GIO v Comptroller of Income Tax
[2024] SGITBR 1

Case Number : ITBR Appeal No. 2 of 2019

Decision Date : 26 March 2024

Tribunal/Court : Income Tax Board of Review

Coram : Edmund Leow; Rajan Menon Smitha; Darren Koh Ngiap Thiam

Counsel Name(s) : Quek Mong Hua and Tan Jin Yong for the appellant; Julia Mohamed and Bjorn Lee for the respondent

Parties : GIO v Comptroller of Income Tax

Introduction

1. The background to this appeal is not disputed. On 18 October 2010, the Comptroller of Income Tax assessed to tax, the Taxpayer's gains from the disposals of two properties:

   a. [FSP]; and

   b. [UP].

2. The total amount brought into tax was SGD1,725,350.

3. The taxpayer objected to the Additional Assessment, but in the end, the Comptroller of Income Tax issued a Notice of Refusal to Amend on 10 December 2018, and the Taxpayer has appealed to the Board.

The [FSP]

4. The Taxpayer purchased the [FSP] for the purchase price of SGD4.6 million by exercising an Option to Purchase ("OTP") on 6 March 2007.

5. Prior to the completion of the purchase, the Taxpayer sold the property for the sum of SGD5.28 million to "[VIH] and/or nominee" through granting an OTP on 10 April 2007. The OTP was finally exercised by [RIH] on 30 April 2007.

6. The purchase of the [FSP] was completed on 15 June 2007.

7. The sale of the same property was completed on 2 July 2007.

8. The final profit (after stamp duties and other costs of completion) on sale of the property amounted to SGD451,510.

The [UP]

9. On 25 June 2007, "[SBN] and/or nominees" were granted an OTP on the [UP] for SGD4.1 million. This option was exercised by the Taxpayer on 9 July 2007.

10. Prior to the completion of the purchase, a buyer for the [UP] exercised on 13 August 2007, an OTP to purchase the property from the Taxpayer for SGD5,551,200.

11. The purchase, and the subsequent sale of the [UP] were completed on the same day, on 17 September 2007.

12. The final profit on the sale of the property (after stamp duties and other costs of completion) amounted to SGD1,273,840.

The Appellant's position

13. The Appellant took up two grounds of appeal before the Board. Firstly, the Appellant argued that that gains in questions were not income in nature and therefore Section 10(1)(g) of the Income Tax Act 1947 ("ITA") did not apply. The main thrust of the arguments here are that gains from the realisation of real property are capital in nature and are therefore not subject to Income Tax. In applying section 10(1)(g), the Respondent had applied a test derived from Australian authorities (the *Myers* test) which should not be applied in Singapore. Secondly, in the alternative (without conceding the first point) the Appellant argues that even if the *Myers* test were applicable in Singapore, the facts of the case were that the Appellants intended to purchase both properties for capital gain. This means that under the *Myers* test, the gains on both properties would have been capital in nature, and therefore not subject to section 10(1)(g).

The role of the Board

14. It is salutary to remind ourselves that according to section 80(10) ITA:

> The Board may, after hearing an appeal, confirm, reduce, increase or annul the assessment (including the amount of any unabsorbed losses, allowances or donations that may be carried forward) or make such order thereon as it thinks fit.

15. It is also important to remember that according to section 80(4) of the same Act:

> The onus of proving that the assessment is excessive or that the amount of any unabsorbed losses, allowances or donations that may be carried forward ought to be of a higher amount than that assessed (as the case may be), is on the appellant.

16. So, while the Board has been given broad discretion over resolving the appeal, it remains the duty of the of the Appellant to prove his case.

The income or capital nature of gains from the disposal of properties

17. The Income Tax Act 1947 provides:

> **Charge of income tax**

10.—(1) Income tax is, subject to the provisions of this Act, payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of —

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;

…

(g) any gains or profits of an income nature not falling within any of the preceding paragraphs.

