Vincent Ooi*

The Taxation of Cryptocurrency Gains

Taking Singapore as an example, this article lays out a series of tests for determining whether gains arising from the disposal of cryptocurrencies are trade or business income, "all other income" or capital gains. It also considers the possibility of a presumption that individuals engaging in such transactions are gambling.

1. Introduction

Cryptocurrencies have become increasingly accepted as part of commerce, thereby raising a range of new regulatory and tax issues for authorities to consider. They are a subset of digital tokens commonly known as payment tokens, and serve as a medium of exchange, though no jurisdiction has accorded them the status of fiat currency to date. Increasingly tax authorities worldwide have realized the need to provide guidance on the tax treatment of transactions involving cryptocurrencies.[1] While cryptocurrencies raise a whole range of tax issues, this article focuses on one particular question that has been the subject of much prior litigation – that of the tax treatment of gains derived from the disposal of an asset. While the focus is on Singapore law, it is hoped that many of the legal principles apply to other jurisdictions as well.

In this context, under Singapore law, gains from the disposal of cryptocurrencies potentially fall into at least one of three categories: (i) trade or business income (*see* sections 3. and 4.); (ii) "all other income", by way of a "sweeping-up" provision (*see* section 5.); or (iii) capital gains (*see* throughout the article). This article examines the various tests for these three categories, so highlighting the issues that may be especially pertinent to the tax treatment of cryptocurrencies. The background to the issue is provided in section 2. and some conclusions are set out in section 6.

Singapore income tax law has its origins in the Model Colonial Territories Income Tax Ordinance 1922 (the "1922 Ordinance"),[2] which was a simplified version of the UK Income Tax Act 1918 (UKITA 2018),[3] and adopts a generally schedular definition of income. Several other Commonwealth countries similarly imported such a system through the 1922 Ordinance.[4] However, the 1922 Ordinance is but one of the models of taxation with its origins in the United Kingdom. For instance, Thuronyi (1998) notes that countries which achieved independence from the United Kingdom before 1922, such as Australia, Canada and New Zealand, did not follow the 1922 Ordinance.[5] Some Commonwealth countries have also chosen to draw on the tax design of the systems of these countries instead, and others have reformed their tax systems over time such that they are quite different from the 1922 Ordinance. Moreover, many common law countries have moved on from a schedular system to a global system of taxation.[6]

Jurisdictions that have a global system rather than a schedular system might not find it relevant to distinguish between trade or business income and "all other income". Some jurisdictions with a schedular system may not have a "sweeping-up" provision. Yet other jurisdictions may tax capital gains, which Singapore does not. Jurisdictions which tax capital gains may do so through a separate capital gains tax or under an income tax. Given the diversity of tax systems in various jurisdictions, care must be taken to appreciate the pertinent differences between the Singapore tax system and other tax systems being considered.

One issue which this article highlights is that of the relevance of similar case law guidance from courts in common law countries with comparable income tax legislation, regarding the taxability of gains derived from gambling, to the context of cryptocurrencies. While, in most situations, the test for determining trade income is simply to apply the "Badges of Trade",[7] it appears that some other considerations may apply in cases where the taxpayer may be said to be engaging in gambling activities. Several courts have generally been reluctant to accept that gambling activities can constitute a trade.[8] The reason why this is relevant in the context of cryptocurrencies is because they can be very volatile, capable of bringing their owners huge poten-

* **MA (Oxon), and Lecturer, Yong Pung How School of Law, Singapore Management University (SMU).** **The author is extremely grateful to Professor Johann Hattingh and Liu Hern Kuan for their insightful comments in the writing of this article.** **The author can be contacted at vincentooi@smu.edu.sg.**

1. OECD, *Taxing Virtual Currencies: An Overview of Tax Treatments and Emerging Tax Policy Issues* (OECD 2020) [hereinafter *Taxing Virtual Currencies*].
2. UK: Report of the Inter-Departmental Committee on Income Tax in the Colonies Not Possessing Responsible Government (Cmd 1788, December 1922) and UK: Model Colonial Territories Income Tax Ordinance 1922 (the "1922 Ordinance").
3. UK: Income Tax Act 1918 (UKITA 2018) (now UK: Income Tax (Trading and Other Income) Act (ITTOIA) 2005) and International Monetary Fund (IMF), *Tax Law Design and Drafting* vol. 2, pp. 484-485 (V. Thuronyi ed., IMF 1998).
4. *See* P. Harris, *Metamorphosis of the Australasian Income Tax: 1866-1922*, Austrl. Taxn. Research Foud. Research Study No. 37 (2002) and Thuronyi ed., *supra* n. 3.
5. Thuronyi ed., *supra* n. 3, at pp. 482-485.
6. Thuronyi ed., *supra* n. 3, at p. 485 and L. Burns & R. Krever, *Individual Income Tax*, in Thuronyi ed., *supra* n. 3, at pp. 495-499.
7. The "Badges of Trade" are a set of indicia used as a guide in the determination of whether a taxpayer has engaged in a trade. *See* section 3.3. and UK: Royal Commission on the Taxation of Profits and Income, Final Report of the Royal Commission on the Taxation of Profits and Income sec. 116 (Her Majesty's Stationary Office 1955) [hereinafter Royal Commission Report].
8. Examples include the English (*see infra* n. 50 and n. 56), Australian (*see infra* n. 47, n. 69 and n. 70) and Hong Kong (*see infra* n. 54 and n. 80) courts.

tial gains and equally huge potential losses.[9] Accordingly, prima facie, a case may be made that, in some situations, investors in cryptocurrencies are engaging in activities akin to gambling. This conclusion may potentially affect the tests for trade income and "all other income" as well as raising a few other practical issues, which are discussed in sections 3., 4. and 5.

2. Background

In Singapore, there have been no reported tax cases involving cryptocurrencies to date, but the amounts of money at stake in other private law disputes involving cryptocurrencies have driven parties to the apex court.[10] Tax authorities worldwide have realized the need to provide guidance on the tax treatment of transactions involving cryptocurrencies,[11] and Singapore is no exception. Helpfully, the Inland Revenue Authority of Singapore (IRAS) has released two electronic(e)-tax guides on the taxation of digital tokens, with one dealing with the income tax implications[12] and the other the goods and services tax (GST) implications.[13] Specific legislation has also been enacted to expressly exempt supplies of digital payment tokens from GST.[14]

Despite the guidance provided by the IRAS, determining the taxability of gains from the disposals of assets is a complex, fact-specific inquiry that cannot easily be reduced to an e-tax guide. The current guidance does provide broad principles that appear to be an accurate statement of the law. For instance, the e-tax guide states that, where cryptocurrencies are exchanged for fiat currency or converted from one form of payment token to another, the resultant gains may be taxed if they are revenue and not capital in nature.[15] Of course, the real difficulty lies in determining the nature of the gain. This position appears to be in line with the majority of other jurisdictions, which consider exchanges made between virtual currencies and fiat currencies to constitute a taxable event, with few exceptions.[16]

In Singapore, there are two main charging provisions under which such gains may be taxed as income. These provisions are set out in section 10(1)(a) and (g) of the Income Tax Act (ITA).[17] Due to the breadth of the provision in section 10(1)(g) of the ITA in particular, such gains only escape taxation if they are not gains or profits of an income nature. In other words, gains or profits of a capital nature are not caught by the charging provisions in section 10(1) of the ITA. Previous cases applying section 10(1)(g) of the ITA have largely involved disposals of real property, with a small number of cases involving shares. The sharp increase in the number of people purchasing and selling cryptocurrencies in Singapore means that it is likely that cryptocurrencies will be the next asset class giving rise to such tax disputes.

