

Making the Most of the Latest Tax Development / Updates in 2015

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Record Keeping

Sections 82 & 82A, Tax Audit Framework



Contents

- Introduction – record keeping
- Interest
- Entertainment
- Allowance for doubtful debts
- Withholding tax
- Individual reliefs
- Penalties and offences

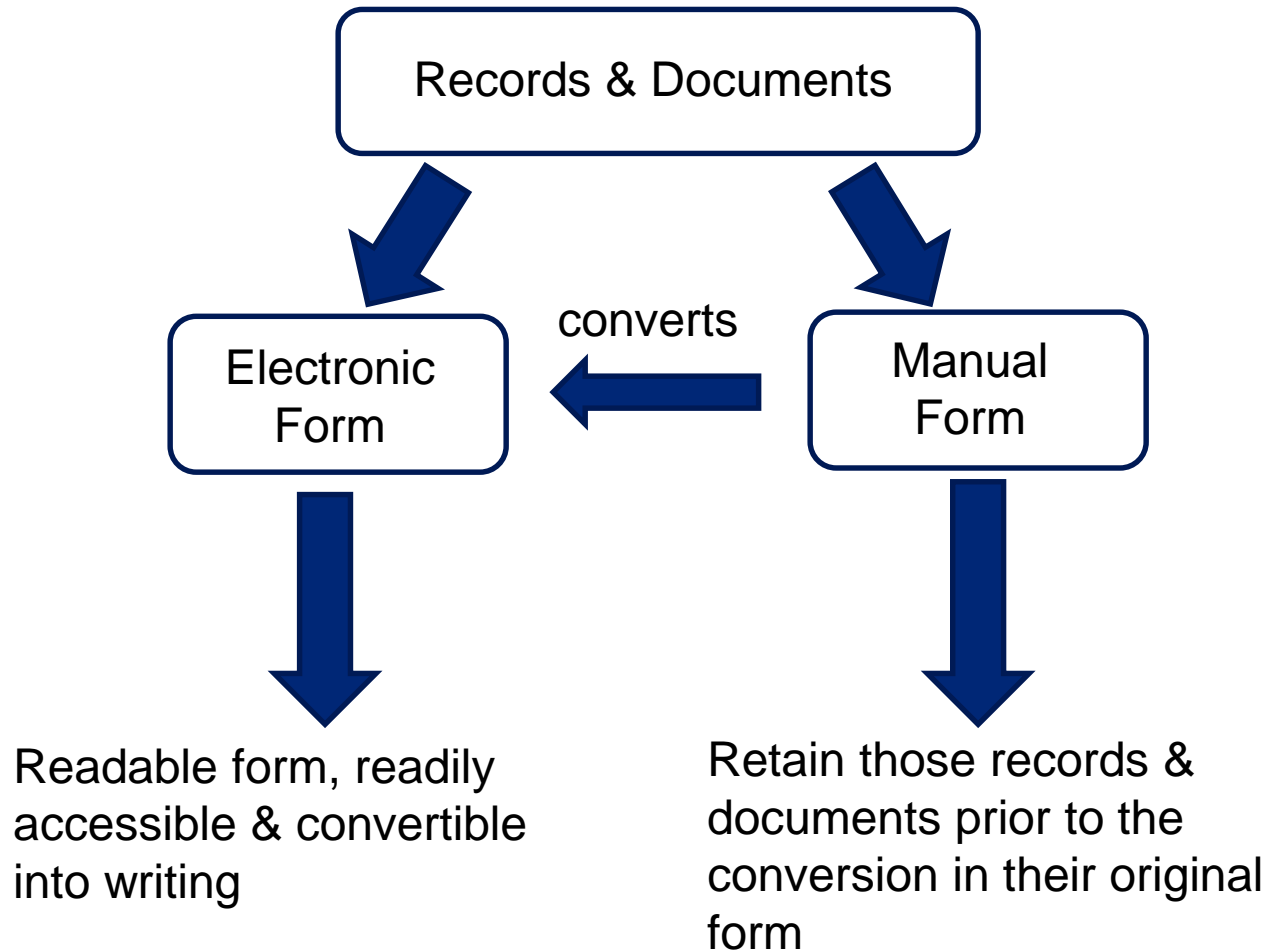
Record Keeping

Section 82 & Section 82A

	Section 82	Section 82A
Application	Business	Non-business
Supporting records / documents	books of account recording receipts and payments or income and expenditure; invoices, vouchers, receipts and other documents; and any other records	statement of income and expenditure and invoices, vouchers, receipts; and other documents
Place of retention of the records / documents	Related to any business in Malaysia - kept and retained in Malaysia	Related to any income in Malaysia - kept and retained in Malaysia
Number of years to keep / retain the records / documents	7 years	7 years

