Dissecting Singapore Tax Cases 2021

Get In On The Act

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The year 2021 saw a myriad of tax cases across various tax types. At a webinar organised by the Singapore Chartered Tax Professionals, Accredited Tax Advisor (Income Tax) & Accredited Tax Practitioner (GST) Allen Tan, Principal, and Jeremiah Soh, Senior Associate, Baker & McKenzie.Wong & Leow; and Justin Tan, Senior Lecturer, Law Faculty, National University of Singapore, discussed notable tax cases in 2021 and shared their insights.

Definition of Qualifying Machinery under Section 2(2) of the Property Tax Act – Skyventure VWT Singapore Pte Ltd V Chief Assesor and Another and Another Matter [2021]

The taxpayer, Skyventure VWT Singapore Pte Ltd, is the owner-operator of a tourist attraction which uses wind tunnel machinery to provide a simulated skydiving experience for customers. The value of the wind tunnel machinery was included in the annual value (AV) of the property and assessed to property tax.

Under Section 2(2) of the Property Tax Act 1960 (PTA)[1], the enhancement in value of the immovable property is excluded from property tax if the machinery is used for the following qualifying purposes:

(a) the making of any article or part thereof,
(b) the altering, repairing, ornamenting or finishing of any article, or
(c) the adapting for sale of any article.

While the High Court agreed that the wind tunnel was machinery and not merely the setting for business, it held that the wind tunnel did not belong to the class of exempted machinery to which Section 2(2) was intended to apply (that is, to encourage investments in plant and machinery for manufacturing, processing and other industrial purposes and to promote investments in manufacturing machinery) as it was used for social events and not for any industrial purpose. The taxpayer appealed against the decision of the High Court.

The key issues before the Court of Appeal (CA) were:

(a) the scope of Section 2(2) of the PTA and statutory interpretation of the term "article",
(b) whether the wind tunnel is "machinery", and
(c) whether Section 2(2) applies to the wind tunnel, such that its value ought to be excluded from the AV of the property.

[1] Now known as Section 2(3) of the PTA

THE CA'S DECISION

Scope of Section 2(2) of the PTA and statutory interpretation of the term "article"

In interpreting Section 2(2), the CA adopted the purposive approach to statutory interpretation of the term "article".

Taking reference from *Chief Assessor and another v First DCS Pte Ltd* [2008] which observed that the language used in Section 2(2) was imported from earlier English legislation where such terms were used to define a "manufacturing process", it was noted that the Parliamentary intention was to incentivise the use of machinery for "manufacturing processes".

Accordingly, the CA held that the term "article" in Section 2(2) refers to "matter which is *intended to be* ***sold*** or which is the subject matter of a ***sale*** *of services* to make, alter, repair, ornament, finish or adapt for sale the same".

Whether the wind tunnel is machinery

The CA considered if the dominant function of the wind tunnel was one that would normally be attributed to machinery generally, or if its dominant function serves as the setting or environment in which the relevant work could take place. It was determined that the wind tunnel is machinery which constitutes "*part of a system which creates, modifies and controls airflow*".

Whether Section 2(2) applies to the wind tunnel, such that its value ought to be excluded from the AV of the property

While the CA recognised that the wind tunnel is machinery, it was held that the wind tunnel is not machinery within the scope of Section 2(2)(c) as there was no sale of an adapted article (in this case, the skydiving-friendly aerodynamic effect of the airflow). The adapted air was merely the means by which the skydivers could enjoy the experience of skydiving.

The CA also held that the wind tunnel did not fall within the scope of Section 2(2)(b) because the altered airflow was not an article which was intended to be sold per se. There was also no sale of services to the skydivers for the alteration of the airflow in the wind tunnel. The taxpayer merely used the wind tunnel to alter the airflow which existed at all material times in its own premises in order to charge the skydivers a fee for the enjoyment of said altered airflow.

KEY OBSERVATIONS

Distinction between machinery and qualifying machinery under Section 2(2) of the PTA

It is interesting to compare the decision in the present case with that of the *First DCS* case. The nuanced distinction between the transfer of property in an adapted article (that is, the chilling effect of the water in *First DCS*) and the scenario where there is no such transfer (that is, the mere enjoyment of the aerodynamic effect in *Skyventure*) highlights the importance for taxpayers to carry out a factual analysis to ascertain whether an asset can be classified as qualifying machinery and hence have its value excluded from the AV of the property.