While it would appear that the fact that cryptocurrencies are the asset being disposed of has little effect on the various legal tests to be applied, the nature of the asset does have some effect on the tax outcomes. For instance, a person purchasing five shares over a period of ten years is far less likely to be held to be trading in shares than one who purchases five real properties over the same period. The effect of cryptocurrencies being the asset in question is something that is considered in greater detail in sections 3., 4. and 5.

3. The General Test for Trade or Business Income

3.1. Introductory remarks

Section 10(1) of the ITA sets out six heads of charge, under which profits or gains are liable to tax in Singapore. For cases involving the disposal of an asset, the heads of charge which are most likely to be relevant are section 10(1)(a) (gains or profits from any trade, business, profession or vocation) and 10(1)(g) (any gains or profits of an income nature not falling within any of the preceding paragraphs, also commonly known as "all other income") of the ITA.

3.2. Business income

Income taxable under section 10(1)(a) of the ITA is not restricted to trade income, but can also include gains or profits from any business, profession or vocation. In the case of disposals of assets, trade income is likely to be the most relevant, but it is also possible to argue that the gains are business income. In practice, the IRAS generally favours assessing gains from the disposal of assets as "trade income" rather than "business income".

A "business" refers to a "wide group of activities that are not purely recreational, that are commercially undertaken and usually, but not necessarily, for profit".[18] Such a business must be "carried on", which, in turn connotes, a "habitual and systematic operation, a continuity or repetition of acts or similar operations".[19] In the case of *American Leaf Blending v. Director-General of Inland Revenue* (1978),[20] the Privy Council (PC) held that:

9. D. Baur & T. Dimpfl, *The volatility of Bitcoin and its role as a medium of exchange and a store of value*, Empirical Econ. (2021), available at https://doi.org/10.1007/s00181-020-01990-5) (accessed 13 July 2021).
10. *See* the decision of the Singapore International Commercial Court of the Republic of Singapore (SICCRS) in SG: SICCRS, 14 Mar. 2019, *B2C2 Ltd v. Quoine Pte Ltd*, [2019] 4 SLR 17, available at www.sicc.gov.sg/docs/default-source/modules-document/judgments/b2c2-ltd-v-quoinepte-ltd.pdf (accessed 13 July 2021) (noted in V. Ooi & Soh Kian Peng, *Cryptocurrencies and Code Before the Courts*, 30 King's L. J. 3, p. 331 (2019)), reported on appeal at [2020] 2 SLR 20 (noted in V. Ooi & Soh Kian Peng, *Rethinking Mistake in the Age of Algorithms*, 31 King's L. J. 3, p. 369 (2020)).
11. OECD, *Taxing Virtual Currencies*, *supra* n. 1.
12. IRAS, *IRAS e-Tax Guide: Income Tax Treatment of Digital Tokens* (9 Oct. 2020).
13. IRAS, *IRAS e-Tax Guide: GST: Digital Payment Tokens* (19 Nov. 2019).
14. SG: Goods and Services Tax Act (Cap. 117A, 2005 Rev Ed), sec. 2A and art. 1B, 4th sch.
15. IRAS Income Tax e-Tax Guide, *supra* n. 12, at p. 13.
16. OECD, *Taxing Virtual Currencies*, *supra* n. 1, pp. 28 and 32.
17. SG: Income Tax Act (ITA) (Cap. 134, 2014 Rev. Ed.).
18. SG: ITBR, 17 May 1996, *Mitsui Soko (MSI) Pte Ltd v. Comptroller of Income Tax (CIT)*, (1997) MSTC 5221, at p. 5225.
19. *See* the decision of the Singapore Court of Appeal in SG: SCA, 17 Jan. 1961, *DEF v. Comptroller of Income Tax (CIT)*, (1950-1985) MSTC, at p. 486.
20. MY, PC, 18 July 1978, *American Leaf Blending Co SDN BHD v. Director-General of Inland Revenue (DGIR)*, [1978] 3 WLR 985, available at www.casemine.com/judgement/uk/5b2897b62c94e06b9e199254 (accessed 13 July 2021).

> in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets *prima facie* amounts to the carrying on of a business.[21]

American Leaf Blending was considered in *Mitsui Soko (MSI) Pte Ltd v. Comptroller of Income Tax* (1996), in which the Singapore Income Tax Board of Review (ITBR) held that it was:

> of the view that it is best to regard this case as authority for the proposition that the presumption only arises when a company has done all that is needed to start trading or doing business [as] [i]t makes hardly any sense to say that there is a presumption that a company is in business when it is hardly in any position to perform any "business oriented" activities.[22]

The ITBR went on to state that:

> [f]or the presumption of business to arise, [the company] must be involved in "business activities"... and the intention to do business must be gleaned from the activities as well as from the Memorandum of Association.[23]

In addition, the ITBR relied on the Australian case of *Ferguson v. Federal Commissioner of Taxation* (1979)[24] to identify the general characteristics of business, namely:

> the profit-making nature of its activities, the repetition and regularity of activities, the organizational structure, the keeping of books and records, the volume of operations, the amount of capital employed.[25]

3.3. Trade income

The test for trade income under Singapore law is well-established. The Singapore High Court (SHC)[26] has recognized the applicability of the traditional six "Badges of Trade" outlined in the Final Report of the 1954 UK Royal Commission on the Taxation of Profits and Income[27] and the (expanded and totalling) 11 characteristics of trading laid out in an article by Teo (1996).[28]

Briefly, the six "Badges of Trade" are: (i) the subject-matter of the realization; (ii) the length of period of ownership; (iii) the frequency or number of similar transactions by the same person; (iv) supplementary work on or in connection with the property realized; (v) the circumstances that were responsible for the realization; and (vi) motive.[29] Teo has proposed another five characteristics of trading. These characteristics are: (vii) accounting treatment of assets; (viii) objects in memorandum of association; (ix) separate legal personality of company and lifting the corporate veil; (x) formation and/or winding up of the company; and (xi) method of financing.[30] Accordingly, in determining whether the gains from a disposal of an asset are in the nature of trade income, a court would apply the various indicia of trade to arrive at a conclusion drawn from a holistic assessment of these indicia.[31]

In the case of cryptocurrencies, certain observations can be made as to how the "Badges of Trade" might be applied. First, with regard to the subject of realization, the traditional test is whether the asset was not of a kind normally used for investment, but for trading.[32] Unfortunately, the fact that cryptocurrencies are a relatively new asset class makes it difficult to conclusively determine whether they are normally used for investment or trading. Things are further complicated by the fact that not all cryptocurrencies are created equal, with some being more stable than others and, therefore, lending themselves better to long-term investment.

