



## Tax Espresso

A snappy delight

### Greetings from Deloitte Malaysia Tax Services

#### Public Ruling (PR) No. 5/2017: Taxation of Real Estate Investment Trust or Property Trust Fund

On 8 September 2017, the Inland Revenue Board (IRB) published PR No. 5/2017 which explains the tax treatment of a real estate investment trust (REIT) or property trust fund (PTF) in Malaysia approved by the Securities Commission Malaysia (SC), covering both listed and non-listed REIT or PTF.

PR No. 5/2017 was published to replace PR No. 2/2015 and the amendments were summarised in Paragraph 17. Mainly the PR was amended to reflect the changes made by Finance Act 2017 on Section 61A(2) and Section 63C of the Income Tax Act 1967 (the ITA) that took effect from year of assessment (YA) 2017. Effective YA

#### Quick links:

[Deloitte Malaysia  
Inland Revenue  
Board](#)

#### Takeaways:

Public Ruling No. 5/2017: Taxation of Real Estate Investment Trust or Property Trust Fund

IRB Media Release: Important announcement for Institutions and Organisations approved under Section 44(6) of the Income Tax Act 1967

#### Tax Cases

CC Sdn Bhd & Anor v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (SCIT)

Toxicol Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (High Court)

2017, only REIT/PTF which is listed on Bursa Malaysia is fully exempt from tax for a YA, if it distributes 90% or more of its total income to its unit holders in the basis period for that YA. A REIT/PTF that is not listed on Bursa Malaysia would not enjoy any exemption from tax for a YA, even if it distributes 90% or more of its total income to its unit holders, in the basis period for that YA.

**IRB Media Release:  
Important announcement for  
Institutions and Organisations  
approved under Section 44(6) of  
the ITA**

The IRB issued a media release dated 7 September 2017 informing all institutions and organisations that have obtained approval under the provisions of Section 44(6) of the ITA on:

- The requirement to comply with the terms and conditions of the approval which include those *specified* in the media release. Any failure to comply and where evidence of non-compliance is found can lead to a cancellation of the approval by the IRB.
- The *extension numbers* of the IRB for enquiries on the matter.

Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (High Court)

**Upcoming events**

[Deloitte Tax Challenge 2017](#)

[Deloitte TaxMax – The 43<sup>rd</sup> series](#)

**Important deadlines:**

Due date for 2018 tax estimates for companies with November year-end (31 October 2017)

6th month revision of tax estimates for companies with April year-end (31 October 2017)

9th month revision of tax estimates for companies with January year-end (31 October 2017)

Statutory filing of 2017 tax returns for companies with March year-end (31 October 2017)

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**CC Sdn Bhd & Anor v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (SCIT)**

**Issue:**

Whether BD Sdn Bhd is a real property company (RPC) pursuant to Paragraph 34A of Schedule 2 of the Real Property Gains Tax Act 1976 (“the RPGTA”).

**Decision:**

The Special Commissioners of Income Tax (“SCIT”) allowed the taxpayer’s appeal. BD Sdn Bhd was not an RPC pursuant to Paragraph 34A of Schedule 2 of the RPGTA. The taxpayer’s disposal of shares in BD Sdn Bhd was not subject to Paragraph 34A of Schedule 2 of the RPGTA. [Note: *Being dissatisfied with*

*the SCIT's decision, the IRB has made an appeal to the High Court which appeal has not yet been decided.]*

CC Sdn Bhd and CV Sdn Bhd ("the taxpayers") had incorporated BD Sdn Bhd in January 2004 as a shelf company, alongside other land developers and an ex-director of BD Sdn Bhd (during 2004-2005). The taxpayers were the shareholders with 56,250 units in BD Sdn Bhd. BD Sdn Bhd later purchased a piece of land via a sale and purchase agreement dated 8 September 2004 for a consideration of RM14,500,000 with the intention of developing it into a mixed development.

