ABB *v* Comptroller of Income Tax
[2010] SGHC 46

Case Number : Income Tax Appeal No 1 of 2009

Decision Date : 08 February 2010

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Tan Kay Kheng and Tan Shao Tong (WongPartnership LLP) for the appellant; Joanna Yap and Joyce Chee (Inland Revenue Authority of Singapore) for the respondent.

Parties : ABB — Comptroller of Income Tax

Revenue Law

8 February 2010 Judgment reserved.

Chao Hick Tin JA:

Introduction

1 This is an appeal from the decision of the Income Tax Board of Review ("the Board") in Income Tax Board of Review Appeal No 32 of 2007, where the Board held that gains obtained from the exercise of share options by the estate of a deceased employee were subject to income tax. It raises two questions, namely: (a) whether such a benefit can be considered to arise from employment; and (b) whether the relevant provisions of the Income Tax Act (Cap 134, 2004 Rev Ed) ("the Act"), which provisions deem gains derived from share options to be taxable income, apply to gains derived from share options permitted to be retained, and subsequently duly exercised, by the estate of a deceased employee.

The facts

2 The appellant is the widow of an employee taxpayer ("the Taxpayer") and brings this appeal in her capacity as the executrix of his estate ("the Estate"). The respondent is the Comptroller of Income Tax. Prior to his death, the Taxpayer was a senior executive in a group of related companies (hereafter referred to collectively as "the Companies" and individually as a "Company"). As part of his remuneration, he was granted share options in each Company pursuant to that Company's share option plan. The terms of the share option plans of the Companies (collectively, "the Share Option Plans") are substantially similar, and the most relevant provisions are the following: [note: 1]

> 7.1 Subject as provided in Rules 7 and 8, an Option shall be exercisable, in whole or in part, during the Exercise Period applicable to that Option and in accordance with the Vesting Schedule and the conditions (if any) applicable to that Option.
>
> …
>
> 7.3 In any of the following events, namely:–
>
> …

(d) the death of a Participant [*ie*, a holder of share options granted pursuant to the Share Option Plans];

…

an Option then held by that Participant shall, to the extent unexercised, *lapse without any claim whatsoever against the Company, unless otherwise determined by the Committee in its absolute discretion*. …

[emphasis added]

The Executive Resource Compensation Committee of each Company is the "Committee" referred to in the above provisions, and it is responsible for administering that particular Company's share option plan. I will refer to the Executive Resource Compensation Committees of the Companies collectively as "the Committees".

3 It may be noted that the other events covered by Rule 7.3 of the Share Option Plans include the bankruptcy of a holder of share options granted pursuant to these plans (a "Participant"), a Participant leaving the Companies due to ill-health, injury or retirement upon reaching the legal retirement age, *etc*. This rule further provides that the Committees, in exercising their discretion to allow a Participant to retain share options which would otherwise have lapsed, can vary the number of shares comprised in the share option and the period during which they have to be exercised.

4 After the death of the Taxpayer in 2005, the Committees exercised their discretion to allow the Estate to retain and exercise the share options that had been granted to the Taxpayer prior to his death ("the Share Options"), which would *prima facie* have lapsed upon his death. In addition, the exercise periods for certain of the Share Options which were not exercisable yet were brought forward such that those share options could be exercised immediately by the Estate. The Committees' decision only restored the Share Options, which (as just mentioned) would otherwise have lapsed due to the death of the Taxpayer, and did not confer any new share options on the Estate.

5 The Share Options were subsequently exercised by the Estate in 2006, and the gains derived from the exercise of the options were computed by the respondent as amounting to over $8m for the Year of Assessment 2007. The tax liability on the Estate from such gains was about $1.7m.

6 The appellant disputed that the gains derived from the exercise of the Share Options were subject to income tax and appealed to the Board. The Board found that the retention of the Share Options by the Estate was a benefit accruing to the Estate by reason of the Taxpayer's employment, and concluded that the gains derived from the exercise of these share options were subject to income tax. Dissatisfied, the appellant now appeals to this court against the Board's decision.

Relevant provisions of the Income Tax Act

7 The respondent subjected the gains derived by the Estate from the exercise of the Share Options to income tax under s 10(1)(*b*) of the Act, which reads as follows:

Charge of income tax

10.— (1) Income tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of —

…

(*b*) gains or profits from any employment;

…

8 In addition to s 10(1)(*b*), two other provisions are also pertinent. The first is s 10(6) of the Act, which reads as follows:

> Any gains or profits, directly or indirectly, derived by any person from a right or benefit granted on or after 1st January 2003, whether granted in his name or in the name of his nominee or agent, to acquire shares in any company shall, *where the right or benefit is obtained by that person by reason of any office or employment held by him*, be deemed to be income chargeable to tax under subsection (1)(*b*) [*ie*, s 10(1)(*b*)] … [emphasis added]

9 The second provision is s 10(5) of the Income Tax Act (Cap 134, 2001 Rev Ed) as it stood prior to the amendments effected by the Income Tax (Amendment) Act 2002 (Act 37 of 2002) ("the former s 10(5)"). The former s 10(5) is the predecessor of s 10(6) of the Act and reads as follows:

> Any gains or profits directly or indirectly derived by any person by the exercise, assignment or release of a right or benefit whether granted in his name or in the name of his nominee or agent to acquire shares in a company shall, *where the right or benefit is obtained by that person by reason of any office or employment held by him*, be deemed to be income … [emphasis added]

10 The Court of Appeal held in *Comptroller of Income Tax v HY* [2006] 2 SLR(R) 405 that s 10(5) of the Income Tax Act (Cap 134, 1996 Rev Ed), which was *in pari materia* with both the former s 10(5) and s 10(6) of the Act, was merely a deeming or definitional provision which sought to include, as taxable income, gains derived from the exercise of share options that had been granted to a taxpayer by reason of his office or employment. By extension, the former s 10(5) and s 10(6) of the Act would operate similarly. Both of these provisions are relevant in this appeal because s 10(6) of the Act applies to share options granted on or after 1 January 2003, while the former s 10(5) applies to share options granted before 1 January 2003 (see s 10(6A) of the Act). Since the Share Options were granted to the Taxpayer over a period from 1999 to 2004, both s 10(6) of the Act and the former s 10(5) are applicable.

