

# Legal Bulletin

A summary of developments in the law

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## Articles

### Tax changes to the Singapore-India Double Tax Agreement arising from the Singapore-India Comprehensive Economic Cooperation Agreement (including developments announced on 17 February 2006 in the Singapore Budget Statement 2006)

This article describes the changes made to the 1994 Singapore-India Double Tax Agreement (the “DTA”) as a result of the signing of the Comprehensive Economic Cooperation Agreement (“CECA”) (“CECA tax changes”).

The changes were made through a Protocol between the two governments signed on 29 June 2005 to take effect from 1 August 2005 (the “Protocol”).

#### Capital gains

Article 13 of the DTA deals with capital gains from the alienation of property. It may be noted also that gains from the disposal of securities may, depending on the circumstances of the taxpayer, be subject to Article 7 (Business Profits) of the DTA rather than Article 13 (Capital Gains). In such cases, gains derived by a Singapore resident investor would be taxable in India only to the extent that the investor has a permanent establishment in India. Applications can be made to the Indian Authority for Advance Ruling (“AAR”) seeking confirmation on whether an investor’s gains would constitute Business Profits or Capital Gains.

The two significant changes brought about by CECA are that first, capital gains from the alienation of shares in a company which owns principally, directly or indirectly, immovable property are no longer taxable in the country in which the immovable property is situated but in the country of residence of the vendor. The second change is that gains from the alienation of shares in other types of companies are no longer taxable in the country of residence of the companies whose shares are sold but in the country of residence of the vendor. The table below provides a comparison of the position in relation to capital gains before and after the CECA tax changes.

	1994 DTA Article 13	2005 Protocol Article 1
Alienation of immovable property	Article 13(1) – May be taxed in the country where property is situated	No change to Article 13(1)
Alienation of movable property forming part of a permanent establishment (“PE”) or fixed based (for the purposes of performing independent personal services) (“fixed base”) or alienation of the PE or fixed base itself	Article 13(2) – May be taxed in country where the PE or fixed base is situated	No change to Article 13(2)

	<b>1994 DTA Article 13</b>	<b>2005 Protocol Article 1</b>
Alienation of ships or aircraft operated in international traffic or movable property pertaining to such operations	Article 13(3) – May be taxed in the country of residence of vendor	No change to Article 13(3)
Alienation of shares of company owning principally, directly or indirectly, immovable property	Article 13(4) – May be taxed in the country where the property is situated	Article 13(4) deleted and replaced with new paragraph (4) – May be taxed in the country of residence of vendor
Alienation of shares of other types of companies	Article 13(5) – Gains from alienation of shares of companies other than those mentioned in paragraph 4 may be taxed in the country of residence of the company the shares of which are sold	Article 13(5) deleted and replaced with new paragraph (4) – May be taxed in the country of residence of vendor
Alienation of other property	Article 13(6) – Gains from alienation of property, other than those mentioned in paragraphs 1 to 5 or industrial, scientific or commercial equipment, may be taxed in the country of residence of the vendor	Article 13(6) deleted and replaced with new paragraph (4) – May be taxed in the country of residence of vendor

It can be seen from the table above that apart from paragraphs 1 to 3 of Article 13, the remaining paragraphs have been replaced with a general paragraph 4, which provides that gains from alienation of properties other than those mentioned in paragraphs 1 to 3 shall be taxable in the country of residence of the vendor.

With the changes above, Singapore tax resident investors (“**Singapore investors**”) who invest in shares in Indian tax resident companies including Indian real estate companies, or other properties in India (apart from real estate or properties relating to a PE or fixed base in India), will no longer suffer capital gains tax in India on the gains from the sale of such shares or properties. When the gains are brought back to Singapore, they will not be subject to Singapore tax since the gains are capital in nature and there is no capital gains tax in Singapore. However, in late 2004 legislative changes were made to the Indian Finance Act and Income Tax Act to exempt securities transacted on recognised stock exchanges in India from Long Term Capital Gains Tax from where Securities Transaction Tax has been paid and the Short Term Capital Gains Tax was reduced to 10 per cent. on these securities. These domestic law changes in

relation to Indian listed securities transactions would have somewhat muted the impact of the changes to the DTA.

#### **Limitation of benefits**

Although the changes to the treatment of capital gains under Article 13 of the DTA can be seen as liberalising the capital gains tax treatment for Singapore investors in India, they have been introduced together with new limitation on benefits rules to prevent exploitation of these changes (Article 3 of the Protocol). It is important to note that these limitations are not present in the Double Tax Agreement between India and Mauritius. These rules are set out below.

- A tax resident of a Contracting State shall not be entitled to the benefits of the changes if its affairs were arranged with the primary purpose of taking advantage of those benefits.
- A tax resident shell or conduit company of a Contracting State shall not be entitled to the benefits of the changes. A shell or conduit company is any legal entity with negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State.
- A tax resident of a Contracting State is deemed to be a shell or conduit company if its total **annual** expenditure on operations in that Contracting State is less than S\$200,000 or RS 5million (as the case may be), in the 24 months immediately preceding the date of the gains. Annual expenditure refers to expenditure incurred during a 12-month period and two blocks of 12 months immediately prior to the date of the gains shall constitute the 24-month period.
- A tax resident of a Contracting State is however deemed NOT to be a shell or conduit company if:
  - it is listed on a recognised stock exchange of the Contracting State;  
or
  - its total annual expenditure on operations in that Contracting State is equal to or more than S\$200,000 or Rs 5 million as the case may be, in the 24 months immediately preceding the date of the gains.

Potential Singapore investors should ensure that neither of the rules described in the first two bullet points is breached if they wish to benefit from the changes to Article 13 of the DTA.

#### **Royalties and fees for technical services (“FTS”)**

Article 4 of the Protocol amends Article 12 of the DTA by substituting paragraph 2 of the Article. The new paragraph 2 provides for a flat rate of 10 per cent. withholding tax on Royalties and FTS. The table below provides a comparison before and after the changes for easy reference.

	<b>1994 DTA Article 13</b>	<b>2005 Protocol Article 1</b>
Royalties for use or right to use, including gains from alienation of intellectual property, information concerning industrial commercial or scientific experience	Article 12(2)(a) - Withholding tax of 15%	Article 12(2) deleted and replaced with new paragraph 2 – Withholding tax of 10%
Royalties for use or right to use of industrial, commercial or scientific equipment (other than payments for incidental leasing of ship or aircraft used in, or for the use, maintenance or rental of containers in connection with, ship or aircraft transportation)	Article 12(2)(b) – Withholding tax of 10%	Article 12(2) deleted and replaced with new paragraph 2 – but no change to withholding tax rate
FTS that are ancillary and subsidiary to the enjoyment of industrial, commercial or scientific equipment (excluding ships, aircraft and containers used in ship or aircraft transportation)	Article 12(2)(b) – Withholding tax of 10%	Article 12(2) deleted and replaced with new paragraph 2 – but no change to withholding tax rate
Other FTS	Article 12(2)(a) – Withholding tax of 15%	Article 12(2) deleted and replaced with new paragraph 2 – Withholding tax of 10%

For Singapore investors, the change is beneficial as there is now a flat rate of withholding tax of 10 per cent. on Royalties and FTS and there is no longer the need to identify the category into which a particular Royalty or FTS falls to determine the applicable rate.

### **Exchange of information**

Article 2 of the Protocol has introduced an additional obligation on the revenue authorities of the two governments to collect and share information that they are competent to obtain for their own purposes under their respective laws, if so requested by a Contracting State.

