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PREMIER TAX EVENT OF THE YEAR
NATIONAL TAX CONFERENCE
2018

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

DAY 2 : 17 JULY 2018

TOPIC 7 : UPDATE OF RECENT TAX CASES

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Senior Revenue Counsel
Inland Revenue Board of Malaysia

STATISTICS – TAX CASES AS AT JUNE 2018

ITEMS	SCIT	HIGH COURT	COURT OF APPEAL	FEDERAL COURT
BALANCE B/F	746	58	19	3
CASES RECEIVED	174	26	15	3
SUB-TOTAL	920	84	34	6
CASES DECIDED/ SETTLED	90	29	11	1
TOTAL	830	55	23	5

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KUALA LUMPUR CONVENTION CENTRE

REINVESTMENT ALLOWANCE & CAPITAL ALLOWANCE

FACTS

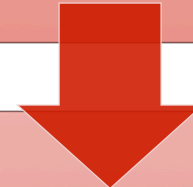
- 1 Business activity of collecting, storage, treatment and disposal of scheduled waste (prescribed under Environment Quality Act 1974)
- 2 Upgraded/purchased following plant and machinery for expansion, modernisation and automation of business:
 - incineration plant
 - physical/chemical treatment plant
 - laboratory equipment/instruments
 - leachate treatment plant
- 3 Claimed reinvestment allowance (RA) on the plant/machinery including mini-incinerators and additional landfill cells on the plant
- 4 RA claim disallowed by the Director General of Inland Revenue (DGIR)

ISSUE

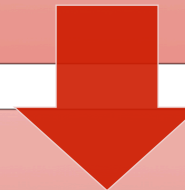
- ☐ Cost on plant and machinery - eligible for claim of RA under Sch 7A of the Income Tax Act 1967 (ITA)

COURT'S DECISION

**Special Commissioners of Income Tax (SCIT) –
Appeal by Taxpayer allowed**



High Court – Appeal by DGIR allowed



Court of Appeal – Appeal by Taxpayer dismissed

DECISION: SCIT

- ☐ YAs 2005 to 2007 - treatment and eventual transformation of hazardous and toxic waste into inert waste amounted to “processing” under para 8(a) of Sch 7A of ITA
- ☐ YA 2011 - activity came within the definition of “manufacturing” under para 8(a) of Sch 7A of ITA
- ☐ Process applied to the scheduled waste resulted in a “product” under para 8(a) of Sch 7A of ITA

DECISION: HIGH COURT

- ☐ Capital improvements not in relation to any product to enable the claim for RA
- ☐ A prerequisite that the Taxpayer either manufactured or processed a “product”
- ☐ Activity undertaken was a subtractive process. The word “product” in para 8(a) of Sch 7A of ITA implied an additive process where value be added to existing matter or substance

FACTS

- 1 Business activity of manufacturing and supplying ready-mixed concrete (RMC)
- 2 Set up plants for the production and sale of RMC at various places
- 3 Plant set up components were constructed and set up in compliance with specific plans to be used to support the batching plant

FACTS

4 Capital expenditures claimed for the following allowances:

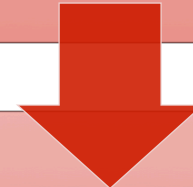
CA/IBA/ Infrastructure Allowance	RA	
Plant set up cost	<ul style="list-style-type: none">- Assets acquired under hire purchase- Plant set up cost- Cement store- Electronic weigh bridge- Concrete mixer drum	<ul style="list-style-type: none">- Compression test machine- Weigh bridge- Mixer trucks- Concrete mixer- Computer system

ISSUES

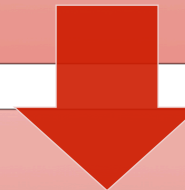
- ☐ Cost of plant set up - eligible for claim of capital allowance (CA)/ industrial building allowance (IBA) under Sch 3 of ITA or alternatively qualified for infrastructure allowance under S.41B of Promotion of Investments Act 1986 (PIA)
- ☐ Cost of assets acquired including set up costs, mixer trucks and cement store - eligible for claim of RA under Sch 7A of ITA
- ☐ Penalty - justified or bad in law

COURT'S DECISION

SCIT – Appeal by Taxpayer dismissed



High Court – Appeal by Taxpayer allowed



Court of Appeal – Appeal by DGIR allowed

DECISION: SCIT

Appeal by Taxpayer disallowed on claim for CA:

