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Tax Espresso
A Snappy Delight

Greetings from Deloitte Malaysia Tax Services

Gazette Order

Income Tax (Exemption) Order 2017 [P.U.(A) 52/2017]

Following the media release by the Ministry of Finance (MoF) on 10 January 2017 pertaining to the taxation of income of religious institutions or organisations, MoF has issued the exemption order P.U.(A) 52/2017 which was gazetted on 15 February 2017.

P.U.(A) 52/2017 exempts a religious institution or organisation in the

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Inland Revenue Board

Takeaways:

Gazette Order

Income Tax (Exemption) Order 2017 [P.U.(A) 52/2017]

Companies are Compulsorily Required to Furnish the Form CP204 and Form CP204A via e-Filing with Effect From the Year of Assessment 2018

Tax Cases

Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri (KPHDN)(High Court) 2016

basis period for a year of assessment from the payment of tax in respect of gross income derived from all sources and from furnishing a return under Section 77 of the Income Tax Act 1967 (the ITA).

Paragraph 2(2) of P.U.(A) 52/2017 provides that "a religious institution or organization" means a religious institution or organisation –

- established in Malaysia exclusively for the purpose of religious worship or the advancement of religion and is not operated or conducted primarily for profit; and

- registered with the Registrar of Societies Malaysia or under any written law governing such institution or organisation.

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Mudah.My Sdn Bhd (Court of Appeal) 2016

Upcoming events

Deloitte Chinese Services Group Tax Workshop

Oil & Gas Tax Seminar

Important deadlines:

Due date for 2017 tax estimates for companies with April year-end
(31 March 2017)

6th month revision of tax estimates for companies with September year-end
(31 March 2017)

9th month revision of tax estimates for companies with June year-end
(31 March 2017)

Statutory filing of 2016 tax returns for companies with August year-end
(31 March 2017)

Companies are Compulsorily Required to Furnish the Form CP204 and Form CP204A via e-Filing with Effect From the Year of Assessment 2018

The Inland Revenue Board (IRB) has issued a letter dated 8 February 2017 informing that:-

- Pursuant to Subsection 107C(7A) of the ITA, companies are compulsorily required to furnish the Forms CP204 and CP204A via e-filing with effect from the year of assessment (YA) 2018.

- Paper Form CP204 and Form CP204A submitted by companies for YA 2018 onwards are **considered as not received** for the purpose of Subsection 107C(7A) of the ITA.

Failure to comply with the relevant provisions under Section 107C of the ITA is an offence under Subsection 120(1)(f) of the ITA.

Tax Cases

Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri (KPHDN)(High Court)(2016)

1. Whether the charitable body, i.e. Society of La Salle Brothers' income tax exemption status given by the Director General of Inland Revenue Board (DGIR) since 26.1.1970, remains since the letter by the DGIR was never withdrawn following the subsequent amendments to Schedule 6 via Finance Acts 1986, 1988, 2000 and 2008 and notices of assessment for years of assessment (YAs) 2004, 2006, 2007, 2011, 2012 and 2013 are ultra vires, illegal, void, unlawful and/or in access of authority;

2. Whether the subsequent amendments to Paragraph 13 of Schedule 6 of the ITA have no legal effect on the premise that those subsequent amendments deprived the taxpayer of the rights that it had acquired on 26.1.1970 based on the Interpretation Acts 1948 and 1967;

3. Whether the application for judicial review (JR) was inappropriate; and

4. Whether the assessments for YAs 2004, 2006 and 2007 by IRB were time-barred.

Decision:
The taxpayer's application to the High Court on all issues was dismissed.

Issue 1:

Referring to the Federal Court's decision in *Foo Loke Ying & Anor* v *Television Broadcast Ltd & Ors* [1958] the words in the ITA and the Finance Act should have effect if they are clear and unambiguous. Pursuant to the amendments in the Finance Act 1998 the taxpayer was mandatorily required to apply to the DGIR for exemption on the income from the business of charitable institution. It was undisputable that IRB had informed the taxpayer of the requirement to re-apply for the tax exemption status via a letter dated 29.07.1995. As it was stated in the special provision to Paragraph 13 of Schedule 6 of the ITA [an amendment inserted via the Finance (No 2) Act 2000 (Act 608)], any exemption obtained by the taxpayer prior to the amendment to the Finance Act should cease to have effect from YA 2003, unless an application is made and approved by the DGIR. Despite DGIR's notification, the taxpayer failed to apply for tax exemption status and it cannot be deemed as an institution/organisation under Subsection 44(6) of the ITA from YA 2003. The High Court decided that the notices of assessment for the YAs 2004, 2006, 2007, 2010, 2011, 2012 and 2013 issued on 13 March 2016 are in accordance with the ITA and are valid and enforceable.

