



Taxability of gains from disposal of investment

In *BQY and another v Comptroller of Income Tax* [2018] SGHC 75 (“*BQY*”), the High Court upheld the decision of the Income Tax Board of Review (“the Board”) and found that the profits derived by the appellants from the resale of three residential properties were taxable under section 10(1)(g) of the Income Tax Act (“the Act”).

In detail

The appellants are a wealthy businessman and his wife. Between 1 April 1997 and 19 June 2012, they bought five landed properties. Three of the properties were good class bungalows which were disposed of within the span of six years, between 2005 and 2011. The couple made total profits of \$16,047,336 from the three disposals.

Details of the five landed properties are as follows:

Address	Date of purchase	Duration of ownership	Profit (\$)
West Coast Road	1 April 1997	21 years and counting	N/A
Wilby Road	29 June 2005	9.5 months	580,255
Brizay Park	21 October 2009	10.1 months	13,617,092
Garlick Avenue	19 October 2010	2.7 months	1,849,989
Binjai Park	June 2012	6 years and counting	N/A

The Comptroller of Income Tax (“the Comptroller”) sought to tax on the profits on the basis that they were revenue in nature. The appellants claimed otherwise, and appealed to the Board. The Board dismissed the appeal as it found that the intention of the appellants was to purchase the three properties for resale with a view to profit. The appellants claimed that was not their intention, that they had bought the properties with a view to making each of them their family home, but had re-sold them because the properties were unsuitable. Dissatisfied, they appealed to the High Court.

Issue considered

The issue is whether the profits from resale of the properties are taxable under section 10(1)(g) of the Act as “gains or profits of an income nature”.

The High Court’s findings

In order to ascertain whether the profits were taxable under section 10(1)(g) of the Act, the High Court sought to determine the appellants’ intention at the time of purchase of the properties by examining the evidence surrounding their conduct. This entailed looking beyond the three properties to see the whole picture.

Out of the five properties, the first (i.e. the property on West Coast Road) was never sold whereas the three in dispute were turned over and never occupied by the appellants. The couple and their children moved into the Binjai property which was bought in June 2012 - but that was only after the Comptroller had started asking questions in February 2012 concerning the previous three properties.

"All this while, and to date, the original home at West Coast remains theirs. This is the forest. The facts found by the Board are the trees." noted Justice Choo Han Teck in his judgment.

Based on the overall conduct of the appellants in respect of the five properties, the High Court held that the Board did not err when it found that their intention was to purchase the three properties for resale with a view to making profit. The appeal was accordingly dismissed.

PwC's observations

Section 10(1)(g) of the Act is the "catch-all" provision under which any gains or profits of an income nature would be charged with tax even if they do not fall within the other heads of charge, e.g. when the gains are not derived from a trade or business.

In order for gains from the disposal of investments to be caught under section 10(1)(g), they must be of a revenue (i.e. income) nature.

Over the years, the courts have relied on a "badges of trade" test to determine if gains are of capital or revenue nature. The former is not assessed to tax whereas the latter is taxable as income gains. The test includes factors such as intention of buyer, subject matter of realisation, frequency of transactions, circumstances leading to sale, supplementary work on or in connection with the property realised and length of period of ownership. While no one factor is determinative, the intention of the buyer at the time of purchase has always been an important consideration, particularly in relation to the application of section 10(1)(g).

In both *BQY* and *GBU v The Comptroller of Income Tax* [2017] SGITBR 3 ("*GBU*"), another section 10(1)(g) case, the outcome hinged on the intention of the taxpayer at the time of acquisition of the investment.

In *GBU*, the taxpayer, which is a Singapore company in the business of operating supermarkets, disposed of certain share counters. Based on the evidence reviewed, the Board was satisfied that the said shares were acquired as long term investments to allow the taxpayer to earn a better rate of return than on bank deposits. Hence, any disposal gains are capital gains which are not taxable. Other supporting factors include the taxpayer's ability to hold the shares for the long-term and the distribution of shares in specie to its shareholders who continued to hold the shares. It should also be noted that the Board refuted the Comptroller's contention that to qualify as a long term investment, there must be an intention to hold the shares for an indefinite period. Instead, the Board noted that the nature of the investment (e.g. property or shares) will give rise to different considerations in the determination of what amounts to capital gains.