Record Keeping

Section 82 & Section 82A



Record Keeping

Public Rulings (PR) on Keeping of Records

Category	Types of records
Companies & co-operatives [PR No. 4/2000 (Revised)]	Books of account recording receipts and payments or income and expenditure; invoices, vouchers, receipts and such other documents as are necessary to verify the entries in any books of account; and any other records as specified by the Director General (DG)
Persons other than companies or individuals [PR No. 6/2000 (Revised)]	
Individuals & Partnerships [PR No. 5/2000 (Revised)]	Examples of records: Bank accounts, physical trading stock-take, private money (legacy or lottery winnings received), personal drawings, separate records for non-trade debtors and creditors, contract and subcontract payments, partners' capital and current accounts.

Record Keeping

Tax Audit Framework

- All the business records & documents – should be made available for examination
- Unable to provide the hard copies for examination – should facilitate and assist – to access the computer system and copy the electronic records onto tapes, disks or diskettes
- Can obtain guidance in relation to record keeping from the guidebook and PRs issued by the Inland Revenue Board (IRB)
- For sole-proprietorships & partnerships - records other than business records – need to be examined

Record Keeping

Interest

Interest expense

- Interest payable on money borrowed and used in the production of income or laid out on assets used in the production of income are deductible [Section 33(1)(a)]
- Interest restriction – part or whole of the interest expense on money borrowed is not deductible – for non-trade purposes or has been used for investment purposes (e.g. acquisition of shares, properties, fixed deposits, etc.) [Section 33(2)]
- Effective YA 2014 – interest payable – deductible only if the **interest is due to be paid** and the deduction would be given in the year the interest is payable – evidence that would indicate the date the interest expense is due to be paid (e.g. loan agreement, inter-company memorandum) [Section 33(4)]
- Documentary evidence – investment not financed by loan – e.g. timing of loan taken, sale of property or investment

Record Keeping

Interest

Interest income

- Interest income – gross income of a person when it is received or deemed received and will be assessed in the relevant period in which the interest is receivable (Section 27)
- Interest income – **deemed obtainable on demand** by the lender when the interest is due to be paid by the borrower notwithstanding that interest has not been paid (this subsection shall not apply if the income is received before it is due to be paid) [Section 29(3)]
- Not due to be paid – must have supporting documents to prove and justify

Record Keeping

Entertainment

Entertainment expense

- Accounting system
 - who is entertained
 - what is the purpose / nature of the entertainment expense incurred
- Entertain client / employee only
 - 100% tax deduction – main purpose – to entertain mainly employees & some suppliers
 - 50% tax deduction – main purpose – to entertain mainly existing suppliers & some employees
- Supporting documents are very important to claim deduction

Record Keeping

Entertainment

Entertainment allowance

- Eligible to 50% tax deduction
- No supporting documents required from employee

Section 39(1)(l) – should keep separate record; tax on balance 50%

Record Keeping

Allowance for Doubtful Debts

Not allowable for tax purposes

- General provision - even if there is a legal requirement or an accounting convention for the particular trade or industry
- Forgiving / waiving payment of a debt
- Non-trade debts written off as bad

Deductible - Trade bad debts written off or specific provision for trade debts. Sufficient evidence of reasonable steps taken, including one or more of the following:

- Issuing reminder notices
- Debt restructuring scheme
- Rescheduling of debt settlement
- Negotiation or arbitration of a disputed debt
- Legal action

Record Keeping

Allowance for Doubtful Debts

Circumstances when a debt can be considered bad – occurrence of any one of the following:

- the debtor has died without leaving any assets
- the debtor is a bankrupt or in liquidation and there are no assets
- the debt is statute-barred
- the debtor cannot be traced despite various attempts and there are no known assets
- attempts at negotiation or arbitration of a disputed debt have failed and the anticipated cost of litigation is prohibitive; or
- any other circumstances where there is no likelihood of cost effective recovery

Record Keeping

Withholding Tax

WT payment – supporting documents to substantiate the tax deducted and remitted

- Details (name, address, country and income tax reference number) of the payer & payee
- Copies of invoice or debit note
- Bank remittance slip or other documentary evidence showing the date the amount is paid or credited
- The relevant WT forms submitted to IRB (Form CP37, CP37A, CP37C, CP37D etc)

