Comptroller of Income Tax *v* AQQ and another appeal
[2014] SGCA 15

Case Number	: Civil Appeals No 7 and 8 of 2013
Decision Date	: 26 February 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Liu Hern Kuan, Joanna Yap Hui Min, Pang Mei Yu (Inland Revenue Authority of Singapore (Law Division)) for the appellant in Civil Appeal No 7 of 2013 and the respondent in Civil Appeal No 8 of 2013; Davinder Singh SC, Ong Sim Ho, Ong Ken Loon, Joanne Khoo Puay Pin, Darianne Lee (Drew & Napier LLC) for the appellant in Civil Appeal No 8 of 2013 and the respondent in Civil Appeal No 7 of 2013.
Parties	: Comptroller of Income Tax — AQQ

Revenue Law – Income Taxation – Avoidance

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 1 SLR 1361.]

26 February 2014 Judgment reserved.

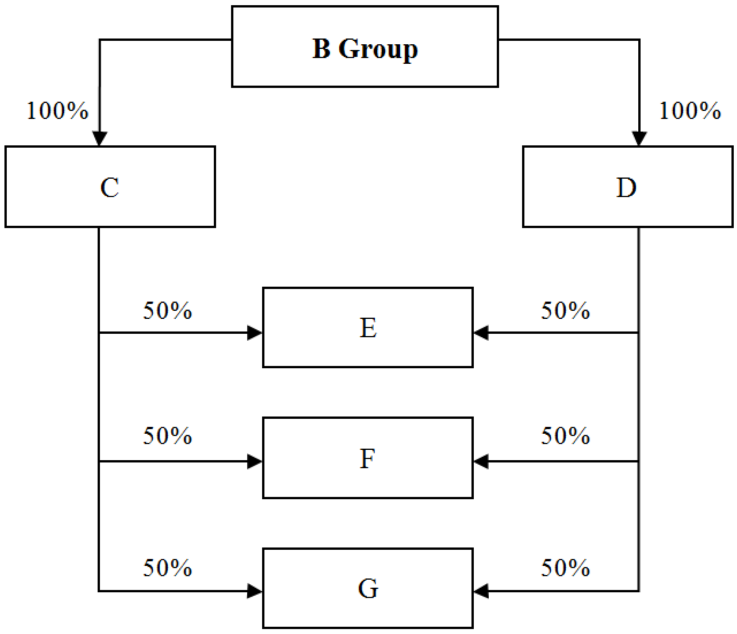
Sundaresh Menon CJ (delivering the judgment of the court):

1 These are two cross appeals against the decision of the High Court judge ("the Judge") in *AQQ v Comptroller of Income Tax* [2013] 1 SLR 1361 ("the Judgment"), where he held that a financing arrangement that was entered into in conjunction with a corporate restructuring scheme amounted to tax avoidance within the meaning of s 33(1) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act"). However, the Judge also held that the Comptroller of Income Tax ("the Comptroller") had not acted reasonably and fairly in exercising his powers under s 33(1) to counteract the tax advantage that had thereby been obtained. Civil Appeal No 7 of 2013 ("CA 7/2013") is the Comptroller's appeal against the Judge's holding that he had not acted reasonably and fairly in exercising his powers under s 33(1); Civil Appeal No 8 of 2013 ("CA 8/2013") is the taxpayer's appeal against the Judge's holding that the financing arrangement amounted to a tax avoidance arrangement within the meaning of s 33(1) of the Act.

Background facts

2 The background facts are set out in considerable detail in the Judgment and we adopt them for the purpose of these appeals. We only highlight some material facts that are germane to the legal issues before us.

3 The taxpayer is AQQ, a Singapore incorporated company that is a wholly owned subsidiary of [B] Bhd ("B Group"), a company listed on Bursa Malaysia. Prior to 2003, B Group held its interests in various companies, namely, [C] Sdn Bhd ("C"), [D] (Singapore) Pte Ltd ("D"), [E] (Singapore) Pte Ltd ("E"), [F] Enterprise Pte Ltd ("F") and [G] Shipping Pte Ltd ("G"), in the following manner:



The Corporate Restructuring

4 In 2002, changes were announced to the Singapore tax regime. These included the introduction of group tax relief and a move from the imputation system under s 44 of the Income Tax Act (Cap 134, 2001 Rev Ed) to a single tier corporate tax system with effect from 1 January 2003: see the then Deputy Prime Minister Mr Lee Hsien Loong's Annual Budget Statement, *Singapore Parliamentary Debates, Official Report* (3 May 2002) vol 74 at cols 698–701.

5 Sometime in or about April 2003, the Board of Directors of B Group approved a proposed group restructuring of its Singapore operations ("the Corporate Restructuring"). The Corporate Restructuring involved the following steps: [note: 1]

(a) the incorporation of AQQ with a paid up share capital of two ordinary shares of $1 each;

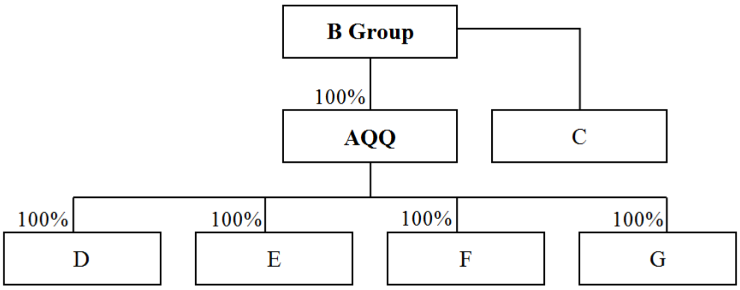
(b) the acquisition of the shares of AQQ by B Group on 31 July 2003;

(c) the disposal and transfer of C's 50% interest in E, F and G to AQQ for cash consideration of $75m on 18 August 2003;

(d) the disposal and transfer of D's 50% interest in E, F and G to AQQ for cash consideration of $75m on 18 August 2003; and,

(e) The disposal and transfer of B's Group's 100% interest in D to AQQ for cash consideration of $75m on 18 August 2003.

6 The result of the Corporate Restructuring was a streamlined corporate structure with D, E, F and G ("the Subsidiaries") organised according to the various business lines of the group, namely, cement, readymix concrete, shipping and trading, under the umbrella of a single holding company (*ie*, AQQ):



The Financing Arrangement

7 Although this was in essence an internal corporate restructuring, AQQ's acquisition of the equity interests in the Subsidiaries was to be effected at a total cost of $225m, which was to be financed through the issuance of $225m of fixed rate notes at an interest rate of 8.85% per annum with a tenure of ten years ("the Fixed Rate Notes") to [N] Bank ("N Bank") acting through its Singapore branch ("N Bank Singapore") on 18 August 2003.

8 The following transactions were subsequently effected on the same day: [note: 2]

(a) N Bank Singapore detached the interest component ("the Interest Coupons") from the Fixed Rate Notes and sold $205m of the principal component of the Fixed Rate Notes ("the Principal Notes") to [N] Bank (Mauritius) Limited ("N Bank Mauritius") for cash consideration of $205m. N Bank Singapore agreed to pay N Bank Mauritius a sum equivalent to interest of 8.845%, or 0.005% less than what it was to receive from AQQ under the Interest Coupons, conditional upon N Bank Singapore receiving such payment from AQQ ("the Conditional Return").

(b) N Bank Singapore agreed to deliver the remaining $20m of Principal Notes to N Bank Mauritius at a later date for cash consideration of $20m.

(c) N Bank Mauritius sold to C the $205m of Principal Notes which it purchased from N Bank Singapore, also for cash consideration of $205m. N Bank Mauritius agreed to pay C a sum equivalent to interest of 8.840%, or 0.005% less than what it was to receive from N Bank Singapore (see sub-paragraph (a) above), conditional upon N Bank Singapore receiving payment from AQQ under the Conditional Return.

(d) N Bank Mauritius agreed to deliver the remaining $20m of the Principal Notes (that it would receive from N Bank Singapore) to C at a later date for cash consideration of $20m.

(e) B Group granted an interest free intercompany loan of $75m to C.

(f) AQQ transferred $150m to E – the designated collection agent for the B Group and C – as payment for its acquisition of (i) the B Group's 100% interest in D and (ii) C's 50% interests in E, F, and G.

(g) AQQ transferred $75m to D as payment for its acquisition of D's 50% interests in E, F, and G.

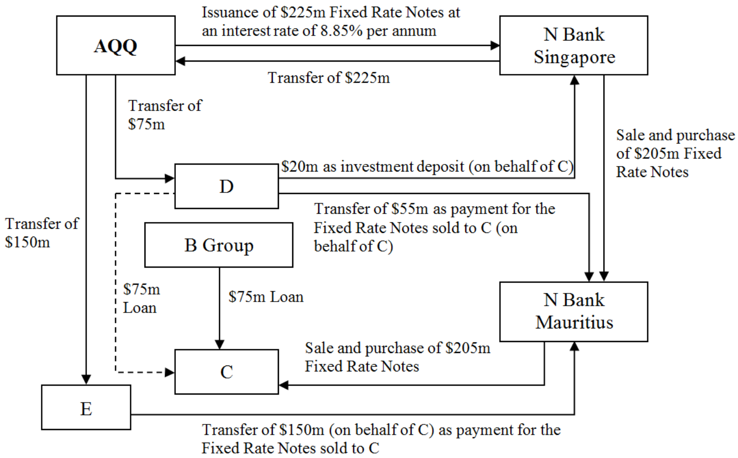
(h) E (on behalf of C) transferred $150m to N Bank Mauritius as payment for the Principal Notes.

(i) D granted an interest free intercompany loan of $75m to C using the proceeds that it had received from AQQ for the sale of its 50% interests in E, F and G.

(j) D (on behalf of C) transferred $55m (*ie*, a portion of the intercompany loan referred to in the preceding sub-paragraph) to N Bank Mauritius as payment for the Principal Notes.

(k) D (on behalf of C) placed $20m (*ie*, the balance of the intercompany loan referred to in sub-paragraph (i)) in an investment deposit with N Bank Singapore.

9 The flow of funds is diagrammatically represented below:



10 On or around 18 November 2003, a second set of transactions took place: [note: 3]

(a) D withdrew its $20m investment deposit with N Bank Singapore and transferred $20m to E, as collection agent for C (*ie*, the balance of the intercompany loan that D had granted to C).

(b) N Bank Singapore delivered the balance of the $20m of Principal Notes to N Bank Mauritius for cash consideration of $20m.

(c) N Bank Mauritius delivered the balance of the $20m of Principal Notes to C for cash consideration of $20m from E (on behalf of C).

11 The financing structure detailed above is hereafter referred to as the Financing Arrangement. The end result of these arrangements was that AQQ obtained $225m from N Bank and the entirety of this sum was effectively returned to N Bank on the same day, albeit following a circuitous route.

The section 44 accounts

12 The corporate taxation regime prior to 2003 under ss 44 and 46 of the Act as it then stood was known as the imputation scheme. Under this scheme, corporate profits would be taxed first at the corporate level. A sum equivalent to the amount of tax paid would then be credited to an account maintained by the company known as “the s 44 account”. When dividends were issued, the company could issue dividends with a tax credit attached reflecting the sum of tax that had previously been paid by the company on its profits. The tax credited to the shareholder in this manner would then be debited from the s 44 account balance. The overall effect of this scheme was that the dividend income would only be subject to tax once, but such that although it was paid up front by the company, it would ultimately be taxed at the marginal tax rate of the shareholder. Where there was a difference between the marginal rates applicable to the company’s profits and the shareholder’s income, the shareholder would be entitled to receive a net tax refund if the tax credits attached to

the dividends exceeded the tax imposed on the shareholder in respect of those dividends.

13 After the move to a single tier corporate taxation regime was announced, companies with unutilised balances in their s 44 accounts were given a five year transitional period from 1 January 2003 to 31 December 2007 to remain on the imputation system before transitioning to the single tier corporate taxation regime. This was provided for under s 44A of the Act. The s 44 accounts were thereafter renamed the s 44A accounts, but for clarity, we refer in this judgment to these accounts without differentiation as "the s 44 accounts".

14 As at 31 December 2002, the residual balances in the s 44 accounts and the accumulated profits of the Subsidiaries were: [note: 4]

Subsidiary	**Section 44 account balance**	**Accumulated profits**
D	$17,916,948.66	$40,000.00
E	$7,354,359.65	$16,456,824.00
F	$1,952,523.91	$1,044,536.00
G	$1,391,292.12	$165,920.00

The tax assessments

15 AQQ paid interest of 8.85% per annum on the Interest Coupons to N Bank Singapore on a biannual basis, totalling $79,650,000 from 2004 to 2007. There was no allegation that these interest payments had not in fact been made. But as will be apparent from the transactions described at [8] and [10] above, as a result of the Interest Coupons being detached and the Principal Notes being sold on by N Bank Singapore to N Bank Mauritius and then to C, N Bank Singapore and N Bank Mauritius *in fact* each retained a spread of only 0.005% or a sum of $3982.50. The rest of the interest payments were paid on to C.

16 AQQ submitted the following tax returns for the years of assessment ("YA") 2004 to 2007 reflecting the dividend income it received from the Subsidiaries as well as the interest payments it made to N Bank Singapore: [note: 5]

(a) for YA 2004, dividend income of $12,329,315 less interest expenses of $7,419,452;

(b) for YA 2005, dividend income of $30,952,630 less interest expenses of $19,852,015;

(c) for YA 2006, dividend income of $19,970,000 less interest expenses of $19,912,500; and

(d) for YA 2007, dividend income of $19,922,000 less interest expenses of $19,912,500.

17 Under the imputation scheme, a shareholder of a company would be entitled to s 44 tax credits that were equivalent to the 22% (for YA 2004) or 20% (for YA 2005 to 2007) tax that had been paid by the company on its profits. Based on the tax returns above, AQQ would have been entitled to a total of $16,881,375 in tax credits for the dividends issued by the Subsidiaries pursuant to ss 44A and 46 of the Act. AQQ's total chargeable income – less the claimed interest expenses of $67,096,467 and other statutory and administrative expenses – was $16,036,060. The total tax payable by AQQ on the

dividend income from the Subsidiaries at the corporate taxation rates would be $3,305,253.84. On the basis of the available tax credits, AQQ contended that it was entitled to a total tax refund of $13,576,121.16 (that is, $16,881,375 less $3,305,253.84) on the dividends. A table of AQQ's tax returns and the claimed tax refunds is annexed to this judgment at Annex A.