In August 2005, the taxpayers disposed of their shares of 56,250 units in BD Sdn Bhd. On a prudent basis, the taxpayers had submitted real property gains tax (RPGT) return forms in September 2005. The IRB subsequently issued notices of assessment for the YA 2005 which subjected the taxpayers' gains on the disposal of 56,025 shares in BD Sdn Bhd to RPGT. The taxpayers then proceeded to appeal against the RPGT assessments by the IRB. The SCIT ruled in favour of the taxpayers with the following grounds of judgement:

1. The SCIT had accepted the decision of the High Court in *Binastra Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2002) MSTC 3897 ("*Binastra Holdings*") which supported the taxpayer's appeal. The SCIT found the High Court's decision in *Binastra Holdings* as a good law and a binding precedent despite the fact that the Court of Appeal had overturned the decision of the High Court. This is because the Court of Appeal did not give its written grounds of judgement, i.e., the doctrine of *stare decisis* is only applicable in circumstances whereby written judgement was produced by the higher court [*Petronas Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2014) MSTC ¶30-078].
2. The SCIT found that the Parliament's intention in enacting Paragraph 34A of Schedule 2 of the RPGTA must be taken into consideration. The intention behind the insertion of Paragraph 34A in 1988 was meant to prevent an individual from acquiring lands in the name of a company and subsequently dispose of the shares in the company to avoid the payment of RPGT. The SCIT was satisfied that the taxpayers did not fall under such an intended category of the enacted Paragraph 34A based on the undisputed facts and evidence found:
  - a) The taxpayers had intended to be involved in the development of land and had acquired the shares in BD Sdn Bhd and BD Sdn Bhd had been involved in the development of land since its incorporation in 2004;
  - b) BD Sdn Bhd acquired the land with the intention to develop it;
  - c) BD Sdn Bhd was the proprietor of the land and had consistently classified the land as current asset in its audited account and had never classified it as capital asset;
  - d) The taxpayers' disposal of the shares in BD Sdn Bhd was due to differences with their business partner; and

- e) The taxpayers' acquisition of the land via BD Sdn Bhd and disposal of shares in BD Sdn Bhd were not made to avoid the imposition of RPGT.
3. The SCIT could not agree with the IRB's approach in its literal reading of Paragraph 34A (6) of Schedule 2 of the RPGTA in determining whether BD Sdn Bhd was an RPC or otherwise, which did not take into consideration the real intention of the Parliament as stated in the *Hansard and the Explanatory Notes* to the enactment of that Paragraph. Reliance on the literal reading would cause injustice to the taxpayer and failure in the application of the intention of Parliament. The SCIT found that the issue in this appeal was whether BD Sdn Bhd was an RPC or not, and not whether the taxpayer was an RPC or not. Therefore, BD Sdn Bhd's business activities were relevant matters to be considered.
4. The SCIT made the decision on the balance of probabilities based on all the evidence and submissions that the taxpayer had successfully proven its case, i.e., satisfied its onus of proof pursuant to Paragraph 13 of Schedule 5 of the Income Tax Act 1967. The SCIT unanimously allowed the taxpayers' appeal.

### **Toxicol Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (High Court)**

#### **Issues:**

1. Whether the sum of RM23million received by the taxpayer in consideration of the sale of contracts by way of novation should be treated as an income receipt or a capital receipt;
2. Whether there was a forced sale of the taxpayer's entire business and therefore the proceeds were not received in the course of its business; and
3. Whether the imposing of penalty under Section 113(2) of the ITA by the Director General of Inland Revenue Board ("DGIR") was correct in law.

