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TECHNICAL

Direct Taxation

TAX CASE UPDATE

Capital Allowances For Purpose built Car Park

Whether the purpose built car park is a plant in the course of the taxpayer's business and thus, whether it qualifies for capital allowance?

Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd (2012) (Court of Appeal)

Facts:

The taxpayer carried on the business of car park operation. By an agreement dated 1 October 1984, the taxpayer entered into a lease agreement with the Penang Development Corporation ("PDC") pursuant to which the taxpayer leased a piece of land from PDC for a period of 30 years. The terms of the lease agreement required the taxpayer to erect a multi-storey car park on the land known as "Komtar's Car Park".

The taxpayer expended a sum of RM10,064,676.00 on the construction of the car park. The multi-storey car park in question was constructed under a privatisation scheme of PDC, and the privatisation contract between PDC and the taxpayer provided, among other matters, that the taxpayer shall ensure that the multi-storey car park was primarily used as a car park, the sole purpose and function of which shall be to service the users and occupiers of Kompleks Tun Abdul Razak.

On 11 August 1998, the Revenue issued notices of additional assessment disallowing the taxpayer's capital allowance claim on the car park. The taxpayer disputed the Revenue's additional assessment on the ground that the construction of the multi-storey car park should qualify for capital allowance under Schedule 3 of the Income Tax Act 1967 ("**the Act**").

Issue:

Whether the purpose built car park is a plant in the course of the taxpayer's business and thus, whether it qualifies for capital allowance?

Decision:

It was not disputed that the words "machinery" and "plant" are nowhere defined in the Act. However, the categories of what constitutes "machinery" or "plant" are not closed and the matters listed in subparagraphs (1)(a), (b) and (c) of paragraph 2 of Schedule 3 of the Act merely elaborate what those words encompass without restricting their scope only to the items stated therein. The meaning to be given to the word "plant" is a question of law and the Court of Appeal adopted the following test formulated in *Yarmouth* v. *France* [1887] QBD 647 for determining if an item qualified as "plant":

"There is no definition of plant in the Act; but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, - not his stock in trade which he buys or makes for sale, but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business: see Blake v. Shaw."

The Court of Appeal explained that it was mindful of the following passage from *Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd* [1982] 2 All ER 230 which served as an apt reminder that in considering what constitutes a "plant", due consideration must be given to the particular industry concerned as well as the specific circumstances of the individual taxpayer's own business:

"The problem which the Commissioners were called upon to solve was one concerned with a 'service industry': I think this factor is important, because the question of what is properly to be regarded as 'plant' can only be answered in the context of the particular industry concerned and possibly, in light also of the particular circumstances of the individual taxpayers' own trade. …. I think that much difficulty is caused by seeking to place limitative interpretations on the simple word 'plant'. I do not think that the classic definition propounded in Yarmouth v France suggests that it is a word which is other than of comprehensive meaning - 'whatever apparatus is used by a business man for carrying on his business' – whatever the business may be …"

In the present case, the taxpayer constructed the multi-storey car park pursuant to a privatisation agreement with PDC. The terms of that agreement conferred on the 30 year lease of the land for the sole purpose of erecting a multi-storey car park to be used primarily as a car park to service the users and occupiers of Kompleks Tun Abdul Razak. The agreement also dictated that the multi-storey car park is to be built in accordance with the plans drawn up by PDC's architects, engineers and consultants. The agreement bestowed the taxpayer the right to operate the multi-storey car park for the duration of the lease and to thereafter surrender the building and land to PDC upon expiry of the lease.

From the terms of the lease agreement, it was not disputed that the taxpayer's business was providing a car park for the users and occupiers of Kompleks Tun Abdul Razak. The taxpayer's income or revenue was derived from the provision of bays to the users and occupiers of Kompleks Tun Abdul Razak to park their vehicles. Without the multi-storey car park, the taxpayer could not have generated an income from the land since the lease agreement expressly restricts the use to which the taxpayer may put the land.

The multi-storey car park was also clearly not part of the taxpayer's stock in trade. It was not something the taxpayer purchased or constructed for sale. It was something that the taxpayer used permanently for his business – at least for as long as the lease subsists. In this regard, the Court of Appeal commented that more was not needed to then conclude that the multi-storey car park was in fact an apparatus or tool the taxpayer used for carrying on its business.

The test of what passes as a 'plant' in *Yarmouth* v. *France* (supra) was coined in a general fashion to give the word the widest possible sense whereby the Court then had the foresight that a whole host of considerations must be taken into account in determining what was a 'plant' in any given set of facts. A restrictive meaning assigned to the word would have disastrous consequences to business enterprise and economic activity since the tools or apparatus of a business man for carrying on his business undergo constant changes with passing time and advancing technology.

According to the Court of Appeal, there was thus clearly a need to take a holistic approach in every case and look at the taxpayer's business in its entirety instead of taking particular facts in isolation. There was a need to refrain from viewing the taxpayer's business in a fragmented fashion when determining whether an apparatus was a 'plant'. An excellent illustration could be

found in the case of *Leeds Permanent Building Society* v. *Proctor (Inspector of Taxes)* [1982] STC 821 where the taxpayer put up some advertisement screens in the windows of the taxpayer's branch offices. The General Commissioners decided that the advertisement screens did not perform any business function but on appeal, the English High Court held that the advertisement screens were plant. The Court found that the advertisement screens were part of the apparatus employed in the commercial activities of the taxpayer's business.

It follows that the multi-storey car park that the taxpayer constructed in this case cannot be discounted as a plant solely on account of the fact that it was a large structure that can be characterised as a building. The taxpayer was a car park operator; that was its business in line with the terms of the lease agreement with PDC. In order to carry on this business, the taxpayer was required by the same agreement to construct the multi-storey car park. Once constructed, it was to be used to service the users and occupiers of Kompleks Tun Abdul Razak. The multi-storey car park was an essential component of the taxpayer's business without which the taxpayer could not have generated its revenue. In the circumstances, the Court of Appeal unanimously ruled that the Revenue's appeal was to be dismissed with cost.

The Revenue had recently withdrawn its application for leave to the Federal Court to challenge the decision of the Court of Appeal.

Members interested in this case may also refer to the judgment of Special Commissioners of Income Tax on TPL Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [Appeal No. PKCP(R)19/2004] [(2008) MSTC 3641] reported in Malaysian and Singapore Tax Cases. You may also view the judgment online at the **Resource Centre** of the Institute during working hours.

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