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26. REVENUE AND TAX LAW

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I. Introduction

26.1 The Supreme Court delivered four decisions in 2023 that had some relevance to revenue law:

Tax type	General Division of the High Court	Court of Appeal
Income tax	1	0
Goods and services tax ("GST")	1	0
Miscellaneous	2	0

26.2 The income tax case related to the issue of whether a cement silo should be treated as plant. The GST case concerned a question of valuation of a supply for GST purposes. The remaining two miscellaneous cases, which are non-revenue cases, dealt with aspects of stamp duty and GST.

II. Income tax

A. Whether cement silo should be treated as plant

26.3 In the General Division of the High Court ("General Division") decision of *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax*[2] ("*Singapore Cement Manufacturing*"), the main issue was whether, on the facts, a cement silo should be treated as plant for the purpose of claiming capital allowances.

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1 The author would like to acknowledge, with thanks, the kind collaboration with Leonard Goh, his co-author of this annual chapter on revenue and tax law the last 18 years (2005–2022).

2 [2023] 5 SLR 1099.

26.4 The taxpayer company (the appellant) was a Singapore-incorporated company in the business of importing cement for distribution and sale to concrete suppliers in Singapore. The cement silo in question was constructed in 2013 and purpose-built for optimum storage and distribution.[3] The Comptroller of Income Tax ("CIT") had rejected the taxpayer's claim for capital allowances as he was of the view that the silo was not plant, and the Income Tax Board of Review ("ITBR") had also dismissed the taxpayer's appeal against the decision of the CIT.[4] At the ITBR, it was the first time that the seminal decision of the Court of Appeal on plant in *ZF v Comptroller of Income Tax*[5] ("*ZF*") came up for consideration and was applied in a reported decision.

26.5 Choo Han Teck J dismissed the appeal. In doing so, Choo J noted that, as it had been explained in *ZF*, the question of whether an asset is plant is a question of fact, and if the ITBR was correct in law but applied the factors referred to in *ZF* erroneously when it found that the silo was *not* plant, then, for the appeal to succeed, the appellant had to show that the ITBR's finding was an "unreasonable conclusion". An appellate court would examine the record of appeal, whereas, by contrast, the ITBR (as a specialist tribunal) not only had heard evidence from witnesses, but also, as in this case, visited the site to see the silo.[6]

26.6 Choo J proceeded to find that the ITBR did not err in law or fact. On the aspect of law, he noted that:[7]

> The mutually exclusive categorisation of 'plant' and 'building' is not disputed. It is further agreed between the parties that in situations where an asset has characteristics that may justify a classification as both 'plant' and 'building', the question is, which category is more appropriate in the circumstances.[8]

26.7 Choo J further disagreed with the appellant's contention that the ITBR had erred in law because it had rejected the application of two English decisions cited by the appellant to support its case that the silo

3 *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [1] and [3].

4 See decision of the Income Tax Board of Review reported as *GEY v Comptroller of Income Tax* [2022] SGITBR 1.

5 [2011] 1 SLR 1044; see a review of this case in Tan Kay Kheng & Leonard Goh, "Revenue and Tax Law" (2010) 11 SAL Ann Rev 534 at paras 22.42–22.54.

6 *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [10].

7 *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [11].

8 These were points of law established in *ZF v Comptroller of Income Tax* [2011] 1 SLR 1044: see discussion in the review of this case in Tan Kay Kheng & Leonard Goh, "Revenue and Tax Law" (2010) 11 SAL Ann Rev 534 at paras 22.42–22.54, especially at para 22.49.

was plant.[9] In Choo J's opinion, the ITBR did not err in disregarding these English cases as relevant, and even if they *were* relevant, they were of limited value "because they offer no help in determining whether the [s]ilo is a plant or building".[10]