Second, with regard to the length of period of ownership, it appears to be well-established that the periods indicative of trading do depend substantially on the nature of the asset in question.[33] For real property, the position in the relevant Singapore cases seems to be that a period of more than six years constitutes a long period of holding.[34] Unfortunately, the only case at the moment involving the disposal of shares are the *GBU v. CIT* (2017)[35] and *CIT v. BBO* (2014)[36] cases, which have very specific circumstances that affected the assessment of the holding period. Accordingly, they are difficult to rely on as a basis for determining what a "long period holding" might mean for shares. As cryptocurrencies cannot be rented out and the focus appears to be on profiting from an appreciation in their value, they are arguably a lot more similar to shares than real property. While shares may sometimes still be traded in physical form, share trading has largely been digitized in many jurisdictions. Cryptocurrencies have the largely intangible nature of shares. Also, unlike land and shares, cryptocurrencies do not have any inherent utility by themselves. They cannot be "enjoyed" in the same way that one can, for example, occupy and use land. However, it should also be noted that, in contrast to shares, cryptocurrencies do not typically pay "dividends" or their equivalents. While it may sometimes be possible for there to be somewhat similar distributions in the

21. Id., at p. 990.
22. *MSI v. CIT* (1996), *supra* n. 18, at p. 5226.
23. Id.
24. *See* the decision of the Australian Federal Court in AU: FC, 12 June 1979, *Ferguson v. Federal Commissioner of Taxation (FCT)*, 79 ATC 4261.
25. *MSI v. CIT* (1996), *supra* n. 18, at pp. 5225- 5226, citing *Ferguson* (1979), *supra* n. 24, at pp. 4264-4265.
26. *See* SG: SHC, 31 August 2007, *NP and Another v. Comptroller of Income Tax (CIT)*, [2007] 4 SLR(R) 599 sec. 9-10, available at www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2007-SGHC-141.pdf (accessed 13 July 2021).
27. *See* Royal Commission Report, *supra* n. 7. It should be noted that, while this might be the case in Singapore, the "Badges of Trade" have not been received in all common law jurisdictions.
28. *See* Teo Keang Sood, *Badges of Trade Revisited*, Sing. J. Leg. Stud. p. 43 (1996), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=955741# (accessed 13 July 2021).
29. *See* Royal Commission Report, *supra* n. 7 and Teo, *supra* n. 28, at p. 51.
30. *See* Teo, *supra* n. 28, at pp. 52-77.
31. *See* the decision of the Singapore High Court in SG: HC, 5 Sept. 1986, *Mount Elizabeth v. Comptroller of Income Tax (CIT)*, (1985-1986) SLR(R) 950 and that of the Singapore Court of Appeal in SG: SCA, 22 Oct. 1981, *CBH v. Comptroller of Income Tax (CIT)*, [1981-1982] SLR(R) 273.
32. *See* the decision of the Scottish Court of Session in UK: CS, 8 Mar. 1929, *Rutledge v. Commissioners of Inland Revenue (CIR)*, (1929) 14 TC 490.
33. *See* SG: ITBR, 31 July 2017, *GBU v. Comptroller of Income Tax (CIT)*, (2017) MSTC 50-028 at sec. 8, where the ITBR held that "What may constitute a short holding period for a particular share portfolio investor is likely to look different from a short holding period for an investor in real property".
34. *See* the decision of the Singapore Court of Appeal (SCA) in SG: SCA, 4 Feb. 2014, *Comptroller of Income Tax (CIT) v. BBO*, [2014] SGCA 10, 2 SLR 609.
35. *GBU v. CIT* (2017), *supra* n. 33.
36. *CIT v. BBO* (2014), *supra* n. 34, at p. 609.

forms of "airdrops"[37] or "hard forks",[38] these are not particularly common for the established cryptocurrencies. Once again, there is not much guidance on this point, due to the dearth of cases involving disposals of cryptocurrencies to date.

Third, there is a similar issue with the frequency or number of similar transactions. Once again, there is no reliable indication of what number of similar transactions might suggest trading in the context of shares, which are arguably the most similar asset class to cryptocurrencies. However, it should be noted that the number of transactions, viewed in insolation, is not determinative. With regard to individuals, it appears that one or two isolated transactions in real property is insufficient to suggest trading.[39] However, things appear to be different for companies, where there seems to be a presumption that even a single transaction may be sufficient to suggest that a company may be trading.[40] Consequently, it might well be the case that companies making gains from the disposal of cryptocurrencies may have a much more difficult time establishing that they were not trading.

The fourth point is general and is not specific to cryptocurrencies. However, it should be noted that cases decided after Teo's article[41] was published have been rather mixed on this point. Some cases have recognized that the accounting treatment of assets is relevant to show what the intention of the taxpayers were at the material time.[42] Other cases have been more dismissive,[43] with the most extreme one dismissing the classification of the properties in question as "colourless facts".[44] This attitude could well readily extend to the next indicia, that of the objects in the memorandum of association, or constitution, of the company.

Fifth, with regard to the method of financing, it appears to be the case that the heavier the external financing taken out to purchase the asset in question, the more likely it is for the taxpayer to be found to be trading.[45] Accordingly, in the case of cryptocurrencies, investment strategies that involve a large amount of "gearing" or leveraging by borrowing are likely to militate towards an inference that the taxpayer is trading.

4. Trade or Business Income from Gambling Activities

4.1. The general principle that gains from gambling are not income

Courts from several jurisdictions have generally been reluctant to accept that gambling activities can constitute a trade.[46] This situation generally means that such gains are not taxable, nor are losses which result from such activities deductible. For instance, in the Australian case of *Brajkovich v. Federal Commissioner of Taxation* (1989),[47] the appellant gambled on horse races and in card games. He suffered extensive losses and sought to have his gambling losses treated as part of his carrying on a business as a gambler. The Federal Court of Australia (FCA) held that gambling as ordinarily conducted by members of the public would seldom be classified as a business.[48]

While there have been no Singapore cases deciding this issue to date, there is still binding authority[49] in the form of old English cases such as *Graham v. Green* (1925).[50] In that case, for many years the taxpayer's sole means of livelihood had been betting on horses from his private residence with bookmakers. The High Court of England and Wales (HCEW) held that his winnings could not be assessed as income under the heads of charge in schedule D of the UKITA 1918.[51] The HCEW noted that "each time the gambler puts down their money, they cannot be said to have organized their effort, or exhibited any skill, the same

