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SUMMARY OF TAX CASES

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Malaysian Special Commissioner's Decisions

1.0 YONG MF V KETUA PENGARAH HASIL DALAM NEGERI (2003) MSTC 3503 (SPECIAL COMMISSIONERS OF INCOME TAX)

Facts

The taxpayer owned a piece of land which was acquired on 7 November 1970. On 30 December 1993, the taxpayer entered into a joint-venture agreement with a developer to develop the land into a residential housing estate in return for 6 units of houses. Approval for the subdivision of the land into 30 lots together with the building plan was obtained in 1994.

In 1995 and 1996, the taxpayer disposed of the 6 units of houses. The DGIR raised RPGT assessments for the relevant years in respect of these disposals. Based on the valuation done by the Jabatan Penilaian dan Perkhidmatan Harta Negeri Pahang, Kuantan on 2 March 1999, the market value of the land as at 30 December 1993 was taken as RM343,000.

The taxpayer disagreed with the assessments raised and lodged an appeal.

Issue

What is the acquisition price of the houses disposed of by the taxpayer in 1995 and 1996?

Arguments

Taxpayer

The taxpayer contended that the sale of the said land in exchange for houses took place more than 6 years after the purchase. As such, he should not be liable to tax under the RPGT Act.

Alternatively, pursuant to paragraph 13, Schedule 2 of the RPGT Act, the market value of the houses received was equivalent to the developer's price. Since the sale price of the houses was the same as the developer's price, the taxpayer is not liable to tax as no profit was made.

DGIR

The DGIR contended that as at the date of the joint venture agreement on 30 December 1993, the 6 units of houses were not yet in existence and therefore, the market value cannot be determined. The acquisition price of the houses should therefore be the market value of the land which is RM343,000. In computing the acquisition price of each house, the DGIR applied the following formula :-

$$\frac{\text{Market value per unit}}{\text{Total market value of all the units receive}} \times \text{Market value of land disposed of to developer}$$

Decision

The appeal was dismissed on the following grounds :

(a) The exchange of the land for the houses vide the joint venture agreement was a disposal of the said land and simultaneously, an acquisition of the houses.

(b) Pursuant to paragraph 15, Schedule 2 of the RPGT Act, the date of disposal of the said land was deemed to t ake place on the date of execution of the agreement i.e, 30 December 1993. Correspondingly, the acquisition date of the houses should be 30 December 1993.

(c) Since there were no houses erected yet at the time the taxpayer disposed of his land to the developer in exchange for 6 houses, the acquisition price of the houses should be the market value of the said land, i.e. RM343,000.

(d) The DGIR had adopted a mathematical formula to apportion the acquisition price of the houses. This appeared reasonable and the taxpayer had failed to adduce any evidence to prove otherwise.

2.0 AT SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2004) 3515 (SPECIAL COMMISSIONERS OF INCOME TAX)

Facts

The taxpayer is a company incorporated on 14 February 1979. On 29 April 1979, it acquired approximately 1453 acres of agricultural land which was subsequently sub-divided into several thousand lots for housing and commercial purposes.

These lots of land were classified as fixed assets in the taxpayer's accounts. From 28 April 1983, these lots were kept separately from trading lands and expenditure on fixed assets retained for investment purposes was transferred to capital account.

On 4 June 1980, part of the land was disposed of taxpayer applied for a certificate of clearance under Section 12(4)(b) of the RPGT Act claiming that the company was a property dealing company and that the gains from disposal are chargeable to income tax. The gains were accordingly subject to income tax. In 1984, the company was under financial distress and by October 1987, it had ceased all its construction activities. It then entered into agreements with some management companies to reorganise and restructure the company. During this time, the land was rezoned as industrial land. From 1991 to 1994, 14 transactions were executed.

On 15 November 1997, RPGT assessments were raised by the DGIR for the years of assessment 1991, 1993 and 1994. Subsequently, income tax assessments were raised for the years of assessment 1995 and 1996 on 17 August 1998. On 26 June 1996, the DGIR unilaterally discharged the earlier RPGT assessments by issuing the relevant reduced assessments. The taxpayer appealed against the income tax assessments.