18. It is self-evident that unless otherwise provided for, the charging provision of the Income Tax Act 1947 only imposes tax on income. Not on capital gains. Even the clause invoked by the Respondent to impose a charge on the Appellant refers to "any gains or profits of *an income nature* not falling within any of the preceding paragraphs." (emphasis added)

19. In paragraph 15 of their closing submissions, the Appellant reiterates "…that the profits from disposal of properties cannot be taxable under section 10(1)(g) of the Income Tax Act unless the statute specifically provides for and regards it as of an income nature. To regard the capital gains from property disposals as 'income' would unreasonably stretch the literal language of section 10(1)(g) of the ITA and tantamount to re-writing section 10(1)(g) …"

20. The Appellant pointed to the existence of the now repealed section 10F(1) of the ITA, which provided:

Where any person has disposed of any real property (with or without any change in use, improvement or development after its acquisition) on or after 15th May 1996 before the expiration of the period of 3 years from the date on which he acquired the real property, then, notwithstanding any other provisions of this Act but subject to this section, the relevant amount of any gain arising from the disposal of the real property shall be deemed to be income of the person chargeable to tax under section 10(1)(g)

21. The repeal of this provision, it is argued by the Appellant, means there is no longer any legally prescribed requirement that the property must be owned for any specific length of time to qualify as a capital gain. In short, all property disposals are of a capital nature and not subject to tax under ITA.

22. The income/capital nature divide is not a new challenge to the world of tax. It was already an issue when Income Tax was first introduced in England in 1799. Parliament has neither defined "income" nor "capital" and has left it to the courts to work out a definition. As the Court of Appeal said in *Comptroller of Income Tax v BBO* [2014] 2 SLR 609:

The imposition of tax is solely within the purview of Parliament through the enactment of clear tax legislation which is to be interpreted by the court or relevant tribunal using principles developed incrementally by case law.

23. During the hearing, the Appellant agreed that a trader in real property is rightly subject to Income Tax as being a trader. The Appellant posited that in other cases, gains from moveable property such as Rolex watches were income in nature, but gains from immoveable property were capital in nature. One explanation put forth for this was that immoveable property was subject to many regulations and therefore is to be treated differently. However, no case law or authority was brought before the Board to show that such a distinction existed in law – either by way of statute or by way of case law. The mere assertion that a disposal of real property is capital in nature per se, runs counter to the weight of decided cases where dealings in real property have been found to be of an income nature, and therefore taxable. In *NP v Comptroller of Income Tax* [2007] 4 SLR(R) 599 a married couple who bought 8 residential properties and sold seven of them within 8 years, was held to be taxable on the profits of some of the sales as "income from trade." In an appeal from the Board of

Review in the case of *BQY v Comptroller of Income Tax* [2018] 4 SLR 1467 the High Court found no reason to disturb a finding that a businessman and his wife who bought and sold 3 "good class bungalows" were liable to tax under section 10(1)(g) of the Act. In the case of *HZ and anor v Comptroller of Income Tax* [2004] SGITBR 8 ("*HZ*") the Board of Review found that the disposals of a shophouse was a realisation of capital, and therefore not subject to income tax. The Board did examine all the facts around the purchase of the shophouse before arriving at their decision: it was not decided merely because it was a disposal of real property. In the case of *GCA and GCB v Comptroller of Income Tax* [2017] SGITBR 5 the Board found that the assessment to tax of 3 properties under section 10(1)(g) was not wrong.

24. The Appellant raises the argument that the introduction and repeal of section 10F(1) shows that gains from isolated transactions in real property were capital in nature and therefore not subject to Income Tax. This matter was ably dealt with by the Board in *HZ* in paragraphs 48 – 51:

> 48. It is appropriate at this juncture to deal with the argument raised by the Appellant's counsel that the introduction of section 10F(1) clearly showed that gains from isolated transactions in property were not of income nature. Section 10F(1) ITA has since been repealed on by Act 37/2002 with effect from 13 October 2001. The purposive approach permits the use of extrinsic materials, such as any explanatory statement relating to the Bill and records of Parliamentary debates, to help in interpretation of this 1996 amendment: see Section 9A(3)(b), (c) and (d) of the Interpretation Act
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> 49. The scope of section 10F(1) ITA was clearly stated in the Explanatory Statement. It reads as follow:
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> > "This bill seeks to amend the Income Tax Act in implementing the tax changes relating to the taxation of gains derived by any person from certain short term real property and shares transaction.
> >
> > Clause 2 inserts new sections 10F and 10G to tax any gain derived by any person from certain short-term transaction in real property and shares in any private company which holds at least 75% of its assets in the form of real property or shares in real property companies. The tax payable by such person in respect of such gain would vary accordingly to the period of holding of the real property or shares by such person … …"
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> 50. The aim of the legislation was to curb property speculation that was rife at that time from1994 to 1996. This was stated by the Minister for Finance Dr Richard Hu Tsu Tau when he introduced the amendment in Parliament. The Minister said:
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> > "*Income tax and stamp duty measures to discourage speculation in the residential property market were announced on 14th May 1996.* The Income Tax (Amendment) Bill 1996 seeks to tax, as income, *any gains arising from the sale of <u>any real estate</u> within three years of its purchase,* as follows:
> >
> > > "<u>Gain from sales of properties within 3 years to be taxed as income.</u>
> > >
> > > Gain made by property developers and traders from the sale of properties are already taxable as income. However, similar gains made by individuals and other companies are not subject to tax. To discourage speculation, clause 2 of the Bill inserts a new section 10F to deem gains from the sale of property within three years of purchase as income, to be taxed at individual and company rates respectively.
> > >
> > > However, even with the above tax treatment to discourage property speculation, Members of Parliament may be aware that taxpayers could circumvent this measure by transacting in shares in property holding companies instead… …" *(italics added)*

51. There is nothing to suggest that Parliament recognised that s 10(1)(g) was inapplicable to such situations involving a single property transaction. Rather, given the need to implement immediate measures to cool the property market at that time, the amendment was to impose a tax on all short-term property transactions (except for a few selected categories). The ordinary meaning of words in s 10(F) ITA, when read harmoniously with the intention of Parliament, clearly indicate that this would include even those transactions that were taken up as a long term investments but, for some legitimate change of purpose subsequent to the purchase, had to be disposed of within 3 years of the date of purchase. We are therefore of the view that Parliament introduced Section 10F as a temporary but immediate measure mainly to curb excessive property speculation at that time but did not in any way restrict the wide scope of section 10(1)(g) ITA.

25. To reiterate the point made in paragraph 51 cited above: section 10F(1) was a "cooling measure" that would have brought into tax even those gains which would otherwise have been categorized as having a capital nature, and therefore not subject to income tax. It deemed capital gains to be income and subjected them to tax. Its subsequent repeal does not change the underlying structure and scope of section 10(1) of the ITA. In the current context, the sale of the two properties if they took place today, may well be subject to a further "cooling measure" of the Seller's Stamp Duty seeing that they were acquisitions and disposals within the holding period. However, the imposition of this also does not change the underlying structure and scope of section 10(1) of the ITA.

26. The Appellant challenges the adoption of the *Myers* test, in determining if a particular gain or profit had an income nature. In the case of *FC of T v Myer Emporium* 87 ATC 4364 ("*FC of T v Myers*"), the Full High Court said:

> … a gain made otherwise than in the ordinary course of carrying on the business which nevertheless arises from a transaction entered into by the taxpayer with the intention or purpose of making a profit or gain may well constitute income. Whether it does depends very much on the circumstances of the case. Generally speaking, however, it may be said that **if circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the taxpayer's business**. (at p 4366) (emphasis added)
>
> […]
>
> It is one thing if the decision to sell an asset is taken after its acquisition, there having been no intention or purpose at the time of acquisition of acquiring for the purpose of profit-making by sale. Then, if the asset be not a revenue asset on other grounds, the profit made is capital because it proceeds from a mere realization. But it is quite another thing if the decision to sell is taken by way of implementation of an intention or purpose, existing at the time of acquisition, of profit-making by sale, at least in the context of carrying on a business or carrying out a business operation or commercial transaction. (at p 4369)

