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TAX AVOIDANCE BY PROFESSIONALS: WHERE ARE WE WITH *WEE TENG YAU*?

Wee Teng Yau v Comptroller of Income Tax

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Wee Teng Yau represents the first case on tax avoidance by professionals to come before the Supreme Court. This note attempts to reconcile the judgments of the High Court and the Income Tax Board of Review, which both made findings that the taxpayer had engaged in tax avoidance, but which approached the case rather differently on some points. Apart from a clear rejection of the "personal exertion" principle as having no legal basis under Singapore law, it appears that the common conclusion is that professionals incorporating a company would not constitute tax avoidance in itself, but if this was coupled with the paying of an artificially low level of remuneration to the same practicing professional, this might well constitute tax avoidance.

I. INTRODUCTION

In 2018, the media reported that the Inland Revenue Authority of Singapore ("IRAS") had been investigating arrangements where professionals incorporated companies through which to practise.[1] The question of whether such arrangements were capable of constituting tax avoidance was considered by the Income Tax Board of Review ("ITBR") in *GBF v CIT*[2] and *GCL v CIT*,[3] but until recently, the only Supreme Court authority in this area was the leading case of *CIT v AQQ*,[4] which the Court of Appeal decided in 2014, and which had a very different fact pattern. Given the focus on such arrangements by the IRAS, the recent decision of the High Court in

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1 "Iras recovers $10m from high-earning tax avoiders; returns of 145 doctors, dentists under scrutiny" *The Straits Times* (15 October 2018), online: Straits Times <https://www.straitstimes.com/singapore/iras-recovers-10m-from-high-earning-tax-avoiders-doctors-lawyers-property-agents>; and "Timely for Iras to shut tax loophole" *Straits Times* (23 October 2018), online: Straits Times <https://www.straitstimes.com/opinion/st-editorial/timely-for-iras-to-shut-tax-loophole>.

2 *GBF v The Comptroller of Income Tax* (2016) MSTC 50-019 (ITBR) [*GBF v CIT*].

3 *GCL v Comptroller of Income Tax* (2020) MSTC 50-100 (ITBR) [*GCL v CIT*]. See also *GBT v Comptroller of Income Tax* (2017) MSTC 50-027 (ITBR) [*GBT v CIT*] at para 9, where the parties did submit arguments on tax avoidance, but the ITBR declined to consider those arguments, deciding the case on grounds of lack of evidence instead.

4 *Comptroller of Income Tax v AQQ* [2014] 2 SLR 847 (CA) [*CIT v AQQ*].

Wee Teng Yau[5] provides much-needed guidance on the issue of tax avoidance by professionals.

Choo Han Teck J delivered the judgment in *Wee Teng Yau* in a succinct manner, clarifying a number of important points of law. These mainly related to how the principles laid out in *CIT v AQQ* are to be applied and also clearly rejected the notion of a common law principle of "personal exertion".[6] The judgments of the ITBR in *GCL v CIT* and the High Court in *Wee Teng Yau* approached the case rather differently on some points. Notably, the ITBR was of the view that there were two arrangements while the High Court held that there was only one arrangement. Nevertheless, it is submitted that the positions of the two judicial bodies are closer in substance than one might expect. This note seeks to analyse the legal position on the issue of tax avoidance by professionals and determine what the applicable legal principles are after *Wee Teng Yau*.

A. *Case Facts*

As far as tax avoidance cases go, the facts of *Wee Teng Yau* are fairly straightforward and are laid out in the judgment of the High Court.[7] The Appellant, Dr Wee, was employed as a dentist by Alfred Cheng Orthodontic Clinic Pte Ltd ("ACOC") from January 2011 to May 2012. On 1 May 2012, Dr Wee incorporated a new company, Straighten Pte Ltd ("SPL"), of which he was the sole director and shareholder. On the same day, Dr Wee left the employ of ACOC for SPL instead, where he continued to provide the same dental services to ACOC's patients as he had done before. Under the new arrangement, ACOC ceased paying Dr Wee a salary, instead paying SPL fees for Dr Wee's services. In turn, SPL paid Dr Wee a salary and also a director's fee. The remuneration Dr Wee received from SPL was significantly lower than the salary that he used to receive from ACOC. However, SPL declared and paid tax-exempt dividends to Dr Wee.

