Comptroller of Income Tax *v* ACC
[2010] SGCA 13

Case Number	: Civil Appeal No 96 of 2009
Decision Date	: 24 March 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Jimmy Oei and Usha Chandradas (Inland Revenue Authority of Singapore) for the appellant; Leung Yew Kwong and Tan Shao Tong (WongPartnership LLP) for the respondent.
Parties	: Comptroller of Income Tax — ACC

Administrative Law

Revenue Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 1 SLR 273.]

24 March 2010

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This was an appeal by the Comptroller of Income Tax ("the Comptroller") against the decision of the High Court judge ("the Judge") granting leave to the respondent under O 53 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") to apply for a quashing order against the Comptroller's letter dated 6 February 2009 ("the 6 February 2009 Letter") informing the respondent that it was liable to account for withholding tax on certain transactions (see *ACC v CIT* [2010] 1 SLR 273). After hearing the arguments of both parties, we dismissed the Comptroller's appeal and now give the reasons for our decision.

The facts

2 The respondent is a company incorporated in Singapore, with subsidiaries incorporated in the Cayman Islands. The respondent's subsidiaries are in the business of leasing certain machinery. Each subsidiary is a special purpose company that owns only one machine. To finance the purchase of the machines, a number of the subsidiaries entered into loan agreements with offshore banks at a floating interest rate. Some of these subsidiaries later leased out their machines at a fixed rental rate (the subsidiaries which did so will hereafter be referred to collectively as "the SPCs" and individually as an "SPC"). As a result, the SPCs were exposed to interest rate fluctuations since the rental income from their machines would not vary with changes in the interest rate on the bank loans.

3 To minimise the risk of such exposure, the SPCs arranged interest swaps with onshore banks. Under these interest swap arrangements, an SPC would make periodic fixed rate payments to the bank concerned in exchange for the bank making floating rate payments to the SPC. The risk of fluctuating interest rates would thus be passed from the SPC to the onshore bank.

4 For reasons of commercial efficiency, the SPCs did not enter into the interest swap agreements with the onshore banks directly. Instead, the respondent acted as a middleman for all the SPCs by entering into the interest swap agreements with the onshore banks. The respondent then entered into individual swap agreements with each of the SPCs which mirrored the swap agreements entered into between the respondent and the onshore banks. The net effect of this arrangement resulted in the SPCs and the onshore banks making payments to each other as described at [3] above. The actual floating rate payments to the SPCs were made by the respondent.

5 Under s 12(6) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the ITA"):

> There shall be deemed to be derived from Singapore —
>
> (*a*) any interest, commission, fee or any other payment in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness which is —
>
> (i) borne, directly or indirectly, by a person resident in Singapore or a permanent establishment in Singapore except in respect of any business carried on outside Singapore through a permanent establishment outside Singapore or any immovable property situated outside Singapore; or
>
> (ii) deductible against any income accruing in or derived from Singapore; or
>
> (*b*) any income derived from loans where the funds provided by such loans are brought into or used in Singapore.

The significance of s 12(6) of the ITA is that interest payments falling within this provision are deemed to be income chargeable to tax under s 10(1)(*d*). Where such interest payments are to be made to a person who is not resident in Singapore, the paying party is required by s 45 of the ITA to withhold tax from the sums payable, and the amount thus withheld is treated as a debt due from the paying party to the Government.

6 The respondent did not withhold tax from the floating rate payments which it made to the SPCs. It subsequently wrote to the Comptroller to confirm that withholding tax was inapplicable to these payments. On 6 February 2009, the Comptroller replied (via the 6 February 2009 Letter) as follows: [note: 1]

> 2 … we are of the view that the payments made to [the SPCs] fall within the ambit of section 12(6). The scope of section 12(6) covers "any … payment in connection with any loan or indebtedness or with any arrangement, management, guarantee, or service relating to any loan or indebtedness …". The scope of payments covered within the ambit of section 12(6) of the ITA is therefore, in our view, broad and will bring the interest rate swap payments made by [the respondent] to [the SPCs] within its scope …
>
> 3 … As the swap payments fall within the ambit of section 12(6) of the ITA, withholding tax requirements under section 45 of the ITA apply. As [the respondent] has not complied with the relevant withholding tax requirements with respect to the payments made to [the SPCs] for the period October 2006 to March 2008, [the respondent] is required to account for the amount of tax that should have been withheld … [The respondent] is also liable to pay any penalty that will be imposed arising from non-compliance with section 45 of the ITA.

