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Tax alert

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Is a cement silo considered "plant" or "building"?:

The long shadow of *ZF v Comptroller of Income Tax*

In this issue of Tax Alert, we analyse the recent case of *GEY v Comptroller of Income Tax* [2022] SGITBR 1, where the Income Tax Board of Review (the **"Board"**) examined the meaning of the term "plant", for the purposes of capital allowance claims under Section 19A of the Singapore Income Tax Act 1947 (the **"Act"**).

Introduction

This is the first case that examines the meaning of the term "plant" since the landmark Court of Appeal case of *ZF v Comptroller of Income Tax* [2011] 1 SLR 1044 (the ***"ZF case"***), which took place more than 10 years ago. Unsurprisingly, the parties and the Board have to deal with the principles laid down in the *ZF case*. Notably, there was disagreement amongst the parties as to whether the Court of Appeal endorsed *Barclay Curle* (the drydock case) and *Schofield* (the grain silo case) for the purposes of Singapore income tax and the Board observed (at [87]) that the Court of Appeal did not endorse the two cases. As we will show in our discussion below, the Court of Appeal's decision is more nuanced than that observed by the Board. We will also discuss the implications of the *ZF case*.

Background

GEY is a Singapore incorporated company whose business includes the importation, distribution and sale of cement. In 2013, GEY commenced the construction of a new silo (the **"Silo"**) which was subsequently completed in 2015.

The total construction expenditure of the Silo was over $18 million, of which GEY claimed accelerated capital allowances on the basis that the Silo constitutes "plant", within the meaning of section 19A of the Act. Notably, GEY did not contend that the Silo qualifies as "machinery" for the purposes of its capital allowance claims.

The Comptroller of Income Tax (the *"***Comptroller***"*) took the opposing view that the Silo should be more appropriately characterised as either "building or structures" instead of "plant". While the Comptroller allowed capital allowance claims of over $3 million incurred by GEY on certain mechanical and electrical equipment associated with the Silo, GEY's claim on the construction costs of the Silo and incidental professional fees of over $13 million was rejected by the Comptroller on the basis that the Silo was neither plant nor machinery.

The Board, after taking into consideration the submissions made by both the appellant and the respondent, concluded that the Silo is not "plant" for the purposes of capital allowances claim under the Act.

Our key observations on the decision of the Board

1. Distinction between "plant" and "building"

For GEY to succeed in the appeal before the Board, it must be able to prove its case that the Silo falls within the meaning of "plant" in the context of the Act. While the Act does not provide a definition of the term "plant", the Board noted that the scope of Part 6 of the Act, which provides for the grant of capital allowances to taxpayers, extends to "industrial building and structures" (under section 18C), "machinery or plant" (under sections 19 and 19A), intellectual property rights (under section 19B) and approved cost-sharing agreement for research and development activities (under section 19C).

The Board then went on to apply the legal principles established by the *ZF case* and held that there must be a basic distinction between "plant" and "buildings and structures" in the Act due to the historical development of the capital allowances system in Singapore.

While there exists two separate and distinct categories (i.e. "plant and machinery" vs "building and structures") which are mutually exclusive for capital allowance purposes, in instances where an asset has the features of both, it would be necessary to determine whether the asset could be "more appropriately"[1] described as "plant" or "building". This would in turn depend on the *extent* to which the asset plays the role of *equipment* in the taxpayer's business, taking into account the legal principles and factors laid down in the *ZF case*.

It follows that not every silo will necessarily qualify as "plant". The onus is therefore on GEY to demonstrate that the Silo constitutes more of a "plant" than a "building or structure".

2. Criteria laid down in the *ZF* case

During the proceedings of the appeal, GEY focused its case primarily on the argument that the Silo should be regarded as an integrated whole, and that the Silo performs a key operational function in its business of importation and distribution of cement. The Board was however unpersuaded, and was of the view that GEY did not adequately address the other criteria previously laid down by the Singapore Court of Appeal in the *ZF case*, which include the following:

i. The exact operational role which the asset plays in the taxpayer's business.
ii. The physical nature and characteristics of the asset.
iii. Whether the asset concerned is intended only to be temporarily located.
iv. Whether the asset, although not a building proper as such, is nevertheless inextricably connected with a building, such that it is to be regarded as part of the building for income tax purposes.