The Appellant, GDY, is a Goods and Services Tax (GST)-registered partnership in the business of selling electronic goods. GDY sold electronic goods to Malaysian customers, who would personally collect the products from GDY's place of business in Singapore and hand-carry the goods to Malaysia by motor vehicles. GDY zero-rated the supplies on the basis that they were exports.

Following an audit in 2006, the Comptroller of GST issued a set of Specific Directions entailing a list of export documents that GDY had to maintain in respect of the zero-rating of the supplies exported to Malaysia. GDY dutifully complied with the Specific Directions in maintaining the export documents.

In 2009, a revised e-Tax Guide (ETG) on exports was published by the Inland Revenue Authority of Singapore (IRAS), containing additional conditions that were not in the Specific Directions issued to GDY.

In a subsequent IRAS audit conducted in 2013, GDY tendered documents which only complied with the Specific Directions. GDY passed the audit without any qualification and was not notified that the tendered documents were non-compliant with the revised ETG.

In 2016, the Comptroller conducted another audit and found that GDY was not in compliance with the revised ETG. Accordingly, the Comptroller of GST disallowed GDY's claim for zero-rating and raised two additional sets of Notices of Assessment (NoAs) against GDY.

GST Board of Review's decision[2]

Whether the Specific Directions superseded the revised ETG

The GST Board of Review (the Board) noted that the auditor would have known during the 2013 audit that Specific Directions had been prescribed for GDY, and could have challenged the zero-rating of the supplies by reason of GDY's breach of the requirements in the revised ETG.

However, the auditor did not highlight the issue during or following the audit and GDY passed the 2013 audit without any qualification. In this regard, GDY was entitled to believe that only the requirements in the Specific Directions were to be met in the future, notwithstanding the passage of the revised ETG in 2009. The Board held that the Comptroller could not deny the zero-rating on the basis that the conditions in the revised ETG had not been complied with.

Whether the Comptroller had made a fair and reasonable determination that GDY had not exported the goods

The Board held that it was not "fair and reasonable" for the Comptroller to conclude that the export had not occurred, as GDY had provided all the material information required by the Comptroller in the revised ETG. There was sufficient evidence that was compliant with the requirements set out in the Specific Directions which demonstrated that there was in fact the export of goods.

[2] In *Comptroller of Goods and Services Tax v Dynamac Enterprise* [2022] SGHC 61, the General Division of the Singapore High Court affirmed the decision of the GST Board of Review in *GDY v Comptroller of Goods and Services Tax* [2021] SGGST1 to allow the taxpayer to claim zero-rating for the goods.

Whether the Comptroller has the power to impose additional conditions and if the ETG was legally binding as a condition issued by the Comptroller

The Board emphasised that e-Tax Guides are not law, noting the High Court's decision in *Zhao Hui Fang v Commissioner of Stamp Duties* [2017]; these guides are generally intended to guide laypersons in navigating a statutory regime.

The Board also offered guidance on how ETGs could be placed on a "clear and unassailable legal footing". In that regard, the Board appears to suggest that conditions stated in ETGs can be legally binding if imposed by the Comptroller under a statutory power, but there should be explicit reference to the fact that the ETG contains conditions issued pursuant to a specified statutory power, and that it was issued under the hand of the Comptroller.

OTHER NOTABLE OBSERVATIONS

The Board rejected GDY's challenge that the revised NoAs were invalid due to the time bar, as the original (albeit defective) NoAs were tendered by the Comptroller within the five-year time bar period. This was sufficient to place GDY on notice with regard to the disputed supplies not being zero-rated, and the quantum of liability exposed to GDY.

The Board, however, disagreed with the Comptroller that it was sufficient that the assessment per se was completed within the time bar, even if the NoAs had not been issued within the time bar period. Given that the intent of the time bar was to allow a taxable party to close its accounts with certainty after five years from the relevant accounting period, a notification of the outcome of the assessment was necessary to ensure finality.

The past year was punctuated with various tax cases across different tax types and explored different concepts. Some have progressed to higher courts for consideration. One thing is for sure – tax controversies are here to stay. So be sure to keep up to date on tax matters.

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