As such, Dr Wee was likely to have received the same amount from SPL (in terms of salary, director's fee and dividend payments) that he would have received directly from ACOC (in terms of salary) before the new arrangement. However, the total tax liability of all the parties would be lower under the new arrangement than before SPL was interposed between ACOC and Dr Wee, due to certain tax benefits under the Start-Up Tax Exemption ("SUTE") Scheme applicable to a company and the tax rate differential between the Corporate Income Tax Rate and the Personal Income Tax Rates.[8]

The Comptroller of Income Tax ("CIT") was of the view that this arrangement entered into by Dr Wee was a tax avoidance arrangement and invoked its powers under

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5 *Wee Teng Yau v Comptroller of Income Tax* [2020] SGHC 236 [*Wee Teng Yau*]; an appeal to the High Court from the decision of the ITBR in *GCL v CIT, supra* note 3.

6 To be discussed in detail below.

7 *Wee Teng Yau*, *supra* note 5 at paras 1, 2, 12.

8 Simply put, the SUTE scheme offered a generous tax exemption on the first $300,000 of chargeable income earned by ACOC, while the corporate income tax rate was 17% as opposed to the top personal income tax rate of 20% (up to 2015) and 22% (after 2016), providing opportunities for tax arbitrage. For a more detailed summary of the various tax advantages, see Vincent Ooi, "The Anti-Avoidance Response to Professionals Incorporating Companies in Singapore" (2020) 26:2 Asia Pacific Tax Bulletin 1 at 2.

Section 33 of the *Income Tax Act*[9] to assess the fees received by SPL from ACOC as Dr Wee's income, thus negating any tax advantages arising from the arrangement. The relevant portions of Section 33 are reproduced as follows:

> 33.—(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly—
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> (a) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;
> (b) to relieve any person from any liability to pay tax or to make a return under this Act; or
> (c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,
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> the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.
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> . . .
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> (3) This section shall not apply to—
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> . . .
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> (b) any arrangement carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.[10]

Dr Wee appealed against the CIT's decision and the matter came before the ITBR, which rejected Dr Wee's appeal and upheld the CIT's assessment. Dr Wee then appealed against the decision of the ITBR, arguing that the CIT had failed to satisfy the requirements of Section 33(1), and that even if the CIT did, that Dr Wee would be exempted under Section 33(3)(b).[11]

B. *Decision of the Court*

The High Court rejected both of Dr Wee's main arguments and dismissed the appeal. It held that the arrangement enabled Dr Wee to get the same amount of pay from ACOC but incur a lower amount of tax liability, through the use of SPL to extract tax

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9 (Cap 134, 2014 Rev Ed Sing) [*ITA*].

10 On 7 December 2020, s 33 was repealed and re-enacted. With respect to the portions of s 33 reproduced below, the old s 33(1) has been re-enacted as the new ss 33(1) and (2), while the old s 33(3)(b) has been re-enacted as the new s 33(7). The main effect of the amendments is that while the CIT previously had a discretion to disregard or vary the tax avoidance arrangement (the statute used the word "may"), it now no longer has such a discretion (the statute now uses the word "must"). The legal principles laid down in *Wee Teng Yau* remain unaffected by these amendments since the issue of the discretion of the CIT was not raised by the parties.

11 *Wee Teng Yau*, *supra* note 5 at para 6.

benefits that he could not himself obtain.[12] As this was the sole purpose of SPL for the period in question, the arrangement fit directly under Section 33(1)(a) and (c), satisfying the requirement under Section 33(1). The High Court further held that there were no *bona fide* commercial reasons for the arrangement[13] and that the purpose of the arrangement was to reduce Dr Wee's personal tax.[14] As such, the arrangement failed to satisfy both of the conditions in Section 33(3)(b) and accordingly, Dr Wee was unable to rely on the exemption.