18 The Comptroller issued Notices of Assessment for YA 2004, 2005 and 2006 ("the Original Assessments") respectively which took into account the dividend income and interest expenses above (see [16]). The total sum of s 44 tax credits that AQQ was entitled to for these three years in respect of the dividends was $12,896,975, while the total amount of income tax due from AQQ for the corresponding period was $3,307,158.16. Tax refunds amounting to $9,589,816.84 were made to AQQ. [note: 6]

19 Subsequently, in July 2007, the Comptroller conducted an audit of AQQ. Following this, the Comptroller decided to invoke s 33 of the Act to disregard the tax effects of all the transactions undertaken. The Comptroller issued Notices of Additional Assessments dated 7 April 2008 to AQQ for YA 2004 to 2006 ("the Additional Assessments"), which assessed AQQ to an overall tax liability of $9,592,577.76. [note: 7] . This sum was calculated by disregarding all the dividend income and interest expenses, and assessing AQQ to tax only on its income from other sources less statutory and administrative expenses. This amounted to a sum of $2,760.92 for this period. The overall tax liability was derived from the sum total of this liability and the tax refunds that had previously been made to AQQ under the Original Assessments as follows:

	YA 2004	**YA 2005**	**YA 2006**
Revised Assessment			
Interest income from other sources	5,189.00	6,337.00	26,607.00
Less: Expenses	(4.00)	(3.00)	(15.00)
Less: Tax exempt amount	(3,889.00)	(4,751.00)	(15,796.00)
Net income	1,296.00	1,583.00	10,796.00
Tax payable	285.12	316.60	2,159.20
Original Assessment			
Tax refunds previously paid	1,633,703.64	3,973,490.60	3,982,622.60
Overall tax liability in the Additional Assessments	1,633,988.76	3,973,807.20	3,984,781.80

20 Similarly, the Comptroller invoked s 33 to disregard all dividend income and interest expenses in the returns that AQQ had filed for YA 2007. On that basis, AQQ's net income for YA 2007 was $57,829.00 and its tax liability for that year was assessed at $11,565.80. [note: 8]

21 AQQ objected to the Additional Assessments and the Notice of Assessment for YA 2007, which the Comptroller declined to revise. AQQ filed an appeal to the Income Tax Board of Review ("the Board").

22 The Board upheld the assessment of the Comptroller. It found that the Financing Arrangement

had the purpose or effect of tax avoidance within the meaning of s 33(1) of the Act, and that it had been structured in a contrived and artificial manner in order to obtain tax refunds through the utilisation of s 44 tax credits. The Board also found that on an objective view, there was no commercial justification for the Financing Arrangement, and that neither s 14 (which entitled a taxpayer to claim a deduction on interest expenses) nor the s 44 imputation system had been intended to be used in the manner that AQQ had. The contention that the Additional Assessments were *ultra vires* and void under s 74(1) of the Act was also rejected.

23 AQQ then filed an appeal to the High Court pursuant to s 81(2) of the Act.

The decision below

24 The Judge examined the structure of s 33 (see [33] below) and concluded that under s 33(1), the court first had to satisfy itself that the arrangement had the purpose or effect listed in any one of the three limbs in s 33(1). It was only if the arrangement was caught by s 33(1) that the court would proceed to consider whether the statutory exception contained in s 33(3)(*b*) applied (at [64] of the Judgment). The Board had erred by probing into whether the arrangement was contrived and artificial – as part of the inquiry under s 33(1) – without first considering whether one of the three limbs of that section had been implicated (at [65] of the Judgment).

25 The Judge then considered the meaning of the phrase "purpose or effect" in s 33(1), and concluded that under the "predication principle" applied in the Australian and New Zealand case law, the purpose or effect of the arrangement had to be determined objectively, without reference to the motives of the parties (at [72] and [76] of the Judgment). Applying this test, the Judge held that the Comptroller had correctly determined that the Financing Arrangement was caught by s 33(1)(*c*) as the arrangement had the effect of reducing the amount of chargeable income through deductions of interest expenses arising from the Financing Arrangement (at [86] of the Judgment), and further, also had the effect of avoiding another liability that C would otherwise have been subject to, *ie*, the liability to bear withholding tax for the interest payments that it had in substance received from AQQ (at [90]–[91] of the Judgment).

26 Next, the Judge construed the statutory exception in s 33(3)(*b*) as importing a subjective test for both limbs – it had to be shown that the arrangement was carried out for *bona fide* commercial reasons and did not have as one of its main purposes the avoidance or reduction of tax (at [105] of the Judgment). After considering the evidence, the Judge found that although the Board had interpreted s 33(3)(*b*) as imposing an objective test, it had nevertheless been justified in reaching the conclusion that the Financing Arrangement did not fall within the statutory exception in s 33(3)(*b*). In particular, the Judge found that the commercial reasons advanced by counsel on behalf of AQQ related only to the Corporate Restructuring and not to the Financing Arrangement (at [111] of the Judgment) and that the oral evidence given by the Chief Financial Officer of the B Group indicated in no uncertain terms that the main objective of the Financing Arrangement was to extract tax credits (at [115] and [119] of the Judgment). The Judge also considered that there were many other questionable features of the Financing Arrangement that could have led to the reasonable conclusion that the arrangement was not carried out for *bona fide* commercial reasons and had as one of its main purposes the reduction or avoidance of tax (at [125] of the Judgment).

27 With respect to AQQ's contention that the operation of s 33 could be overridden by giving effect to the specific provisions of the Act, the Judge observed that this argument was essentially premised on the proper relationship between s 33 and other specific provisions of the Act that conferred tax benefits (at [144] of the Judgment). The Australian courts had dealt with this issue by developing the "choice principle"; the New Zealand courts had developed the "scheme and purpose

approach" to resolve this conundrum. After a survey of the relevant jurisprudence (at [146]–[154] of the Judgment), the Judge expressed a preference as between the two for the New Zealand approach but concluded that neither approach should apply in Singapore (at [155]–[156] of the Judgment). The statutory exception in s 33(3)(*b*) sufficed to strike the proper balance and it was consistent with Parliament's intention that neither approach should be adopted (at [157]–[158] of the Judgment).

28 Although the requirements for the Comptroller to invoke s 33 were satisfied, the Judge nevertheless proceeded to hold that the Comptroller had not exercised his powers under s 33(1) fairly and reasonably by choosing to disregard both the dividend income and interest expenses under the Additional Assessments and the Notice of Assessment for YA 2007. The power under s 33(1) only enabled the Comptroller to disregard the impugned arrangement and the Comptroller's real objection was to the artificial generation of interest expenses (at [165]–[166] of the Judgment). Accordingly, the proper approach ought to have been to disregard only the interest payments attributable to that portion of the loans amounting to $150m that were not in substance real loans to AQQ (at [168]–[170] of the Judgment). The Comptroller should not have disregarded the interest payments attributable to the $75m loan (on monies which belonged to C) that C in substance had extended to AQQ by buying the Fixed Rate Notes from AQQ and receiving the corresponding interest payments from AQQ through the chain of conditional payment arrangements between N Bank Singapore, N Bank Mauritius and C (at [170] of the Judgment). The Judge also observed that the Comptroller ought to have required AQQ to account to it for the withholding tax on the interest for the $75m that eventually flowed to C (at [172] of the Judgment).

29 Finally, the Judge also held that the Comptroller did not in any event have power to issue the Additional Assessments under s 74(1) of the Act as the power to issue Additional Assessments under s 74(1) only applied if the taxpayer had been assessed at an amount *less* than that which ought to have been charged (at [178]–[179] of the Judgment). The Additional Assessments had been issued to recover the shortfall in the amount previously assessed but here, the Additional Assessments had in fact assessed tax at an amount *less* than the Original Assessments (at [178] of the Judgment).

30 The final result was therefore a purely symbolic victory for the Comptroller and in substance a victory for AQQ. Although the Judge found that the Financing Arrangement was a tax avoidance arrangement within the meaning of s 33, the Comptroller was not able to recover the tax refunds that had been paid as he had failed to exercise his powers under s 33(1) appropriately to counteract the tax advantage.

Issues before this court

31 Each party appealed against all those findings of the Judge that went against it. CA 7/2013 raises procedural issues relating to the exercise of the Comptroller's powers under s 33(1) to counteract the tax advantage obtained by the taxpayer and the power under s 74(1) to issue additional assessments that attempt to claw back tax refunds to which AQQ was found not to be entitled to after the arrangement was found to be a tax avoidance arrangement. CA 8/2013 concerns the substantive issue of whether s 33 was properly engaged in this case.

32 There are five broad issues arising in these appeals and by reference to which this judgment is organised:

(a) whether any of the threshold limbs in s 33(1) was satisfied on the facts of this case;

(b) whether AQQ could rely on the exception in s 33(3)(*b*);

(c) if s 33(1) was *prima facie* engaged, whether AQQ could nevertheless rely on any specific provisions of the Act to preclude the operation of s 33;

(d) whether the Comptroller had exercised his powers under s 33(1) fairly and reasonably to counteract the tax advantage obtained; and

(e) whether the Comptroller had acted *ultra vires* s 74(1) by issuing the Additional Assessments.

Issue I: Were the threshold limbs of s 33(1) of the Act satisfied?

Legislative history of s 33

33 The key provision in issue is s 33 of Act, which is drafted in seemingly straightforward terms:

> **Comptroller may disregard certain transactions and dispositions**
>
> **33.**—(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly —
>
> (*a*) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;
>
> (*b*) to relieve any person from any liability to pay tax or to make a return under this Act; or
>
> (*c*) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,
>
> the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.
>
> (2) In this section, "arrangement" means any scheme, trust, grant, covenant, agreement, disposition, transaction and includes all steps by which it is carried into effect.
>
> (3) This section shall not apply to —
>
> (*a*) any arrangement made or entered into before29th January 1988; or
>
> (*b*) any arrangement carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.

34 The present s 33 was enacted in 1988 by the Income Tax (Amendment) Bill (No 22 of 1987) ("the Bill") and was intended to represent a substantial departure from the previous s 33 ("the old s 33") of the Income Tax Act (Cap 134, 1985 Rev Ed), which stated as follows:

> **Comptroller may disregard certain transactions and dispositions**

> **33.**—(1) Where the Comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly.
>
> (2) In this section, 'disposition' includes any trust, grant, covenant, agreement or arrangement.

35 The old s 33 re-enacted s 29 of the Income Tax Ordinance 1947 (Ordinance 39 of 1947) ("the 1947 Ordinance"), which was based on s 22B of the Model Colonial Territories Income Tax Ordinance 1922 ("the 1922 Model Ordinance") (see the *Report of the Inter-Departmental Committee on Income Tax in the Colonies not Possessing Responsible Government* (Cmd 1788, December 1922) at Appendix I). Many British colonies had, at some point in time, a similar general tax-avoidance provision (see, for example, s 61 of the Hong Kong Inland Revenue Ordinance (Cap 112) (HK) ("the Hong Kong Ordinance"), which has been supplemented by a broader general anti-avoidance provision in s 61A).

36 During the Second Reading for the Bill, the then Minister for Finance, Dr Richard Hu Tsu Tau ("Dr Hu"), explained that it was necessary to amend s 33 in order to meet the need for a more effective general anti-avoidance provision to deal with increasingly sophisticated tax avoidance schemes (see *Singapore Parliamentary Debates, Official Report* (13 January 1988) vol 50 at cols 358–359):

> … The need to strengthen section 33 stems from the fact that tax avoidance schemes are getting increasingly complex and are becoming "tailor-made" to suit specific clients, thereby adding to this difficulty in identifying them. The existing section 33 is grossly inadequate to deal with these schemes. Most countries have taken steps to strengthen their legislation to combat tax avoidance. Even Hong Kong has far wider provisions than our proposed amendment.
>
> In assessing whether a particular scheme would fall under the ambit of section 33, the Inland Revenue Department would, among other things, look for the presence of artificiality, the interposing of various intermediaries or transactions to reduce or avoid tax and transfer pricing. *It should be stressed that the aim is to reduce blatant or contrived tax avoidance arrangements and is not intended to affect normal commercial transactions. I would also like to clarify that companies and individuals granted tax exemptions and concessions under specific incentive schemes would not be affected by the new section 33. They will continue to enjoy the tax concessions.*
>
> …
>
> I would like to reiterate that the sole objective of the amendment is to curb the proliferation of blatant tax avoidance schemes in Singapore and *is not intended to affect normal commercial transactions*.
>
> [emphasis added]

37 Responding to concerns raised by other Members of the House that the scope of s 33 was too uncertain and potentially over inclusive, Dr Hu also clarified that the judicial interpretations of similarly worded general anti-avoidance provisions in other jurisdictions could be relied on for the purpose of construing s 33 (see *Singapore Parliamentary Debates, Official Report* (13 January 1988) vol 50 at cols 365–366):

> I think we have in the process of drafting this legislation studied the anti-avoidance provisions of a number of countries before we finalized our draft, including countries such as Hong Kong,

Australia and New Zealand.

…

Furthermore, there are adequate safeguards provided under the amendment which are to be found in the judicial interpretations of legislations having similar wordings such as in New Zealand and Australia, for there is a considerable body of case law on which we can rely for the purpose of construing the proposed section 33. One of the principles which has emerged is that the *provision will not apply to bona fide transactions even if these result in tax savings where such savings are incidental to the transactions.* On the other hand, the provisions will apply to transactions where payment of tax is avoided through deliberate and artificial tax avoidance arrangements.

[emphasis added]

38 A comparison of s 33 with anti-avoidance provisions in other jurisdictions suggests that s 33 was inspired by s 260 of the Commonwealth of Australia Income Tax Assessment Act 1936 (Cth) (Aust) ("the Australian Act") – which was replaced by Part IVA of the Australian Act for all arrangements entered into after 27 May 1981 – and also by s 99 of the New Zealand Income Tax Act 1976 (NZ) ("the 1976 New Zealand Act"), re-enacted in materially similar form in BG 1 and GA 1 of the New Zealand Income Tax Act 2007 (NZ) ("the 2007 New Zealand Act"): see generally, Tan Wee Liang, "Tax Avoidance and Section 33 of the Income Tax Act" (1989) 31 Mal LR 78 ("*Tan Wee Liang*") and John H Telfer, "General Anti-Tax Avoidance Provisions: The Singapore Position and Australasian Comparisons" (1990) 32 Mal LR 20. The statutory exception in s 33(2) also bears more than a passing resemblance to s 28 of the United Kingdom Finance Act 1960 (c 44) (UK) ("the Finance Act 1960").

39 As noted above, it had been envisaged at the outset by Parliament that s 33 would not be construed literally, and that the courts could derive guidance from judicial considerations of similarly worded provisions in other jurisdictions. The construction of s 33 has not, however, been considered locally in the more than 20 years since its enactment, and this is the first time it has arisen before this court.

The interpretation of s 33(1)

40 The Comptroller's powers to disregard or vary an *arrangement* under s 33(1) are triggered where the *purpose or effect* of the arrangement is to:

(a) alter the incidence of tax;

(b) relieve a liability to pay tax; or,

(c) reduce or avoid any liability imposed or would have otherwise been imposed.