27. In light of this and the other cases considered therein, the Board of Review said in paragraph 53 of *HZ*:

> 53. We therefore accept the proposition *in DWTH v Comptroller of Income Tax (Appeal No. 32 of 1999)* [2004] SGDC 255 that our section 10(1)(g) ITA can apply to profits arising out of a transaction which is not an activity in the ordinary course of trade or business, or an ordinary incident of some other business activity, and at the time the transaction was entered into, the taxpayer had the intention or purpose of making a profit from that transaction. The means or mode of realizing the profit need not be specific or precisely determined at the outset. Nonetheless, the Board is of the view that the words "gains or profits of an income nature" (emphasis added) would preclude capital gains arising from the disposal of long-

term investments from being taxed under section 10(1)(g). The Appellants would be able to succeed in this appeal if they were able to prove that the gains were made by them on the disposal of properties that were acquired with the intention of being held by them as long-term investments.

28. The scope of section 10(1)(g) was canvassed again in *IB v Comptroller of Income Tax* [2005] SGDC 50. The Board of Review reviewed again cases of the UK and Australia, included *FC of T v Myers*, and concluded that:

> 39 In our view, section 10(1)(g) can apply to profits arising out of a transaction which is not an activity in the ordinary course of trade or business, or an ordinary incident of some other business activity, and at the time the transaction was entered into the taxpayer had the intention or purpose of making a profit from that transaction. The means or mode of realizing the profit need not be specific or precisely determined at the outset. Nonetheless, the Board is of the view that the words "gains or profits of an income nature" (emphasis added) would preclude capital gains arising from the disposal of long-term investments from being taxed under section 10(1)(g). On the facts of this 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.

29. While the legislative provisions in countries such as UK and Australia are different, such differences while cautioning us to proceed with care, are not, of themselves, a bar to drawing guidance from cases from these common-law countries. If it were such a bar, then the many cases in which this country has drawn guidance from cases abroad would be all *per incuriam,* a state of matters we do not find possible.

30. In light of the weight of authority on the matter, the Board takes the view that there is no absolute bar to the increase in value of an item that is normally regarded as capital in nature, to be caught by income tax. For as much as one can trade in real property, one can also make speculative profits on a real property transaction that can be caught by section 10(1)(g). The dividing line between the realisation of a capital investment, the profits on which are capital in nature and therefore not subject to Income Tax unless otherwise provided for, and the realisation of a quick profit through a buy-sell transaction that is then subject to tax for being "of an income nature" depends on the facts and circumstances of each case.

The intention at the time of purchase

31. The dispute in question lies in the intention on the part of the Appellant at the time he purchased the properties. If he had bought them with the intention of holding them as investments for capital gain, then the gains if any, on disposal were capital in nature and would not be caught by section 10(1)(g). If, however, he had bought them with an eye to making a quick sale, then the gains would be income in nature, and caught by section 10(1)(g).

32. In the case of *BQY v Comptroller of Income Tax* [2018] 4 SLR 1467 the taxpayers had bought and sold three residential properties, never having moved into any of them. In that case, the Comptroller had raised assessments on the profits of the properties under section 10(1)(g). Mr Justice Choo Han Teck remarked in paragraph 6:

> 6 The matter is to be decided by a determination of the buyer's intention at the time he purchased the property. But how does one ascertain his intention? *When parties disagree as to what the true intention of a person was, the court, as a finder of fact, can only look at the action or conduct of that person and see on the balance of probabilities, whether the conduct was more consistent with one intention or the other. There is no magical or fail-safe method. So, when we put all the evidence in this case together, what do we see?* Do we see a couple who bought three houses to be used as their residential home, but resold for the reason that the houses did not suit them? Or do we see a couple who was aware of the opportunities for making a good profit, who went ahead and made the most of the opportunities? If it were the latter, the profits they made would surely be taxable. (*emphasis added)*

The [FSP]

33. The Appellant's position is that the property was bought with a sitting tenant as a long-term investment. However, prior to completion of the purchase, the tenant terminated the tenancy. An offer was brought to the Appellant by an agent, and the property was then sold. That much is common ground.