II. Legal Principles Clarified by *Wee Teng Yau*

Though the High Court felt that *Wee Teng Yau* was a simple and straightforward case (as Choo J put it, a small rodent rather than the mammoth that was *CIT v AQQ*),[15] it did take the time to clarify a number of important points of law. The first major set of clarifications related to the application of the principles laid out in *CIT v AQQ*.

A. *Application of the Principles Laid out in* CIT v AQQ

1. *Conjunctive reading of the two conditions in Section 33(3)(b)*

The High Court made it clear that the two conditions in Section 33(3)(b) were to be read conjunctively if the taxpayer was to successfully rely on the exemption to fall outside the scope of Section 33(1).[16] The taxpayer must be able to show not only that the arrangement must have been carried out for *bona fide* commercial reasons, but also that it must not have had as one of its main purposes the avoidance or reduction of tax; merely satisfying either one condition is insufficient. The High Court further highlighted that the second condition is that the arrangement "'had not as one of its main purposes' the avoidance [or reduction] of tax" emphasising that the term used was "one of" rather than "the" main purpose.[17] As such, a taxpayer would not be able to avail himself of the exception just by showing that there were other non-tax motivated main purposes for the arrangement. The provision clearly contemplates the possibility of there being multiple main purposes for the arrangement and does not require the court to find only one main purpose.

Apart from being manifestly correct as a matter of the plain reading of the statutory provision, it is noted that this principle is also supported by the judgment in *CIT v AQQ*, where the Court of Appeal held that Section 33(3)(b) contains two cumulative limbs.[18] In fact, in *CIT v AQQ*, the court held that while it might be willing to accept that there were genuine *bona fide* commercial reasons for the arrangement in that

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12 *Ibid* at para 8.
13 *Ibid* at para 10.
14 *Ibid* at para 11.
15 *Ibid* at para 15.
16 *Ibid* at para 16–18.
17 *Ibid* at para 18 (emphasis added).
18 *CIT v AQQ*, *supra* note 4 at para 67.

case, the exception in Section 33(3)(b) still did not apply since one of the main purposes of the arrangement was the reduction of tax.[19]

2. *Objective ascertainment of subjective facts*

The next legal principle which the High Court clarified was that for the purposes of determining if the taxpayer could avail himself of the exception in Section 33(3)(b), it was necessary to infer the taxpayer's intentions from the surrounding evidence or features of the arrangement.[20] This may be summarised as requiring the objective ascertainment of subjective facts. In other words, while the taxpayer's intentions are subjective and depend on the tax advantage that the taxpayer hopes to obtain from the arrangement in question,[21] the court may use objective facts and evidence to aid its determination of this subjective state of mind.

This principle was established in *CIT v AQQ*, where the Court of Appeal first stated that the two limbs of Section 33(3)(b) are concerned with the taxpayer's subjective commercial motives for entering into a transaction, and the subjective consequences that the taxpayer wishes to obtain respectively.[22] The court went on to state that "[s]ubjective intentions might not always be readily apparent, and that the Board or Judge may ascertain these intentions" by reference to objective evidence.[23]

While the case of *GBF v CIT* was not cited in the judgment of the High Court in *Wee Teng Yau*, it is worth looking at how the ITBR applied this principle. In that case, the ITBR stated as follows:

> Although we have to consider the subjective intentions of the Appellant, we have to do so by drawing the requisite inferences from the surrounding objective evidence or features of the arrangement. Afterall, subjective intentions can be perfected with time and we have carefully scrutinized the Appellant's explanations in the context of the overall circumstances.[24]

It is submitted that the ITBR did not mean that the subjective intentions of a taxpayer may change over time and that a taxpayer's subsequent frame of mind might be relevant to the determination of his subjective intentions. In *CIT v AQQ*, the Court of Appeal followed the discussion of the subjective nature of taxpayer's intentions by stating that "[s]imilarly structured transactions may thus be taxed differently depending on whether the taxpayer had set out to create a result whereby his tax liability was avoided or reduced".[25] This makes it clear that the relevant point of assessment of the taxpayer's subjective intentions is where the taxpayer had set out to create the result, *ie* when the arrangement had been executed. As such, it is likely that the ITBR in *GBF v CIT* was actually making a cynical comment about the potentially