37. "Airdrops" refer to the distribution of virtual currencies without compensation. Generally, this position is adopted as a marketing tool to increase awareness of a new token, especially amongst social media influencers, and to increase liquidity in the early stages of issuance. (*See* IRAS Income Tax e-Tax Guide, *supra* n. 12, at p. 13).
38. "Hard forks" refer to changes in a protocol code to create a new version of a blockchain that co-exists alongside the old version. This position is typically adopted for technical reasons, often used in fixing important security risks in older blockchain protocols. (*See* IRAS, *supra* n. 12).
39. *DEF v. CIT* (1961), *supra* n. 19, at pp. 59 and 61, except in the case of one who has intended to engage in a trade.
40. *See* SG: ITBR, 11 May 1991, *SCL Pte Ltd v. Comptroller of Income Tax (CIT)*, (1991) 1 MSTC 5,032 and the decision of the Singapore Income Tax Board of Review, in SG: ITBR, 29 Sept. 1994, *GRP Ltd v. Comptroller of Income Tax (CIT)*, (1995) 2 MSTC 5,207.
41. Teo, *supra* n. 28. Teo's article was for many years the only academic commentary that comprehensively considered the "Badges of Trade" and their applicability in Singapore. He raised the point that under Singapore law, the accounting treatment of assets might be considered to be a relevant indicia of trade.
42. *See* the decision of the Singapore Income Tax Board of Review in SG: ITBR, 20 June 2007, *ML & W Co Ltd v. Comptroller of Income Tax (CIT)*, (2007) MSTC 5,647and that of the Singapore Income Tax Board of Review, in SG: ITBR, 1 June 1991, *C Ltd v. Comptroller of Income Tax (CIT)*, (1991) 1 MSTC 5052.
43. *GRP Ltd v. CIT* (1995), *supra* n. 40, affirmed by the decision of the Singapore Income Tax Board of Review, in SG: ITBR, 15 Dec. 1997, *KE v. Comptroller of Income Tax (CIT)*, (1998) MSTC 5235.
44. *Mount Elizabeth* (1986), *supra* n. 31, at sec. 18.
45. *See* SG: ITBR, 12 Dec. 2006, *T&W v. Comptroller of Income Tax (CIT)*, (2007) MSTC 5,604, sec. 103, in which the ITBR held that the *modus operandi* of "having put out only a small outlay with very heavy financing" is the "usual method when a person wishes to make a quick profit from the sale and purchase of properties".
46. Examples include the English (*see infra* n. 50 and n. 56), Australian (*see infra* n. 47, n. 69 and n. 70) and Hong Kong (*see infra* n. 54 and n. 80) courts.
47. AU: FCA, 8 Nov. 1989, *Brajkovich v. Federal Commissioner of Taxation (FCA)*, (1989) 89 ALR 408.
48. Id., at 413. The FCA went on to explain that the following criteria should be applied to determine if a gambling activity was part of a business and, therefore, "extraordinary": (i) whether it was conducted in a systematic, organized and "business-like" manner; (ii) its scale; (iii) whether it was related to other activities of a business-like character; (iv) whether the better engaged in the activity principally for profit or for pleasure; (v) whether the form of betting is likely to reward skill and judgement or depends purely on chance; and (vi) whether the gambling activity is of a kind which is ordinarily thought of as a hobby or pastime.
49. SG: The Application of English Law Act (Cap 7A, 1994 Rev. Ed.), sec. 3(1) provides that the English common law, including the principles and rules of equity, insofar as it was part of the law of Singapore immediately before 12 November 1993, would continue to be part of the law of Singapore. *See* A. Phang, Y. Goh & J. Soh, *The Development of Singapore Law: A Bicentennial Retrospective*, 31 Sing. Academy L. J., sec. 10-33 (8 May 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602508 (accessed 13 July 2021) and S. Chan, *Application of English Law Act 1993*, in *Singapore Law: 50 Years in the Making* ch. 2, [2.78] (Y. Goh & P. Tan, Academy Publg. 2015).
50. UK: HCEW, 11 Mar. 1925, *Graham v. Green (H.M. Inspector of Taxes)*, (1) (1923-25) 9 TC 309, 2 KB 37.
51. Sch. D UKITA 1918.

way that a bookmaker has".[52] Instead, the HCEW understood the taxpayer's activities as a result of an addiction. The HCEW, therefore, concluded that the taxpayer's winnings from the bets were not a result of a trade or vocation.

4.2. What can constitute gambling?

As noted in section 1., the reason why this is relevant in the context of cryptocurrencies is because they can be very volatile indeed, capable of bringing their owners huge potential gains and equally huge potential losses.[53] The idea that gains from gambling are not considered generally to be in the nature of income is not limited to common forms of gambling such as horse racing and card games. This was made clear in the Hong Kong case of *Lee Yee Shing v. Board of Review* (2012),[54] which involved securities and futures. In that case, McHugh NPJ stated, *obiter*, as follows;

> consciously or unconsciously, taxation authorities and tribunals see the buying of shares, other than for investment or as an incident in the carrying on of a business of share trading, as a gamble or akin to a gamble. The unexpressed assumption may be that the price of shares- even so called "blue chip" shares- can fluctuate so greatly during the course of a year that buying and selling shares, for most people, is only a step or two away from wagering in the casino.[55]

Further, there is old English authority in the form of *Lewis Emanuel & Son Ltd v. White* (1965),[56] where, in considering whether the buying and selling of shares was an allowable deduction for income tax purposes, Pennycuick J said that "[f]or want of a better phrase, I will describe this class of activities as gambling transactions".[57] Based on this, it is not a particular stretch to say that buying and selling cryptocurrencies might, in certain circumstances, be considered to be a form of gambling.

Several academics, such as Chuff (2011) and Lynch (2011), have argued that, in some situations, the buying and selling certain financial products can be difficult to distinguish from gambling. Chuff has argued that both gambling and investing require similar skills to effectively participate. He submits that, while many believe that gambling is a matter of pure chance and investing requires analytical ability, the truth is that many if not most investors pursue investment decisions for "irrational and ill-informed reasons without the use of analysis of research".[58] Lynch has focused on a type of financial instrument known as "purely speculative derivative contracts" (PSDCs), which involve a situation where neither counterparty hedges a pre-existing risk. He argues that PSDCs are identical to gambling, as PSDCs are nothing but bets between two parties on the outcome of something which they have no control over.[59] Other forms of derivatives and financial instruments may not resemble gambling to the same extent as PSDCs, but, nevertheless, they may have many features in common.

4.3. A test for trade or business income from gambling activities

4.3.1. *Lee Yee Shing*

A review of the relevant case law of several jurisdictions[60] reveals a pattern of common factors that the various courts consider when determining if a taxpayer is engaging in gambling. A framework was laid out by the Hong Kong Court of Final Appeal (HKCFA) in *Lee Yee Shing*,[61] which can usefully serve as the starting point for this analysis. In *Lee Yee Shing*, the taxpayers were a husband and wife who claimed that the husband's losses in dealings in securities and futures had been incurred in the carrying on by him of a trade or business, and, therefore, should be deducted in computing their total income. As the losses could only be deducted under Hong Kong law, as with Singapore law, if they were incurred in the carrying on of a trade or business, the HKCFA had to first determine whether such a trade or business had in fact existed.

The HKCFA made several key findings. First, the husband's dealings were not so systematic and organized that they amounted to the carrying on of a trade or business. Second, that the Hong Kong Board of Review (HKBR) was right to hold that pure speculation was a factor weighing against the finding that a person is carrying on a trade. Third, that the husband's activities of attending share related courses, reading a massive amount of material and engaging in vast preparation work was no different from the activities of other investors in this day and age. Accordingly, the HKCFA concluded that the HKBR had not been in error in concluding that the husband's trading was not in the course of a trade or business.[62]

In his judgement, McHugh NPJ noted that betting and share trading are both affected by chance to a greater extent than is the case of traditional businesses, but that business-minded bettors and share traders engage in these activities in an organized and systematic way, invoking "systems that, as a matter of probability, should result in the gains from their successful outcomes outweighing the losses from their losing outcomes".[63] As such, it was possible to distinguish between those situations where a

52. *Graham v. Green* (1925), *supra* n. 50, at p. 42.
53. Baur & Dimpfl, *supra* n. 9.
54. *See* the decision of the Hong Kong Court of Final Appeal (HKCFA) in HK: HKCFA, 30 Mar. 2012, *Lee Yee Shing Jacky, Yeung Yuk Ching v. Board of Review (Inland Revenue Ordinance) Commissioner of Inland Revenue*, [2008] 2 HKC 436, available at www.info.gov.hk/bor/en/docs/(v26t)CACV%2049_2011.pdf (accessed 13 July 2021). The facts of *Lee Yee Shing*, *supra* are described in section 4.3.1.
55. Id., at sec. 65.
56. UK: HCEW, 26 March 1965, *Lewis Emanuel & Son, Ltd. v. White (H.M. Inspector of Taxes) Joseph I. Emanuel, Ltd. v. Southall (H.M. Inspector of Taxes)*, (1963-1966) 42 TC 369.
57. Id., p. 377.
58. C. Chuff, *Rolling the Dice on Financial Regulatory Reform: Gambling Law as a Framework for Regulating Structured Investments*, 18 Vill. Sports & Ent. L. J. 2, pp. 599-600 (2011).
59. T. Lynch, *Gambling by Another Name; The Challenge of Purely Speculative Derivatives*, 17 Stan J. L. Bus. & Fin. 1, pp. 93-96 (2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788219 (accessed 13 July 2021).
60. Examples include the English (*see supra* n. 50 and n. 56), Australian (*see supra* n. 47 and *infra* n. 69 and n. 70) and Hong Kong (*see supra* n. 54 and *infra* n. 80) courts.
61. *Lee Yee Shing* (2012), *supra* n. 54, at secs. 1-3.
62. Id., sec. 38.
63. Id., sec. 90.

person is engaging in betting and share trading activities as a business, and other situations where a person is not.