> 4 *We have reached determination on your request after due consideration and consultation of the issue raised based on the representations and information furnished. … Our Enforcement Division will be contacting you separately on the recovery of the tax and penalty due from [the respondent]*.
>
> [underlining in original; emphasis added in italics]

For ease of reference, we will use the expression "the material SPC payments" to denote the floating rate payments mentioned in para 3 of the 6 February 2009 Letter (*ie*, the floating rate payments made by the respondent to the SPCs between October 2006 and March 2008).

7 The respondent did not agree with the Comptroller's interpretation of s 12(6) of the ITA. Nevertheless, the respondent seemed to treat the 6 February 2009 Letter as containing an administrative decision or a determination that, if not quashed by a court order, would result in its having to pay withholding tax and any corresponding penalties under s 45 of the ITA. In the course of hearing this appeal, we were informed that the respondent had already paid, under protest, the amount of withholding tax (but not the penalties) determined by the Comptroller.

8 The respondent subsequently obtained leave from the High Court under O 53 r 1 of the ROC to apply for a quashing order against the Comptroller's determination in the 6 February 2009 Letter. In his grounds of decision, the Judge noted that the Comptroller's determination was a matter which was susceptible to judicial review because, in making such a determination, the Comptroller had exercised his power to assess and collect tax under s 4(3) of the ITA. The Judge also rejected the Comptroller's argument that the respondent had no *locus standi* to seek a quashing order. He held that, since the Comptroller had directed the respondent to account for the amount of withholding tax which (in the Comptroller's view) should have been deducted from the material SPC payments, on pain of such amount being recovered as a debt, the respondent had *locus standi* to invoke the jurisdiction of the court. Having found that the respondent had an arguable case in challenging the Comptroller's interpretation of s 12(6) of the ITA, the Judge accordingly granted the respondent leave to apply for a quashing order.

9 Dissatisfied with the decision of the Judge, the Comptroller appealed to this court on the ground that the respondent had no *locus standi* to seek a quashing order. The Comptroller also introduced a new argument on appeal – namely, that it was in any event an abuse of process for the respondent to take out judicial review proceedings under O 53 of the ROC. Before we address the parties' submissions, we should briefly note that both parties, throughout these proceedings, treated the Comptroller's determination in the 6 February 2009 Letter as a decision capable of being quashed. Indeed, the Comptroller did not, in this appeal, challenge the Judge's ruling that that determination was susceptible to judicial review. We will comment on this matter further below (at [15]–[33]).

The Comptroller's grounds of appeal

The locus standi of the respondent

10 The Comptroller argued that the respondent did not have *locus standi* to apply for a quashing order because the tax liabilities in question were the SPCs' and not the respondent's. The respondent, it was contended, was only a collecting agent which owed a debt to the Government due to non-compliance with an obligation imposed under the ITA, and should not be given the same right as if it were the taxpayer. This argument had earlier been made before the Judge, who (as mentioned at [8] above) rejected it on the ground that, since the respondent was being made liable for the amount of withholding tax which (in the Comptroller's view) should have been deducted from the material SPC

payments, it had *locus standi* to object to the Comptroller's determination.

11 Before us, the Comptroller referred to *Singapore Airlines Ltd and another v Inland Revenue Authority of Singapore and another* [1999] 2 SLR(R) 1097 ("*Singapore Airlines*") in support of its argument that the respondent lacked *locus standi* to apply for a quashing order. In *Singapore Airlines*, G P Selvam J said at [23] apropos O 15 r 16 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) (the then equivalent of O 15 r 16 of the ROC):

> That provision does not mean that declaratory orders can be sought by all and sundry irrespective of whether there was a justiciable issue between the parties. It [*ie*, a declaratory order] can be sought only by persons who have a right to enforce against a defendant or by persons who say that [they themselves are] not liable. It is not the function or purpose of the courts to render legal opinion to indirect parties.

This statement was made in the context of a case where the first plaintiff sought a declaration that the proposed transfer of monies from a provident fund for its employees ("the Fund") to the Central Provident Fund would not amount to a premature withdrawal of sums in the Fund for the purposes of s 13(1)(*ja*) of the Income Tax Act (Cap 134, 1996 Rev Ed) (which is *in pari materia* with s 13(1)(*ja*) of the ITA), and therefore would not cause the first plaintiff's employees to lose their right to tax exemption *vis-à-vis* the sums transferred. The first defendant disagreed with this view. At the commencement of the hearing, Selvam J queried the *locus standi* of the first plaintiff to seek the declaration in question when it had no interest in the Fund and would not be liable to pay tax if the proposed transfer did indeed amount to a premature withdrawal of sums in the Fund. The judge eventually dismissed the application on that ground.