11 Both the appellant and the respondent have accepted that, for the purposes of this appeal, there is no material difference between s 10(6) of the Act and the former s 10(5). What is more important is that both of these provisions only operate in respect of share options that are obtained *by reason of* any office or employment held by the taxpayer. Counsel for the appellant, Mr Tan Kay Kheng ("Mr Tan"), has also pointed out that neither s 10(6) of the Act nor the former s 10(5) makes any express reference to gains derived from share options that are allowed to be retained by the estate of a deceased employee.

Issues arising in this appeal

12 In order to subject the gains obtained by the Estate from the exercise of the Share Options to income tax under s 10(1)(*b*) of the Act, the respondent must show that:

> (a) the retention of the Share Options by the Estate was a benefit extended by the Companies by reason of the Taxpayer's employment; and

(b) s 10(6) of the Act and the former s 10(5) apply to share options retained by a deceased taxpayer's estate.

These are the two determinant issues in this appeal.

The first issue: Whether the retention of the Share Options by the Estate constituted a benefit arising from the Taxpayer's employment

The law

13 Before I examine the relevant authorities, I need to refer to the Court of Appeal's decision in *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484, where the court cautioned against the blind use of foreign case law in elucidating tax principles, especially where the wording of the foreign tax legislation was not *in pari materia* with the local equivalent. I acknowledge that foreign tax statutes may be (and are often) worded differently from our local tax legislation. However, for the purposes of the present appeal, I find Commonwealth cases to be relevant, and even persuasive, sources of authority in determining the issue of whether a particular gain or benefit is one that was obtained by reason of the taxpayer's employment. This is because, as I will go on to show, the question of whether a gain or benefit arose from employment is a very broad inquiry that depends very much on the circumstances of each individual case. In determining this question, the precise wording of the relevant tax statute would be less crucial. What matters more are the factors which the courts in other Commonwealth jurisdictions have considered to be germane in characterising whether a gain falls within or outside employment.

General principles

14 I will begin my analysis of the first issue (*viz*, whether the retention of the Share Options by the Estate was a benefit obtained by reason of the Taxpayer's employment) by referring to the applicable general principles enunciated by Upjohn J in *Hochstrasser (Inspector of Taxes) v Mayes* [1959] Ch 22 ("*Hochstrasser (HC)*"), where he said at 33:

> In my judgment, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. … [N]ot every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something *in the nature of a reward for services past, present or future*. [emphasis added]

15 Two points from the above passage by Upjohn J should be noted. First, whether a particular gain can be treated as having arisen by reason of employment depends on the facts and circumstances of that individual case. Second, for the gain in question to be regarded as having arisen from employment, it must be a reward for services past, present or future. This "reward for services" test has also been quoted with approval by local authors (see Pok Soy Yoong & Damian Hong Chin Fock, *Singapore Taxation* (Butterworths, 2nd Ed, 1989) at p 224 and Angela Tan, *Singapore Master Tax Guide Handbook 2008/09* (CCH Asia Pte Limited, 27th Ed, 2008) at ¶ 5-210).

16 It seems to me that, since the question of whether a gain or benefit has arisen by reason of employment would depend on the unique facts of each case, the "reward for services" test should not be regarded as the only applicable test. The problem with the "reward for services" test is that it focuses entirely on the services rendered by the employee, whereas s 10(6) of the Act (and also the

former s 10(5)) requires the court to determine whether the benefit in question arises from an employment relationship. It is not that the "reward for services" test is wrong. But, there could be circumstances where a benefit, although arising by reason of the taxpayer's employment, has nothing to do with the taxpayer's services, past, present or future. The "reward for services" test is, of course, a very useful test, but, as I have just stated, it is not the only test. Indeed, in *Hochstrasser (Inspector of Taxes) v Mayes* [1960] AC 376 ("*Hochstrasser (HL)*"), the House of Lords, while affirming Upjohn J's judgment in *Hochstrasser (HC)*, focused on the concept of employment rather than that of services rendered. As Viscount Simonds held (at 390):

> The question is one of substance, not form. I accept, as I am bound to do, that the test of taxability is whether from the standpoint of the person who receives it the profit accrues to him by virtue of his office …

17 Similarly, Lord Radcliffe said (at 391–392):

> [W]hile it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him *in return for acting as or being an employee*. [emphasis added]

18 Later English cases have also affirmed the principle that gains from employment are not restricted to payments (or other benefits) received as a reward for services (see *Hamblett v Godfrey (Inspector of Taxes)* [1987] 1 WLR 357 at 370 and *Wilcock (H M Inspector of Taxes) v Eve* (1994) 67 TC 223 ("*Wilcock*") at 237).

