



Singapore Business Tax developments

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GCH v The Comptroller of Income Tax [2018] SGITBR 1

Background

GCH, an individual, purchased a total of 11 residential and commercial properties from 2009 to 2011. Of these, five were sold by GCH during the period 2009 to 2013 and the profits that arose from the sale were assessed to tax by the Comptroller of Income Tax (Comptroller) as gains or profits arising from trading activities.

Issue

The issue before the Income Tax Board of Review (Board) was whether the gains from the sale of the properties were chargeable to tax under section 10(1)(a) of the Income Tax Act (ITA) as profits made from trading activities.

Facts

Details of the disposed properties (collectively, the Properties) are as follows:

Property	Type	Date of purchase	Holding Period	Profit brought to tax (\$)
[Property 1]	“Walk-up” apartment	6 May 2009	4.6 months	162,687
[Property 2]	situated above shops or eateries	11 September 2009	1 year	149,309

[Property 3]		23 October 2009	0 days	43,000
[Property 4]	Condominium unit	26 November 2009	8.8 months	694,900
[Property 5]		21 April 2011	1.9 years	371,660

Legal principles and evidence adduced

The Board endorsed and applied the principles set out in *NP v Comptroller of Income Tax [2007] 4 SLR(R) 599 (NP)* in ascertaining whether the profits derived by GCH from the sale of properties arose from trading activities.

Briefly, the appellants in NP were husband and wife who bought eight residential properties and sold seven of them during a period of eight years. In deciding NP, the High Court held that, although the definition of "trade" is not provided in the ITA, in determining what would constitute a "trade" under section 10(1)(a) of the ITA, one would look at the various characteristics of trading activities, commonly known as "badges of trade" and the extent to which the transaction in question reflects those characteristics. The following non-exhaustive characteristics were regarded as common to both individuals and corporations:

- Motive of taxpayer;
- Nature of the subject matter;
- Method of financing;
- Whether there has been a multiplicity of similar transactions;
- Duration of ownership;
- Application of special skill or supplementary work; and
- Reasons for realisation.

The Board resolved that the aforementioned factors were to be considered holistically and in aggregate and one should not "count up" the various badges of trade that are present on the facts. In other words, the determination of whether there is an existence of a trade is a qualitative one, rather than a quantitative one.

The following general observations were made by the Board in relation to the disposal of the Properties:

- There was a multiplicity of transactions by GCH as evidenced by the close proximity of the purchase of properties 1 to 4, all in the year 2009, which would infer the presence of a trade.
- The holding period of each of the Properties was adjudged to be relatively short.

Hence, the Board was of the view that there was evidence to suggest GCH was engaging in a trade with respect to each of the properties. The onus¹ thus fell on GCH to prove otherwise.

Judgement of the Board

Although GCH contended that the purchase and sale of each property was not made with the intention of trading in them, the taxpayer was unable to put forward credible evidence to corroborate with the reasons given.

As such, the Board held that GCH had not discharged the burden of proving that she was not trading in the Properties. The profits from the disposal of the Properties are therefore subject to tax under section 10(1)(a) of the ITA.

¹ Pursuant to section 80(4) of the ITA

Deloitte Singapore's views

This case turns largely on its facts as GCH was not able to put forward credible evidence to convince the Board that she was not trading in the Properties.

The following comments by the Board are of interest:

Holding period of property

The Board did not consider NP to be laying down an absolute or binding test of any sort in determining whether the holding period of a property is to be considered as long or short. While noting that the High Court in NP considered a holding period of two years as "not unduly short", the Board in GCH was of the view that a holding period of 1.9 years (for Property 5) could be regarded as short and, when considered with the multiplicity of transactions, suggested that GCH was trading in the said property.

Application of special skill

Of interest is that GCH worked as a real estate agent at various points between 2005 and 2008 and thereafter as a director of a real estate agency from 2008 to 2011. The Comptroller suggested that GCH would have intimate knowledge of the local property market and submitted that there was a high chance that GCH was engaged in speculative trading as the properties were purchased and sold in a period² where property prices were rising.

The Board did not place too much weight on this, and opined [at 23] that (emphasis added):

"While the Board accepts that the Appellant [GCH] may have had specialised knowledge of the local property market...**there is nothing further to suggest that, by dint of this fact alone, an inference that the Appellant was trading was**

justified. Her specialised knowledge may be relevant in explaining her motives behind certain transactions, or her reasons for acquisition or disposal of the Properties, **but it is not a badge of trade in and of itself from which any inference of trade can be drawn.**"

When the Board examined the purchase and sale of Property 4 in detail, it commented [at 54] that GCH (emphasis added):

"...is a **shrewd and enterprising property agent**. It is likely that she would not have proceeded to acquire Property 4 without first checking or making enquires as to whether there were ongoing talks for a collective sale. The Board's view is that the Appellant probably knew that there was potentially going to be an en bloc sale of the condominium before deciding to purchase Property 4. It follows from this that the **inference must be that the Appellant acquired the property in the hope of making a quick profit** if and when the condominium is sold en bloc."

The Board may be of the view that a taxpayer possessing relevant skills and/or knowledge that is relevant to the subject matter (in this case, residential properties) should not, in itself, be regarded as a badge of trade, **unless there are supplementary work or activities which may suggest that the specialised skill or knowledge was applied by the taxpayer.**

There is merit in the viewpoint adopted by the Board; simply put, real estate agents may well purchase properties for investment purposes. No trading inference should be drawn solely on the fact that they possess specialised knowledge relevant to their investments.

However, determining whether the specialised skill or knowledge was applied by a taxpayer is very much a subjective enquiry. It is generally accepted that the test for determining whether a particular transaction was a trading transaction or an investment is an objective test (i.e., based on observable facts). In the UK case of *Marson v Morton*³, it was suggested that a transaction that is in some way related to the trade that the taxpayer otherwise carries on may be regarded as a badge of trade. For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel. This is a point that may require further clarification from the Singapore Courts.

Ultimately, there is no single determining factor to conclude whether the gains or profits from a transaction are to be regarded as trade or investment in nature. Rather, all factors and circumstances surrounding a particular transaction would need to be reviewed in totality to ascertain whether the gains or profits arising from the same would constitute trading gains or otherwise.

We hope that you find this newsletter useful and we welcome your feedback.

² Between 2009 to 2013. It bears noting that Additional Buyer's Stamp Duty was introduced on 8 December 2011 as a 'property cooling' measure, targeted at moderating strong investment demand by local and foreign buyers of residential property.

³ *Marson v Morton* [1986] 59 TC 381. Briefly, the case concerned whether profits from the sale of land arose from a trading transaction. In arriving at a decision that the profits did not arise from a trading transaction, it was noted (amongst others) that the purchase of the land was far removed from the taxpayer's normal activity (that of a potato merchant).

Contacts

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