

## Question 1

First, it is necessary to determine whether, due to her relocation to Singapore, Holly will become a resident for Singapore tax purposes.

Individuals are considered to be resident in Singapore if they satisfy either the qualitative or quantitative test (sec. 2 ITA). Under the qualitative test, a person who, in the preceding year of assessment, resided in Singapore (except for temporary absences) is regarded as resident. "Reside" means to dwell permanently and the question of a person's residence must be determined taking into consideration all relevant facts and circumstances (e.g. presence of a permanent home, personal ties, frequency and motive for visits to Singapore). Based on the qualitative test, Holly is not likely to be regarded as resident in Singapore as she does not intend to establish a permanent home there and plans to return to Blaavos after the end of her two-year employment. Her centre of vital interests is in Blaavos where she has lived all her life.

Under the quantitative test, residence requires physical presence or the exercise of employment in Singapore for more than 183 days during the preceding year of assessment. As Holly will be employed in Singapore for a continuous period of two years, she will be considered resident for Singapore tax purposes.

Thus, during the two-year period Holly will be regarded as tax resident in both Blaavos and Singapore. The residence conflict can be solved by the hierarchy of criteria of the tie-breaker rule of the tax treaty. If the tie-breaker rule follows article 4 of the OECD Model, the decisive criteria are: the availability of permanent home, centre of vital interest, citizenship. If the application of these criteria does not lead to a satisfactory result, the mutual agreement procedure can be invoked.

Two scenarios are considered below:

- i) Holly is resident of Singapore based on the treaty tie-breaker rule;
- ii) Holly is resident of Blaavos based on the treaty tie-breaker rule.

### Singapore residence

As Singapore resident, Holly is subject to Singapore tax on her income derived from Singapore. Foreign income received by Singapore residents after 1/1/2004 is exempt (sec. 13 (7A) ITA), unless received through a partnership. Residents are subject to progressive tax rates ranging from 2% to 20% (22% as from YA 2017) and they may benefit from tax rebates (for YA 2015: 50% of tax liability, capped at SGD 1,000). They can take advantage of personal relief (sec. 39 ITA).

Holly's salary constitutes employment income (sec. 10 (1)(b) ITA). Interest income received from Singapore bank is likely to be exempt (sec. 13 (zd) ITA). Interest income from Blaavos and another third country is exempt based on sec. 13 (7A) ITA.

Holly could benefit from the Non-Ordinarily Resident scheme (sec. 13N ITA). If the condition prescribed in this section are met, Holly may take advantage of the time apportionment concession and exemption for non-obligatory contributions to overseas pension and social security funds.

As under the tie-breaker rule Holly is regarded as resident in Singapore, she is deemed to be non-resident in Blaavos during the two-year period. Assuming that non-residents are subject to limited taxation in Blaavos (i.e. only their Blaavos-sourced income is taxed), Holly is not subject to double

taxation that would have to be resolved by the tax treaty. Her interest income derived from Blaavos is taxed only in Blaavos, whereas her other interest income and employment income are not deemed to be sourced within the country territory.

#### Blaavos residence

Non-residents are subject to tax only on their Singapore-sourced income. Foreign-sourced income received in Singapore is exempt (sec. 13 (7A) ITA).

Interest income received from Singapore bank is likely to be exempt (sec. 13 (zd) ITA). Interest income from Blaavos and another third country is exempt based on sec. 13 (7A) ITA.

Holly's salary is deemed to be derived from Singapore as employment is exercised there (sec. 12 (4) ITA). Employment income derived by non-residents is taxed at a flat rate of 15% or residential tax rates, whichever results in higher tax liability.

As a Blaavos resident, Holly is subject to tax on her worldwide income there. Thus, her employment income is subject to tax both in Singapore and Blaavos based on the domestic tax law of both countries. Double taxation can be resolved by article 15 of the tax treaty, under which Singapore (the source state) will have the right to tax Holly's employment income.