19 While I recognise that there is considerable overlap between the two tests – *viz*, the "reward for services" test and the "capacity as employee" test – and that, in most circumstances, the application of the two tests would produce the same result, they are certainly not identical. What cannot be disputed is that the real focus of s 10(6) of the Act (and the former s 10(5) as well) is on whether the share options in question were obtained by the taxpayer in his capacity as an employee. This "capacity as employee" test at least clarifies that a particular gain can be treated as having arisen from employment even if it is not referable to services rendered by the employee.

20 At this juncture, I would like to refer briefly to s 10(2)(*a*) of the Act, which gives a general definition of the phrase "gains or profits from any employment" for the purposes of s 10(1)(*b*) of the Act. Although s 10(2)(*a*) is not relevant in the present appeal, it is important to see the difference in wording between this provision and s 10(6) of the Act (and, by extension, the former s 10(5)) because all of these subsections attempt to define when a particular gain or benefit should be treated as having arisen from employment. Section 10(2)(*a*) of the Act reads as follows:

> (2) In subsection (1)(*b*) [*ie*, s 10(1)(*b*)], "gains or profits from any employment" means —
>
> (*a*) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a subsistence, travelling, conveyance or entertainment allowance which is proved to the satisfaction of the Comptroller to have been expended for purposes other than those in respect of which no deduction is allowed under section 15) *paid or granted in respect of the employment* whether in money or otherwise;
>
> …
>
> [emphasis added]

21 One would immediately notice that s 10(2)(*a*) of the Act refers to payments made "in respect of the employment", whereas s 10(6) of the Act refers to a right or benefit obtained "by reason of any office or employment". The question is whether this difference in wording should affect the court's approach in ascertaining whether the gain in question arises from employment. In his article "Taxation of Employment Benefits" (1993) 5 SAcLJ 219, Mr Liu Hern Kuan ("Mr Liu") argued (at p 223) that the phrase "in respect of the employment" in s 10(2)(*a*) of the Income Tax Act (Cap 134, 1992 Rev Ed) (which is *in pari materia* with s 10(2)(*a*) of the Act) connoted a wider test than gains or benefits that were "caused" by the employment. Mr Liu found support for this view in, *inter alia*, the Canadian Supreme Court case of *Nowegijick v The Queen* (1983) 144 DLR (3d) 193,where Dickson J said (at 200):

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.

On this view, the court should adopt a wider approach under s 10(2)(*a*) of the Act. On the other hand, the phrase "by reason of … employment" in s 10(6) of the Act seems to require a causal link between the benefit obtained and the employment. This requirement may not, however, narrow the inquiry. If something happens by reason of an *event*, it is easy to find a causal link between the event and the consequence. But, where a benefit arises by reason of a *relationship*, it is much more difficult to pinpoint the causal links between the relationship and the benefit. The truth of the matter is that both the phrases "in respect of" in s 10(2)(*a*) of the Act and "by reason of" in s 10(6) of the Act are imprecise. Mr Liu himself acknowledged in his article that the phrase "in respect of employment" was "vague and greatly lacking in content" (at p 227). As such, I am unable to see, from a practical point of view, how s 10(2)(*a*) of the Act may be distinguished from s 10(6) of the Act.

22 In my opinion, the court should adopt the same approach to both ss 10(2)(*a*) and 10(6) of the Act in deciding whether a particular gain is "from any employment" for the purposes of s 10(1)(*b*). Essentially, both provisions focus on whether the benefit arose out of an employment relationship. Beyond that, it is not very useful to examine the exact differences in wording between the two provisions. Ultimately, reverting to Upjohn J's judgment in *Hochstrasser (HC)*, the question of whether a benefit arises from employment depends heavily on the facts of each case.

23 I would also hasten to clarify that it does not necessarily mean that, just because a benefit is somehow connected with employment, it follows that the benefit constitutes a benefit obtained by reason of employment. The facts of *Hochstrasser (HL)* itself provide a good example. There, the taxpayer was required by his employers to transfer from one part of the country to another. He sold his existing house at a loss, which was indemnified by the employers. The House of Lords held that the indemnity was not taxable. The taxpayer had incurred a personal loss because of the requirements of his employment, and the indemnity provided by the employers was nothing in the nature of income. Although the payment could be said to have arisen in respect of the employment or by reason of the employment in a very broad sense, it was really not in the nature of employment income to be taxed. The nature of and the circumstances surrounding a benefit obtained within the context of an employment relationship must be looked at holistically. Thus, the gains or profits derived from a benefit conferred on an employee by reason of his employment need not necessarily be income which is taxable as "gains or profits from any employment" (*per* s 10(1)(*b*) of the Act).

Gains from employment distinguished from gifts

24 A gain from employment should be distinguished from a mere gift which accrues to the taxpayer in his personal capacity and which is hence not taxable. Admittedly, in particular circumstances, the line may not be so easily drawn. However, that there is such a distinction was alluded to by Viscount Cave LC in *Seymour v Reed* [1927] AC 554 at 559:

> [I]t must now (I think) be taken as settled that [gains or benefits from employment] include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services.

25 Atkinson J illustrated the distinction thus in *Calvert (Inspector of Taxes) v Wainwright* [1947] KB 526 at 528–529:

> Suppose somebody … has the same taxi every day, which comes in the morning as a matter of course to take him to his work, and then takes him home at night. The ordinary tip given in those circumstances would be something which would be assessable, but supposing at Christmas, or, when the man is going for a holiday, the hirer says: "You have been very attentive to me, here is a … 10*l*. note," he would be making a present, and I should say it would not be assessable because it has been given to the man because of his qualities, his faithfulness, and the way he has stuck to the passenger. In those circumstances, it would, in my opinion, be a payment of an exceptional kind.