According to McHugh NPJ, "the factors that determine whether betting is a business seem applicable in determining whether share trading is a business", and, therefore, his analysis draws on Australian case law on betting.[64] A total of 26 factors were listed by McHugh NPJ as being relevant to the determination of whether a person who buys and sells shares is carrying on a business.[65] The presence of a great number of these factors might indicate that the activities of the trader are so considerable, organized and systematic that they go beyond what is found in the share trading activities of ordinary share buyers and, therefore, amount to a business.[66]

The list of 26 factors is far too long to list in full here, but when read together with other cases,[67] a smaller list of key factors to consider when determining whether a taxpayer is engaging in a trade or business may be produced. These factors include: (i) whether the outcome is primarily governed by chance or skill; (ii) the level of skill of the taxpayer; (iii) the level of organization; and (iv) the nature of the entity involved.

It should be noted that these key factors are factors that are of particular relevance to situations in which a taxpayer is engaging potentially in gambling. As the HKCFA ultimately still has to determine whether there is a trade or business, in spite of the facts suggesting gambling, the general indicia for carrying on a trade or business would apply in addition to these key factors listed previously. As the general indicia have been addressed again previously, this article now focuses on the additional key factors, going through each of them in turn (*see* sections 4.3.2. to 4.3.5.).

4.3.2. Outcome affected by chance or skill

Activities that require skill, as compared to activities requiring chance simpliciter, are more likely to constitute a trade or business. In *Brajkovich*, the FCA held that, where gambling involves a significant element of skill, the gamble is more likely to have tax consequences than gambling on merely random events. The FCA affirmed it was difficult to imagine circumstances in which people gambling on random events could be thought of being in a business, particularly where the "results are [...] purely random and in which there is a high probability that each player will lose in the long-run".[68]

In cases involving horse racing, including *Brajkovich* itself, it has been particularly difficult to convince the courts that the taxpayer was carrying on a trade or business. In *Babka v. Federal Commissioner of Taxation* (1989), the FCA held that:

> [the] intrusion of chance into the activity as a predominant ingredient at least in the outcome of the race itself suggested that it would be a rare case where a court would reach such a conclusion.

The FCA further noted that the significance of chance and instinct in the present case was sufficiently great to "negate" the concept of system and organization which was otherwise present in the applicant's case.[69] In *Shepherd v. Commissioner of Taxation of the Commonwealth of Australia* (1965),[70] the High Court of Australia (HCA) had further elaborated that:

> the chance of one owner's horse winning is dependent to an extent on considerations as to which no system or organization would usually apply, for example the form of the various horses and the weather conditions.[71]

The extent to which the values of cryptocurrencies are "purely random"[72] and dependent "on considerations as to which no system or organization would usually apply"[73] is not clear entirely. As with the case of people buying and selling shares, there would arguably be some kind of system that might improve the chances of turning a profit in the long term. Given the similarities with buying and selling shares, it is possible to draw upon the existing case law in that area and analogize it to the context of cryptocurrencies. While it is theoretically possible for such activities to be affected by a mix of chance and skill,[74] the exact mix depends on the level of skill of the taxpayer in question, which is the next key factor that must be considered (*see* section 4.3.3.). However, it does not appear to be the case that all activities involving the buying and selling of cryptocurrencies are inevitably largely affected by chance, such that they should all be considered to be in the nature of gambling. Certainly, the fact that certain established financial institutions have started to trade in and offer cryptocurrency products suggests that some participants in cryptocurrency markets, at least, may be applying some level of skill in their trades.

4.3.3. Level of skill of the taxpayer

While the previous factor related to the general extent to which chance or skill might affect the outcome of an activity, this factor relates to the level of skill of the particular taxpayer in carrying out its activities. Generally, the greater the amount of skill exhibited by the taxpayer, the more likely it is that a court considers the taxpayers activities to constitute a trade or business. In *Cooper v. Stubbs* (1925),[75] the taxpayer was a cotton broker who had entered into a number of speculative transactions in

64. Id.
65. Id., sec. 95.
66. Id., sec. 96.
67. Particularly the leading Australian case of *Brajkovich* (1989), *supra* n. 47. *See also* Pei-Teing Kee, *Should Gambling Gains Be Taxed As Income?*, 2(2) Murdoch U. Elec. J. L. 2, p. 22 (1995).
68. *Brajkovich* (1989), *supra* n. 47, at p. 415.
69. AU: FCA, 21 Sept. 1989, *Babka v. Federal Commissioner of Taxation* (1989), 89 ALR p. 380.
70. AU: HCA, 17 Dec. 1965, *Shepherd v. Commissioner of Taxation of the Commonwealth of Australia (CTCA)*, (1965) 113 CLR 385, available at https://staging.hcourt.gov.au/assets/publications/judgments/1965/038--SHEPHERD_v._FEDERAL_COMMISSIONER_OF_TAXATION--(1965)_113_CLR_385.html (accessed 13 July 2021).
71. Id., p. 398.
72. Drawing on the language used in *Brajkovich* (1989), *supra* n. 47, at p. 415.
73. Drawing on the language used in *Shepherd* (1965), *supra* n. 70, at p. 398.
74. Reasoning by analogy with the case of buying and selling of shares, as in *Lee Yee Shing* (2012), *supra* n. 54.
75. UK: CAEW, 30 June 1925, *Cooper (Inspector of Taxes) v. Stubbs*, [1925] All ER p. 648.

cotton for future delivery. The Court of Appeal of England and Wales (CAEW) held that the profits arising from the transactions were trade income, emphasising that the taxpayer had the "means and the knowledge of engaging in certain transactions on the cotton exchange, according to his own business ability and experience".[76]

In *Commissioner of Taxes v. McFarlane* (1952),[77] the New Zealand High Court of Wellington (HCW) found the earnings of the taxpayer, who was a professional jockey, derived from betting on racehorses to be part of a business. The HCW noted that:

> the knowledge which enabled him to make successful bets was gained in the course of his vocation, and the success of his bets flowed partly from his skilful exercise of his vocation, [...].[78]

The HCW added that the bets were:

> not casual but were shrewd and calculated, and depended upon the arising of conditions judged by the appellant to be favourable to success and capable of being exploited by his skill.[79]

