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马来西亚 | 税刊 | 2018 年 10 月

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在十月的税刊中，我们将介绍关于秘书费用与税务申报费用扣除的修订指引，以及马来西亚所得税与不动产利得税上的最新案例法。

关于秘书费用及税务申报费用扣除的第二修订指引（于 2018 年 8 月 17 日修订）

马来西亚内陆税收局针对 2014 年所得税条例（秘书费用及税务申报费用扣除）*[“P.U.(A) 336/2014”]*，于 2018 年 8 月 17 日发布了关于秘书费用及税务申报费用扣除的第二修订指引（于 2018 年 8 月 17 日修订）。

马来西亚内陆税收局的立场:

a) “费用”不包括自费费用；

b) 在该课税年内当支出已经“产生”（例如发票已收到），同时已完成支付，那么税务申报费用可以被扣除；以及

c) 秘书费用可以在该课税年内被扣除，当此费用所对应的服务已经收到且已产生责任义务，费用也已支付并可以记入损益账户。

税务局局长（“KPHDN”）诉 Continental Choice 有限公司＆Anor（高等法院）

争议内容：

1. 所得税特别委员判定高等法院对 Binastra Holdings 公司诉税务局局长案件的判决仍然有效，尽管上诉法院已推翻了此判决，这是否正确。

2. 所得税特别委员判定上诉法院对税务局局长诉 Binastra Holdings 公司案件的判决并不适用，因为上诉法院没有作出书面判决，这是否正确。

3. 所得税特别委员判定《1976 年不动产利得税法案》附表 2 第 34A 段必须给予有目的性的解释而非字面解释，这是否正确。

4. 所得税特别委员判定 Bioford Development 有限公司并不属于不动产利得税法令附表 2 第 34A 段范围内规定的不动产公司，这是否正确。

5. 所得税特别委员判定纳税人出售其所持 Bioford 股份所得无需缴纳不动产利得税，这是否正确。

判决:

高等法院驳回税务局局长就争议 1 和 2 提出的上诉，但准许税务局局长就争议 3、4、5 提出上诉，并给出以下判决理由:

争议 1 和 2

1. 上诉法院在撤销高等法院对 Binastra Holdings 公司诉税务局局长 (2002) *MSTC 3,897/[2001] 5 ML J 481* 案件的判决时并没有出示任何书面依据。基于这一原因，所得税特别委员在本案中根据高等法院对 Binastra Holdings 公司的判决没有任何错误，因为这是唯一一项针对不动产利得税法令附表 2 第 34A 段附有书面依据的判决，受法律允许。

2. 然而，高等法院在 Binastra Holdings 案件中的判决对另一个具有相同权力的高等法院并没有约束力，因此高等法院将在此案中自行作出裁决。

争议 3，4，5

1. 在税法中的规定没有提供明确用语的情况下，需采取目的性的方法。法院须采取一种公正也合理的方法。

2. 根据不动产利得税法令附表 2 第 34A 段，对判断 Bioford 是否为不动产公司必须给予严格的解释，因为判断是清楚和明确的。

3. 纳税人收购 Bioford 股份或 Bioford 主要业务的意图，对判断 Bioford 是否是不动产利得税附表 2 第 34A 段范围内的不动产公司没有影响。此外，并无条款规定从事地产发展业务的公司应被排除在评判和/或不动产利得税法令附表 2 第 34A 段的规定范围之外。

4. 在不动产利得税法令附表 2 第 34A 段，对征税已有清晰明确的规定。对第 34A 段所使用措辞的字面解释并没有造成任何的不公正或荒谬，所以对此问题的征税规定是非常清楚的。法院同意税务局局长的意见，即在这种情况下，对第 34A 段措辞一般和自然的含义解释并没有造成任何不公正或荒谬。

5. 纳税人认为， 1988 年财政法案颁布第 34A 段的历史和原因需要被考量。换句话说，纳税人不是第 34A 段所针对的房地产投机者。Bioford 不是第 34A 段所指的不动产公司，因为其贸易库存不受不动产利得税法令的约束。在这方面，法院认为在模棱两可的情况下，可引用颁布此条款背后的意图来加以解释。第 34A 段中已明确规定了如何判定 Bioford 是否为不动产公司，纳税人购买股份的意图是否为从

事房地产开发是无关紧要的。该公司的主要业务或纳税人收购该公司股份的意图不是问题，也不会影响 Bioford 作为不动产公司的状态。

6. 所得税特别委员在 Binastra Holdings 公司案件中的判决是正确的。同样在本例中，Bioford 是不动产利得税附表 2 第 34A 段 (6) 节所指的不动产公司。纳税人处置的 Bioford 股份将被视为应税资产，应该缴纳不动产利得税。