26 Viscount Cave's judgment in *Seymour v Reed* is also significant for the principle that the voluntary nature of a payment does not necessarily mean that the payment arises outside employment. This principle was elaborated on by Fullagar J in the Australian High Court case of *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 54:

> A voluntary payment of money or transfer of property by A to B is prima facie not income in B's hands. If nothing more appears than that A gave to B some money or a motor car or some shares, what B receives is capital and not income. *But further facts may appear which show that, although the payment or transfer was a "gift" in the sense that it was made without legal obligation, it was nevertheless so related to an employment of B by A, or to services rendered by B to A, or to a business carried on by B, that it is, in substance and in reality, not a mere gift but the product of an income-earning activity on the part of B, and therefore to be regarded as income from B's personal exertion*. A very simple case is the case where A employs B at a salary of £1000 per annum, and at the end of a profitable year "gives" him a "bonus" of £100. Obviously the bonus is income. It is paid without obligation, but it is clearly in truth part of what B has earned during the year. [original emphasis omitted; emphasis added in italics]

27 I respectfully agree with Fullagar J that a gratuitous payment made without any legal obligation attached to it should not automatically be considered as arising outside employment. Many forms of employee remuneration nowadays, such as performance bonuses and "golden handshakes", are voluntary in that they involve an element of discretion and are not strictly payable under an employment contract. Yet, it is impossible to regard such payments as anything other than payments arising out of employment. Thus, the voluntary nature of a payment (or other benefit) is a factor to be considered in determining whether that payment arises from employment, but it is not conclusive.

28 In this regard, another principle to note is that, in determining whether a payment (or other benefit) arises out of employment, the court should look at the true nature of the payment and not the parties' description of it. As Viscount Simon held in *Inland Revenue Commissioners v Wesleyan*

and General Assurance Society [1948] 1 All ER 555 at 557:

> [T]he name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it.

Viscount Simon's *dictum* was applied by the High Court in *Pinetree Resort Pte Ltd v Comptroller of Income Tax* [2000] 1 SLR(R) 275, where the court found that "initiation deposits" paid to a club were not in the nature of interest-free loans.

29 As mentioned at [14]–[19] above, whether a particular benefit is a gift or whether it arises by reason of employment is a question to be decided on the facts of each case, and the fact that the benefit in question is a reward for services is one relevant factor to be taken into account. I now turn to the authorities to see what other factors the courts have considered.

Other relevant factors which distinguish between gains from employment and gifts

30 In *Cowan v Seymour (Surveyor of Taxes)* [1920] 1 KB 500, the taxpayer acted without remuneration as a company secretary for a company from the date of its incorporation to the date of its liquidation. After the company's liquidation, there was a sum in hand, which the company's shareholders voted to award to the secretary. The English Court of Appeal held that the payment did not accrue to the secretary in respect of an office or employment. Lord Sterndale MR (at 509) identified two factors which heavily influenced his decision: first, the payment had been made after the secretary's office had ended; and, second, the payment came not from the company as employer, but from its shareholders.

31 Similarly, in *Bridges (Inspector of Taxes) v Hewitt* [1957] 1 WLR 674, two directors who wished to acquire shares in a company agreed with the future shareholders to continue working for the company, in return for which shares would be transferred to them at a later date. The English Court of Appeal held, by a majority, that the shares did not constitute remuneration for employment. In particular, Morris LJ held at 695:

> The circumstance that a large payment is to be made by someone other than an employer may be a considerable indication, though by no means a conclusive one, that the payment is not by way of remuneration. Remuneration is, as a rule, something that an employer has arranged or contemplated or at least knows about. This is so even though payments may come other than from the employer and may depend on the liberality of others.

32 The purpose of the payment (or other benefit) is also a relevant factor. In *Seymour v Reed*, the committee of a cricket club granted a "benefit match" to a professional cricketer who had been in the employment of the club for many years. The proceeds of the match were held by the House of Lords not to constitute profits from employment because they amounted to a one-off payment which was meant to express the gratitude of the cricketer's employers and the cricket-loving public for what the cricketer had done, as well as their appreciation of his personal qualities.

33 A case in contrast to *Seymour v Reed* is *Moorhouse (Inspector of Taxes) v Dooland* [1955] Ch 284 ("*Moorhouse*"). In *Moorhouse*, a professional cricketer was awarded the proceeds from collections taken from spectators on days when his play had been particularly commendable. However, unlike *Seymour v Reed*, the proceeds in *Moorhouse* were held to arise out of the taxpayer's

employment. Sir Raymond Evershed MR (at 297–298) distinguished *Seymour v Reed* on the grounds that, in *Moorhouse*, it was a term of the taxpayer's contract that the taxpayer was entitled to have a collection taken for him when his performance was exceptional. Jenkins LJ said at 304:

> If the recipient's contract of employment entitles him to receive the voluntary payment, whatever it may amount to, that is a ground, and I should say a strong ground, for holding that, from the standpoint of the recipient, it does accrue to him by virtue of his employment, or in other words, by way of remuneration for his services.