Notably, the Board in the case of *GEY* was of the view that the exact operational role of the Silo was to store and house equipment and cement. The Board then went on and held that an asset which performs the role of storage and shelter is more likely to be a "building" than "plant".

In the present case, the issue of whether the Silo is to be regarded as a "plant" or "building" for capital allowance purposes is to be determined based on the specific facts of the case taking into account the principal business activities of GEY. While the Silo has features of both "plant" and "building", we agree with the Board that the Silo is to be categorised as either "plant" or "building" (and not both), taking into account which characterisation is "more appropriate" in the circumstances.

That said, it is to be noted that in the *ZF case*, the Court of Appeal acknowledged that there are "grey areas" (see [57] of said judgment), and "intermediate situations" (see [59] of the said judgment). As pointed out by the learned judges in the Court of Appeal case of *ZF*, where a very large asset has features of both equipment and premises in which the business is carried on, the question then is whether the asset is "more appropriately" described as equipment (and hence "plant") or as a building. This would in turn depend on the *extent* to which the asset plays the role of equipment in the taxpayer's business, as well as the other criteria laid down in the *ZF* case (as set out above).

1. The words "more appropriate" were used in *Barclay Curle,* and observed by Hoffman J in *Wimpy International Ltd v Warland* (1988) 61 TC 51 at 82.

3. The "permanent" nature of the Silo

In the case of *GEY*, the Board noted that the Silo was constructed in the form of a large concrete structure made with "permanent materials" and required pile foundations with depths of up to 44 metres. The construction of the Silo also required the approval of the Building and Construction Authority (**"BCA"**).

In contrast, the construction of the dormitories in the *ZF* case involved "prefabricated materials to ensure portability and demountability". Furthermore, the lease for the site of the dormitories in the *ZF* case was for a short-term duration of three years, and the tenancy agreement specifically provided for a 90-days' notice period for the site to be vacated.

The Board in the case of *GEY* therefore held the view that the Silo was constructed with the intention of permanence and not intended to be temporarily located. This further reinforced the Board's view that the Silo was more of a "building" than "plant."

In our view, the Board placed too much emphasis on the permanent nature of the silo in contrast to the dormitories in *ZF* (see [94a] and [94c] of the Board's decision). The temporary nature of the dormitories in *ZF*, is merely a feature of the particular facts in that case. Other cases do not necessarily have to measure up to the same extent of "temporariness" before an item may qualify as "plant".

In the present case involving the Silo, the primary argument of GEY was that the Silo functions more like an integrated piece of equipment or apparatus which plays an active operational function of transportation, control, filtration, batching, preservation and protection of the cement, which are critical in its business of importing, distributing and selling of cement. The "portability and demountability" of the Silo are clearly not key value drivers in the context of GEY's cement business. In this regard, the Board should have further discussed its basis for placing little weight on the operational functions of the Silo in the transportation, control, filtration, batching, preservation and protection of cement, which are critical functions from the perspective of GEY's business. Even if the primary purpose of the Silo is for the storage of cement, it is submitted that depending on its function, the Silo may nevertheless be characterised as a large piece of equipment or apparatus which plays a critical role in the business of GEY (see sections 4 and 7 below pertaining to the issues of whether the Silo is an integrated piece of equipment, apparatus or machinery and the relevance of the UK case of *Schofield*). In this regard, in the recent First-tier Tribunal case of *JRO Griffiths Ltd v HMRC* [2021] FTT 257, the potato store with its functions of the control of temperature and ventilation which were critical in the crisping potato industry, was held to be "plant". Similarly in the present appeal, an investigation into the functions of the Silo in the preservation of the cement (which is known to be a quick-coagulating substance) in a form which is conducive for the transportation and subsequent use at construction sites, may provide valuable insights into the characterisation of the Silo as "plant".