In contrast, in *Case No. D74/00* (2000),[80] the HKBR held that the taxpayer's dealings in shares did not amount to a trade or business, as the taxpayer "had no particular expertise, knowledge or ability in share dealings".[81] Most significantly, the taxpayer had purchased shares as introduced to her by friends, and dealt with shares on a speculative basis. And she was "aiming at a largest profit within the shortest period of time and that she did not take hedge or other protective measures to minimize risks".[82] As such, it was "evident from these facts that the taxpayer's dealings in shares were purely speculative and without a system of operation".[83]

In a majority of situations, it is likely that an individual taxpayer is held due to lacking the sufficient skill to be found to be trading or carrying on a business. Certainly, it can be seen that as in the case of *Case No. D74/00*, a taxpayer who deals with shares, and, by analogy, cryptocurrencies, on a speculative basis, thereby aiming to maximize profit without taking steps to minimize risks is most likely held to be trading.[84] Some guidance may also be drawn from *Lee Yee Shing*,[85] in which, despite the fact that the husband had attended numerous courses, read a massive amount of material and engaged in vast preparation work, the HKCFA was not prepared to consider him to be engaging in a trade or business. It does appear, therefore, that the bar for establishing that a taxpayer had the requisite level of skill to be held to be trading or carrying on a business is a very high one. Perhaps, it is so high that very few people buying and selling cryptocurrencies would be able to establish that they were doing so as a trade or business. Here, it should be noted that this test appears to be an objective one. In none of the cases cited in this section did any of the courts give any consideration to the subjective views of the taxpayers as to the level of their own skills.

4.3.4. Level of organization

Often, if the activities are carried out in a "business-like manner" or "organized manner", the courts are inclined to make a finding that there is a trade or business. In *Minister of National Revenue v. Walker* (1951),[86] the Canadian Supreme Court (CSC) held that the taxpayer was in the business of betting for profit, noting that the taxpayer did not simply have an interest in racehorses. Instead, the taxpayer had:

> [the] benefit of inside information from jockies [sic] and other persons on the probable outcome of races, [...] and that for ten years or more he systematically attended all the races in sometimes four different cities and bet on most of the events.[87]

Similarly, if the activities have not been carried out in such a manner, courts are less likely to find that there is a trade or business. In *Shepherd*,[88] the appellant was a taxpayer who had been interested in horses all her life and trained her own horses. The appellant had not gained any material advantage from these activities until she acquired by chance a horse that proved very successful, and the racing of the horse resulted in substantial gains from prize money and wagering. The HCA held that the gains were not treated as income in the course of a trade or business because there was "no system, or no sufficient system, in relation to the chances involved as to lead to the conclusion that a system for profit-making had been devised". Instead, the appellant relied primarily on the element of chance.

However, just because there are certain indicia of organization does not necessarily mean courts will make the finding that there is a trade or business. In *Babka*,[89] the taxpayer had kept notebooks that recorded net winnings and losses, and racing results. On the facts of the case, the FCA held that the taxpayer did not keep the notebooks to enable him to have a yearly record of the net outcome of his betting activity. The taxpayer did nothing more than calculate the outcome of a particular day; nor did he make any notes of the incidental expenditures that he had incurred. The FCA also held that it was important to look at the use to which the taxpayer put the books to determine the purpose for which he kept them. In sum, the taxpayer did have records, but they were not so for the purpose of providing a financial record of his activity, and, therefore, he was held not to have carried on a business.

Lee Yee Shing[90] suggests that the bar for establishing a sufficient level of organization to show the existence of a trade or business is a high one. In that case, despite the not insignificant operations of the taxpayers, the HKCFA

76. Id., p. 648.
77. NZ: HCW, 15 June 1951, *Commissioner of Taxes (CT) v. McFarlane*, [1952] NZLR pp. 353-354.
78. Id., p. 353.
79. Id., p. 354.
80. HK: HKBR, 25 Oct. 2000, *Case No. D74/00*, vol. 15.
81. Id., p. 670.
82. Id.
83. Id.
84. Id., in general.
85. *Lee Yee Shing* (2012), *supra* n. 54, at secs. 104 and 107.
86. *See* the decision of Exchequer Court of Canada in CA: ECC, 1951, *Minister of National Revenue v. Walker*, 52 DTC 1001.
87. Id., p. 1003.
88. *Shepherd* (1965), *supra* n. 70, at p. 398.
89. *Babka* (1989), *supra* n. 69, at p. 382.
90. *Lee Yee Shing* (2012), *supra* n. 54, at secs. 104 and 107.

ultimately held that the dealings were "not so systematic and organised that they amounted to the carrying on of a trade or business".[91] Reasoning by analogy to the facts in *Lee Yee Shing*, it is likely that even if a person buying and selling cryptocurrencies had an office, a personal assistant, several accounts with broker firms, direct telephone lines to securities firms and the relevant necessary equipment, they might still well be considered to have operations that are not "systematic and organised" enough.[92]

4.3.5. Nature of the entity

In general, individuals are less likely to be held to be trading or conducting a business as compared to companies. As noted in section 4.3.2., in *Brajkovich*,[93] the FCA held that gambling as ordinarily conducted by members of the public is seldom classified as a business. This position is supported by the decision of the HKBR in *Case No. D74/00*, which held that "private individuals would rarely be considered as carrying on a business of trading and securities unless there were other associated activities".[94]

The decision of the HCEW in *Lewis Emanuel*[95] not only supports the proposition that individuals engaging in stock exchange transactions are unlikely to be trading, but goes further, and states that it is much more difficult to bring the activities of a company within the class of gambling transactions. Accordingly, it appears that there is a prima facie presumption that individuals buying and selling shares are unlikely to be trading and a corresponding converse presumption for companies doing the same.

This factor is likely to be significant, as the majority of individuals buying and selling cryptocurrencies are unlikely to have incorporated a company through which to do so. As a result, the starting presumption is likely to be that such individuals are not engaged in a trade or business.

Taking all the key factors and original indicia of trade or business, it is likely that individuals buying and selling cryptocurrencies are unlikely to be held to be engaged in a trade or business. It is certainly not impossible to prove otherwise, but would appear to be an uphill task. Conversely, companies doing the same are likely to be in the exact opposite position, and would struggle to demonstrate that they were not engaged in a trade or business. This situation raises the tricky question of whether this is satisfactory in terms of tax policy for the same substantive activity to be accorded different tax treatment based on the legal form of the taxpayer.

5. The Test for "All Other Income"

5.1. In general

A finding that gains from the disposal of cryptocurrencies are not in the nature of trade or business income does not mean in itself that the gains are not taxable. Many jurisdictions[96] have a "sweeping-up" provision that catches income that does not fall under any of the other heads of charge. The classic example is schedule D, Case VI of the UKITA 1918.[97]

As the test for gambling described in section 4. appears to focus on the existence of a trade or business, strictly speaking, it does not answer the question of whether, even in the absence of a trade or business, gains from the disposal of cryptocurrencies can be considered to be another form of income other than trade or business income. The learned authors of *Whiteman & Sherry on Income Tax* are of the view that these sweeping-up provisions do not apply to gambling winnings,[98] but it is by no means clear that this would necessarily be the case across the other Commonwealth jurisdictions.