- ☐ Works of the plant set up are preliminary in nature and involved foundation works at the place where RMC plant will be erected
- ☐ Not an apparatus use in manufacturing of the RMC. Actual apparatus for producing RMC are the batching plant
- ☐ A premise where RMC was manufactured and not a plant
- ☐ Not eligible for claim of CA due to expenditure incurred exceeding 10% of the aggregate of the qualifying plant expenditure. No evidence to challenge the material fact

DECISION: SCIT

Appeal by Taxpayer disallowed on claim for IBA:

- ☐ Plant set up including earthwork and roadwork not a structure under definition of “building”
- ☐ Expenditure incurred similar to preparing, cutting, tunnelling or levelling land to prepare a site for installation of machinery or plant to be used for business under para 67 of Sch 3 ITA
- ☐ Not eligible for claim of IBA due to expenditure incurred less than 75% of the aggregate costs of the plant. No evidence to challenge the material fact

DECISION: SCIT

Appeal by Taxpayer disallowed on claim for infrastructure allowance:

- ☐ Plant set up showed more of preparation work for plant site
- ☐ Not fall within the ambit of construction nor reconstruction, extension or improvement of any permanent structure
- ☐ Not within definition of “infrastructure” under S41A PIA

DECISION: SCIT

Appeal by Taxpayer disallowed on claim for RA:

- ☐ Asset acquired under hire purchase in 1998 and 1999 but claimed in YA 2001 and 2002 were not the years in acquisition for RA purposes
- ☐ Plant set up cost related to cost of shifting or relocation of plant to a new site and not incurred for expansion, modernization or automation of plant

DECISION: SCIT

Appeal by Taxpayer disallowed on claim for RA:

- ☐ Mixer truck merely a medium maintaining the liquidity of the produced RMC and transporting of RMC but did not involve in the manufacturing of RMC for purposes of expansion, modernisation or automation of plant
- ☐ Cement store merely used for storing cement and not for expansion, modernisation or automation of plant

DECISION: SCIT

- ❑ Discretion exercised to impose penalty under S.113(2) of ITA

DECISION: HIGH COURT

Appeal by Taxpayer allowed on claims for CA and RA:

- ☐ Reasoning by SCIT contradicted with proved facts
- ☐ SCIT misdirected on the law and the interpretation of the law on the words 'plant', 'premise' and 'building' in the context of the process of manufacturing RMC
- ☐ No necessity to consider on qualification for infrastructure allowance upon allowing claims for CA and RA

DECISION: HIGH COURT

- ☐ No finding by SCIT on submission of incorrect return or giving incorrect information to warrant imposition of penalty

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KUALA LUMPUR CONVENTION CENTRE

APPLICATION FOR RELIEF UNDER S.131 OF ITA

FACTS

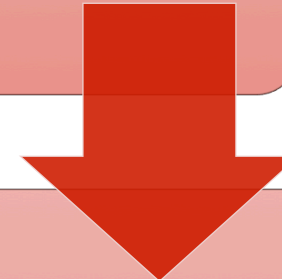
- 1 Business activity of a property developer and cultivation of oil palm
- 2 Acquired a piece of land and recorded as fixed assets in the balance sheet
- 3 Paid initial planning development fee and land was reclassified to development expenditure which subsequently disposed off
- 4 Made an application under S.131 of ITA due to error or mistake for wrongly declared proceeds from disposal of land in the tax return as trading income and not capital gain

ISSUES

- ☐ Declared proceeds from disposal of land in the tax return as subjected to ITA instead of Real Property Gains Tax Act 1967 (RPGTA) - Error or mistake under S.131 of ITA
- ☐ Proceeds from disposal of land - assessed under RPGTA or ITA

COURT'S DECISION

SCIT – Appeal by Taxpayer dismissed



High Court – Appeal by Taxpayer dismissed

DECISION: SCIT

- ☐ Failed to prove any error or mistake
- ☐ Error or mistake concerned an issue of fact
- ☐ Classification from a business income to capital receipt from sale of land was not error or mistake
- ☐ Proceeds from the disposal of land constituted a business income

FACTS

- 1** Business activity of manufacture and sales of plastic air freshener and plastic parts
- 2** RA claimed on items in the production area of new buildings in compliance with Public Ruling (PR) No.2/2008
- 3** Filed an application under S.131(1) of ITA for relief to claim RA on certain items on grounds of error or mistake upon becoming aware of judicial decisions relating to RA
- 4** Application was rejected under S.131(4) of ITA by the DGIR