Issue

(a) Are the gains from the disposal of the subject lots liable to income tax or RPGT ?

(b) Is the DGIR empowered under the RPGT Act to unilaterally issue reduced assessments in respect of assessments raised under the RPGT Act ?

(c) Can the DGIR maintain two assessments, one under the ITA and one under the RPGT Act ?

Arguments

Taxpayer

(a) The gains arising from the disposal of the subject lots are not assessable to income tax under Section 4(a) of the ITA but liable to RPGT.

(b) The DGIR is not empowered under the RPGT Act to unilaterally issue a reduced assessment in respect of an assessment raised under the said Act.

(c) The DGIR cannot maintain two assessments, one under the ITA and another under the RPGT Act.

DGIR

(a) The disposal of the subject lots is an adventure in the nature of trade and the gains from the said disposal are chargeable to income tax under Section 4(a) of the ITA.

(b) The DGIR is empowered under the RPGT Act to review revise an assessment including having the power to vacate or discharge an assessment.

(c) The DGIR is not imposing double taxation but rather seeking to impose tax under the ITA and discharging the assessments under the RPGT Act.

Decision

The taxpayer's appeal was disallowed for the following reasons:

(a) The disposal of the subject lots represents an adventure in the nature of trade. The inference is supported by the presence of badges of trade and the Memorandum of Association.

(b) It is settled law that the manner in which accounts are kept is admissible to show intention, but must be weighed against other available evidence to determine the nature of the transaction. Considering the evidence adduced, the reflection of the subject lots as fixed assets in the accounts was not a proper description of the actual nature of the transaction.

(c) The taxpayer's contention that a forced sale vitiated the intention to trade was rejected. The sale was not caused by a sudden emergency or unanticipated need for funds as the financial distress of the taxpayer started almost 10 years before the sale of the subject lots in 1993 and 1994.

(d) On the 2nd and 3rd issues, the Court followed the High Court decision in the case of Teruntum Threatre Sdn Bhd V KPHDN (1998) MSTC 3720 and as such :

- the DGIR has the power to review or revise an assessment including discharging an assessment under the RPGT Act.
- there is no double taxation as the DGIR was raising an assessment under the ITA and discharging the assessment under the RPGT Act.

3.0. MB v. KETUA PENGARAH HASIL DALAM NEGERI (2004) MSTC 3,536 (SPECIAL COMMISSIONERS OF INCOME TAX)

Facts

MB, the appellant was a body corporate presently established under Section 41 of the Legal Profession Act 1976 ["LPA"].

Members of MB were advocates and solicitors admitted and enrolled under the LPA. Its members did not become members on their own volition but they were required to do so by virtue of Section 43 of the LPA.

The main object of MB as provided under Section 42(1)(a) of the LPA was "to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour".

MB received the following types of income from its members:-

- Subscriptions, which were allocated for various purposes such as to the Library Fund, Sports Fund, Scholarship Fund, Building Fund, Law Conference Account, etc.
- Contributions to the Legal Aid Centre Fund, Building Fund, Compensation Fund, etc.
- Donations for the specific purpose of the Defence Fund
- Interest income on deposits of various funds consisting of "Subscriptions" and "Contributions".

MB did not carry out any other trading or business activity for gain. All its activities were governed by the need to act in the public interest and interests of justice. The Minister of Finance ["MOF"] granted tax exemption status to MB in relation to its income other than income derived from its Compensation Fund and dividends.

Despite having obtained a specific Ministerial exemption in terms of P.U.(A) 4/1996, MB had sought clarification on its tax exemption status under Section 142(2) of the LPA both from the MOF and DGIR.

While awaiting the clarification, the DGIR sent Forms T to MB to be completed and filed pursuant to the Income Tax Act 1967 (ITA). On 20 November 1986, MB returned the Forms T without completing the same as MB contended that it was tax exempt and it was awaiting confirmation of its status.