41 The Comptroller contended before the Judge that both the Corporate Restructuring and Financing Arrangement satisfied all three limbs and maintained the same position before us. The Judge found that limb (c) was satisfied, but reserved his view on the applicability of limbs (a) and (b).

An arrangement

42 Under s 33(2), the word arrangement "*means* any scheme, trust, grant, covenant, agreement, disposition, transaction and *includes* all steps by which it is carried into effect" [emphasis added].

Both parties took issue with the Judge's demarcation between the Corporate Restructuring and Financing Arrangement, which led him to treat them as discrete arrangements both for the purposes of considering (i) the applicability of the statutory exception in s 33(3)(*b*) and (ii) how the Comptroller's powers under s 33(1) should have been exercised to counteract the tax advantage.

43 The definition of an arrangement in s 33(2) is in similar terms to that found in s 99(1) of the 1976 New Zealand Act. It is a composite term that *means* the overarching scheme, agreement or transaction and *includes* the component steps that carry into an effect an arrangement. Thus, a tax avoidance arrangement may constitute a combination of steps that may be individually unobjectionable: see the decision of the Supreme Court of New Zealand in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 ("*Ben Nevis*") at [105], addressing the definition of "arrangement" in YA 1 of the 2007 New Zealand Act. In the Privy Council decision of *Peterson v Commissioner of Inland Revenue* [2006] 3 NZLR 433 ("*Peterson*"), Lord Millett, delivering the judgment for the majority of the Board, observed at [33]:

> Their Lordships consider that the Commissioner is entitled at his option to identify the whole or any part or parts of a single composite scheme as the "contract, agreement, plan or understanding" which constitutes the "arrangement" for the purpose of section 99. Whether there was a single "arrangement" or two or more connected but distinct "arrangements" (as there were in *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450) is a question of fact for the [Commissioner]. …

44 The Comptroller had chosen – before the Board, the High Court and indeed before us – to particularise the impugned arrangement as the composite scheme that comprised both the Corporate Restructuring and Financing Arrangement. It was on this basis that the Comptroller sought to apply the purpose and effect test in s 33(1). In our judgment he was entitled to do this and we accept that the composite scheme falls within the definition of "arrangement" in s 33(2). Our ensuing analysis will proceed on this broad premise, with references to the term "Financing Arrangement" used generally where the tax avoidance element can be found in the relevant component steps.

Purpose or effect

45 AQQ and the Comptroller both agreed with the interpretation that the Judge attached to the phrase "purpose or effect" (at [71]–[76] of the Judgment). Applying the "predication principle" that emerges from Lord Denning's judgment in *Lauri Joseph Newton and others v Commissioner of Taxation of the Commonwealth of Australia* [1958] 1 AC 450 ("*Newton*"), the words are to be construed conjunctively so as to refer to the *objectively ascertained effect* of the arrangement in question. In *Newton*, Lord Denning explained the like phrase found in s 260 of the Income Tax and Social Services Contribution Assessment Act 1936-1951 (Cth) (Aust) then in force in the following terms (at 465–466):

> They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every "contract, agreement or arrangement" (which their Lordships will henceforward refer to compendiously as "arrangement") which has the purpose or effect of avoiding tax. *In applying the section you must, by the very words of it, look at the arrangement itself and see which is its effect - which it does - irrespective of the motives of the persons who made it.* …
>
> *In order to bring the arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions*

are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.

[emphasis in original omitted; emphasis added]

46 Read as a whole, the "predication principle" is thus concerned with the characterisation of the objective ends of an arrangement, that is, whether it may be predicated from the observable acts by which an arrangement is implemented that it was implemented in that way so as to achieve the ends stated in any of the limbs in s 33(1).

47 As articulated by Lord Denning, an arrangement would not be predicated as a tax avoidance arrangement if the arrangement is capable of explanation "by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax" (see *Newton* at 466). In *Owen Thomas Mangin v Inland Revenue Commissioner* [1971] 1 AC 739 ("*Mangin*"), which involved s 108 of the Land and Income Tax Act 1954 (NZ) ("the 1954 New Zealand Act"), the predecessor to s 99 of the 1976 New Zealand Act, the majority of the Privy Council referred to the passage of Lord Denning's judgment cited above (at [45]) and stated (at 751D–G) that:

… this passage, properly interpreted, does not mean that every transaction having as one of its ingredients some tax saving feature thereby becomes caught by a section such as section 108. If a bona fide business transaction can be carried through in two ways, one involving less liability to tax than the other, their Lordships do not think section 108 can properly be invoked to declare the transaction wholly or partly void merely because the way involving less tax is chosen. … *The clue to Lord Denning's meaning lies in the words "without necessarily being labelled as a means to avoid tax." … Their Lordships think that what this phrase refers to is, to adopt the language of Turner J. in the present case*,

"*a scheme … devised for the sole purpose, or at least the principal purpose*, of bringing it about that this taxpayer should escape liability on tax for a substantial part of the income which, without it, he would have derived."

[emphasis added]

48 The exclusion of certain types of arrangements from the ambit of s 33(1), such as ordinary business or family dealings that do not have as their sole or principal purpose the avoidance of liability to tax, appears to have been one of the principles emerging from the judicial interpretations that Dr Hu referred to during the Parliamentary debates (cited above at [37]) which was codified in modified form in s 33(3)(*b*): see *Tan Wee Liang* at p 96. We consider this statutory exception in greater detail below.

To reduce or avoid any liability imposed or would have otherwise been imposed

49 Counsel for AQQ, Mr Davinder Singh *SC* ("Mr Singh") submitted that none of the threshold limbs under s 33(1) was satisfied because there was no relevant tax liability imposed by the Act that was or would have been avoided or reduced by the Corporate Restructuring; as tax for the dividends had been deducted at source, AQQ was never, at any point, liable to pay tax on the dividend income. The scheme was merely designed to extract tax credits. Mr Singh relied on two decisions of the High Court of Australia namely, *Rowdell Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1963) 111 CLR 106 ("*Rowdell*") and *Patcorp Investments Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1976) 140 CLR 247 ("*Patcorp*") in support of the

proposition that s 33 was engaged only where the relevant tax liability had arisen or would have arisen prior to the arrangement sought to be impugned. Framed in terms of statutory interpretation, Mr Singh's argument was that the phrase "liability imposed" refers to any amount that is actually payable by way of tax after setting off any applicable tax credits from the assessed sum of tax. Counsel for the Comptroller, Mr Liu Hern Kuan ("Mr Liu"), submitted that a tax liability under s 10(1)(*d*) of the Act had been imposed when the dividend income was paid to AQQ, and that the arrangement entered into had reduced or avoided a liability that otherwise would have been imposed had the interest expenses not been incurred.

50 While Mr Singh's argument – that one cannot speak of avoidance without liability – has a superficial intuitive appeal, we do not accept its fundamental premise which turns on the legal nature and characterisation of the tax position that avails in relation to dividends that are paid to a shareholder after tax on those dividends has been paid by the company and an equivalent sum of tax credits is attached to the issued dividends.

51 We first observe that s 33(1)(*c*) includes both tax liability that has been imposed and liability which "would otherwise have been imposed". The insertion of the latter phrase has the effect of pre-empting the argument raised in *Newton* that the word "liability" only referred to a pre-existing liability that had actually accrued: see *Tan Wee Liang* at 93. In *Newton*, Lord Denning said at 464:

> … Their Lordships cannot accept this submission. They are clearly of opinion that the word "avoid" is used in its ordinary sense - in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of "avoid" which gives the clue to the meaning of "liability imposed." *To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you.*
>
> [emphasis added]

52 The words "*would otherwise* have been imposed" [emphasis added] postulate a hypothetical liability that was about to fall on the taxpayer which the interpolation of the arrangement had the purpose or effect of reducing or avoiding: see Tang Siau Yan, "Tax Avoidance" in ch 45 of *The Law and Practice of Singapore Income Tax* (Pok Soy Yoong *et al* ed) (2nd Ed, LexisNexis, 2013) at para 45.88.

53 In our judgment, it is evident that there was a relevant tax liability that would have been imposed on AQQ had the Financing Arrangement not been entered into. Mr Singh's argument elides the *factual* setting in relation to the payments of tax that had been made with the quite separate matter of the *legal* position of the taxpayer. This argument rests, in effect, upon the court reading into s 33(1)(*c*) the word "net" before the phrase "liability imposed" and the words "and payable" immediately thereafter.

54 The plain meaning of the words "*any* liability *imposed* by this Act" [emphasis added] refers to legal liability to tax, that is, a liability that results from the application of any specific provision or combination of provisions of the Act. Mr Singh's argument, on the other hand, presupposes that s 33 of the Act is concerned only with the question of whether as a matter of fact, tax that was or would be factually payable by AQQ over and above any set-off arising from the s 44 tax credits had been reduced or avoided. There is no basis, from the words of the statute, to conclude that this was the intended scope of s 33. As a matter of policy and logic, we accept the general proposition that only an existing legal liability that has or would have accrued but for the arrangement can be said to have been avoided. However, it does not follow that a taxpayer who may not, as a matter of fact, have an obligation to make any further payment of tax because a payment in advance has already been made

on that portion of chargeable income, cannot be said to have avoided or reduced his *legal liability* to tax. The former is a matter of fact and accounting; the latter is a matter of legal liability.

55 We are satisfied that neither *Rowdell* nor *Patcorp* is of any assistance to AQQ in the light of this analysis. Both *Rowdell* and *Patcorp* involved companies that were in the business of dealing in stocks, shares and securities. These companies purchased shares in other private companies which had ceased to trade but had undistributed profits. Dividends were declared out of the profits of these private companies and their shares were either (i) bought at a price lower than the net asset value of the private companies before they were stripped of profits and resold thereafter (as in *Rowdell*) or (ii) subsequently sold at a price lower than the original purchase price by pre-arrangement (as in *Patcorp*). The first mentioned companies then claimed to be entitled to certain rebates or exemptions under various specific provisions of the Australian Act. In *Rowdell*, the Commissioner of Taxation sought to invoke s 260 of the Australian Act to characterise the dividends received by the companies not as dividends but as profits, which did not qualify for various exceptions and rebates provided for under ss 44(2), 46 and 107 of the Australian Act. The court unanimously held that s 260 did not apply, and Kitto J observed that (at 125):

> … no more need be said than that *tax-avoidance on the part of Rowdell was clearly not within either the purpose or effect of the transactions.* No doubt among the considerations which led Rowdell to enter into the transactions was the consideration that its tax liability resulting from the transactions would be reduced by the application of ss. 44(2), 46 and 107 (or whichever of them should apply in the circumstances); *but it is impossible to point to any tax liability which Rowdell would have incurred if the arrangement had never been made and for the avoidance of which the arrangement was a concerted means*.
>
> [emphasis added]

56 *Patcorp* involved a similar fact situation in which the companies sought to rely on ss 46 and 51 of the Australian Act to claim rebates for the dividends and to deduct losses on resale respectively. The majority of the High Court (Gibbs, Stephen and Jacobs JJ, McTiernan J expressing no opinion) held that s 260 was of no application. Gibbs J cited with approval the passage of Kitto J in *Rowdell* that we have quoted in the previous paragraph and his reasoning in this regard merits citing at some length (at 299-300):

> … A taxpayer who is entitled to a rebate in respect of dividends does not, by arranging to receive the dividends, avoid any liability imposed on him by the Act. In *Europa Oil (N.Z.) Ltd. v. Inland Revenue Commissioner*, Lord Diplock, speaking of the New Zealand section which corresponds to s. 260, said:
>
>> **"Any liability of the taxpayer to pay income tax must be found elsewhere in the Act. There must be some identifiable income of the taxpayer which would have been liable to be taxed if none of the contracts, agreements or arrangements avoided by the section had been made."**
>
> **Those remarks apply equally to s. 260. … s.260 did not prevent the appellant companies from arranging their affairs so that the income that they received would include dividends subject to a rebate. Nor does s. 260 enable the Commissioner to treat the expenditure on the purchase of the shares as if it had never been made. … Whether the whole of any of these transactions, or part, be examined it is not possible to find an arrangement whose purpose was to avoid tax. The purpose was to buy, and later resell, shares the dividends from which would be rebatable. It may rightly be said of the present case, as I said in the**

very different circumstances of *Federal Commissioner of Taxation v. Casuarina Pty. Ltd.* , that "no liability to tax imposed by the Act on the company is avoided for whatever tax is appropriate to its situation remains payable."

[emphasis added in bold]

57 There are hints in this passage of the choice principle (which we turn to below), but for present purposes, it is sufficient to note that Gibbs J was of the view that it could not be said that the purpose or effect of the arrangement in that case was to avoid tax just because the arrangement had been entered into precisely in order to take advantage of the rebates conferred by s 46 of the Australian Act. This reasoning does not support a general proposition of law that there is no relevant tax *liability* that can be avoided or reduced under a general anti-avoidance provision because a taxpayer would as a matter of fact not have to *pay* tax on dividend income following the set-off of a tax credit. Both these cases in fact stand for the narrow proposition that on the facts presented, the purchasers of shares (the dividends of which carried certain rebates) could not be said to have entered into a transaction to purchase shares for the purpose or effect of reducing their tax liability in circumstances where their tax liability only arose as a result of that very purchase and where they were entitled to the rebates under specific provisions of the Australian Act. The real point of the decisions was that there was no tax liability that was otherwise avoided by virtue of the arrangements; indeed, any tax liability only arose because of those arrangements.

58 The facts of *Rowdell* or *Patcorp* are also distinguishable from those in the present appeals. The Comptroller is not arguing that AQQ is not entitled to the benefit of the s 44 tax credits; rather, his position is that the separate generation of interest expenses to obtain deductions from otherwise chargeable income is impermissible under s 33. Both cases would only be of assistance to AQQ to the extent that it could be said that there would have been no liability for tax on the dividend income whether or not the Financing Arrangement had taken place. But this is plainly not the case.

59 Mr Singh also put his case another way, contending that it was an impossibility to avoid a liability that did not ultimately exist once the set-off of the tax credits was taken into account. Under s 10(1)(*d*) of the Act, income tax is payable in respect of "dividends, interests or discounts". Mr Singh contended that when s 10(1)(*d*) is read together with ss 44, 44A and 46 in relation to a shareholder, the overall effect is that there would be no liability to pay tax by operation of law. The tax would be deemed to have been paid by the company on behalf of the shareholder under the imputation system. Section 46 of the Act, as it then stood, stated as follows:

Tax deducted from dividends, interests, etc.

