Tax Excellence Decoded

Residence and Source

Grasping ambiguous taxation concepts when doing business in Singapore
20 August 2015, Thursday

Accredited Tax Advisor (Income Tax) Matthew Marcarian, Principal, CST Tax Advisors, provided clarity on the foundation concepts of residence and source in Singapore.

Ultimately, the residency of an individual or a company and the source of income are determined by the actual circumstances of the case.

It is important for individuals, foreign and local companies to be aware of the tax rules and their implications in Singapore which may be different from their home countries, and where possible, plan ahead to ensure that the facts of their case support their positions on residency and source.

Tax residency determines, among other things, the tax rates and tax treatments applicable to an individual or company. For example, a resident and a non-resident individual are subject to different tax rates in Singapore. Importantly, Singapore's extensive tax treaty network only offers treaty benefits to Singapore tax resident individuals and companies.

"Residence and source are foundation concepts in Singapore. If not handled appropriately, they may lead to problems not only in Singapore but also in the countries from which the foreign employer or entrepreneur hails," highlighted Accredited Tax Advisor (Income Tax) Matthew Marcarian, Principal at CST Tax Advisors, at a recent *Tax Excellence Decoded* session organised by the Singapore Institute of Accredited Tax Professionals (SIATP), where he dissected the relevant sections in the Singapore Income Tax Act (ITA) and discussed key principles established in case laws.

Residency of an Individual

A resident individual in Singapore is defined in Section 2 of ITA as *"…* a person who, in the year preceding the year of assessment, *resides in Singapore* except for such temporary absences therefrom as may be reasonable and not inconsistent with a claim by such person to be resident in Singapore, *and includes a person who is physically present or who exercises an employment* (other than as a director of a company) *in Singapore for 183 days or more* during the year preceding the year of assessment."

In reality, whether a person is physically present or exercises an employment in Singapore for 183 days or more is easily determined. However, whether a person resides in Singapore may be subject to varying interpretation. How then should one determine whether an individual has resided in Singapore? The following two English cases provide guidance on the word "reside".

In *Levene v Inland Revenue Commissioners [1928] AC 217*, it was established that the word "reside" should take its ordinary meaning for the purpose of interpreting the Income Tax Act and Schedules. Separately, it was held in *Inland Revenue Commissioners v Lysaght [1928] AC 234* that the question of whether a person is "resident" was not a question of law and hence the Commissioners' finding of facts should not be disturbed.

Taking reference from the English cases, it would appear that the word "reside" should take on an ordinary meaning[1], and that the finding of whether an individual resides in Singapore should be performed through a review of the underlying circumstances. Practically, this may depend on factors such as the amount of time the individual spends in Singapore, and the types of connections that the individual has in Singapore (in terms of family, financial, business, employment or social connections). Based on the facts of the case, an individual's tax residency may be determined.

Residency of a Company

Section 2 of ITA defines a resident company in Singapore to be "… a company or body of persons the control and management of whose business is exercised in Singapore".

The location of the company's Board of Directors meetings, during which strategic decisions are made, is often seen as a key factor in determining where the control and management is exercised. Control and management is viewed by the Inland Revenue Authority of Singapore (IRAS) as the function of strategic decision-making, such as those on company policy and strategy. The location where the control and management of a company is exercised is a question of fact.

As the world shifts towards substance over form, it is increasingly important for companies to ensure that strategic decisions are indeed made at the Board of Directors meetings (and not made prior to the Board of Directors meetings only to be "rubber-stamped" at the meetings).

Foreign-owned companies

Foreign-owned investment holding companies with purely passive sources of income or receiving only foreign-sourced income are generally regarded by IRAS as non-residents (on the basis that such companies usually act on the instructions of its foreign shareholders).

As residency is dependent on the facts of the case, it would be helpful for a foreign-owned company looking to set up operations in Singapore (and to rely on Singapore's treaty network) to plan ahead in ensuring that the fact pattern will support its claim to be a Singapore resident.

The facts of the case must be able to convince the IRAS that the company's control and management is in Singapore and the company has valid reasons for setting up an office in Singapore. If there is convincing evidence, among other things, that the Singapore office possesses real economic substance, has employees based in Singapore, and makes strategic decisions in Singapore, it is possible for IRAS to regard the foreign-owned company to be a resident in Singapore.