Paragraph 1 of Article 28 of the DTA provides that the two governments shall exchange such information and documents as is necessary for carrying out the provisions of the DTA or their respective domestic laws concerning taxes covered by the DTA, in particular for the prevention of fraud or evasion of such taxes. It is not clearly stated if Article 2 of the Protocol is to be read subject to Article 28(1) of the DTA but a view can be taken that it should be so read as that would be the likely intention of the two governments when agreeing to Article 2 of the Protocol. If Article 2 of the Protocol is read in isolation, then so long as a request is made by either by Singapore or India, the relevant tax authorities are obliged to collect and share the information obtained even if the information is not necessary for carrying out the

provisions of the DTA or the respective domestic tax laws concerning DTA provisions.

### **Condition of application of changes**

Article 6 of the Protocol provides that the changes discussed in this article in relation to capital gains, limitation of benefits, and exchange of information shall remain in force so long as the DTA between India and Mauritius provides that capital gains from the alienation of shares is taxable in the country of residence of the vendor.

Therefore, Singapore investors will need to be aware of any review or re-negotiation of the DTA between India and Mauritius in relation to the tax treatment of capital gains from the alienation of shares because if those gains cease to be taxable in the country of residence of the vendor under that DTA, the tax treatment on such capital gains under the Protocol will similarly cease.

An interesting point to note is that as part of the ongoing discussions between the Government of India and the Government of Mauritius on a potential comprehensive economic co-operation agreement between the two countries, the Government of India had proposed to re-negotiate the double taxation agreement between the two countries. If the treaty were to be re-negotiated, the Government of India may try to introduce a limitation of benefits clause into the treaty similar to the one in the Protocol for the Singapore DTA.

### **Some implications of the DTA changes**

Singapore has traditionally not taxed gains of a capital nature and only gains of an income nature are taxed (whether gains from the realisation of securities ARE capital or income in nature depends on the factual circumstances of the investor).

For a Singapore resident investor whose gains are likely to be on capital account (for example, a corporation making non-portfolio investments), Article 13 of the DTA can now provide an exemption from Indian capital gains tax, subject to the qualifying conditions under the DTA as described above being met.

A Singapore-resident investment fund company may seek to claim the benefit of exemption under Article 7 (Business Profits) of the DTA assuming that it has no permanent establishment in India (perhaps subject to obtaining a confirmatory ruling from the AAR as a practical matter). Historically, Singapore did not provide any tax exemptions for resident investment funds owned by foreign investors but managed locally. Singapore has provided tax concessions for certain domestic unit trusts meant for local retail investors (Designated Unit Trusts). These concessions have now been extended in the 2006 budget to certain unit trusts targeted at sophisticated and institutional investors. In the context of the DTA, however, the use of trust vehicles may be complicated by factors such as uncertainty about the eligibility of trusts to qualify for tax treaty benefits.

However, the Government has recently announced in the 2006 Budget that a new "Tax exemption scheme to encourage fund domiciliation in Singapore" would be introduced whereby specified income derived by funds set up in the form of resident companies substantially owned by foreign investors may be exempt from tax, under terms which are substantially similar to the pre-existing tax exemption scheme of non-resident funds substantially owned by foreign investors and managed in Singapore. Applications may be made

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between 17 February 2006 and 11 February 2011 for this new incentive on a case-by-case basis.

If a Singapore-resident investment company is unable to claim the benefit of Article 7 (Business Profits) of the DTA (or perhaps does not wish to), the availability of the exemption under Article 13 (Capital Gains) is subject to a number of hurdles. In particular, the investment fund would have to have been operating for at least two years in order to satisfy the requirement that its total **annual** expenditure on operations in Singapore is less than S\$200,000 or RS 5 million in the 24 months immediately preceding the date of the gains unless the fund were to be listed on the Singapore Exchange Securities Trading Limited (“**SGX-ST**”).

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## **ACRA Practice Direction No 4 of 2006: Interpretation of sections 201(1A), (3) and (3A) of the Companies Act in relation to consolidated accounts**

On 27 April 2006, the Accounting and Corporate Regulatory Authority (the “**ACRA**”) issued Practice Direction No 4 of 2006 (“**PD 4/2006**”) to replace Practice Direction No 9 of 2005 (“**PD 9/2005**”) with immediate effect. PD 4/2006 interprets sections 201(1A), (3) and (3A) of the Companies Act and elaborates on the issues raised and the interpretation taken in PD 9/2005.

Sections 201(1A) and (3) of the Companies Act provide that the profit and loss account and the balance sheet which are presented at a company’s annual general meeting must comply with the prescribed Accounting Standards and give a true and fair view of the profit and loss of the company and the state of affairs of the company. Section 201(3A) of the Companies Act deals with the consolidated accounts of a holding company and also the requirement for such accounts to comply with the prescribed Accounting Standards.

The prescribed Accounting Standards under the Companies Act are the Financial Reporting Standards (“**FRS**”) and basically refer to statements of standard accounting practice applicable to companies.

### **Position before PD 4/2006**

PD 9/2005 dealt with the difference between the definitions of “subsidiary” and “holding company” in the Companies Act, and the accounting definitions of a “subsidiary” and “parent” under FRS 27. As the definitions are similar but not identical, a company may meet the definition “subsidiary” and “holding company” under the Companies Act but not the accounting definition of “subsidiary” and “parent” under FRS 27, and *vice versa*.

Such differences in the legal and accounting definitions gave rise to two scenarios which might cause some uncertainty. A parent company that is not a holding company would not have to prepare consolidated accounts according to section 201(3A) but must comply with FRS 27.

On the other hand, a holding company that is not a parent company must comply with section 201(3A), which requires compliance with FRS 27. However, there may be situations whereby a holding company that is not a parent company may be required under the prescribed Accounting

Standards to use methods other than FRS 27, and this has caused concern that the company would be unable to comply with section 201(3A) of the Companies Act to prepare consolidated accounts according to FRS 27.

#### **Position after PD 4/2006**

The PD 4/2006 addresses the uncertainty caused by the differences between the definitions of “subsidiary” and “holding company” under the Companies Act when read with the accounting definitions of “subsidiary” and “parent” under FRS 27 of the prescribed Accounting Standards, as follows:

- **When a company is a parent company under FRS 27 of the prescribed Accounting Standards but is not a holding company under the Companies Act:** Must prepare consolidated accounts as required by FRS 27 because the company is required under section 201(1A) and (3) of the Companies Act to prepare accounts to comply with the Accounting Standards and to give a true and fair view of the financial position of the company. There is no prohibition in section 201(1A) and (3) against the consolidation of accounts by a parent which is not a holding company.
- **When a company is a holding company under the Companies Act and also a parent company under FRS 27:** Must prepare consolidated accounts as required by FRS 27 and section 201(3A) of the Companies Act.
- **When a company is a holding company under the Companies Act but is not a parent company under FRS 27:** Must consolidate accounts but may be in accordance with FRS 28, 31 and 39. The definition of “consolidated accounts” under section 209A of the Companies Act is wide enough to include the incorporation of financial information of the holding company’s legal subsidiaries howsoever accounted for under the Accounting Standards.

To view the full text of PD 4/2006, please [click here](#).

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## **MAS consultation on proposed amendments to the Code on Collective Investment Schemes**

The Monetary Authority of Singapore (the “**MAS**”) is inviting comments on proposed amendments to Appendix 1 (Non-Specialised Funds) of the Code on Collective Investment Schemes (the “**Code**”). The proposals are set out in a consultation paper issued by the MAS on 24 May 2006. Feedback on the proposals must be submitted to the MAS by 22 June 2006.

