



## Tax Bytes

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We are pleased to update you on the following:

### GIO v Comptroller of Income Tax [2024] SGITBR 1

On 26 March 2024, the Income Tax Board of Review (ITBR) published its decision on [GIO v The Comptroller of Income Tax \(CIT\) \[2024\] SGITBR 1](#). All section references are made to the Singapore Income Tax Act 1947 (ITA).

#### Background

The case involves a taxpayer (GIO), who disputed the tax assessments issued by the CIT on 18 October 2010 on the aggregate gains of S\$1,725,350 [see (1) + (2) in the table below] arising from the sale of two properties - [FSP] and [UP] in 2007.

The dispute involves the issue of whether the gains should be assessed to tax under Section 10(1)(g). The ITBR dismissed the taxpayer's appeal with costs.

#### Facts of case

The details of the 2 transacted properties are as follows:

Property	FSP	UP
Date of exercise of the Option To Purchase (OTP)	6 March 2007	9 July 2007

Date OTP granted to buyer by GIO	10 April 2007	(not stated)
Date OTP exercised by buyer	(not stated)	13 August 2007
Date of completion of purchase by GIO	15 June 2007	17 September 2007
Date of completion of sale to buyer	2 July 2007	17 September 2007
Purchase price (S\$)	4,600,000	5,551,200
<b>Final profit (after stamp duties and other costs of completion) on sale of the property (S\$)</b>	<b>451,510 (1)</b>	<b>1,273,840 (2)</b>

### Key issues

In determining the taxability of gains from the disposal of two properties by GIO to the buyer, the ITBR had to address the following issues:

#### Primary issues

- Nature of the gains: Whether the gains from the disposals of [FSP] and [UP] which were sold shortly after their purchase by GIO were in the nature of capital gains and therefore not subject to income tax under Section 10(1)(g) of the ITA;
- Applicability of the Myers test<sup>1</sup>: Whether the Myers test should be applied in Singapore and even if it applies in Singapore, whether the taxpayer's intention of purchasing the properties for capital gains displaces the applicability of the Myers test.

#### Secondary issue

- Legislative interpretation: Whether the repeal of Section 10F(1)<sup>2</sup> with effect from 13 October 2001 meant that, in the absence of a specific deeming provision, gains from isolated transactions in real property are of a capital nature and not subjected to income tax.

### Key takeaways

- **Interpretation of Section 10(1)(g)**

The ITBR noted that Section 10(1)(g) applies to any gains or profits of an income nature that do not fall within the other specific categories of income listed in Section 10(1).

The ITBR reiterated that the ITA imposes tax on income but not on capital gains. As such, a key enquiry in relation to the application of Section 10(1)(g) is whether the gain or profit is income or capital in nature.

- **Applicability of the Myers Test**

Whilst the ITBR did not explicitly endorse the Myers test, it had articulated that, despite differences in legislative contexts between Singapore and other common-law jurisdictions such as Australia and the United Kingdom, these differences do not prevent Singapore from drawing guidance from foreign jurisprudence such as the Myers test. If

<sup>1</sup> The Myers test, originating from the Australian tax case *FC of T v Myer Emporium Ltd* (1987) 163 CLR 199, primarily established that profits or gains made from a transaction, even if not conducted in the ordinary course of a business, could still be considered income for tax purposes if the transaction was entered into with a profit-making intent.

<sup>2</sup> Briefly, Section 10F was introduced in Income Tax Act (Amended by Act 23 of 1996) to deem gains from the sale of property within three years of purchase as income subject to tax under Section 10(1)(g).

there was a prohibition against drawing guidance from foreign jurisprudence, then the many foreign cases in which Singapore has relied on would be rendered non-binding, a situation which the ITBR finds untenable.

The ITBR did increase the weight of the factor propounded under Myers test in particular the taxpayer's intention at the time of acquiring the property for the purposes of determining whether the realized gains arising from the disposal of the properties are revenue or capital in nature. Based on the evidence before hand, the ITBR concluded that the taxpayer did not have the intention to acquire the properties as long-term investment and discharged its burden of proof that the assessments were excessive.

