipt is in the nature of section 10(1)(g) income, it is necessary to first exclude the possibility of it falling under any other head of charge. There must be at least some analysis to rule out the other heads of charge before applying the section 10(1)(g) test. Such analysis appears to be unfortunately lacking in the existing jurisprudence, where the courts appear to apply the section 10(1)(g) test in isolation of the general concept of income, or of the other specific tests for sections 10(1)(a)–(f) income. The current approach of applying the section 10(1)(g) test directly risks rendering sections 10(1)(a)–(f) otiose.

6.4. Different mechanisms for determining intention

Under the current jurisprudence, it would be accurate to say that the ITBR has 'divorced the analysis under section 10(1)(g) from any consideration of whether a trade or business exists, or may be intended to exist'.[83] The findings from this analysis would only be relevant to determine whether section 10(1)(a) applies, and thus, to the issue of whether section 10(1)(g) is inapplicable. However, apart from this, the findings would not be relevant to section 10(1)(g) at all.[84] In all the section 10(1)(g) cases in Singapore, the courts have not expressly applied the Badges of Trade test; instead, they have focused on the sole factor of the intention of the taxpayer. One might add while the findings may be relevant to whether section 10(1)(a) applies, thus excluding section 10(1)(g), such analysis has never been expressly done in any of the section 10(1)(g) cases to date.

It is also accurate to say that under the section 10(1)(a) and (g) tests, '[b]oth approaches focus on the intention of the taxpayer *at the time of acquisition of the asset disposed of*'.[85] The section 10(1)(g) test provides that 'unless the Appellant proves that the gains were made by him on the disposal of properties that were acquired with the intention of being held by him as long-term investments, this appeal fails'.[86] For the Badges of Trade test, the applicable principle was laid out by the House of Lords in *Simmons v IRC*, which held that '[t]rading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset'.[87]

However, it is respectfully submitted that it may not be true to say that there is little practical difference between the two approaches.[88] While both the section 10(1)(g) test and the Badges of Trade do focus on the intention of the taxpayer, the means through which they determine the said intention differ significantly. Under the section 10(1)(g) test, the intention of the taxpayer has to be directly ascertained by the court; no framework or list of indicia are provided to assist the court in making this judgment. However, it is argued that it is precisely the deficiencies in this kind of approach that resulted in the introduction of the Badges of Trade in the first place.

The original report of the Royal Commission which laid out the Badges of Trade test makes it clear that the focus of the test was the ascertainment of the taxpayer's motive. However, the taxpayer's motive is by no means easily determined. The Badges of Trade were thus preferred as they offered 'objective tests of what is a trading adventure instead of concerning itself directly with the unravelling of motive'.[89] The Royal Commission further stated that 'if motive is to be ascertained, it is better ascertained by being imputed as the automatic result of prescribed conditions than by an attempt to search the mind of the taxpayer himself'.[90]

Thus, while both tests are objective in nature, the section 10(1)(g) test lacks a framework on which to assess the intention of the taxpayer, a problem which the Badges of Trade were precisely introduced to counter. Instead, in the application of the section 10(1)(g) test, the court directly proceeds to objectively determine the intention of the taxpayer. Indeed in the existing case law on section 10(1)(g), we do not see the application of any clear framework to assist the court in determining the taxpayer's intention.

It would thus appear that there are significant differences for a taxpayer depending on whether his receipts are assessed under section 10(1)(a) or (g). Such differences become even more stark if the courts should choose to apply an interpretation of the specific test with a sole focus on taxpayer intention.

7. Conclusion

Since the section 10(1)(g) test was laid down in *IB v CIT*, the cases show a growing gulf between the tests for section 10(1)(a) income and section 10 (1)(g) income. While the Badges of Trade test for section 10(1)(a) income requires a holistic assessment of various indicia in order to establish whether a gain or profit is in the nature of income, the cases suggest that the section 10(1)(g) test was becoming construed as requiring the taxpayer to satisfy the Board that he did not intend to profit from the transaction at the time of acquisition of the asset. There may even have been a suggestion that the taxpayer was required to show that he intended to hold onto the asset as a long-term investment at the time of acquisition. Phrased in such a way, the section 10 (1)(g) test put the taxpayer at a considerable disadvantage as compared to if the assessment of the gain or profit had been made under section 10(1)(a) instead. Given the rather blurry distinction between cases which should fall under the section 10(1)(a) situation and those which should fall under section 10(1)(g), there is currently an incentive for the Revenue authorities to assess the taxpayer under section 10(1)(g) wherever possible.

No good conceptual reason has been put forward as to why we should consider a multitude of factors when testing for section 10(1)(a) income and only one factor when testing for section 10(1)(g) income. One would have thought that on a common-sense approach, using the same list of factors for section 10(1)(a) income and removing those specific to trade, would have produced a test fit for application to section 10(1)(g).

This article has sought to show that the *Myer Emporium* case was decided in a very different statutory context and that the section 10(1)(g) test should not be based on principles drawn from *Myer Emporium*. However, it has been submitted that the modified Badges of Trade approach may fit in nicely with the existing jurisprudence. In contrast, a sole focus on intention is untenable in light of the foregoing discussion and is apt to result in injustice. The modified Badges of Trade test should be applied instead as it provides a much better structural framework with which to determine the question of whether a gain or profit from the disposal of an asset is in the nature of capital gains or income.