34 In *Ball (H M Inspector of Taxes) v Johnson* (1971) 47 TC 155 ("*Ball*"), a bank clerk (and others holding similar positions) was required by his employer bank to sit for certain examinations in order to better qualify himself for his duties. Failure to pass these examinations did not bar him from continued employment, but, if he passed, a cash award would be given by the bank. The bank clerk passed the examinations and duly received this cash award. The award was held not to be remuneration for employment because the sole reason for its payment was the bank clerk's success in passing the examinations. The common thread running through these three cases – *viz*, *Seymour v Reed*, *Moorhouse* and *Ball* – is that a one-off payment is more likely to be considered not to be a payment arising from employment if its purpose was to congratulate the taxpayer for a personal achievement rather than to reward him for his work.

35 In *Laidler v Perry (Inspector of Taxes)* [1966] AC 16, it was the practice of a group of companies to give a £10 gift voucher every Christmas to every employee who had worked for the group for more than a year. The House of Lords held that the voucher constituted a profit from employment. The salient factors in *Laidler v Perry* were that: (a) the vouchers were given regularly at Christmas year after year; and (b) they were given to every qualifying member of the staff (the qualifying members numbered about 2,000 in total). The judgment of Lord Denning MR in the English Court of Appeal (see *Laidler v Perry (Inspector of Taxes*) [1965] Ch 192 at 199) shows that the value of the gift was also significant:

> Suppose it had been £100 a year which had been given to all the staff of these companies each year at Christmas. In that case it would clearly be open to the commissioners to find that it was a reward, a remuneration or a return for services rendered. But now suppose that, instead of £100, it was a box of chocolates or a bottle of whisky or £2, it might be merely a gesture of goodwill at Christmas without regard to services at all. So it is a question of degree.

36 *Moore v Griffiths (Inspector of Taxes)* [1972] 1 WLR 1024 is another important case. There, a football player received a bonus from the English Football Association ("the English FA") for being a member of the English team which won the World Cup in 1966. Brightman J held that the bonus had "the quality of a testimonial or [an] accolade rather than the quality of remuneration for services rendered" (at 1034). In so deciding, he pointed (at 1035) to six factors in support of his conclusion, namely:

(a) the payment had no foreseeable element of recurrence;

(b) there was no expectation of reward;

(c) the payment was made only after the English FA had dispensed with the player's services;

(d) the English FA's principal function was to promote the sport of football and not to derive a benefit from the services of footballers;

(e) the purpose of the English FA in making the payment was to mark its pride in a great achievement rather than to remunerate the meritorious execution of the player's services; and

(f) each team member had been awarded the same amount, regardless of how many times he played in the course of the World Cup tournament and whether he was a player or a reserve.

The sum was therefore not linked with the quantum of any services rendered by the player.

37 A contrasting decision was reached in *Brumby (Inspector of Taxes) v Milner* [1976] 1 WLR 1096. In that case, a company which had a profit-sharing scheme for its employees decided to merge with a larger company. In view of the merger, the trustees of the scheme thought that the scheme was no longer viable. They thus wound it up and distributed the funds among the employees. The House of Lords held that the distributions to the employees were taxable as profits from employment. Lord Kilbrandon, in rejecting the argument that the payment had nothing to do with employment, said at 1101:

> Certainly the money forming the payment became available in consequence of certain events and decisions connected with the structure of the company. But the sole reason for making the payment to the [taxpayer] was that he was an employee, and the payment arose from his employment. It arose from nothing else, as it would have done, if for example, it had been made to an employee for some compassionate reason.

Summary of the law

38 In the light of all the above authorities, the applicable principles may be summarised as follows:

(a) Any gain or benefit obtained by a person in his capacity as an employee would constitute a gain or benefit from employment and is taxable as income.

(b) A gift made to an employee on personal grounds is not a benefit from employment, but the voluntary or discretionary nature of a payment (or other benefit) will not *ipso facto* render that payment a gift.

(c) In determining whether a benefit is obtained by reason of employment, the court will look at the true nature of the benefit and not what the parties call it.

(d) Whether a benefit is one arising from employment ultimately depends on the facts and circumstances of each case. The court will consider the following factors in answering this question (bearing in mind that no single factor is conclusive and that it is the overall picture which emerges that will be determinant):

(i) the value of the benefit;

(ii) the purpose of the benefit;

(iii) the class of persons to whom the benefit was granted;

(iv) whether the benefit was granted by the employer or a third party;

(v) whether the employment had ceased when the benefit was granted;

(vi) whether the benefit had a foreseeable element of recurrence;

(vii) whether the benefit was granted pursuant to the terms of the contract of employment; and

(viii) whether the benefit was granted voluntarily.

Application of the law to the present appeal

39 Reverting to the instant case, counsel for the appellant, Mr Tan, submitted that the retention of the Share Options by the Estate was not a benefit obtained by reason of the Taxpayer's employment. He relied on the wording of Rule 7.3 of the Share Option Plans, which (as mentioned earlier at [2] above) states that the share options given to a Participant (as defined at [3] above) would *prima facie* lapse upon his death. Mr Tan therefore argued that the subsequent decision of the Committees to restore the Share Options was in the nature of a gift to the Estate (which, for practical purposes, meant the Taxpayer's family) because the Share Options had originally become void at the time of the Taxpayer's death.

40 In contrast, counsel for the respondent, Ms Joanna Yap ("Ms Yap"), argued that the Share Options did not lapse upon the Taxpayer's death because Rule 7.3 of the Share Option Plans also provided that these options would lapse *unless* the Committees in their discretion determined otherwise. Ms Yap submitted that, based on the wording of Rule 7.3, the decision of the Committees effectively meant that the Share Options never lapsed upon the Taxpayer's death.

