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Greetings from Deloitte Malaysia Tax Services

Quick links: *Deloitte Malaysia*
Inland Revenue Board of Malaysia

Takeaways:

1. 2nd Amended Guidelines on Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee (revised as at 17.08.2018)
2. KPHDN v Continental Choice Sdn Bhd & Anor (High Court)
3. Country Heights Holdings Bhd v KPHDN and another appeal (High Court)
4. KJTB Bhd v KPHDN (Special Commissioners of Income Tax)

Upcoming event:

1. *Deloitte Tax Challenge 2018*

Important deadlines:

Task	2018 Due Date	
	30 September	1 October
1. 2019 tax estimates for companies with October year-end		√
2. 6th month revision of tax estimates for companies with March year-end	√	
3. 9th month revision of tax estimates for companies with December year-end	√	
4. Statutory filing of 2018 tax returns for companies with February year-end	√	
5. Due date for 2018 CbCR notification for companies with September year-end	√	

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.

Back to top

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.

Back to top

Country Heights Holdings Bhd v KPHDN and another appeal (High Court)

Issues:

1. Whether the DGIR was time-barred under Section 15(1) of the RPGTA from issuing the notices of assessment (Forms K) ["NOA"] and notices of additional assessment (Forms KA) ["NOAA"] for the years of assessment ("YAs") 1993, 1998 and 1999 under Section 16(1) of the RPTGA;

2. Whether the DGIR had the power to validly issue on the taxpayer, being the acquirer of chargeable assets, the aforesaid NOA and NOAA for YAs 1993, 1998 and 1999 under Section 16(1) of the RPGTA;

3. If the DGIR had the power to validly issue on the taxpayer, being the acquirer of chargeable assets, the aforesaid NOA and NOAA for YAs 1993, 1998 and 1999, whether the DGIR's power had been validly and properly exercised;

4. Whether the NOA and NOAA could be validly issued on the taxpayer when compliance with and the payment by the taxpayer would give rise to offences under Section 11(1) of Securities Industry Act, 1983 ("SIA"), Section 354(1) of Capital Markets and Services Act, 2007 ("CMSA") and Section 133A(1) of Companies Act 1965 ("CA");

5. Whether the DGIR was correct (in issuing a NOA for YA 1999) to take the disposal date of real property as 21.5.1999 which fell under YA 1999, instead of the date under the relevant sale and purchase agreement which fell under YA 1998; and

6. Whether the DGIR was correct in imposing a penalty under Section 29(3) of the RPGTA at the rate of 10% under each of the aforesaid NOA and NOAA for YAs 1993, 1998 and 1999 and if not, what penalty, if any, should be imposed.

Decision:

The High Court allowed the appeal by the taxpayer on all issues and dismissed the cross-appeal by the DGIR on Issue # 5 with the following grounds of judgement:

Issue 1

1. It was not disputed that all the NOA and NOAA for YAs 1993, 1998 and 1999 raised in 2006 were time-barred under Section 15(1) of the RPGTA as these notices were issued beyond the six (6) years from end of YAs 1993 and 1998. As the NOA and NOAA were not made within the prescribed period, the DGIR could only rely on Section 15(2) of the RPGTA which extends the time bar in cases involving fraud and wilful default committed by the person chargeable with the tax.

2. The words in Section 15(2) were "a person chargeable with tax". A plain reading of Section 15(2) of the RPGTA would show that the person responsible to make good loss of tax attributable to the fraud or wilful default by that person, could only mean the "disposer" of the property.

3. The NOA and NOAA, including the penalty for YA 1993, were not raised on the taxpayer to make good loss of tax arising from the wilful default of the taxpayer **as the disposer**. Instead the taxpayer here had been issued with NOA and NOAA in its capacity **as the acquirer** of the chargeable assets.

Issue 2

1. Section 16(1) of the RPGTA allows the DGIR to make an assessment on the acquirer of an amount equal to the amount of tax payable by the disposer when "**there is failure by both the disposer and the acquirer to submit a return to the DGIR in the prescribed form as required under section 13"**.

   Section 16 of the RPGTA did not stipulate the time within which the DGIR may make an assessment against the acquirer. Neither did Section 16 provide for an extension of time for the DGIR to make an assessment on the acquirer.

   The HC's view was that without any express provision to connect the acquirer to Section 15(2), the DGIR could not rely on Section 15(2) to open up the time bar provision for him to make an assessment on the acquirer to make good the loss of tax purportedly attributable to fraud or wilful default.