12 In our view, *Singapore Airlines* is clearly distinguishable from the present case. Here, the Comptroller had determined that:

> (a) the material SPC payments fell within the ambit of s 12(6) of the ITA and were thus subject to withholding tax under s 45; and
>
> (b) the respondent was *personally liable* under s 45(3) to pay to the Government, as a debt, the amount of withholding tax which it had failed to deduct from the material SPC payments, along with any prescribed penalties.

Indeed, as we mentioned earlier (at [7] above), the respondent paid, under protest, the debt claimed by the Comptroller with a view to challenging his determination through legal proceedings. In these circumstances, if the respondent did not have *locus standi* to commence proceedings for a review of the Comptroller's determination, we were unable to see who else would have *locus standi* to do so.

Abuse of process

13 The Comptroller also submitted that the respondent's application for leave to apply for a quashing order was an abuse of process as the respondent should have first applied for either ministerial exemption from tax or ministerial remission of tax under, respectively, s 13(4) and s 92(2) of the ITA. This submission was made on the basis that there was no question that the respondent was liable to pay the amount assessed by the Comptroller pursuant to his determination as set out in the 6 February 2009 Letter. We rejected this argument. While a person seeking judicial review should normally exhaust all alternative remedies before invoking the jurisdiction of the court (see *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [25]), we did not consider ministerial exemption and ministerial remission under the ITA to be alternative remedies for this

purpose. Section 13(4) of the ITA allows the Minister to exempt certain payments which constitute income under either s 12(6) or s 12(7) from tax if the payments are "made for any purpose which will promote or enhance the economic or technological development of Singapore" (see s 13(4)). The Minister's power under s 13(4) is a discretionary power, and, if a decision is made against a taxpayer pursuant to this power, such decision is not subject to challenge on its merits by way of judicial review. In other words, the Minister's decision to exempt payments which constitute income under either s 12(6) or s 12(7) from tax is founded on policy considerations, and such ministerial exemption can hardly be considered as a remedy for an aggrieved person who disputes his liability to pay tax in the first place.

14 Similarly, the Minister's power under s 92(2) of the ITA is a discretionary power. This provision confers discretion on the Minister to remit the tax payable by any person "if he is satisfied that it is just and equitable to do so". It likewise rests on the premise that tax is payable in the first place, which is precisely what the respondent denies and is trying to challenge in these proceedings. Section 92(2) does not offer a remedy to an aggrieved taxpayer as it does not operate as an appeal against the Comptroller's interpretation of the provisions in the ITA. Accordingly, since there were no alternative remedies for the respondent to exhaust, it was not an abuse of process for the respondent to bring judicial review proceedings in the present case.

The real question to be decided: Whether the Comptroller's determination in the 6 February 2009 Letter could be quashed

15 Although we ruled against the Comptroller in respect of both of his grounds of appeal (*viz*, lack of *locus standi* and abuse of process (see [9] above)), it did not follow that the present appeal should therefore be dismissed. We also had to consider what, in our view, was the real issue in this appeal – namely, whether the respondent's application for leave to apply for a quashing order had no basis as there was nothing for the court to quash. This argument was not raised by the Comptroller, but, as just mentioned, we regarded it as the crux of the present appeal.

16 It is trite law that a quashing order will not lie unless a public authority has done something that a court can quash or, in other words, deprive of legal effect (see *De Smith's Judicial Review* (Lord Woolf, Jeffrey Jowell & Andrew Le Sueur eds) (Sweet & Maxwell, 6th Ed, 2007) ("*De Smith*") at paras 18-026 and 18-027). In *Regina v Statutory Visitors to St Lawrence's Hospital, Caterham; Ex parte Pritchard* [1953] 1 WLR 1158, for instance, Parker J said (at 1166) that a quashing order "[could] only [lie] to bring up to [the] court and quash something which [was] a determination or a decision". In that case, the court refused to quash a report as to the need for the continued detention of a mental defective because the power to order continued detention rested in another body, and not the body which prepared the report; as such, the report did not have any legal force of its own. Similarly, in *R (on the application of the Association of British Travel Agents Ltd) v Civil Aviation Authority* [2007] 2 Lloyd's Rep 249, the English Court of Appeal saw no need to quash a guidance note which contained erroneous statements of law because it did not affect existing or future rights. Instead, the court ordered the guidance note to be withdrawn because it had the potential to mislead the public.