- **Repeal of Section 10F(1)**

The ITBR had observed that Section 10F was introduced to curb property speculation by taxing gains arising from the sale of certain short-term real property transactions, and the sale of shares in private companies with significant real estate holdings. Under this legislative measure, the gains arising from such disposals are treated as income if the transactions occurred within three years of purchase. Although Section 10F was subsequently repealed, the ITBR highlighted that this repeal did not alter the broader principle that Section 10(1)(g) is still applicable to gains if the taxpayer's intention at the time of acquisition of such real property was to make a profit. Notwithstanding that Section 10F has been repealed, Section 10(1)(g) is wide enough to capture gains of an income nature based on the taxpayer's intention and the specific circumstances of the transaction. The ITBR clarified that Section 10F does not limit the scope of Section 10(1)(g). As such, gains from property transactions can still be regarded as income under Section 10(1)(g) should the taxpayer intend to make a profit at the time of acquisition of such property.

### Deloitte Singapore's view

The present case adds to a considerable body of jurisprudence interpreting the scope and applicability of Section 10(1)(g):

No.	Case name	Decision date	Subject matter
1	IB v CIT [2004] SGITBR 10	April 2004	Commercial and residential property
2	HZ B v CIT [2004] SGITBR 8	October 2004	Housing & Development Board (HDB) shophouse
3	GBU v CIT [2017] SGITBR 3	July 2017	Shares
4	GCA and GCB v CIT [2017] SGITBR 5	October 2017	Residential property
5	BQY v CIT [2018] SGHC 75	March 2018	Residential property (appeal from GCA and GCB)
6	GIO v CIT [2024] SGITBR 1	March 2024	Residential property

With the exception of BQY v CIT [2018] SGHC 75, all cases were adjudicated at the ITBR level. A consistent theme across these decisions is the focus on the taxpayer's intent at the time of acquiring the subject matter, whether property

or shares. It is however unclear how much weight is placed by the courts on the taxpayer's intention at the time of acquisition of the subject matter. Nonetheless, it should be highlighted that there are other relevant factors (e.g., method of financing and duration of ownership of the assets) that would be taken into account when determining the taxability of gains under Section 10(1)(g).

Separately, the applicability of the Myers test has yet to be tested beyond the ITBR level. In the Myer case, the Full High Court stated (emphasis added to what is known as the Myers test):

*"... a gain made otherwise than in the ordinary course of carrying on the business which nevertheless arises from a transaction entered into by the taxpayer with the intention or purpose of making a profit or gain may well constitute income. Whether it does depends very much on the circumstances of the case. Generally speaking, however, it may be said that **if circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the taxpayer's business.**"*

The reference to Myers may represent an attempt to address the dilemma posed by Section 10(1)(g), which suggests that, in the absence of the carrying on of a trade or business, a profit or gain derived by a taxpayer could nevertheless be considered revenue in nature. Therefore, it is suggested that the Myers test be interpreted narrowly and applied exclusively to extraordinary income derived by a taxpayer within the context of their existing trade or business, where Section 10(1)(g) ought not to apply.

Additionally, where a taxpayer is engaged in business activities, the Court of Appeal had in *CIT v BBO* [2014] SGCA 10 held that the gains derived by that taxpayer were capital in nature without considering the Myers test. To recap, the BBO case concerns the characterisation of profits derived from the sale of shares by an insurer.

Regardless of whether the Myers test is applicable in Singapore and in the absence of further jurisprudence on this, the factors (such as intention, duration of ownership, etc.) considered by the ITBR in various judgements should be considered as relevant when considering the applicability of Section 10(1)(g).

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## Contacts

Should you have any comments or questions arising from this newsletter, please contact either the listed contacts below, or any member of the [Singapore Tax & Legal team](#).



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