46.—(1) Any tax —

(*a*) which a person has deducted or is entitled to deduct from any dividend under section 44 …

…

shall, when the income from which the tax has been deducted … *is included in the chargeable income of any person, be set-off for the purpose of collection against the tax charged on that chargeable income*.

…

[emphasis added]

60 We accept that the *effect* of the operation of s 46 would be that no further payment of money might be required to be made over and above the set-off of s 44 tax credits (representing tax that had already been deducted at source from the dividend income). But this is because the tax liability of the taxpayer would have been met by this set-off against the s 44 tax credits. As a matter of legal liability, we agree with the Judge's conclusion (at [86] of the Judgment) that the dividends received by AQQ clearly constituted income chargeable to tax under s 10(1)(*d*). It is implicit in s 46(1) that the dividend income is still regarded as "chargeable income" for the purposes of assessing the amount of tax liability. Section 46(1) states that the set-off for the purpose of collection will take place only when the income from which the tax has been deducted "is included in the *chargeable* income" [emphasis added] of any person. It follows that what is ultimately at issue in s 46(1) is the tax payable by the shareholder on the dividend income that it stands to receive. This only arises after dividend income is included in the shareholder's chargeable income and tax is charged on that income.

61 The fact that an advance deduction in respect of the shareholder's anticipated tax liability would already have been made at the corporate level does not displace this. Tax at the prevailing rate is levied on the entirety of the shareholder's chargeable income, but as a matter of *collection*, this is then subject to set-off against the sum of s 44 tax credits relating to the dividend income. A legal liability to tax crystallises at the time that the shareholder receives dividend income that constitutes chargeable income, even if as a matter of fact, payment of tax in respect of this liability is then subsequently set off under s 46. The question is whether AQQ was trying to avoid this liability; and as a matter of law, there was nothing conceptually impossible with this.

Whether the purpose of effect of the arrangement was to reduce or avoid liability that was imposed or would have been imposed under the Act

62 Following from our analysis above, we agree with the Judge's finding that s 33(1)(*c*) was satisfied on the facts. We have found that the words "liability imposed" in s 33(1) refer to legal liability to tax under any provision of the Act, and not whether there is in fact an obligation to pay more tax after the liability has been set off by a corresponding tax credit.

63 Mr Liu submitted that the Comptroller's position was that the generation of interest expenses under the Financing Arrangement had reduced AQQ's tax liability for the dividend income. Section 14(1)(*a*)(i) allows, for the purpose of ascertaining the income of any person chargeable with tax under the Act, the deduction of all outgoings and expenses incurred, including sums payable by way of interest. We agree with the Comptroller, and find that on an objective evaluation of the totality of the Corporate Restructuring and Financing Agreement, AQQ's deduction of interest expenses under s 14(1)(*a*)(i) of the Act to reduce the total amount of chargeable income under s 10(1)(*d*) had the objective purpose or effect of reducing a liability which would otherwise have been imposed by the Act, *ie*, the tax chargeable on the full sum of dividend income. In the words of Lord Denning in *Newton*, it is possible to "predicate" from the overt mechanism of the Financing Arrangement that it was implemented in that particular manner so as to reduce AQQ's liability for tax on the dividend income.

64 Mr Singh argued that s 33 was not intended to apply to a scheme that had the object of extracting tax credits in the s 44 accounts of the Subsidiaries as opposed to reducing a specific tax liability. But the effect of the generation of interest expenses was to reduce AQQ's tax liability in relation to the dividends it received from the Subsidiaries. By causing the tax payable on the dividend income to be reduced, this in turn resulted in a refund being made to AQQ after setting-off the s 44 tax credits; this was indeed the entire object of the arrangement. The fact that AQQ was entitled, as

a shareholder receiving dividends from the Subsidiaries, to draw on the credits reflected in the s 44 account balances during the five-year transitional period is not the issue. The real question we are concerned with is the propriety of the incurrence of the interest expenses and whether those expenses had reduced the tax liability of AQQ imposed under s 10(1)(*d*) of the Act. As we think that the interest expenses were not properly incurred and did have the effect of reducing AQQ's tax liability, s 33(1)(*c*) is clearly engaged.

65 We also note the Judge's finding (at [88]–[91] of the Judgment) that withholding tax on the part of C, a non-resident company, had been reduced or avoided as a result of the Financing Arrangement that involved the interposition of N Bank Singapore and N Bank Mauritius. The Judge thought that AQQ would have been obliged, under s 45(1) of the Act, to withhold a percentage of the interest payable to C at the prevailing rate of tax and pay to the Comptroller the amount deducted. This argument was not advanced by either party before the Board or the High Court. Before us, Mr Liu also conceded that the Comptroller was not proceeding against C and was not entitled under s 33(1) to counteract the tax advantage obtained by C by acting against AQQ. It is not necessary for us in the circumstances, to say anything more on this.

66 In summary, we find that the arrangement fell within the ambit of s 33(1)(*c*). It is therefore not necessary for us to further consider ss 33(1)(*a*) or 33(1)(*b*).

Issue II: Was AQQ entitled to avail itself of the exception under s 33(3)(*b*) of the Act?

67 Section 33(1) does not apply to an arrangement that falls within the ambit of s 33(3)(*b*). Section 33(3)(*b*) (referred to by the Judge as a "statutory exception") contains two cumulative limbs. To fall under this exception, the arrangement:

(a) must have been carried out for *bona fide* commercial reasons; and

(b) must not have had as one of its main purposes the avoidance or reduction of tax.

68 Before us, both parties accepted that the Judge correctly construed the statutory exception as importing two subjective elements (at [105] of the Judgment) and they only diverged on the application of s 33(3)(*b*) to the facts. However, in the light of its importance, we add our views on the scope of this provision.

The interpretation of s 33(3)(b)

69 The Judge compared s 33(3)(*b*) with s 28 of the Finance Act 1960, and relied on Lord Pearce's interpretation of s 28(1) in *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18 ("*Brebner*"). The relevant portions of s 28(1) state:

> **28.**-(1) Where-
>
> (*a*) in any such circumstances as are mentioned in the next following subsection, and
>
> (*b*) in consequence of a transaction in securities or of the combined effect of two or more such transactions,
>
> a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions *were carried out either for bona fide commercial reasons* or in the ordinary course of making or managing investments, *and that none of them had as their main*

> *object, or one of their main objects, to enable tax advantages to be obtained*, this section shall apply to him in respect of that transaction or those transactions …
>
> [emphasis added]

Lord Pearce held in *Brebner* (at 27C–D) that the word "object" in s 28(1) referred to "a subjective matter of intention".

70 Although the word "object" rather than "purpose" was used in s 28(1) of the Finance Act 1960, the Judge concluded that s 33(3)(*b*) of the Act should be likewise interpreted as requiring an inquiry into the subjective reasons of the taxpayer for carrying out the arrangement and the subjective intentions of the taxpayer in determining whether the arrangement had as one of its main purposes the avoidance or reduction of tax (at [105] of the Judgment).

71 We agree with the Judge that the phrase "*bona fide* commercial reasons" necessitates a subjective inquiry. The concept of *bona fides* or good faith is subjective, and the word "reasons" in common parlance concern motives or justifications, which are again infused with a subjective quality. However, we also note that to construe the word "purpose" as referring to the taxpayer's subjective intentions in s 33(3)(*b*) might at first blush seem to contradict the objective sense given to the words "purpose or effect" under s 33(1): see *Tan Wee Liang* at 96. Read in its context, the exception in s 33(3)(*b*) applies to any arrangement that does not have "as one of *its* main purposes the avoidance or reduction of tax" [emphasis added]. Seen in this way, the purpose may be referable to the arrangement, *ie*, *its* external purpose as objectively discerned, and not to the taxpayer, *ie*, *his* subjective motivations for instituting the arrangement.

72 The New Zealand courts have adopted an objective reading of similar words in s 99(2)(*b*) of the New Zealand Act, which states that an arrangement shall be void as against the Commissioner of Inland Revenue in the following circumstances:

> … [w]here it has 2 or more purposes or effects, *one of its purposes or effects (not being a merely incidental purpose or effect) is tax avoidance*, whether or not any other or others of its purposes or effects relate to, or are referable to, ordinary business or family dealings …
>
> [emphasis added]

Thus, in *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 ("*Challenge (CA)*"), Woodhouse P stated (at 533) that whether or not a tax saving purpose was incidental was to be decided objectively by reference to the arrangement and not subjectively in terms of motive.

73 Section 99(2)(*b*) of the New Zealand Act makes reference to "purpose or effect", instead of "purpose" in isolation, and the need for consistency with the *Newton* objective approach would appear more compelling than might be the case with s 33(3)(*b*). Further, the enactment of s 99 of the 1976 New Zealand Act to replace s 108 of the 1954 New Zealand Act was for the intended purpose of reading down the apparently broad width of *Newton* as a result of which an arrangement would be *excluded* from the scope of the anti-avoidance provision if the arrangement could additionally be explained by non-tax related purposes: see *Ben Nevis* at [81] (though s 99 as drafted also indirectly retained an exception for merely incidental tax effects). In contrast, s 33(3)(*b*) of the Act is expressed as an exception to the general definition of tax avoidance arrangements that engage s 33(1), and was included in s 33 as one of the "safeguards … to be found in the judicial interpretations of legislations having similar wordings" (see [37] above).

74 In our judgment, the Judge's reading of "purpose" – as being concerned with the taxpayer's subjective intentions of the end to be achieved in carrying out the transaction – is more consistent with the overall tenor and intention underlying s 33(3)(*b*), which seeks to narrow the *prima facie* overly inclusive scope of s 33(1) that could conceivably catch *any* arrangement that has an objectively ascertainable purpose of reducing or avoiding tax. The first limb of s 33(3)(*b*) is therefore concerned with the taxpayer's subjective commercial motives for entering into a transaction, and the second limb is concerned with the subjective consequences that the taxpayer wishes to obtain. Similarly structured transactions may thus be taxed differently depending on whether the taxpayer had set out to create a result whereby his tax liability was avoided or reduced. This is to be seen in the context of the fact that s 33(3)(*b*) only comes into play where the taxpayer is found to have derived a tax advantage on the basis of one or more of the limbs of s 33(1). In that situation, the question then becomes whether the taxpayer is able to take himself out of the operation of s 33(1) by showing that even if objectively it is predicated that he had acted in order to obtain a tax advantage, subjectively, this was not what he had set out to do and that he was acting with *bona fide* commercial reasons.

The application of s 33(3)(b)

75 We turn to consider the Judge's application of s 33(3)(*b*) to the facts.

76 Mr Singh submitted that the Judge's conclusion that AQQ could not demonstrate any *bona fide* commercial reason for the arrangement was due to the Judge's erroneous approach in considering the Financing Arrangement in isolation from the Corporate Restructuring. Mr Singh also contended that the Judge erred in his appreciation of particular aspects of the arrangement and further argued that the Judge ought not to have inferred, from the fact that the Financing Arrangement was entered into with the aim of carrying out the Corporate Restructuring in a tax efficient manner, that its main purpose was therefore the avoidance or reduction of tax.

77 Mr Liu on the other hand argued that even if the Corporate Restructuring and Financing Arrangement were viewed together, the entirety of the arrangement had not been carried out for *bona fide* commercial reasons as the Corporate Restructuring involved the purchase of the Subsidiaries by AQQ at inflated prices to enable D in particular – which had the largest s 44 balance but only $40,000 in accumulated profits (see above at [14]) – to generate large amounts of undistributed profits for distribution as dividends. Mr Liu also took the position that the Financing Arrangement was commercially unjustifiable and involved a circuitous flow of funds with no real loan being made in substance by N Bank Singapore to AQQ. In relation to the Judge's finding that tax avoidance or reduction had been one of the main purposes of the Financing Arrangement, Mr Liu submitted that the Judge had carefully considered all aspects of the arrangement and had placed appropriate emphasis on discerning the relevant subjective intentions of AQQ from the available evidence.

78 Both the Comptroller and AQQ agreed that the arrangement should be analysed as a composite scheme. As the Comptroller has chosen to characterise the relevant arrangement as comprising both the Corporate Restructuring and Financing Arrangement, we similarly do not consider that it is realistic or helpful to adopt a narrower analytical framework that divorces the Corporate Restructuring from the modes and methods of financing obtained to carry out the scheme.

79 The Comptroller did not impugn the acknowledged commercial reasons and business considerations of the B Group in planning the Corporate Restructuring. The Chief Financial Officer of the B Group ("the Chief Financial Officer") gave evidence before the Board that the original structure of the B Group in Singapore was cumbersome and unwieldy and that the Corporate Restructuring was

intended to create a simplified structure such that each subsidiary would be organised along separate lines of business. [note: 9] He further averred that the original structure of the Singapore operations did not entitle the B Group to participate in the group tax relief scheme that came into effect on 1 January 2003 (see [4] above) as 50% of the shareholding in the Subsidiaries was then held by C, a company incorporated in Malaysia. There was therefore a need to restructure the shareholdings of the Subsidiaries under a single holding company (*ie*, AQQ) in order to qualify for group tax relief. [note: 10] The Corporate Restructuring was also part of a larger ongoing process of reorganising the entire corporate structure of the B Group. [note: 11] None of this was disputed, and the Judge acknowledged that there was nothing in itself wrong with the restructuring (at [111] of the Judgment). The Judge nevertheless considered that the *bona fide* commercial reasons for the Corporate Restructuring should not be conflated with those for the Financing Arrangement, and concluded that there were no such independent *bona fide* commercial reasons for the Financing Arrangement. In particular, the Judge found that AQQ had grossly overpaid for its interests in the Subsidiaries (at [129] of the Judgment) and questioned how the 8.85% interest rate for the Fixed Rate Notes had been arrived at (at [134] of the Judgment).

80 The *bona fide* commercial reasons for a particular step in the arrangement should ordinarily be construed within the context of the entire economic and commercial reality of the arrangement. The Financing Arrangement followed from the Corporate Restructuring as part of an integrated and concerted arrangement, and on a broad pragmatic view of the facts, it might not have been possible for us, on the evidence that was on the record, to come to a conclusion as to whether the purchase price of the Subsidiaries was inflated or whether the interest rate payable on the Fixed Rate Notes was a commercial rate, and to ascertain whether there were *bona fide* commercial reasons for the entire arrangement under the first limb of s 33(3)(*b*). But in the final analysis this is not material in this case.

81 That is because in relation to the second limb of s 33(3)(*b*), we were satisfied that the Corporate Restructuring and Financing Arrangement were not commercial transactions under which any tax avoidance or reduction was merely incidental by reference to AQQ's real object. To the contrary, it is clear to us that AQQ's express intention was to obtain a tax benefit in the form of a reduction of its tax liability so as to secure the release of the tax credits in the s 44 accounts of the Subsidiaries. In our judgment, both the Corporate Restructuring and Financing Arrangement were conceived as a single integrated whole; and while we might be willing to accept that there were genuine *bona fide* commercial reasons for the arrangement, we are satisfied that the Judge correctly concluded that one of the main subjective purposes, or ends to be achieved by the arrangement, was to reduce AQQ's liability to tax for the dividend income it received from the Subsidiaries.