26.8 A brief comment may be made at this juncture. The point of relevance of the two English cases appears to be debatable (perhaps even highly debatable), since both these cases (together with a number of other English cases)[11] had been discussed at length by the Court of Appeal in *ZF*. As noted by Choo J,[12] the parties (rightly) agreed that in *ZF*, the Court of Appeal ultimately held that the categories of "plant" and "building" are mutually exclusive, unlike the English position. Despite this, with respect, *ZF* did *not* go so far as to state that the assets in these two English cases would not have been "plant", or that they were *only* buildings, if the categories of "plant" and "building" had been mutually exclusive under English law. Neither should such a view be inferred. One may arguably take the view that these assets would still be rightly regarded as plant rather than buildings, even under mutually exclusive categories, and consequently, that they would not be buildings under the Singapore position. Ultimately, as the Court of Appeal stressed in *ZF*, "[i]n the final analysis, much will depend upon *the precise factual matrix and context* concerned" [emphasis in original].[13]

26.9 The court next rejected the appellant's argument that the ITBR erred in fact when it found that the operational function of the silo was the storage and housing of equipment and cement. Choo J agreed with the ITBR's approach in excluding the equipment for which the appellant had been granted capital allowance and with which other aspects of operations were associated, and in finding that the function of the silo was storage and housing such that any preservation and protection of cement were performed by and integral to a building.[14]

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9 The two English cases were *Schofield v R&H Hall* (1974) 49 TC 538 and *Inland Revenue Commissioners v Barclay, Curle & Co Ltd* [1969] 1 WLR 675: see *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [9] and [12].

10 *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [12].

11 About 20 English cases, as well as a few from other jurisdictions (*eg*, Australia): see *ZF v Comptroller of Income Tax* [2011] 1 SLR 1044 at 1046 for the list of cases referred to by the Court of Appeal.

12 See para 26.6 above.

13 *ZF v Comptroller of Income Tax* [2011] 1 SLR 1044 ("*ZF*") at [70]. It is beyond the scope of this review to discuss *ZF* at length here and it may be appropriate to revisit this aspect of the discussion when further cases are reported in future.

14 *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [13].

26.10 The court also rejected the appellant's final argument that the cement silo was an indivisible whole that should be treated as plant. Choo J rejected the foreign cases cited[15] as relevant in light of the difference in position on the mutual exclusivity of categories of "plant" and "building" in these foreign jurisdictions and Singapore. The court also held that s 19A of the Income Tax Act[16] ("ITA") does not preclude the CIT from classifying parts of the silo as separate assets for differentiation for tax purposes (*ie*, the equipment was separated and given capital allowances, whereas the silo was not).[17] In any case, "a strong case could be made that the entire [s]ilo resembles a building more than it does a plant".[18]

26.11 The legal issue of what constitutes plant is very much tied to case law developments as the ITA does not provide a statutory definition of "plant" and the current judicial guidance is mainly in the decision of the Court of Appeal in *ZF*. The decision in *Singapore Cement Manufacturing* is therefore to be welcome, as it provided an opportunity for the guidance given in *ZF* to be more closely discussed and applied to a new factual matrix (*ie*, a cement silo in the precise scenario of the appellant's business). The precise factual matrix and context is of paramount importance, as pointed out in the *dictum* from *ZF*,[19] so much so that even with this new decision by the General Division, it does not mean that going forward silos in every other case would have to be rejected as plant. An asset may not be plant in one scenario but may be plant in another. In this connection, by way of illustration, Lord Denning MR's comment in the English case of *Bridge House (Reigate Hill) Ltd v Hinder (H M Inspector of Taxes)*[20] (involving sewage pipes) is apposite: "*Vis-à-vis* the sewerage authority the pipes may be part of their 'plant', but *vis-à-vis* the restaurant proprietor they are not."[21]

15 Namely, *Schofield v R&H Hall* (1974) 49 TC 538 and *Commissioner of Inland Revenue v Waitaki International Ltd* [1990] 3 NZLR 27: see *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [14].

16 Cap 134, 2014 Rev Ed.

17 *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [15]–[16].

18 *Singapore Cement Manufacturing Co (Pte) Ltd v Comptroller of Income Tax* [2023] 5 SLR 1099 at [18].

19 See para 26.8 above.

20 [1971] 47 TC 182.

21 *Bridge House (Reigate Hill) Ltd v Hinder (H M Inspector of Taxes)* [1971] 47 TC 182 at 192.