Appendix 1 of the Code sets out the investment and borrowing guidelines applicable to collective investment schemes (“**CISs**”) which invest in equities and/or fixed income instruments.

The MAS proposes to revise Appendix 1 of the Code in two areas:

- method for calculating the single party limit; and
- investment in financial derivatives.

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## Single party limit

Currently, the Code provides that a CIS may only invest up to 10 per cent. of the deposited property of the CIS in securities issued by and deposits placed with the same entity ("**single party limit**"). For the purpose of this provision, a company, its subsidiaries, fellow subsidiaries and holding company are regarded as one entity.

For CISs tracking a benchmark which is widely accepted and constructed by an independent party, the single party limit will be the higher of 10 per cent. or the benchmark weighting of the issuer.

In response to industry feedback that the current 10 per cent. single party limit restricts the ability of CISs to execute their investment strategies effectively, the MAS proposes revising the single party limit as follows:

- investments in securities issued by a single issuer ("**single issuer limit**") should not exceed 10 per cent. of the deposited property of a CIS;
- investments in securities issued by a group of companies ("**single group limit**") should not exceed 20 per cent. of the deposited property of a CIS. A group of companies will be defined as a company, its subsidiaries, fellow subsidiaries and its holding company; and
- notwithstanding the "single issuer limit" and "single group limit", investments in any security that is a component of a CIS's reference benchmark may be up to the benchmark weighting of the issuer, with an additional absolute overweight allowance of two percentage points above the benchmark weight.

## Investment in financial derivatives

The Code prohibits a CIS from investing in financial derivatives. A CIS is only allowed to invest in financial derivatives for the purpose of:

- hedging existing positions in a portfolio; or
- efficient portfolio management ("**EPM**"), provided that derivatives are not used to gear the overall portfolio.

Under the revised guidelines, a CIS will be allowed to invest in financial derivatives (for purposes other than those stated above) if adequate risk management procedures and controls are in place. The risk management procedures and controls will be disclosed in the prospectus together with a statement that they will be in place so long as the CIS invests in financial derivatives as part of its general investment policy. Exposure arising from investments in financial derivatives should not exceed 100 per cent. of the deposited property of the CIS. The method used for determining the CIS's exposure should also be disclosed in the prospectus and be subject to an assessment by the manager's in-house risk management experts or an independent expert.

This proposal follows the European Union's approval for European Union-constituted UCITS III funds to invest in financial derivatives. UCITS III funds are offered in Singapore as "recognised" CISs under the Securities and Futures Act.

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To view the full text of the Consultation Paper, please [click here](#).

To view the press release relating to the above development, please [click here](#).

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## **MAS proposes to fine-tune existing minimum liquidity risk supervision framework for banks**

On 19 May 2006, the Monetary Authority of Singapore (the “**MAS**”) issued a consultation paper on its proposal to enhance the existing liquidity risk supervision framework for banks which is stipulated in MAS Notice 613 (“**MAS 613**”).

Liquidity risk refers to the risk to a bank’s earnings or capital arising from its inability to meet its obligations as they fall due, without incurring significant costs or losses. The liquidity risk supervision framework in MAS 613 aims to ensure that banks in Singapore have robust liquidity risk management capabilities.

Under the existing framework, banks can adopt either a general methodology or a risk-sensitive methodology for determining their Minimum Liquid Assets (“**MLA**”) requirements.

Banks that adopt the risk-sensitive methodology for determining their MLA requirements must meet the requirements of the bank-specific liquidity assessment, a rigorous on-site review process to assess the bank’s liquidity risks management policies and practices. These banks are known as “BS banks”. BS banks are assigned a base MLA ranging between 12 per cent. and 15 per cent. of liabilities base (“**LB**”).

“Non-BS banks” are subject to a flat MLA requirement of 18 per cent. of LB.

The MAS is seeking public comments on the following amendments proposed to fine-tune the current liquidity risk supervision framework.

### **Imposing MLA requirements on a revised set of “Qualifying Liabilities”**

The MAS is of the view that the components of LB can be redefined to reflect a more appropriate coverage.

Hence, a revised set of “Qualifying Liabilities” will replace the current LB. The composition of Qualifying Liabilities will be as follows:

- gross SGD liabilities to non-bank customers;
- net cumulative SGD interbank liabilities of up to one month; and
- 15 per cent. of SGD undrawn commitments.

### **Expanding range of assets qualifying as eligible liquid assets**

The eligible liquid assets for meeting MLA requirements will be expanded to afford banks greater flexibility in managing their portfolio of liquid assets.

The new eligible liquid assets to be included are investment grade SGD-denominated debt securities issued by supranationals, statutory boards,

banks and corporates with a minimum issue size of S\$250 million. These debt securities would also be subject to certain valuation haircuts.

Eligible liquid assets will also be subject to additional requirements.

### **Revising the computation of MLA requirements for BS banks**

Under the current liquidity risk supervision framework, the MLA requirements for BS banks are determined by the higher of the banks' base MLA or cash flow volatility, subject to a maximum of 18 per cent. of LB.

The existing cash flow volatility computation formula for BS banks does not distinguish between positive and negative cash flows. To address this shortcoming, a revised cash flow volatility computation formula is proposed.

MLA requirements for BS banks will be the amount computed using the revised cash flow volatility formula, subject to a floor of 5 per cent. of its Qualifying Liabilities and a cap of between 10 per cent. and 15 per cent. of its Qualifying Liabilities. The specific MLA cap to be assigned to each BS bank will depend on the strength and robustness of the bank's liquidity risk management as assessed by the MAS.

### **Revising the computation and maintenance period for non-BS banks**

Instead of the current 2-week computation/2-week maintenance period, non-BS banks will be required to compute their MLA requirements daily and maintain MLA on the second business day after the computation day.

### **Replacing the existing minimum SGS requirement with a minimum Tier 1 MLA requirement**

All banks (BS and non-BS banks) will be required to maintain at least 50 per cent. of their MLA requirements in Tier 1 assets, comprising cash and SGS. This requirement will replace the existing minimum 10 per cent. SGS requirement.

### **Formalising the procedures for MLA drawdown**

The MAS proposes having a set of MLA drawdown procedures to facilitate the timely drawdowns of the banks' MLA reserves to deal with liquidity stress situations.

A set of revised Liquidity Risk Management Guidelines will be published by the MAS to convey MAS' expectations of banks for liquidity risk management and to assist banks in enhancing their existing practices.

To view the related MAS press release issued on 19 May 2006, please [click here](#).

To view the full text of the present consultation paper, please [click here](#).

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## **SGX-DC releases consultation paper on proposed amendments to SGX-DC Clearing Rules**

On 19 May 2006, the Singapore Exchange Derivatives Clearing Limited (the “**SGX-DC**”) released a public consultation paper on the proposed amendments to the SGX-DC Clearing Rules (the “**Consultation Paper**”). Comments on the proposals in the Consultation Paper must be submitted to the SGX-DC before 19 June 2006.

The proposed amendments to the SGX-DC Clearing Rules covers three main areas, namely:

- clearing by SGX-DC of physical delivery contracts traded on the Joint Asian Derivatives Exchange Market (“**JADE**”);
- harmonisation of the SGX-DC Clearing Rules to be consistent with the Derivatives Trading Rules of the Singapore Exchange Derivatives Trading Ltd (the “**SGX-DT Trading Rules**”); and
- requiring members of the SGX-DC (the “**Members**”) to report to the SGX-DC on: (a) all their credit facilities with financial institutions and any changes to their credit facilities; (b) the identification of their accounts.

