



## Singapore Tax Cases 2022 (Part 2) *Key Tax Cases and Implications for Taxpayers*

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### KEY TAKEAWAYS

- An asset cannot be classified as both “building” and “plant” in Singapore under the ITA which differs from the statutory framework in the United Kingdom. Accordingly, whether an asset qualifies as “plant” for the purposes of a capital allowance claim will largely be guided by locally developed case law.
- For acts or documents to be a “sham”, all the parties thereto must have a common intention that the acts or documents are not to create legal rights and obligations which they give the appearance of creating. As this involves an inquiry into the subjective intentions of the parties, the court may have regard to a wider category of evidence, such as the parties’ subsequent conduct.

**I**n last month’s article on Singapore Tax Cases 2022 (Part 1), we covered two notable GST cases based on a webinar organised by the [Singapore Chartered Tax Professionals](#) and facilitated by Accredited Tax Advisor (Income Tax) & Accredited Tax Practitioner (GST) Allen Tan, Principal, and Jeremiah Soh, Local Principal, Baker & McKenzie.Wong & Leow; and Justin Tan, Senior Lecturer, Law Faculty, National University of Singapore.

In this article, we will discuss an Income Tax Board of Review (ITBR) case on whether a silo may be regarded as “plant”, and a High Court case on whether a Deed of Trust is executed for the purpose of evading Additional Buyer’s Stamp Duty (ABSD).

### ***Plant or Building for Capital Allowance Purposes? – Gey V Comptroller of Income Tax [2022] SGITBR 1***

GEY is in the business of providing bulk deliveries of cement via cement tankers. In 2011, GEY began to import a new type of cement and decided to construct a new silo (the “Silo”) to facilitate the storage and distribution of the new type of cement.

The construction of the Silo began in financial year (FY) 2013 and was completed in FY 2015. GEY incurred construction costs, expenditure on mechanical and electrical equipment, and incidental professional fees.

In Year of Assessment (YA) 2016, GEY applied for an advance ruling to the Comptroller of Income Tax (the “Comptroller”) to confirm whether the Silo would qualify as “plant” under Section 19A of the Singapore Income Tax Act (ITA) and accordingly be eligible for a capital allowance claim.

The Comptroller ruled that the Silo did not qualify as “plant” for the purpose of a Section 19A claim under the ITA. Consequently, the capital allowance claims on the construction costs and incidental professional fees were disallowed, while the capital allowance claims on the mechanical and electrical equipment were allowed, subject to conditions.

## INCOME TAX BOARD OF REVIEW'S DECISION<sup>1</sup>

### ***Whether a silo deployed in a Taxpayer's business constitutes "plant" for the purposes of claiming accelerated capital allowances under Section 19A of the ITA***

The ITBR noted that the legal principles established by the Court of Appeal in [ZF v Comptroller of Income Tax \[2010\] SGCA 48](#) ("ZF") for the ascertainment of whether an asset is "plant" or "building" is appropriate for determining the true nature of the Silo in the present case.

In ZF, the Court of Appeal observed that the ITA draws a clear distinction between "plant" and "building". Essentially, "plant" consists of apparatus that is utilised for carrying on the trade or business concerned, while "building" consists of a permanent structure or part of a permanent structure that houses the trade or business.

The ITBR highlighted that the Silo was constructed of permanent materials and that it comprised several built-in structures which serve as housing for specific equipment. These point to the Silo being a "building" rather than "plant". The ITBR also considered the following factors:

#### ***a. The operational role of the asset in the taxpayer's business***

While GEY contended that the Silo provided some form of "preservatory" treatment for the cement, the ITBR found that the most important operational function of the Silo was that of storage and shelter for the cement and concluded that an asset which performs the role of storage and shelter is more likely to be a "building" than "plant".

#### ***b. The physical nature and characteristics of the asset***

The Silo was a large concrete structure supported by pile foundations and constructed under approval by the Building and Construction Authority (BCA) for Additions and Alterations works to GEY's existing cement plant. These pointed to it being a "building" rather than "plant".

#### ***c. Whether the asset concerned is intended only to be temporarily located***

The ITBR concluded that the Silo was not intended to be temporarily located as it was built alongside existing silos constructed in the 1990s and that the construction of the Silo required approval from the BCA.

