KPMG

Tax alert

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Cement silo: building or plant; perhaps machinery?

In a previous tax alert issue published in January 2023, we examined the case of *GEY v Comptroller of Income Tax* [2022] SGITBR 1 where the appeal by a taxpayer in respect of its capital allowance claim on a cement silo was dismissed by the Income Tax Board of Review ("the **Board**"). The appellant company, Singapore Cement Manufacturing Co (Pte) Ltd (referred to as "GEY" in the decision issued by the Board) (the "**Appellant**") subsequently lodged an appeal to the High Court against the decision of the Board.

The Appellant's appeal to the High Court was recently dismissed by the High Court, which set out the grounds of its decision in *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] SGHC 57. In this tax alert, we examine the decision of the High Court which ruled that the cement silo is a building and not a plant — affirming the Comptroller's decision to disallow the capital allowance claim made by the Appellant.

Background

The Appellant constructed a cement silo (the "**Silo**") in 2013 and made accelerated capital allowance claims under Section 19A of the Singapore Income Tax Act 1947 (the "**Act**"). The Comptroller disallowed the Appellant's claim on the structural components but allowed the claim on the mechanical and electrical equipment installed within the Silo that perform operational functions relating to the dispensing of cement.

The decision of the High Court to dismiss the Appellant's appeal is discussed in the following paragraphs.

The decision of the Court

The primary issue in the appeal before the High Court was whether the Board was correct in finding that the Silo is a building, as opposed to a plant.

The High Court, in arriving at its decision to dismiss the appeal and uphold the decision of the Board, reasoned that:

I. The Board did not err in law by finding that the UK cases of *Schofield* (involving a grain silo) and *Barclay Curle* (involving a dry dock) are of no relevance to the Appellant's case. Under the income tax law of Singapore, "plant" and "building" are mutually exclusive categories. In contrast, under the UK's income tax law, an asset may be classified as both a building and a plant. It follows that the UK courts deciding the cases of *Schofield* and *Barclay Curle* did not have to determine whether the asset was either a plant or a building. Consequently, the High Court is of the view that the UK cases of *Schofield* and *Barclay Curle* do not help in deciding whether the Silo is plant or building, which is the issue under dispute in the present appeal.

II. The Board's findings that the primary functions of the (structural components of the) Silo are to provide preservation and protection, and hence the Silo is akin to a building, is correct. In particular, the High Court endorsed the view that the primary functions performed by the Silo can be equally performed by a building which serves the purposes of storage and housing. In contrast, the operational functions of the Silos, such as transportation, control, filtration and batching of cement, are performed by the other equipment (fitted within the Silo), which have already been granted capital allowances.

III. The Comptroller's assessment of the Silo as a building with machinery (as opposed to viewing the Silo as an integrated whole which qualifies as a plant) is a fair and reasonable assessment. Section 19A of the Act does not preclude the Comptroller from classifying parts of the Silo as separate assets for the purposes of assessing the eligibility for capital allowances. Moreover, the Appellant in presenting its case to the Comptroller and the Board had also broken down the Silo into its separate components, and provided the Comptroller with the cost breakdown for the structural components and the equipment, respectively.

IV. While the Comptroller is not bound by a tax position which it previously adopted (i.e granting industrial building allowances to the other silos previously constructed by the Appellant), the High Court is of the view that the Silo cannot at the same time be (i) a building which qualifies for industrial and building allowance and (ii) a plant which qualifies for capital allowances.

Our comments

1. Standard of review

An understanding of the standard of review applicable to taxpayers' appeals to the High Court is fundamental to better appreciating the High Court's decision in the present appeal.

Section 81(2) of the Act provides taxpayers with the statutory right of appeal to the High Court from the decision of the Board, but only "upon any question of law or of mixed law and fact". There is no right of appeal on pure questions of fact.

In particular, it is to be noted that the appropriate standard of review for purely legal questions is a *de novo* review where the appellate court is not required to give deference to the rulings of the Board. Rather, the High Court is free to perform its own analysis of the legal issue presented.

On the other hand, whilst the findings of fact made by the Board would generally be respected, the High Court is free to decide whether the conclusion reached by the Board is consonant with the facts found and to reject the Board's conclusions if the same are unreasonable (see: *NP v Comptroller of Income Tax* [2007] 4 SLR(R) 599 at [6]).