34. Somewhere between the events of 2007, the correspondence between the Appellant and the agent in 2011, the first enquiries of the Respondent with the agent in 2017, and the agent's own affidavit of 2020 point to a fading of memories as to what exactly took place, in particular if the agent had actually been engaged to find a new tenant for the property or whether the agent had actually been engaged to market the property.

35. We are also left with the documentary evidence of an overdraft facility dated 8 May 2007 secured on the [FSP], which had a special condition attached:

> 11.1 This offer is subject to the Bank's receipt of a copy of the duly exercised Option to Purchase for the sale of the Property at selling price of not less than $5,280,000 prior to the implementation of the Overdraft.
>
> 11.2 The Overdraft shall be fully repaid with 2 months from date of implementation or upon completion of the sale of the Property whichever is earlier.

36. This clearly indicates that this facility was taken out in anticipation of a sale, and the Appellant explains that he had obtained the overdraft facility approval from UOB prior to the sale of the property, and in fact the buyer had exercised the option to purchase the [FSP] unit. Instead of cancelling the UOB facility which he says would have incurred charges, UOB suggested and he agreed, to proceed with the facility to completion of the purchase and inserted the clause to facilitate repayment. Unfortunately, we have no other documents to support these assertions. The Respondent asserts that such a financing arrangement advances its case that the Appellant had no intention of acquiring the [FSP] as a long-term investment.

37. In light of the evidence that we have before us, the Board finds it difficult to say that the Respondent's interpretation of the facts was wrong.

The [UP]

38. The [UP] involves a person who has not been traced, whose whereabouts is uncertain, and the Board has not benefitted from observing this person under cross-examination.

39. What we do have is an option granted to "[SBN]and/or nominees" which was exercised by the Taxpayer on 9 July 2007. Prior to the completion of the purchase, a buyer for the [UP] exercised on 13 August 2007, an OTP to purchase the property from the Taxpayer for SGD5,551,200.

40. The purchase, and the subsequent sale of the [UP] were timed to complete on the same day, on 17 September 2007, without the need for any financing.

41. We are told by the Appellant that [SBN] was then the girlfriend of his godson, and she was trying to seek Permanent Residency in Singapore. The Appellant says that this was a joint purchase agreement, as [SBN] could not afford the purchase on her own. We are told that [SBN] was having difficulty getting her financing when they then received an unsolicited offer. [SBN] convinced the Appellant to sell the property. There is no record of the Appellant paying [SBN] half the proceeds. Unfortunately, no documentation or any other evidence has been adduced to support these assertions.

42. It is regrettable that there has been such a lapse of time between the events in 2007 and the appeal being filed in 2018, and the Board hearing this matter in 2023. It is already difficult for an organised business to keep documentation and corporate memories for such a long time; more so for individuals who do not live their lives expecting to litigate everything they do. For as much as the Board is charged with finding the truth, the Board has to find that truth from within the evidence brought before it.

43. It is also important to remember that according to section 80(4) of the same Act:

> *"The onus of proving that the assessment is excessive or that the amount of any unabsorbed losses, allowances or donations that may be carried forward ought to be of a higher amount than that assessed (as the case may be), is on the appellant."*

44. In light of this, the Board finds that the Appellant has not discharged the onus placed upon him by section 80(4).

The Application for a Case Stated

45. At the hearing, the Appellant applied to the Board to state a case for the determination of the High Court under section 82 of the ITA. The Board has declined to do so and proceeded with the full determination of the matter before it. The case stated procedure is not a substitute for the appeals process, nor is it a way to leap-frog the Board for an opinion of the High Court. It is one used when there is uncertainty in the law, and the early clarification of the law would be beneficial to the disposal of the case. In this instance, the Appellant wishes to challenge the legality of decisions based on the *Myers* test. This is certainly something he is entitled to do so, on appeal.

The decision of the Board

46. In conclusion, the Board finds that the Appellant has not proven that the assessments are excessive and dismisses the appeal with costs of the appeals to be awarded to the Comptroller, the quantum of which is to be agreed between parties or fixed by the Board.

BACK TO TOP