III. Goods and services tax

A. Valuation of supply

26.12 In *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax,*[22] the interpretation of s 17 of the Goods and Services Tax Act[23] ("GST Act")[24] was the main issue before the General Division. That statutory provision provided as follows:[25]

> **Value of supply of goods or services**
>
> **17.**—(1) For the purposes of this Act and subject to the Third Schedule, the value of any supply of goods or services shall be determined in accordance with this section.
>
> (2) If the supply (other than one from which a reverse charge supply arises) is for a consideration in money, its value shall be taken to be such amount as, with the addition of the tax chargeable, is equal to the consideration.
>
> (3) If the supply (including one from which a reverse charge supply arises) is not for a consideration or is for a consideration not consisting or not wholly consisting of money, the value of the supply shall be taken to be its open market value.

26.13 Choo J allowed the taxpayer's appeal against a decision of the GST Board of Review ("GSTBR").[26]

26.14 The facts are briefly as follows. The taxpayer, a Singapore-incorporated company, was registered for GST and operated a "direct selling" business model relating to nutritional supplements, weight-management products and other personal care products. By using this business model, the taxpayer sold products only to its members and not directly to consumers. Depending on the volume of each member's purchases, discounts were given to them ranging from a standard rate of 25% to as high as 50%. When a member sold the products to end-consumers at prices stipulated by the taxpayer, the difference in these prices and the discounted prices for each product was the profit retained (or earned) by the member.[27]

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22 [2023] 4 SLR 1707.
23 Cap 117A, 2005 Rev Ed.
24 Section 17 has been considerably expanded by amendments as it now appears in the Goods and Services Tax Act 1993 (2020 Rev Ed). However, the issue discussed by the General Division of the High Court remains relevant as the language of s 17 being considered remains part of the current provision.
25 Goods and Services Tax Act (Cap 117A, 2005 Rev Ed) s 17.
26 Reported as *GEV v Comptroller of Goods and Services Tax* [2022] SGGST 1.
27 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [1]–[2].

26.15 The taxpayer did not dispute that GST was chargeable on the value of the products purchased by its members. The issue was in the computation of the value of the supplies of these products: Was the taxpayer entitled to use the discounted price as the value of the supplies? The Comptroller of GST contended that the taxpayer was not entitled to do so and had to use the open-market value. The disputed amount of GST, including a late payment penalty of 5%, was nearly $2.2m.[28]

26.16 The Comptroller of GST had relied on s 17, particularly sub-s (3), of the GST Act as the basis for using open-market value. It was contended that s 17(3) addressed the problem of revenue leakage, since the difference between the price sold to end-consumers and the discounted price would not attract GST in the hands of the members selling to the end-consumers. This occurred because the members were not GST-registered.[29]

26.17 The taxpayer had argued that the word "consideration" consisted wholly of money and the supply fell to be valued under s 17(2) of the GST Act.[30] The Comptroller disagreed and contended that the undertaking of obligations by the members would fulfil the requirements to constitute non-monetary consideration, and in the alternative, the Comptroller argued that the members provided non-monetary consideration in the form of marketing services to the taxpayer in exchange for the products, with the result that s 17(3) should apply.[31]

26.18 As noted by the court, the issue therefore "requires an examination of the scope of the word 'consideration' under s 17 of the GST Act" but there is a distinction between the use of the word in the GST Act and its use in the law of contract. Its use in the law of contract is wider and the purposes are not exactly the same as those for use in the GST Act. A table on the comparison made by the court is set out here for ease of reading:[32]

28 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [3].

29 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [4].

30 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [7].

31 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [8].

32 This table is based on *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [17]–[19].

Use of the word "consideration"	
Law of contract	***GST Act***
"Consideration" is used for establishing the formation and enforceability of contractual relationships, and it is not concerned about the valuation of the obligations owed under the contract.	"Consideration" is concerned both with the taxability of the supply and the taxable value ascribed to the supply.
It is concerned with the question of: "Was there sufficient consideration furnished for that transaction to be valid and binding?"	It is concerned with the question of: "What was the payment in the taxable transaction?"
"Consideration" must move from the promisee to the promisor.	"Consideration" for a supply may be furnished by a third party.
"Consideration" need not exist for a contract under a deed.	The absence of "consideration" for a deed is no bar to imputing GST on the supply based on open-market value.
The concern is the sufficiency of the "consideration" and not its adequacy, valuation or form (monetary or non-monetary).	The concern is its valuation and form (monetary or non-monetary).
"Valuable consideration" can include some right, interest, profit or benefit accruing to a party or some forbearance, detriment, loss or responsibility.	The mechanism for valuing non-monetary consideration is to resort to open-market value, and not to include non-monetary items of *de minimis* value.

