
TECHNICAL

Direct Taxation

TAX CASE UPDATE

Whether an offshore company which has made an election under Section 3A of the LOBATA to be taxed under the ITA is exempted from income tax on dividends received, pursuant to the Income Tax (Exemption) (No. 22) Order 2007.

[Statutory Ref. Section 3B of the Income Tax Act 1967 (ITA), Income Tax (Exemption) (No. 22) Order 2007 and Section 3A of the Labuan Offshore Business Activity Tax Act 1990 (LOBATA)]

[Positive Vision Labuan Limited v Ketua Pengarah Hasil Dalam Negeri \(KPHDN\) \(2014\) \(Court of Appeal\)](#) (Civil Appeal No: W-01-67-02/2013)

[GA Investment Limited v KPHDN \(2014\) \(Court of Appeal\)](#) (Civil Appeal No: W-01-68-02/2013)

[Avenues Zone Inc. v KPHDN \(2014\) \(Court of Appeal\)](#) (Civil Appeal No: W-01-69-02/2013)

Date of Judgment: 27 June 2014

Facts and Issues:

There were 3 appeals before the Court of Appeal (hereinafter referred to as “the Court”). The appellants are all offshore companies incorporated under the Offshore Companies Act 1990 (collectively referred to as “the appellants” in the Judgment of the Court). All the appellants are in the business of investment holding, and have their office in Labuan. They all made irrevocable elections under section 3A of the LOBATA, to be taxed under the Income Tax Act 1967 (ITA). The date of incorporation of each appellant and the dates on which they made the election are as shown below:

Name	Date of incorporation	Date of election under S3A of LOBATA
Positive Vision Labuan Limited	22.3.2011	15.6.2011
GA Investment Limited	17.3.2011	30.5.2011
Avenues Zone Inc.	16.3.2011	13.6.2011

Determination of the appeal by the Court involved the interpretation of the following legislative provisions:

1. Section 3B of the ITA which was amended by Act 683, the amendment having effect from the year of assessment (YA) 2008. Pursuant to the amendment, section 3B reads:

“3B. Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company, other than an offshore company (in this Act referred to as “chargeable offshore company”), which has made an election under section 3A of the Labuan Offshore Business Activity Tax Act 1990.”

2. Income Tax (Exemption) (No. 22) Order 2007 (“the Exemption Order”) which has effect

from the YA 2007 and subsequent years. The Order exempts dividends received by an offshore company from tax (under the ITA).

3. Section 3A of the LOBATA, (inserted by Act 683) which had effect from YA 2009 and subsequent years. Under section 3A(1), Labuan companies and Labuan entities are given the option to make an irrevocable election to be taxed under the ITA instead of the LOBATA.
4. The other statutory provisions referred to are:
 - a. section 2(3)(d) of the LOBATA;
 - b. section 2 of the ITA as amended by the Finance Act 2011 (which came into force on **11.2.2010**).

All the appellants received dividend income for YA 2011. By a letter dated 16.1.2012, the appellants' tax consultant sought confirmation from the respondent that a Labuan company which has made an election under section 3A of the LOBATA to be taxed under the ITA is exempted from income tax on dividends received, pursuant to the Exemption Order. The respondent replied on 20.6.2012 that the Ministry of Finance had decided as a matter of policy, that w.e.f **12.2.2010**, exemption from tax under the ITA was no longer available for such Labuan entities. On 2.8.2012, the respondent issued notices of assessments to each appellant for tax payable as shown below:

Name	Tax payable (RM)
Positive Vision Labuan Limited	36,754,986.00
Avenues Zone Inc.	24,650,000.00
GA Investment Limited	20,361,839.25

In an application for judicial review made to the High Court, the appellants sought the High Court's determination on whether the respondent was correct in law to disallow the tax exemption to the appellants under the Exemption Order. The High Court held that:

- a) Section 3B of ITA makes it clear that companies which have elected to be taxed under ITA are not covered by the Exemption Order;
- b) Once election is made, the applicants are no longer eligible for the exemption;
- c) There is no notification in the Gazette of the cut-off date;
- d) By virtue of Article 96 of the Federal Constitution, the respondent cannot simply fix the cut-off date which results in the appellants now being subject to tax, without at least making it an order in the Gazette;
- e) The law is clear that once an election is made, the Exemption Order no longer applies;
- f) The Exemption Order takes effect from the date of election. Prior to that date, the appellants were still entitled to get the exemption.

Consequently, the High Court quashed the decision of the respondent as stated in the letter dated 20.6.2012 to the extent that the appellants were liable to be taxed under the ITA w.e.f their respective dates of election.

Being dissatisfied with the High Court's decision, the appellants then appealed to the Court of Appeal. The issue for determination was whether the High Court (Judge) was right in ruling that the appellants are not entitled to income tax exemption provided under the Exemption Order upon their making the irrevocable election to be taxed under the ITA.

Decision:

All 3 appeals dismissed, decision of the High Court affirmed.

The following are some salient points in the grounds of judgment:

- The resolution of the issue before the Court involved the interpretation of the ITA, the LOBATA and the Exemption Order. Hence the principles of interpretation of statute was discussed at length with quotes from the Judgment of various precedent cases, among which are the following:

Cape Brandy Syndicate v. Inland Revenue Commissioners – “.. in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd. – “A subject is only to be taxed on clear words, not on ‘intendment’ or on the ‘equity’ of an Act .. What are ‘clear words’ is to be ascertained on normal principles; these do not confine courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded .. This is known as the Ramsay Principle (reference is made to Lord Wilberforce in *W.T. Ramsay Ltd v Inland Revenue Commission* [1982] AC 300). While clear words are needed.....what those words are would be interpreted in line with the purposive approach.”

Generation Products Sdn Bhd v. Majlis Perbandaran Klang – “...the court’s interpretation of the meaning of statutory words used should thus coincide with what Parliament meant to say. The first or ‘golden’ rule is to ascertain the primary and natural sense of the statutory words in their context, since it is to be presumed that it is in this sense that the draftsman is using the words in order to convey what it is that Parliament meant to say. They will only be read in some other sense if that is necessary to obviate justice, absurdity, anomaly or contradiction, or to prevent impediment of the statutory objective. It follows that **where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning.** (emphasis added)”

- The Exemption Order must necessarily be read subject to and consistent with the parent Act. The Exemption Order is clear in that it applies only to an “**offshore company**” which must be interpreted as defined under the ITA. The Court found that with effect from the date the appellants made their respective elections, the appellants were “**chargeable offshore companies**” (refer Section 3B of ITA) and were therefore no longer within the terms of the Exemption Order.
- The Court disagreed with the appellants’ submission that the Exemption Order (which makes no reference whatsoever to either section 3B of the ITA or section 3A of the LOBATA) applies to all offshore companies that come within the meaning assigned under the LOBATA. The appellants had failed to show that the Exemption Order applied to them. To adopt the interpretation suggested by the appellants would mean that Labuan companies which have elected to be taxed under the ITA could also claim exemption from tax under the ITA on the basis of the Exemption Order. This cannot be the intention of Parliament, and it was the Court’s view that such an interpretation was “absurd”.
- The Court agreed with the High Court decision that the Exemption Order no longer applied to the appellants, effective from the respective dates of election. Having considered the relevant legislative provisions, in particular, the Finance Act 2011, the Court found that the

date 11.2.2010 determined by the Ministry of Finance as the date when the Exemption Order no longer applied to “chargeable offshore company” is neither unreasonable nor contrary to the ITA.

Members may read the full [Grounds of Judgment](#) from the Official website of the Office of Chief Registrar, Federal Court of Malaysia.

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