



Singapore tax developments

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BRE v CIT (2018) SGHC 77

The Board of Review case of *GBX v The Comptroller of Income Tax (2017) SGITBR 4* has been appealed to the Singapore High Court as *BRE v Comptroller of Income Tax (2018) SGHC 77*.

Briefly, the appeal revolved around whether income derived by BRE, an individual, should be taxable as gains or profits from an employment or otherwise.

The salient facts of the appeal are as follows:

1. Facts

- 1.1. BRE is an Australian citizen and is the sole shareholder and sole (managing) director of a Singapore incorporated company, Subjunctive Geo Pte Ltd (Subjunctive). BRE holds an Employment Pass issued with Subjunctive as the stated employer.
- 1.2. Subjunctive's registered activity was oil and gas consultancy.
- 1.3. Slightly less than a year after the incorporation of Subjunctive, BRE was offered a position of Project Development Manager to be based in Singapore by TGS, a company incorporated in Australia. BRE signed the employment contract and appears to have been initially employed by the Singapore representative office of TGS and thereafter by TGS Singapore, a Singapore incorporated company. BRE was also the director of TGS Singapore.
- 1.4. An application for an employment pass (with TGS as the stated employer) for BRE was made, but ultimately the

employment pass was not issued due to BRE's apparent refusal to complete the application process. BRE continued to stay and work in Singapore using his existing employment pass with Subjunctive.

- 1.5. Both TGS and TGS Singapore paid cash remuneration for services performed by BRE. The payments were initially paid to BRE's personal bank account but six months into the employment, BRE instructed TGS to remit the payments to Subjunctive's bank account. Subsequently, both TGS and TGS Singapore remitted payments to Subjunctive's bank account.
- 1.6. TGS and TGS Singapore had issued the relevant employer's declaration of employee remuneration (via the Forms IR8A or Form IR21) for the assessment years concerned. BRE's contract with TGS was terminated on 14 April 2015.
- 1.7. The cash remuneration derived in the relevant assessment years was assessed as employment income of BRE.

2. Issue

- 2.1. The appeal to the High Court centred on the same issue that was brought before the Income Tax Board of Review (Board), which is:
 - Whether, as contended by the Comptroller of Income Tax (CIT), the cash remuneration should be assessable in the hands of BRE under Section 10(1)(b) of the Income Tax Act as gains or profits from an employment on the basis that there was a contract of service between BRE and TGS; or
 - As argued by BRE, the cash remuneration should be taxable as profits arising from a trade or business assessable under Section 10(1)(a) in the hands of Subjunctive on the basis that there was a contract for service between Subjunctive and TGS.

3. Arguments

- 3.1 The following facts and evidence (amongst others) were presented by the CIT when the appeal was heard at the Board and centred on substantiating that there was an employment relationship between BRE and TGS:
 - The remuneration paid by TGS to BRE were for services performed by the latter in accordance with the employment contract;
 - In performing said services, BRE was subject to TGS's control over the kind of work and the manner in which the work was carried out, including the provision and use of TGS's property and equipment for work; and
 - BRE was also awarded share options under TGS Singapore's employee stock option plan.
- 3.2 BRE contended that he should not be regarded as an employee of TGS for income tax purposes given that he

did not have an employment pass with TGS as the stated employer.

- 3.3 Upon appeal, the High Court took the view that the employment contract between TGS and BRE (which was signed by BRE) represents cogent evidence that BRE was an employee of TGS.
- 3.4 On the other hand, BRE was also unable to produce any agreement between TGS and Subjunctive to support his claim that he was discharging the role of Project Development Manager for TGS in his capacity as an employee of Subjunctive. Attempts at claiming that it was an oral contract were also not successful, as no one from TGS could testify and corroborate with his claims.
- 3.5 In view of the above, the appeal by BRE was dismissed.

Deloitte Singapore's views

No question of law was addressed in BRE and the case turned largely on its facts.

We note that the cash remuneration paid by TGS remains taxable even if they are assessed in the hands of Subjunctive, albeit at a tax rate of 17%. The assessment years relating to the appeal are from YA 2012 to YA 2016, which is before the increase in the top marginal tax rate for individuals from 20% to 22% commencing from YA 2017. As such, it is unclear whether this appeal was motivated by a desire for tax savings.

This being the case, we posit that BRE would prefer the cash remuneration to be taxed in Subjunctive, given the possible irregularity in his employment pass status and, if so, the attendant violation of the Employment of Foreign Manpower Act.

On this point, the High Court stated that the legality of activities is generally not relevant for determining the taxability of income derived from such activities. If income from an illegal activity is revenue in nature, such income falls within the ambit of Section 10(1) of the Income Tax Act. In what may be the most flowery articulation of this principle, the Court commented, at [9]:

"It is not disputed that BRE did not have an employment pass with TGS...he had been working illegally in that sense, but illegality is a garden of mixed fruit, and not all are forbidden to the tax authority."

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