

Tax alert

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Section 10L and the Situs of Movable and Immovable Property

Introduction

Under the new section 10L(1) of the Income Tax Act 1947, the gains from the sale or disposal of “any movable and immovable property situated outside Singapore at the time of sale or disposal or any right of interest thereof” may be taxable under section 10(1)(g) of the Act, where those gains which occur on or after 1 January 2024 are received in Singapore¹. The shorthand used in section 10L to refer to the phrase “any movable and immovable property situated outside Singapore”, is “foreign asset”. It is to be noted that the shorthand, “foreign asset”, even though it appears in the provisions of section 10L itself, does not define the scope of section 10L, and that not all assets are “property” that would fall under section 10L. Hence, in considering section 10L, where there is a disposal gain, we have to ask ourselves whether the gains are from the sale or disposal of any movable and immovable property. We will discuss the notion of “property” in the course of this tax alert.

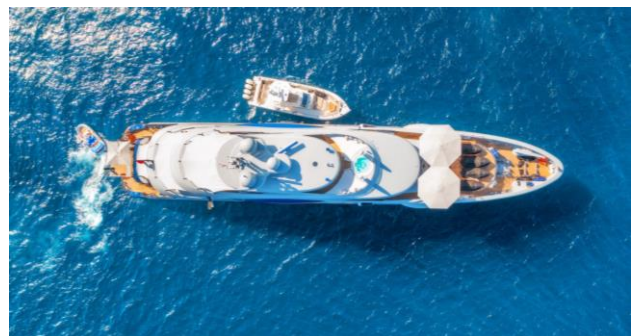
Only “movable and immovable property situated *outside* Singapore” would fall within the scope of section 10L. To state the obvious, where movable and immovable property are situated *inside* Singapore, the capital gains from their sale or disposal would not come within the scope of section 10L. The identification of the situation or *situs* of the movable and immovable property is therefore important in determining whether the disposal gains may fall within the scope of section 10L.

Situs of movable and immovable property

In this tax alert, we shall discuss the *situs* of the various forms of movable and immovable property as set out in the 12 paragraphs from (a) to (l) of section 10L(15). Where the property has a physical existence (i.e. immovable property and tangible

movable property, which is often referred to as *chose in possession* under the common law²), its *situs* may be easily discerned. Their *situs* or situation is where the immovable property or tangible movable property is “physically located”: see paragraphs (a) and (b) of section 10L(15), respectively.

However, in respect of “ship or aircraft” (which is a specific kind of tangible movable property³), which may be constantly on the move, its physical situation at the time of sale or disposal may be more easily “manipulated”. For example, the ship or aircraft may be “moved” to within the territory of Singapore at the time of sale or disposal, and their *situs* may then be said to be in Singapore such that section 10L does not apply. In this regard, in the case of a “ship or aircraft”, section 10L(15)(c) provides that the *situs* or situation of the “ship or aircraft” is “where the owner, or the person entitled to the right or interest, is resident”. Under the maxim, *generalia specialibus non derogant* (i.e. the specific provisions override the general), as section 10L(15)(c) specifically provides for the *situs* of ship or aircraft, one will not be able to argue that section 10L(15)(b), which provides for the *situs* of the general category of “tangible movable property”, is to be applicable in respect to “ship or aircraft”.



¹ See earlier [KPMG Tax Alert on “Taxing Gains from the Sale of Foreign Assets”, Issue 12 in August 2023](#).

² In *AA v Persons Unknown who demanded bitcoin on 10th and 11th October 2019* [2019] EWHC 3556, Bryan J said at [55]: “English law traditionally views property as being only of two kinds, *choses in possession* and *choses in action*”, which was cited with approval in *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [60]. *Chose in possession* is anything tangible that can be possessed and *chose in action* is any right that can be legally enforced.

³ A “ship or aircraft” is obviously tangible movable property. The owner of a “ship or aircraft” who would have proprietary rights against the “ship or aircraft”, may sell or mortgage the property and may exclude other persons from access to the property.

Paragraphs (d) to (k) of section 10L(15) deal with the *situs* of various specific forms of intangible movable property, i.e. debts, shares, equity interests or securities, goodwill and intellectual property right, which are commonly referred to as *choses in action*⁴ under the common law. The final paragraph (l) of section 10L(15), in turn, deals with any other intangible movable property that does not fall under any of the preceding paragraphs.