26.19 The court accepted the GSTBR's two requirements concerning how the scope of "consideration" should be narrowed for GST purposes, by refining as follows:[33]

> … first, whether the undertakings were independent of, and not ancillary to the supply of the [products]; and second, whether the undertakings provided a benefit which goes beyond the monetary transaction in question.

26.20 The court held that on the first requirement, the "regular terms of trade" imposed on the members under the taxpayer's business model "would not ordinarily be 'independent of, and not ancillary to' the supply of goods" and hence these terms were not "consideration" within the

33 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [21].

meaning of s 17(3).[34] On the second requirement, the court noted that the GSTBR's interpretation of the word "benefit" was overly broad, which "would render nugatory any attempt to restrict the scope of consideration for GST purposes".[35] The court disagreed with the GSTBR that the terms of trade imposed on the members were sufficiently valuable or given in exchange for the supply of goods, so as to be a benefit that could be treated as non-monetary consideration.[36]

26.21 Finally, it is worth noting the concluding comments by the court as they add to the explanation as to how s 17(3) should work:[37]

> Section 17(3) of the GST Act is intended to cover situations where valuing a supply by reference only to its monetary value is underinclusive, because what the consumer gives in exchange for that supply is not only money, but something additional of value in non-monetary form. But if the meaning of consideration in s 17(3) of the GST Act is interpreted too broadly, such that items of *de minimis* value fall within the meaning of non-monetary consideration, there may be implications on all kinds of commercial practices that may not be intended to so be covered. For example, it is not uncommon for companies to run promotional campaigns which require purchasers to do certain acts to qualify for the discount such as sharing the purchaser's campaign on their social media or liking their posts. It is also commercial practice for distributorship agreements regulating the supply chain for the sale of goods to contain terms and conditions stipulating purchase price, advertising restrictions and on-sale prices. An overly broad conception of consideration threatens to introduce considerable uncertainty as to the taxable value of these supplies. Thus, the solution to the revenue leakage raised by the Comptroller lies not in expanding the scope of non-monetary consideration but in the adoption of a special valuation provision such as para 2 of the Sixth Schedule to the [UK] VAT Act 1994, which specifically addresses business models akin

34 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [22].

35 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [23].

36 See close discussion of the analysis and facts by Choo J in *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [22]–[36]. For completeness, it should be mentioned that the taxpayer had also made another argument on the basis of a comparison of the Value Added Tax Act 1994 (c 23) (UK) and the Goods and Services Tax Act (Cap 117A, 2005 Rev Ed) ("GST Act"), but the court held that a conclusion of its views on whether direct selling structures would fall within the ambit of s 19(3) of the UK statute would not dispose of the appeal, as s 17(3) of the GST Act would still have to be considered: see *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [9]–[17]. However, it is important to note the court's reference to the UK provision as a possible solution to the tax leakage raised by the Comptroller: see *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [37].

37 *Herbalife International Singapore Pte Ltd v Comptroller of Goods and Services Tax* [2023] 4 SLR 1707 at [37].

> to the appellant without the potential negative collateral effects on commercial practices. This, however, is beyond the power of the courts, and must be implemented legislatively. For the reasons above, the appeal is allowed.

26.22 This decision by the General Division is timely and useful as it clarifies the meaning of the word "consideration" in the context of the GST Act, and has thereby reduced (or, hopefully, even removed) the ambiguity inherent in that word as used in the law of contract and how it would apply under the GST Act.[38]

IV. Miscellaneous

26.23 There were two non-revenue law cases which highlighted certain aspects of stamp duty and GST respectively, but which did not involve substantial interpretation of revenue law.

