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Tax Espresso
A snappy delight

Greetings from Deloitte Malaysia's Tax services group

Mutual Agreement Procedure Guidelines

The Inland Revenue Board (IRB) has recently issued the Mutual Agreement Procedure (MAP) Guidelines. To resolve tax disputes involving double taxation and the interpretation and application of a tax treaty, a taxpayer may seek assistance from the Malaysian

Quick links:

Deloitte Malaysia

Inland Revenue Board

Takeaways:

Mutual Agreement Procedure Guidelines

Tax Audit Framework 2015

Tax Cases:

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v

Competent Authority (CA) on issues such as transfer pricing, residence status, withholding tax, permanent establishment and classification of income.

The time limit for presenting a case for CA assistance depends upon the terms of the particular Tax Treaty under which the MAP is invoked. If the time limit is not specified, the Malaysian CA will follow the time specified under Article 25 (MAP) of the OECD Model Tax Convention on Income and on Capital i.e. within three years from the first notification of the action resulting in taxation. Presenting a case to the Malaysian CA to invoke MAP does not deprive a person from filing an appeal under Section 99(1) of the Income Tax Act 1967 (ITA). Pursuant to Section 102(1A) of the ITA, no appeal shall be forwarded to the Special Commissioners of Income Tax (SCIT) until the determination of the MAP.

Tax Audit Framework 2015

The Tax Audit Framework 2015 has recently been issued by the IRB. Among others, important updates in the Tax Audit Framework 2015 that takes effect from 1 February 2015 are:

i) Application of Section 39(1A) of the ITA where deduction of expenses will not be allowed if taxpayers fail to provide information within a specified time;

ii) the time frame for settlement of a tax audit is extended from 3 to 4 months;

iii) 35% concessionary penalty rates is applicable for voluntary disclosure provided that relevant actions taken by a taxpayer within 21 days after the letter requesting for documents is issued by the IRB for desk audit cases; and

OKA Concrete Industries Sdn Bhd (High Court)

TRGM v KPHDN (SCIT)

Gazette Order

Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014

Important deadlines:

Due date for 2016 tax estimates for companies with April year-end (31 March 2015)

6th month revision of tax estimates for companies with September year-end (31 March 2015)

9th month revision of tax estimates for companies with June year-end (31 March 2015)

Statutory filing of 2014 tax returns for companies with August year-end (31 March 2015)

iv) Tax audited taxpayers will be listed and monitored under the Monitoring Deliberate Tax Defaulters (MDTD) Programme.

Tax Cases

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v OKA Concrete Industries Sdn Bhd (High Court)

Issues

i) Whether the SCIT were right in allowing the taxpayer the claim of reinvestment allowance (RA) on the capital expenditure incurred on its 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) from year of assessment (YA) 2003 to YA 2006.

ii) Whether the KPHDN has any legal basis to insist that the mixer trucks and batching plant must be physically operated by the taxpayer in order to claim capital allowance (CA) on the said items.

iii) Whether the SCIT were correct in disallowing the imposition of the penalty under Section 113(2) of the ITA.

Decision

The High Court upheld the decision made by the SCIT that was decided in favour of the taxpayer based on the following grounds:

i) As affirmed by the Court of Appeal in the case of *Ketua Pengarah Hasil Dalam Negeri v Success Electronic & Transformers Manufacturer Sdn Bhd (Success Electronics)*, the imposition of the condition “production area” based on internal ruling or guidelines of the KPHDN are without any legal authority and therefore had no force of law. The SCIT were correct to hold that those items claimed by the taxpayer 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.

[Note: The definition of "factory" had been inserted under Paragraph 9 of Schedule 7A of the ITA with effect from YA 2012. "Factory" means portion of the floor areas of a building or an extension of a building used for the purposes of qualifying project to place or install plant or machinery or to store any raw material, or goods or materials manufactured prior to sale: Provided that the portion of the building or extension of the building used for the storage of raw material, or goods or materials, or both, shall not be more than one-tenth of the total floor areas of that building or extension. With this definition of "factory", the capital expenditure incurred on the factory such as fencing and office are not eligible for RA effective from YA 2012].

ii) 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 the 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. 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 pre-cast 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.

iii) 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 was 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, hence penalty should not be imposed.

TRGM v KPHDN (SCIT)

Issues

i) Whether the distribution fee paid by TRM to the taxpayer was royalty under Article 12(4) of the Malaysia-Swiss Federal Council Double Taxation Agreement (DTA) 1974.

ii) 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.

Decision

The SCIT allowed the taxpayer's appeal based on the following grounds:

i) The distribution fee paid by TRM to the taxpayer was not royalty under Article 12(4) of the DTA. The 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 determining whether the EDP charges were royalty in Damco case, it was decided that one has to resort to the definition in the DTA instead of ITA by relying on the Federal Court decision in *Director General of Inland Revenue v Euromedical Industries* and Section 132(1) of the ITA. 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 of service. In this appeal, TRM was paying only for the distribution of the products and not to exploit any right in the software copyrights of the products, therefore, the distribution fee was not royalty within Article 12(4) of the Malaysia-Swiss Federal Council DTA 1974.

ii) The distribution fee was the business profit of the taxpayer in Switzerland and the taxpayer was taxed by the Swiss Tax Authority on that basis. 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 permanent establishment. In this appeal, the taxpayer did not have a permanent establishment in Malaysia, hence the distribution fee should not be taxable in Malaysia.

Gazette Order

Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014 [P.U. (A) 347/2014]

The introduction of these Regulations on 26 December 2014 is an attempt by the Government to pre-empt and mitigate any undue rise in the prices of goods and services before and after the Goods and Services Tax (GST) is implemented on 1 April 2015, as well as to punish errant businesses who would seek to take advantage of consumer uncertainty.

These Regulations provide formulas to determine that there is no increment in the net profit margin of any particular goods sold or offered for sale, or services supplied or offered for supply within the periods from 2 January 2015 to 31 March 2015 and from 1 April 2015 to 30 June 2016 as compare to the net profit margin as at 1 January 2015.

We invite you to explore other tax related information at:
http://www2.deloitte.com/my/en/services/tax.html

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