Record Keeping

Withholding Tax

Double Tax Agreement (DTA) preferential rate

- Tax resident certificate from the Revenue Authority of the relevant country
- Concept of beneficial owner in applying DTA rates
- Income – not attributable to a Permanent Establishment (PE) in Malaysia
- Fee – at arm's length

Record Keeping

Individual Reliefs

Reliefs

- Only available to an individual who is a tax resident in Malaysia
- Comprise personal, wife, children, insurance premium and EPF reliefs
- Some reliefs need supporting documents

Reliefs	Maximum (RM) – wef YA 2015	With document	No document
Individual and dependent relatives	9,000		√
Medical treatment, special needs and carer expenses for parents	5,000	√	
Disabled person (self)	6,000 (*)	√	
Basic supporting equipment for disabled person	6,000	√	

Record Keeping

Individual Reliefs

Reliefs	Maximum amount (RM)	With document	No document
Higher education fees (self)	5,000	√	
Medical expenses for serious disease	6,000 (#)	√	
Purchase of books / magazines	1,000	√	
Purchase of personal computer	3,000 (%)	√	
Net deposit in Skim Simpanan Pendidikan Nasional (SSPN)	6,000 (^)	√	

Record Keeping

Individual Reliefs

Reliefs	Maximum amount (RM)	With document	No document
Purchase of sports equipment or any sports activity as defined under the Sport Development Act 1997	300	√	
Husband / wife relief / payment of alimony to former wife	3,000		√
Disabled husband / wife	3,500 (*)	√	
Child – under the age of 18 years / child – 18 years & above and studying	1,000 / 1,000 or 6,000	√	

Record Keeping

Individual Reliefs

Reliefs	Maximum amount (RM)	With document	No document
Child – disabled child (unmarried)	6,000 or 12,000 (6,000 + 6,000)	√	
Insurance and provident fund	6,000	√	
Private Retirement Scheme and Deferred Annuity	3,000 (@)	√	
Education and medical insurance	3,000	√	

* Further deduction

Include RM500 for complete medical examination

% Every 3 years

^ YAs 2012 - 2017

@ YAs 2012 – 2021

Record Keeping

Penalties and Offences

- Consequences if sufficient records are not kept - may be prosecuted and on conviction, may be liable to a fine of not less than RM 300 and not more than RM 10,000 or to imprisonment for a term not exceeding 12 months, or to both (Section 119A)
- Failure to furnish return or give notice of chargeability – be liable to a fine of not less than RM 200 and not more than RM 20,000 or to imprisonment for a term not exceeding 6 months or to both (Section 112)
- Incorrect return – be liable to a fine of not less than RM 1,000 and not more than RM 10,000 and shall pay a special penalty of double the amount of tax which has been undercharged (Section 113)
- Wilful evasion – be liable to a fine of not less than RM 1,000 and not more than RM 20,000 or to imprisonment for a term not exceeding 3 years or to both, and shall pay a special penalty of treble the amount of tax which has been undercharged (Section 114)

Record Keeping

Indirect Tax



Contents

- Goods and Services Tax
- Customs duties
- Sales Tax / Service Tax

Record Keeping

Duty to Keep Records

Description	GST	Customs duty	Sales Tax	Service Tax
Who is required to keep records?	<ul style="list-style-type: none"> Taxable person Non taxable person (exceptions) 	<ul style="list-style-type: none"> Importer Exporter 	Taxable Person	Taxable Person
How long are the records to be kept?	7 years	6 years	6 years	6 years
Place where records are to be kept	Malaysia Any other place with prior approval	--	--	--
Language in which records are to be maintained	Bahasa Malaysia or English			

Record Keeping

Duty to Keep Records

What type of records are to be maintained?

All records relating to transactions that would affect the tax / duty liability such as:

- Invoices, debit notes, credit notes, purchase orders etc.
- All books of account i.e. stock register, register of fixed assets, financial statements etc.
- All parts of the accounting system including program documentation
- Business registration records i.e. form 9, form 13, form 24
- Tax records i.e. returns, payment receipts, tax calculations / workings
- Customs forms such as K1, K2, K9 etc.
- Product brochures / product specifications
- Transportation documents such as packing list, bill of lading, transit insurance etc.
- Legal records i.e. contracts, DG decisions, assessment letters, rulings, appeals etc.
- Banking records i.e. payment advice, letter of credit, payment records, details of loans etc.