17 The Australian courts have adopted a similar position. This can be seen from (*inter alia*) the High Court of Australia's decision in *Ainsworth and another v Criminal Justice Commission* (1992) 175 CLR 564 ("*Ainsworth*"). In that case, the applicant was defamed by a report which had been tabled in the Parliament of Queensland without his having had a chance to answer the allegations contained in the report. The High Court of Australia readily granted a declaration that there had been a breach of natural justice, but refused to quash the report. Four members of the court (*viz*, Mason CJ and Dawson, Toohey and Gaudron JJ), in a joint judgment, held at 580:

> The function of certiorari [*ie*, a quashing order] is to quash the legal effect or the legal consequences of the decision or order under review. The report made and delivered by the [Criminal Justice] Commission has, of itself, no legal effect and carries no legal consequences, whether direct or indirect. It is different when a report or recommendation operates as a precondition or as a bar to a course of action, or as a step in a process capable of altering rights, interests or liabilities. A report or a recommendation of that kind may be quashed, that is to say its legal effect may be nullified by certiorari.

Similarly, Brennan J, who agreed with the other judges, held in a separate judgment at 595:

> Certiorari is not available. Certiorari might go to quash a report if its production or furnishing were to affect directly a prosecutor's rights or were to subject them in some way to a new hazard but, as the [Criminal Justice] Commission's Report has no legal effect, there is nothing to be quashed.

18 It is also important to note from the judgment in *Ainsworth* that a decision need not in itself have a direct legal effect or consequence before it can be quashed. A decision which operates as a prerequisite to or a step in a process capable of altering rights, interests or liabilities may also be the subject of a quashing order. For instance, in *Hot Holdings Pty Limited v Creasy and others* (1996) 185 CLR 149 ("*Creasy*"), which concerned a recommendation made by a mining warden to the Minister under the Mining Act 1978 (WA) that a ballot should be held in respect of applications for exploration licences and mining leases, the High Court of Australia ruled (by a majority of 3:2) that, although the mining warden's recommendation was not binding on its own, it was susceptible to a quashing order because the Minister was required to take it into account and, thus, it had a discernible legal effect upon the Minister's exercise of discretion.

19 A similar situation arose in the English Court of Appeal case of *Regina v Panel on Take-overs and Mergers, Ex parte Datafin Plc and another* [1987] QB 815 ("*Datafin*"). That case concerned the Panel on Take-overs and Mergers ("the Panel"), an unincorporated association responsible for administering the City Code on Take-overs and Mergers ("the Code") and deciding if there had been violations of the Code. The Panel had no statutory or contractual powers and, thus, its decisions were without direct legal effect. Nonetheless, the Panel wielded immense *de facto* power because a ruling by it that there had been a violation of the Code would have led to other sanctions, such as exclusion from the London Stock Exchange and investigation by the Department of Trade and Industry. The Panel's decisions were therefore capable of indirectly affecting the rights of citizens and were held to be amenable to a quashing order.

2 0 *Creasy* and *Datafin* may be contrasted with a local case, *Tan Eng Chye v Director of Prisons* [2004] 4 SLR(R) 521. The applicant in that case had pleaded guilty to a charge of robbery which carried a mandatory sentence of not less than 12 strokes of the cane. The district judge called for a pre-sentence medical report to determine whether the applicant was fit for caning. The medical report answered this question in the affirmative and the applicant was accordingly sentenced to caning. The applicant subsequently sought to have the medical report quashed, but failed. The High Court held that the district judge was bound by law to impose the mandatory sentence of caning irrespective of what the medical report stated. The relevant provisions of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) requiring a prisoner to be certified by a medical officer as being fit for caning only applied at the post-sentence stage when the sentence of caning was about to be carried out. As such, the pre-sentence medical report was redundant and did not have any legal effect on the applicant.

