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PREMIER TAX EVENT OF THE YEAR
NATIONAL TAX CONFERENCE
2018

16 & 17 JULY 2018 | MONDAY & TUESDAY
KUALA LUMPUR CONVENTION CENTRE

“Taxation in a Changing Economy”

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16 & 17 JULY 2018 | MONDAY & TUESDAY
KUALA LUMPUR CONVENTION CENTRE

DAY 2 : 17 JULY 2018
UPDATE OF RECENT TAX
CASES

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Civil Recovery of Taxes Notwithstanding Appeal

Civil Recovery

- Pay first and appeal later?
- Summary judgment or full trial?
- Stay of proceedings
- Stay of execution

Civil Recovery

Section 106 of the ITA

“(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

(2) ...

(3) In any proceedings under this section, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103(1A), (3), (4), (5), (6), (7) or (8).”

Civil Recovery

Section 142(1) of the ITA

“In a suit under section 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.”

Civil Recovery

Kerajaan Malaysia v IH Sdn Bhd
(BA-21NCVC-63-09/2017) - Ongoing

Overview

- This is an RPGT vs income tax case. In addition to the substantive issue, there are also civil recovery proceedings to recover the tax.
- The taxpayer acquired land and as the landowner, entered into a JV with a developer to build and develop a mixed-use development.
- The taxpayer never sold any of its entitlement units from the development and actively carries on a rental business.

Civil Recovery

Kerajaan Malaysia v IH Sdn Bhd
(BA-21NCVC-63-09/2017) - Ongoing

Overview (cont.)

- The taxpayer filed RPGT returns in respect of the JV transaction.
- IRB then decided to regard the taxpayer as conducting a business of selling property and raised income tax assessments against the taxpayer.
- The Government initiated civil recovery proceedings against the taxpayer in relation to income tax assessed against the taxpayer.
- The Government applied for summary judgment.

Civil Recovery

Kerajaan Malaysia v IH Sdn Bhd
(BA-21NCVC-63-09/2017) - Ongoing

Overview (cont.)

- The taxpayer opposed the summary judgment application on the grounds that there were triable issues, namely:
 - Whether the assessments are null and void – IRB did not indicate which particular provision of the ITA the taxpayer is liable to be taxed under
 - Whether the assessments are time barred – the IRB had not alleged that any of the exceptions to the time bar applies

Civil Recovery

Kerajaan Malaysia v IH Sdn Bhd
(BA-21NCVC-63-09/2017) - Ongoing

Overview (cont.)

- The taxpayer argued that section 106(3) of the ITA is not applicable here as the taxpayer is not entering any plea that the amount of tax is “excessive” or “incorrectly assessed”. Instead, the taxpayer is questioning the legality of the assessment.
- The High Court agreed with the taxpayer and dismissed the application for summary judgment.

Civil Recovery

Kerajaan Malaysia v IH Sdn Bhd
(BA-21NCVC-63-09/2017) - Ongoing

Overview (cont.)

- The High Court held that there are triable issues in this case. There seems to be uncertainty on which section of the ITA the IRB is replying on to tax the taxpayer. Further, the Plaintiff has to prove that there has been fraud, wilful default or negligence.
- It was also held that these triable issues are not on quantum but on whether or not the IRB has the power to raise the assessments.
- The Government has appeal against the decision to the Court of Appeal.

Civil Recovery

Kerajaan Malaysia v IH Sdn Bhd
(BA-21NCVC-63-09/2017) - Ongoing

Comments

- In this case, it was not pleaded in the Statement of Claim that any of the exceptions to the time bar applies in this case. No evidence was adduced at the summary judgment stage.

Civil Recovery

Kerajaan Malaysia v Mudek Sdn Bhd
(2017) MSTC 30-149

Decision

- RPGT case.
- Taxpayer argued that the sale and purchase agreement was not completed because the purchaser did not fulfil its obligations under the agreement. Therefore, there was no “disposal” or “chargeable gain”.
- High Court allowed the government’s application for summary judgment. However, the Court of Appeal allowed the taxpayer’s appeal. Court of Appeal held that the RPGT Act will only be triggered if there is a “disposal” and this was a triable issue.