Importance of Record Keeping

Description	GST	Customs duty	Sales Tax	Service Tax
Penalties and Prosecution				
Penalties up to (RM) and or	50,000	20,000	50,000	5,000
Max period of imprisonment	3 years	3 years	5 years	3 years
Investigations / Audit / Assessment				
Period of limitation for assessment	6 years (could be extended in certain cases)	3 years	3 years	3 years

Importance of Record Keeping

Description	GST	Customs duty	Sales Tax	Service Tax
Outcome of investigations / Audit / Assessment				
No further action	--	--	--	--
Letter of assessment / bill of demand or both	Tax payer has 2 options: 1. Accept the assessment decision 2. Dispute the assessment decision			
If the assessment decision is accepted	<ul style="list-style-type: none"> • Pay the amount of tax / duty demanded along with the penalty • Apply to Minister for remission of tax / duty • Tax payer may approach compounding authority to compound penalty and any prosecution provided offence is compoundable 			
If the assessment decision is disputed	A decision may be disputed due to the following reasons: <ul style="list-style-type: none"> • Dispute of fact • Dispute of application of law • Dispute of involving mixed question of fact and law 			

Dispute Resolution Mechanism

• Aggrieved by decision of tax officer below rank of Director General ('DG')

Appeal to DG

• Aggrieved by decision of DG

Appeal to Tribunal

• Aggrieved by decision of Tribunal

Appeal to HC

• Aggrieved by decision of the High Court ('HC')

Court of Appeal

Dispute Resolution Mechanism

Important points on disputes and dispute resolution process

- Under both GST and pre-GST regime, if bill of demand is issued, an aggrieved tax payer cannot approach the Tribunal unless the bill of demand is fully paid.
- Dispute can be settled on mutual agreement between tax payer and customs department.
- Tribunal is the final fact finding authority and its decision is final.
- Appeal can be filed against decision of the Tribunal before HC on question of law or mixed question of fact and law.
- Appeal against decision of High Court before Court of Appeals.
- Aggrieved party has option of judicial review in 'special circumstances'.
- Certain matters deemed to be non appealable under GST regime. However this limitation not applicable to customs duty / sales tax / service tax laws.

Record Keeping

Key Takeaways

- Taxpayers to give importance to record keeping requirements
- Taxpayers to review record keeping process's from time to time to ensure that records are adequately maintained.
- Taxpayers to be aware of their legal options and formulate best strategy for resolution of disputes.

Public Rulings



Contents

- PR No. 3/2015 Failure to furnish information within a stipulated period
- PR No. 4/2015 Entertainment expense

PR No. 3/2015: Failure to Furnish Information Within a Stipulated Period

- Issued on 29 July 2015 by the IRB
- Explain a taxpayer's duty to keep records and documents, situations where a taxpayer is required to furnish information within a specified period as well as the consequences of non-compliance
- No deduction of expenses from the gross income shall be allowed if the person fails to comply with a notice issued by the DG under Section 81 which requires the taxpayer to furnish information in respect of such deduction claimed by the taxpayer within a specified time or such extended time as may be allowed by the DG. [Effective YA 2014 - Section 39(1A)]
- Deduction is only allowed if the taxpayer submits the records or documents in accordance with the requirement as specified in the notice issued by the DG

PR No. 3/2015: Failure to Furnish Information Within a Stipulated Period

Example 1:

AZT Sdn Bhd is a supplier of food product in Kuala Lumpur. The company claimed a deduction of RM50,000 for the transportation cost incurred to deliver goods to customers.

During an audit, AZT Sdn Bhd could not provide any supporting documents to support the claims. Therefore, a notice under Section 81 was issued to AZT Sdn Bhd to furnish the invoices, receipts and payment vouchers related to the claims within the period of time stipulated by the DG.

If the company is able to furnish the supporting documents as requested in the notice within the period of time stipulated by the DG, the expense of RM50,000 will be allowed as a deduction.

PR No. 3/2015: Failure to Furnish Information Within a Stipulated Period

Example 2:

The facts are the same as in Example 1 except that AZT Sdn Bhd failed to furnish the invoices and receipts. The company only submitted payment vouchers to support the claims. The expense of RM50,000 will not be allowed as a deduction under Section 39(1A).

Example 3:

The facts are the same as in Example 1 except that AZT Sdn Bhd failed to furnish the receipts and payment vouchers. The company only submitted invoices to support the claims. The expense of RM50,000 will not be allowed as a deduction under Section 39(1A).