82 We do not accept Mr Singh's argument that the Judge had failed to apply the subjective test in his assessment of the evidence before him. Subjective intentions of course might not always be readily apparent, and the Board or Judge may ascertain this by reference to evidence or testimony of the taxpayer's actual contemporaneous state of mind and assess the veracity of this by drawing the requisite inferences from the surrounding objective evidence or features of the arrangement. It is clear that it was at the forefront of the Judge's mind that the Board's assessment of the facts had been made from an objective perspective (at [108] of the Judgment), and the Judge took this into account when evaluating the evidence before the Board. We therefore do not see any reason to find that the Judge erred in finding that one of the main subjective purposes of the arrangement was to reduce or avoid a liability to tax.

83 We note that the Chief Financial Officer had admitted during cross-examination before the Board in fairly unequivocal terms that apart from the objectives of simplifying the corporate structure

and claiming group tax relief, the B Group's decision to implement the Corporate Restructuring through the Financing Arrangement was influenced by the additional object of recovering the "tax assets" in the Subsidiaries. Contrary to Mr Singh's submission that the Judge had taken this evidence out of context, we are satisfied that the portions of the Chief Financial Officer's testimony cited in the Judgment at [114] and [117] were an accurate reflection of the Chief Financial Officer's consistent position in respect of the tax related objectives of the arrangement, and evinced the B Group's subjective purpose and object of recovering the tax assets by deducting the interest expenses incurred on the Fixed Rate Notes against the dividend income received by AQQ.

84 In our view, the recovery of tax assets may well have been just one of the key objectives, but it was nevertheless a main purpose in that it involved a conscious and elaborate plan to procure a particular and defined method of reducing AQQ's tax liability rather than being an incidental tax advantage that accrued as an ancillary benefit. The critical chronology that Mr Singh directed our attention towards – that the Financing Arrangement was only subsequently decided upon when the method of implementing the Corporate Restructuring was discussed and considered with N Bank Singapore – does not change the analysis or undermine the Board's or Judge's interpretation in relation to what the Chief Financial Officer had expressly stated in his oral testimony. There is nothing in s 33(3)(*b*) that suggests that a subsequent objective to obtain a net tax refund by reducing chargeable income does not constitute a main purpose when it was in fact a critical and free-standing objective in deciding on the mode of financing for the Corporate Restructuring.

85 We also do not agree with Mr Singh that the Judge could not fairly discern the B Group's or AQQ's intentions from the discussion paper prepared by N Bank Singapore titled "[B Group] – Fixed Rate Notes Financing Structure" ("the Discussion Paper"). The Financing Arrangement that was eventually put in place replicated the proposal in the Discussion Paper, and it does not advance AQQ's case much further to argue that N Bank Singapore's perspectives on the "tax savings" cannot be imputed to AQQ or the B Group as they were not involved in the preparation of the Discussion Paper. The Chief Financial Officer testified that N Bank Singapore had prepared the Discussion Paper following a discussion on the B Group's proposed restructuring plans, and the Chief Financial Officer also stated that he was aware of the tax implications, including the fact that AQQ would be claiming interest deductions on the dividend income received from the Subsidiaries and that the tax liability on the dividends would be reduced accordingly. [note: 12]

86 Read together with the Chief Financial Officer's candid admissions that one objective was to recover tax assets, we consider that the only logical inference was that the B Group adopted the proposal in the Discussion Paper in full, and did so in order to achieve the possible tax savings identified in the Discussion Paper. This is not an impermissible imputation of N Bank Singapore's subjective intentions to the B Group, but merely an inference, as a matter of common sense, of what must have been the B Group's and thus AQQ's subjective purpose in proceeding with the Financing Arrangement.

87 This is not to say that the B Group or AQQ was not entitled to carry out what was a commercially justifiable Corporate Restructuring by choosing a tax efficient method. This was a point that Mr Singh pressed upon us repeatedly, and we have no difficulty in accepting this in principle. However, what Mr Singh could not explain to us was how the Corporate Restructuring and Financing Arrangement, viewed as a whole, could be explained otherwise than as a contrived and concerted scheme to reduce AQQ's liability to tax on the dividends. We cannot accept Mr Singh's characterisation of the involvement of N Bank Singapore and N Bank Mauritius in the Financing Arrangement as merely being in the capacities of facilitators or intermediaries or his suggestion that the $225m paid for the purchase of the Fixed Rate Notes by N Bank Singapore was a "bridging loan".

88 Even before the Financing Arrangement was carried out, the B Group had made a public announcement that the issuance of the Fixed Rate Notes was not intended to affect the B Group's consolidated borrowing position [note: 13], and the Chief Financial Officer stated that it was not a mere coincidence that the B Group was able to purchase the Fixed Rate Notes on the same day because the B Group "had the money to buy back [their] own bonds from internal funds within the [B Group] as there were no suitable investment opportunities in cement and related industries at that time". [note: 14] There was therefore in reality no injection of funds from N Bank Singapore as it was planned right from the start that no real loan, or even a short-term bridging one, would be extended to AQQ by an external party.

89 As the Board correctly pointed out, there was no evidence of discussion within the B Group or AQQ itself as to the issuance of the Fixed Rate Notes or the re-purchase of these notes by C. Although interest at the rate of 8.85% per annum was legally payable to N Bank Singapore under the Interest Coupons, the chain of transactions was structured such that almost the full value of the interest payments would eventually be transferred to C, a company owned by the same B Group. The Fixed Rate Notes were sold on twice on the same day, with N Bank Singapore and N Bank Mauritius bearing at most only a negligible commercial risk for their purchases of the Fixed Rate Notes (as opposed to the higher risks that are commonly involved with bridging loans). The round tripping of AQQ's full purchase price of the Subsidiaries in a single day and the artificial interposition of the two external entities crosses the line between tax efficiency and tax avoidance in the absence of any cogent explanation for why it was necessary for AQQ to choose this all too complicated method of transferring funds from one subsidiary of the B Group to another through the conduit of two entities of N Bank located in two different countries.

90 The Board and the Judge were justified in reaching the conclusion that one of the main purposes of the arrangement was that of incurring interest expenses on the Fixed Rate Notes that were to be deducted from the chargeable dividend income, and we see no reason to disturb this finding. We thus affirm the Judge's conclusion that AQQ's subjective purpose and object of the arrangement was to reduce or avoid liability that would otherwise have accrued on the dividend income. For this reason AQQ was unable to avail itself of the exception under s 33(3)(*b*).

Issue III: Was AQQ entitled to rely on the specific provisions of the Act to preclude the application of s 33?

The interaction between s 33 and other specific provisions of the Act

91 The Judge also considered whether the operation of s 33 could be overridden by certain specific provisions of the Act, *ie*, ss 10(1)(*d*), 14(1)(*a*), 44, 44A and 46, that were enacted for the purpose of conferring on the taxpayer the benefit of particular tax advantages. After reviewing the judicially crafted choice principle in Australia and the scheme and purpose approach in New Zealand that have both sought to resolve the tension between the specific provisions of a taxing statute and a general anti-avoidance provision, the Judge concluded that it was not necessary for the Singapore courts to select between either approach in developing its jurisprudence on s 33 of the Act (at [155] of the Judgment). The Judge observed that the same role was performed in Singapore by the statutory exception under s 33(3)(*b*), and that it was consistent with Parliament's intention that neither approach should be adopted (at [156]–[157] of the Judgment).

92 Mr Singh contended that the choice principle should be applicable in Singapore, and that AQQ should be entitled to obtain the benefits of ss 14, 44, 44A and 46 even if s 33 was engaged on the facts. Mr Liu agreed with the Judge that the judicially developed principles in Australia and New

Zealand did not apply in the face of an express statutory exception in s 33(3)(*b*), but submitted in the alternative that if the court considered it necessary to determine this question, the New Zealand scheme and purpose approach should be preferred.

93 We disagree with the basic premise of the Judge's reasoning that it is not necessary to have regard to or to attempt to resolve the tension between specific provisions in the Act and a general anti-avoidance provision. As noted above, the Judge was of the view that the statutory exception in s 33(3)(*b*) represented what the legislature deemed to be the correct balance between broadening the scope of transactions that could be impugned by the Comptroller under s 33(1), while protecting taxpayers from legislative overreach. By implication, this meant that Parliament could not have intended for either the Australian or New Zealand approach to apply because the structure and wording of s 33 was considered to be materially different from the equivalent provisions that applied in Australia and New Zealand (at [156]–[158] of the Judgment).

94 We do not think that the statutory exception was intended to be the sole safeguard against the potentially over inclusive reach that would follow from a literal interpretation of the threshold limbs of s 33(1). Section 33(3)(*b*) appears to have been a statutory codification of an attenuated form of the *Newton* predication test as it later developed in *Europa Oil (NZ) Ltd v Commissioner of Inland Revenue* [1976] 1 WLR 464, where Lord Diplock held (at 475) that s 99 did not "strike down transactions which [did] not have as their main purpose or one of their main purposes tax avoidance". But this does not deal with the conceptual conundrum that presents itself when an overarching general anti-avoidance provision in a taxing statute seems to pull in the opposite direction from other provisions that appear to exist for the taxpayer's benefit: how is the general anti-avoidance provision to be construed in a manner that is compatible with the other specific provisions of the statute that appear, on their face, to define the taxpayer's obligations and liabilities and entitle a taxpayer to structure his affairs accordingly in order to reduce his tax liability?

95 Moreover, it appears to us that recourse to the Australian and New Zealand jurisprudence to develop adequate safeguards through purposive judicial interpretations was expressly contemplated by Parliament: see Dr Hu's speech above at [37]. Dr Hu also appeared to have anticipated the tension that could potentially arise when a taxpayer is granted tax exemptions and concessions under specific incentive schemes, and in relation to this, Dr Hu stated that s 33 was not intended to affect the operation of such tax benefits. This assurance was not, however, expressly addressed in s 33. The foreign jurisprudence that attempts to chart the boundaries of what constitutes the permissible use of other taxing provisions thus merits serious consideration.

The Australian choice principle

96 The Australian choice principle has its roots in Lord Tomlinson's famous dictum in *The Commissioners of Inland Revenue v The Duke of Westminster* [1936] AC 1 at 19 that "[e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be". In *W P Keighery Proprietary Limited v Federal Commission of Taxation* (1957) 100 CLR 66 ("*Keighery*"), where the choice principle was enunciated for the first time, Dixon CJ, Kitto and Taylor JJ set out the following principle in their joint judgment at 92:

> Whatever difficulties there may be in interpreting s. 260, one thing at least is clear: *the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them.*
>
> [emphasis added]

97 The choice principle was subsequently expanded in a trio of High Court of Australia cases, *Mullens v Federal Commissioner of Taxation* (1976) 135 CLR 290 ("*Mullens*"), *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314 ("*Slutzkin*") and *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330 ("*Cridland*"). The high watermark is represented by the unanimous judgment in *Cridland*, where Mason J said at 339:

> The decision in the *Mullens Case* and the passages from the judgments to which I have referred show that the principle which underlies the *Keighery Case* is ... not confined to cases in which the Act offers two alternative bases of taxation; it proceeds on the footing that *the taxpayer is entitled to create a situation by entry into a transaction which will attract tax consequences for which the Act makes specific provision and that the validity of the transaction is not affected by s. 260 merely because the tax consequences which it attracts are advantageous to the taxpayer and he enters into the transaction deliberately with a view to gaining that advantage*.
>
> The distinction drawn by Lord Denning in *Newton v. Federal Commissioner of Taxation*, between arrangements implemented in a particular way so as to avoid tax and transactions capable of explanation by reference to ordinary business or family dealing has not been regarded as the expression of a universal or exclusive criterion of operation of s. 260. Lord Denning's observations were applied neither in the *Mullens* Case nor in the subsequent case of *Slutzkin v. Federal Commissioner of Taxation*.

98 In other words, if the taxpayer structured his transaction by choosing a particular legal form to conform to a provision of the Australian Act, s 260 could not apply even if the transaction had been structured in that way precisely to obtain the benefit of that provision. Effect had to be given to "the legal form and consequence of the taxpayer's transaction" (*per* Barwick CJ in *Slutzkin* at 319; also see *Mullens* at 298). The result of this liberal application of the choice principle was to dilute s 260 and the *Newton* predication principle to a significant degree.

99 The final case in which s 260 was comprehensively considered is *Federal Commissioner of Taxation of the Commonwealth of Australia v Gulland* (1985) 160 CLR 55, where the application of the choice principle was described as giving effect to the principle of statutory construction expressed in the maxim *generalia specialibus non derogant* (*per* Gibbs CJ at 67; Brennan J at 77–78). Section 260 of the Australian Act had to be read as a general provision that could not negate the operation of specific provisions of the Australian Act; at the same time, s 260 was also not to be relegated to irrelevance. Therefore, Brennan J considered (at 81) that:

> … [t]he choice principle should not be applied when there is no occasion to invoke the rule generalia specialibus non derogant on which it is founded. If the choice principle were applied to deny the operation of s. 260 on arrangements which do not depend on a specific provision of the Act, the choice principle would annihilate s. 260 itself. The true reconciliation between the choice principle and the *Newton* test of purpose is to limit the former to cases depending upon a specific provision of the Act.

100 The development of the choice principle during the late 1970s, which substantially constrained the invocation of s 260 by the Commissioner of Taxation, eventually precipitated the passage of the Income Tax Laws Amendment Bill (No 2) 1981, which replaced s 260 with Part IVA of the Australian Act for schemes entered into or carried out after 27 May 1981. Part IVA dispensed with the previous jurisprudence and applies to any arrangement which, on an objective view, was entered into or carried out for the sole or dominant purpose of obtaining a tax benefit. Given that the Australian legislature was compelled to amend s 260 as the choice principle had emerged as a problematic and unduly restrictive interpretation of s 260 (see The House of Representatives of the Parliament of the

Commonwealth of Australia, *Explanatory Memorandum to the Income Tax Laws Amendment Bill (No 2) 1981* at pp 1–2), we would consider it anomalous if our Parliament had contemplated in 1988 that the choice principle should apply to straightjacket a new provision (*ie*, s 33 of the Act) that was intended to strengthen the ability of the Comptroller to deal with increasingly complex tax avoidance schemes.