As pointed out by the learned judges in the Court of Appeal case of *ZF* (at [59] of the said judgment), an asset which looks like a building and is constructed from permanent materials, such as brick and mortar, may in one of the rare cases be "more appropriately" described as a piece of equipment rather than a building. As an example, a dry dock may be "permanent", but may yet qualify as "plant" depending on its function: the relevance of the UK case of *Barclay Curle* which involves a dry dock is further discussed in section 7 below.

We are also of the view that the Board may have been influenced by the fact that the construction of the Silo required the approval of the BCA: the installation of certain machinery such as lifts and escalators would also require the approval of the BCA, but such approval from the BCA does not turn the "machinery" into a "building" for capital allowance purposes. For example, the construction of a Ferris wheel may require a BCA approval but the Ferris wheel may nevertheless be a piece of machinery.

In our view, the policy intent of a particular statute (the Building Control Act 1989 in this case) may be very different and should not influence the characterisation of an asset as to whether it is a building or structure under the income tax statute.

4. Whether the Silo may be viewed as an integrated machinery

In the case of *GEY*, the Board examined the facts of the case and favoured a detailed analysis of the individual parts of the Silo rather than analysing the Silo as an integrated whole. The Board further pointed out that GEY did not submit that the inverted cone or any other parts of the Silo should be separately considered as "plant" on its own (other than those parts which have already been allowed for capital allowance claims by the Comptroller).

In our view, it may have been useful for the Board to first examine if the Silo may be viewed as an integrated equipment, apparatus or machinery for the purposes of the analysis: see *Denis Coakley & Co Ltd v Commissioner of Valuation* [1996] 2 ILRM 90 and *Chief Assessor and another v First DCS Pte Ltd* [2008] 2 SLR(R) 724. To illustrate our point, if the asset in question involves an aircraft, the fundamental question which should first be addressed is:

- Whether capital allowance is to be granted on the aircraft as a whole (to the extent that it qualifies as a plant or machinery); *or*

- Whether capital allowance is to be granted only to specific components of the aircraft (e.g. the engine or propellers) which qualify as plant or machinery vis-à-vis the other parts of the aircraft (such as the cockpit or fuselage) which primarily serve the function of housing or storing other components of the aircraft.

In this respect, the decision of the Board was silent and did not go into the details on its basis for viewing the Silo as comprising various separate and distinct parts, as opposed to an integrated whole.

5. Relevance of the Sixth Schedule to the Act

Another issue which arose during the appeal proceedings of the *GEY* case is whether the Sixth Schedule to the Act (which provides for the number of years that capital allowances may be claimed for particular items of plant) may be instructive in the review and determination of the nature of the Silo which is the subject matter of the appeal.

Notably, the Comptroller is of the view that the Sixth Schedule to the Act does not determine whether an asset qualifies as "plant". In other words, it is the Comptroller's view that whether an asset constitutes a "plant" would depend on the meaning of "plant" in the statutory context of the Act and case law guidance on the determination of "plant". On this basis, the Comptroller is of the view that the Sixth Schedule is only applicable if the asset in question qualifies as "plant".

While we agree that the Sixth Schedule does not of itself determine whether an asset is "plant" for capital allowance purposes, it is to be noted at the same time that the Parliament does not legislate in vain: see *Li Weiming v Public Prosecutor and other matters* [2013] 2 SLR 1227 where it is stated at [18] that "it is a basic premise of statutory interpretation that Parliament does nothing in vain". In this regard, the Sixth Schedule to the Act which provides for the number of years that capital allowances may be claimed for a particular item of plant, cannot be treated as redundant. It must serve a function. The fact that an item appears in the Sixth Schedule indicates that there may be situations where that item may yet qualify as plant for the purposes of the Act.