Intangible movable property, by its very nature, has no physical existence, occupies no space and can, therefore, have no actual location⁵. Nevertheless, the statutory provisions attribute a *situs* for the various kinds of intangible movable property, which provide for certainty in the operation of section 10L. The statutory provisions would preclude arguments which would otherwise arise if the determination of the *situs* is left to the common law. The common law *situs* rules on intangible movable property have sometimes been criticised as arbitrary and controversial, and Michael Ng in his article “Choice of law for property issues regarding Bitcoin under English law”⁶ said, “Once we move beyond land and tangible movable property, the reality is that any *situs* of each type of intangible property is notional, and the label does little more than to obscure the true connection factor”. In the following paragraphs, we shall discuss the *situs* of various forms of intangible movable property as provided under section 10L(15).

Debts

A debt is a *chose in action*, and in the Privy Council case of *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] STC 728, 732 (on appeal from Hong Kong), Lord Oliver of Aylmerton said: “It is clearly established that a simple contract debt is locally situated where the debtor resides, the reason being that that is, *prima*

facie, the place where he can be sued.”

Section 10L(15)(e), which provides that “a judgment debt, or any right or interest in a judgment debt, is situated where the judgment is recorded”, codifies the common law in respect of the *situs* for such debts: *Attorney-General v Bouwens* (1834) 4 M&W 171, 191. However, section 10L(15)(d), which provides that “a secured or unsecured debt (other than a judgment debt or securities⁷), or any right or interest in such secured or unsecured debt, is situated where the *creditor is resident*”, does not seem to be in alignment with the *situs* under the common law. Of course, the statutory provisions in section 10L(15)(d) will then prevail in the case of secured or unsecured debt (other than a judgement debt or securities).

Shares, equity interests or securities

Under the common law, the basic rule is that a share is situated where it can be effectively dealt with as between the owner of the share and the company. Hence, where only registration on the register of members would constitute a person as a member, the location of the share register is the *situs* of the registered shares: *Brassard v Smith* [1925] AC 371 and *Macmillan Inc v Bishopsgate Investment Trust plc (No.3)* [1996] 1 WLR 387. This common law principle has been codified in section 10L(15)(i), which reads as follows:

Subject to paragraph (f) (and despite paragraphs (g) and (h)), any registered shares, equity interests or securities, or any right or interest in any registered shares, equity interests or securities, are situated where the shares, equity interests or securities are registered or, if registered in more than one register, where the principal register is situated.



⁴ Property is generally classified as real property (e.g. land and building) or personal property (e.g. cars, jewellery, rights to sue under a contract such as for a debt owed or for insurance proceeds under a contract of insurance). Personal property is commonly further sub-categorised as chattels or choses-in-possession (e.g. tangible property such as cars and jewellery) and choses-in-action (e.g. intangible property such as debts and rights to sue under a contract). See: Singapore Law Watch website, under the Section of Commercial Law, Ch 11 < <https://www.singaporelawwatch.sg/About-Singapore-Law/Commercial-Law/ch-11-the-law-of-credit-and-security> > (accessed on 18 February 2024)

⁵ ‘Situs of Intangible Property in Conflict of Laws’, (1956) 30 *St John’s Law Review* 224.

⁶ (2019) 15(2) *Journal of Private International Law* 315 at 326 and cited in Tan Shao Wei, ‘Transnational Transactions on Cryptoasset Exchanges: A Conflict of Laws Perspective’, [2022] *SJLS* 384 at 400.

⁷ The word “securities” is defined in section 10L(16) to mean “debentures and debt securities”.

It is envisaged that in practice, section 10L(15)(i) will be the most frequently applicable provision as against paragraphs (g) and (h) of section 10L(15), as shares are likely to be registered in the share register of the company or the register of equity interests in the case of a non-company. Where the shares or equity interests are not registered in the register of shares (e.g. in the case of bearer shares) or where the equity interests are *not* registered in the register of equity interests of the non-company, then paragraphs (g) and (h) provide that the shares or securities are situated where the company is incorporated or where the non-company principally carries out its operations.

Goodwill

Section 10L(15)(j), which provides that “goodwill relating to a trade, business or profession is situated where the trade, business or profession is principally carried on”, codifies the *situs* of goodwill under the common law: *Inland Revenue Commissioners v Muller’s Margarine* [1901] AC 217.

Intellectual property right

Section 10L(15)(k) provides that “any intellectual property right, or any licence or other right in respect of any intellectual property right, is situated where the owner of the intellectual property right, licence or right is resident.” Copyrights, patents and trademarks are clearly the well-recognised forms of intellectual property right. Even where a right may not be intellectual property right, it may still fall within the category of intangible movable property under section 10L(15)(l).