DISPUTED ITEMS

- | | |
|--|---|
| <ul style="list-style-type: none">- Lobby- Administrative office- Walkway- Canteen- Surau- Toilet- Filing production- Injection moulding production | <ul style="list-style-type: none">- Assembly production- Warehouse- Utility building consisting of guard house- Switch room- Production waste depot- Crushing room |
|--|---|

ISSUES

- ☐ Claim of RA - entitlement to claim for items in the production area
- ☐ Relief under S.131(1) of ITA - applicable for claim of RA under Sch 7A of ITA
- ☐ Application for relief under S.131(1) of ITA - legal basis for rejection

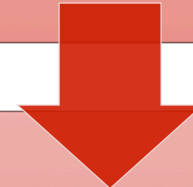
RAPID GROWTH TECHNOLOGY SDN BHD v. KPHDN

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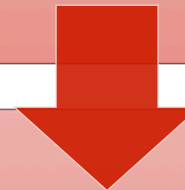
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COURT'S DECISION

SCIT – Appeal by Taxpayer allowed



High Court – Appeal by DGIR allowed



Court of Appeal – Appeal by Taxpayer allowed

DECISION: SCIT

- ☐ Ordinary interpretation on provisions of Sch 7A of ITA shall apply based on decided cases
- ☐ Paragraphs 1 and 8(a) of Schedule 7A of ITA not restricted the claim of RA merely in the production area of factory
- ☐ Taxpayer fulfilled requirements under S.131(1) of ITA:
 - ✓ Payment of tax
 - ✓ Assessment was excessive due to error or mistake in a return
 - ✓ Within 6 years
 - ✓ Application made in writing to DGIR

DECISION: SCIT

- ☐ Definition of error or mistake based on ordinary meaning
- ☐ Error or mistake due to reliance on PR 2/2008
- ☐ Recent court decisions on similar issues on RA should bind DG retrospectively
- ☐ DGIR failed to exercise discretion required under S.131(2) and (3) of ITA

DECISION: HIGH COURT

Appeal by DGIR disallowed on following issues:

- ☐ A settled issue as decided by several cases that RA may also be claimed for non-production area of factory
- ☐ Definition of error or mistake based on ordinary meaning
 - Error or mistake applicable on misplaced confidence on law at the material time of submission of tax return due to reliance on PR 2/2008

DECISION: HIGH COURT

Appeal by DGIR allowed on following issue:

- ❑ “Practice of the DGIR” in S.131(4) of ITA includes PR
 - S.131(4) of ITA applicable to interpretation of law and not restricted to administrative matter

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DEDUCTION

FACTS

- 1 Business activity of importer and dealer of reconditioned motor vehicles
- 2 Appointed 'runners' to handle matters relating to clearance procedures with Customs department and Puspakom
- 3 Claimed "Express Custom Duty" expenses under 'Purchase' item which had been paid and claimed deduction in the trial balance
- 4 Expenses disallowed for tax deduction

SENTIMAS SDN BHD v. KPHDN

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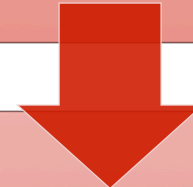
ITEMS		
Code	Description	Debit
201-0000	Purchase	RM89,297,759.00
202-0000	Customs Duty	RM22,266,520.00
203-0000	Sales Tax	RM 3,597,938.43

ISSUES

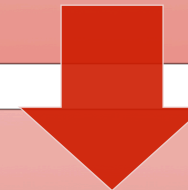
- ☐ “Express custom duty” expenses – deductible
- ☐ Penalty - discretion correctly exercised by DGIR under S.113(2) of ITA

COURT'S DECISION

SCIT – Appeal by Taxpayer dismissed



High Court – Appeal Taxpayer dismissed



Court of Appeal – Appeal by Taxpayer dismissed

DECISION: SCIT

- ☐ No evidence to prove “express custom duty” expenses were payment to the ‘runners’
- ☐ Inconsistency of evidence among the Taxpayer’s witnesses to support facts on “express custom duty” expenses
- ☐ Consistent evidence from the DGIR’s witness
- ☐ DGIR exercised correctly his discretion to impose penalty in accordance with the law

DECISION: HIGH COURT

- ☐ Evidence from the 'runners' were circumstantial and not admissible
- ☐ 'Runners' not able to determine amount of fees received and services provided
- ☐ Consistent evidence from the DGIR's witness and documentary evidence tendered
- ☐ Discretion of DGIR to impose penalty upon considering all facts and circumstances of the case

