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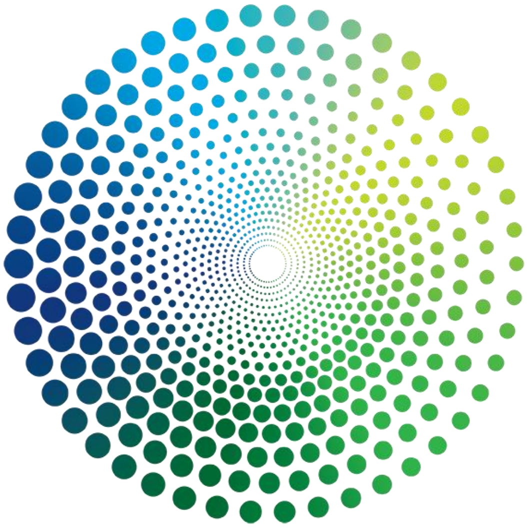

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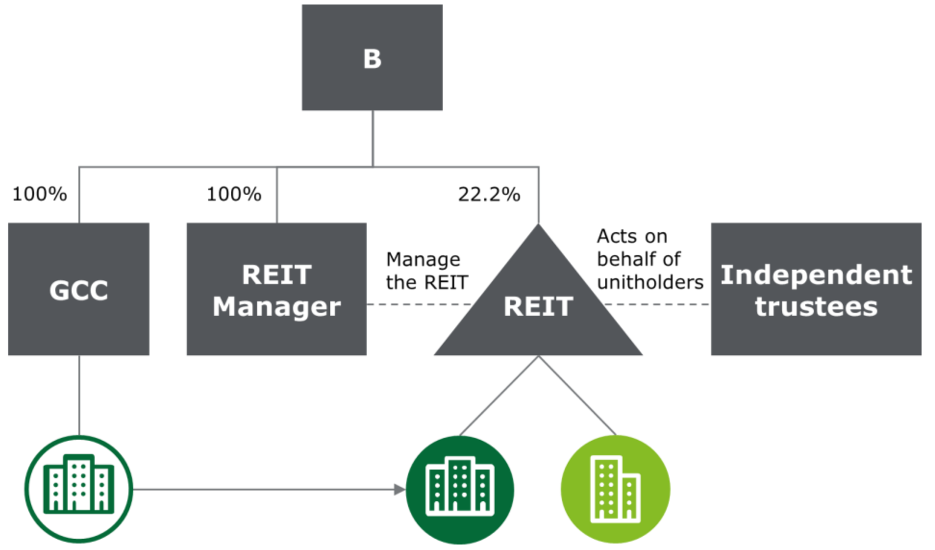
GCC v Comptroller of Income Tax [2019] SGITBR 1

GCC v Comptroller of Income Tax [2019] SGITBR 1 (*GCC v CIT*) is the first income tax board case to be issued in year 2019. The issue in dispute in *GCC v CIT* concerns the meaning of 'control' under section 24(1) of the Income Tax Act (ITA).

Briefly, section 24 of the ITA deals with the capital allowance claims on the sale of any property between persons under common control. An election could be made to treat the tax written down value of the asset sold as the deemed sales price if the buyer and seller are under common control, or where one has control over the other. In this way, no balancing allowance or balancing charge is made on the seller and the buyer could continue to claim capital allowances as if no sale has taken place. Balancing adjustments will be made on the buyer when the asset is subsequently sold in the future.

GCC v CIT is the second tax case concerning the application of section 24 of the ITA, the first being *Comptroller of Income Tax v GE Pacific Pte Ltd* [1994] SGCA 73 (*GE Pacific*). The meaning of 'control' was not discussed in *GE Pacific*.

Background
The background facts of *GCC v CIT* could be summarised as follows:



A balancing charge arose in GCC from the sale of property (which qualified for industrial building allowances) to the trustee, where the property was injected into the asset base of the REIT. GCC sought to elect section 24 on the sale of the property to negate the balancing charge from the sale. This would have allowed GCC to reduce its taxable income as the section 24 election would mean that it would not be taxed on the balancing charge arising from the difference between the sales price and the tax written down values. The REIT is, however, likely indifferent to such section 24 as REITs are generally concerned with maximising taxable income (due to its tax transparent status) and would therefore, seek to minimise the annual capital allowance claims to the extent possible.