The New Zealand scheme and purpose approach

101 The New Zealand jurisprudence proceeded down a different path. In the New Zealand Court of Appeal decision in *Challenge (CA)*, Woodhouse P observed (at 539) that "the choice principle seems to have had the effect of putting such wide-ranging limits upon the anti-tax avoidance provisions of the Australian Act as to virtually stultify it" and that it would be unfortunate if it had a similar effect on s 99 of the New Zealand Act. Richardson J propounded the scheme and purpose approach in the following terms at 549 (which was also previously advanced extra-judicially in Sir Ivor Richardson, "Appellate Court Responsibilities and Tax Avoidance" (1985) 2 Australian Tax Forum 3 at 8):

> Section 99 thus lives in an uneasy compromise with other specific provisions of the income tax legislation. *In the end the legal answer must turn on an overall assessment of the respective roles of the particular provision and s 99 under the statute and of the relation between them. That is a matter of statutory construction and the twin pillars on which the approach to statutes mandated by s 5(j) of the Acts Interpretation Act 1924 rests are the scheme of the legislation and the relevant objectives of the legislation.* Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole statute, analysing its structure and examining the relationships between the various provisions and recognising any discernible themes and patterns and underlying policy considerations.
>
> …
>
> The necessary starting point is that each section has its function under the statute. … *For the inquiry is as to whether there is room in the statutory scheme for the application of s 99 in the particular case. If not, that is because the state of affairs achieved in compliance with the particular provision relied on by the taxpayer is not tax avoidance in the statutory sense.* Reading s 99 in this way is to give it its true purpose and effect in the statutory scheme and so to allow it to serve the purposes of the Act itself. It is not the function of s 99 to defeat other provisions of the Act or to achieve a result which is inconsistent with them.
>
> [emphasis added]

On the facts of the case, Richardson J found (at 555) that the tax changes effected by the relevant arrangement were contemplated by s 191 in the 1976 New Zealand Act relating to the off-setting of group losses, and that the application of s 99(1) would defeat the legislative purpose underlying this statutory scheme. The majority (Cooke and Richardson JJ) concluded that the taxpayer's use of the specific provision was not tax avoidance under s 99(1).

102 The Privy Council allowed the Commissioner's appeal in *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1987] 1 AC 155 ("*Challenge (PC)*"). Lord Templeman, delivering the majority opinion of the Board, rejected the suggestion that formalistic compliance with the conditions in specific statutory provisions would preclude the operation of s 99 (at 164H–165A) and instead drew a distinction between tax mitigation and tax avoidance (at 168D–F):

> Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by

reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.

Lord Templeman made no comment on Richardson J's approach, although the distinction between tax mitigation and tax avoidance is conceptually premised on the notion that there are circumstances where a reduction of tax liability under the taxing statute is permitted and where the general anti-avoidance provision would not apply.

103 The last word of the Privy Council on this subject was in *Peterson*, a 3:2 split decision. The majority (Lord Millett, Baroness Hale and Lord Brown) allowed the taxpayer's appeal against the Commissioner. Lord Millett, delivering the decision of the majority, considered the statutory purpose of the specific provision allowing for depreciation (the tax benefit that the taxpayer was relying upon) (at [41]–[42]) and held that the taxpayer had suffered the loss or incurred the relevant expenditure contemplated by the depreciation allowance. What had been done thus did not constitute tax avoidance (at [45]–[46]). The minority (Lord Bingham and Lord Scott) disagreed that an economic burden had been incurred within the purpose of the statutory regime to entitle the taxpayers to deduct the amount of depreciation from assessable income (at [91]), but did not disagree with the majority with respect to the applicable law and endorsed Richardson J's approach in *Challenge (CA)* (at [61] and [65]).

104 In *Ben Nevis*, the Supreme Court of New Zealand sought to lay out a comprehensive statement on how the general anti-avoidance provision should be applied. The approach adopted by the minority and majority respectively may be summarised as follows:

(a) The minority, Elias CJ and Anderson J, considered that the specific statutory provision and general anti-avoidance provision should not be seen as potentially conflicting but should be purposively and contextually interpreted. Recourse to the general anti-avoidance provision is not necessary if the taxpayer's use of the specific provision, on its proper construction, falls outside its intended scope as an unauthorised use of the specific provision (at [2]).

(b) The majority, Tipping, McGrath and Gault JJ, in a slant on this held that the legislature's purpose was best served by construing specific tax provisions and the general anti-avoidance provision to give appropriate effect to each instead of considering one as overriding the other (at [103]). Where the taxpayer relies on specific provisions, the taxpayer must satisfy the court that the use of the specific provision was within its intended scope and that the use of the provision, viewed in the light of the arrangement as a whole, has altered the incidence of tax in a way that was within the contemplation and purpose of the legislature. If it was not, it will be a tax avoidance arrangement for the purposes of the general anti-avoidance provision (at [107]). The court is not confined as to the matters which may be taken into account in deciding whether a tax avoidance arrangement exists, and a classic indicator is when the taxpayer obtains the benefit of the statutory provision in an artificial or contrived way (at [108]). The court is also not limited to purely legal considerations, but may consider whether the impugned arrangement, viewed in a commercially and economically realistic way, uses the specific provision in a manner that is consistent with the legislature's purpose (at [109]).

Reading s 33 purposively

Reading s 33 purposively

105 Both the choice principle and scheme and purpose approach draw upon two canons of statutory interpretation – the former invokes the maxim *generalia specialibis non derogant*, while the latter is a facet of purposive statutory interpretation that seeks to construe the ambit of the general anti-avoidance provision consistently with other provisions in the Act that confer upon the taxpayer a tax benefit or an allowable deduction from assessable income.

106 In our judgment, the correct approach in construing s 33 together with other specific provisions of the Act is the scheme and purpose approach as adopted by the majority in *Ben Nevis*.

107 The choice principle is not one that can provide practical guidance as to what circumstances will or will not constitute tax avoidance where the taxpayer chooses a course of action that leads to the least liability to tax. As the choice principle developed in cases after *Keighery*, it was only necessary for the taxpayer to satisfy the court that the legal form of the transaction conformed to the requirements of the specific provision, and the court would not otherwise look at the substance of the transaction that had been entered into. Specific provisions – regardless of the manner in which they were used – appeared to take precedence over the general anti-avoidance provision, and rendered s 260 of the Australian Act virtually toothless. The choice principle is now obsolete in Australia (see *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 for the present approach), and we do not think that this principle is one that can be imported into the interpretation of s 33(1).

108 We also agree with the reasoning of the majority in *Ben Nevis* that a general anti-avoidance provision should not be read as "overriding" any specific provision of the Act or *vice versa* and would respectfully adopt Richardson J's approach in *Challenge (CA)* on the purposive interpretation of s 33. An arrangement should not be construed as having the purpose and effect of, for example, reducing or avoiding liability imposed by the Act within the meaning of s 33(1) if the arrangement results in a tax effect or advantage that is in fact contemplated by the use of the specific provision in the Act; there is thus, in a legal sense, no *reduction* or *avoidance* of liability that would otherwise have been imposed by the Act. This would enable s 33 to be read purposively, as a provision that can be understood within the context of the Act and in accordance with s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act") as promoting the overall purpose and object underlying the Act.

109 The scheme and purpose approach provides a conceptual methodology for analysis that combines tax policy and principle to deal with the question of whether a taxpayer is entitled to point to the use of a specific provision of the Act as not constituting a tax avoidance arrangement under s 33. We acknowledge the force of some of the criticisms that Mr Singh levied against the scheme and purpose approach, but the majority in *Ben Nevis* did not assume that discerning whether the use of a specific provision was within the contemplation or purpose of Parliament would be an easy task, and nor do we. Tax legislation evolves in a fragmented manner according to policy shifts at any single point in time and it may not be always possible to identify a coherent set of intentions within the Act; but the advantage of the scheme and purpose approach is that it provides a helpful framework in applying s 33(1), instead of asserting a doctrinal position that leans entirely in favour of the taxpayer's choice.

110 In summary, the scheme and purpose approach that ought to be adopted with respect to the interpretation of s 33 is as follows:

(a) consider whether an arrangement *prima facie* falls within any of the three threshold limbs of s 33(1) such that the taxpayer has derived a tax advantage; and if so,

(b) consider whether the taxpayer may avail himself of the statutory exception under s 33(3)(*b*); and if not,

(c) ascertain whether the taxpayer has satisfied the court that the tax advantage obtained arose from the use of a specific provision in the Act that was within the intended scope and Parliament's contemplation and purpose, both as a matter of legal form and economic reality within the context of the entire arrangement.

Whether s 33 should apply to AQQ when read with ss 10(1)(d), 14(1)(a)(i) 44, 44A and 46 of the Act

111 We have found above that the arrangement fell within s 33(1)(*c*) and that AQQ could not avail itself of the statutory exception in s 33(3)(*b*). In our judgment, there was also no basis for AQQ to rely on the combination of ss 10(1)(*d*), 14(1)(*a*)(i), 44, 44A and 46 of the Act as entitling it to the tax advantage that it had obtained, *ie*, the deduction of interest expenses from the dividend income.

112 In our view, the tax advantage obtained from the arrangement was not merely the extraction of the tax credits that AQQ was entitled to under ss 44, 44A and 46 of the Act, but the reduction of chargeable income through the deduction of the interest expenses. The release of the tax credits was the consequence of the arrangement, the purpose and effect of which was the reduction of liability to tax on chargeable income. It is therefore misconceived to say that AQQ was simply attempting to obtain tax credits that they were entitled to under the imputation system as recipients of the dividends declared by the Subsidiaries.

113 The real issue is whether it can be said, under s 14(1)(*a*)(i), that the interest payments to N Bank Singapore for the Fixed Rate Notes were "outgoings and expenses wholly and exclusively *incurred* during that period … in the production of the income" [emphasis added] within the scope of the section and within Parliament's contemplation and purpose. Formal and mechanistic compliance with the letter of s 14(1)(*a*)(i) is insufficient, and seen in the context of the Corporate Restructuring and Financing Arrangement as a whole, we do not think that it was within Parliament's contemplation and purpose that deductions could properly be made in the circumstances of this case in respect of the interest expenses in order to reduce the quantum of assessable dividend income, where the payment of interest expenses did not incur any real economic costs within the B Group as a whole. We therefore hold that the scheme and purpose approach does not apply to remove the arrangement from the scope of s 33(1).

Issue IV: Did the Comptroller exercise his powers under s 33 so as to counteract the tax advantage obtained by AQQ?

The appropriate standard of review

114 Before we address the substantive issue, we briefly consider a preliminary issue raised by the Comptroller's submissions, namely, the appropriate standard of review over the Comptroller's exercise of his powers under s 33(1) to "disregard or vary the arrangement and make such adjustments as he considers appropriate … so as to counteract any tax advantage". This issue was not canvassed before the Judge, who only observed that the Comptroller's powers under s 33(1) had to be exercised "in a manner that is fair and reasonable … in order to achieve the purpose of counteracting the tax advantage obtained or obtainable from the arrangement" (at [162] of the Judgment).

115 Mr Liu did not dispute this statement of principle, but submitted that s 33(1) conferred a wide

discretion on the Comptroller to decide how he might wish to exercise his powers to counteract the tax advantage and that the court should not impose its own views as to how the Comptroller ought to have exercised his discretion save in exceptional cases. He submitted that the standard grounds for judicial review should apply. Mr Singh contended that Mr Liu's argument ignored the taxpayer's statutory right of appeal under the Act and the contemplated role of the court in such appeals, which was in effect to conduct a fresh and wholly unconstrained review of the merits of a decision, including the Comptroller's exercise of his discretion under s 33(1).

116 Section 79 of the Act expressly confers on the taxpayer a statutory right of appeal to the Board against an assessment made by the Comptroller. Under s 81, there is a further second tier of appeal against the decision of the Board to the High Court on a question of law or of mixed law and fact, and subsequently to the Court of Appeal in accordance with the Court of Appeal's jurisdiction to hear appeals from decisions made by the High Court in the exercise of its original civil jurisdiction.

117 The statutory right of appeal against assessments – both to the Board and subsequently to the High Court – also applies where the taxpayer wishes to question the exercise of any discretion of the Comptroller under s 33: see s 34 of the Act.

118 Section 33(1) is an empowering provision conferring wide powers of reconstruction; the Comptroller "*may*" disregard or vary an arrangement "as he *considers* appropriate" where "he is *satisfied*" that the arrangement falls within one of the three limbs. The words used in s 33(1) are therefore reminiscent of statutes conferring administrative discretion. In *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484 ("*JD Ltd*"), this court commented on the scope of review in an appeal against a decision of the Comptroller that involved an exercise of discretion and observed that where a provision provided that the Comptroller was to be "satisfied" (at [49]):

> … [s]ome degree of administrative discretion is therefore conferred on the Comptroller, who has to be satisfied that the interest expended on borrowings was incurred to earn the dividend income. We are of the opinion that such discretion, as has been acknowledged by the Comptroller, does not give the latter *carte blanche* authority but is instead to be exercised in good faith and in the interests of good administration.

119 We also held in *JD Ltd* that the Comptroller's use of a particular formula to ascertain whether the expenses allowed for deduction had been incurred to produce the dividend income was not unreasonable in the *Wednesbury* sense, *ie*, it was not so outrageous that no reasonable or sensible person who had applied his mind to the question could not have arrived at the decision, and that the court should not substitute its views as to how the discretion should otherwise be exercised (at [50]). This court also observed (at [51]) that the Comptroller had demonstrated a measured approach in exercising his administrative discretion.

120 Mr Singh attempted to distinguish *JD Ltd*, submitting that this point had apparently not been decided with the benefit of full arguments by counsel, and further, that *JD Ltd* was not decided in the context of s 34 of the Act, which expressly permits the Comptroller's exercise of his discretion under s 33(1) to be questioned in an appeal. Mr Singh also cited the Privy Council decision on appeal from the Supreme Court of Ceylon of *Donald Jason Ranaweera v R Ramachandran and others* [1970] AC 962 ("*Ranaweera*") and the High Court decision of *Ling Uk Choon and another v Public Accountants Board* [2004] 3 SLR(R) 517 ("*Ling Uk Choon*") for the proposition that the court could review matters that were the subject of an executive discretion where there was a statutory right of appeal.

121 While we would reserve our endorsement of the language of *Wednesbury* unreasonableness outside the administrative law context, we cannot accept Mr Singh's argument that the court's scope

of review necessarily entails a full and unconstrained consideration of the merits. Mr Singh's basic submission that the court is entitled to review the exercise of the Comptroller's discretion under s 33 is undoubtedly correct. Section 34 puts it beyond doubt that ss 79 and 81, which are expressly stated to apply to the Comptroller's *assessments*, also apply to the exercise of the Comptroller's discretion such that there is no need to have recourse to judicial review to challenge the Comptroller's discretion: see Tang Siau Yan, *LexisNexis Annotated Statutes of Singapore – Income Tax Act* (LexisNexis, 2012) at para ITA 34.1. This is consistent with the dicta in *Ranaweera* that a statutory constituted taxation board of review was empowered to review matters which were the subject of a discretion exercised by executive officers (at 968D).