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INCOME VS CAPITAL

FACTS

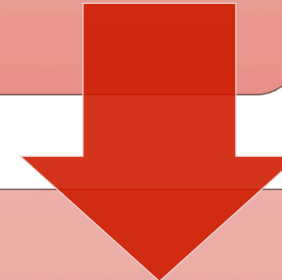
- 1 Business activity of cultivation of oil palm and investment holding
- 2 Awarded additional compensation and late payment charges for land compulsorily acquired by the land administrator
- 3 Received reimbursement for retrenchment benefits payment made to its former employees working on the land
- 4 Late payment charges and retrenchment benefits were assessed to tax

ISSUES

- ☐ Late payment charges – income or capital
- ☐ Retrenchment benefits – income or capital
- ☐ Penalty – valid and reasonable under S.113(2) of ITA

COURT'S DECISION

SCIT – Appeal by Taxpayer allowed



High Court – Appeal by DGIR dismissed

DECISION: SCIT

- ❑ Late payment charges were capital in nature:
 - related to appreciation in value of land
 - part of the compensation
 - not analogous to interest on judgment debtor under Rules of Court but governed under S.48 Land Acquisition Act 1960
 - not similar to interest income under S.4(c) of ITA

DECISION: SCIT

- ☐ Facts not disputed on receipt of retrenchment benefits:
 - payment to retrenched employees out of own fund
 - no deduction for payment made to retrenched employees
 - payment made on behalf of land administrator
 - reimbursement to repay payment made on behalf
- ☐ No issue of penalty upon determination of payment of retrenchment benefits as not taxable

DECISION: HIGH COURT

- ☐ Late payment charges were capital in nature:
 - accretion to capital of the value of land
 - amendment of term “late payment interest” to “late payment charges” in the Land Acquisition Act 1960
- ☐ Reimbursement was payment for actual expenditure incurred
 - no deduction claimed in the year the payment made
- ☐ Penalty on payment received on retrenchment benefits wrongly imposed

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REAL PROPERTY GAINS TAX VS INCOME TAX

FACTS

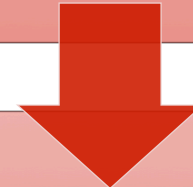
- 1 Property investment company
- 2 Purchased 50 acres of land in 1997 and subsequently disposed off in 2004
- 3 Subjected proceeds from disposal of land to RPGTA
- 4 Assessment raised under ITA

ISSUES

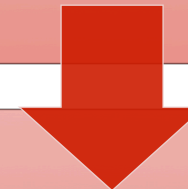
- ☐ Disposal of land - stock in trade or capital investment
- ☐ Penalty - DGIR exercised discretion correctly under section 113(2) of ITA

COURT'S DECISION

SCIT – Appeal by Taxpayer dismissed



High Court – Appeal by Taxpayer dismissed



Court of Appeal – Appeal by Taxpayer dismissed

DECISION: SCIT

- ❑ Disposal of land constituted a stock in trade:
 - Sale & Purchase Agreement (SPA) stated purpose of purchased land for development
 - Company resolution passed for purchase of land with terms and conditions similar to SPA
 - Memorandum of Association contained construction activity as object or business to be carried on
 - Company resolution passed for appointment of a developer consequent to SPA

DECISION: SCIT

- ❑ Imposition of penalty at 45% was justified:
 - Supporting documents show purpose of land purchase is for development
 - Supporting documents discovered upon audit
 - DGIR exercised his discretion to impose penalty in accordance with the law

DECISION: HIGH COURT

❑ Disposal of land as a stock in trade:

- Intention for purchase of land as a stock in trade
- SPA contained specific conditions to develop land for a profit
- Memorandum of Association allowed to enter into contract to build buildings and other construction works
- Company resolution passed prior and consequent to SPA

DECISION: HIGH COURT

☐ Imposition of penalty was justified:

- Discretionary power to impose penalty on an incorrect return
- Right to impose penalty irrespective the return was made negligently, or in good faith or with intent to deceive or evade tax
- Discretion to impose penalty after due consideration of all relevant facts and circumstances
- Taxpayer made an incorrect return