There has been some discussion on the Singapore equivalent of the "all other income" provision in section 10(1)(g) of the Singapore ITA, and it is to that discussion that this article now turns. The law here is less clear than for section 10(1)(a) (gains or profits from any trade, business, profession or vocation) of the ITA, as there is no clear binding judicial authority for the section 10(1)(g) test.[99] The leading case on the test in section 10(1)(g) of the ITA is *IB v. CIT* (2004),[100] a decision of the ITBR, which has persuasive but not binding force. In *IB v. CIT*, the ITBR held that:

> gains from "extraordinary" isolated transactions may constitute income where the taxpayer had the requisite intention to make a profit or gain before entering into the transaction.[101]

Further, the ITBR stated that:

> on the facts of [that] case unless the Appellant proves that the gains were made by him on the disposal of properties that were acquired with the intention of being held by him as long-term investments, this appeal fails.[102]

It is submitted that these two statements of the ITBR are not conclusive tests, but, rather, that the first statement establishes the primacy of intention over the other factors, which were not listed, but which the taxpayer submitted were basically the "Badges of Trade", bar the indicia of frequency, and the second statement is not a test, but a con-

91. Id., sec. 44.
92. Id., sec. 29.
93. *Brajkovich* (1989), *supra* n. 47, at p. 414.
94. *Case No. D74/00* (2000), *supra* n. 80.
95. *Lewis Emanuel* (1965), *supra* n. 56, at pp. 377-378.
96. For instance, *see* DO: Income Tax Act, ch. 67:01 (Dominican Republic); IL: Income Tax Ordinance 5721 (1961), sec. 33(10(h) (Israel); MY: Income Tax Act 1967 (Act 53), sec. 4(f) (Malaysia); MT: Income Tax Act, ch., 123, sec. 2(10) (Malta); s 4(1)(g): and NG: Companies Income Tax Act, ch. 60, sec. 9(1)(d) and NG: Personal Income Tax Act (No. 104), ch. P8, sec. 3(1)(f) (Nigeria).
97. Now pt. 5, ch. 8, sec. 687-689 ITTOIA.
98. M. Sherry, *Whiteman & Sherry on Income Tax* para. 12.018/1 (Sweet & Maxwell).
99. The only SHC decision applying section 10(1)(g) of the ITA to date is SG: SHC, 21 and 29 Mar. 2018, *BQY v. Comptroller of Income Tax (CIT)*, [2018] 4 SLR 1467, but this relatively short judgement does not conclusively set out the test to be applied, thereby leaving a number of unanswered questions.
100. SG: ITBR, 30 Apr. 2004, *IB v. Comptroller of Income Tax (CIT)*, [2004] SGITBR 10 (also reported as SG: ITBR, 30 Apr. 2004, *DWTH v. Comptroller of Income Tax (CIT)*, (2005) MSTC 5,347).
101. Id., sec. 38.
102. Id., sec. 39.

clusion specific to the facts of that case.[103] This can be seen from the following statement of the ITBR in *GBU v. CIT*:

> Although the cases of *IB* and *HZ* only identify the concept of "long-term investments" as being an exception to the rule, we do not take this to mean that if the Appellant is unable to prove that the acquisition [of shares] is for the purposes of a long-term investment, it must necessarily mean that the gain derived from the subsequent sale is a taxable income gain … the second stage of the test must be broader than merely long-term investments to also encompass "other capital purposes depending on the context".[104]

It is submitted that this demonstrates that the statements made by the ITBR in *IB v. CIT* are not conclusive tests for income in respect of section 10(1)(g) of the ITA but, rather, are parts of a wider test.[105] Further, the ITBR in *GBU v. CIT* clarified that:

> the concept of "long-term investments" is merely a safe harbour which would satisfy the Board [ITBR] that the gain was capital in nature, but does not automatically render a gain derived without the intention to hold the purchase as a long-term investment as being an income gain. All the facts and circumstances of the case must be considered.[106]

A modified version of the "Badges of Trade" should be applied for the test for income falling under section 10(1)(g) of the ITA. Such a modified version would merely remove "frequency of transaction" as an indicia, while retaining the other "Badges of Trade".[107] It is again submitted that this is what the courts have been doing in practice, even as they accept the primacy of intention over other factors.[108]

It should also be noted that the law in this area remains rather uncertain for a few reasons. First, the statements of the ITBR in *GBU v. CIT*[109] on the test in section 10(1)(g) of the ITA have never been considered to date by any subsequent tribunal or court, despite the fact that a handful of opportunities have arisen since the decision in *GBU v. CIT* decision was given. Notably, the SHC in *BQY v. CIT* (2018) did not expressly examine this question.[110] Second, none of this author's previous submissions have been judicially considered to date either. Accordingly, there is a situation in which the sole binding authority of *BQY v. CIT* does not expressly set out the test in section 10(1)(g) of the ITA, thereby leaving a number of persuasive authorities that cannot always be read as a coherent whole.

With regard to the current discussion on the taxability of gains from the disposal of cryptocurrencies, there are at least three potential interpretations of the current law. The first interpretation has been summarized in the arguments of counsel for the tax authorities in *GBU v. CIT*, in which it was submitted that the test for income in section 10(1)(g) of the ITA:[111]

> is two-pronged: first, if the Appellant had an intention to profit from the transaction at the time the transaction was entered into, the gain derived from the transaction would *prima facie* be taxable under section 10(1)(g) of the Act; and second, only if the Appellant satisfied the Board [ITBR] that the acquisition was intended to be held as a long-term investment, the gain would then be considered a non-taxable capital gain.[112]

On this interpretation of the test in section 10(1)(g) of the ITA, it would be necessary to determine the intention of the taxpayer when in purchasing the relevant asset – in this case, shares, but in our present case, cryptocurrencies. If it had an intention to profit from the transaction at that time, the only way it could escape taxation would be to demonstrate that it intended that the cryptocurrencies were to be held as a long-term investment. Given the general lack of contemporaneous documentation produced in such situations, this test would make it very difficult for the taxpayer to evidence its intention and effectively object to the assessment of the tax authorities.

This first interpretation has been rejected by both the ITBR in *GBU v. CIT* and previously by this author, who have provided the following two interpretations respectively. According to the ITBR in *GBU v. CIT*, if the taxpayer can prove that the assets in question, in the case in question, cryptocurrencies, were purchased as a long-term investment, it would be able to avail itself of a safe harbour, which would satisfy the ITBR that the gain was capital in nature. However, the inverse would not apply. Where a taxpayer was unable to do so, the ITBR would not necessarily find that the gain was income in nature.[113] The ITBR in *GBU v. CIT* emphasized that it was necessary to look at "other capital purposes" and "all [of] the facts and circumstances of the case",[114] but, unfortunately, it did not provide any further guidance on what these "purposes" and "facts and circumstances" might be.

This author's position effectively builds on that of the ITBR in *GBU v. CIT*, in adopting most of the principles set out there, but proposing that the "purposes" and "facts and circumstances" might be the modified "Badges of Trade", i.e. all of the "Badges of Trade" except the indicia of frequency of transactions. In the author's interpretation, it would be necessary to apply the same analysis considered previously in the context of the test in section 10(1)(a) of the ITA, but exclude the analysis on frequency of transactions.[115]

5.2. The test in section 10(1)(g) of the ITA in situations involving potentially speculative activities

It is submitted that, in the case of situations involving potentially speculative activities, activities that would not be considered to constitute a trade or business by virtue of the fact that they are speculative in nature, would sim-

103. V. Ooi, *Taxing 'All Other Income' in Singapore and Malaysia*, 19(2) Oxford U. Cmmw. L. J. 2, pp. 213 and 218 (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436550 (accessed 13 July 2021).
104. Id., p. 214, citing *GBU v. CIT* (2017), *supra* n. 33, at sec. 3.
105. Id., p. 214.
106. *GBU v. CIT* (2017), *supra* n. 33, at sec. 3.
107. Ooi, *supra* n. 103, at p. 219.
108. Id., p. 221.
109. Id., p. 214.
110. *BQY v. CIT* (2018), *supra* n. 99.
111. *GBU v. CIT* (2017), *supra* n. 33, at sec. 2.
112. Id.
113. Id., sec. 3.
114. Id.
115. Ooi, *supra* n. 103, at p. 219.

ilarly not result in gains taxable under section 10(1)(g) of the ITA. It is submitted that the sole indicia distinguishing section 10(1)(a) and (g) of the ITA is that of frequency. This position does not affect the analysis in situations involving potentially speculative activities.