### **Physical delivery contracts**

JADE is an Asian-based commodity derivatives market jointly established by the Singapore Exchange Ltd (the “**SGX**”) and Chicago Board of Trade (“**CBOT**”).

The SGX-DC proposes to amend the SGX-DC Clearing Rules to facilitate the clearing of JADE products which will have the following common features:

- involve agriculture commodities;
- may be physically delivered;
- traded on CBOT’s electronic trading platform (“**e-cbot**”); and
- cleared by the SGX-DC.

The SGX-DC Clearing Rules will be revised to address the following issues:

- matching process for a contract subject to physical delivery;
- expanded list of events stating whether a Member is deemed insolvent;
- an additional event of default applicable to a contract subject to physical delivery and its default procedure;
- cessation of the SGX-DC’s duties as a central counterparty once the buyer and seller is matched by the SGX-DC upon the maturity of the contract;
- outlining the SGX-DC’s role as an escrow agent in respect of the Performance Deposits (namely deposits paid as security, for the benefit of a buyer or seller who is a counterparty under a delivery contract, for the performance of the depositing party’s obligations under the delivery contract) and the exchange of Title Documents (namely documents

evidencing title to an underlying commodity) and payments between the buyer and seller;

- imposing responsibility on a Member to procure performance of all delivery obligations for the underlying commodity under a contract;
- resolution of disputes between Members and their buyers and sellers in relation to JADE contracts;
- exclusion of the SGX-DC's liability for:
  - the acts, omissions, default or insolvency of organisations involved with delivery of commodities under any contract cleared by the SGX-DC;
  - the delivery or non-delivery of Title Documents;
  - the transfer of title, or failure to transfer title, of a commodity by an Approved Warehouse (premises approved by the SGX to store commodities relating to a delivery contract); and
  - the limitation or exclusion of liability by an Approved Warehouse.

#### **Harmonisation of SGX-DC Clearing Rules with SGX-DT Trading Rules**

The SGX intends to include a new Practice Note in the SGX-DC Clearing Rules to set out expressly the procedures for determining the daily settlement price (“**DSP**”) for Over-the-Counter (“**OTC**”) Contracts.

The SGX-DT Trading Rules provide that the DSP for each exchange-traded contract shall be determined in accordance with the relevant formula and procedures set forth in the SGX-DC Clearing Rules. A new Practice Note is proposed to be inserted in the SGX-DC Clearing Rules to clearly identify the following factors to compute the DSP for exchange-traded contracts. The factors are arranged in descending order of preference.

- The last traded price.
- The bid and offer spread at the close of market.
- Price data derived from pricing models, as stated or established by the SGX-DC.

#### **Reporting requirements**

The Consultation Paper proposes to incorporate the following requirements in the SGX-DC Clearing Rules:

- Submission of monthly report to the SGX-DC on all credit facilities maintained by a Member with its financial institutions to meet the margin calls in respect of a customer's account and immediate notification to the SGX-DC of any changes to these credit facilities.
- Submission of an Account Identity Form for House Accounts and Customer Accounts which are used for trading or carrying of contracts or which contain positions that are required to be reported, in relation to position change sheets or large positions.

These reporting requirements are currently provided in Circulars issued by the SGX-DC.

Please [click here](#) to read the full text of the press release by the SGX on the above development.

Please [click here](#) to read the full text of the Consultation Paper.

Appendix A of the Consultation Paper comprises a table setting out the existing Clearing Rules, the proposed amendments and the reasons for the amendments. Please [click here](#) to view Appendix A.

The Consultation Paper also contains drafts Practice Notes and Regulatory Circulars that will be issued to supplement the proposed amendments to the SGX-DC Clearing Rules. They are set out in the following Appendices of the Consultation Paper, please click on the title of each Practice Note or Regulatory Circular to view the full text of each document:

- Appendix B1: [Practice Note on daily settlement procedures for eligible OTC contracts](#)
- Appendix B2: [Practice Note on daily settlement price methodology](#)
- Appendix C1: [Regulatory Circular on credit facilities](#)
- Appendix C2: [Regulatory Circular on account identity](#)
- Appendix C3: [Regulatory Circular on reports of large positions](#)
- Appendix C4: [Regulatory Circular on limits of positions](#)

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## MAS issues response to feedback received from consultation paper on review of framework for nomination of beneficiaries

From 7 December 2005 to 18 January 2006, the Monetary Authority of Singapore (the “MAS”) conducted a public consultation on a proposed framework for the nomination of beneficiaries in respect of the proceeds of insurance policies.

On 27 April 2006, the MAS released the comments received that are of wider interest and its response thereto (the “Response”).

Currently, the Insurance Act does not have provisions governing the nomination of beneficiaries to the proceeds from insurance policies. However, by virtue of section 73 of the Conveyancing and Law of Property Act (the “CLPA”), a nomination by the policyholder of his spouse and/or children as beneficiaries on his life insurance policy will automatically create an irrevocable statutory trust in favour of the nominees. As a result of the concern expressed by some insurers and policyholders over the inflexibility and apparent ambiguities in the application and effect of section 73 of the CLPA, the MAS is proposing to amend the Insurance Act to bring under its purview the issue of nomination of beneficiaries to the proceeds from insurance policies. Following the amendment, section 73 of the CLPA will be repealed.

The Response discusses the following key issues in relation to the proposed framework:

- The usefulness of revocable nomination;
- Rationale for restricting policyholders from enjoying the advantages of irrevocable nominations and concurrently retaining the flexibility to deal with the policies as they wish to without having to obtain the consent of the beneficiaries;
- Clarification on the types of policies eligible for nomination, in particular, whether group policies will come under the ambit of the proposed framework;
- Prohibition of class nominations, namely, nominations which merely spell out the classes of persons to be nominated, such as “wife” or “children”;
- Minimum age to nominate. The MAS stated in its response that policyholders aged 16 and above will be able to make revocable nominations. For irrevocable nominations, policyholders are also the default trustee of the policy. As such, only policyholders aged 21 and above will be allowed to make irrevocable nominations;
- Right of beneficiaries to unilaterally change an insurance policy. The MAS responded that beneficiaries will not be able to unilaterally make changes to the insurance policy as they are regarded as third parties to the insurance contract. Only policyholders will be able to make changes to the insurance policy. In the case of irrevocably nominated policies, policyholders will require the consent of all beneficiaries before changes can be effected;
- Persons eligible as irrevocably nominated beneficiaries. The MAS is of the view that the class of persons eligible as irrevocably nominated beneficiaries should remain as the policyholder’s spouse and/or children. The MAS is of the view that the class of persons should not be expanded to include a policyholder’s parents and siblings;
- Manner of paying out the policy proceeds where a beneficiary predeceases the policyholder;
- Whether minor beneficiaries under irrevocable nominations may give consent to effect changes to an insurance policy. The MAS responded that beneficiaries who are minors will be able to execute their rights, including giving or denying consent to proposed changes to the policy, through their appointed guardians;
- Impact of the new nominations framework on Muslim policyholders;
- Effect on nominations if an insurance policy lapses due to non-payment of premium;
- Payment of lifetime proceeds from revocably nominated policies;
- Requirement for policyholders to notify their insurers in writing whenever they make changes to their nominations will address disputes arising from conflict between a revocable nomination form and a will;
- Inclusion of explicit insurance policy details, in particular the name of the insurer and policy number, in order to be considered a validly executed instrument which encompasses an insurance policy;

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- Policy holders will only be able to make revocable nominations for policies purchased with CPF monies;
- Reason for not extending the proposed framework to existing policies with encumbrances. The MAS explained that when a policyholder nominates his spouse and/or children as beneficiaries to the proceeds of his insurance policy, a statutory trust is automatically created in favour of the beneficiaries. The statutory trust cannot be unwound without the consent of all the beneficiaries. This is the current position under section 73 of the CLPA. As a fundamental principle in public policy making, new legislation should not retrospectively unravel former legislation. In the case of nomination of beneficiaries, the new framework similarly cannot retrospectively revoke the statutory trust to void a legal protection that has already been accorded to the beneficiaries under section 73 of the CLPA.