PR No. 3/2015: Failure to Furnish Information Within a Stipulated Period

- Application for an extension of time (EOT) should be made before the expiration of the time specified in the notice.
- EOT may be granted based on the merits of each case (whether the reason given is reasonable and acceptable).
- Taxpayer will be notified of the outcome for EOT in the form of a notice under Section 81.
- In the event the records and documents cannot be furnished but if the taxpayer is able to submit supporting evidence and reasonable grounds to prove the occurrence of circumstances beyond the taxpayer's control, the DG may give due consideration to allow the deduction of expenses claimed.
- However this submission is subject to approval by the DG who must be satisfied that the taxpayer has made every endeavor to obtain the records or documents from third parties but still fails to get it and there is no other avenue to obtain the requested records and documents.

PR No. 4/2015 Entertainment Expense

- To replace PR No. 3/2008
- Mainly to include the redefinition of “entertainment” under Section 18 – effective YA 2014
- Entertainment – includes the provision of food, drink, recreation or hospitality or the provision of accommodation or travel in connection with the said provision, by a person or an employee of his, **with or without any consideration paid whether in cash or in kind, in promoting or** in connection with a trade or business carried on by that person
- Promotion expense is part of entertainment expense
- Promotional expense – if no element of entertainment the expense does not fall under the definition of entertainment – 100% deductible – Section 33(1)
- Promotional expenses – entertainment element will only qualify for 50% deduction unless they fall into the provisos (i) to (viii) of Section 39(1)(l)

PR No. 4/2015 Entertainment Expense

Example 1

Akai Sdn Bhd spent advertising cost of RM15,000 to advertise its congratulatory message to a badminton team on winning the Axiata Cup in 2014 and also to promote the company's name with its expertise in interior decoration. The logo and the company's name with types of services were printed in the advertisement. The forms of advertising were by mass media and via a few selected moving vans.

The promotion expense does not have an entertainment element and does not fall within the definition under Section 18. Thus, the promotion expense is not an entertainment expense under Section 39(1)(l).

However, the logo and the company's name as well as types of services printed in all of its advertisements proved the company's intention to promote the company's services in addition to convey congratulations. Thus, the advertising expense for the purpose of promoting the services of the company is allowable as a deduction under Section 33(1).

PR No. 4/2015 Entertainment Expense

Example 2

Sunset Sdn Bhd (Sunset) is a company selling electrical goods. Sunset gave promotional gifts of electrical goods costing RM50,000 to suppliers in conjunction with the company's annual dinner. The annual dinner was held for employees, distributors and dealers.

The electrical goods did not have the company's business logo. Sunset claimed a promotional expense of RM50,000 as a deduction under Section 33(1).

Although the promotional expense falls under the definition of entertainment in Section 18, it does not fall within any of the categories of expenses mentioned in the provisos to Section 39(1)(l).

Thus, only RM25,000 that is fifty percent (50%) of the entertainment expense of RM50,000 is allowed as a deduction.

PR No. 4/2015 Entertainment Expense

Example 3

Lavender Beauty Sdn Bhd (Lavender) carries on a business of selling wedding dresses and accessories. Lavender offered free promotional gifts of brooches and umbrellas which were affixed with the company's logo to customers who made purchases exceeding RM2,000 in a single receipt. Lavender claimed promotional expenses of RM3,000.

The promotional expenses have an entertainment element which falls under proviso (vi) of Section 39(1)(l). Thus, the promotional expenses are allowed a 100% deduction totalling to RM3,000.

PR No. 4/2015 Entertainment Expense

- List of the general entertainment expense – 50% tax deduction
 - gift without business logo for customer's annual dinner
 - gift of flower for customer's opening of new outlet
 - entertainment to suppliers
 - hampers for customers during festive seasons
- List of entertainment expense – non-allowable
 - entertainment given to a potential customer in a closed transaction
 - wedding gift to customer
 - entertainment to employees of related companies
 - entertainment for annual general meeting of company
 - cash contribution for customer's annual dinner

PR No. 4/2015 Entertainment Expense

- List of the entertainment expense – 100% tax deduction
 - the provision of entertainment to employees
 - the provision of entertainment for payment in the ordinary course of business
 - the provision of promotional gifts at trade fairs or trade exhibitions or industrial exhibitions outside Malaysia
 - the provision of promotional samples of products of the business
 - the provision of entertainment for cultural or sporting events open to members of the public wholly to promote the business
 - the provision of promotional gifts within Malaysia of articles incorporating the logo of the business
 - the provision of entertainment related wholly to sales arising from the business
 - the provision of leave passage benefit in Malaysia provided by an employer to its employees to facilitate a family day