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REAL PROPERTY GAINS TAX

FACTS

- 1 1993 & 1998 – 13 disposal and acquisition of shares and properties between several companies (disposer) and the Taxpayer (acquirer), a public listed company
- 2 8.7.2004 - DGIR conducted audit on the disposers
- 3 Between 2004 and 2005, both the disposers and acquirers submitted Forms CKHT-1 and CKHT-2 subsequent to the audit
- 4 28.4.2006 - Assessments raised and issuance of notices of assessment and notices of additional assessment for YA 1993, 1998 and 1999

ISSUES

- ☐ Time-bar - notices of assessment and notices of additional assessment for YAs 1993, 1998 and 1999
- ☐ Validity of assessment on acquirer
- ☐ Power validly and properly exercised on issuance of the notices of assessment and notices of additional assessment
- ☐ Validity of assessment – payment would give rise to commission of offences under Securities Industry Act 1983, Capital Market and Services Act 2007 and Companies Act 1965

ISSUES

- ☐ Correctness of disposal date for YA 1999
- ☐ Correctness of imposition of penalty at the rate of 10%

COUNTRY HEIGHTS HOLDINGS BERHAD v. KPHDN

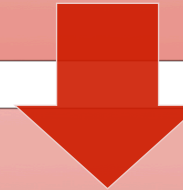
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COURT'S DECISION

SCIT – Appeal by Taxpayer dismissed on assessments for YA 1993 and 1998 except YA 1999



High Court – Appeal by Taxpayer allowed & appeal by DGIR dismissed



Court of Appeal – Appeal by DGIR dismissed

DECISION: SCIT

- ☐ Wilful default committed – failure to declare disposal/acquisition of shares and property transacted in 1993 and 1998 within 30 days from the date of transaction under S.13(1) of RPGTA
- ☐ Notices of assessment and notices of additional assessment were valid – authorized under S.16(1)(b) of RPGTA
- ☐ Notices of assessment and notices of additional assessment were valid – payment not against Securities Industry Act 1983, Capital Market and Services Act 2007 and Companies Act 1965

COUNTRY HEIGHTS HOLDINGS BERHAD v. KPHDN

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DECISION: SCIT

- ☐ Error in issuance of notice of assessment for YA 1999
- ☐ Rate of 10% referred to increase in tax and not penalty

DECISION: HIGH COURT

- ☐ S.15(2) of RPGTA not applicable for purpose of S.16(1)(b) of RPGTA to enlarge the time for assessment
- ☐ S.16(1) of RPGTA not applicable since Taxpayer neither a disposer or acquirer of the assets
- ☐ Notice of assessment for YA 1999 wrongfully issued

DECISION: HIGH COURT

- ☐ Notices of assessment and notices of additional assessment not validly issued – payment of taxes of subsidiaries
- ☐ Error in issuance of notice of assessment for YA 1999
- ☐ Imposition of penalty of 10% to be discharged

FACTS

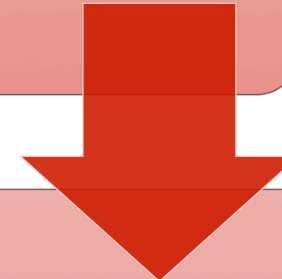
- 1 Disposal of shares in a company, Bioford Development Sdn Bhd
- 2 Gains from disposal of shares subjected to RPGTA being disposal of shares in a real property company (RPC)

ISSUES

- ☐ Determination of Bioford Development Sdn Bhd as RPC
- ☐ Gains from disposal of shares in Bioford Development Sdn Bhd subjected to RPGTA

COURT'S DECISION

SCIT – Appeal by Taxpayer allowed



High Court – Appeal by DGIR allowed

DECISION: SCIT

- ☐ Applied decision of High Court in *Binastra Holdings Sdn Bhd v KPHDN*
- ☐ Relevant to consider business activity of Bioford Development Sdn Bhd as RPC

DECISION: HIGH COURT

- ☐ SCIT correctly relied on the decision of High Court in *Binastra Holdings Sdn Bhd v KPHDN*
- ☐ Doctrine of *stare decisis* applicable whereby written judgment produced by the higher court
- ☐ Decision of High Court in *Binastra Holdings Sdn Bhd v KPHDN* not binding on another High Court

DECISION: HIGH COURT

- ☐ Court not bound by the High Court decision in *Binastra Holdings Sdn Bhd v KPHDN*
- ☐ Literal approach taken to determine a company being a RPC under Para 34A Sch 2 RPGTA
- ☐ Para 34A(6) RPGTA applied objective test to determine a company being a RPC
- ☐ Primary business of Bioford Development Sdn Bhd as RPC not a relevant factor

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THANK YOU!