Civil Recovery

Kerajaan Malaysia v Mudek Sdn Bhd
(2017) MSTC 30-149

Decision (cont.)

- The Federal Court disagreed with the Court of Appeal.
- The taxpayer should have lodged an appeal to the SCIT against the assessments. Since no appeal was lodged, the issues raised by the taxpayer cannot be raised as triable issues to oppose the IRB's application for summary judgment.

Civil Recovery

Kerajaan Malaysia v Mudek Sdn Bhd
(2017) MSTC 30-149

Comments

- Does this mean that if a taxpayer files an appeal to the SCIT, the taxpayer can raise triable issues to oppose an application for summary judgment?
- Is the principle of “pay tax first, appeal later” a rigid one that is applicable in all cases?
- Do taxpayers have any other recourse?

Application for Judicial Review vs Appeal to the SCIT

JR vs SCIT

SBI Sdn Bhd v KPHDN
(NA-25-13-10/2017) - Ongoing

Overview

- The taxpayer obtained an advance ruling that confirmed that the sale of certain intangible assets were not subject to income tax.
- The IRB departed from the advance ruling and taxed the sum received by the taxpayer for the sale of the intangible assets.
- High Court granted leave to the applicant to commence judicial review proceedings.

JR vs SCIT

SBI Sdn Bhd v KPHDN
(NA-25-13-10/2017) - Ongoing

Overview (cont.)

- The taxpayer argued that there are exceptional circumstances in the case, namely that the Director General failed to carry out his statutory duty to apply the advance ruling and that the decision to depart from the advance ruling is ultra vires the ITA.
- Although the IRB did not object to leave at the leave hearing, the IRB has brought up the alternative remedy point at the substantive stage.
- The matter is still pending the High Court's decision.

JR vs SCIT

SBI Sdn Bhd v KPHDN
(NA-25-13-10/2017) - Ongoing

Comments

- Can the IRB bring up the alternative remedy point at the substantive stage if the IRB did not object to leave being granted? Consider the principle of judicial estoppel.
- Although the main issue in this case is whether the Director General can depart from the earlier advance ruling, can the issue of the taxability of the sum (whether or not there was an advance ruling) be ventilated in the High Court or should this matter be reserved for the SCIT?

JR vs SCIT

SBI Sdn Bhd v KPHDN
(NA-25-13-10/2017) - Ongoing

Comments (cont.)

- In this case, as part of the reliefs sought by the taxpayer in its application for judicial review, the taxpayer is claiming interest.

JR vs SCIT

IBM Malaysia Sdn Bhd v KPHDN (2018) MSTC 30-157

Decision

- High Court allowed the taxpayer's application for judicial review against the advance ruling the taxpayer obtained which was unfavourable.
- Advance rulings are amenable to judicial review.
- Notwithstanding the averment that an advance ruling is a mere opinion, an advance ruling is final and binding on both the taxpayer and the IRB.

JR vs SCIT

IBM Malaysia Sdn Bhd v KPHDN
(2018) MSTC 30-157

Decision (cont.)

- There is no alternative remedy available to the taxpayer since no assessment was made by the IRB.
- The only remedy available to the taxpayer is by way of judicial review. Although the Advance Ruling Rules state that no appeal shall be lodged against any advance ruling, this is not a bar to judicial review.

JR vs SCIT

IBM Malaysia Sdn Bhd v KPHDN
(2018) MSTC 30-157

Comments

- There is now precedent that taxpayers can challenge unfavourable advance rulings by way of judicial review.
- Will more taxpayers use this approach now?
- Will this decision be overturned by the Court of Appeal?

Capital Allowance & Reinvestment Allowance

CA & RA

KPHDN v Kualiti Alam Sdn Bhd (2017) MSTC 30-139

Decision

- High Court held that the taxpayer, who was in the business of waste disposal and treatment, was not manufacturing or processing any “product”. Thus, the taxpayer was not entitled to claim reinvestment allowance.
- The term “product” used in the definition of “qualifying project” in Schedule 7A of the ITA connotes that the end-result must be something that has value which can be realised by way of sale to customers.