Case Law Development



KPHDN v OKA Concrete Industries Sdn Bhd

Facts

- Preparation of ready-mixed concrete was sub-contracted to a subsidiary of the taxpayer's holding company i.e. OKA Engineering Trading Sdn Bhd (OET) under an arrangement where OET was merely a labour contractor.
- The labour contractor used the taxpayer's plant and machinery including mixer trucks and batching plant in the taxpayer's factory for the preparation of ready-mixed concrete.
- OET's labour was at all material times under the taxpayer's instruction and supervision.
- The products were made in accordance with the taxpayer's specification.

KPHDN v OKA Concrete Industries Sdn Bhd

Facts

- Instead of the taxpayer employing the labour directly, for better management, the labour in regard to the making of ready-mixed concrete for the business of the taxpayer was supplied by OET.
- The taxpayer paid OET for the labour supplied for the making of the ready-mixed concrete.
- Claim for capital allowance on the capital expenditure incurred on mixer trucks and batching plant was disallowed by IRB as these items were not physically operated by the taxpayer.

KPHDN v OKA Concrete Industries Sdn Bhd

Facts

RA claim

- factory (fencing, maintenance parts storage area, office, bridge, road and pile shoe fabrication yard); and
- plant and machinery (mixer trucks, batching plant, cranes and compressor, lorries and weigh bridge)

was disallowed as the items were not involved in production activity.

Special Commissioners of Income Tax (SCIT) allowed the taxpayer's appeal.

KPHDN appealed to the High Court.

KPHDN v OKA Concrete Industries Sdn Bhd

Issues

- Whether the SCIT were right in allowing the taxpayer to claim for RA and CA on the capital expenditure incurred on its factory and plant and machinery.
- Whether KPHDN has any legal basis to insist that the mixer trucks and batching plant must be physically operated by the taxpayer to claim CA .
- Whether the SCIT were correct in disallowing the imposition of the penalty under Section 113(2).

KPHDN v OKA Concrete Industries Sdn Bhd

High Court's Decision

- Imposition of the condition “production area” based on internal ruling or guidelines are without any legal authority and had no force of law (*KPHDN v Success Electronics & Transformers Manufacturer Sdn Bhd*).
- SCIT was correct that those items claimed were necessary and integral to the taxpayer's manufacturing activity, based on functionality test, that every of such items performed an integral function in the context of the taxpayer's business of manufacturing ready-mixed concrete and precast concrete products.

KPHDN v OKA Concrete Industries Sdn Bhd

High Court's Decision

- The law only requires mixer trucks and batching plant to be used for the purposes of the taxpayer's business.
- The law does not require the taxpayer to physically operate the mixer trucks and batching plant.
- There is no room for KPHDN to read in the additional requirement that the mixer trucks and batching plant cannot be operated by a contract labourer on behalf of the taxpayer.

KPHDN v OKA Concrete Industries Sdn Bhd

High Court's Decision

- As long as the taxpayer had incurred capital expenditure on the mixer trucks and batching plant, remained as the owner of the items and used the items for the purposes of its business of manufacturing precast concrete, the taxpayer was entitled to claim CA.
- The KPHDN had no authority to dictate how a taxpayer should conduct its business.
- The taxpayer was at its own liberty to conduct his business with all available means to make good profits.

KPHDN v OKA Concrete Industries Sdn Bhd

High Court's Decision

- Since the issues on RA and CA were decided in favour of the taxpayer, the issue of penalty did not arise.
- The SCIT's finding based on the evidence that the taxpayer had at all material times acted in good faith, made full disclosure and the matter in dispute arose as a result of technical adjustment.

High Court decided in favour of taxpayer on all issues.

Dato' Yap Pak Leong v KPHDN

Facts

- The taxpayer is a qualified public accountant and also a sole proprietor who owns PLY Plantation in Sandakan.
- The income received from PLY Plantation was taxed as the personal income of the taxpayer.
- The general manager of PLY Plantation, who is the son of the taxpayer, was not paid any remuneration for his work but was provided employment perquisites in the form of staff quarters and two maids of which he had declared these perquisites in his tax returns.