However, if the other two interpretations of section 10(1)(g) of the ITA are adopted instead, a very different conclusion may be reached. If the interpretation advanced by counsel for the tax authorities in *GBU v. CIT* is accepted, a taxpayer would almost always be caught by section 10(1)(g) of the ITA. Nearly all taxpayers buying and selling cryptocurrencies would intend to profit from the transaction in some way, and, if it is held that the taxpayer was effectively gambling or speculating, it would be virtually impossible to demonstrate that the cryptocurrencies were intended to be held as a long-term investment. The concept of a long-term investment is simply totally at odds with activities of gambling.

If the interpretation of the ITBR in *GBU v. CIT* is accepted, the position becomes very uncertain, as it is necessary to consider "other capital purposes" and "all [of] the facts and circumstances of the case",[116] without stating what they might be. Consequently, it might be possible that the speculative nature of an activity could be one of those relevant "purposes", but there is no guidance as to whether that would matter and even so, how it might affect the reasoning of the courts. Accordingly, this interpretation gives future courts the most space in terms of developing the test for income in section 10(1)(g) of the ITA, but has the disadvantage of being considerably more uncertain compared to the other two interpretations.

6. Conclusions: Bringing Everything Together

6.1. A series of tests

This article has set out a series of tests for determining whether gains from the disposal of cryptocurrencies are taxable as income under Singapore law as it presently stands. The starting point is to determine whether the taxpayer was carrying on a business or trade. Relevant indicia for determining the existence of a business include activities that are commercially undertaken, with habitual and systematic operation with some elements of continuity and repetition of acts. Relevant indicia for finding trading activities include the "Badges of Trade" as well as a variety of other factors. Given that cryptocurrencies are a relatively new class of assets, it is difficult to determine the length of period of ownership and frequency of transactions that would indicate the existence of a trade, but some guidance may be drawn by analogy with other asset classes. It is also argued that the larger the amount of loans taken out to finance the cryptocurrency transactions, the more likely it is for a trade to be determined.

The next step is to consider whether the taxpayer was engaging in gambling, a finding of which would negate the existence of a trade or business. Here, the key relevant factors have to do with the level of skill of the taxpayer, the level of organization, and whether the taxpayer is an individual or a company. It has been shown that, generally, a very high level of skill and organization is required for individual taxpayers to demonstrate that, in fact, they are trading or carrying on a business rather than speculating in the case of shares. This situation is also likely to be the case for cryptocurrencies. The converse is true for businesses, which could find it much more difficult to demonstrate that they are not trading or carrying on a business.

The following step involves the application of the relevant "sweeping-up" provision, if any exist in the jurisdiction in question. There are three possible interpretations of section 10(1)(g) in the Singapore context, the strictest of which would result almost always in the taxpayer being liable to tax under section 10(1)(g) of the ITA, and the most generous likely to conclude that a taxpayer found to be speculating should not be so liable. The final step would be the application of capital gains tax provisions, if there are any in the jurisdiction in question.

6.2. Importance of following the order of the tests

It is especially important that the order of the tests referred to in section 6.1. be followed strictly, both as a matter of statutory interpretation and practical outcomes. In particular, the test for income in relation to section 10(1)(g) of the ITA must necessarily come after the test for section 10(1)(a) income. As income under section 10(1)(g) of the ITA catches any gains or profits of an income nature not falling within any of the preceding paragraphs, it follows that it can only have any application after it has been demonstrated that the gains or profits in question do not fall, inter alia, within the scope of section 10(1)(a).

There are also practical implications of taxing the income under section 10(1)(a) or 10(1)(g) of the ITA. As the author has previously argued, the tax authorities may be more likely to succeed under an assessment based on section 10(1)(a) because the taxpayer would not have the framework of the "Badges of Trade" framework on which to prove its intention, and may have the burden of showing that it acquired the assets with the intention of holding them as long-term investments.[117] It is also the case that unabsorbed losses in respect of section 10(1)(a) of the ITA can be carried forward for set-off against the statutory income of future years of assessment and also allow for the deduction of capital allowances. Losses arising under section 10(1)(g) of the ITA are subject to a much stricter set-off mechanism where the expenses incurred in the production of each source must be matched against that particular source.[118]

6.3. The policy dilemma

This article has sought to show that determining the taxability of gains from the disposal of cryptocurrencies under Singapore law is an intensely fact-specific enquiry,

116. *GBU v. CIT* (2017), *supra* n. 33, at sec. 3.

117. Ooi, *supra* n. 103, at p. 221.
118. Id., citing the decision of the Singapore High Court in SG: HC, 27 Sep and 2 Dec 2005, *JD v. Comptroller of Income Tax (CIT)*, [2006] 1 SLR(R) sec. 45.

making it necessary to look at numerous factors, such as each of the "Badges of Trade", and the level of skill and organization of the taxpayer. There is also some uncertainty in the relevant law, particularly with regard to the application of section 10(1)(g) of the ITA. It is difficult to form a conclusion or provide any general guidance on the taxability of such gains without a careful examination of all of the relevant facts. Unfortunately, this position gives rise to a problem for both the tax authorities and the taxpayer, who have less certainty that they would probably like.

The key issue for the tax authorities is that, if they take a position that gains from the disposal of cryptocurrencies are generally taxable under section 10(1)(a) of the ITA, subject to the taxpayer showing otherwise, it would follow that they must also take a position that losses from the disposal of cryptocurrencies are similarly deductible under Singapore law. Accordingly, while this position may potentially bring in a good amount of additional revenue, the tax authorities must also consider the impact of allowing a good amount of additional deductions that might affect correspondingly revenue collection. There is also the prospect of additional administrative costs incurred if a large number of taxpayers start to claim deductions for their cryptocurrency losses.

The optimal solution for the tax authorities would be to assess taxpayers under section 10(1)(g) of the ITA rather than section 10(1)(a), as section 10(1)(g) losses are subject to the far more restrictive set-off regime and, importantly, cannot be set-off against other forms of income. As a result, there would be no issue of taxpayers trying to set-off their cryptocurrency losses against, for example, their employment income.

That said, it has been shown that, conceptually, section 10(1)(g) of the ITA cannot be applicable until section 10(1)(a) has been first applied and the conclusion reached that the gains in question do not fall under section 10(1)(a). The conceptual and practical distinctions between sections 10(1)(a) and 10(1)(g) of the ITA have always been present under Singapore tax law, but are likely to acquire considerable importance as the amounts of revenue potentially collectable from cryptocurrency transactions have become increasingly large. It may not be too long before this issue falls to be decided by the courts, thereby hopefully providing some much-needed certainty in this area.