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Direct Taxation

TAX CASE UPDATE

Exemption under S54A(1) of the Income Tax Act 1967 (ITA) in respect of "Malaysian Ships"

Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Labuan Ferry Corporation Sdn. Bhd. (High Court) (Civil Appeal No: R4-14-01-2009)

Date of Judgment: 26 March 2010

Facts:

This is an appeal against the decision of the Special Commissioners of Income Tax (SCIT) who had held that income from the operation of 3 vessels used for the carrying of vehicles/ passengers between the jetty at Labuan and Menumbuk in Sabah is entitled to exemption from income tax under S54A(1) of the ITA.

The respondent (LFC), rented 3 vessels from the state of Sabah and used them for the purpose stated above. The 3 vessels were not registered under the Merchant Shipping Ordinance 1952 (MSO) during the relevant years of assessment (YA), i.e. YA 1996 to 2001. There were profits from the operation of these vessels during the relevant years. In 2007, LFC bought over the vessels and were in the process of registration under the MSO, which imposes the legal obligation for registration of the vessels under S12 of that Ordinance.

(In the appeal before the SCIT, it was Revenue's contention that the income for the relevant years did not qualify for exemption under S54A of the ITA because the vessels were not registered under the MSO. Even if they were "Malaysian ships" the taxpayer would still not be entitled to the exemption as the vessels were used as ferries and not ships.)

Issues:

The question of law to be decided by the High Court is whether the taxpayer (LFC) is entitled to claim for tax exemption under S54A of the ITA. Specifically, deliberation of the law relates to the following:

1. S54A of the ITA which grants tax exemption to Malaysian operators of "Malaysian Ships" which are ships registered under the MSO;
2. Definition of "Malaysian Ship" found in S54(6) – defined as "*a sea-going ship registered as such under the MSO other than a ferry, barge, tug-boat, supply vessel, crew boats, lighter, dredger, fishing boat or other similar vessel";*
3. S11 of the MSO which deals with the qualifications of a Malaysian Ship;
4. S12 of the MSO which provides for the mandatory requirement of registration of Malaysian ships with the Registrar of Ships;
5. S13 of the MSO that speaks of exemptions from registration (not applicable in this case).

Decision:

Appeal allowed. Assessments confirmed.

The following are the main points from the Grounds of Judgment:

- From the outset, it was stated that the SCIT's findings that the 3 vessels were exempted from the provisions of the MSO (i.e. exempted from the requirement to be registered under the MSO) as they come under the provisions of S4 and S271 of the said Ordinance was a **misconception**. (S4(1) of the MSO states - " *This Ordinance shall not, except where specially provided and subject to the other provisions of this section, apply to ships belonging to her Majesty or to His Highness the Ruler or His Excellency the Governor of any State*.")
- Under the clear provisions S12(4) of the MSO, those ships belonging to the Government of Malaysia or any state thereof, are still subject to registration under the MSO. (Hence, even though the vessels belonged to the State of Sabah, they were not exempt from the requirement for registration under the MSO. S12(4) of the MSO states – "*The Minister may prescribe the manner in which ships or classes of ships belonging to the Government of Malaysia or any State thereof or any statutory body therein may be registered under this Ordinance*.")
- Exemption under S54A of the ITA is only available for operators of ships that are registered under the MSO. The wordings of that section in respect of this condition for exemption is very clear and unambiguous. All the 3 vessels were not registered, and the facts disclosed that they were not exempted from the requirement for registration as a Malaysian ship under the MSO. The vessel could be classified as a "Malaysian Ship" only upon registration and only then could it qualify for exemption under S54A(1) of the ITA.
- As there is no ambiguity in the interpretation of the law relevant to the issue at hand, there is no room for any other interpretation to be construed in favour of the taxpayer. (Reference made to National Land Revenue v DGIR (1993)4 CLJ 339 and Multi-Purpose Holdings Bhd v KPHDN (2006) 1 CLJ 1121). Further, the onus of proof that an assessment is excessive or erroneous is on the taxpayer, as provided under paragraph 13 of Sch. 5 of the ITA.

Members may read the full Grounds of Judgment from the Kuala Lumpur Law Courts Official website.

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