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January 2018

Greetings from Deloitte Malaysia Tax Services

Quick links: *Deloitte Malaysia*
Inland Revenue Board

Takeaways:

1. Public Rulings issued in December 2017
2. Kerajaan Malaysia v Mudek Sdn Bhd (Federal Court)
3. KPT Sdn Bhd v KPHDN (Special Commissioners of Income Tax)

Upcoming events:

1. *2017 Employer's Income Tax Reporting Seminar*
2. *Human Resources (HR) Role Transformation Talk by BPS*
3. *2018 Capital Allowances Study Workshop*
4. *FMM & Deloitte - Employer's 2017 Income Tax Reporting Seminar*

Important deadlines:

1. Due date for 2019 tax estimates for companies with February year-end (29 January 2018)
2. 6th month revision of tax estimates for companies with July year-end (31 January 2018)
3. 9th month revision of tax estimates for companies with April year-end (31 January 2018)
4. Statutory filing of 2017 tax returns for companies with June year-end (31 January 2018)
5. Due date for 2018 CbCR notification for companies with January year-end (31 January 2018)

Public Rulings issued in December 2017

The following Public Rulings (PRs) were issued in December 2017 to explain the relevant tax treatments with various examples provided in the respective PRs:

Public Rulings	Remarks
PR 7/2017: Disposal Of Plant Or Machinery Part I - Other Than Controlled Sales	Issued on 12 December 2017 to explain the tax treatment for the disposal of plant or machinery that is not subject to controlled sales.
PR 8/2017: Professional Indemnity Insurance	Issued on 19 December 2017 to replace PR 3/2009 "Professional Indemnity Insurance".
PR 9/2017: Reinvestment Allowance Part I - Manufacturing Activity	Issued on 22 December 2017, which is a rewritten, rearranged and updated version of PR 6/2012 "Reinvestment Allowance". PR 9/2017 focuses on the treatment of reinvestment allowance in relation to manufacturing activities.
PR 10/2017: Reinvestment Allowance Part II - Agricultural And Integrated Activities	Issued on 22 December 2017 to assist a company resident in Malaysia that is engaged in agricultural and integrated activities in ascertaining its eligibility to claim reinvestment allowance.
PR 11/2017: Residence Status Of Individuals	Issued on 22 December 2017 to replace PR 6/2011 "Residence Status Of Individuals".

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Kerajaan Malaysia v Mudek Sdn Bhd (Federal Court)

Issues:

1. Whether a Court, in its hearing and decision on the application for summary judgement in a civil action for the recovery of tax due and payable by the taxpayer under Section 23(1) of the Real Property Gains Tax Act 1976 (the RPGTA), could entertain the issue of whether there had been a chargeable gain accruing and/or disposal of assets between the buyer and the seller prior to the assessment raised against the taxpayer;

2. Whether in deciding the Kerajaan Malaysia's civil claim under Section 23(1) of the RPGTA, the issue as to a chargeable gain had accrued and/or disposal of assets would raise a triable issue; and

3. Which was the right forum to hear and decide regarding the facts on whether there had been a chargeable gain accruing and/or disposal of assets under the assessment raised by the Inland Revenue Board.

Decision:

The Federal Court overruled the decisions of the Court of Appeal in favour of the Kerajaan Malaysia with the following grounds of judgement:

1. Pursuant to Section 21(1) of the RPGTA, once a notice of assessment had been served, the tax payable will be due and payable. If the taxpayer felt aggrieved by the issue of no chargeable gain arising, the taxpayer should have lodged an appeal to the Special Commissioners of Income Tax pursuant to Section 18 of the RPGTA. Since no appeal was lodged, this issue was precluded from being raised as a triable issue pursuant to Section 23(3) of the RPGTA. The Federal Court also found that the majority judgment of the Court of Appeal had failed to consider all the relevant provisions of the RPGTA particularly Section 18 and Section 23(3); it was therefore *per incuriam* (i.e., made through lack of due regard to the provisions of the RPGTA).

2. If a notice of assessment is raised, and if a taxpayer wishes to raise issues pertaining to the amount, the correctness or the legality of the assessment raised, the taxpayer should invoke Section 18 of the RPGTA. If this is resolved in the taxpayer's favour, then whatever tax paid can be refunded as an overpayment pursuant to Section 24 of the RPGTA. If the taxpayer fails to do so, then these issues cannot be raised as triable issues in an application for summary judgment by virtue of Section 23(3) of the RPGTA.

