



Tax Espresso A snappy delight

Greetings from Deloitte Malaysia's Tax services group

Dormant Companies - Filing of Income Tax Return Form (ITRF)

At the IRB-CTIM Forum 2014 held on 27 March 2014, the Inland Revenue Board (IRB) has confirmed that a dormant company must still file its tax returns (ITRF) pursuant to

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Takeaways:

**Dormant Companies -
Filing of Income Tax
Return Form**

Amendment Act:

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(Amendment) Act 2014**

Gazette Orders:

Section 77A(1) of the Income Tax Act 1967 (ITA). The IRB will not issue letters to grant concession to taxpayers relieving them from filing ITRF.

On request by CTIM pertaining to the above, the IRB has vide its letter dated 18 August 2014 agreed to CTIM's proposals as follows:

- i) Submission of ITRF by companies, limited liability partnerships, trust bodies or co-operative societies which are dormant, have ceased operations, have not commenced business operations or have received a letter of exemption from filing the ITRF from the IRB's branches on prospective basis starting from YA 2014 onwards.
- ii) Subject to Section 107C(4) and Section 107C(4A) of the ITA, companies, limited liability partnerships, trust bodies or co-operative societies which are dormant, have ceased operations, have not commenced business operations or have received a letter of exemption from filing the ITRF from the IRB's branches are required to submit their tax estimates via Form CP204 prospectively starting from YA 2016.
- iii) A letter of exemption from filing the ITRF from the IRB's branches is cancelled with effect from 18 August 2014.
- iv) Companies, limited liability partnerships, trust bodies or co-operative societies that are dormant do not include those that hold investments such as shares, real properties (including stock-in-trade) and fixed deposits.

The above consideration is not applicable to companies, limited liability partnerships, trust bodies or co-operative societies that are in operation but did not submit the ITRF for prior years. Any companies, limited liability partnerships, trust bodies or co-operative societies that are found to submit incorrect information are subject to the provisions of Sections

Real Property Gains Tax
(Exemption) Order 2014

Stamp Duty (Exemption)
(No. 2) Order 2014

Tax Cases:

Petronas Penapisan
(Terengganu) Sdn Bhd v
Ketua Pengarah Hasil
Dalam Negeri (High
Court)

Clear Water Sanctuary
Golf Management Berhad
v Ketua Pengarah Hasil
Dalam Negeri (High
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Director General of Inland
Revenue v Kok Fai Yin
Co Sdn Bhd (High Court)

Kerajaan Malaysia v Raja
a/l K Veerasamy (High
Court)

Pengarah Kastam Negeri
Johor & Anor v Kedai
Makan Kebuh Teh
(Sutera Utama) Sdn Bhd
& Ors (Court of Appeal)

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

Important deadlines:

Due date for 2015 tax
estimates for companies
with October year-end
(1 October 2014)

6th month revision of tax

113 and 114 of the ITA.

Promotion of Investments (Amendment) Act 2014

The Promotion of Investments (Amendment) Bill 2014 (Bill 2014) has been gazetted as the Promotion of Investments (Amendment) Act 2014 (Act A1468) on 22 August 2014. It amends the Promotion of Investments Act 1986 (PIA 1986). The amendments to PIA 1986 are the same as the proposed amendments in the Bill 2014 which had been highlighted in our August 2014 Tax Espresso.

estimates for companies with March year-end (30 September 2014)

9th month revision of tax estimates for companies with December year-end (30 September 2014)

Statutory filing of 2014 tax returns for companies with February year-end (30 September 2014)

Gazette Orders

Real Property Gains Tax (Exemption) Order 2014

A person is exempted from the payment of real property gains tax on the chargeable gains accruing on the conveyance of any chargeable asset relating to the conversion of a conventional partnership or a private company to be a limited liability partnership (LLP) registered on or after 1 January 2013 until 31 December 2017.

The conveyance is deemed to take place on the date the conventional partnership or private company is registered as a LLP under Section 32 of the Limited Liability Partnership Act 2012.

Upon submitting the return under the Real Property Gains Tax Act 1976, the person shall furnish:

- i) a confirmation from the Companies Commission of Malaysia confirming that at the date of registration of the LLP, the partners of the LLP are all the partners of the conventional partnership which converted to be the LLP or the partners of the LLP are all the shareholders of the private company that converted to be the LLP; and
- ii) a list of assets to be transferred to the LLP.

The Order is deemed to have come into operation on 1 January 2013 [*Real Property Gains Tax (Exemption) Order 2014 - PU(A) 229/2014*].

Stamp Duty (Exemption) (No. 2) Order 2014

All instruments of transfer of land, business, asset and share in relation to the conversion of a conventional partnership or a private company to be a LLP is exempted from stamp duty subject to the following conditions:

- i) the conversion of the conventional partnership or the private company to be the LLP shall be registered on or after 1 January 2013 until 31 December 2017; and
- ii) the instruments are executed within twelve months from the date of the registration of the conversion.