CA & RA

KPHDN v Kualiti Alam Sdn Bhd (2017) MSTC 30-139

Comments

- The rule of interpretation is useful to note.
- Where the provision in question is one that provides relief, the Court is not bound to construe any ambiguity in favour of the taxpayer.
- This does not mean that a provision giving relief must be construed against a taxpayer.

CA & RA

Quality Concrete Sdn Bhd v KPHDN (KCH-14-1/9-2015)

Comments

- The provisions of Schedule 7A of the ITA have been repeatedly amended. Taxpayers can acquire a vested right in certain circumstances - see **Malaysian Assurance Alliance Berhad v KPHDN (W-01-211-06/2014)**.
- Is the High Court's decision binding since there are no grounds of judgment from the Court of Appeal?

Relief in respect of error or mistake (section 131 of the ITA)

Section 131 of the ITA

KPHDN v Rapid Growth Sdn Bhd
(2017) MSTC 30-148

Decision

- The taxpayer filed an application to the Director General under section 131 for relief in respect of reinvestment allowance on the grounds there was an error or mistake in its tax assessment.
- The taxpayer claimed that it did not include certain items in its claim for reinvestment allowance because it complied with the IRB's public ruling which states that reinvestment area can only be claimed for the production area of new buildings.

Section 131 of the ITA

KPHDN v Rapid Growth Sdn Bhd
(2017) MSTC 30-148

Decision (cont.)

- The taxpayer applied for relief after becoming aware of SCIT and judicial decisions relating to RA claims (e.g. Success Electronics, Firgos, OKA Concrete, Marigold).
- The DG rejected the taxpayer's application.
- The High Court held that the DG was entitled to reject the application pursuant to section 131(4) of the ITA.

Section 131 of the ITA

KPHDN v Rapid Growth Sdn Bhd
(2017) MSTC 30-148

Decision (cont.)

- “Practice of the Director General” includes public rulings.
- By the purposive construction of section 131 of the ITA, the policy intended by the legislature was for taxpayers to be proactive in making challenges against public rulings.
- Reactive taxpayers such as the taxpayer in this case was estopped by section 131(4) from obtaining relief.

Section 131 of the ITA

KPHDN v Rapid Growth Sdn Bhd
(2017) MSTC 30-148

Comments

- The High Court said that proactive challenges relating to the interpretation of Schedule 7A took place successfully in Success Electronics.
- How proactive do taxpayers need to be?
- In Success Electronics, the IRB reduced the RA claims and the taxpayer appealed against this. Was this proactive or reactive?

Section 131 of the ITA

KPHDN v Rapid Growth Sdn Bhd
(2017) MSTC 30-148

Comments (cont.)

- Can a taxpayer enjoy the fruit of someone else's litigation?
- If a taxpayer has not paid the tax, can the taxpayer raise this as a triable issue at civil recovery proceedings?
- Consider the application for extension of time to file an appeal to the SCIT via Form N. If the application is not allowed, the taxpayer can consider applying for judicial review.

Section 131 of the ITA

Struktur Klasik Sdn Bhd v KPHDN (PKCP(R) 292/2013)

Comments

- The failure was in discharging the evidential burden. This case does not have any precedent value on the substantive issue.
- A similar issue occurred in **Sentimas Sdn Bhd v KPHDN (WA-14-2-01/2017)** in relation to the deductibility of expenses.

RPGT vs ITA

RPGT vs ITA

Insaf Tegas Sdn Bhd v KPHDN
(2017) MSTC 30-141

Decision

- The High Court held that the disposal of land by the taxpayer was a disposal of stock in trade.
- The taxpayer's intention from the onset of the purchase of the land was for commercial development. This intention changed following unfavourable market conditions where the land was assigned to a 3rd party pursuant to the taxpayer's debt settlement exercise.
- Court effectively disregarded the change in intention.

RPGT vs ITA

Insaf Tegas Sdn Bhd v KPHDN
(2017) MSTC 30-141

Comments

- What if a taxpayer buys a land for investment holding purposes but later changes its intention?
- Would the Courts follow the original intention?
- When do the provisions on withdrawal of stock apply?

