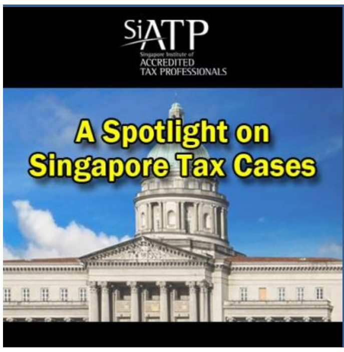

A Spotlight on Singapore Tax Cases

Get Updated On Key Tax Cases In 2017

8 February 2018, Thursday

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A creature of statute, the Singapore taxation system is construed from tax legislations and domestic case laws, which provide precedents and legal tests used by the Courts to better interpret and apply tax legislations on a going-forward basis. While it is useful for tax practitioners to stay updated on the latest tax cases, it can be time consuming to read extensive judgements and figure out their implications.

Allen Tan, Principal, and Ng Chun Ying, Senior Associate, from Baker & McKenzie.Wong & Leow, eased the process for participants of the recent *Tax Excellence Decoded* session. Organised by the Singapore Institute of Accredited Tax Professionals (SIATP), the session saw them summarising the significant tax decisions that were made in 2017. An extensive array of tax cases spanning different issues was covered, ranging from the interpretation of "beneficial ownership" to the taxation of employment income. Some of these cases are highlighted and discussed in more detail here, to illustrate the application of tax rules in various areas.

ABSD Inapplicable for Charitable Trusts: Zhao Hui Fang V Commissoner of Stamp Duties [2017]

In *Zhao Hui Fang and others v Commissioner of Stamp Duties (CSD)* [2017], the settlor had set up a charitable trust and also made a will before his passing. The will made available his family home to surviving family members (including his wife) for use as their personal residence. The will also provided that if none of the family members wished to use it as such, the property may be leased or disposed of, and any income or proceeds shall be paid to the charitable trust.

The executor of the will subsequently sold the property and bought a replacement property to house the deceased's wife. The dispute centred on the Additional Buyer's Stamp Duty (ABSD) assessed on the purchase of the replacement property by the charitable trust.

Under the Stamp Duties Act, sale of residential property to a "foreigner" or "entity" attracts 15% ABSD. Where the property is transferred to a trustee, the chargeability of ABSD depends on whether the beneficial owner is a "foreigner" or an "entity".

On the basis that there was no active or extant beneficial owner to the property held under a charitable purpose trust, the High Court ruled that ABSD was not chargeable on the purchase of the replacement property.

Key Observations and Comments

Beneficial Ownership of Charitable Trust

On the beneficial ownership of properties held under a charitable purpose trust, the High Court commented that neither the factual beneficiaries of the charitable trust, nor the trustees, nor the public could be said to be the beneficial owners of property held under a charitable purpose trust.

"The beneficial interest in a charitable purpose trust is simply "in suspense" and not extant; there is in such a trust simply no ascertained or ascertainable beneficiary."

Materials in Aid of Statutory Interpretation

In relation to both parties' reliance on government-issued press statements in their arguments, the High Court remarked that the context of these materials must be considered in deciding the weight to be attributed to them. While preparatory materials are generally useful in clarifying the purpose of the statute or its provisions, post-enactment materials are often not deemed to have a similar effect.

"*Materials post-enactment would in most situations be unhelpful and caution must be exercised to avoid ascribing meaning that arises after enactment, or was not present at all in the minds of those exercising the power of enactment.*"

In addition, greater weight will usually be given to materials that are clearly intended or designed to be used to explain, in a legal sense, the meaning of the statutory provisions. This is in contrast to press statements, which are typically used to explain a specific regime to a layperson in an easy-to-understand manner.

The High Court also commented that e-Tax Guides issued by the Inland Revenue Authority of Singapore (IRAS) should not control or influence the interpretation of statutory provisions, as they tend to be simplified and are meant to guide laypersons in navigating a particular statutory regime. While e-Tax Guides may reflect the guidelines and practices of the tax authorities, they are not necessarily law.