KJTB 有限公司诉税务局局长（所得税特别委员）

争议内容:

1. 纳税人在 2008 课税年度内开具 102.6 万令吉的贷记单，以减少其对 PPSB 项目的索款（即收入），是否是可以接受和允许的。

2. 支付给测量师的款项如超出协议规定的金额，是否可以根据所得税法令第 33（1）条进行扣除；

3. 根据所得税法令第 113（2）条，税务局局长处以罚款的惩罚是否正确。

判决:

所得税委员会驳回了纳税人对所有争议的上诉，并给出以下判决理由：

争议 1

所得税委员会认为纳税人没有理由或目的开具 102.6 万令吉的贷记单，并且纳税人也未曾解释为什么实际收到的金额为 923.5 万令吉，但纳税人的销售分类账中却记录为 1002.6 万令吉。纳税人也没有传唤证人或提供证据就此事作证。因此，纳税人未能履行所得税法令附表 5 第 13 段规定的举证责任。

争议 2

纳税人作为“外包服务：建立地籍管理基础设施”项目的中间人，纳税人指定的测量师在其下注册执行项目。根据证据，税务局局长发现向测量师支付的款项超过了协议中的金额。其超出的款项，已经在 2007 课税年度抵扣了 30％，而剩余的 70％则在 2008 课税年度抵扣。

虽然纳税人就超额支付呈出了补充协议，但因为协议本身没有加盖印花，也没有纳税人和测量师双方的签字，无法作为证据。因此，虽然根据所得税法第 33（1）条的规定该项付款可以抵扣，但纳税人未能证明上述文件和补充协议为有力证据，以支持其根据所得税法第 33（1）条规定要求进行抵扣。

争议 3

根据所得税法令第 113（2）条规定，如果税务局局长确信纳税人触犯了不正确的税务申报或提供错误信息等罪行，可对纳税人进行处罚。尽管纳税人积极回复税务局局长所提出的问题，但税务局局长所要求的大多数文件纳税人未能提供，且纳税人没有妥善保留记录。因此，税务局局长有权在税务审计中提出的额外评估下对纳税人进行处罚。

Deloitte Malaysia Chinese Services Group Publication

In our October issue, we cover the amended guidelines on the deduction for expenses in relation to secretarial fee and tax filing fee as well as the latest case laws on Malaysian Income Tax and Real Property Gains Tax.

2nd Amended Guidelines on Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee (revised as at 17.08.2018)

The Inland Revenue Board of Malaysia ("IRBM") has on 17 August 2018 issued a 2nd 'Amended Guidelines on Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee (revised as at 17.08.2018)' relating to the Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2014 ["P.U.(A) 336/2014"].

The IRBM takes the position that:

a) "fee" excludes out of pocket expenses;

b) Tax filing fee is eligible for deduction in the basis period of a YA when the expenditure has been 'incurred' (i.e., invoice has been received) and 'paid'; and

c) Secretarial fee is eligible for deduction in the basis period of a YA upon receipt of services, a liability exists and secretarial fee can be charged to the profit and loss account and the payment has been made.

Ketua Pengarah Hasil Dalam Negeri ("KPHDN") v Continental Choice Sdn Bhd & Anor (High Court)

Issues:

1. Whether the Special Commissioners of Income Tax ("SCIT") was correct in deciding that the High Court ("HC") decision in Binastra Holdings Sdn Bhd v KPHDN was still good law despite being reversed by the Court of Appeal ("CoA").

2. Whether the SCIT was correct in deciding that the CoA decision in KPHDN v Binastra Holdings Sdn Bhd could not be applied since there was no written judgment produced by the CoA.

3. Whether the SCIT was correct in deciding that Paragraph 34A of Schedule 2 of the Real Property Gains Tax Act 1976 ("RPGTA") must be given a purposive, rather than literal, interpretation.

4. Whether the SCIT was correct in deciding that Bioford Development Sdn Bhd ("Bioford") was not a real property company ("RPC") within the ambit of Paragraph 34A of Schedule 2 of the RPGTA.

5. Whether the SCIT was correct in deciding that the gains made by the taxpayer from the disposal of its shares in Bioford were not subject to RPGTA.

Decision:

The HC dismissed the appeal by the Director General of Inland Revenue ("DGIR") on Issues 1 and 2, and allowed the appeal by the DGIR on Issues 3, 4 and 5 with the following grounds of judgement:

Issues 1 and 2

1. The CoA when reversing the HC decision in Binastra Holdings Sdn Bhd v KPHDN (2002) MSTC 3,897/[2001] 5 ML J 481, did not produce any written grounds. Based on that reason, there was nothing wrong for the SCIT in the present case to rely on the HC decision in ***Binastra Holdings*** because that was the only decision where written grounds were made available in respect of Paragraph 34A of Schedule 2 of the RGPTA. It was permitted under the law.

