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TECHNICAL

Direct Taxation

TAX CASE UPDATE

Reinvestment allowance – Meaning of "qualifying project".

BUDI NASIB SDN BHD v KPHDN

High Court in Sabah and Sarawak at Kuching
Application For Judicial Review
No. KCH-13NCvC-17/8-2016

Date of Judgment: 11 April 2017

Facts and Issues:

Budi Nasib Sdn Bhd ("the Taxpayer") was carrying on the business of oil palm cultivation. The Taxpayer filed an application for judicial review following the decision of the respondent ("Revenue") not to allow the Taxpayer's claims for reinvestment allowance (RA) made under para. 1A of Sched. 7A of the Income Tax Act 1967 (ITA). The claims were made for the years of assessment (YA) 2006 to 2008, and for the subsequent YA until 2013. The Revenue's decision relating to the former was conveyed to the Taxpayer on 4.11.2013, and on 23.9.2015 for the latter, in respect of YA 2010 to 2013, but not for YA 2009 where no decision was conveyed to the Taxpayer. The Taxpayer had filed appeals to the Special Commissioners of Income Tax (SCIT) against both decisions (on 25.11.2013 and 2.10.2015 respectively). However, both appeals have yet to be heard and the Taxpayer filed this action for extension of time, and if granted, for leave to review the rejection of its claim for RA.

Order 53r3(6) of the Rules of Court 2012 stipulates that an application for judicial review must be made within 3 months from the date when the grounds of application first arose, or when the decision is communicated to the applicant, but under sub rule (7), the court has the discretion to extend the time.

(All provisions cited below are from the ITA unless otherwise stated.)

Decision:

The notice of application was dismissed. The grounds of the decision are summarized below:

1. The Court noted that "(t)*his action was filed on 30.8.2016, way out of the prescribed timeline*" but the Taxpayer contended that there were very good reasons for the delay, which would justify the grant of the notice of application dated 30.8.2016.
2. The Court also noted that "*it is trite law that in exercising its discretion to grant an extension of time both the length of the delay and the reason(s) for it must be considered*….(but*) the delay here…… is not favourable to the applicant because it is not just days or a few months but even years (in respect of the first impugned decision).*" Thus "(g)*iven that rather extreme delay….the reason(s) for it must be exceptionally good for* (the Judge) *to allow the*

application…"

3. The Taxpayer's claim for RA was based on "…capital expenditure in relation to an agricultural project". The kinds of expenditure that qualify are listed under para.9 (a) to (g) of Sched. 7A for activities which include "cultivation of fruits" (para. 9 (cc), Sched. 7A). In Bintulu Lumber's case the SCIT's decision that the cultivation of oil palm fell within the meaning of "cultivation of fruits" was overruled by the High Court (case no. KCH-14-1/9-2013), and this decision was affirmed by the Court of Appeal on 20.4.2016. The application for leave to appeal to the Federal Court was dismissed on 8.2.2017.

4. The Court noted that "…*the central issue in the disputes in these two cases* (the Bintulu Lumber case and the present case) *is exactly the same…"* Although the dismissal of leave application by the Federal Court (in Bintulu Lumber's case) was "*on a point of jurisdiction*"…"*the unavoidable fact is that the said merit* (whether palm oil cultivation fell under "cultivation of fruits") *has been decided by an appellate court i.e. the Court of Appeal. It is a decision* (that the Judge) *is bound by the doctrine of stare decisis to follow…"* This leads to the conclusion that "*in the face of such a clear and express outcome of the leave application…..it would be terribly foolhardy for* (the Judge) *to waste everybody's time and resources to pursue and/or defend an outcome which is a foregone conclusion or exert ourselves in an exercise of futility."*

5. A second reason for not granting the extension of time and the leave sought for, is the clear dicta from the superior courts in the 2 following cases –
   - Government of Malaysia and Anor v Jagdis Singh [1987] CLJ (Rep)110 (Supreme Court)
   - Ta Wu Realty Sdn Bhd v KPHDN & Anor [2008] 6CLJ 235 (Court of Appeal)

   - which established that an aggrieved taxpayer has to exhaust the appeal procedure in the ITA and not to resort to judicial review to quash the impugned decision of the tax authority.

6. Reference was also made to KPHDN v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1AMR 209; [2017] 1 MLJ 563, where it was held that the respondents therein have "circumvented" the appeal process to the SCIT, and because there was no such appeal, "*the court must accept certain facts and conclusion as not reversible*…" Based on that case, the Court declared that, in the present case, "*the merits of the decision of the respondent on the allowance* (RA*) could not be challenged as stated in Alcatel's case (supra) and is not open to challenge by virtue of Bintulu Lumber's case (supra)*", and "…*this fact adds to the hopelessness of allowing the application….*"

7. In this case, it is a fact that the Taxpayer had filed an appeal to the SCIT and it should have proceeded with that appeal and allowed it "*to go through its own natural process…..all the way to the Court of Appeal….Awaiting the outcome of Bintulu Lumber's decision , all the way up to the Federal Court may be a good reason to apply for a stay of the hearing of the appeal before the SCIT but…it is not good justification for circumventing that appeal process by filing this application way out of the timeline prescribed …."*

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

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