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TECHNICAL

Direct Taxation

TAX CASE UPDATE

Meaning of "cultivation of fruit" for the purpose of claiming Reinvestment Allowance

KPHDN v BINTULU LUMBER DEVELOPMENT SDN BHD

High Court in Sabah and Sarawak at Kuching
Appeal No: KCH-14-1/9-2013

Date of Judgment: 20 June 2014

Facts and Issues:

This is the appeal by the Inland Revenue against the decision of the Special Commissioner of Income Tax (SCIT) in allowing the claim of Bintulu Lumber Development Sdn Bhd ("the respondent" for reinvestment allowance (RA) for the year 2008.

The respondent was incorporated on 25 October 1995 and resident in Malaysia for tax purposes. It is engaged in the business of logging and palm oil cultivation and farming. The respondent claimed RA for the year 2008 in respect of preparatory works (clearing and preparing the ground, provision of irrigation or drainage systems and construction of access roads and bridges) and planting of oil palm trees under paragraph 1A of Schedule 7A of the Income Tax Act 1967 (ITA). The claim was disallowed by the Director General of Inland Revenue (DGIR).

The respondent appealed against the DGIR's decision to the SCIT, who found in favour of the respondent. No oral testimony was called but the parties were directed by the SCIT to file written submissions on the issue of law which was framed by the SCIT as follows:

> *"Whether the cultivation of palm oil (sic) falls within the ambit of the words "cultivation of fruit" stipulated in paragraph 9(C)* of Schedule 7A, Income Tax Act 1967."*
>
> * CTIM's Note: This is likely to be a typo. The correct reference is to paragraph 9(cc) of Schedule 7A of the ITA.

The SCIT summed up its decision as follows:

> *"Thus, in summing up, based on the dictionary meaning and other references from the Internet referred to by both sides in their respective bundles, we conclude the palm oil fruits fall within the ordinary, literal, dictionary meaning of the word "fruit." "*

The DGIR appealed to the High Court ("the Court") against the SCIT's decision.

Decision:

Appeal allowed. The grounds of decision are summarized below:

1. The relevant provisions of the law under consideration are:
   - paragraph 1A of Schedule 7A of the ITA, which provides for the deduction of RA in respect of capital expenditure in relation to an agricultural project for the purposes of "*any qualifying project referred to under subparagraph 8(c)*"; and
   - paragraph 9 (which defines "Capital expenditure" in relation to an agricultural project),

specifically, subparagraph 9(cc) which reads as follows:

(cc) cultivation of fruits;

2. On the preliminary issue of whether the decision of the SCIT is appealable, it is noted that –
   - no evidence was called in deciding the question framed by the SCIT and hence, there was no finding of primary facts by the SCIT;
   - it was a common ground that the word "fruits" in paragraph 9(cc) is unambiguous and therefore the literal interpretation should apply.
   - it was undisputed fact that the SCIT had adopted the literal interpretation of the word "fruits" by referring to dictionary meaning of the word.

   However the Court is of the view that the issue whether the conclusion reached by the SCIT in concluding that palm oil fruit is envisaged or in consonance with the intention of the legislature is a mixed question of law and fact and it is appealable.
3. The Court reviewed the submissions by both the appellant and respondent, the main points of which are as follows:

   Appellant's submission
   - On the correct approach to be taken by the Court in the interpretation of taxing statute, the SCIT relied on the case of *Palm Oil Research & Development Board Malaysia & Anor v Premium Vegetable Oil* in their decision. In seeking to find the ordinary and literal meaning of "fruit", the SCIT had referred to 3 dictionaries, (Merriam-Webster Dictionary; Oxford Fajar Advanced Learner's English-Malay Dictionary; Webster's Third International Dictionary) as well as Wikipedia.
   - Based on the plain and ordinary meaning of "fruits" as expounded by the dictionaries referred to, the fruit is fleshy seed associated structures of plant and sweet and edible in raw state. As a guide of what kind of fruits are recognized in common usage in Malaysia, reference was made to the book "Buah-Buahan Malaysia" published by Dewan Bahasa dan Pustaka, in which palm oil fruit is not listed as a fruit.
   - Various legislation relating to the palm oil industry was cited by Appellant's counsel to support the contention that the cultivation of oil palm is regulated and is commonly used as oil and part of the process or ingredient in food.
   - The SCIT's reading of palm oil fruits into paragraph 9(cc) of Schedule 7A has resulted in gross and manifest absurdity, which defeats the general ordinary meaning and the common usage as well as defeats the true intention of Parliament. It is tantamount to reading an intendment into the word "fruit".
   - The SCIT's interpretation of "fruit" is contrary to the intention of the Legislature. The intention of the Legislature and the purpose of enacting RA could be clearly seen in the Budget Speech of Year 1995. The Act as a whole clearly indicates that palm oil fruit does not fall within the category of "fruits".

   Respondent's submission
   - Revenue's contention that fruit is as commonly understood or according to common parlance is contrary to the dictionary meaning of fruit. Such alleged meaning is akin to alleged term of art and must be proved. However no such evidence has been led before the SCIT.
   - The SCIT's conclusion that the plain dictionary meaning of fruit covers all kinds of edible fruits including culinary fruits is correct. In principle as well as in logic, if something is clearly within a literal reading of a provision by Parliament, if the Parliament wants to exclude it, it would have done so expressly.
   - The SCIT's decision is not perverse to the literal rule of interpretation. Based on the meanings given in the dictionaries referred to, the palm oil fruit is (among the other

descriptions) "a succulent plant part", "the fleshy seed-bearing part of a plant used as food". It is the SCIT's finding that palm oil fruits are edible raw as well as tropical culinary fruit and must therefore, be "fruits" within paragraph 9(cc) of Sch. 7A.

4. The Court agrees that in accordance with the dictionary meaning of fruit, the palm oil fruit, being an edible part of the oil palm tree, does point to fruit per se. However, it must be asked whether the reading of the SCIT of palm oil fruits into paragraph 9(cc) of Sch. 7A has resulted in gross and manifest absurdity, which defeats the general ordinary meaning and the common usage as well as defeats the true intention of Parliament.
5. The Court can take judicial notice that 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. The palm oil fruits are not sold in the markets in Malaysia as a fruit to be eaten raw or as culinary fruit.
6. In Malaysia, oil palms are cultivated as a commercial plant for the production of oil, which is used as an ingredient in food and not as food per se. The commercial cultivation of oil palm in Malaysia is evidenced by the various legislation that have been enacted to regulate the palm oil industry (e.g. Palm Oil (Research Cess) Act 1979, Palm Oil Registration and Licensing Authority (Corporation) Act 1976, etc.)
7. "Fruits" in the oil palm tree is a nomenclature that refers to the fruit bunch harvested from the oil palm tree which is processed for palm oil. It, however, cannot be commonly considered as fruit in the ordinary and plain meaning as understood in common parlance. In the Court's view, the SCIT added intendment to the word "fruits" to include palm oil fruits, thus resulting in gross and manifest absurdity contrary to the intention of Parliament.
8. By referring to the Budget Speech (for Budget) Year 1996, it is clear that the intention of Parliament in enacting paragraph 9(cc) of Schedule 7A, is to encourage/stimulate food production activities by granting RA for activities such as "the cultivation of rice, corn, fruits and vegetables, rearing of livestock and aquaculture."
9. In Malaysia, it is common knowledge that oil palm is grown commercially, and the palm oil industry was losing competitiveness to the neighbouring countries. The respondent's submission that the DGIR's restrictive approach (of excluding oil palm from RA) would be "deadly" to the palm oil industry in Malaysia may sound persuasive. Nevertheless *"it cannot be over-emphasized that the intention of the Parliament in giving RA 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…."*
10. In the Court's view, if the Parliament had intended to include palm oil fruits under "fruits" in paragraph 9(cc) of Sch. 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..*" and therefore not within the ambit of that paragraph.

Members may read the full Grounds of Judgment at the Institute website and the LHDNM website.