Intangible movable property

Intangible movable property that does not fall within any of the paragraphs (d) to (k) of section 10L may yet fall under the sweep-up provisions of section 10L(15)(l), which provides that “any intangible movable property, or any right or interest in any intangible movable property, that is *not the subject of any paragraph in this subsection*, is situated where the ownership rights in respect of the property, right or interest would be primarily enforceable”.

As mentioned earlier, not all assets are “property”. In the House of Lords case of *National Provincial Bank v Ainsworth* [1965] AC 1175, Lord Wilberforce laid out four criteria for a right or an interest to be admitted into the category of “property”. The *Ainsworth* criteria have been cited with approval in *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2023] 3 SLR 1191 at [69] to [72]. Under those criteria, (a) the asset must be definable in that the asset must be capable of being isolated from other assets whether of the same type or of other types and thereby identified; (b) the asset must have an owner being capable of being recognised as such by third parties; (c) the asset must be capable of assumption by third parties, which in turn involves two aspects: that third parties must respect the rights of the owner in that asset, and that the asset must be potentially desirable; and (d) the asset must have some degree of permanence or stability. Proprietary rights, which include ownership, possession and various security interest, will define the rights that a person may have in dealing with the thing.

Information is not unequivocally classified as property at law. In *Oxford v Moss* (1978) 68 CrAppR 183, it was held that information is not property and cannot be stolen. It may be argued that “know-how” is not property⁸. This proposition may also be deduced from the deemed source rules in section 12(7) where “know-how” payments fall specifically under paragraph (b), and where there is separate paragraph (a) for the payment for the use or right to use any movable property. One may then argue that if “know-how” is “property” falling under paragraph (a), there would be no necessity to have paragraph (b) providing for “know-how” payments. Where “know-how” is not “property” even though it may be an asset, the disposal gains will then not fall within the scope of section 10L.

⁸ See *Herbert Morris Limited v Saxelby* [1916] 1 AC 688 at 703, cited in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [89], although trade secret may be “property”.



What are then some of the kinds of “intangible movable property” that may fall within the scope of section 10L? Cryptoassets would be intangible movable property⁹. In the recent case of *Cheong Jun Yoong v Three Arrows Capital Ltd and others* [2024] SGHC 21, Chua Lee Ming J said:

“[58] It cannot be seriously disputed that cryptoassets constitute property, the proprietary rights to which may be enforced in court: *CLM v CLN and others* [2022] 5 SLR 273 at [46]; *Bybit* at [33] and [36].

[59] A cryptoasset has no physical identity and is not associated with any physical object; it exists as a record in a network of computers associated with it: *ByBit* at [31]; *CLM* at [10]. Hence, its location cannot be determined by its physical presence.”

In the *Three Arrows Capital* case, it was held that the *situs* of the cryptoasset is the residence of the person who controls the private key to the cryptoasset. Nevertheless, Chua Lee Ming J acknowledged that different judges may have arrived at different conclusions on the *situs*, as cryptoassets are a new type of property. For the purposes of the scope of section 10L, the statute has defined the *situs* as that where the ownership rights in respect of the cryptoasset would be

primarily enforceable.

Another kind of intangible movable property would be carbon credits. In the English case of *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 516, it was held that a carbon emission unit was a form of intangible property. The above examples are not exhaustive of the kinds of intangible movable property that may fall within the scope of section 10L. As new technologies and products emerge, there may yet be new candidates that may constitute intangible movable property¹⁰.

Conclusion

The interpretation and application of section 10L involve an overall understanding of the concept of *situs*. Where the *situs* of the property in question is in Singapore, the sale of the property should not be taxable under section 10(1)(g) read with section 10L of the Act. As can be seen, the introduction of the new section 10L, has added a new layer of complexity to Singapore’s income tax system. An appreciation of the *situs* rules is hence critical in navigating the multifaceted world of income tax.

How we can help

As your committed tax advisor, we welcome any opportunity to discuss the relevance of the above matters to your business and any transactions which your business may be contemplating.

⁹ In *Quoine Pty Ltd v B2C2 Ltd* [2020] 2 SLR 20 at [144], the Court of Appeal observed that “there may be much to commend to the view that cryptocurrencies should be capable of assimilation into the general concepts of property”.

¹⁰ In *ByBit Fintech Limited v Ho Kai Xin and others* [2023] 5 SLR 1748 at [35], Philip Jeyaretnam J said: “Holdsworth’s historical survey demonstrates the diversity of incorporeal property that has been classed as things in action. This diversity suggests that the category of things in action is broad, flexible, and not closed.”

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