The application for the above exemption must be accompanied by:

- i) a confirmation from the Companies Commission of Malaysia confirming that at the date of registration of the LLP, the partners of the LLP are all the partners of the conventional partnership which converted to be the LLP or the partners of the LLP are all the shareholders of the private company which converted to be the LLP; and
- ii) a list of land, business, asset and shares to be transferred to the LLP.

The Order is deemed to have come into operation on 1 January 2013 [*Stamp Duty (Exemption) (No. 2) Order 2014 - PU(A) 230/2014*].

Tax Cases

Petronas Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (High Court)

The issue for determination was whether the interest received by the taxpayer from certain placements of its funds in certain types of deposits (Placements) with commercial banks and financial Institutions fell to be taxed as gains or profits from a business under Section 4(a) or as investment income under Section 4(c) of the ITA.

Decision

The High Court allowed the appeal by the taxpayer. The High Court found that the Special

Commissioners of Income Tax (SCIT) had committed error in failing to follow precedent in the Privy Council decision in *American Leaf Blending Co. Sdn Bhd (American Leaf) v Director General of Inland Revenue (DGIR)* and the Court of Appeal decision in *Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Pan Century Edible Oils Sdn Bhd*, but relied on the order by Court of Appeal in *KPHDN v Nilai Cipta Sdn Bhd* which has no written judgment.

The taxpayer clearly intended to make numerous temporary placements of its excess funds, turn them over for a quick profit and plough the proceeds back into the taxpayer's business. In the same light as in the case of *American Leaf*, the taxpayer put its fund to gainful use and should therefore lead to a presumption that its income should be treated as business income under Section 4(a). The SCIT had committed error in disregarding the facts found as proved or admitted, the presumption of business as the taxpayer is a company and judicial precedent.

Clear Water Sanctuary Golf Management Berhad v Ketua Pengarah Hasil Dalam Negeri (High Court)

Whether the whole amount of "deferred licence fees" (i.e. Advance Payment) received by the taxpayer pursuant to the Licence Agreement and Rules and Regulations of the taxpayer was correctly brought to tax under Section 24 of the ITA in the year the amount was received.

Decision

The High Court allowed the appeal by the taxpayer. The Annual Licence Fee is payable annually in advance on the due dates during the term of the Licence and the advanced payment is paid as security for the due and punctual payment of the Annual Licence Fees. This is paid for future services which have not been rendered yet. The beneficial ownership of the Advance Payment remains with the member during the terms of the Licence and if the member decides to cancel his membership, he can ask for a refund. If the administrator, executor or beneficiary of a deceased member elects to surrender the transferable licence, such portion of the Advance Payment paid for the unexpired period of the term of the Licence shall be payable by the taxpayer to the member.

The SCIT had failed to refer to any of the clauses of the Licence Agreement and Rules & Regulation of the taxpayer. The SCIT ignored the contractual agreements between the taxpayer and the members in respect of the Advance Payment.

Section 24 of the ITA requires services to be rendered for there to be a debt owing in respect of the services rendered. In the Audited Accounts of the taxpayer, the Advance Payment was recognized as Deferred Licence Fee. The SCIT had misdirected themselves in law when they failed to consider the

accounting evidence. The advance payment was never legally and factually meant to be the income of the taxpayer.

The deferred Licence fee (Advance Payment) received by the taxpayer pursuant to the Licence Agreement and Rules and Regulations of the taxpayer was not taxable in the year the said fee was received.

Director General of Inland Revenue v Kok Fai Yin Co Sdn Bhd (High Court)

Taxpayer had paid directors' fees to its three directors. The DGIR was of the view that the amount paid by the taxpayer to each of its directors was unreasonably excessive and added back certain portion to the gross income of the taxpayer. The main issue was whether the DGIR had the power to apportion the director's fees into allowable and disallowable portion under Section 33(1) of the ITA.

Decision

The High Court upheld the decision made by the SCIT that was decided in favour of the taxpayer. Section 33 of the ITA does not empower the DGIR to consider and determine what reasonable fees should have been paid to the directors by the taxpayer, and to disallow the excess from deduction under that section.

Kerajaan Malaysia v Raja a/l K Veerasamy (High Court)

Evangelical Lutheran Church in Malaysia ("the Church") is registered under the Societies Act 1966. The Church had been assessed to income tax and additional income tax levied under the ITA, in respect of the years of assessment 1984 to 2003. The Church had appealed to the SCIT against the assessments. Form Q was submitted on 28 July 2006 and the appeal was still pending before the SCIT. The Church applied for a stay of proceedings pending disposal of the appeal to the SCIT on the following grounds:

- i) There was an earlier agreement that Kerajaan Malaysia (plaintiff) would consent to the stay application. However, there had been a subsequent change in position.
- ii) The plaintiff's affidavit in reply was late by almost a month and no explanation had been provided for the delay nor was any attempt made to remedy the defect.