To view the full text of the Response, please [click here](#).

To view an article featured in a previous issue of the Allen & Gledhill Legal Bulletin (December 2005) entitled “*MAS consults on proposed framework for nomination of beneficiaries to insurance policies*”, please [click here](#)

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## The Singapore Treaty on the Law of Trademarks

In March 2006, Singapore hosted the Diplomatic Conference for the Adoption of a Revised Trademark Law Treaty. This conference marked the first time that a Diplomatic Conference of this nature was held in Asia. The event culminated in a new Treaty on the Law of Trademarks, which was named the “Singapore Treaty on the Law of Trademarks” (the “**Singapore Treaty**”), after the host country.

The Singapore Treaty heralds a new era in the area of intellectual property law. The main aim of the Singapore Treaty is to introduce a revision to the 1994 Trademark Law Treaty that allows the law of trade marks to keep pace with the rapid technological developments in the global arena, especially with the advent of electronic communications. In this way, it further cements the significance of trade marks in the promotion of trade, the development of enterprise and the creation of consumer confidence.

The Singapore Treaty brings about streamlined procedural frameworks for both national and regional trade mark administration authorities, which is intended to lead to lowered costs of registration. The Singapore Treaty thus covers many facets of the registration process, including registration formalities, the recordal of trade mark licences, and the avenues of relief available when certain time limits are missed.

With the market for luxury branded goods ever increasing, the Singapore Treaty also recognises the need to acknowledge efforts made in terms of investments in product differentiation and the creation of a unique brand identity by including rules that encourage creativity and investment in brand development. By implementing a common standard in this area, the Singapore Treaty thus implements an exciting regulatory framework for brand rights that is efficiently enhanced by the establishment of an Assembly of all contracting parties.

Crucially, developing countries will also be able to enjoy the fruits of the Singapore Treaty in light of the commitment made by the industrialised

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countries to furnish them with the requisite technical expertise to strengthen their institutional capacity. This is vital to the success of the Singapore Treaty because there are provisions governing non-traditional and non-visible trade marks like sounds, smells and holographic signs.

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## Cases

### Corporate & financial services

#### Singapore High Court holds that Articles of Association is a self-contained document

*Yeo Gek Lang Susie (administratrix of the estate of Teo Lay Swee) & Ors v Guan Soon Development Pte Ltd* [2006] 1 SLR 337; [2005] SGHC 211

The Singapore High Court in *Yeo Gek Lang Susie (administratrix of the estate of Teo Lay Swee) & Ors v Guan Soon Development Pte Ltd* held that the Articles of Association is a self-contained document and, on the facts, the parties were not entitled to rely on extrinsic evidence, for example, the minutes of director's meetings, to narrow the scope of application of a provision in the Articles of Association.

In the present matter, the plaintiffs made an application for an order compelling the defendant company to register them as shareholders in the defendant company's register of shareholders. All of the plaintiffs (except one) were children of a deceased shareholder of the defendant company (the "**Deceased Shareholder**"). The shares of the deceased shareholder had been transmitted to his estate.

The defendant company opposed the application on the ground that the plaintiffs' right to inherit shares of the Deceased Shareholder was subject to a pre-emption right to existing members stipulated in Article 28 of the defendant company's Articles of Association (the "**old Article 28**"). The old Article 28 stated that no shares of a member of the defendant company should be transferred to a person who was not a member, so long as any member was willing to purchase the same at fair value. The defendant company submitted that as the plaintiffs were not members of the company, they were not entitled to be registered as shareholders of the defendant company.

After the death of the Deceased Shareholder, the Articles of Association of the defendant company were amended so that the pre-emption right in Article 28 did not apply in respect of any transfer of shares following the death of a member where the deceased's shares were transferred to such persons in accordance with the applicable laws of intestacy or the deceased member's last will and testament.

The plaintiffs contended that by virtue of these amendments made to the Articles of Association of the defendant company, the old Article 28 no longer applied and they were entitled to be registered as the shareholders in the defendant company.

The defendant company disagreed with the plaintiffs and alluded to a minute of the directors' meeting to the effect that these amendments were not intended to apply to deaths of members occurring before the amendments.

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The Singapore High Court rejected the defendant company's argument. The court held that if the defendant company had intended to limit the effect of the amendments to deaths of members occurring after the amendments, they should have stated it expressly in the Articles of Association. This is because the Articles of Association is the document that any third party would look at to determine the rights of the members among themselves. It was held that the defendant company could not rely on the minutes of the directors' meeting to substantiate their argument.

Ordinarily, any amendment to the Articles of Association takes effect, unless specifically stated otherwise, from the date the resolution of amendment is passed. Hence, the court held, on the basis of the revised Articles of Association, that the plaintiffs were entitled to be registered as the shareholders of the defendant company.

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## Intellectual property & technology

### English High Court in "The Da Vinci Code" case dismisses claim for non-textual copyright infringement

*Baigent & Leigh v The Random House Group Limited* [2006] EWHC 719

No matter how closely one looks at the stately names of the parties involved in the case of *Baigent & Leigh v The Random House Group Limited*, there are no clues that this case is about the ubiquitous book it involves. It was sheer coincidence, but one cannot deny the fact that Justice Peter Smith's judgment in the English High Court has certainly fuelled the media frenzy surrounding the release of the long-awaited film, "*The Da Vinci Code*".

The case itself concerned author Dan Brown's popular novel of the same title. The two claimants, Michael Baigent and Richard Leigh, claimed that the novel infringed their copyright in their own non-fiction creation, "*The Holy Blood and The Holy Grail*". Notably, the defendant in this case was The Random House Group Limited, which is the publisher of the book in the United Kingdom. Brown himself was not a defendant in this case, but he is separately on trial over his authorship of the novel.

The claimants took the view that Brown had copied certain themes of their work. For example, they claimed that they were the first to propose the thesis that the Holy Grail was a metaphor for Mary Magdalene and thus argued that Brown had thereby misappropriated this thesis from them in his novel. This was thus a claim of non-textual copyright infringement in a literary work, an unusual claim in itself but made all the more complex in this particular context due to its Biblical undertones.

Therefore, at the centre of the raging religious storm stood a pure unadulterated claim for copyright infringement. The claim for copyright infringement was based on the so-called "Central Theme" of both books. Essentially, this Central Theme had to be present in the claimant's work in order for them to establish their case.

It was therefore very significant that the claimants made changes to their original version of what the Central Theme comprised of. In Justice Smith's own words, there were "fundamental omissions" from the original version and the claimants' explanation that it was a mere blunder did not sit well with the judge. In addition, the judge was of the opinion that the claimants failed to establish at least four components of the Central Theme. Hence, Justice

Smith concluded that the Central Theme was an “artificial contrivance designed to create an illusion of a Central Theme for the purposes of alleging infringement”. Accordingly, the claim of non-textual copyright infringement was not founded.