41 As I see it, the focus of the inquiry should be on the substance of the transaction as a whole, rather than the exact mechanism or the exact wording of the provision by which the Share Options were conferred on the Estate. As mentioned earlier (at [28] above), in determining whether a payment (or other benefit) arises from employment, the court should look at the true nature of the payment and not what the parties call it. It would be most undesirable if an employer and an employee can contractually determine the latter's tax liability through the use of appropriate labels. Ultimately, the Share Options were retained by the Estate through the exercise of the Committees' discretion. Whether or not these options lapsed at the time of the Taxpayer's death and were subsequently restored, or whether they remained valid all along, is not crucial to the overall picture. What matters more are the circumstances surrounding the exercise of discretion by the Committees.

42 As I see it, in determining whether the retention of the Share Options by the Estate should be considered a benefit or gain arising from the Taxpayer's employment, three factors are highly pertinent. First, the value of the benefits derived by the Estate from the exercise of the Share Options is very considerable – over $8m in total (see [5] above). The size of the benefits seems more commensurate with their being remuneration to the Taxpayer as a senior employee of the Companies, rather than a condolence gift or a token of appreciation.

43 Second, I find that the Committees' purpose in allowing the Estate to retain the Share Options was to reward the Taxpayer for the services which he had rendered. Rule 3 of the Share Option Plans states *vis-à-vis* each Company's plan: [note: 2]

> The Plan is a share incentive scheme. The Plan is proposed on the basis that it is important to retain staff whose contributions are essential to the well-being and prosperity of the Group [*ie*, the Companies] and to give recognition to outstanding executives and executive directors of the Group … The Plan will give Participants an opportunity to have a personal equity interest in the Company at no direct cost to its profitability …

44 Rule 3 of the Share Option Plans clearly indicates that the object behind these plans was to grant share options to Participants as a reward for their services rather than as a personal gift to them. Although no evidence was called from the Committees' members as to their reason or purpose for exercising their discretion to allow the Estate to retain the Share Options, there is nothing to suggest that their objective was in any way different from that which underlies Rule 3. The sole function of the Committees was to administer the Share Option Plans. It was certainly not part of the mandate of the Committees to grant condolence gifts or any other largesse to the Companies' employees. Accordingly, there is no basis for me to find that, in allowing the Estate to retain the Share Options, the Committees intended to do something outside the objective of the Share Option Plans. In the absence of evidence to the contrary, it is reasonable to presume that the Committees' reason or purpose for allowing the Estate to retain the Share Options was to reward the Taxpayer for his past services.

45 Third and most importantly, the retention of the Share Options by the Estate was something that was expressly contemplated and provided for in the Share Option Plans. If, under the rules of the Share Options Plans, the share options held by a Participant unconditionally lapsed upon his death without any provision for restoration such as that set out in Rule 7.3, and if the Companies, purely out of goodwill or compassion to the family of a deceased Participant, then allowed his estate to retain *some* share options, that could perhaps make a difference. In this case, however, the possibility of the Estate retaining the Share Options upon the death of the Taxpayer had always been part and parcel of the latter's terms of employment. This is a strong indicator that the retention of the Share Options by the Estate constituted a benefit obtained by reason of the Taxpayer's employment, notwithstanding the element of discretion present in this case.

46 Mr Tan submitted that it made no difference whether or not the retention of the Share Options by the Estate was contemplated by the Taxpayer's terms of employment, and relied in this regard on the case of *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* (1983) 46 SATC 1 ("*Shell Southern Africa*"). In *Shell Southern Africa*, the rules of a pension fund ("the Fund") provided that, if a male pensioner died, his widows or dependants would be entitled to a pension of an amount to be determined according to the rules of the Fund. The rules further provided that the committee responsible for administering the Fund had the discretion to commute the whole or any part of a pension to a single lump sum. A dispute arose between the Fund and the Commissioner for Inland Revenue over the effect of para 3 (as it stood at the material time) of the Second Schedule to the Income Tax Act (Act 58 of 1962) (South Africa) ("the South African Act"), which read:

> Any lump sum benefit which becomes recoverable *in consequence of or following upon* the death of a member of a pension fund, provident fund or retirement annuity fund shall be deemed to be a lump sum benefit which accrued to such member immediately prior to his death … [emphasis added]

47 Paragraph 3 of the Second Schedule to the South African Act was significant because s 1(*e*) of that Act defined the "gross income" of a taxpayer as including:

> … any amount determined in accordance with the provisions of the Second Schedule in respect of lump sum benefits received by or accrued to such person from any fund …

The issue in *Shell Southern Africa* was whether a lump sum paid out to a deceased male pensioner's widows or dependants by the Fund pursuant to the exercise of the committee's discretion constituted a lump sum benefit within the meaning of para 3 of the Second Schedule to the South African Act. The Supreme Court of South Africa answered this question in the negative. It held (at 9) that the exercise of discretion by the Fund's committee constituted an intervening event that broke the chain

of causation between a male pensioner's death and the recoverability of the lump sum benefit by that pensioner's widows or dependants. Thus, the payment of a lump sum by the Fund to the widows or dependants of a deceased male pensioner would not be "in consequence of or following upon" (*per* para 3 of the Second Schedule to the South African Act) the death of the pensioner concerned.

48 Mr Tan submitted that the facts of the present case were even stronger than those in *Shell Southern Africa*. While the widows and dependants in *Shell Southern Africa* already had a right to payment from the Fund, the Estate in the present case had no right to retain the Share Options if the Committees did not exercise their discretion in its favour. Therefore, Mr Tan contended, the fact that the retention of the Share Options was originally contemplated in the Share Option Plans was immaterial because the exercise of discretion by the Committees was an intervening factor that broke the link between the Taxpayer's employment and the Estate's retention of the Share Options.