21 From the authorities, it appears to us that a quashing order will only lie against decisions which have some form of actual or ostensible legal effect, whether direct or indirect. A mere opinion clearly

does not fall within this category. This can be seen from *Regina v Secretary of State for Employment, Ex parte Equal Opportunities Commission and another* [1995] 1 AC 1, a decision of the House of Lords. In that case, the Equal Opportunities Commission ("the EOC") considered that certain provisions of the Employment Protection (Consolidation) Act 1978 (c 44) (UK) ("the EPCA") were contrary to European Community law (including, *inter alia*, Art 119 of the Treaty establishing the European Economic Community ("the EEC Treaty")) and wrote to the Secretary of State for Employment ("the Secretary of State") asking him to reconsider the legislation. The Secretary of State replied via a letter stating his view that the statutory provisions concerned were justifiable. The EOC then applied for judicial review of the Secretary of State's letter. The House of Lords declared that the statutory provisions in question were contrary to Art 119 of the EEC Treaty, but nevertheless declined to grant a quashing order. Lord Keith of Kinkel, referring to the Secretary of State's letter, held at 26:

> In my opinion that letter does not constitute a decision. It does no more than state the Secretary of State's view that the threshold provisions of the [EPCA] regarding redundancy pay and compensation for unfair dismissal are justifiable and in conformity with European Community law. The real object of [the EOC's] attack is these provisions themselves.

22 A similar decision was reached in *Regina v London Waste Regulation Authority, Ex parte Specialist Waste Management Ltd* (*The Times* (UK), 1 November 1988). There, a public authority informed the applicant, through a meeting and a series of letters, that it was required to obtain a licence under the Control of Pollution Act 1974 (c 40) (UK) before it could operate an incinerator on hospital grounds. The court held that the public authority's opinion was not susceptible to judicial review because it was not a ruling or decision. The statute in question did not give any power to the public authority to make rulings or orders in individual cases placed before it. In communicating its opinion, the public authority was merely expressing its understanding of the law in relation to the applicant's proposal to operate an incinerator at a hospital. It was open to the applicant to proceed to operate the incinerator as planned and have the matter tested in court if the public authority chose to prosecute it for failing to obtain a licence before beginning to operate the incinerator.

23 In the present case, the Comptroller purported to determine the liability of the respondent for withholding tax as if he were exercising a statutory power, with the consequence that the respondent would be legally bound by and obliged to comply with such a determination. The 6 February 2009 Letter stated (in para 4) that the Comptroller had "reached determination on [the respondent's] request" [note: 2] and that "[the] Enforcement Division [would] be contacting [the respondent] separately on the recovery of the tax and penalty due from [it]". [note: 3] The tone of this letter indicated the finality of the Comptroller's decision that the respondent was liable for withholding tax *vis-à-vis* the material SPC payments and must arrange to pay the amount assessed or computed as being payable on the facts disclosed by the respondent.

24 The respondent's position was that the Comptroller's determination was incorrect in law and that it was not liable for withholding tax in relation to the material SPC payments as no tax was payable by the SPCs. Nonetheless, as a responsible commercial enterprise, the respondent decided to pay, under protest, the amount of withholding tax demanded by the Comptroller with a view to taking court proceedings to nullify or set aside the Comptroller's determination.

25 The question thus arose as to whether the Comptroller's determination was a decision which had actual or ostensible legal effect, whether direct or indirect, on the respondent. If that determination were made under a statutory power and were binding on the respondent unless and until it was set aside by a court, then it would certainly affect the rights of the respondent. If, on the other hand, the determination had no such effect, it would be nothing more than an expression of the

Comptroller's opinion or view as regards the respondent's liability for withholding tax. Such a determination would be no more than advice to the respondent or an answer to the query by the respondent as to its liability for withholding tax, and the respondent was free to disregard the determination if it did not agree with it. In the present case, the respondent disagreed with the Comptroller's determination, but did not feel free (from a commercial point of view) to disregard it. Hence, it paid under protest the withholding tax determined by the Comptroller and commenced these proceedings.

26 Despite the wording used in the 6 February 2009 Letter, we were doubtful if the Comptroller's determination had any actual or ostensible legal effect (whether direct or indirect) on the respondent's liability to pay the amount claimed by the Comptroller. There seems to be nothing in the ITA which gives the Comptroller the power to unilaterally determine an individual's liability for withholding tax under s 45.

27 In this connection, we sought the views of counsel for the Comptroller as to the relevance of s 89 of the ITA *vis-à-vis* the Comptroller's purported determination. Section 89 provides as follows:

> **Suit for tax by Comptroller**
>
> **89**.—(1) Notwithstanding the provisions of any other written law, tax, interest and any penalty imposed under this Act and any sum due to the Government under sections 44, 44A and 45, may be sued for by way of a specially endorsed writ of summons.
>
> …
>
> (4) In any suit under this section, the production of a certificate signed by the Comptroller giving the name and address of the defendant and the amount of tax, interest or penalty due [from] him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.