### Question 3

Individuals are considered to be resident in Singapore if they satisfy either the qualitative or quantitative test (sec. 2 ITA). Under the qualitative test, a person who, in the preceding year of assessment, resided in Singapore (except for temporary absences) is regarded as resident. Under the quantitative test, residence assumes physical presence or the exercise of employment in Singapore for more than 183 days during the preceding year of assessment. Singapore taxes income derived from Singapore (Singapore-sourced income) and income received in Singapore from outside Singapore (foreign-sourced income) (sec. 10 (1) ITA).

Foreign-sourced income received by individuals (both residents and non-residents) is exempt from Singapore income tax (sec. 13(7A) ITA). A condition for the exemption of foreign-sourced income received by resident individuals is that such income must be received after 1 January 2004, must not be received through a partnership and the exemption must be beneficial to the individual. Therefore, both resident and non-resident individuals are effectively taxed only on their Singapore-sourced income. This could imply that "tax residence is effectively irrelevant".

However, the statement that "tax residence is effectively irrelevant" fails to take into account many important differences between the taxation of residents and non-residents:

- Non-residents cannot take advantage of the Singapore tax treaty network (about 74 tax treaties);
- Only residents can take advantage of personal relief (sec. 39 ITA);
- Non-residents cannot fully benefit from the quasi-territorial tax system of Singapore as they are usually subject to worldwide taxation in their home countries;
- Withholding taxes are levied on certain payments to non-residents (sec. 45 ITA); and
- Different tax rates apply to residents and non-residents (sec. 42 and 43 ITA). Resident individuals are taxed at progressive rates ranging from 2% to 20% (22% as from YA 2017) and they may benefit from tax rebates (for YA 2015: 50% of tax liability, capped at SGD 1,000).

Non-residents are taxed at the rate of 20% (there are special rules for employment income, income derived by non-resident professionals and public entertainers):

- Only employees who are Singapore residents or citizens are required to contribute to the Central Provident Fund; and
- In order to benefit from the Non-Ordinarily Resident Scheme (sec. 13N ITA), an individual must be resident in Singapore.

The above examples show that residence is not "effectively irrelevant" as certain benefits are available only to residents. To enable non-residents to benefit from a resident status, Singapore offers various concessions. Under the two-year concession, an individual (other than a director, public entertainer or professional) staying in Singapore for more than 183 days straddling two calendar years may be regarded as resident for both calendar years, even if in either year he stays in Singapore for less than 183 days. Under the three-year concession, an individual who stays in Singapore for three years can be regarded as resident for all three years, even if in the year of arrival and departure his stay in Singapore was shorter than 183 days.

#### Question 4

Singapore companies are taxed on their income derived from Singapore and foreign income received in Singapore. All income is taxed at the rate of 17%. Certain types of foreign-sourced income are exempt (sec. 13 ITA).

#### Dividend income

Under sec. 13(8) ITA, foreign-sourced dividends are exempt if the conditions specified in sec. 13(9) ITA are met. Singapore-sourced dividends are always exempt as Singapore applies the one tier system.

A dividend is regarded as foreign-sourced if it is paid by a non-resident company. As MaxxedOut is resident in Australia, the dividend received by Capital Ltd is deemed to be foreign-sourced.

The conditions of sec. 13(9) ITA are as follows:

- The dividend must be subject to income tax in the country from which it is received. The "subject to tax" criterion is also met if the dividend is not taxed based on an exemption for substantial business activities.

In the case in question, the dividend is not taxed at all in Australia. However, if it is assumed that the exemption for branch profits is only available for substantial business activities, the "subject to tax" condition will be met.

- The headline tax rate (not necessarily the actual tax rate) in the foreign country is at least 15%. If income is subject to a special regime, the highest tax rate prescribed by that regime is decisive. In the case in question, the headline tax rate is 30%.
- The tax exemption is beneficial to the recipient of the dividend. It is assumed that this is the case in the case in question.

If the above-mentioned conditions are met, the dividend received by Capital Ltd is exempt.