RPGT Assessment on the Acquirer

Assessing the Acquirer

Country Heights Holdings Berhad v KPHDN
(W-01(A)-202-05/2016)

Decision

- The **ACQUIRER** was assessed to RPGT under section 16(1) of the RPGT Act after the time bar period.
- The High Court held that the exceptions to the time bar in the RPGT Act did not apply to an acquirer.

Assessing the Acquirer

Country Heights Holdings Berhad v KPHDN
(W-01(A)-202-05/2016)

Comments

- Section 15(2) of the RPGT Act:

*“The Director General, where it appears to him that a **person chargeable with the tax** has been guilty of any form of **fraud or wilful default** in connection with or in relation to the tax, **may at any time make and assessment in respect of that person...**”*

Assessing the Acquirer

Country Heights Holdings Berhad v KPHDN

(W-01(A)-202-05/2016)

Comments (cont.)

- Consider section 91(3) of the ITA:

“The Director General where it appears to him that –

*(a) any form of **fraud or wilful default** has been committed **by or on behalf of any person**; or*

*(b) any person has been **negligent**,*

*in connection with or in relation to tax, **may at any time make an assessment in respect of that person...***

Assessing the Acquirer

Country Heights Holdings Berhad v KPHDN (W-01(A)-202-05/2016)

Comments (cont.)

- 2 significant differences between section 91(3) of the ITA and section 15(2) of the RPGT Act:
 - Only fraud or wilful default are covered under the RPGTA. Negligence is not a ground for opening the time bar for RPGT purposes.
 - Under the RPGT Act, fraud or wilful default must be by the person chargeable with the tax. The ITA is wider in that fraud, wilful default or negligence can be committed by any person and not just the taxpayer.

Assessing the Acquirer

Country Heights Holdings Berhad v KPHDN (W-01(A)-202-05/2016)

Comments (cont.)

- Civil debt recovery was also commenced in this case. The Court of Appeal agreed with the taxpayer that summary judgment should not be granted and the Federal Court refused to grant the IRB leave to appeal.
- Again, the Courts are starting to show a reluctance to mechanically grant summary judgment in tax cases.

Deductibility of ESOS Costs

ESOS Costs

A Sdn Bhd v KPHDN

(PKCP(R) 72-74/2014) - Ongoing Decision

- SCIT held that the costs incurred by the taxpayer in relation to its stock based compensation package for employees are eligible for deduction under section 33(1) of the ITA.
- The taxpayer argued that the stock based compensation package offered to its employees was a reward for the employees services. The taxpayer had incurred costs to grant the employees the stock based compensation.
- The taxpayer drew similarities to other types of non-monetary compensation granted to employees such as accommodation rental and car rental.

ESOS Costs

A Sdn Bhd v KPHDN

(PKCP(R) 72-74/2014) - Ongoing

Decision (cont.)

- The taxpayer also argued that the expenses incurred are not capital in nature. This is because although the taxpayer made payment for the stocks or stock options, the stocks or stock options were never acquired by the taxpayer nor was the taxpayer ever the owner of the stock or stock options.
- The employees were the ones to acquire the asset and the taxpayer is merely the payer.

ESOS Costs

A Sdn Bhd v KPHDN

(PKCP(R) 72-74/2014) - Ongoing

Decision (cont.)

- There is a real cost incurred by the taxpayer and it is not mere accounting entries. The stock offered to the employees are not the taxpayer's but is instead, its holding company's stock.
- There is a value attached to the stock and the taxpayer's holding company is reimbursed by the taxpayer for the value of the stocks issued to the taxpayer's employees. There is a legal liability to pay the reimbursement.

ESOS Costs

A Sdn Bhd v KPHDN

(PKCP(R) 72-74/2014) - Ongoing

Decision (cont.)

- The IRB tried to rely on paragraph 10 of the Public Ruling 11/2012: Employee Share Scheme Benefit which provides that:
 - When a company fulfils its obligations under an employee share scheme using newly issued shares of its own company, the share issue merely involves a movement in the company's share capital account. Although a charge is made to the P&L as staff costs, the company did not incur actual cost that is wholly and exclusively incurred in the production of income.
 - A company that offers newly issued shares of its holding/subsidiary company to its employees under an employee share scheme will not be allowed deductions for the costs related to such new shares.