28 We asked counsel for the Comptroller whether, if the Comptroller were to commence proceedings under s 89 of the ITA against the respondent to recover the debt referred to in the 6 February 2009 Letter, the latter would be entitled to dispute its liability to pay the tax demanded. Counsel for the Comptroller conceded that the respondent might be able to resist the Comptroller's claim on the ground that the Comptroller's determination was wrong in law. On the basis of this concession, it was clear to us that the Comptroller's determination in the 6 February 2009 Letter was nothing more than an expression of the Comptroller's opinion. Regardless of whether or not that determination was final from the Comptroller's point of view, it had no actual or ostensible legal effect on the respondent. Section 89(4) of the ITA, which empowers the Comptroller to issue a certificate conclusive of (*inter alia*) the *amount* of tax due for the purposes of proceedings under s 89, only precludes a taxpayer from disputing the *quantum* of tax demanded, and not his *liability* to pay that amount. It would follow that the respondent could simply have ignored the Comptroller's demand for payment and waited for the Comptroller to commence proceedings against it under s 89 to recover the amount which was allegedly payable.

29 As mentioned at [8] above, the Judge held that the Comptroller's determination in the 6 February 2009 Letter was reviewable because the Comptroller had been exercising his power to assess and collect tax under s 4(3) of the ITA when he made that determination. Section 4(3) of the ITA reads as follows:

> **Powers of Comptroller**

4. …

…

(3) The Comptroller shall be responsible for the assessment and collection of tax and shall pay all amounts collected in respect thereof into the Consolidated Fund.

30 With respect, although this aspect of the Judge's ruling was not challenged by the Comptroller on appeal, we did not agree with the Judge's reading of s 4(3) of the ITA. That provision merely states the *responsibility* of the Comptroller to assess and collect tax, and to pay all amounts collected into the Consolidated Fund. It does not confer any *power* on the Comptroller to make binding determinations of law concerning the provisions of the ITA in the discharge of this responsibility. Instead, as counsel for the Comptroller conceded, it is the court alone which can make such determinations of law if the Comptroller chooses to bring an action under s 89 of the ITA.

31 In the circumstances, the legal position of the respondent was really that it was under no liability at all to pay any withholding tax under s 45 of the ITA until a court had decided that it was so liable. That being the case, the 6 February 2009 Letter did not contain any decision having actual or ostensible legal effect for the court to quash, and the proper remedy of the respondent would have been to commence (by filing a normal originating summons) an action for a declaration of non-liability, which action is (as can be seen from O 15 r 16 of the ROC) maintainable in our courts.

32 The question which we had to decide, therefore, was whether we should allow the present appeal on the ground that the respondent should have applied for a declaration instead of a quashing order, or let the appeal proceed on the basis that the parties had agreed that there was a determination by the Comptroller which had some legal effect on the respondent. In our view, since both parties had already accepted the Judge's ruling that the Comptroller's determination in the 6 February 2009 Letter was susceptible to a quashing order and since the Comptroller did not challenge this particular aspect of the Judge's decision before us, this appeal should, in the interests of procedural convenience and efficiency, proceed on that basis, *ie*, on the basis that the 6 February 2009 Letter did contain a determination by the Comptroller which was susceptible to judicial review. Indeed, as we noted earlier (at, *inter alia*, [7] and [12] above), the respondent had already paid the amount of withholding tax demanded, albeit under protest.

33 Furthermore, the dispute between the parties involved a pure question of law, *viz*, whether the material SPC payments fell within the ambit of s 12(6) of the ITA. Both counsel for the Comptroller and counsel for the respondent confirmed at the hearing of this appeal that all the relevant facts were before the court, and that there was no issue of any dispute of facts arising. Since the substantive question of law to be decided could be determined by the court regardless of whether the parties proceeded by way of an action for a declaration or an action for judicial review, we decided that, procedurally and substantively, the respondent should be allowed to continue with the present appeal on the basis that the Comptroller's determination in the 6 February 2009 Letter was susceptible to judicial review. In our view, given the particular circumstances of this case, for the court to require the respondent to recommence proceedings for a declaratory judgment would be to take an overly legalistic view of what procedural justice requires.

Conclusion

34 To recapitulate, we dealt with this appeal on the basis that the Comptroller's determination in the 6 February 2009 Letter could be subject to judicial review, and we rejected the Comptroller's arguments (as outlined at [9] above) as to why the Judge should not have granted the respondent

leave to apply for a quashing order. For these reasons, we dismissed this appeal with costs and the usual consequential orders.

[note: 1] See the Appellant's Core Bundle at vol 2, pp 77–78.

[note: 2] *Id* at vol 2, p 78.

[note: 3] *Ibid*.