As summarised by the High Court in the landmark case of *AQQ v Comptroller of Income Tax* [2013] 1 SLR 1361 at [56]:

> "… The proper test to apply in appeals under section 81(2) is to ask whether the Board had misdirected itself in law, or had proceeded without sufficient evidence in law to justify its conclusion."

In other words, unless the Board had erred in law or made findings of fact that no reasonable Board could have reached, the High Court would be slow to overturn the decision of the Board.

This means that in order for the Appellant to succeed on an appeal under section 81(2) of the Act in respect of factual findings of the Board, the Appellant must be able to cross the higher threshold of convincing the High Court that "no reasonable body of members of the Income Tax Review Board could have reached the findings reached by the Board" (*per* Chan Sek Keong JC, as he then was,in *Mount Elizabeth (Pte) Ltd v Comptroller of Income Tax* [1985–1986] SLR(R) 950 at [17]).

With the above in mind (and in particular, the higher threshold to be satisfied by the Appellant), we are of the view that the High Court quite correctly extends deference to the Board where findings of facts are concerned.

As explained by Lord Radcliffe in the case of *Edwards v Bairstow & Harrison* (1955) 36 TC 207 at 231 (and endorsed in *NP v Comptroller of Income Tax* [2007] 4 SLR(R) 599 at [6]):

> "… the reason why the Courts do not interfere with Commissioners' [i.e. the Board's] findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. **The reason is simply that by the system that has been set up, the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The Court is not a second opinion, where there is reasonable ground for the first. …. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."**

Returning to the present appeal, the question of whether the Silo constitutes a "plant", within the meaning of the Act, is a question of fact and degree, and the answer given by the Board is to be treated as decisive unless the answer was an unreasonable conclusion on the facts (see also: *ZF v Comptroller of Income Tax* [2011] 1 SLR 1044 at [72]).

In its decision, the High Court had acknowledged that the Silo come with characteristics of both "plant" and "building" and that the crux of the question before the Board was which category is more appropriate in the circumstances. That being the case, the High Court rightly pointed out at [10] that the onus is on the Appellant to show that the Board's finding was an "unreasonable conclusion". This is especially so, given that an appellate court examines only the record of appeal, whereas the Board as a specialist tribunal not only hears evidence from witnesses, but also, as in this case, visited the site to see the Silo.

Against the above backdrop, the High Court concluded that "the Board was not wrong to find that the Silo is a building and not a plant" and that "the findings of the Board, after a site visit to the Silo, cannot be said to be unreasonable".

At this juncture, it is worth noting that the High Court (merely and rightly) held that the Board was "not wrong" (as opposed to being "correct") in coming to the decision that the Silo constitute a "building" within the meaning of the Act. Such an approach taken by the High Court is in line with the standard of review applicable to appeals to the High Court, as discussed above.

2. Is the Silo more appropriately described as a plant/machinery or building?

The case highlighted the importance of adopting the right strategy and approach at the outset in any interaction with the Inland Revenue Authority of Singapore. In this case, it is noted that the issue was first brought to the attention of the Comptroller of Income Tax when the tax agent of the Appellant sought an advance ruling on behalf of the Appellant.

Based on our reading of the decisions issued by the Board and the High Court, respectively, it is unclear whether the respective parties have had the chance to consider the argument that the Silo is a machinery (as opposed to merely being a plant). There are also a number of points which in our view have not been fully discussed or ventilated, as noted in the commentary in our previous tax alert.

In addition, it is unclear whether the parties have had the chance to consider the Silo as an integrated whole (as opposed to being the sum of its parts). To illustrate our point, if an aircraft or a lorry is broken down into different parts or components, the fuselage of the aircraft and the chassis of the lorry may well be said to be merely performing the functions of storage, housing, preservation and protection, and hence not qualify for capital allowances.

Such an approach would however be too narrow in our view, as it would overlook the fact that the aircraft and lorry are, respectively, an integrated whole and should constitute machinery or plant within the meaning of the Act. It is also to be noted that large structures such as the ferris wheel, the district cooling system (*ala First DCS*) and dry dock (characterised as a hydraulic device for receiving and discharging ships in *Barclay Curle*) may yet qualify as "machinery" (in contradistinction with "plant"). It would have been illuminating had the Board had the opportunity to first consider whether the Silo is "machinery" before moving on to considerations of whether the Silo is a "plant".

How we can help

As your committed tax advisor, we welcome any opportunity to discuss the relevance of the above case to your business, as well as any transactions which your business may be contemplating.

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