However, on 2 January 1987, the DGIR wrote to MB directing that it file the Forms T for the years of assessment 1979 to 1991. Meanwhile, the DGIR informed MB that no assessments would be raised until the appellant's status was clarified. Following this direction by the DGIR, MB then wrote to the DGIR that it would file the Forms T on the basis that it was tax exempt and it derived no chargeable income. On the same basis, MB did not claim any revenue expenditure, capital allowance or any other statutory allowances or deductions at the time of filing Forms T.

Due to the time taken in determining the status of MB, the DGIR had on 16 December 1991 raised assessments upon MB on the basis that MB was a trade association deriving business income chargeable to tax for the years of assessment 1979 to 1991. Collection of the tax was stood over until August 1995.

MB objected to being classified as a trade association and appealed against the assessments.

Issues

a) Whether by reason of Section 142(2) of the LPA, MB was liable to tax;

b) Whether Section 53 of the ITA was applicable to MB;

c) Whether income derived from the Compensation Fund was chargeable to tax;

d) Should MB be held to be a trade association, the DGIR have the power to deny claims for all or any of the expenses and allowances available for deduction under the ITA in computing income chargeable to tax.

Arguments

Taxpayer

a) MB contended that it was a non-profit institution incorporated under the LPA and was not created by its members.

b) The intention of Parliament was to exclude any liability to tax and typographical errors had crept into the LPA when Section 142 of the LPA was drafted.

c) The appellant submitted that in any event, Section 53 of the ITA did not, apply to MB.

d) Interest income derived from the Compensation Fund was statutorily exempt from tax.

e) In the event MB were held to be a trade association under Section 53 of the ITA, the DGIR had no power to deny MB the right to claim all or any of the expenses and allowances available for deduction under the ITA in computing the chargeable income of MB.

DGIR

a) The DGIR contended that Section 142 of the LPA did not exclude the appellant from any liability to tax.

b) Further, the DGIR also argued that the exemption of taxes was conferred on the Minister concerned under Section 127 of the ITA, which is a special Act governing tax matters and therefore it should prevail over any power or provisions for exemption under any other Acts and in particular the LPA

c) The DGIR contended that MB was a trade association within the ambit of Section 53 of the ITA in the light of its primary objective and the purpose of its establishment as set out in the LPA

d) The principle of mutuality was not applicable as the appellant was being taxed as a trade association

e) The DGIR claimed that income derived from the Compensation Fund for all relevant years of assessment was not exempted from income tax

f) The DGIR contended that the total sums receivable on revenue account by MB for the years of assessment 1982 to 1991 was deemed to be gross income and therefore was taxable

g) The DGIR argued that MB should not be granted capital allowances on the basis that it had failed to submit its claim for capital allowances as provided under Paragraphs 76 and 77 Schedule 3 of the ITA.

Decision

The appellant's appeal was allowed.

MB was held to be not liable to income tax by virtue of Section 142(2) of the LPA. Based on the language used in the provision of Section 142(2) of the LPA and adopting a purposive approach in interpreting the statutory concerned, it was evident that Parliament had clearly envisaged an intention to grant an exemption to the appellant from income tax. The drafting error in Section 142(2) of the LPA did not impair the intention of Parliament as envisaged under the law.

As for the arguments that the power for exemption of taxes was conferred on the Minister under Section 127 of the ITA, the Special Commissioners were of the view that given that Parliament was expressly conferred the power to levy tax by any Federal Law, tax exemption provision could also be provided under Section 142 of the LPA and are not necessarily confined to the ITA alone as contended by the DGIR.

MB was not a trade association as defined under Section 53 of the ITA on the basis that it lacked the following necessary ingredients i.e. it was not formed by advocates and solicitors, but it was created by statute, i.e. the LPA. MB was primarily formed to uphold the cause of justice without regard to its own interest or that of its members and it was clear that it was not formed to safeguard or promote the interest of the advocates and solicitors but to regulate the conduct of the legal profession.

The income derived from the Compensation Fund was not taxable as it was exempted from tax under the substantive provision of Section 80(13) of the LPA.

