KPMG

Tax alert

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GIO v Comptroller of Income Tax:

Section 10(1)(g) and the relevance of the Australian *Myer Emporium* case

Introduction

The recent Income Tax Board of Review of *GIO v Comptroller of Income Tax* [2024] SGITBR 1, at first blush, seems to be just another ordinary case concerning the taxability of the gains upon disposal of immovable properties. The taxpayer was held to be taxable on the profits on the two separate transactions involving two properties which were sold about a month after the purchase of those properties. The profits were not taxed on the basis of section 10(1)(a) ("gains or profits from any trade, business), but on the basis of section 10(1)(g) ("any gains or profits of an income nature not falling under any of the preceding paragraphs").

The Board in coming to its decision stated at [30]: "In the light of the weight of authority on the matter, the Board takes the view that there is no absolute bar to the increase in value of an item that is normally regarded as capital in nature, to be caught by income." This statement, viewed in isolation, seems to suggest that income tax may be imposed on gains which are capital in nature, which clearly offends the traditional distinction between income and capital under our tax jurisprudence.

It is trite that income tax is a tax imposed on income, which is separate and distinct from capital gains. As Lord Macnaghten emphasised in *London County Council v Attorney-General* [1901] AC 26 at 35, "income tax is a tax on income". As a matter of policy, and as enshrined in the tax legislation, Singapore does not impose tax on capital gains.

In its application of section 10(1)(g) of the Income Tax Act 1947, the Board seems to have relied on the Australian High Court case of *Federal Commissioner of Taxation v The Myer Emporium Ltd*, 87 TC 4363, (1987) 163 CLR 199. We will examine *Myer Emporium* in this article.

What is *Myer Emporium* about?

In *Myer Emporium*, the taxpayer was the parent company of the Myer group of companies which carried on business in retail trading and property development. In 1981, the Myer group undertook a substantial reorganisation. As part of that reorganisation, the taxpayer on 6 March 1981, lent $80 million to its subsidiary, Myer Finance Ltd. The loan agreement required Myer Finance to repay the principal on, but not prior to, 30 June 1988 and to pay interest at the commercial rate of 12.5% per annum on the principal owing as per the dates indicated in the loan agreement. The total interest payable over the 7-year period of the loan, amounted to $72 million. On the date the loan was made, the taxpayer received an initial interest payment of $82,192 from Myer Finance Ltd.

Three days after the loan agreement was made, the taxpayer assigned to an unrelated finance company, Citicorp Canberra Pty Ltd (“Citicorp”), the moneys due or to become due as the interest payments under the loan agreement, in return for a lump sum consideration of $45.37 million paid on the same day. The amount of $45.37 million was calculated based on the present value of the stream of interest payable over the period of the loan, discounted at the rate of 16% per annum.

The loan agreement and the assignment were interdependent in that the taxpayer would not have entered into the loan agreement unless it knew that Citicorp would immediately thereafter take an assignment of the moneys that would become due as interest payments under the loan agreement.

The Commissioner assessed the taxpayer on the amount of $45.37 million on the basis that the amount constituted a profit which was of income according to ordinary concepts under section 25(1) of the Australian Income Tax Assessment Act 1936 (“ITAA”) which read:

> The assessable income of a taxpayer shall include --- (a) where the taxpayer is a resident --- the gross income derived directly or indirectly from all sources whether in or out of Australia ….

Alternatively, the amount was also assessable as “profit arising from the carrying out of any profit-making undertaking or scheme” under section 26(a) of the Act. On appeal, both the Supreme Court of Victoria and the Full Court of the Federal Court of Australia held that the amount of $45.37 million was a non-assessable capital receipt.

On further appeal, the High Court of Australia held that because the taxpayer entered into the two transactions (i.e. the loan and assignment) as part of a single scheme with the intention or purpose of making a relevant profit from the transactions, the sale price of $45.37 million constituted income within the meaning of section 26(a) and it also constituted income within the meaning of section 25(1) as the sale of a mere right to interest for a lump sum representing the present value of the future interest payments is a revenue item.