ESOS Costs

A Sdn Bhd v KPHDN

(PKCP(R) 72-74/2014) - Ongoing

Decision (cont.)

- The taxpayer submitted that the IRB's view in paragraph 10 of PR 11/2012 is erroneous in light of persuasive case laws which have acknowledged that there is a cost involved where shares/stocks or share/stock options are granted to employees and such costs are deductible expenses to the company issuing the shares.

ESOS Costs

A Sdn Bhd v KPHDN

(PKCP(R) 72-74/2014) - Ongoing

Comments

- The IRB has appealed against this decision to the High Court.

Income vs Capital

Income vs Capital

KPHDN v United Malacca Berhad
(2017) MSTC 30-140

Decision

- The High Court held that late payment charges and reimbursement the taxpayer received for retrenchment benefits as compensation for compulsory acquisition was not taxable.
- The purpose for which late payment charges were imposed was to account for the accretion to capital of the value of the compulsorily acquired land between the time the land was acquired and the time compensation was paid.

Income vs Capital

KPHDN v United Malacca Berhad
(2017) MSTC 30-140

Decision (cont.)

- The fact that the late payment charges were expressed or calculated as a % of the principal value did not itself mean that those charges were in the nature of income. The true characterisation would depend on the nature of the underlying debt, obligation or asset.
- The underlying asset was land, which was capital in nature. Therefore the late payment charges would follow the characterisation of the land.

Income vs Capital

KPHDN v United Malacca Berhad
(2017) MSTC 30-140

Decision (cont.)

- The reimbursement of retrenchment benefits was not in the nature of income – it was simply a payment for actual expenditure incurred in order to make the taxpayer whole.
- The taxpayer was not obtaining “income” from the Land Administrator. It was merely being repaid the amount of an expenditure that had been incurred as a necessary consequence of the compulsory acquisition.

Income vs Capital

KPHDN v United Malacca Berhad
(2017) MSTC 30-140

Decision (cont.)

- Based on the true construction of section 22(2) of the ITA, a reimbursement would only be taxable as income in the hands of the taxpayer if the amount reimbursed had been deducted when determining gross income.

Income vs Capital

KPHDN v United Malacca Berhad
(2017) MSTC 30-140

Comment

- Just because a large sum is received by a company doesn't automatically make it taxable. One has to determine the characteristics of the receipt – see **MSE Sdn Bhd v KPHDN (2015) MSTC 10-049** where a receipt of RM 9,492,500 was accepted to be an ex-gratia receipt which is not taxable.

Powers of the IRB

Powers of the IRB

Bar Malaysia v KPHDN
[2018] MLJU 296

Decision

- There were complaints from lawyers that IRB officers have been carrying out raids on law firms to conduct audit of their client's account and insisting to have sight of the relevant accounting books and records
- High Court held that the IRB cannot carry out raids on law firms to conduct audit of the law firms' clients' account and to insist to have sight of the relevant accounting books and records.

Powers of the IRB

Bar Malaysia v KPHDN
[2018] MLJU 296

Decision

- The IRB cannot be allowed to use the ITA as an instrument of fraud purportedly to fish for information on the clients of law firms.
- Fishing expedition by the IRB has been successfully challenged.

Powers of the IRB

Bar Malaysia v KPHDN
[2018] MLJU 296

Decision

- Section 142(5)(b) of the ITA, at most, only has the effect of removing privilege in respect of any book, account, statement or other records prepared or kept by “practitioners” such as tax accountants and tax agents and it does not extend to “advocates and solicitors”.
- Parliament had clearly used different words as it recognised that “practitioner” and “advocate and solicitor” are different persons.

Powers of the IRB

Bar Malaysia v KPHDN
[2018] MLJU 296

Comments

- Weigh the risk of the IRB taking action against you for non-compliance vs your client bringing an action against you for wrongful disclosure.

THANK YOU!

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