Tie-breaker Tests On Residency

It should be noted that certain Singapore tax treaties provide for tie-breaker tests on residency of individuals or companies where the facts of the case do not point to a unanimous location.

The tie-breaker rule on corporate residency is typically the place of effective management (where the key management and commercial decisions that are necessary for the conduct of the company's business as a whole are made).

[1] Based on Levene v Inland Revenue Commissioners [1928] AC 217, the word "reside" is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place".

Common tie-breaker rules on individual residency include the availability of permanent home, personal and economic relations, habitual abode and nationality of the individual.

Source of Income

The source of income is crucial in determining the taxability of the income in Singapore.

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

It is clear from Section 10(1) that Singapore has a quasi-territorial tax system where there are two basis of tax. Under the territorial basis, income is liable to Singapore tax if the source of the income is in Singapore. Under the remittance basis, income having a source outside Singapore is liable to Singapore tax only if it is received in Singapore. How then should one interpret this section to determine the source of income?

In *Comptroller of Income Tax v HY [2006] 2 SLR 405; [2006] SGCA 7*, CJ Yong Pung How mentioned that *"... in deciding whether income was derived from or accruing in Singapore, one had to look to the originating source of those gains or profits. This was essentially a question of fact to be determined based on a scrutiny of the circumstances in each individual case... The broad guiding principle was to focus on what the taxpayer had done which earned him the gains or profits in question, and then to identify the location where those activities that he had engaged in or the work he had done took place".*

Going by these principles established by CJ Yong, the determination of the source of income should be based on the facts of the case. While conflicting facts are bound to complicate the determination of the source of income, one should focus on what the taxpayer had done to earn the income and identify the location where these activities took place.

Deeming Provisions

It should be noted that certain deeming provisions exist in the ITA which may subject an income to tax in Singapore even though it does not have a common law source in Singapore or is not received in Singapore. For example, Section 12(4) of ITA provides that "the gains or profits from any employment exercised in Singapore shall be deemed to be derived from Singapore whether the gains or profits from such employment are received in Singapore or not".

Based on Section 12(4), the employment income earned by the individual will be deemed to be derived from Singapore (and hence subject to tax in Singapore) notwithstanding that such income may not have been received in Singapore.

Use of Tax Treaties for Reliefs

In situations where the source of income is unclear, resulting in both IRAS and the other tax authority laying claim on the same income, Singapore tax residents could turn to the country's extensive tax treaty network for possible reliefs (assuming there is a tax treaty between Singapore and the other country).

Ultimately, the residency of an individual or a company and the source of income are determined by the actual circumstances of the case. It is important for individuals, foreign and local companies to be aware of the tax rules and their implications in Singapore which may be different from their home countries, and where possible, plan ahead to ensure that the facts of their case support their positions on residency and source. If in doubt, always ask a friendly accredited tax professional.

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About SIATP's Technical Discussions

SIATP's technical discussions have continually been very well received by accredited tax professionals. Unlike the run-of-mill Continuing Professional Educational courses which typically cover tax fundamentals, SIATP's interactive technical discussions are designed to cover tax issues that do not have clear-cut solutions or situations that may have different interpretations. Over time, these discussions contribute in boosting the overall tax standards in Singapore.

About Mr Matthew Marcarian

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Matthew, a Principal at CST Tax Advisors, provides income tax advice to global expatriates, high net worth families and international small to medium enterprises across Asia, Australia, the United Kingdom, United States of America and Europe. A Chartered Tax Advisor and Chartered Accountant with over 20 years of experience, Matthew is qualified in both Singapore and Australia.

Matthew is a member of the Taxation Institute of Australia and holds a Bachelor of Commerce from the Macquarie University and a Master of Taxation from the University of New South Wales (UNSW). At UNSW, Matthew was awarded the Allens Arthur Robertson Prize for the Best Performance by a Graduating Student. Matthew has had works published in leading taxation industry journals including Taxation in Australia and the Tax Specialist.

This technical event commentary is written by SIATP's Tax Manager, Felix Wong. Felix has over eight years of corporate and international tax experience working in both international accounting firm and multinational corporation. He now leads various initiatives of the national tax institute to boost the standards of tax practice, technical competency and capability of tax professionals to enhance Singapore's position as a centre of tax excellence.