Issue

The issue in *GCC v CIT* relates to whether GCC and the trustee of the REIT were under the common control of *B* (the shareholder of GCC) such that an election under section 24 can be made.

Section 24 does not define the term 'control'.

Briefly, the taxpayer argued that 'control', within the meaning of section 24(1), is the power of one person to **direct or influence another***.* In the present case, the taxpayer argued that [B]'s power to direct or influence the trustee is exercised through the REIT manager, a wholly-owned subsidiary of *B*, pursuant to the Trust Deed.

The Comptroller argued that the meaning of 'control' requires the relevant entities to be closely identifiable with **shared economic interests** and since *B* does not satisfy this requirement, *B* does not have control over the trustee and accordingly, an election under section 24 is not available to the taxpayer.

Decision

The Board held in favour of the Comptroller, but does not conclusively state that **shared economic interests** are the primary determinant in ascertaining whether 'control' exists for the purpose of section 24 election.

In arriving at its grounds of decision, the Board considered the section's legislative roots in the United Kingdom (UK) tax legislation and drew the following inferences:

- The section was meant to apply to companies that were "so closely associated to each other in that the sale was essentially a book transaction—a transfer from one pocket of the concern to another". In other words, the level of control between the seller and buyer must be "a close relationship, with a high degree of control".

- The UK Income Tax Act defined 'control', in relation to a body corporate, to mean "the power of a person to secure, **by means of the holding of shares or the possession of voting power** in or in relation to that or any other body corporate, or by virtue of any powers conferred by the **articles of association or other document regulating** that or any other body corporate, that the affairs of the first-mentioned body corporate are conducted in accordance with the wishes of that person…" (emphasis added). The Board considered this definition as "not binding", but "persuasive".

The key findings by the Board were that:

- *B* and the trustee are separate legal entities;
- *B* does not own shares in the trustee;
- *B* does not have any directors in common with the trustee;
- *B* does not have any direct relationship with the trustee; and
- The sale of property from GCC to the trustee was not a mere book transaction, but rather "an outright and arm's-length transfer".

The Board also mentioned, in passing, that the fiduciary duties owed by the trustee towards the unitholders of the REIT (i.e., the trustee has a legal obligation to act in the best interests of the unitholders) renders it incapable of being controlled by *B*.

The Board observed that the trust deed did not override the legal obligations that the trustee owe to the unitholders and consequently *B* cannot be regarded as having control of the trustee.

Deloitte Singapore's views

The Board leaned towards **shared economic interests** as the primary basis for determining control in the context of section 24, although it was careful not to commit to this factor exclusively. The Board stated that "there should be a non-exhaustive list of factors" to determine control, but did not elaborate further beyond citing a few examples. Those hoping for a checklist similar to the ‘Badges of Trade’ concept would be disappointed.

Perhaps out of an abundance of caution, the Board also viewed the trustee, within the factual matrix of *GCC v CIT*, as holding a fiduciary duty to the unitholders of the REIT and, by extension should be of an independent status.

The decision in *GCC v CIT* is arguably consistent with the current **practice** of the IRAS, wherein ‘control’ under section 24 of the ITA is *prima facie* regarded to exist insofar as the buyer or seller holds 50 percent or more of the shareholdings over the other, or 50 percent or more of the shareholdings in the buyer and seller are owned by a common holding company.

We also note that ‘control’ over a registered business trust (RBT) in the context of section 24 is primarily a quantitative test. For example, a company is deemed to have control over a RBT if it holds more than 50 percent of the units in that RBT.

It remains to be seen whether *GCC v CIT* would have wider application beyond section 24, in view that the term ‘control’ is used fairly widely in the ITA (in particular, within the definition of ‘related parties’) and remains undefined in most of them.

Contacts

For more information on the above or any other matters, please contact either the listed contacts below, or any member of the Singapore Tax & Legal team.

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