Even if MB were held to be a trade association, the DGIR had no power to deny MB the right to claim all or any of its expenses and allowances available for deductions under the ITA in computing the appellant's income chargeable to tax.

4.0 MC SDN BHD v KETUA PENGARAH HASIL DALAM NEGERI (2004) MSTC 3573 (SPECIAL COMMISSIONERS OF INCOME TAX)

Facts

The taxpayer is a company incorporated on 15 December 1983. Its principal business was hire purchase and lease financing. During the years of assessment 1988 to 1993, the taxpayer incurred common expenses and capital allowances in respect of the leasing and hire purchase business. By virtue of Regulation 2 of the Income Tax Leasing Regulations 1986, income from leasing and non-leasing activities are to be treated separately and distinct from each other. Accordingly, common expenses are to be apportioned between the 2 business. The DGIR apportioned the common expenses based on the formula:

$$\frac{\text{Leasing income (Interest + capital)}}{\text{Leasing Income (Interest + capital) + Non-leasing income}} \times \text{Common Expenses}$$

The taxpayer disagreed with the above basis and contended that the apportionment should be based on the formula:

$$\frac{\text{Leasing income (interest)}}{\text{Leasing Income (interest)} + \text{Non-leasing income}} \times \text{Common Expenses}$$

Issue

Which method of apportionment of common expenses was correct in law?

Arguments

Taxpayer

The taxpayer contended that in line with the accounting practice of recognising only the interest element as the leasing income, the correct basis of apportionment of common expenses should be between the interest element of leasing income and income from non-leasing sources.

DGIR

The DGIR was of the view that its method of apportionment between the interest and capital elements of leasing income and income from non-leasing sources is correct.

Decision

The taxpayer's appeal was allowed for the following reasons:

(a) In the absence of any legal provisions in the ITA and Leasing Regulations, both the DGIR and the taxpayer's formulae for expenses apportionment are rejected.

(b) Relying on the Court decision in Daya Leasing v DGIR, the accepted principle is that revenue expenditure is deductible only against revenue income. The capital element from the leasing business should not be taken into account for the purpose of apportioning the common expenses. Only the interest element should be included.

5.0 MDD v KETUA PENGARAH HASIL DALAM NEGERI (2004) MSTC 3581 (SPECIAL COMMISSIONERS OF INCOME TAX)

Facts

Syarikat Hamidi Sdn Bhd ("the company") was incorporated on 16 March 1974. On 16 December 1975, the taxpayer transferred two properties to the company in return for an allotment of shares. These shares were subsequently disposed of on 18

December 1989. The DGIR issued a Notice of Assessment dated 26 December 1998 requiring the taxpayer to pay real property gains tax (RPGT) on the gain from the sale of the real property company (RPC) shares. The taxpayer appealed against the Notice.

Issue

What is the date of acquisition of the shares?

Arguments

Taxpayer

(a) The date of acquisition of the shares is the date of registration of the transfer of the two properties by the taxpayer to the company, i.e, on 16 December 1975. This is evidenced by the Form 14A which was properly stamped and executed.

(b) Even though the Company is a RPC pursuant to paragraph 34A(6)(a) of Schedule 2 of the Act, this provison is only applicable to companies which acquired properties after 21 October 1988.

(c) Since the said shares were disposed of on 18 December 1989 which was 14 years after the acquisition date of 16 December 1975, the gain made is not subject to RPGT as provided under Schedule 5 of the Act.

DGIR

(a) The Company is a RPC even before 1988 as conceded by the taxpayer.

(b) It is not disputed that the shares were obtained in 1975 but by virtue of paragraph 34A(6)(a) Schedule 2 of the Act, the said shares were deemed to have been acquired on 21 October 1988.