122 However, it does not thereby follow that the standard of review on appeal in relation to the exercise of an administrative discretion would entail a complete reconsideration of the merits of the matter without any regard to the manner in which the Comptroller did in fact exercise his discretion. It may be noted that in *Ling Uk Choon*, Woo Bih Li J accepted (at [32]–[33]) that where there was a statutory right of appeal from the decision of a professional board, the court was not confined to determining whether the rules of natural justice had been observed, but he did not go so far as to affirmatively state that a full rehearing on the merits would be the norm.

123 The authorities demonstrate that the same intensity of review does not apply to all issues before the court on an appeal from the Board (or for that matter, on an appeal to the Board from the Comptroller's decision). For example, when the court considers an appeal from the Board on a finding of fact, the question that the court asks itself is whether "no reasonable body of members constituting an Income Tax Review Board could have reached the findings reached by the Board" (*per* Chan Sek Keong JC, as he then was, in *Mount Elizabeth (Pte) Ltd v Comptroller of Income Tax* [1985–1986] SLR(R) 950 at [17]). The court therefore quite correctly extends deference to the Board where findings of facts are concerned notwithstanding the availability of an appeal. The approach of this court in *JD Ltd* similarly recognised that a more limited degree of review, inherent in the appellate review process, was appropriate where the Comptroller's exercise of a flexible statutory discretion was challenged before the court.

124 We affirm the standard of review adopted by the Judge in this case, namely that the Comptroller had to exercise his powers in a manner that was "fair and reasonable". This is consistent with the general latitude accorded to the Comptroller in *JD Ltd* where the exercise of an administrative discretion was called into question. The court is therefore entitled to strike down any variations or adjustments made by the Comptroller that are arbitrary or unreasonable as well as any excessive or abusive exercise of discretion that falls outside the scope of the Comptroller's powers under s 33(1). However, this review is necessarily limited, and where there are two or more methods of counteracting a tax advantage, it is not for the court to decide that one particular method is to be preferred over the others. Such an attenuated standard of review would not render the statutory right of appeal under the Act nugatory.

To counteract a tax advantage

125 The Judge did not expressly analyse the meaning of the phrase "counteract the tax advantage" in s 33(1), and the section does not contain express statutory guidance as to how the relevant tax advantage may be identified or counteracted. Reading s 33(1) as a whole, "tax advantage" is referable to the tax liability that the arrangement had the purpose or effect of avoiding or reducing; and the word "counteract" indicates that the Comptroller's powers can only be exercised to nullify the tax advantage that was obtained and nothing more. Section 33(1) operates as (i) a voiding provision to disregard the arrangement, (ii) a reconstruction provision empowering the Comptroller to vary or make adjustments to the tax elements of the arrangement and (c) a charging provision that allows for

the imposition of liability to tax. It may be noted that the last mentioned power is not present in either s 99(3) of the 1976 New Zealand Act or Part IVA of the Australian Act.

126 There is nothing in the section that mandates the Comptroller to take a particular course or choose a specific mode of exercising his powers, as long as the final object of counteracting the tax advantage is attained. Thus, the Comptroller may seek to exercise his powers under s 33(1) with reference to the following postulates:

(a) the tax liability that arises from the inclusion of an income sought to be excluded or the disallowance of a deduction sought to be made (see, for example, s 177F of the Australian Act and the very recent New Zealand Court of Appeal case of *Alesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] 2 NZLR 175 at [120] and [123], currently on appeal to the Supreme Court of New Zealand);

(b) the hypothetical tax liability on the economic and commercial basis of what would likely have happened if the taxpayer had not entered into the arrangement constituting tax avoidance (see, for example, s 99(3)(a) of the 1976 New Zealand Act and *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 at [22], where Lord Hoffmann stated that "[t]he Commissioner's duty is to make an assessment with regard to what in his opinion was likely to have happened if there had been no scheme"); or,

(c) the tax liability if the arrangement simply had not taken place.

127 While the above approaches are not mandated by s 33(1), we consider that these are practical yardsticks that the Comptroller may look towards in deciding how he wishes to exercise his discretionary powers. The Comptroller is entitled to look at the tax advantage broadly and holistically instead of counteracting each element of advantage with exacting specificity, and the court will hesitate to intervene except in the circumstances set out above at [124].

Whether the Comptroller had acted fairly or reasonably or outside the scope of his s 33(1) powers

128 The Judge adopted a meticulously detailed approach that dissected the arrangement and correlated each element of the "tax advantage" to be counteracted to the discrete step in the arrangement that was objectionable from a tax avoidance point of view. In particular, the Judge distinguished between the payments of interest on loans that he considered were "in substance" genuine and those that were not. Based on his finding that the Comptroller had not taken issue with the payment of dividends by the Subsidiaries and the receipt of s 44 tax credits by AQQ, the Judge held (at [164] of the Judgment) that the Comptroller therefore should not have disregarded the dividend income and was only entitled to disregard the interest expenses attributable to $150m of the Fixed Rate Notes, which he thought were not real loans with actual interest payments. This sum of $150m was in reality obtained by C (which had purchased the Fixed Rate Notes) through interest-free intercompany loans provided to it by the B Group and D (see [8(e)] and [8(i)] above) when the loans could have been directly extended to AQQ instead (at [169] of the Judgment). In contrast, with respect to the remaining $75m of the Fixed Rate Notes purchased by C, there was in substance a loan made by C of its own money to AQQ (through the utilisation of the $75m it had received from AQQ in exchange for its 50% shareholdings in E, F and G), and the interest payments should have been allowed as deductible expenses (at [170] of the Judgment). As mentioned above, the Judge further observed that the Comptroller should also have required AQQ to account for the withholding tax that ought to have been paid by C on the interest attributable to the $75m of Fixed Rate Notes (at [171] of the Judgment). The conceptual approach adopted by the Judge therefore sought to

target each discrete element of tax advantage, assessed on the basis of whether, *in substance*, a certain step in the arrangement had reduced tax liability that would otherwise have been imposed.

129 In our judgment, the limited standard of review over the Comptroller's exercise of discretion did not warrant the Judge substituting his own view for that of the Comptroller as to how the tax advantage ought to have been counteracted. The Comptroller chose to disregard the arrangement (*ie*, both the Corporate Restructuring and the Financing Arrangement) and treat the arrangement as in effect void and null. In our view, in these circumstances, the Comptroller was entitled to take such a holistic view.

130 It is not apparent to us how the Judge's alternative approach explains why the exercise of the Comptroller's discretion was so unreasonable or demonstrably wrong that it warranted the court substituting the Comptroller's discretion with a scheme that appeared to be more efficacious and targeted in counteracting the tax advantage. First, even if the Comptroller had taken the view that there was nothing in itself objectionable about the Corporate Restructuring, as we have discussed above, the Corporate Restructuring and Financing Arrangement were in substance an integrated scheme, and we do not think that the only reasonable way of counteracting the tax advantage was to focus solely on the interest expenses that reduced the amount of chargeable dividend income. The Comptroller was justified in adopting any method that was broadly appropriate to the object of counteracting the tax advantage, even if the method adopted did not precisely correlate the particular elements of tax advantage with the discrete steps of the arrangement that were deemed objectionable.

131 Second, the Judge made certain assumptions in determining the nature and amount of the tax advantage. But there is more than one plausible alternative fact scenario that may serve as the basis of comparison, and the Comptroller is entitled at his option to disregard or vary the arrangement in its entirety if he reasonably considers that to be appropriate. There is nothing to indicate that the scenario chosen by the Comptroller was plainly wrong and unreasonable or that the tax impact of choosing it was entirely disproportionate to any tax advantage that could plausibly have been obtained by AQQ such that the exercise of the Comptroller's discretion fell outside the scope of his powers under s 33(1).

132 Mr Singh also contended in the alternative that the Comptroller had exceeded his powers by disregarding the full amount of the interest expenses because the Comptroller had not objected to an intercompany loan within the B Group and would have allowed the interest deductions if this had been the actual manner in which the financing for the Corporate Restructuring had taken place. On this basis, Mr Singh argued that if there was any tax advantage obtained by AQQ, this would be limited to 0.01% of the interest payments, which was the difference between what was paid by AQQ and what was in fact received by C. We do not see any substance in this since it was precisely the fact that AQQ was claiming interest expenses at 8.85% per annum as deductions from dividend income when the B Group was at the same time receiving interest at 8.84% per annum that invited scrutiny. Moreover, the Comptroller is entitled, at his option, to assess the tax advantage by reference to what AQQ impermissibly obtained from the presently impugned arrangement, and not only by reference to the difference between the illegitimate tax advantage and any legitimate tax advantage that AQQ might have obtained through an alternative arrangement.

133 We make no comment as to whether the Judge had correctly identified the particular elements of tax advantage linked to each component step of the Financing Arrangement as it is not necessary to do so given our conclusion above that the Comptroller was entitled to disregard all the dividend income and interest expenses. We only observe that the Judge had chosen to characterise the flows of certain sums of money as artificial and the flows of other sums of money as genuine, but the

different characterisations may not, in our judgment, be so readily rationalised. We add that we are also unable to agree with the Judge's view that the Comptroller ought to have assessed AQQ for the withholding tax that was not borne by C as a result of the interposition of N Bank Singapore and N Bank Mauritius. This hypothetical withholding tax would not have been in respect of a tax on AQQ; rather, it would have constituted a sum withheld from C by AQQ and paid on behalf of C as tax on the interest income received by C. As such, it would have been beyond the Comptroller's powers under s 33(1), which, with regard to an arrangement which has the purpose or effect of reducing or avoiding a liability imposed on any person, enables only the tax advantage obtained by *that person* to be counteracted. As Mr Liu conceded (see [65] above), the Comptroller would not have been entitled to counteract any tax advantage that may have been obtained by C by invoking s 33(l) against AQQ.

134 For the foregoing reasons, we find that there is no reason for us to disturb the Comptroller's exercise of his powers under s 33(1). The Comptroller was therefore entitled in principle to counteract the tax advantage obtained by AQQ in the manner that he set out to do. It follows from this that the Comptroller validly issued the Notice of Assessment for YA 2007.

Issue V: Had the Comptroller acted ultra vires s 74 of the Act by issuing the Additional Assessments?

Whether the Comptroller was entitled to issue the Additional Assessments under s 74

135 As noted above, the Comptroller exercised his powers under s 33(1) to disregard both the dividend income and the interest expenses, and issued the Additional Assessments to claw back the tax refunds. In our judgment, while the Comptroller was entitled to exercise his discretion under s 33(1) in the way that he did to issue the Notice of Assessment for YA 2007 on this basis, it was a different matter in relation to the tax refunds that had already been granted for YA 2004 to YA 2006. The Comptroller purported to exercise his powers under s 74(1) of the Act by issuing the Additional Assessments for the three years from YA 2004 to 2006 to claw back the tax refunds previously paid to AQQ and the question that remains is whether he was entitled to do this.

136 The power to issue an additional assessment under s 74(1) arises when tax "has not been assessed or has been assessed at a less amount than that which ought to have been charged". The Judge took the view that this required a comparison between the original amount of tax assessed and the amount of tax assessed under the Additional Assessments and found that the Additional Assessments were void as the amounts of tax assessed thereunder were actually less than that under the Original Assessments (at [178]–[179] of the Judgment). The Judge further suggested that the Additional Assessments would have been valid under s 74(1) if the Comptroller had simply disregarded the interest expenses as it followed that the chargeable dividend income – and thus the amount of tax assessed – would have increased (at [180] of Judgment).

137 By way of illustration, the Original and Additional Assessment for YA 2004 (reproduced at [176]–[177] of the Judgment) are tabulated in a combined form below:

	Amount ($)	
	Original	**Additional**
Dividend income:	4,902,092.00	Nil
Interest income:	5,185.00	5,185.00
Chargeable income:	4,907,277.00	5,185.00

Tax assessed:	**1,078,745.36**	**285.12**
Less: Tax deducted at source	- 2,712,449.00	Nil
Tax payable:	**- 1,633,703.64**	**285.12**
Less: Previous assessment	N/A	- 1,633,703.64
Additional tax payable as per this Assessment:	N/A	1,633,988.76

138 The dividend income for the Original Assessment for YA 2004 refers to the net income after deducting the interest expenses from the dividend income received by AQQ (*ie*, $12,329,315 minus $7,419,452) (see above at [16]).

139 Mr Liu submitted that the Judge had erred by failing to look at AQQ's position in the round – whether AQQ's overall tax liability had *in fact* increased after taking into account the tax that had been refunded under the Original Assessments – in determining whether the tax assessed under the Original Assessments was less than that under the Additional Assessments. This is reflected in the row labelled "Additional tax payable as per this Assessment" in the table above. Mr Singh, on the other hand, contended that the tax refunds paid by the Comptroller to AQQ did not constitute income which could be the subject of "assessment" by the Comptroller under s 74(1).

140 Section 74(1) of the Act states as follows:

> **74**.—(1) Where it appears to the Comptroller that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Comptroller may, within the year of assessment or within 6 years (if the year of assessment is 2007 or a preceding year of assessment) or 4 years (if the year of assessment is 2008 or a subsequent year of assessment) after the expiration thereof, assess that person at such amount or additional amount as according to his judgment ought to have been charged.

141 The predecessor provision to s 74 was s 69 of the 1947 Ordinance, which was adopted from s 40 of the 1922 Model Ordinance. Section 69 was subsequently repealed and re-enacted in 1953 by the Income Tax (Amendment) Ordinance 1953 (Ordinance No 40 of 1953) to include a clause that removed any limitation period for the issuance of additional assessments where fraud or wilful default has been committed by any person in connection with or in relation to tax (now found in s 74(2) of the Act). Subsequent amendments altered the limitation periods for issuing additional assessments, but the primary substance of the provision remained unchanged.

142 In our judgment, there were two cumulative difficulties with the manner in which the Comptroller had exercised s 74(1) to issue the Additional Assessments:

> (a) As the Judge pointed out (at [178]–[179] of the Judgment), the amount of tax assessed under the Additional Assessments was *less than* the amount of income tax assessed under the corresponding Original Assessments for each year. The Comptroller therefore acted *ultra vires* s 74(1) as AQQ had not been previously "assessed at a less amount than that which ought to have been charged" and the trigger event for enabling the Comptroller to issue an additional assessment had not occurred. In essence, the Additional Assessments did not purport to assess AQQ for tax that it had not been previously assessed for under the Original Assessments.
>
> (b) In the Additional Assessments, the Comptroller had added the tax refunds that had

previously been paid by the Comptroller to AQQ under the Original Assessments to obtain the net final sum of additional tax payable.