On the facts of the case and submissions made, the ITBR concluded that the Silo should be characterised as a structure and not "plant" for the purposes of claiming accelerated capital allowances under Section 19A of the ITA.

## OTHER NOTABLE OBSERVATIONS

The ITBR highlighted that GEY had claimed IBAs on the existing silos and continue to do so today. Given that an asset cannot be classified as both "plant" and "building" under the ITA, the ITBR took the view that the tax treatment of the existing silos (being "building" and not "plant") was correct. Notwithstanding GEY's submission that the tax treatment of the existing silos was irrelevant to the present appeal, the ITBR applied the same tax treatment to the Silo for the present case.

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<sup>1</sup> In *Singapore Cement Manufacturing Company (Private) Limited v Comptroller of Income Tax* [2023] SGHC 57, the General Division of the Singapore High Court affirmed the ITBR's decision that the Silo is a building and not a plant. The decision of the General Division of the Singapore High Court will not be the subject of discussion in this article.

## ***Sham Vs Bona Fide Trust – Siraj Ansari Bin Mohamed Shariff V Juliana Bte Bahadin and Another [2022] SGHC 186***

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The plaintiff (“S”) is the husband of the first defendant (“J”) and the father of the second defendant (“M”). S and J executed a Deed of Trust (the “Trust Deed”) in favour of M, as beneficiary, over a property (the “Trust Property”). S and J were appointed as trustees under the Trust Deed.

After J filed for divorce in 2020, S initiated legal proceedings to set aside the Trust Deed on various grounds. Inter alia, S argued that the Trust Property was never purchased for M and that the Trust Deed was executed to evade ABSD.

The central issue before the General Division of the High Court (the “High Court”) was whether the Trust Deed is a bona fide instrument executed for the purpose of purchasing the Trust Property on trust for M, or a sham instrument executed for the purpose of evading ABSD.

### **THE HIGH COURT’S DECISION**

#### ***Whether the Trust Deed is a bona fide instrument, or a sham instrument executed for the purpose of evading ABSD***

In determining whether the Trust Deed is a sham, the High Court applied the legal principles as summarised in *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kuan, deceased) v Chng Eng Chye [2013] 2 SLR 715 (citing Snook v London and West Riding Investments Ltd [1967] 2 QB 786 at 802)*:

*“... that for acts or documents to be a ‘sham,’ with whatever legal consequences follow from this, all the parties thereto **must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.**”*

As the inquiry is one into the subjective intentions of the parties, the court is not restricted to the usual rules governing interpretation of documents and may have regard to a wider category of evidence, such as the parties’ subsequent conduct.

Having considered the evidence, the High Court found that the conduct of S and J and the contemporaneous evidence point to the Trust Deed being bona fide.

#### ***a. S and J’s execution of documents as trustees***

S and J executed the Option to Purchase, the Sale and Purchase Agreement, and several other tenancy agreements, as trustees for M. When viewed together, these documents showed a consistent pattern of behaviour by S and J that they understood that they were trustees of the Trust Property under the Trust Deed and acted as such in accordance with the terms.

#### ***b. S and J’s communication with third parties***

S and J informed their lawyer and their property agent of their intention to create a trust for M.

The High Court found the evidence provided by these third-party individuals to be consistent with the Trust Deed being a bona fide instrument and held that documentation and communication with them should rest S’ assertion that J misrepresented to him.

#### ***c. S’ conduct prior to commencing the action***

The High Court found that S’ conduct prior to the commencement of the action was generally consistent with the terms of the Trust Deed and the belief that the Trust Deed was a bona fide instrument. S only began to depart from his original position after the commencement of the divorce proceedings. Accordingly, the High Court found that S’ new position was not an honest one and was nothing but an afterthought.

On the facts of the case, the High Court concluded that the Trust Deed is a bona fide instrument executed for the purpose of purchasing the Trust Property on trust for M, and that S’ allegation of illegality fails.

## Conclusion

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As new tax cases are argued in courts, a little more clarity may be gained through each new judgement. Be sure to keep up to date with the latest tax cases and stay in the know.

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## Facilitators

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