- ***Intention is based on action and conduct determined on a balance of probabilities***

Where the true intention of the taxpayer is in dispute, the action or conduct of the person should be examined and a balance of probabilities test applied to determine whether the conduct is more consistent with one intention or the other.

While the appellants in *BQY* claimed that the three disputed properties were purchased for use as a residential home, they were unable to provide convincing and consistent evidence.

Address	Appellants' reason for sale	Board's findings that contradicted the appellants' purported reasons
Wilby Road	The property was too large for second appellant and her children's liking.	<ul style="list-style-type: none"> • The net floor area of the property was actually smaller than the appellants' family home at West Coast. • The appellants' reason contradicts the rationale given for buying the property at Wilby Road in the first place, which was to search for a bigger house for their growing children. • The subsequent property purchased (Brizay Park) was more than twice the size of the property on Wilby Road.
	Presence of public manhole and large tree placed undue restrictions on the design of the property.	The appellants could not explain why this reason was not included in their initial response when the Comptroller first raised queries.
	Significant monetary outlay to rectify drainage problems and reconstruct the house.	Appellant did not specify exact nature of the alleged drainage problems and there was no independent evidence as to the rectification or reconstruction costs required.
	The second appellant did not view the property when the option to purchase was secured. Upon viewing of the property, she disapproved its suitability as a family home.	No satisfactory explanation for the second appellant's lack of involvement in the search for a family home.
Brizay Park	Inability to find a tenant for the house.	<ul style="list-style-type: none"> • No evidence of the property agent placing advertisement for the lease of the property was provided. • The appellants had admitted that the house was too old and rather dilapidated; not in move in condition.
	Property was located far away from Nan Hua Primary School, their youngest child's school.	The Board was not convinced as all three properties purchased were almost equally far from Nan Hua Primary School.

Garlick Avenue	Major refurbishment and reconstruction – source of financial uncertainty.	The Board was not convinced as the appellants had claimed that they could afford to purchase the properties with their personal funds. Additionally, the appellants had made substantial financial gains from the disposal of the properties at Wilby Road and Brizay Park.
	Property was in close proximity to a columbarium.	While the columbarium was nearer to the property on Garlick Avenue, it is not visible from the property. However, the columbarium was clearly visible from the property on Brizay Park.
	Property was located far away from Nan Hua Primary School, their youngest child's school.	The appellants and their children had moved into their property in Binjai Park in 2012, which was equally far from Nan Hua Primary School.

In view of the above, the appellants were unable to satisfy the Board that the three properties were purchased for use as family home.

In addition, the appellants had never moved into any of the three properties and their permanent abode had always been their original home in West Coast up until they moved to the Binjai property in June 2012. This led the High Court to conclude, based on its assessment of the appellants' actions and on a balance of probabilities, that the appellants were more likely to have purchased the three properties for resale with a view to making profits.

- *Finding of fact properly made should not be disturbed*

Counsel for the appellant in *BQY* argued that the Board erred in adopting the “responsible man” test instead of objectively inferring the appellant's intention from the actual surrounding circumstances.

To that, Justice Choo noted that he “would have intervened had [he] found obvious discrepancies and errors”, which he had not. Thus, the findings of fact by the Board were held to be properly made and not disturbed.

It is a general principle that the finding of fact by a lower court should not be interfered with unless a reasonable tribunal could not have reached the same decision based on the facts found. This was not the case in *BQY*.

Conclusion

While the taxpayers in both *BQY* and *GBU* derived gains from disposal of assets, the differing ability to produce consistent evidence to support their intention resulted in different outcomes.