49 I am unable to agree with this submission. With respect, counsel seems to have missed the point that the decision in *Shell Southern Africa* did not concern the question of whether a lump sum payment made pursuant to the rules of the Fund was employment income. Instead, the issue there was whether such a payment fell within a specific statutory provision (*ie*, para 3 of the Second Schedule to the South African Act) and, in particular, whether such a payment was in consequence of or following upon the death of the male pensioner concerned. The judgment of the court (at 8) made it very clear that this was essentially a question of causation. The inquiry was thus a linear one, namely: did the death of the male pensioner concerned cause the ultimate result, *ie*, the payment of a lump sum to his widows or dependants? The court, having answered this question in the negative, naturally had to rule that such a lump sum payment did not come within para 3 of the Second Schedule to the South African Act. The fact that a deceased male pensioner's widows or dependants had a prior right to payment from the Fund in the form of annuities was irrelevant because it was the exercise of the committee's discretion that converted this right into a lump sum payment – that was the crux of the dispute before the court in *Shell Southern Africa*, and it was determinant of the eventual outcome in that case.

50 In contrast, and unlike the circumstances in *Shell Southern Africa*, the court, in determining whether a gain or benefit arises from employment, has to consider all the relevant factors in a holistic manner. In my judgment, the three factors enumerated above (at [42]–[45]), taken together, show quite clearly that the Share Options were allowed to be retained by the Estate by reason of the Taxpayer's employment with the Companies. These factors far outweigh the following factors which tend to support the opposite conclusion (*viz*, that the retention of the Share Options by the Estate did not constitute a benefit obtained by reason of the Taxpayer's employment), namely: (a) the retention of the Share Options was a one-off benefit to the Estate; (b) the benefit was granted to the Estate after the Taxpayer's employment had ceased; and (c) the conferment of the benefit was discretionary.

51 Mr Tan next relied on the case of *Wilcock* and submitted that the facts in the present case were indistinguishable from those in *Wilcock*. In *Wilcock*, the taxpayer was granted share options in his employer's parent company which he could originally have exercised at a future point in time. However, the employer ceased to be a subsidiary of the parent company and the share options lapsed. The parent company, in order to maintain its reputation for fair dealing, decided to make an *ex gratia* payment of £10,000 to the taxpayer. This payment was held not to be taxable.

52 In my view, the facts in *Wilcock* are hardly the same as those in the present case and are distinguishable as follows. In *Wilcock*, the taxpayer was compensated for the loss of a right to exercise share options at a future point in time, and the payment was made entirely *ex gratia*. It did not arise from the terms of the share option scheme in question, unlike the present case, where the

rules of the Share Option Plans expressly provide that, upon the death of a Participant, the Committees can allow the estate of the deceased Participant to retain the share options. In the present case, the share options retained by the Estate were precisely the Share Options as defined at [4] above. The Estate did not receive any compensatory payment; instead, it was allowed to retain the Share Options. Since s 10(6) of the Act and the former s 10(5) deem gains derived from share options which are granted to a taxpayer by reason of his office or employment to be "gains or profits from … employment" within the meaning of s 10(1)(*b*) of the Act, all that the respondent needs to show is that the Share Options were obtained by the Estate by reason of the Taxpayer's employment. As far as this point is concerned, it is abundantly clear (see [42]–[45] above) that the Estate was allowed to retain the Share Options because of the Taxpayer's employment.

53 Lastly, Mr Tan relied on three cases which were cited before the Board in the proceedings below, namely, *Income Tax Case No 1386* (1984) 46 SATC 116, *Secretary for Inland Revenue v Watermeyer* (1965) 4 SA 431 and *Turner (Surveyor of Taxes) v Cuxon* (1889) 22 QBD 150. Mr Tan's main contention was that the payments in these three cases were held not to be taxable in circumstances which, he submitted, were indistinguishable from those in the present case. I have read these cases and the only common factor in them, as well as in the present case, is the fact that the payment in question was discretionary. Beyond that, I do not propose to examine each case in detail. I have already indicated earlier (at [27] above) that the voluntary nature of a payment does not conclusively show that the payment arose outside an employment relationship. I respectfully agree with the Board's conclusion that each case has to be looked at on its own facts. I am accordingly of the view that the retention of the Share Options by the Estate was a benefit arising from the Taxpayer's employment, despite the exercise of discretion by the Committees.

The second issue: Whether s 10(6) of the Act and the former s 10(5) apply to share options retained by a deceased taxpayer's estate

54 I now turn to the second issue to be decided in this appeal, *viz*, whether s 10(6) of the Act and the former s 10(5) apply to share options retained by a deceased taxpayer's estate. This issue essentially turns on a construction of these two provisions. In this regard, I note that s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) requires the court, in construing a statute, to adopt an interpretation that would promote the legislative purpose or object underlying the statute. This provision applies to all written law and effectively displaces the common law principle that tax statutes should be interpreted strictly in favour of the taxpayer. As the High Court put it in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [41]:

> Section 9A(1) of the Interpretation Act requires the construction of written law to promote the purpose or object underlying the statute. In fact, it *mandates* that a construction promoting legislative purpose be preferred over one that does not promote such purpose or object: see Brady Coleman, "The Effect of Section 9A of the Interpretation Act on Statutory Interpretation in Singapore" [2000] Sing JLS 152 at 154. Accordingly, any common law principle of interpretation, such as the plain meaning rule and the strict construction rule, must yield to the purposive interpretation approach stipulated by s 9A(1) of the Interpretation Act. *All* written law (penal or otherwise) must be interpreted purposively. Other common law principles come into play *only* when their application coincides with the purpose underlying the written law in question, or alternatively, when ambiguity in that written law persists even after an attempt at purposive interpretation has been properly made. [emphasis in original]

Thus, in interpreting s 10(6) of the Act and the former s 10(5), the court must give paramount weight to the legislative intention behind these two provisions.