6. Relevance of the previous silos constructed by GEY

The Board, in its written decision, noted that GEY had previously constructed three other silos in earlier years, and was still claiming industrial building allowances under section 16 of the Act for these other silos.

The Board then went further and cited the following as one of the factors in its conclusion that the new Silo is not a "plant" – *"The Board considers the previous tax treatment of the old silos to be correct and further notes that this treatment was also agreed by both the Appellant and the Respondent"* (see: para 94e of the written decision).

With due respect, the only issue before the Board is the characterisation of the new Silo, and not of the other three silos. There does not seem to be any evidence before the Board for it to consider that the previous tax treatment of the old silos to be correct. In any case, the prior characterisation of the three other silos is irrelevant to the findings of the current appeal and cannot colour the issue as to whether the new Silo may qualify as plant, which is the issue before the Board.

Conversely, if GEY had for any reasons previously claimed capital allowance under section 19A in respect of the other three silos, that should not in itself be relevant in the Board's determination of whether the new Silo qualifies as "plant" under section 19A.

7. Relevance of the UK cases of *Barclay Curle* and *Schofield*

It is also interesting to note that the Board in the case of *GEY* made the observation that the Singapore Court of Appeal in the *ZF* case did not endorse the UK landmark cases of *Barclay Curle* (involving a dry dock) and *Schofield* (involving a grain silo), for the purposes of capital allowance claims in Singapore. Instead, the Board was of the view that while the dry dock and grain silo could be treated as plant in the UK, it does not necessarily mean that such assets would also be treated the same for Singapore tax purposes (see [87]).

With respect, what the Court of Appeal did not endorse was the UK treatment that an asset could simultaneously be classified as "plant" and "building", as the Singapore Income Tax Act contemplates the clear distinction between "plant" and "buildings", with the two categories of assets being mutually exclusive: see [45] of *ZF*. Nevertheless, the Court of Appeal acknowledged that an asset may possess the features of both categories and in those situations, the question is whether the asset is "more appropriately" described as "plant" or "building": see [46] of *ZF*. In that case, the Court further stated at [77]:

> Although the dormitories in the present case could reasonably have been held to be either "plant" or buildings, a final decision has to be made on the facts. Having considered the circumstances, we are of the view that the dormitories qualify as "plant" for the purposes of ss 19 and 19A of the ITA. **Even though they were definitely not large pieces of equipment** and also resembled buildings from a physical perspective, they were not made of such lasting materials so as to fall inextricably on the buildings side of the boundary. ... In the circumstances, the dormitories were more akin to **apparatus or equipment or machinery (albeit like, for example, the dry dock in *Barclay Curle* ([32] supra) and the silos in *Schofield* ([38] supra), being rather large in size)**. …

From the dicta at [77] of the *ZF* case, it is clear that the Court of Appeal did endorse the basis of the characterisation of the drydock and the grain silo, which are more akin to apparatus, equipment or machinery, as a "plant". With due respect, the following statement at [87] of the *GEY* case seems to be incorrect:

> In our view, the SGCA in *ZF* recognised that the dry dock and the grain silo could be treated as plant for UK tax purposes. However, that does not necessarily mean that such assets would also be treat as "plant" for Singapore tax purposes. As such, the Board observes that the SGCA did not endorse *Barclay Curle* and *Schofield* for the purpose of Singapore income tax.

It is submitted that the misreading of the *ZF* case has led the Board to make the erroneous conclusion at [94f] that "the scope of the current legislation does not provide for the treatment of silos as "plant". That statement seems to suggest that a silo cannot qualify as "plant" under the law. With due respect, that is too sweeping of a statement. The most that may be stated is that a silo may not qualify as "plant" based on the facts of its case.

Concluding comments

The decision of *GEY v Comptroller of Income Tax* is the first case in more than 10 years that involves a dispute on whether an asset constitutes a "plant" or a "building", since the landmark case of *ZF*. In our view, the decision of the Board in *GEY* has left many unanswered questions, particularly those relating to the determination of whether an asset is "more appropriately" classified as a "plant" or a "building".

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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