3. The proper forum to hear the said issue would be the Special Commissioners of Income Tax pursuant to Section 18 the RPGTA.

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KPT Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (Special Commissioners of Income Tax)

Issues:

1. Whether the determination of valuable consideration for stock purchased from Syarikat K by the taxpayer was in accordance with Subsection 35(5) of the Income Tax Act 1967 (the ITA);

2. Whether an adverse inference ought to be drawn against the taxpayer for failing to call Mr. LNK, who was the sole proprietor of Syarikat K and currently a director of the taxpayer, to give evidence;

3. Whether the taxpayer's value of stock-in-trade has been apportioned in a just and reasonable manner as required by Subsection 35(5)(c)(i) of the ITA; and

4. Whether the IRB has any basis in law or fact to impose penalty under Subsection 113(2) of the ITA.

Decision:

In a majority opinion, the Special Commissioners of Income Tax (SCIT) dismissed the appeal by the taxpayer on all issues with the following grounds of judgement:

1. The words used in the taxpayer's board resolution were clear and unambiguous. The resolution stated that the acquisition by the taxpayer was for the whole of the business, assets and liabilities of Syarikat K and that the consideration of the acquisition was in the sum of RM99,000. In other words, for the consideration of RM99,000 the taxpayer had obtained the rights on all of the assets and at the same time became responsible for all the liabilities of Syarikat K.

   In addition, the resolution did not state that the valuable consideration included absorption of the liabilities amounting to RM1,174,406 as contended by the taxpayer's tax agent. The testimony of the taxpayer's tax agent that the absorption of the liabilities of RM1,174,406 were part of the valuable consideration of the transfer of Syarikat K's business for the purposes of Subsection 35(5)(a) of the ITA and the calculation for valuable consideration made by the taxpayer arrived at the figure as contended by them, i.e., RM1,273,406 (RM1,174,406 + RM99,000) was not corroborated by any other contemporary documentary evidence.

   Based on the board resolution, an evaluation of the facts of this case and the submissions of the taxpayer and the IRB, it was clear that there was no single statement to suggest that RM99,000 was net payment of the consideration and not the valuable consideration of the acquisition.

2. On the subject of adverse inference and whether such an inference ought to be drawn against the taxpayer for failing to call Mr. LNK, the sole proprietor of Syarikat K and also the taxpayer's director, it is trite that a party who alleged or relied upon a particular fact had the onus to establish on evidence the existence of that fact. In the present appeal, the attendance of Mr. LNK or any of the taxpayer's directors as witness was vital to explain critical and crucial questions as to why the taxpayer's contention in respect of the net payment, absorption of the liabilities and request to settle liabilities were not in the board's resolution or other documentary evidence but were adduced through the taxpayer's tax agent.

   The true meaning of the wordings in the board resolution and their intention could only be explained by Mr. LNK or any of the taxpayer's directors as the persons directly involved in deliberating and passing the said resolution, but no reasons were given by the taxpayer as to why Mr. LNK or any of the taxpayer's directors was not called to give evidence. The absence of such possible evidence from Mr. LNK or any of the taxpayer's directors could only mean that it would have been adverse to the taxpayer, if adduced. Therefore, it was appropriate to invoke Section 114(g) of the Evidence Act 1950 against the taxpayer.

3. Under Subsection 35(5)(c)(i) of the ITA, it is a mandatory requirement for the total consideration given for the transferred stock and the assets be apportioned in order to obtain the value of the stock. However, the taxpayer merely derived the value of the stock purely based on Syarikat K's account as at 31 October 2005 and failed to compute the apportionment as required by Subsection 35(5)(c)(i) of the ITA. On the other hand, the calculation made by the IRB in determining the value of the stock was correct and as required by Subsection 35(5)(c)(i) of the ITA.

4. It was within the discretionary powers of the IRB as provided in Subsection 113(2) of the ITA to require a person to pay a penalty where there was an incorrect return by omitting or understating any income required by the ITA or giving any incorrect information in relation to any matter affecting his chargeability to tax. In the present appeal, it was only after the IRB

conducted the audit that it discovered that the taxpayer had filed an incorrect return by valuing the stock at purchase value thus providing incorrect information which affected the chargeability to tax. Based on the facts, the penalty imposed was justified, reasonable and valid.

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