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19 *Ibid* at para 81.
20 *Wee Teng Yau*, *supra* note 5 at para 18.
21 *Ibid.*
22 *CIT v AQQ*, *supra* note 4 at paras 71–74.
23 *Ibid* at para 82.
24 *GBF v CIT, supra* note 2 at para 10(ix) (emphasis added).
25 *Ibid, supra* note 4 at para 74 (emphasis added).

self-serving nature of a taxpayer's evidence, placing greater weight on the objective evidence rather than what the taxpayer declares to be his subjective intentions.

3. *Guides to the proper application of the law to the facts*

Dr Wee had submitted that the ITBR had erred in law by considering the reasonableness of the taxpayer's acts under Section 33(1) where the statute had not expressly provided for such an element.[26] The ITBR had stated as follows:

> [I]t would not suffice to assert that an arrangement falls within the ambit of Section 33(1) merely because its tax outcome was more favourable than a prior arrangement, without considering the reasonableness of the overt acts undertaken. If this were the case, any restructuring that results in a more favourable tax outcome would, prima facie, fall within Section 33(1).
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> Rather, based on the decisions in *AQQ* and *Newton*, an examination of the overt acts and the effects of those acts need to be examined, and we must be able to predicate those were carried out for tax avoidance.[27]

Thus, the ITBR rejected the notion that any arrangement that results in a more favourable outcome would, *prima facie*, fall within Section 33(1). Rather, even if the arrangement would result in a more favourable outcome, it would still not fall within Section 33(1) if the overt acts undertaken were reasonable. In this sense, the ITBR afforded Dr Wee a more favourable interpretation of Section 33(1) than might be discerned from a plain reading of the provision. The ITBR went on to justify this interpretation by reference to the predication principle, which was laid out in *CIT v AQQ* and which will be discussed in detail subsequently. That said, the true test is the "purpose or effect" of the arrangement, as discerned through the application of the predication principle.[28] Whether the arrangement is 'reasonable' is not directly relevant and merely a tangential point.

In any case, the High Court dealt with this argument by clarifying that while the term "reasonableness" was not expressly used in the statute, "when lawyers and judges apply the law, they are invariably guided by the unseen hand of reason" and "look at the full picture to see whether the facts fit the law and vice versa".[29] It went on to explain that to help with difficulties in applying the statutory provisions in this area, courts sometimes "invent steps to help them understand how the arrangement works in the peculiar facts of those cases".[30] Thus, while terms such as "reasonableness", "two-step test" or "three-step test" are used in the judgments, they are simply "guides to the proper application of the law to the facts" and need not be construed as creating new elements or adding requirements to the statutory provisions.[31]

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26 *Wee Teng Yau, supra* note 5 at para 14.
27 *GCL v CIT, supra* note 3 at paras 15, 16.
28 *ITA, supra* note 9 at s 33(1).
29 *Wee Teng Yau, supra* note 5 at para 14.
30 *Ibid* at para 13.
31 *Ibid*.

B. *Personal Exertion*

The second major set of clarifications related to the principle of "personal exertion". The CIT had argued before the High Court that, following the New Zealand case of *Spratt v CIT*,[32] there ought to be a "personal exertion" principle, providing that income resulting from the personal activities of a taxpayer will remain with the taxpayer for tax purposes irrespective of his attempts to assign or dispose of it.[33] This argument had already been considered and dismissed by the ITBR, which held that there was no specific provision in the *ITA* that could provide the basis for such a principle.[34]

The High Court affirmed the decision of the ITBR on this point, but added that the Board might have created confusion by adding the statement that "a company is a legal person under the laws of Singapore and capable of deriving its own income" immediately after rejecting the existence of the "personal exertion" principle.[35] Indeed, as the "personal exertion" principle has no legal basis in Singapore, this would be the case regardless of whether a company has separate legal personality under Singapore law.