55 The former s 10(5) was first introduced into our legislation as s 10(5) of the Income Tax Act (Cap 141, 1970 Rev Ed) via s 3 of the Income Tax (Amendment) Act 1973 (Act 26 of 1973) ("the 1973 Amendment Act"). Mr Tan referred me to the following extract from the second reading of the Income Tax (Amendment) Bill 1973 (Bill 42 of 1973) – *ie*, the Bill which was subsequently enacted as the 1973 Amendment Act – in *Singapore Parliamentary Debates, Official Report* (26 July 1973) vol 32 at cols 1244–1245 (Hon Sui Sen, Minister for Finance):

> The Stock Exchange[,] which witnessed a lot of speculative activity last year, also saw the emergence of "share option schemes". Such share option schemes allow directors and employees to take an option to buy shares in the company at often a nominal price. Clause 3 of the Income Tax [(Amendment) Bill 1973 (Bill 42 of 1973)] will make it clear beyond doubt that gains or profits from share option schemes are liable to income tax.

56 Mr Tan drew my attention in particular to the phrase "directors and employees" in the above quotation and submitted that Parliament's intention in enacting the former s 10(5) was to tax gains derived from share options given to living directors and employees only. I cannot agree with this submission. Reading the above extract as a whole, it is clear that the phrase "directors and employees" was merely being used in a descriptive sense to identify the usual beneficiaries of a share option scheme. Nothing in the speech of the then Minister for Finance suggests that Parliament intended to distinguish between a living employee and the estate of a deceased employee, or to treat gains derived by the estate from the deceased employee's share options more favourably. On the contrary, the last sentence of the above passage affirms my belief that Parliament simply intended to tax all gains derived from share options obtained by reason of a taxpayer's employment. Indeed, it would make absolutely no sense if the taxability of gains derived from such share options were to depend on whether or not, at the time of the grant of the options, the employee was still alive.

57 The former s 10(5) was amended by the Income Tax (Amendment) Act 2002 (Act 37 of 2002), and subsequently re-numbered to become s 10(6) of the Act. The only difference between the two provisions is that s 10(6) of the Act expressly deems gains derived from share options to be chargeable to tax under s 10(1)(*b*) of the Act, whereas the former s 10(5) does not expressly indicate a head of income under s 10(1). Like the former s 10(5), s 10(6) of the Act does not draw a distinction between living and deceased employees. Accordingly, I am of the view that both provisions apply to gains derived from share options retained by the estate of a deceased employee as long as the options are shown to have been obtained by reason of that person's employment, which the respondent has done in this case.

58 Mr Tan also referred me to ss 10(6)(*d*) and 10(6)(*e*) of the Act, which provide that any gains or profits derived from share options obtained by reason of a taxpayer's office or employment shall be deemed to accrue at such time and to be of such amount as determined by the following mechanisms:

> (*d*) … any gains or profits derived by *him* [*ie*, the taxpayer] by any exercise of a right or benefit to acquire shares in any company listed on the Singapore Exchange shall be the last done price on the listing date of the shares so acquired less the amount paid for the shares;
>
> (*e*) "the last done price on the listing date", in relation to any shares referred to in paragraph (*d*), means the price of the shares in the open market at the last transaction on the date on which the shares are first listed on the Singapore Exchange after the acquisition of the shares by *him* …
>
> [emphasis added]

Sections 10(6)(*d*) and 10(6)(*e*) of the Act are substantially similar to, respectively, sub-paras (*c*) and (*d*) of the former s 10(5).

59 Mr Tan contended that the use of the word "him" in ss 10(6)(*d*) and 10(6)(*e*) of the Act indicated that the whole of s 10 was meant to apply to living employees who exercised their share options in the open market. As such, s 10(6) of the Act and the former s 10(5) would not be applicable to deceased employees as they would have had no opportunity to exercise the share options which had been granted to them while they were alive. For the reasons set out at [55]–[57] above, I have no hesitation in rejecting this argument. Sections 10(6)(*d*) and 10(6)(*e*) of the Act merely set out a mechanism for valuing gains derived from share options obtained by reason of a taxpayer's employment where the company in question is a listed company. They do not change the overall purpose of s 10(6) of the Act (and also the former s 10(5)), which is to deem such gains to be taxable income regardless of whether the share options were given to an employee before his death or whether they were restored to his estate pursuant to the rules of the relevant share option scheme after his death. The personal representatives of a deceased employee's estate are just as capable of exercising (or otherwise realising) the share options and obtaining gains in the open market.

Conclusion

60 For the foregoing reasons, I find that the Share Options retained by the Estate constituted a benefit which arose by reason of the Taxpayer's employment with the Companies, and that s 10(6) of the Act and the former s 10(5) apply to the gains derived by the Estate in exercising those share options. Accordingly, I affirm the decision of the Board and dismiss this appeal with costs and the usual consequential orders.

[note: 1] See the appellant's Core Bundle of Documents filed on 14 August 2009 ("ACB") at pp 57–58.

[note: 2] See ACB at p 54.