Taxpayers should maintain proper documentation of their intent at the time of the acquisition of an investment. To maintain a capital gains position, the evidence and actions taken should be consistent throughout the entire holding period of the investment to reinforce the taxpayer's intention and it is necessary to consider the

matter holistically by reviewing all the relevant circumstances, including related transactions, so as not to miss the forest for the trees.



Your PwC contacts

If you would like to discuss the impact of these developments on your group's affairs, please feel free to reach out to any of the facilitators or your local PwC Contact.

Tax Leader

Chris Woo
chris.woo@sg.pwc.com
+65 9118 0811

Indirect Tax (Goods and Services Tax)

Koh Soo How
soo.how.koh@sg.pwc.com
+65 9623 6091

International Assignment Services

Sakaya Johns Rani
sakaya.johns.rani@sg.pwc.com
+65 9088 8347

Margaret Duong
margaret.duong@sg.pwc.com
+65 9723 8238

Worldtrade Management Services (Customs and International Trade)

Frank Debets
frank.debets@sg.pwc.com
+65 9750 7745

Legal Services

Legal services are provided by Camford Law Corporation. Camford Law Corporation is part of the network of member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity.

Natarajan
natarajan.s@camfordlaw.com
+65 6597 3339

Joanna Teng
joanna.teng@camfordlaw.com
+65 6597 3331

Corporate Tax

Sunil Agarwal
Technology, Media & Telecommunication
sunil.agarwal@sg.pwc.com
+65 8218 8320

Allison Cheung
International Tax
allison.cheung@sg.pwc.com
+65 8218 8350

Paul Cornelius
Energy, Utilities & Mining
paul.cornelius@sg.pwc.com
+65 9633 5834

Brendan Egan
Insurance
brendan.m.egan@sg.pwc.com
+65 9627 4720

Andrew Fairfoull
Transfer Pricing
andrew.fairfoull@sg.pwc.com
+65 9620 7417

Abhijit Ghosh
Healthcare & Pharmaceutical,
India Desk
abhijit.ghosh@sg.pwc.com
+65 8223 0698

Anuj Kagalwala
Financial Services,
Asset & Wealth Management
anuj.kagalwala@sg.pwc.com
+65 9671 0613

Paul Lau
Financial Services
paul.st.lau@sg.pwc.com
+65 6236 3733

Peter Le Huray
International Tax Services
peter.g.le.huray@sg.pwc.com
+65 9787 7782

Jun Igarashi
Transfer Pricing
jun.igarashi@sg.pwc.com
+65 9627 3842

Lennon Lee
Treasury, Consumer & Retail,
China Desk
lennon.kl.lee@sg.pwc.com
+65 9800 0848

Lim Hwee Seng
Mergers & Acquisitions
hwee.seng.lim@sg.pwc.com
+65 9758 7049

Lim Maan Huey
Financial Services, Treasury
maan.huey.lim@sg.pwc.com
+65 9734 0718

Florence Loh
Consumer & Retail
florence.ch.loh@sg.pwc.com
+65 9815 9327

Ketan Madia
International Tax
ketan.madia@sg.pwc.com
+65 9725 8453

Elaine Ng
Transport & Logistics
elaine.ng@sg.pwc.com
+65 8223 1126

Rose Sim
Financial Services
rose.sim@sg.pwc.com
+65 9623 9817

Tan Ching Ne
Technology, Media & Telecommunication,
Research & Development,
Digital Tax Leader
ching.ne.tan@sg.pwc.com
+65 9622 9826

Tan Hui Cheng
Financial Services
hui.cheng.tan@sg.pwc.com
+65 8338 5182

Tan Tay Lek
Conglomerates & Industrial Products
tay.lek.tan@sg.pwc.com
+65 9179 2725

Teo Wee Hwee
Real Estate & Hospitality
wee.hwee.teo@sg.pwc.com
+65 6236 7618

Falgun Thakkar
Transfer Pricing
falgun.d.thakkar@sg.pwc.com
+65 9634 7984

Sarah Wong
Mergers & Acquisitions
sarah.wc.wong@sg.pwc.com
+65 9817 6501