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Tax Espresso
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Greetings from Deloitte Malaysia Tax Services

Tax Cases

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Bandar Nusajaya Development Sdn Bhd (Court of Appeal) 2016

Issues:

1. Whether judicial review was amenable to the taxpayer in view of the domestic appeal process provided under Section 99 of the Income Tax Act 1967 (ITA).

2. Interpretation of the words "any sums receivable or deemed to have been received" and the word "otherwise" in Section 22(2)(a) of the ITA and whether they apply to the interest claimed as deductible expense for the calculation of the non-business statutory income of the taxpayer but subsequently

Quick links:

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Takeaways:

Tax Cases

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Bandar Nusajaya Development Sdn Bhd (Court of Appeal) 2016

KPHDN v Bintulu Lumber Development Sdn Bhd (High Court) 2014

Piramid Intan Sdn Bhd v KPHDN (High Court) 2014

Guidelines on Advance Rulings (Updated)

waived by UEM Land, its holding company.

Decision:

The Court of Appeal dismissed the appeal by KPHDN and affirmed the High Court's decision.

Issue 1:

The taxpayer had shown special circumstances in this case to empower the High Court to exercise its discretion to allow the judicial review application. Charging a subject based on its erroneous interpretation of the ITA shows a lack of jurisdiction on the part of the KPHDN and was a special circumstance justifying the High Court's exercise of its discretion to allow the judicial review application.

Issue 2:

The ordinary dictionary meaning of the word "receivable" means "able to be received" and "capable of receiving" (see Oxford English Dictionary), and "capable of being admitted or accepted", "awaiting receipt of payment (accounts receivable)" and "subject to a call for payment" (a note receivable) as found in Black's Law Dictionary.

The word "receivable" in the ordinary sense is something to be received and must be from a source of the taxpayer's income in the ordinary sense. It must tally with features of income, that is, something that "comes in" and not what is saved from, as illustrated in the earlier common law decisions of *Tenant v Smith [1892] AC 150* and *Federal Commissioner of Taxation v Cooke & Sherden 29 ALR 202*.

A release of debt i.e. the waiver of interest owed by the taxpayer to UEM Land was not any receivable or a receivable that is deemed to have been received to constitute the "income" of the taxpayer.

In order for Section 22(2)(a) of the ITA to apply, it must be a sum receivable or deemed to have been

Important deadlines:

Due date for 2017 tax estimates for companies with September year-end
(31 August 2016)

6th month revision of tax estimates for companies with February year-end
(31 August 2016)

9th month revision of tax estimates for companies with November year-end
(31 August 2016)

Statutory filing of 2016 tax returns for companies with January year-end
(31 August 2016)

received. The interest payable to UEM Land was not and could not be regarded as an income of the taxpayer because it was neither receivable nor a receivable that is deemed to have been received from a source of the taxpayer's income. The sum was a release of debt which was a liability and cannot be receivable.

The word "otherwise" in Section 22(2)(a) of the ITA must be confined to things of the same kind as specified in the preceding words, i.e. "insurance", "indemnity", "recoupment", "recovery" and "reimbursement" which have a common character connoting a receipt, a coming in. On the other hand, a release of debt is a discharge of an obligation.

There is no room for adopting the purposive approach to interpret the words "any receivable or deemed to have been received" and "otherwise" in Section 22(2)(a) of the ITA for to do so would render Section 30(4) of the ITA superfluous and redundant and this could not have been the intention of the Parliament as the Parliament does not pass law in vain.

Release of debt is specifically governed by Section 30(4) of the ITA. This is the only provision in the ITA that brings the release of debt to income tax. In other words, the Parliament had only intended debt that had been deducted against a business source income to be brought to income tax. The release of debt in this case did not fall within Section 30(4) of the ITA as this amount was deducted against a non-business source income.

KPHDN v Bintulu Lumber Development Sdn Bhd (High Court) 2014

Issue:

Whether the cultivation of palm oil falls within the ambit of the words "cultivation of fruits" stipulated in Paragraph 9(cc) of Schedule 7A, ITA.

Decision:

Appeal by KPHDN was allowed by the High Court.

It was clear from the Budget Speech year 1996 that the intention of the Parliament in enacting Paragraph 9(cc) of Schedule 7A of the ITA is to encourage food production activities as a measure to combat inflation caused by rising prices of food components. The objective of the Parliament was to alleviate the hardship faced by Malaysians due to inflation and through reinvestment allowance, it would give incentive to stimulate food production activities such as "the cultivation of rice, corn, **fruits** and vegetables, rearing of livestock and aquaculture."

The intention of the Parliament in giving reinvestment allowance was to encourage cultivation of fruits in its plain and ordinary language as understood in common parlance in Malaysia, namely, fruits which one can pluck from the tree and be eaten raw.

Although the fruit in the oil palm tree is edible, no reasonable person would pluck the fruit from the oil palm tree and eat it by itself. One does not find the palm oil fruits being sold in the market or shops in Malaysia as a fruit to be eaten raw or as culinary fruit.

If the Parliament had intended to include palm oil fruits under "fruits" in Paragraph 9(cc) of Schedule 7A, it would have expressly provided for it. In the absence of such expressed provision, palm oil fruit is a fruit per se, it is not the fruit in the plain and ordinary meaning as understood in the common parlance of Malaysia, therefore, not within the ambit of Paragraph 9(cc) of Schedule 7A, ITA.

Piramid Intan Sdn Bhd v KPHDN (High Court) 2014

Issues:

1. Whether payments by a timber contractor (taxpayer) to a timber licence holder were capital expenditure.
2. Whether penalty under Section 113(2) of the ITA should be imposed.

Decision:

Issue 1:

The High Court upheld the decision of the Special Commissioners of Income Tax (SCIT) that the upfront payments made by the taxpayer to obtain the right to extract, remove and sell timber logs from the timber license holder's concession area for a period of 20 years were capital expenditure as the taxpayer was able to bring into existence an advantage for the enduring benefit of the taxpayer's trade. Hence, the High Court was of the view that the upfront payments were not wholly and exclusively incurred in the production of gross income.

Issue 2:

The High Court also agreed with the SCIT's decision that the taxpayer did not understate or omit their income as all documents and payments made had been disclosed in the taxpayer's annual return and audited financial statements and there was no deliberate submission of incorrect tax return and information. The disallowance of deduction made by the taxpayer was merely a technical adjustment due to a differing interpretation of the tax legislation. Hence, the penalty under Section 113(2) of the ITA should not be imposed.

Guidelines on Advance Rulings (Updated)

The Inland Revenue Board (IRB) has issued a media release relating to an application of an advance ruling.

In the media release, the IRB clarified that an arrangement which involves the interpretation of Double Taxation Avoidance Agreement such as the determination of permanent establishment does not fall within the scope of advance ruling as provided under the subrule 2(1) of the Income Tax (Advance Ruling) Rules 2008 [P.U. (A) 41/2008].

In line with the above, the IRB has amended Paragraph 6.1 of the Guidelines on Advance Ruling issued on 1 October 2015. Paragraph 7(h) of the Guidelines [circumstances where an advance ruling is not issued] has also been amended to include the term "transfer pricing". The updated Guidelines on Advance Rulings issued on 10 June 2016 has also been uploaded on its website.

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

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