Dato' Yap Pak Leong v KPHDN

Facts

- The IRB carried out an audit on the financial records of the taxpayer for the years 2004 to 2006. During the audit, the IRB was furnished with various invoices and receipts in respect of the staff quarters upkeep expenses and the purchase of furniture and gadgets.
- The staff quarters address was No. 88, Jalan Bukit Bendera, Kota Kinabalu and it belonged to the taxpayer.
- IRB disallowed the taxpayer's claim for deductions for staff quarters upkeep, maid expenses, purchase of furniture and gadget expenses which were claimed by the taxpayer.

Dato' Yap Pak Leong v KPHDN

Facts

- IRB also disallowed the taxpayer's claim for capital allowances on gadgets, namely, MP3 player and Ipod Nano and furniture.
- IRB issued Notices of Additional Assessment and imposed a 45% penalty on the taxpayer.

SCIT disallowed the taxpayer's appeal.

The taxpayer appealed to the High Court.

Dato' Yap Pak Leong v KPHDN

Issues

- Whether the expenses claimed by the taxpayer i.e. staff quarters' upkeep, maids' expenses and labour quarters' upkeep were allowable deductions under Section 33(1);
- Whether the capital allowances claimed by the taxpayer on the expenditure incurred on modern gadgets and house furniture were allowable;
- Whether the penalties imposed on the taxpayer under Section 113(2) were correct?

Dato' Yap Pak Leong v KPHDN

High Court's Decision

The High Court held that those expenses were disallowed under Section 39(1) as they were **domestic or private expenses** which related to a luxury home owned and occupied by the taxpayer in Kota Kinabalu based on the SCIT's findings as follows:

- The expenses for the “upkeep” of the “staff quarters” were more in the nature of renovation or renewal of the private residence of the taxpayer and it should not be considered as maintenance expenditure.

Dato' Yap Pak Leong v KPHDN

High Court's Decision

- The “staff quarters” is located in Kota Kinabalu which is five to six hours drive away from the plantation in Sandakan. The provision of the luxury quarters was not wholly incurred in the production of income.
- The two maids worked at the “staff quarters” which was also the private residence of the taxpayer and his wife besides the general manager. Since the taxpayer also obtained benefit out of the services provided by the two maids, the maid expense was not wholly and exclusively incurred in the production of income under Section 33(1).

Dato' Yap Pak Leong v KPHDN

High Court's Decision

No capital allowance was allowed as these items were used for domestic or private purposes based on the following findings:

- The taxpayer was unable to prove how the modern gadgets such as MP3 players and iPod Nano were used in the production of income in the plantation business.
- The purchase of furniture was used by the general manager at the taxpayer's private residence in Kota Kinabalu.

Dato' Yap Pak Leong v KPHDN

High Court's Decision

The High Court agreed with the SCIT's decision that:

- “good faith” as a defence only applies if a taxpayer is prosecuted under Section 113(1); and
- the IRB has discretion to impose the penalty under Section 113(2) and the defence of good faith is not available.

Kenny Heights Development Sdn Bhd v KPHDN

Facts

- Two agreements for sale of the respective subject lands by Kenny Heights Development Sdn Bhd to Mycom Berhad and Olympia Industries Berhad were made in year 2000
- Agreements were subject to pre-conditions
- The sale and purchase price was reduced by Supplemental Agreements in year 2003
- Pre-conditions being satisfied on 27.04.2007, Kenny Heights Development Sdn Bhd submitted the notices of assessment to KPHDN in respect of the disposal of the lands
- Kenny Heights Development Sdn Bhd was dissatisfied with the assessment by the KPHDN

Kenny Heights Development Sdn Bhd v KPHDN

Issues

- What were the dates of disposal and the consideration price of the conditional agreements which were subsequently amended by Supplemental Agreements
- Whether the Real Property Gains Tax (Exemption)(No. 2) Order 2007 applied to exempt the taxpayer from RPGT
- Whether the Notice of Assessment for YA 2000 was statute barred by virtue of Section 15(1) of the RPGT Act 1976

Kenny Heights Development Sdn Bhd v KPHDN

Court of Appeal's Decision

- The amount of consideration was the actual consideration (as amended by the Supplemental agreement) at the time the conditions were satisfied on 27.04.2007 and the date of disposal was the date when all the conditions were satisfied
- The taxpayer was entitled to the exemption under the RPGT (Exemption)(No. 2) Order 2007 which exempted a person from all provisions of the RPGT Act 1976 for any disposal of chargeable asset from 1 April 2007 until 31 December 2009
- The Notice of Assessment for YA 2000 dated 31 December 2008 and served on 2 February 2009 was statute barred by virtue of Section 15(1) of the RPGT Act 1976