Justice Smith relied heavily on the important cases dealing with non-textual copyright infringement, including *Ravenscroft v Herbert* [1980] RPC 193, *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 113, *IPC Media Ltd v Highbury-Pleasure Publishing Ltd* [2005] FSR 20 and *Harman Pictures NV v Osborne* [1967] 1 WLR 723. Essentially, all these cases expound on the principle that copyright law protects the effort, skill and labour of the author in creating the particular original expression of an idea. Anyone else is entirely entitled to refer to any existing works in producing other works of a similar nature, provided that the particular expression is not mirrored in their own new works.

On the facts of the case, Justice Smith found that there was use of the claimants’ work as “a source of material”, especially by Brown’s wife Blythe. The fact that she did not give evidence at trial on this matter “without any reasonable excuse” was deemed to be “determinative on this issue” by Justice Smith. Crucially, although most of the language copying claims were in fact established, these were not claims of non-textual infringement and hence did not avail the claimants’ cause.

In sum, Justice Smith’s judgment sheds further light on the area of non-textual copyright infringement. With the lack of a solid Central Theme to support their claim, the claimants therefore failed to convince the judge that there was indeed basis from which the alleged non-textual infringement could take place.

Nevertheless, perhaps the most fascinating aspect of the case may well be “The Smithy Code”, a reference to a series of seemingly random italicised letters throughout the judgment. In what he later described as “a bit of fun”, Justice Smith mischievously hid a secret message about a significant event that took place a century ago, even going so far as to include a deliberate typographical error to create further confusion. The first ten of these letters spell out “smithycode”, revealing that there is indeed a hidden message in the judgment. Justice Smith then released a set of hints focussed on The Fibonacci Sequence that should be used to break the code.

Even if “The Smithy Code” is unlikely to be the moniker given to this case, it did bestow a sense of mystery that successfully heightened the intrigue surrounding “*The Da Vinci Code*”.

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## **Singapore High Court: Trade mark applicant under duty to inquire into bona fides of proposed mark**

*Rothmans of Pall Mall Limited v Maycolson International Ltd* [2006] SGHC 51

The Singapore High Court recently had to consider the appropriate test for bad faith under section 7(6) of the Trade Marks Act in relation to an opposition to the registration of marks under the same Act. As section 7(6) is often pleaded in opposition proceedings, this case is significant because it is the first time that a Singapore court has issued guidelines as to what amounts to bad faith under the Act.

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Section 7(6) of the Trade Marks Act provides that a trade mark shall not be registered if or to the extent that the application was made in bad faith.

As a matter of background, this case came before Lai Siu Chu J in the High Court as an appeal against the decision of the Principal Assistant Registrar of Trade Marks (the “**Registrar**”). Rothmans of Pall Mall Limited (the “**Applicant**”) opposed the registration of a mark (the “**Respondent’s mark**”) by Maycolson International Ltd (the “**Respondent**”) pursuant to the provisions of the Trade Marks Act. One of the grounds of the Applicant’s opposition was that the Respondent’s application to register the mark was made in bad faith and therefore should not have been registered by virtue of section 7(6) of the Trade Marks Act. The Registrar dismissed the Applicant’s opposition and permitted the registration of the Respondent’s mark. The Applicant appealed against the decision of the Registrar.

### **Relevant facts**

The Applicant was the registered proprietor in Singapore of numerous trade marks relating to cigarettes under Class 34 of the International Classification of Goods and Services (“**ICGS**”). These trade marks consisted of a dark blue background framed by a gold/yellow border, a crest device at the top, and a banner at the bottom of the dark blue background and all except for one contained the word “Rothmans” in cursive script, with the first letter “R” in upper case.

The Respondent was the licensee of Axel and Klaus Hertlein (the “**Hertlein brothers**”), who operate a business by the name of “Top Brands” which is the distributor of “Fairlight” cigarettes in various Arab countries and East Africa. “Fairlight” cigarettes were not sold in Singapore.

The proceedings were part of a long-standing saga between the Applicant and the Hertlein brothers over the latter’s use of the “Fairlight” mark. Although no conclusive verdict had been delivered, the Applicant had thus far managed to obtain an interim injunction in Berlin to restrain a contract manufacturer of Top Brands from producing, marketing and/or exporting cigarettes bearing the “Fairlight” mark. In another set of proceedings, the Applicant managed to obtain a Europe-wide injunction against the Hertlein brothers preventing the use of the “Fairlight” mark or packaging but this mark was not identical to the Respondent’s mark in the present proceedings. Litigation had also been commenced in Austria.

### **On appeal in the High Court**

One of the issues which the High Court had to consider on appeal was the appropriate test for bad faith under section 7(6) of the Trade Mark Act. Bad faith constitutes an absolute bar to the registration of a trade mark.

Lai Siu Chu J held that a duty should be imposed on an applicant to make further inquiries if the circumstances would lead a reasonable person to harbour suspicions as to the propriety of the proposed mark. A trade mark applicant has a positive duty to investigate the *bona fides* of a mark before seeking registration. Breach of such a duty to make further inquiries can arise even if further inquiries do not reveal clear and conclusive evidence of a breach of any legal requirement. Tying the issue of legal breach to bad faith would encourage applicants to seek registration of questionable marks. As such, despite trade mark infringement proceedings which occur simultaneously in numerous countries in relation to similar (or identical) marks and which might have dissimilar conclusions because of the differing legal principles and facts involved in each case, regard should still be had to the outcome of overseas proceedings as they may be indicative of any impropriety surrounding the proposed mark. The registration of such marks

should be rejected under section 7(6) of the Trade Mark Act should bad faith be established.

In the present proceedings, the learned judge took the view that the dissimilarity between the Applicant's trade marks and the Respondent's mark would not negate the existence of bad faith. The determination of confusion and the establishment of bad faith were two distinct issues that had to be considered separately.

The court then went on to tackle the issue of the standard and/or type of proof that would be required for a finding of bad faith to arise. In this regard, the learned judge referred to two previous cases where significant weight was attached to the existence of misconduct by the parties and their motives for registration. On the facts of the present proceedings, the court made a finding of misconduct because the Respondent's attempt to register its mark was a blatant attempt to ride on the goodwill and reputation of the Applicant's trade marks. Before bad faith could arise, the applicant's conduct had to fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular commercial area under consideration. The test for bad faith is a combination of an objective and subjective standard. This would mean that the Respondent's case was not furthered by the mere fact that the Respondent did not regard the Applicant's trade marks as confusingly similar or consider the Hertlein brothers guilty of passing off. Second, the Respondent was subject to a duty to inquire into the origins of the "Fairlight" mark and the intentions of the Hertlein brothers.

Based on the facts of this case, the court drew an inference of bad faith on the Respondent's part taking into account, among others, the following facts:

- circumstances surrounding the incorporation of the Respondent were highly suspicious in nature;
- the Respondent had no proper place of business in Singapore;
- there was no evidence that the Respondent was involved in or intended to be involved in the retailing and/or distribution of cigarettes and tobacco products;
- the description of "Fairlight" cigarettes was similar in packaging to "Rothmans" cigarettes; and
- the Applicant and the Hertlein brothers were currently parties to various infringement suits overseas. The Hertlein brothers had paid little heed to the terms of the Europe-wide injunction by using a variation (and newer version) of the "Fairlight" mark.