Decision

The taxpayer's appeal was allowed for the following reasons:

(a) Paragraph 34A, Schedule 2 of the Act was enacted for the purpose of imposing RPGT on the gains arising f rom the disposal of shares in a RPC and to prevent the avoidance of RPGT by way of selling shares in a RPC as stated in the Explanatory Statement of Finance Bill 1988. As such, to give an absolute interpretation to paragraph 34A to catch all holders of shares in a

RPC as contended by the DGIR would go against the intention of the Act of Parliament. Therefore, in applying the law to the facts of the case, the taxpayer did not use the company in order to purchase land and then disposed of the shares in the company as it is evident from the facts that the taxpayer had transferred his two properties to the company on 16 December 1975 and in consideration thereof was allotted the said shares. Thus, paragraph 34A is not applicable to the taxpayer.

(b) The acquisition date of the shares is the date of transfer of the land by the taxpayer to the company, i.e, on 16 December 1975 as provided under paragraph 34A(2)(b) of the Act. Since the date of acquisition of the shares was more than 6 years from the date of disposal on 18 December 1989, the rate of tax is NIL as provided under Schedule 5 of the Act

B Malaysian Court Decisions

1.0 KETUA PENGARAH HASIL DALAM NEGERI V MSDC SDN BHD (2003) MSTC 3,973

Facts

The taxpayer had incurred capital expenditure in constructing a building and training ground for purposes of carrying on business as a driving institute. The IRB treated the expenses incurred as not qualifying for capital allowances under the Income Tax Act, 1967 (ITA).

The Special Commissioners of Income Tax (the 'commissioners') found that the building did not qualify for capital allowance but held that the training ground did qualify for capital allowance. It was decided as a matter of fact that the training ground was prepared specifically for carrying out a driving institute.

The IRB appealed against the decision of the commissioners in respect of the fact for finding that the training ground qualifies for capital allowance.

Issue

Whether capital expenditure incurred in constructing a training ground used for the purpose of the taxpayer's business of a driving institute qualified for capital allowance under the ITA.

Arguments

IRB

The Commissioners erred when considering the meaning of 'apparatus' in its definition of 'plant' in the ITA.

The word 'apparatus' is limited to 'machinery tool to the business'.

Taxpayer

The training ground is an integral part of the taxpayer's business in carrying on the business of a driving institute. As such, it is an 'apparatus' within the meaning of 'plant' in the Third Schedule of the ITA.

Decision

The IRB's appeal was dismissed for the following reasons:

(1) Limiting the word 'apparatus' to 'machinery tool to the business' does not reflect the true position in law. This is because jurisprudence setting out the principles on the meaning of the word 'apparatus' and whether it is plant, requires an assessment of the trading activities as a whole and/or all its constituent parts and appurtenances to be viewed as a whole in relation to the 'apparatus' in question.

(2) The fundamental test is that an apparatus will constitute plant if it fulfils the function of plant, in that it is the means by which the trading operation is carried out. Based on the facts, without the training ground, the taxpayer would not be able to carry out their business of a driving school. As such, it does constitute a plant,which qualifies for capital allowance under the Third Schedule of the ITA.

2.0 ONG BEE YAM v. PENGARAH HASIL DALAM NEGERI, SARAWAK & ANOR (2003) MSTC 3,979 (HIGH COURT OF SABAH & SARAWAK)

Facts

The Director General of Inland Revenue ("DGIR") obtained judgement against Ong Bee Yam ("OBY"), the administratrix of the estate of a deceased individual (Polycarp Soon), for the income tax due from the deceased on 30 June 1989. Subsequently, almost 10 years later, on 26 April 1999, the DGIR issued a certificate under Section 104 of the Income Tax Act 1967 ("the Act") to prohibit OBY from leaving Malaysia on account of unpaid tax due from the deceased.

More than 2 years later, on 13 September 2001, OBY submitted an application for a declaration that:

- OBY is not to be personally liable for the debt due from the estate of the deceased;
- the certificate dated 26 April 1999 issued by the DGIR is null and void; and
- the judgement debt is statute-barred and no longer payable.