2. However, the HC decision in ***Binastra Holdings*** was not binding on another HC of similar jurisdiction. This Court would proceed in making its own decision.

Issues 3, 4 and 5

1. The purposive approach was adopted in a situation where the provision in the tax statute did not provide plain and unambiguous language. It was required for the Court to adopt an approach that produced neither injustice nor absurdity.

2. The test of whether Bioford was an RPC under Paragraph 34A of Schedule 2 of the RPGTA must be given a strict interpretation as the test was clear and unambiguous.

3. The intention of the taxpayers in acquiring Bioford shares or the primary business of Bioford had no bearing on the test as to whether Bioford was an RPC within the ambit of

Paragraph 34A of Schedule 2 of the RPGTA. In addition, there was no provision stating that a company which business was property development should be excluded from the test and/or the provisions of Paragraph 34A of Schedule 2 of the RPGTA.

4. Clear words had been employed to impose tax under Paragraph 34A of Schedule 2 of the RPGTA. The literal interpretation of the words used in Paragraph 34A did not give rise to any injustice or absurdity. It was clear enough to impose tax on the subject. The Court agreed with the DGIR that in this case no injustice or absurdity would arise from construing Paragraph 34A to give the words their ordinary and natural meaning.

5. The taxpayers had argued that the history and reasons behind the enactment of Paragraph 34A by way of the Finance Bill 1988 must be considered. In other words, the taxpayers were not property speculators which Paragraph 34A was designed to catch. Bioford was not an RPC within the meaning of Paragraph 34A as its stock in trade was not subject to RPGTA. In this regard, the Court took the view that the intention behind the introduction of the provision might be used as to aid its interpretation in cases of ambiguity. The test to determine whether Bioford was an RPC was clearly set out in Paragraph 34A and it did not matter whether the intention of the taxpayers in acquiring the shares was for engaging in property development. The primary business of the company in question or the intention of the taxpayers in acquiring the shares of the company was not an issue and would not affect the status of Bioford as an RPC.

6. The decision by the SCIT in ***Binastra Holdings*** was correct. Similarly, in this present case, Bioford was an RPC within the meaning of Paragraph 34A(6) of Schedule 2 of the RPGTA. Bioford's shares disposed of by the taxpayers were deemed to be chargeable assets and subject to RPGT.

KJTB Bhd v KPHDN (Special Commissioners of Income)

Issues:

1. Whether the issuance of credit note of RM1.026M by the taxpayer that reduced the taxpayer's project claims (i.e., income) from PPSB in YA 2008 was admissible and allowable;

2. Whether the payments made to the surveyors which exceeded the amounts stated in the agreement could be deducted under Section 33(1) of the Income Tax Act 1967 ("ITA");

3. Whether the DGIR was right in its imposition of penalty under Section 113(2) of the ITA.

Decision:

The SCIT dismissed the appeal by the taxpayer on all issues with the following grounds of judgement:

Issue 1

The SCIT found that there was no reason or purpose for the taxpayer's issuance of the credit note of RM1.026M and there was no explanation proffered by the taxpayer as to why RM10.026M had been recorded as sales in the taxpayer's ledger if the actual amount received was RM9.235M. There were also no witnesses called by the taxpayer to testify on this issue. The taxpayer had thus failed to discharge the onus of proof as provided under Paragraph 13 of Schedule 5 of the ITA.

Issue 2

The taxpayer had acted as the middle person for the project of "Outsourcing of Service: The establishment of Cadastral Control Infrastructure" wherein the taxpayer appointed surveyors registered under it to carry out the projects. Based on the evidence, the DGIR found that the payments made to the surveyors exceeded the amount in the agreement. Out of the amount, 30% had already been claimed for YA 2007 whilst the balance 70% had been claimed for YA 2008.

While the taxpayer presented a supplementary agreement for the excessive payment, the supplementary agreement was inadmissible in evidence as it was not stamped and neither was it signed by the taxpayer nor the surveyors. Hence, although the payment was liable for deduction under Section 33(1) of the ITA, the taxpayer had failed to prove that the documents and the supplementary agreements were strong evidence to support its appeal for a deduction under Section 33(1) of the ITA.

Issue 3

A penalty under Section 113(2) of the ITA could be imposed on a taxpayer if the DGIR is satisfied that the taxpayer has committed an offence of making an incorrect return or providing incorrect information. Despite the fact that the taxpayer had cooperated with the DGIR by following up with correspondence, most documents required by the DGIR were not presented by the taxpayer and the taxpayer also did not keep proper records. Hence, the DGIR had the right to impose penalty on the taxpayer for the additional assessments raised upon auditing.

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