Taking all the circumstances into consideration, the court was of the view that any reasonable person would or should have made further inquiries as to the origins of the Respondent's mark. The fact that this did not take place, coupled with the suspicious circumstances in which the Respondent was set up, led to a very strong inference that the Respondent was privy to the Hertlein brothers' nefarious activities. As such, the court held that the Respondent's application was tainted with bad faith and that it should not be allowed to proceed for registration.

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## Real estate

### Singapore Court of Appeal grants declaration of implied easement of way

*Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] SGCA 12

In the Singapore Court of Appeal case of *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] SGCA 12, a bungalow that was constructed more than 40 years ago was faced with the prospect of having its only access to the public road removed.

When No 48 Dalvey Road (“**No 48**”) was developed, access was provided through a short driveway over the land of the adjoining bungalow (“**No 48A**”). These two bungalows were part of the same parent lot and approval for subdivision was granted on 14 July 1970. After the subdivision, the bungalows stood on their own separate plots. Subsequently, when certificates of title were issued in respect of the plots on which the two bungalows stood, no express right of way was created. A dispute arose over whether there is an implied easement of way.

The appellant entered into a sale and purchase agreement to purchase No 48. As there was no express right of way for No 48 over No 48A, the agreement was made subject to the appellant obtaining a court declaration that No 48 enjoyed an implied easement of way in accordance with the provisions of Section 99(1) of the Land Titles Act (the “**Act**”) over No 48A. This condition was contained in Clause 8 of the agreement.

Sections 99(1) and 99(1A) of the Act provide as follows:

Implied easements for right of way and other rights shown in subdivision plan

**99.**—(1) Where the competent authority has approved the development and subdivision of any land comprised in an estate before or after 1<sup>st</sup> March 1994 and the subdivision plan has been submitted to the competent authority, there shall be implied, in respect of each lot of the estate which is used or intended to be used as a separate tenement, in favour of the registered proprietor of the lot and as appurtenant thereto, all the easements referred to in subsection A).

(1A) The easements which shall be implied under subsection (1) are all such easements of way and drainage, for party wall purposes and for the supply of water, gas, electricity, sewerage and telephone and other services to the lot on, over or under the lands appropriated or set apart for those purposes respectively on the subdivision plan submitted to the competent authority relating to the estate, as may be necessary for the reasonable enjoyment of the lot and of any building or part of a building at any time thereon.

The appellant took out an application for the declaration. In support of the application, she made an affidavit which did not refer to any approvals for the development of the two bungalows in No 48 and No 48A.

#### **Locus standi**

At first instance, the judge dealt with the respondent’s preliminary objection that the appellant did not have *locus standi* to seek the declaration because

she had not completed the purchase of the property, and that only a registered proprietor had the right to do that.

The Court of Appeal highlighted that it is established law that a condition in a contract for the exclusive benefit of one party may be waived by that party. Clause 8 of the agreement was intended exclusively for the benefit of the appellant. If she did not obtain the declaration, she could rely on the clause and call off the purchase. However, it was within her right to waive that benefit and seek specific performance of the agreement without the declaration. Hence, when the agreement was signed, specific performance was available to the appellant, and she had thereby acquired the equitable interest and *locus standi* to seek the declaration. It may be that if she failed to obtain the declaration, she might not want to complete the purchase, but that did not detract from the fact that specific performance was available to her.

Therefore, the Court of Appeal held that, on the facts, the appellant had an equitable interest in No 48 recognised under section 4 of the Act, and she thereby had the *locus standi* to maintain the action as long as she had not renounced her equitable interest by invoking Clause 8 to call off the purchase.

#### **Demarcation of the access route**

The judge below had also dismissed the appellant's application on the ground that the requirements of section 99(1A) of the Act had not been satisfied. Section 99(1A) required the subdivision plan to show the land appropriated or set apart over which the easement was to be enjoyed.

On the facts, in the plans annexed to the certificates of title for No 48 and No 48A, it was clear that the path over which the easement of way run was marked out when the subdivision occurred. The lots covered by the certificates of title were identical to the approved subdivided plots. In such a situation, the Court of Appeal held that it was permissible and proper for a court, when asked to determine whether there is an implied easement of way following a subdivision, to refer to the plans annexed to the certificates of title to ascertain the access route that was provided during the subdivision, and read them together with the subdivision plan.

#### **Whether the conditions of section 99(1) of the Act were satisfied**

The judge below went on to consider whether the conditions of section 99(1) of the Act were satisfied. It was found that section 99 was inapplicable in this case as the subdivision plan did not relate to both the development *and* subdivision of the amalgamated lots. The judge found that although the subdivision plan showed the existing houses, it did not show that permission was granted for their actual development.

In view of the fact that one of the grounds for the decision of the judge below was that there was no evidence of any approved development, the appellant applied for the admission of new evidence.

Under section 37 of the Supreme Court of Judicature Act ("**SCJA**") and Order 57 rule 13(2) of the Rules of Court (the "**Rules**"), further evidence shall not be admitted in an appeal to the Court of Appeal except with the leave of the court, which will only be given when there are special grounds. The SCJA and the Rules do not lay down what constitutes special grounds.

Pursuant to the rule in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 (the "**rule in Ladd v Marshall**"), three conditions have to be met before additional evidence may be admitted:

- first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
- thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

The Court of Appeal held that in these very exceptional circumstances, the strict rule in *Ladd v Marshall* should not be applied rigidly. The Court of Appeal held that the difference in understanding and treatment of the subdivision plan went to the root of this part of the judge's findings. Had the point been brought up during the hearing, the appellant could easily have brought in the new evidence to seal the point. The rule in *Ladd v Marshall* would not have applied.

The Court of Appeal also raised another factor that supported a relaxation of the rule in *Ladd v Marshall* in a case such as this. Clearly, when deciding a case, a judge can take a new point which the parties have not raised. However, the judge in such a situation should give notice of the new point to the parties, especially where the point is of a substantive nature, so that they can have the opportunity to address it. In this case, the parties did not receive any notice of the new point before judgment was delivered. If the notice had been given, the point could and would have been addressed.

Hence, the appellant's motion was granted and the evidence on the development approval was admitted.

### **Conclusion**

With the admission of the additional evidence of unquestionable relevance and reliability, all the conditions of sections 99(1) and 99(1A) of the Act were fulfilled. The Court therefore allowed the appeal and made the declaration the appellant sought.

Before concluding, the court commented on the requirement in section 99(1) for subdivision approval *and* development approval. In the court's view, there does not appear to be a need to link subdivision approval with development approval. As section 99(1A) states, upon the subdivision of land, easements of way necessary for the reasonable enjoyment of the land may be implied. The court was of the view that land may be subdivided and sold as open plots for the purchasers to develop. Easements of way necessary for the reasonable enjoyment of such plots should in proper cases be implied, whether there is development approval or not.

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If you would like to discuss the impact of this case on your business, please contact:

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## General

### Tax

#### **Singapore Court of Appeal disallows tax deduction of interest expenses incurred in relation to non-income-producing share investments**

*JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484

In the case of *JD Ltd v Comptroller of Income Tax*, the Singapore Court of Appeal held that the source of dividend income must stem or originate from the particular share counter that yielded the revenue. It is wrong to treat dividend income arising from a variety of share investment counters as a single source of income. In doing so, the Court of Appeal gave due consideration to the meaning of “source” (of dividend income) and of the deductibility provision under the Singapore scheme of taxation. In addition, the court also considered whether it was appropriate for the proceedings to be heard *in camera*.

The taxpayer was a listed investment holding company that focused on making long-term share investments. During the years of assessment 1985 to 1996 (the “**relevant period**”), the taxpayer received, as its only income, dividends from its share investments. The taxpayer financed its share investments in part through overdrafts and loans from banks at varying interest rates.