A further clarification was made by the High Court that the so-called "personal exertion" principle is merely a judicial expression used to emphasise the fact that a person cannot alter his tax liabilities merely be assigning his pay to someone else.[36] As a mere judicial expression and not a common law exception, the legal basis for this "principle" must be found in the statute.[37] While such a legal basis might exist in the New Zealand statutes, it does not exist in the Singapore statutes and thus, the CIT could not rely on the "personal exertion" principle to levy tax that the *ITA* has not provided for.

III. Harmonising the ITBR and High Court Judgments

A. *One Arrangement or Two?*

The most obvious difference between the judgment of the ITBR in *GCL v CIT* and that of the High Court in *Wee Teng Yau* lies in the way that the various structures and activities of Dr Wee were framed. The ITBR held that there had been two arrangements: (a) the setting up of SPL to receive income from ACOC, and (b) the setting of the level of remuneration paid to Dr Wee by SPL.[38] It considered that the setting up of a company to provide services and receive service income (the first arrangement) was not by itself tax avoidance, while the salary paid to Dr Wee by SPL (the second arrangement) was artificially low and constituted tax avoidance.[39]

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32 *Spratt v Commissioner of Inland Revenue* [1964] NZLR 272 (HC).
33 *Wee Teng Yau, supra* note 5 at para 20.
34 *GCL v CIT, supra* note 3 at para 36.
35 *Wee Teng Yau, supra* note 5 at para 21.
36 *Ibid* at para 22.
37 *Ibid.*
38 *GCL v CIT*, *supra* note 3 at para 17.
39 *Ibid*.

The High Court remarked that to refer to two arrangements might lead to confusion and stated that it believed that what the ITBR meant was that the arrangement in the present case can be seen as having two parts in some other arrangements.[40] It thus proceeded to decide the case on the basis that there was only one arrangement, ruling that the arrangement did indeed constitute tax avoidance. This note will analyse how the ITBR and High Court applied the legal test for tax avoidance laid out in *CIT v AQQ* based on their respective frameworks and submit that the two positions are closer in substance than one might expect.

B. *The Predication Principle*

In *CIT v AQQ*, the Court of Appeal held that the term "purpose or effect" in Section 33(1) resulted in the need to characterise the objective ends of an arrangement, in other words, "whether it may be predicated from the observable acts by which an arrangement is implemented that it was implemented in that way so as to achieve the ends stated in any of the limbs in s 33(1)" (the "predication principle").[41] This was to be done through an objective determination, without reference to the motives of the parties.[42]

In setting out this legal principle, the Court of Appeal approvingly cited the decision of Lord Denning in the Australian case of *Newton*,[43] stating that "an arrangement would not be predicated as a tax avoidance arrangement if the arrangement is capable of explanation 'by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax'."[44] It also cited the decision of the Privy Council in the New Zealand case of *Mangin*,[45] agreeing that if a "*bona fide* business transaction can be carried through in two ways, one involving less liability to tax than the other," the section cannot be invoked "merely because the way involving less tax is chosen".[46]

The ITBR had held in *GCL v CIT* that for the first arrangement, it was unable to predicate that the setting up of SPL to receive income from ACOC was implemented for tax avoidance, but rather that it was capable of explanation by reference to ordinary business norms and practices.[47] For the second arrangement, the ITBR did not expressly use the term "predication", but clearly did consider the principle, finding that the "'artificially' low" remuneration paid by SPL to Dr Wee was not capable of explanation by reference to ordinary business or commercial basis.[48]

The High Court did not expressly use the terms 'predication', not 'ordinary business or commercial basis' in its judgment in *Wee Teng Yau*. However, it is likely that the High Court did in fact consider the predication test. Firstly, it concluded that the

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40 *Wee Teng Yau*, *supra* note 5 at para 7.
41 *CIT v AQQ*, *supra* note 4 at para 46.
42 *Ibid* at para 25.
43 *Lauri Joseph Newton v Commissioner of Taxation of the Commonwealth of Australia* [1958] AC 450 (PC) at 465, 466.
44 *CIT v AQQ*, *supra* note 4 at paras 45–47.
45 *Owen Thomas Mangin v Inland Revenue Commissioner* [1971] AC 739 (PC).
46 *CIT v AQQ*, *supra* note 4 at para 47.
47 *GCL v CIT, supra* note 3 at paras 18–20.
48 *Ibid* at paras 22, 23.

arrangement enabled Dr Wee to receive the same amount of pay as he previously did from ACOC, but with reduced tax liability because he could use SPL to extract tax benefits that he could not himself obtain. It added that for the period in question, this was the sole purpose of SPL.[49] Based on these findings, the High Court concluded that Section 33(1) applied.