A. Whether trust deed created trust for illegal purpose (avoidance of stamp duty)

26.24 In the General Division's decision of *Lau Sheng Jan Alistair v Lau Cheok Joo Richard*,[39] the applicant's parents had entered into an option to purchase a residential property for a total consideration of $4.925m on 13 July 2020. Pursuant to a trust deed, the parents were to hold the property, or alternatively, the net proceeds of the sale of the property, on trust as joint trustees for the applicant's sole benefit. The applicant, relying on his right as a sole beneficiary to terminate the trust and vest the absolute interest of the property in him, applied to the court for the appropriate orders, including a declaration and an order to transfer the property to him. The parents were named as respondents and the father (as first respondent) disputed the purpose of the trust.[40]

26.25 One of the arguments made by the father against the application was that the trust was unenforceable as it was created illegally or for an illegal purpose, *viz*, to avoid additional buyer's stamp duty ("ABSD"). Goh Yihan JC held that the trust deed was not a sham as the respondents had intended to benefit the applicant by the trust.[41] The court referred to the provisions on ABSD in s 4(1)(*a*) and Art 3(*bf*) of the First Schedule

38 This ambiguity has been noted by Chua Yee Hoong, "The Value of Supply and Importation of Goods" in *Goods and Services Tax – Law and Practice* (Koh Soo How chief ed) (LexisNexis, 2nd Ed, 2015) at para 11.2.

39 *Lau Sheng Jan Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703.

40 *Lau Sheng Jan Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703 at [1]–[6].

41 *Lau Sheng Jan Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703 at [28]–[29].

to the Stamp Duties Act,[42] and held that from these provisions there was no express prohibition of trusts created to avoid ABSD obligations, and it was difficult to conclude that there was a necessary inference or clear implication that such trusts are illegal.[43]

B. Charges under customs law for fraudulently evading GST

26.26 In *Public Prosecutor v Tan Teck Leong Melvin*,[44] the accused was charged under s 128D of the Customs Act[45] for fraudulently evading GST of $604,227.07 on imported goods.[46] As noted by the General Division, the scope of s 128D was extended to include the fraudulent evasion of GST on imported goods by s 26 of the GST Act and para 3 of the Goods and Services Tax (Application of Legislation Relating to Customs and Excise Duties) Order.[47]

26.27 A three-judge bench sat to hear the appeal on sentencing and, in a judgment delivered by Tay Yong Kwang JCA, the court set out a sentencing framework where, as step 1, the indicative fines where the offences do not involve harmful goods (such as tobacco products or liquor) and the offender is a first-time offender, are as follows:[48]

Amount of GST evaded	Multiplier applied to each bracket	Range of indicative fine
$1 to $250	× 12	$12 to $3,000
$251 to $1,000	× 10	$3,010 to $10,500
$1,001 to $10,000	× 8	$10,508 to $82,500
$10,001 to $100,000	× 6	$82,506 to $622,500
$100,001 to $500,000	× 4	$622,504 to $2,222,500
$500,001 to $1m	× 3	$2,222,503 to $3,722,500
>$1m	× 2	> $3,722,500

26.28 The sentencing court would then, in step 2, identify the aggravating and mitigating factors present on the facts of the case and adjust the indicative sentence accordingly. It can do this by adjusting the

42 Cap 312, 2006 Rev Ed.
43 *Lau Sheng Jan Alistair v Lau Cheok Joo Richard* [2023] 5 SLR 1703 at [82]–[83].
44 *Public Prosecutor v Tan Teck Leong Melvin* [2023] 5 SLR 1666.
45 Cap 70, 2004 Rev Ed.
46 *Public Prosecutor v Tan Teck Leong Melvin* [2023] 5 SLR 1666 at [1] and [6].
47 2009 Rev Ed; see *Public Prosecutor v Tan Teck Leong Melvin* [2023] 5 SLR 1666 at [13].
48 *Public Prosecutor v Tan Teck Leong Melvin* [2023] 5 SLR 1666 at [40].

amount of the fine or by modifying the multiplier, which may include fractions if appropriate. Finally, in step 3, the court would consider if any further adjustments should be made on account of the totality principle, especially in cases involving multiple charges.[49]

26.29 It may also be relevant to note the court's ruling on the framework for default imprisonment terms, the purpose of which is to prevent evasion of fines imposed.[50]

49 *Public Prosecutor v Tan Teck Leong Melvin* [2023] 5 SLR 1666 at [48]–[54].
50 *Public Prosecutor v Tan Teck Leong Melvin* [2023] 5 SLR 1666 at [59]–[68].