Decision

Application by the Church for a stay in proceedings was granted by the High Court on the following reasons:

- i) the plaintiff had not disputed that the Evangelical Lutheran Church in Malaysia is a religious institution;
- ii) as a religious institution the Church is exempted from income tax under paragraph 13(1)(b) of Schedule 6 of the ITA;
- iii) its status as a religious institution and the exemption provided in Schedule 6 had merit in the appeal;
- iv) the DGIR had yet to forward the Form Q to the SCIT; and
- v) the plaintiff had failed to honour its agreement to consent to this application.

Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebuh Teh (Sutera Utama) Sdn Bhd & Ors (Court of Appeal)

Jabatan Kastam Negeri Johor (JKNJ) had issued a Notice dated 9 April 2012 which stated that the taxpayers were liable to pay sales tax and penalty for the years 2010 and 2011. The taxpayers had filed an application for judicial review to the High Court and the judge had granted leave to the taxpayers to proceed with the judicial review. JKNJ appealed to the Court of Appeal against the decision of the High Court on the following grounds:

- i) The application by the taxpayers was 3 days late and had not complied with the requirement under Order 53 of the Rules of the High Court 1980 (RHC 1980). Taxpayers did not apply to extend time to regularise the breach nor was there an explanation as to why there was a delay.
- ii) Taxpayers had not exhausted the internal remedy that was available to redress its grievance caused by the decision of JKNJ.

Decision

JKNJ appeal was allowed with costs. Taxpayers had failed to comply with the time stipulation as contained in Order 53 of the RHC 1980. There was no application before the learned trial judge for an extension of time to abridge time that had lapsed. On this ground alone, the appeal ought to succeed.

Taxpayers also ought not be granted leave in the circumstances of this case because they had not exhausted the statutory remedy as provided for under Section 68 of the Sales Tax Act 1972.

Ketua Pengarah Hasil Dalam Negeri v Bee Garden Sdn Bhd (High Court)

Issues

- i) Whether the conclusion made by the SCIT before arriving at the Deciding Order was correct as the conclusion contradicted its earlier findings.
- ii) Whether the disposal of Lot 111 and Lot 112 should be (a) the declared selling price as per the SPA less the amount of rebate (in the form of a deduction from the declared selling price) given by the taxpayer or (b) the declared selling price as per the SPA.
- iii) Whether Section 25(2) of the Real Property Gains Tax Act 1976 (RPGT) applied to the disposal of Lots 111 and 112.

Decision

The High Court dismissed the appeal of the KPHDN on the following grounds:

- i) The SCIT had erred when it reached the conclusion which contravenes the finding of facts in the Deciding Order. The SCIT's conclusion in Paragraph 9 of the Case Stated that there was no evidence of rebate as the rebate was not stated in the SPA was not consistent with the finding of facts which were stated earlier in Paragraph 6 that amongst fact that were proven and admitted were rebates given by the taxpayer to the purchasers and the actual amount received by the taxpayer was the amount after deducting the rebate which was less than the amount stated in the SPA.
- ii) As the Ground of Decision of the Case Stated was wrong, it was ordered to be redrafted on 27 July 2011 to be in line with the Deciding Order. The above Order of 27 July 2011 was not appealed against by the KPHDN. Since the KPHDN did not appeal against the Order of 27 July 2011, the Order was still binding on them.
- iii) The expression "consideration" in Paragraph 5(1) of Schedule 2 of the RPGT, in its plain and ordinary sense, must mean an amount or a sum actually paid by the purchasers of the said lots to the taxpayer in connection with the disposal of the said lots. In the light of the findings of fact by the SCIT, there was no dispute that the rebates given did not form part of the amount actually paid by the purchasers of the said Lots to the taxpayer. Consequently, the rebates could not form part of the consideration received by the taxpayer in connection with the disposal of the said lots.
- iv) Section 25(2) of the RPGT is actually for avoidance of tax. In *Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri*, the Court of Appeal considered the meaning of tax avoidance in the context of Section 140(1) of the ITA. It is important to note that Section 140(1) of ITA and Section 25(2) of the RPGT are in *pari material*. Hence the principles expressed in *Sabah Berjaya's* case (*Supra*) should apply with equal force to Section 25(2) of the RPGT. The rebates

reduced the taxpayer's gains in circumstances in which the Act by way of paragraph 5(1) of Schedule 2 to the RPGT clearly affords a reduction in tax liability. It is clear from Sabah Berjaya Sdn Bhd's case (Supra) that Section 140(1) of ITA does not apply where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability. Accordingly, since the SCIT found that the rebates were given by the taxpayer to the purchasers of the said Lots, this clearly is not a case to which Section 25(2) of the RPGT applies.

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