This does seem to be an application of the predication principle. The High Court does appear to have decided that, objectively speaking, it may be predicated that the arrangement was implemented to achieve a tax advantage. Although the High Court found that for the period in question, the tax benefits were the sole purpose of SPL, the nature of the predication test as being objective rather than subjective indicates that it is likely that the High Court could objectively see no other purpose for the arrangement than the achieving of a tax advantage.

Secondly, the High Court stated that "doctors who set up private limited companies with a compendium of purposes such as delegating the management of the business and limiting the liability of the doctors are not the sort of arrangements contemplated in s 33."[50] It went on to state that "Section 33 is intended to cover arrangements which are created by the taxpayer so as to reduce the taxes which he would otherwise have to pay."[51] It ended this paragraph by concluding that the main, if not only, purpose of SPL was to enable Dr Wee to avoid tax, and that this is precisely the type of arrangement that is covered by Section 33(1).

Thus, the High Court reiterated the conclusion previously stated that the purpose of SPL was to achieve a tax advantage, which can be read as a conclusion similarly reached through the application of the predication principle. But the High Court appears to recognise that in certain situations, where doctors set up companies "with a compendium of purposes", this might not fall within the ambit of Section 33(1). To use the language of the predication principle, this may well be because such situations are "capable of explanation by reference to ordinary business or commercial basis."

We thus have a situation where the High Court appears to draw a distinction between the setting up of companies by professionals for "a compendium of purposes" (not being tax avoidance) and what Dr Wee did in this case (being tax avoidance). The most straightforward difference between these two cases is that Dr Wee did not appear to have a "compendium of purposes", since the High Court appeared to suggest that Dr Wee had only argued that "SPL was a legitimate business concern and established for the bona fide commercial reason of operating a dental clinic."[52]

But it might well be possible to infer that, objectively speaking, it may be predicated that it was also the level of remuneration paid to Dr Wee by SPL that was implemented to achieve a tax advantage, rather than merely the lack of purposes for the incorporation of SPL. After all, the High Court's judgment repeatedly makes reference to the fact that the remuneration paid to Dr Wee by SPL was lower than that previously received directly from ACOC.[53]

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49 *Wee Teng Yau*, *supra* note 5 at para 8.
50 *Ibid* at para 19.
51 *Ibid*.
52 *Ibid* at para 10.
53 *Ibid* at paras 4, 8.

C. *Similar in Substance?*

In substance, the ITBR and High Court appear to agree on two issues: (1) that the remuneration paid to Dr Wee by SPL was set at such a level in order to achieve a tax advantage; and (2) that doctors who incorporate companies for a variety of good reasons are not engaging in tax avoidance. However, the ITBR found that the setting up of SPL in Dr Wee's case was not capable of constituting tax avoidance, whereas the High Court held that it was capable and did in fact constitute tax avoidance on the facts. This has to do with the framing of the various structures and activities of Dr Wee.

The ITBR chose to consider, in isolation, the act of incorporation. In doing so, it made the point that incorporation is perfectly capable of explanation by ordinary business norms and practices and thus, it may not be predicated that such an act was implemented to achieve a tax advantage.[54] This is an important point which one can fully appreciate why the ITBR wished to establish. However, having framed the issue as such and applied the principle to Dr Wee's case, this led to the ITBR having to frame the setting of the level of remuneration as another arrangement. The High Court made the same point that incorporation for a "compendium of purposes" was not tax avoidance, but chose not to apply this to Dr Wee's case.[55] Instead, it framed all the various structures and activities of Dr Wee as one arrangement and then applied the predication test to that arrangement.