Deductibility of Interest on Shareholder Bonds: BML V Comptroller of Income Tax [2017]

BML v Comptroller of Income Tax (CIT) [2017] concerned a dispute over interest deductibility under section 14(1)(a) of the Income Tax Act (ITA). The taxpayer was a company that owned and operated a shopping mall. It underwent a securitisation exercise where it assigned its rights to rental income from the mall as security for a $520-million loan, of which $170 million was used by the taxpayer to refinance its borrowings and the balance $350 million was lent to its shareholders in interest-bearing loans. The taxpayer's share capital was initially only $10.2 million. The taxpayer went on to increase its share capital to $335.5 million by capitalising its assets revaluation reserve, and subsequently underwent a capital reduction exercise which resulted in a debt of $333 million due and payable to the shareholders. Instead of returning cash to the shareholders, the taxpayer issued interest-bearing bonds of $333 million to the shareholders. These transactions resulted in the shareholders earning interest on the bonds.

Under section 14(1)(a) of the ITA, the underlying debt which resulted in the interest payment must have been "capital employed in acquiring the income" for it to be deductible. The taxpayer argued that the money borrowed on the bonds represented the company's capital which was represented by income-producing assets, and as such, the interest on the bonds must be deductible.

The High Court observed that the mall was already owned by the taxpayer and was generating income prior to the bond issue (and the issuance of bond did not change the fact). It also relied on the director's resolutions showing that the bond issue was part of a capital restructuring plan (and not for financing needs or the desire to generate more rental income). On these facts, the High Court dismissed the taxpayer's appeal as it could not establish a direct link between the bonds and the mall's rental income.

Allen Tan, Principal, and Ng Chun Ying, Senior Associate, from Baker & McKenzie.Wong & Leow, summarised significant tax decisions in 2017, spanning from the interpretation of "beneficial ownership" to the taxation of employment income.

Key Observations and Comments

Direct Link between the Money Borrowed and the Income Produced

The High Court upheld the principle that in order to meet the test in section 14(1)(a), there must be a direct link between the money borrowed and the income produced. This link has to be "*real, tangible, precise and factual*", and would require the consideration of a number of factors, such as whether the money borrowed had an observable effect on income produced, the purpose of borrowing the money, and whether it was necessary to borrow the money.

The Comptroller's Discretion

The High Court also highlighted that while the Courts have powers to overturn the Comptroller's decision (on the basis that the law has been wrongly interpreted or that the discretion is not reasonably exercised), section 14(1)(a) gives the Comptroller wide discretion in deciding which and to what extent each factor is relevant in determining whether there is a direct link between the money borrowed and the income produced. The onus is thus on the taxpayer to produce supporting evidence and prove to the satisfaction of the Comptroller that there is indeed a direct link for the interest to be deductible.

Taxation of Employment Income – GBS V CIT [2017]

GBS v CIT [2017] *(GBS)* is the first case in Singapore concerning the taxability of a payment to an employee upon termination of his employment. The CIT's administrative position is that severance payments that are made to compensate loss of employment are not taxable as they are capital receipts, but other payments, such as gratuity for past services, are taxable as employment income.

In *GBS*, the taxpayer, a Chief Operating Officer, left employment and received a sum of $510,000 from his company. The CIT assessed this amount to be taxable as a gratuity for past services pursuant to the service agreement. The taxpayer argued that the amount should not be taxable because his position was made redundant, and that the employment contract was not in force as the employer had failed to honour certain terms.

The Income Tax Board of Review (ITBR) dismissed the taxpayer's appeal as the evidence presented (such as the manner of computation of the amount of $510,000 and the timing of the payment on completion of the service agreement) indicated that the amount was intended to be a gratuity payment under the service agreement. The fact that the employer failed to honour certain terms of the service agreement did not affect the validity and force of the service agreement as a whole. The taxpayer also failed to provide evidence to support his assertion that the amount was in fact a redundancy payment.

Key Observations and Comments

Evidence Prevails

In GBS, the legal test was not significantly disputed. The case was decided by the evidence presented which indicated the amount to be a gratuity payment, and accordingly taxable as employment income. It should be noted that the label of the payment is not conclusive; the true substance of the payment must be inferred from the evidence presented.

Covering a total of 10 cases in the half-day session, the speakers clued participants in on the intricacies of various tax cases.

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