MSE Sdn Bhd v KPHDN

Facts

Taxpayer

- Business of trading in consumer electronic products and domestic appliances
- Sole and exclusive distributor of household electrical, electronic and information technology (IT) related products bearing the G Electronics Inc. brand or trademarks in Malaysia
- The trade was to be continued until the agreement was terminated by a Termination Agreement
- Did not distribute any other products other than G products as it is prohibited to do so
- Took steps to close down its business operations when it received the formal notice of termination
- Received a lump sum ex-gratia payment

MSE Sdn Bhd v KPHDN

Facts

- Did not bring the ex-gratia payment to tax because it was a capital receipt

IRB

- Viewed the ex-gratia payment as a revenue receipt
- The payment was in the nature of a gratuitous payment in recognition of the taxpayer's services to G for the past 9 years

MSE Sdn Bhd v KPHDN

Issues

- Whether the ex-gratia payment received by the taxpayer under a Termination Agreement is taxable under the Act
- Whether the KPHDN had rightly imposed the penalties at the rate of 45% under Section 113(2)

MSE Sdn Bhd v KPHDN

Special Commissioners of Income Tax's Decision

- Taxpayer was initially a dormant company until it obtained the distributorship from G to distribute G products
- Distribution Agreement (the said Agreement) was the basis to start its business and its whole organisation had been set up and structured to comply with the terms of the said Agreement
- Whole structure of the taxpayer company had to be closed down upon the termination of the said Agreement
- The said Agreement was the foundation for the whole structure & profit-making apparatus of the taxpayer
- Ex-gratia payment received by taxpayer for cancellation of the said Agreement which was so fundamental to the taxpayer's trading activities must be regarded as a capital receipt and was not compensation for loss of income

MSE Sdn Bhd v KPHDN

Special Commissioners of Income Tax's Decision

- SCIT discharged the penalty imposed by the KPHDN as there was no negligence on the taxpayer in submitting its returns and no tax was undercharged.

TRGM v KPHDN

Facts

- Taxpayer is a non-resident with a business address in Switzerland. Involved in the business of compiling, processing and selling products in the form of “information services” and “dealing services”
- The “information services” and “dealing services” consist of news, financial and economic information and related matters
- Taxpayer appointed TRM as distributor in Malaysia to market and sell the taxpayer’s products
- TRM also provides sales and marketing related services including customer support to its customers in Malaysia
- TRM pays a distribution fee to the taxpayer and remitted WT on the distribution fee to IRB

TRGM v KPHDN

Facts

- Taxpayer through TRM and TRM's tax agent informed the IRB that the said distribution fee had been inadvertently subjected to WT
- Taxpayer requested for the WT paid to be refunded to the Taxpayer through TRM
- IRB had rejected the taxpayer's application for the refund of the WT as the said distribution fee was subject to WT as it fell under the definition of royalty

TRGM v KPHDN

Issues

- Whether the distribution fee paid by TRM to the taxpayer was royalty under Article 12(4) of the Malaysia-Swiss Federal Council DTA 1974
- Whether the distribution fee paid by TRM to the taxpayer was the business profit of the taxpayer and thus the said distribution fee was only taxable in Switzerland pursuant to Article 7(1) of the Malaysia-Swiss Federal Council DTA 1974

TRGM v KPHDN

Special Commissioners of Income Tax's Decision

- Distribution fee paid by TRM to the taxpayer was not royalty under Article 12(4) of the Malaysia-Swiss Federal Council DTA 1974
- SCIT made the decision based on the case of *Damco Logistics Malaysia Sdn Bhd v KPHDN (Damco)* because the material facts of this appeal were the same as in Damco
- In the Damco case, the Court resorted to the definition of royalty in the DTA instead of the Act by relying on the *Federal Court decision in Director General of Inland Revenue v Euromedical Industries* and Section 132(1)
- In the Damco case, there was no involvement of know-how to allow the applicant to acquire any rights or partial rights in the contract service
- TRM was paying only for the distribution of the products and not to exploit any right in the software copyrights of the products

TRGM v KPHDN

Special Commissioners of Income Tax's Decision

- Distribution fee was the business profit of the taxpayer in Switzerland and the taxpayer was taxed by the Swiss Tax Authority
- Pursuant to Article 7(1) of the DTA, the business profit of the taxpayer shall not be taxable in Malaysia unless it carries on business in Malaysia through a PE
- Taxpayer did not have a PE in Malaysia and hence the distribution fee should not be taxable in Malaysia



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