   Therefore, with respect to the NOA and NOAA for YA 1993, the exception to the 6-year time bar specified in Section 15(2) of the RPGTA could not apply to the taxpayer as the acquirer of the chargeable asset. The exception to the time bar in Section 15(2) of the RPGTA only applies to a disposer.

2. Further, it was proven before the SCIT that both the taxpayer and the disposers had filed their returns for **YA 1998**. In view of this, the provision of Section 16(1)(b) of the RPGTA could not be invoked against the taxpayer.

   Therefore, the NOA and NOAA with respect to **YA 1998** issued to the taxpayer who was neither the disposer nor the acquirer were issued illegally and unlawfully.

Issue 3

1. Notwithstanding the HC's views that Sections 6 and 15 of the RPGTA were not applicable to the taxpayer as the taxpayer was not the disposer of the chargeable asset, the HC examined if the DGIR had discharged the burden of proving that the taxpayer was guilty of any form of fraud or wilful default in connection with or in relation to the tax, so as to justify the act of the DGIR in making assessment on the taxpayer for the purpose of making good any loss of tax due to fraud or wilful default under Section 15(2).

2. The HC considered case laws relating to burden of proof in situations of fraud or wilful default or negligence as envisaged by Sections 91(1) and (3) of Income Tax Act 1967 ("the ITA"), which are somewhat similar to Section 15(2) of RPGTA. Section 91 of the ITA is penal in nature and therefore must be construed strictly.

   Based on Sections 6 and 15 of the RPGTA, the HC was satisfied that Section 15(2) of the RPGTA can only be applied to a person who is chargeable to tax. It could not apply to the taxpayer.

3. In the HC's view, the DGIR's **argument that the taxpayer and the disposers were somewhat connected was not relevant for the purpose of Section 16(1)(b) of the RPGTA**. In concluding that the taxpayer and the acquirers/disposers were connected, the SCIT fell into errors and had ignored the law and the facts before it when arriving at its conclusion and decision.

   There was no finding of fact on the refusal or failure of the disposers to pay. The DGIR found that the cheques provided by the disposers could not be cashed as there was no money in the account. The disposer (EC Sdn Bhd) had written a letter dated 29 June 2005 to the DGIR not to act upon the post-dated cheques issued as the disposer was seeking the approval from the Minister of Finance for the payment of the tax to be waived.

4. If at all the DGIR was vested with a discretion under Section 16(1)(b) of the RPGTA, the HC found that the DGIR had exercised that discretion without due care, for improper reasons and without a proper appreciation of the facts when the disposers had admitted liability, executed letters of agreement and issued post-dated cheques according to approved instalment schemes.

Issue 4

1. Section 133A(1) of the CA prohibits making of loan to persons connected with directors of a company or its holding company. Any director who authorises the making of the loan will be guilty of an offence under Section 133A(1) of the CA .

   Section 11(1) of the SIA and Section 354(1) of the CMSA make it an offence for a breach of the stock exchange rules. A listed company is prohibited from providing financial assistance under the Listing Requirements.

2. The taxpayer too ought not to pay taxes of private entities owned by its directors as this would jeopardise the interest of the minority shareholders.

3. If the taxpayer was directed to pay the tax due to the DGIR, it would in fact pay real property gains tax of the disposers which were owned either directly or indirectly by a director of the taxpayer. Such payment can breach financial assistance laws as discussed above.

4. In view of the above, Section 16(1)(b) must not be construed to allow such absurdity or injustice.

Issue 5

Section 6 of the RPGTA had specifically provided for real property gains tax to be charged in respect of a chargeable gain accruing in the year of the disposal of the chargeable asset. The DGIR had made an error in taking the disposal date of real property as 21 May 1999 (which fell in YA 1999) instead of 25 September 1998 (which fell in YA 1998), the date the sale and purchase agreement was executed. As the assessment was being raised in a wrong year, the notice of assessment was, therefore, bad in law.

Issue 6

The NOA and NOAA for YAs 1993, 1998 and 1999 were raised without due or proper care and not for a proper purpose. Therefore, the 10% penalty imposed on the taxpayer ought to be discharged.

[*Our remark: According to the IRBM officer (En Muhammad Farid Jaafar) at the National Tax Conference 2018 held on 16-17 July 2018, the Court of Appeal has dismissed the appeal by the DGIR. At the time of this publication, the Court of Appeal's decision has not been reported yet.*]

Back to top

KJTB Bhd v KPHDN (Special Commissioners of Income Tax)

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 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.

Back to top

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