Some of the companies in which the taxpayer had shareholdings did not declare dividends for the entire duration of the relevant period. Some other companies did not declare dividend income for certain years during the relevant period. The taxpayer was assessed on the basis that only interest expenses attributable to shareholdings that produced income were deductible. The Comptroller of Income Tax (the “**Comptroller**”) disallowed the deduction of interest expenses attributable to non-income-producing share investments.

The issue before the Court of Appeal was, if interest expenses are incurred to maintain a portfolio of share investments in which some share investment counters do not yield dividend income, is the entire sum of interest expenses deductible, or are only those interest expenses attributable to the income-producing share investment counters deductible?

The relevant provisions of the Income Tax Act (the “**ITA**”) were sections 10(1)(d), 14(1) and 14(1)(a).

#### **Meaning of “source” in section 14(1)**

The Court of Appeal was of the view that the taxpayer was wrong in arguing that dividend income, even if arising from a variety of share investment counters, collectively formed a single source of income under section 10(1)(d) of the ITA, against which interest expenses were deductible regardless of whether the share counters were income-producing. The court held that the heads of income enumerated under section 10(1) are simply descriptions of the types of income that section 10(1) enacts as being chargeable to tax, one of which is dividend income. The key was to look at the taxpayer’s activities and/or property as the originating cause of income or the means by which the different types of gains or rewards enumerated and classified as “income” were derived. The source of the dividend income must

necessarily stem or originate from the particular share counter that yielded the revenue.

### **The deduction formula in section 14(1)**

As to the deductibility of interest expenses, the Court of Appeal highlighted that section 14(1) does not merely refer to expenses that are incurred in the production of income, but to expenses incurred in the production of “*the income*” and in acquiring “*the income*”. Therefore, pursuant to section 14(1), the interest expenses are specific to “*the income*” and not “*any income*” chargeable with tax. There must be a direct link between the money borrowed and the income produced. In the court’s view, this link would clearly be broken if the dividend income arose from a share investment counter which purchase was not funded by the loan for which the related interest expense was sought to be deducted.

### **Whether section 10E is intended to be a declaration of the law as it has been or a change in the law**

In interpreting section 14(1), the Court of Appeal also made reference to section 10E of the ITA. In contrast to section 14(1), section 10E expressly declares that in the context of investment holding companies, where the expenditure incurred is not attributable to any income produced, such expenditure is not allowed for deduction.

The court was of the view that it is much more likely that the purpose of section 10E was merely meant to confirm the prevailing legal position as it was, rather than to lay down a change in the deduction formula for expenses incurred by investment holding companies. In other words, it was more probable that the legislative intention has always been to disallow deduction for expenses incurred by investment holding companies in respect of investments which do not produce any income, and neither the law nor Parliament’s intention changed with the insertion of section 10E. Section 10E was enacted to lay down this rule for the avoidance of doubt.

### **In camera proceedings**

The court found it opportune to set down once and for all the law relating to the hearing of tax appeals before the Court of Appeal *in camera*.

The provision in the ITA that stipulates when proceedings are to be held *in camera* is section 83, which reads as follows:

#### Proceedings before Board and High Court

**83.—(1)** Subject to subsections (2) and (3), all proceedings before the Board and in appeals to, or in cases stated for the opinion of, the High Court under the provisions of this Part, and in *appeals from decisions of the High Court under section 81(5)* shall be heard *in camera*.

Section 83(1), read with section 81(5), provides that appeals before the Court of Appeal will only be held *in camera* if the High Court had heard the case at first instance, that is, if the High Court had heard the case in the exercise of its *original* civil jurisdiction. The Act remains silent as to the case where the taxpayer appeals against the decision of the High Court exercising its *appellate* jurisdiction, as is the situation in the present appeal where the case was first heard by the Board of Review.

The Court of Appeal was of the view that the special nature of tax cases and the spirit of section 83(1) ought to be taken into consideration in deciding

whether the hearing of all tax appeals before the Court of Appeal should be held *in camera*. It has generally been observed that income tax cases should be heard *in camera* so as not to expose the appellant taxpayer's taxation and financial affairs to the peril of public scrutiny. Indeed, such information may be particularly sensitive when it relates to a listed company, such as the taxpayer in the present appeal. This would consequently warrant the preservation of secrecy. It would defeat the purpose of compulsorily requiring proceedings before the Board and the High Court to be held *in camera* if the same rule is not applied to all proceedings before the Court of Appeal regardless of where the case originated. The Court of Appeal held that there was little justification for protecting the taxpayer's identity or confidential tax matters only in appeals before the Board or the High Court, but not before the Court of Appeal.

Further, the court noted that the Court of Appeal always has the discretion to hear an appeal *in camera* if the court is satisfied that it is "expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason to do so": section 8(2) of the Supreme Court of Judicature Act, which applies to both the High Court and the Court of Appeal. On the facts of this case, the Court of Appeal thought it is necessary to hold the hearing *in camera* so as to protect the secrecy of the appellant's taxation affairs.

### **The persuasiveness of foreign authorities**

The Court of Appeal reminded practitioners that as tax law is essentially a creature of statute, decisions from foreign jurisdictions should be treated with the appropriate degree of caution, especially where the wording of the foreign tax legislation is not identical with or not *in pari materia* with the local equivalent. It is desirable, therefore, in interpreting tax legislation, to rely on foreign authorities only if the corresponding tax statutes are identical or very similar to local legislation, and if the schemes of deduction and taxation systems are alike. Despite the fact that there may be tax principles common across jurisdictions, each country's taxation system is different and one cannot blindly pick foreign precedents conveniently just to suit one's purposes. Ultimately, one must return to the wording of the relevant tax provision to gauge whether a particular tax treatment is legally justifiable.

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## News

### **Acquisition of Asia General Holdings Limited and The Asia Life Assurance Society Limited**

Tokio Marine & Nichido Fire Insurance Co. Ltd (“**TMNF**”) has agreed to acquire Asia General Holdings Limited (“**AGH**”) and The Asia Life Assurance Society Limited (“**ALS**”), AGH’s Singapore life insurance subsidiary. The acquisition will be carried out in three stages: the acquisition of 14.74 per cent. of AGH, an option to acquire an additional 39 per cent. of AGH, followed by a mandatory offer for AGH and ALS.

Advising TMNF are Allen & Gledhill Partners Prawiro Widjaja, Tan Jessie and Margaret Soh, Senior Associates Elaine Ho, Grace Teo and Desmond Ho and Associate Shawn Tan.

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### **Sales of shares in NS Electronics Bangkok (1993) Ltd**

UBS Capital B.V. (“**UBS Capital**”) and United Test and Assembly Center Ltd (“**UTAC**”) have entered into a share purchase agreement whereby UBS Capital will sell its 68.45 per cent. of the total issued shares of NS Electronics Bangkok (1993) Ltd to UTAC for approximately US\$119.79 million.

Advising UBS Capital are Allen & Gledhill Partner Lee Kim Shin and Senior Associate Silke Martjiono.

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### **Upcoming tax seminars by Allen & Gledhill Tax Practice Group**

Allen & Gledhill will be holding a series of tax seminars in the next few months. Members of Allen & Gledhill’s Tax Practice Group will be sharing their knowledge and experience on topics relating to issues such as recent tax cases, effective tax management in financial services and products, tax considerations when investing in intellectual property and the tax impact of the recent amendments to the Companies Act.

For more details on the seminars, please [click here](#).

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