In *GIO*, the part of the judgment in the *Myer Emporium*, cited by the Board at [26] is as follows:

> … 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.** (at p 4366) (emphasis added)
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> […]

> It is one thing if the decision to sell an asset is taken after its acquisition, there having been no intention or purpose at the time of acquisition of acquiring for the purpose of profit-making by sale. Then, if the asset be not a revenue asset on other grounds, the profit made is capital because it proceeds from a mere realisation. But it is quite another thing if the decision to sell is taken by way of implementation of an intention or purpose, existing at the time of acquisition, of profit-making by sale, at least in the context of carrying on a business or carrying out a business operation or commercial transaction. (at p 4369)

It is to be noted that in *Myer Emporium*, the taxpayer was carrying on a business and made a gain that was not in the ordinary course of its business. In *GIO*, the taxpayer was not found to be running a business, so the profit from selling the two properties could not be considered as something outside his normal business activities.

As may be seen, any reliance on *Myer Emporium* for the construction of the provisions of section 10(1)(g) of the Income Tax Act 1947 may be problematic, as the facts there are quite different. Moreover, the Australian statutory provisions are not in *pari materia* with those of section 10(1)(g)[1].

It is also to be noted that the *Myer Emporium* was not followed in the English High Court case of *Commissioners of Inland Revenue v John Lewis Properties plc* [2002] 1 WLR 35, where the facts are quite similar. In that case, the taxpayer was the property holding company of a group and it leased 5 properties to the group's trading company. It entered into an agreement with a bank where it assigned the right to receive the rents from the properties to the bank for a period of 5 years for a lump sum consideration of £25.5 million calculated as the discounted value of the rental stream. The Court held that the lump sum proceeds of the sale of a right to receive income in the future could not be treated as income for income tax purposes, and that there was no broad "economic equivalence" test entitling the court to treat a capital item as income because it was the economic equivalent of income. Upon appeal, the majority of the Court of Appeal in *Commissioners of Inland Revenue v John Lewis Properties plc* [2003] 2 WLR 1196 upheld the judgment of the court below and did not mention *Myer Emporium*. Lady Arden LJ in her dissenting judgment confined *Myer Emporium* to the facts of its own case, and stated at [49]: "… the High Court of Australia's conclusion was in reference to the facts of the case before it and could not be taken for the purposes of English law, even on the assumption that English law is the same, to have established an immutable principle."

Conclusion

Given the vastly different factual matrix and statutory framework in *Myer Emporium*, it is submitted that any reliance on *Myer Emporium* in the construction of the words "any gains or profits of an income nature not falling under any of the preceding paragraphs" in section 10(1)(g) of the Income Tax Act is problematic. Here, one is reminded of the *dicta* of the Court of Appeal in *ZF v Comptroller of Income Tax* [2011] 1 SLR 1044, where it warned against wrenching isolated passages of a judgment in the earlier Court of Appeal case of *Comptroller of Income Tax v IA* [2006] 4 SLR(R) 161, where it is stated at [45]: "However, it is our view that these isolated passages cannot be wrenched from the context of both the judgment as well as the factual matrix concerned…"

Coming back to *GIO*, it cannot be read as extending the boundaries of the nature of income. Ultimately, "the dividing line between the realisation of a capital investment, the profits on which are capital in nature and therefore not subject to income tax unless otherwise provided for, and the realisation of a quick profit trough a buy-sell transaction that is then subject to tax for being "of an income nature", depends on the facts and circumstances of each case.

How we can help

As your dedicated tax advisor, let us help you to identify how the above case relates to you, and any transactions that you may be planning for your business.

[1] See "Taxing 'all other income' in Singapore and Malaysia" by Vincent Ooi, (2019) *Oxford University Commonwealth Law Journal*, where the learned author explained that it was incorrect to apply the reasoning in *Myer Emporium* in the earlier Income Tax Board of Review case of *IB v Comptroller of Income Tax* [2005] SGDC 50.

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