There is one crucial difference between the effect of the two judgments. The ITBR, by finding that the incorporation of SPL by Dr Wee was not capable of constituting tax avoidance, established this principle as the *ratio decidendi* of the case. The High Court, by noting that incorporation for a "compendium of purposes" was not tax avoidance, but then not applying this principle to Dr Wee's case, can only be said to have handed down *obiter dicta* on the issue.

IV. Interaction with Section 34D

In *GCL v CIT*, the ITBR suggested that even though the parties did not raise Section 34D, it might have hypothetically been successfully pleaded.[56] Section 34D empowers the CIT to recalculate the income, losses or deductions of related parties if they enter into transactions on a non-arm's length basis; in other words, if the conditions of the transactions differ from those which would have been made if they were not related parties. In the case of Dr Wee and SPL, since they were related parties, arguably, Dr Wee's remuneration from SPL would have to be adjusted upwards, according to what Dr Wee should have been paid by SPL if they were unrelated parties. This might well remove most, if not all of the tax advantage offered by the arrangement.

The High Court in *Wee Teng Yau* did not consider this suggestion of the ITBR. Nevertheless, moving forward, the issue of whether Section 33 or Section 34D is applied

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54 *GCL v CIT, supra* note 3 at para 18.
55 *Wee Teng Yau, supra* note 5 at para 19.
56 *GCL v CIT, supra* note 3 at para 33.

will become a matter of considerable practical significance. Under Section 34E, from Year of Assessment 2019 onwards (thus, not affecting the taxpayer in *Wee Teng Yau*), where the CIT makes an adjustment to the income, losses or deductions of any person under section 34D, a surcharge equal to 5% of the amount of the increase or reduction (as the case may be) will be due to the Government. On the other hand, the recently passed *Income Tax (Amendment) Bill* will introduce a surcharge of 50% of the additional amount of tax imposed on a taxpayer as a result of an adjustment under Section 33, applicable from Year of Assessment 2023 onwards.[57]

Thus, for cases relating to the Year of Assessment 2019 onwards, there will be a significant practical difference for the taxpayer depending on whether the CIT invokes Section 33 or Section 34D. It is worth highlighting that the surcharge made under Section 34D is computed based on the amount of the increase or reduction of the income, losses or deduction. Thus, it is based on chargeable income and not tax payable. The surcharge made under Section 33, on the other hand, is computed based on the change in the tax payable. The question of which outcome would be worse for the taxpayer, would heavily depend on the specific facts of each case.

V. Conclusion

Tax avoidance is a complex area of law and *Wee Teng Yau* adds much-needed Supreme Court authority to our local jurisprudence. The case clarifies how to apply the legal principles laid out in *CIT v AQQ*, reaffirming the need for conjunctive reading of the two conditions in Section 33(3)(b). If a taxpayer is to benefit from the exception therein, he must show both that the arrangement must have been carried out for *bona fide* commercial reasons, and also that it must not have had as one of its main purposes the avoidance or reduction of tax; merely satisfying either one condition is insufficient. *Wee Teng Yau* also reminds us that the test for taxpayer intention under Section 33(3)(b) is a subjective one, but must be inferred from the objective evidence or features of the arrangement. Further, to the High Court, it is insufficient to merely assert that a company is incorporated for the *bona fide* commercial reason of operating a clinic, but establishing a company for a "compendium of purposes" does not constitute tax avoidance in itself. *Wee Teng Yau* also conclusively dismisses the existence of any purported "personal exertion" principle as a mere judicial expression that has no legal basis under Singapore law. Finally, both the ITBR in *GCL v CIT* and the High Court in *Wee Teng Yau* appear to accept that professionals incorporating a company would not constitute tax avoidance in itself, but if this was coupled with the paying of an artificially low level of remuneration to the same practicing professional, this might well constitute tax avoidance.

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[57] Bill No. 38/2020, *Income Tax (Amendment) Bill,* 1st Sess, 14th Parl, 2020. This would add a new s 33A of the *ITA*, not yet in force as of the time of writing.