Issue 2:

The question of retrospective effect of the amendments to the ITA does not apply in this case. The DGIR had notified the taxpayer of its need to re-apply for the tax exemption. It was not the case where notification to do so was not issued and the taxpayer was taxed for the years in question. The reliance of the taxpayer on the Interpretation Acts will not be applied here.

Issue 3:

The judicial review application was inappropriate and an abuse of the process of Court as the taxpayer had bluntly refused to resort to the appeal procedure provided under Section 99 of the ITA and file an appeal to the Special Commissioners of Income Tax within 30 days on receiving the notices of assessment.

Issue 4:

On the issue of time bar, where the assessments for the YAs 2004, 2006 and 2007 are beyond the period provided by Subsection 91(1) of the ITA, the burden of proof rests on the taxpayer to show that there is no existence of wilful fraud, negligence and wilful default, which the taxpayer failed to show [see note below]. Therefore, IRB is rightfully entitled to issue the notices of assessment for the YAs 2004, 2006, and 2007.

[*Note: In Subsection 91(3), it is stated* ***where it appears to the DGIR*** *that there is fraud, willful default or negligence of the taxpayer, the time-barred provision would not apply. This means that the DGIR must show why he thinks there is fraud, etc. on the part of the taxpayer. It is not for the taxpayer to show that there is no fraud, etc.*]

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Mudah.My Sdn Bhd (Court of Appeal) 2016

1. Whether the application for judicial review (JR) was prematurely filed by Mudah.My and whether there was in fact a decision made by IRB that would warrant a JR;

2. Whether the purchase of software was subject to royalty under Section 109 of the ITA;

3. Whether payments for technical and management services paid to Malaysian residents are subject to withholding tax under Section 109B of the ITA;

4. Whether payments for technical and management services performed outside Malaysia paid to non-residents are subject to withholding tax under Section 109B of the ITA; and

5. Whether the applicant must exhaust its remedy by way of an appeal process provided under the ITA first before approaching the court by way of a judicial review application.

Decision:
IRB's appeal to the Court of Appeal on all issues was allowed.

Issue 1:
The letter of findings issued by IRB was merely to inform the taxpayer on the initial audit findings and issues of the field audit, and thus **was not a decision** and there was no assessment made by IRB. No demand of payment for the withholding taxes from IRB strongly supported that the letter of findings was not a decision. In the absence of a decision by IRB, the application to file a JR was premature.

Issue 2:
The payments made by the taxpayer to the non-resident companies were indeed for the "right to use the software" within Malaysia where its exclusive ownership belonged to the non-resident companies. The payments fell within the definition of "royalty" under Section 2 of the ITA, hence were subject to the withholding taxes.

The definition of the word "royalty" ought to be taken in its widest sense and not be limited only to any sums or income included in Section 2 of the ITA. The word "literary works" includes computer programs and "literary works" are eligible for copyright.

The taxpayer was thus statutorily bound under Section 109(1) of the ITA to deduct from the royalty the applicable withholding tax.

Issues 3 & 4:
A perusal of all the documents submitted showed inherent discrepancies between the taxpayer's sworn affidavits which could only be resolved by way of oral evidence during an appeal before the Special Commissioners of Income Tax including the payments stated as made to Vincomm Trading Sdn. Bhd. whereas supporting documents revealed that these were payments made to Clickatell Inc. and 701 Search Pte Ltd which were non-resident companies. The Court of Appeal concluded

there were also other findings of payments made to the non-residents for which tax was deductible under Sections 109(1) and 109B of the ITA.

Issue 5:

It was also held that JR is always at the discretion of the Court but where there is another avenue or remedy open to the taxpayer it will only be exercised in very exceptional circumstances, i.e. there is shown a clear lack of jurisdiction, or a blatant failure by IRB to perform some statutory duty, or in appropriate cases a serious breach of the principles of natural justice. The taxpayer who had failed to show there were exceptional circumstances that warrant a JR should instead resort to the appeal process provided under Section 109H of the ITA.

In choosing the court before availing the remedy of appeal under Section 109H of the ITA, the taxpayer lost the opportunity to challenge IRB's decision as to whether the payments made to non-residents were indeed subject to withholding taxes under Sections 109(1) and 109B of the ITA. The taxpayer could have appealed on a question of law against a deciding order by requiring the Special Commissioners of Income Tax to state a case for the opinion of the High Court pursuant to Paragraph 34 of Schedule 5 of the ITA.

The Court of Appeal set aside the findings of the High Court as the taxpayer's JR application ought not to be allowed.

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

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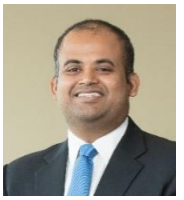

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