#### **Decision:**

The High Court overruled the decision by the SCIT on Issues #1 and #2 in favour of the taxpayer, and upheld the SCIT's decision on Issue #3. *[Note: Being dissatisfied with the High Court's decision, the IRB had made an appeal to the Court of Appeal and it was dismissed. No grounds of judgment were made available by the Court of Appeal.]*

#### **Issue 1**

The taxpayer carried on the business of management, handling, removal and disposal of toxic waste such as paints, varnishes, dye-ware, medical drugs, etc. from any industrial processes or manufacturing by-products. The taxpayer had entered into a contract dated 1 October 1999 with Kualiti Alam Sdn Bhd ("Kualiti Alam") and this contract was the only profit-making asset of the taxpayer ("1999 Agreement"). During the initial period of the 1999 Agreement, the relationship between the

taxpayer and Kualiti Alam was smooth. However, after the new management took over as a result of the takeover of Kualiti Alam by Khazanah, the taxpayer was unhappy and frustrated with the conduct of the new management of Kualiti Alam.

On 7 February 2005, the taxpayer and UEM Environment Sdn Bhd ("UEM") entered into an agreement for the novation of contract. Pursuant to the Novation Agreement, the taxpayer as the transferor agreed to transfer all its rights and liabilities under the 1999 Agreement to the transferee for RM23 million. As a result of the Novation Agreement, the taxpayer had no business and/or employees except its Managing Director. The taxpayer claimed that the RM23 million was not for stock in trade and therefore capital in nature but this was disputed by the IRB. According to the IRB, the said sum was compensation claimed for loss of income. The SCIT held that the effect of the Novation Agreement did not amount to transfer of rights but merely transfer of obligations and benefits. The SCIT went on to rule that the taxpayer's main obligations of providing the logistics and services of toxic waste collection had been transferred to UEM. As such, the SCIT was of the view that the question of transfer of rights did not arise.

The High Court overruled the SCIT's decision and laid down its judgement that the sale of contracts by way of novation should be treated as capital receipt based on the findings as stated below:

- a) The conclusion of the SCIT was inconsistent with the facts found and the law applicable. The SCIT had made an error of law as they had rejected their own "Proved Facts". Whilst the SCIT can reject evidence they cannot reject facts proved. Once SCIT arrived at "Proved Facts" they can only draw inference from those facts [*Chua Lip Kong v Director General of Inland Revenue (1950-1985) MSTC 58*].
- b) Pursuant to the Novation Agreement dated 7 February 2005, the taxpayer lost its business rights. Therefore, the sum of RM23 million was capital in nature. The disposal of rights and liabilities had always been held to be a capital receipt and not taxable.
- c) The SCIT's conclusion that the taxpayer was in the business of selling contracts was inconsistent with the finding of facts that there was only one contract. Hence, there was an error of law and fact. The taxpayer was not in the business of selling and buying contracts. The transfer of rights to UEM was not a normal incident of the taxpayer's business.
- d) The facts had clearly demonstrated that the only business of the taxpayer had ceased and was crippled as a result of the Novation Agreement and guided by the authorities, the RM23 million paid was for loss of a capital asset and as such it was a capital and not a revenue receipt. Such sale of rights had been held not taxable in *Paget v Commissioner of Inland Revenue 21 TC 677* because they were capital in nature.
- e) The SCIT had not shown by proven facts that there was a change of intention to trade in the 1999 Agreement, notwithstanding the glaring facts that the taxpayer's

existence was solely a special purpose vehicle to undertake the obligations under the 1999 Agreement.

## **Issue 2**

In the High Court's view, despite the SCIT's finding that the relationship between the taxpayer and the new management was strained and that the taxpayer was pushed to a corner, the SCIT went on to conclude that the Novation Agreement was not a forced sale. Therefore, the finding of fact of the SCIT contradicted its decision that there was no forced sale. The SCIT had acted without evidence and/or upon a view which could not be reasonably entertained.

## **Issue 3**

The High Court decided that the SCIT was justified in not imposing a penalty. The DGIR had not exercised his discretion properly as required of him under the ITA by examining all the relevant material facts but had arbitrarily imposed a penalty which was dictated by the guidelines issued by the Department.