If the above-mentioned conditions are not met, the dividend is subject to 17% income tax in Singapore. Double taxation (and the need to apply unilateral tax relief) does not arise as the dividend income is exempt in Australia.

#### Interest income

Interest income received from Australia is subject to tax at the prevailing corporate tax rate (17%). There is no exemption comparable to that applicable to foreign-sourced dividends.

As interest is subject to tax both in Australia (withholding tax of 10%) and in Singapore, double taxation occurs. Assuming that there is no tax treaty between both countries, double taxation can be mitigated by the application of the unilateral tax credit (sec. 50A ITA). The credit amount is limited to the lower of the foreign tax paid and Singapore tax that would be due on that foreign sourced income. As from YA 2012, credit pooling is available.

## Question 7

AQQ v. CIT was a case decided by the Court of Appeal in 2014. It concerned the interpretation of section 33 ITA and its relation to other provisions of the ITA.

The facts of the case were as follows. A group of companies headed by a Malaysian parent underwent restructuring that also involved a financing arrangement. As a result of the restructuring, a holding company AQQ was established in Singapore. AQQ held shares of other Singapore companies and received dividend income from them. AQQ opted to remain under the imputation system (which was possible during the transition period 1/1/2003 – 31/12/2007) and not to switch to the one-tier system. The financing arrangement involved a Singapore and Mauritius bank and was so structured that the money borrowed by AQQ was effectively returned on the same day via a very complex route. The lender effectively did not bear any creditor risk. The outcome of the financing arrangement was that interest could be deducted from imputation credits, which resulted in a tax refund to AQQ.

The Comptroller initially granted the refund; however, after further investigation, he concluded that the arrangement amounted to tax avoidance. Consequently, he issued additional tax assessments disregarding both interest and dividend income. AQQ objected to the additional assessments. The Board of Review upheld the decision of the Comptroller. The High Court confirmed that the arrangement constituted tax avoidance; however, it also ruled that the Comptroller did not exercise his powers fairly and reasonably by issuing additional assessments. Both parties appealed to the Court of Appeal.

The Court of Appeal (CA) considered five issues:

### Whether the arrangement satisfied any of the threshold limbs of sec. 33(1)

The CA ruled that "arrangement" is a composite term and may involve steps that are unobjectionable on its own. The CA confirmed that the operations of AQQ amounted to tax avoidance as they lead to a reduction of tax liability. The taxpayer could not provide convincing reasons for its restructuring and financing operations.

### Whether the exception of sec. 33(3)(b) applied

The CA ruled that the taxpayer could not rely on the exception of sec. 33(3)(b) ITA. Even if there were any commercial reasons for the restructuring and financing arrangement, the main purpose of these operations was a reduction of tax liability.

### Whether the taxpayer could rely on any other provision of the ITA to prevent the application of section 33

The CA ruled that the proper way to interpret sec. 33 and its relationship to other provisions of the ITA was to apply the "scheme and purpose" approach set out by the Supreme Court of New Zealand in Ben Nevis. The "scheme and purpose" approach requires three steps:

- To determine whether any of the threshold limbs of sec. 33(1) is satisfied; and if so,
- To determine whether the exception of sec. 33(3)(b) can be applied; and if not,

- To determine whether the benefit obtained by the taxpayer results from the application of any other provisions of the ITA and the achieved outcome is within the intended scope of the provision and Parliament's contemplation.

The CA ruled that the taxpayer cannot be removed from the scope of sec. 33 by the application of any other provision of the ITA.

Whether the Comptroller exercised his powers fairly and reasonably

The CA ruled that the Comptroller exercised his powers fairly and reasonably. The Comptroller has broad powers under sec. 33 as this section does not require him to take any particular course of action. Consequently, the Comptroller could disregard both interest and dividend income instead of applying a withholding tax. The discretion of the Comptroller cannot be replaced by that of the court.

Whether the Comptroller acted ultra vires sec. 74 ITA by issuing additional assessments

The CA ruled that the Comptroller acted ultra vires sec. 74 ITA . A tax refund does not constitute taxable income and cannot be the object of an additional assessment.