



## Singapore Tax Cases 2022 (Part 1) Key GST Cases And Implications For Taxpayers

9 March 2023, Thursday

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### KEY TAKEAWAYS

- The Singapore courts have consistently held that e-Tax Guides are merely guidelines and are not law.
- The high threshold set by the Singapore Court of Appeal must be crossed before the higher courts can review a finding of fact by the Board of Review.
- To constitute “non-monetary consideration” for GST purposes, the consideration must be independent of and not ancillary to the purchase, disposition or use of the product.

**A**s one of the main revenue sources for Singapore, Goods and Services Tax (GST) is closely scrutinised by the tax authorities. In the first part of 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 two notable GST cases in 2022.

### ***Are e-Tax Guides Legally Binding – Comptroller of Goods and Services Tax V Dynamac Enterprise [2022] SGHC 61***

The taxpayer, Dynamac Enterprise (“Dynamac”), sold electronic goods to Malaysian customers who personally collected and hand-carried the goods to Malaysia by motor vehicles. Dynamac would zero-rate these supplies on the basis that they were exports.

Following an audit in 2006, the Comptroller of GST (the “Comptroller”) issued a set of Specific Directions entailing a list of export documents that Dynamac had to maintain to zero-rate the exports. In 2009, a revised e-Tax Guide (ETG) on exports containing additional conditions was published by the Inland Revenue Authority of Singapore (IRAS).

In the 2013 audit, Dynamac tendered documents to IRAS which only complied with the Specific Directions and passed the audit without any qualifications.

However, IRAS found that Dynamac was not in compliance with the revised ETG in a subsequent 2016 audit, and disallowed Dynamac’s claim for zero-rating.

The GST Board of Review (the “GST Board”) found that the Specific Directions issued by the Comptroller in 2006 were not revoked in subsequent audits or the passage of the revised ETG in 2009, and concluded that Dynamac should not be denied zero-rating for failing to comply with the conditions in the revised ETG.

## THE HIGH COURT'S DECISION

### ***Whether the GST Board made a fundamental error of law in failing to decide whether Section 21(6) of the GSTA or Regulation 105 of GSTR applied***

On appeal, the Comptroller challenged that the GST Board was wrong for failing to determine whether Section 21(6) of the GSTA or Regulation 105 of the GSTR applied because the latter has a “prior approval” requirement which is materially different from the former.

The High Court disagreed with the Comptroller that prior approval was required as the Comptroller had, by its own practice, deemed “prior approval” automatically once Dynamac had maintained the export evidence as required by the Comptroller. Regardless of which provision applies, the central issue was whether the applicable requirements had in fact been complied with, and this turned on what the applicable requirements were – the ETG, or the Specific Directions.

### ***Whether the GST Board has jurisdiction to determine the applicable export evidence requirements***

The Comptroller argued that the GST Board has no jurisdiction to determine the applicable export evidence requirements because the discretion to impose conditions for export evidence is vested solely in the Comptroller. However, the High Court disagreed on the basis that the GST Board was not deciding which export evidence should be needed for zero-rating but rather, which set of export evidence requirements applied on the present facts.

## ***Non-Monetary Consideration for GST Purposes – GEV V Comptroller of Goods and Services Tax [2022] SGGST 1***

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The Appellant, GEV, is a GST-registered company that adopts a “direct selling” business model to distribute weight management products, nutritional supplements, and personal care products (“Nutritional Products”) at a discounted price to its Members either for personal consumption or for resale to end-consumers.

### ***If the GST Board had jurisdiction, whether the GST Board had wrongly decided the applicable requirements, which should be the ETG requirements and not the Specific Directions***

The High Court highlighted that the high threshold set by the Singapore Court of Appeal (such that “no reasonable body of members constituting an Income Tax Review Board could have reached the findings reached by the Board”) must be crossed before it can review a finding of fact by the GST Board.

As the high threshold was not met on the facts, the High Court declined to disturb the GST Board's finding that the Specific Directions applied.

## **OTHER NOTABLE OBSERVATIONS**

The High Court noted that the Singapore courts have consistently held that ETGs are merely guidelines and are not law. If the Comptroller intends to impose legally binding statutory conditions, there should minimally be some explicit reference in the document which states that it contains conditions issued pursuant to a specified statutory provision, by a specified statutory authority. As these elements were all absent in the ETG in the present case, the ETG did not impose legally binding conditions and did not override the Specific Directions.

Individuals register as Members for an annual fee and are provided with a member pack which contains materials that form a comprehensive agreement regulating the terms and conditions by which Members can purchase and market the Nutritional Products, as well as recruit other Members who form “downlines”.

Members enjoy a standard discount of 25% and may enjoy further tiered discounts (at 35%, 42% and 50%) depending on the volume of products they or their downlines purchase. Members also receive commissions on products purchased by their downlines.

GEV had taken the net price (that is, the price after the application of the tiered discounts) as the value of the supply. The Comptroller, however, took the view that there is non-monetary consideration in the form of services provided by the Members in exchange for a right to purchase the Nutritional Products at a discount. Pursuant to Section 17(3) of the GSTA, the Comptroller computed the value of the supply based on the open market value.

An assessment was issued, to which GEV filed an appeal. The issue before the GST Board was the computation of GST on the value of the Nutritional Products directly purchased by the Member from GEV (and not the commissions earned by Members from purchases by their downlines).

## **GST BOARD OF REVIEW'S DECISION<sup>1</sup>**

### ***What constitutes “non-monetary consideration” under Section 17(3) of GSTA***

The GST Board observed that the typical case where a non-monetary obligation is found involves the incurrance of obligations that are extraneous to the sale of the product itself and would constitute a separate and independent non-monetary benefit to the supplier.

To constitute “non-monetary consideration” for the purposes of Section 17(3) of GSTA, the consideration must therefore be independent of and not ancillary to the purchase, disposition, or use of the product. The contractual undertaking incurred by the recipient of the supply should also provide a benefit to the supplier that goes beyond the monetary transaction in question.

In the present case, the GST Board was of the opinion that the host of terms and conditions found in the terms of Membership (for example, GEV could dictate who the Members could sell to, how they may be sold, the required customer service standards, business records that should be kept) constituted obligations that were independent of the underlying transactions, and which presented a clear and practical benefit to GEV in a manner which was separate from the benefit of the transaction itself. Consequently, the GST Board found that there was non-monetary consideration being provided by the Members to GEV.

### ***Whether non-monetary obligations were separate from contract for supply***

The GST Board rejected GEV's argument that there were two separate contracts (one that conferred Membership and the other for the supply of Nutritional Products) and opined that there was essentially one and the same contract.

The GST Board concluded that there was a direct causative and contractual link between the purchase by the Member of discounted price products and the various obligations undertaken to GEV in terms of Membership. This is because failure to comply with the rules would mean the Member could not purchase at the discounted price, while a breach would also entitle GEV to suspend all Member rights and privileges as well as terminate the Membership. Hence, both sets of terms were inextricably interlinked.

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<sup>1</sup> In *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] SGHC 54, the General Division of the Singapore High Court overturned the decision of the GST Board of Review in *GEV v Comptroller of Goods and Services Tax* [2022] SGGST1 to allow GEV's appeal. The decision of the General Division of the Singapore High Court will not be the subject of discussion in this article.

## Conclusion

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As GST disputes can easily run into significant amounts, it is possible that taxpayers who have a legal basis to support their positions may increasingly challenge the Comptroller going forward, especially with the GST rate increasing to 9% in 2024. Be sure to review your GST matters and stay tuned for Part 2 of our article on other notable 2022 tax cases.

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