## **Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (High Court)**

### **Issues:**

1. Whether the letter sent by the IRB was a decision which was amenable to judicial review;
2. Whether the judicial review application was prematurely filed; and
3. Whether judicial review was appropriate when there is an avenue for appeal under the ITA.

### **Decision:**

The High Court dismissed the judicial review application by the taxpayer. *[Note: Being dissatisfied with the High Court's decision, the taxpayer had appealed to the Court of Appeal and the appeal was dismissed. No grounds of judgment were made available by the Court of Appeal.]*

## **Issue 1**

Pursuant to an audit conducted by the IRB in 2007 on the taxpayer for the years of assessment ("YAs") 2000 to 2005, the taxpayer had been required to furnish information and documents to the IRB over the period of seven years of ongoing discussions and/or communications concerning the tax issues, up until the IRB issued a letter dated 10 December 2014 ("IRB's Letter") which informed the taxpayer that notices of assessment for the YAs 2004 to 2006 would be made pursuant to Section 140(2) of the ITA together with the tax adjustment and penalty. In the same letter, the IRB had explained that the adjustment was made due to the taxpayer's failure to furnish the information and documents relating to the audit issue. The taxpayer was invited to raise any queries or provide a reply within 14 days from the date of the said letter. The taxpayer then filed the

application for judicial review seeking for the order of certiorari to quash the said letter.

The High Court found that the IRB's Letter was not a decision which was amenable to judicial review on the following grounds:

- From the language of the IRB's Letter, it appeared that the IRB required the taxpayer to furnish and/or provide further information and documents for the IRB's consideration. At the point the IRB's Letter was issued, there was no threat of additional assessment by enforcing Sections 39(1)(f) and (j) of the ITA.
- It was obvious that the IRB's Letter had not affected taxpayer's rights as it was merely a letter informing the taxpayer of the status of the audit conducted by the IRB officers. In the event the taxpayer chose not to respond to the IRB's Letter, the IRB would not be able to enforce against the taxpayer.
- The liability of the taxpayer would be triggered only upon the service of the notice of assessment pursuant to Sections 103(1) and (2) of the ITA. Only upon service of the notice of assessment on the taxpayer would the taxpayer be liable to pay the sum due and payable under Section 103 of the ITA. In the event the taxpayer failed to pay the sum due, then the same shall be deemed to be a debt due and payable to the Government of Malaysia. The notice pursuant to Sections 103(1) and (2) would specify the period within which the recipient of the notice had to make payment and the said notice too would provide an appeal mechanism to the Special Commissioners of Income Tax [*Sun Man Tobacco Co Ltd v Government of Malaysia (1973) 2 MLJ 163*].

## **Issue 2**

The High Court decided that the taxpayer's judicial review application was prematurely filed as the IRB's Letter was not final and conclusive but merely a finding made by the IRB during the audit's visit and based on the information and the documentation furnished to the IRB by the taxpayer. Therefore, there was no decision, omission or action which had adversely affected the taxpayer within the context of *Order 53 Rule 2(4) of the Rules of Court 2012* at the point the IRB's Letter was sent and received by the taxpayer.

## **Issue 3**

For completeness, the Judge also looked at Issue #3 whether taxpayer could apply for judicial review even though the ITA has provided an avenue for appeal to the Special Commissioners of Income Tax. Based on authorities, judicial review can be resorted to even if the specific law had provided for an alternative remedy in the form of an appeal process. The taxpayer could still approach the Court for judicial review process if the taxpayer is able to demonstrate the following factors:

- a) There was clear lack of jurisdiction;
- b) Failure on the part of the decision maker to perform statutory duty;

- c) Breach of natural justice; and
- d) Illegality.

The taxpayer had not shown by way of their affidavits that their case fell within the very special case as envisaged by decided cases, in that there was lack of jurisdiction, abuse of power or breach of natural justice.

We invite you to explore other tax-related information at:

<http://www2.deloitte.com/my/en/services/tax.html>

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