143 A distinction should be drawn between the issuance of an additional assessment under s 74(1) and the amendment of an assessment, which is deemed to be final and conclusive under s 84(1) of the Act if no valid notice of appeal has been lodged within 30 days of the date of the refusal of the Comptroller to amend an assessment. This 30-day time limit does not apply to an additional assessment that does not reopen a matter that has been determined on appeal, which may be raised at any time within the relevant limitation period: see s 84(2) of an Act. An additional assessment should hence relate to an *additional* amount that ought to have been chargeable to tax so as to supplement the shortfall from the original assessment.

144 In our judgment, Mr Liu's argument that the court should look at the taxpayer's net liability to pay tax in the round was entirely circular as this net liability was calculated by adding the sum of tax refunds paid out under the Original Assessments, and presumes that the Comptroller has the power under s 74(1) to do so when issuing an additional assessment.

145 Section 74 only entitles the Comptroller to "assess [a taxpayer] … at such amount or additional amount as according to his judgment ought to have been charged". There is no statutory definition of the verb "assess" or noun "assessment" and there is no local authority on what may be "assessed" under s 74.

146 In *Gokuldas Ratanji Mandavia v Commissioner of Income Tax* [1959] AC 114, the Privy Council appears to have assumed that s 72 of the East African Income Tax (Management) Act 1952 (East Africa), which closely resembles the wording of s 74, could only be invoked to assess an "amount or additional amount [that] ought to have been charged" such that the taxpayer would be *liable to tax* for which he had not been assessed for that year (at 124).

147 A similar provision, section 60(1) of the Hong Kong Ordinance, was considered by the Hong Kong Court of Appeal in *The Commissioner of Inland Revenue v Common Empire Ltd* [2007] 1 HKLRD 679. Section 60(1) provides:

> **60**(1) Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed …

148 In that case, the question arose as to whether the issuance by the Commissioner of a statement of loss amounted to an "assessment" such that s 60(1) applied to entitle the Commissioner to revise the statement. The Hong Kong Court of Appeal held that a statement of loss issued by the Commissioner would not constitute an *assessment* of tax, and Rogers VP concluded (at [8]) that "an assessment is a process by which an assessor … determines the *amount of tax payable* by a person." [emphasis added]. An assessment, in its narrow meaning, therefore did not include a statement of loss which was an administrative document issued by the Commissioner (at [9]).

149 In line with these authorities, we consider that the word "assess" therefore only applies to the ascertainment (whether this refers to the process or result) of a person's existing liability to tax under the provisions of the Act and the application of the relevant tax rate. This corresponds with the manner in which the word "assess" is used under the Act. Section 72 of the Act imposes a statutory obligation on the Comptroller to make assessments for persons chargeable with tax by "[determining]

the amount of the chargeable income of the person and [making] an assessment accordingly". Derivatives of the verb "assess" are also used, for example, in the following contexts in the Act: to assess tax on gains or profits (ss 10(7A) and 10(7C)), to assess tax on the distribution of dividends (ss 10N(5) and 10N(8)), and to "make good any loss of tax" where certain forms of exemptions of dividend income or allowances ought not to have been given (ss 13B(1) and 18C(9)).

150 Judicial definitions of "assessment" under the common law are consistent with this implicit statutory meaning of the word under the Act. In *A B C v The Comptroller of Income Tax, Singapore* [1959] 25 MLJ 162, Buttrose J cited (at 165) the following observations of Isaacs J in the High Court of Australia decision in *The King v The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper* (1926) 37 CLR 368 at 373:

> An assessment is not a piece of paper: it is an official act or operation; *it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer*.
>
> [emphasis added]

151 In the light of the consistently narrow meaning assigned to the word "assess" to refer to the determination of the amount of liability to tax under the Act, we do not think that the Comptroller has the implied power under s 74 to *assess* for tax a sum that had previously been refunded or repaid to a taxpayer. We recognise that this leaves an asymmetry in the positions of the Comptroller and the taxpayer – under ss 93 and 93A, a taxpayer may recover tax in excess of the amount payable under the Act or overpaid tax by reason of an error or mistake in a return filed. But we do not think that this can displace our conclusion that s 74 does not allow the Comptroller to assess a taxpayer to liability for sums that are not in fact taxes on income but rather tax refunds apparently paid out by mistake. To put it simply, prior tax refunds do not, in the absence of a specific provision enabling the imposition of liability to make good such refunds, constitute existing chargeable income liable to be assessed to tax.

152 It follows from this that s 77 of Act cannot assist the Comptroller. Mr Liu conceded, quite correctly, that s 77 could not render *intra vires* what was done *ultra vires*. Section 77(1) states:

> **Errors and defects in assessment and notice**
>
> **77**.—(1) No assessment, warrant or other proceeding purporting to be made in accordance with the provisions of this Act shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if it is in substance and effect in conformity with or according to the intent and meaning of this Act, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.

This section is concerned only with formal or administrative defects in assessments made by the Comptroller, and cannot validate what is void in law.

153 In *Fleming v London Produce Co Ltd* [1968] 1 WLR 1013, the Commissioner sought to rely on s 514 of the United Kingdom Income Tax Act 1952 (15 & 16 Geo 6 & 1 Eliz 2, c 10) (UK), which is almost identical to s 77 of the Act, to cure an error in the description of the taxpayer's source of income in the assessments. Megarry J made the following observations on the scope of s 514 (at 1027–1028):

> I shall not attempt an exegesis of the subsections. I would be slow to accept that they provide an impervious coverlet for gross errors. One may observe the form of paragraph (a) of subsection (3); what this saves from impeachment is a mistake in an assessment "as to" the name or surname of a person liable, and so on. This suggests that, for example, something recognisable as the true name of the person liable must appear in the assessment, and only if it does is any mistake as to that name cured by the subsection. Faulty spelling is an obvious example. … The likelihood of the recipient being deceived or misled would also be an important factor.

154 Section 514 was re-enacted in s 114 of the United Kingdom Taxes Management Act 1970 (c 9) (UK), which was considered by the English Court of Appeal in *Craven v White* [1989] 1 AC 398. The Commissioner had made an error in the assessment by stating the fiscal year of assessment as 1974-1975 instead of 1975-1976, and Slade LJ held (at 437H–438E) that s 114(1) could not validate the assessment as it did not provide for rectification of the fiscal year of assessment, which was a fundamental part of the assessment.

155 In the case before us, the Additional Assessments were not challenged because of some want of form or mistake. Rather, the Comptroller had simply intended to assess AQQ for tax in a particular manner when he had no power to do so under s 74, and in the final analysis, s 77 could not cover this gap.

156 Mr Liu submitted in the alternative that the wide powers granted by s 33(1) of the Act to counteract a tax advantage must be read together with s 29(1) of the Interpretation Act as additionally conferring the necessary powers to assess, recover and collect tax refunds that should not have been paid after the impugned arrangement is reconstructed. Parliament's intention in amending s 33 in 1988 to confer greater powers on the Comptroller to address the mischief of tax avoidance schemes would otherwise be undermined. Section 29(1) states in general terms:

> **Construction of enabling words**
>
> **29**.—(1) Where a written law confers powers on any person to do or enforce the doing of any act or thing, such powers shall be understood to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

157 The short answer to this is that what was at issue here was not whether the Comptroller could counteract a tax advantage. Rather, it was whether he could recover tax refunds that had been paid out at a time when he did not realise there was an illegitimate tax advantage to be counteracted.

158 The powers under s 33(1) of the Act enable the Comptroller to alter the relevant tax liability either indirectly by disregarding or varying the arrangement or directly through the immediate imposition of liability to tax. Section 33(1) is not concerned with the act of assessment – that is to say, the Comptroller's ascertainment of the amount of chargeable income and tax payable by applying the provisions of the Act – nor is it concerned with the collection of tax. It is not contained in the parts of the Act (Parts XVII and XIX) which deal specifically with these matters. In our judgment, it is not reasonably necessary, in order for the Comptroller to achieve Parliament's intended purpose of the powers conferred under s 33(1), that the Comptroller should be held to have the further power to recover refunds that had been paid to a taxpayer on a mistaken premise.

159 Our conclusion on the scope of s 74 might appear to place the Comptroller in a rather unenviable position in that there seems to be no obvious statutory mechanism to claw back the tax refunds which AQQ was clearly not entitled to keep. Mr Singh urged us not to create a remedy where a remedy does not exist under the Act. But a remedy appropriate to this situation may well have been

available in the broad reconstruction powers conferred on the Comptroller under s 33(1). General anti-avoidance provisions in other jurisdictions are not "charging" sections: see Richardson J's observations in *Challenge (CA)* (at 548) that s 99 of the 1976 New Zealand Act "does not itself create a liability for income tax. Its function is to protect the liability for income tax established under other provisions of the legislation". Section 33(1) however, does expressly give the Comptroller wide powers, including the power to impose a liability to tax that hitherto would not have existed under any other specific provision of the Act in order to counteract any illegitimate tax advantage arising from the impugned arrangement. Conceivably, the Comptroller might have exercised his discretion to impose a tax liability equivalent to the sum of the tax refunds, *ie*, the tax advantage obtained, and then invoked s 74(1) to assess AQQ for these sums. This might arguably not be *ultra vires* s 74(1) as the Comptroller would subsequently be assessing AQQ for tax that had not been assessed under the Original Assessments. This point was not argued before us and so these views should not be regarded as final. Moreover, this was not the basis on which the Additional Assessments were raised.

An alternative cause of action

160 In the course of oral argument, Mr Singh suggested that it might be possible for the Comptroller to file a suit to recover the tax refunds under s 89 of the Act, which states as follows:

> **Suit for tax by Comptroller**
>
> **89**.—(1) Notwithstanding the provisions of any other written law, *tax, interest and any penalty imposed under this Act and any sum due to the Government under sections 44, 44A and 45, may be sued for by way of a specially endorsed writ of summons*.
>
> ….
>
> [emphasis added]

161 The original provision, s 86 of the 1947 Ordinance, referred only to *tax* due. Section 89 now provides that the Comptroller may sue for "tax, interest and any penalty imposed under this Act and any sum due to the Government under sections 44, 44A and 45" by way of a specially endorsed writ of summons. A certificate by the Comptroller as to the amount due to the Government is sufficient evidence of the amount due by the taxpayer and entitles the Comptroller to obtain judgment from the court for that amount: see s 89(4) of the Act. Again, the point was not argued before us at any length but we make the tentative observation that the provision may not avail the Comptroller in the present appeals as the mistakenly paid tax refunds that the Comptroller now wishes to recover from AQQ might not readily be categorised as "tax, interest and any penalty".

162 However, nothing in the Act bars the Comptroller from instituting an action at common law to recover tax refunds that he claims he is entitled to. It is possible, for example, that the Comptroller may have a remedy under a common law claim in unjust enrichment to recover the tax refunds as monies paid under a mistake. We express no further view on this and do not in any way foreclose any possible arguments or defences that AQQ may see fit to raise should the Comptroller wish to pursue this or any other avenue that might be considered viable.

Conclusion

163 For the foregoing reasons, we allow CA 7/2013 in part but only to the extent that the Comptroller had validly issued the Notice of Assessment for YA 2007 and dismiss CA 8/2013. In our judgment the Additional Assessments for YA 2004, YA 2005 and YA 2006 were *ultra vires* and we

affirm the Judge's order setting these aside. We will hear the parties on the appropriate orders as to costs in the event they are unable to come to an agreement. In that event, each party is to file written submissions within 14 days setting out its respective position on the questions of who should bear such costs, in what portion (if appropriate) and for what amount. Such submissions are to be limited to 15 pages in length.

ANNEX A – AQQ'S TAX RETURNS AND CLAIMED TAX REFUNDS

	YA 2004	**YA 2005**	**YA 2006**	**YA 2007**
Dividend income	12,329,315	30,952,630	19,970,000	19,992,000
Interest expenses	(7,419,452)	(19,852,015)	(19,912,500)	(19,912,500)
Other expenses	(7,771)	(17,021)	(11,409)	(5,217)
Net dividend income	4,902,092	11,083,594	46,091	4,283
Tax payable on dividend income	1,078,460.24	2,216,718.80	9,218.20	856.60
Tax deducted at source	(2,712,499)	(6,190,526)	(3,994,000)	(3,984,400)
Tax repayable on dividend income	(1,633,988.76)	(3,973,807.20)	(3,984,781.80)	(3,983,543.40)
Interest income	5,189	6,337	26,607	110,358
Exempt amount	(3,889)	(4,751)	(15,796)	(52,500)
Other expenses	(4)	(3)	(15)	(29)
Net interest income	1,296	1,583	10,796	57,829
Tax payable on interest income	285.12	316.60	2,159.20	11,565.80
Net tax refunds claimed by AQQ	(1,633,703.64)	(3,973,490.60)	(3,982,622.60)	(3,971,977.60)

[note: 1] Affidavit of Christina Ng Sor Hua at para 12-14; CA 8/2013 ACB Vol 2 at pp 91-95.

[note: 2] Affidavit of Christina Ng Sor Hua at para 14-15; CA 8/2013 ACB Vol 2 at p 92-98.

[note: 3] Affidavit of Christina Ng Sor Hua at para 16-17; CA 8/2013 ACB Vol 2 at p 98-100.

[note: 4] Affidavit of Christina Ng Sor Hua at para 22; CA 8/2013 ACB Vol 2 at p 103.

[note: 5] Affidavit of Christina Ng Sor Hua at CN-27; CA 8/2013 ROA Vol 3 Part C at p 7.

[note: 6] Affidavit of Christina Ng Sor Hua at para 37; CA 8/2013 ACB Vol 2 at p 110.

[note: 7] Affidavit of Christina Ng Sor Hua at para 40; CA 8/2013 ACB Vol 2 at p 111.

[note: 8] Affidavit of Christina Ng Sor Hua at para 42; CA 8/2013 ACB Vol 2 at pp 111-112.

[note: 9] Affidavit of B Group's Chief Financial Officer at para 30; CA 8/2013 ACB Vol 2 at p 26.

[note: 10] Affidavit of B Group's Chief Financial Officer at para 16; CA 8/2013 ACB Vol 2 at p 15.

[note: 11] Affidavit of B Group's Chief Financial Officer at para 17; CA 8/2013 ACB Vol 2 at p 15.

[note: 12] XXN of B Group's Chief Financial Officer; ROA Vol III (Part F) at pp 63-64.

[note: 13] Announcement made by the B Group to the Kuala Lumpur Stock Exchange; CA 8/2013 ACB Vol 2 at p76.

[note: 14] Affidavit of B Group's Chief Financial Officer at para 43; CA 8/2013 ACB Vol 2 at p 33.

Copyright © Government of Singapore.