Issues

(1) The interpretation of the term "payable by him" in Section 104 of the Act in the context of an executor (i.e. whether OBY assumed personal liability for the tax owed by the estate);

(2) Whether the Government could time-bar the DGIR from enforcing the judgement debt against the estate pursuant to the provisions in the Sarawak Limitation Ordinance (the Ordinance)

Arguments

Taxpayer

OBY claimed that, in her representative capacity as the adm inistratrix of the estate of the deceased, she was not held to be personally liable for the payment of debt due from the estate of the deceased and hence, the debt could not be said to be payable by her. As she did not personally owe the debt, the certificate dated 26 April 1999 issued by the DGIR is null and void.

In addition, the judgement debt is time-barred under item 98 of the Schedule to the Sarawak Limitation Ordinance, which provides for a limitation period of 12 years from the date of the judgment.

Defendants (1st Defendant - DGIR and 2nd. Defendant - the Government of Malaysia)

The defendants contended that by virtue of Section 104 of the Act, they were empowered to issue the certificate against OBY to bar her from leaving Malaysia until the tax that is owing by the estate of the deceased administered by OBY is settled.

On the enforceability of the judgement debt, the respondents contended that the period of limitation does not apply to the Government for the recovery of income tax.

Decision

The following declarations were granted:

(1) OBY shall not be personally liable for the debt due from the estate of the deceased on the basis that the tax payable is only a debt due from and payable out of the estate of that deceased individual [Section 74 (4) of the Act], provided that she has not distributed the estate to the heirs or beneficiaries without first having discharged all the legally recoverable debts contracted by the deceased.

(2) The certificate dated 26 April 1999 issued by the DGIR against OBY (barring her from leaving Malaysia) is null and void as the plaintiff did not personally owe the debt.

(3) The defendants were not barred from enforcing the judgement debt against the estate as there was no express provision or necessary implication in the Ordinance (by virtue of the doctrine of Crown immunity and Section 27 of the Interpretation Act, 1967) that applied to the Government.

3.0 PREMIUM VEGETABLE OILS SDN BHD V PALM OIL RESEARCH AND DEVELOPMENT BOARD MALAYSIA ('PORD') & ANOR (2003) MSTC 3,986

Facts

The taxpayer was an oil palm miller and engaged in the extraction of crude palm oil ('CPO') from the whole fruits and also extraction of crude palm kernel oil ('CPKO') from the kernel of the oil palm fruits.

A letter of demand was sent by PORD for the payment of cess on the CPKO production pursuant to the Palm Oil (Research Cess) Order 1979 (the 'Order'). The taxpayer refused to pay the cess on the basis that the Palm Oil Research and Development Act, 1979 (the 'Act') only empowers the Minister to impose tax on CPO and not CPKO.

The High Court dismissed the taxpayer's claim and held that cess was payable. The taxpayer then appealed to the Court of Appeal.

Issue

(1) Whether the interpretation of cess on 'palm oil' under the Act includes cess on CPKO or merely on CPO.

Arguments

Taxpayer

(1) PORD was not empowered to levy and collect the cess on CPKO on the basis that the Act only empowers the minister to impose tax on CPO and not CPKO.

(2) There is a difference between the extraction of crude oil from CPO and CPKO. The former is the crude oil extracted from oil palm fruits while CPKO is the crude oil extracted from the kernel of the crushed fruits of the

oil palm. As such, CPKO is not crude oil from oil palm fruits or seeds as stipulated in Section 2 of the Act which provides for the definition of 'palm oil'.

(3) There is no ambiguity in the Act in that the cess is to be imposed only on the CPO and that being the case, the Minister is empowered to make an Order in respect of imposition of cess on CPO only and not others (including CPKO). Any law which imposes cess should be stated in clear and plain terms.

(4) The word 'palm oil' in the Order should be given the same meaning as in the Act as the words 'crude oil from oil palm fruits and seeds' should be read conjunctively and disjunctively as provided in the Order. Even if the Order intended the words to be read disjunctively as stated in the 1982 Amendment Order, it should be ignored. To do otherwise would render the Order and subsequent amendment orders to be ultra vires the Act. This is substantiated by the fact that the PORLA Act, 1976 (the 'PORLA Act') makes clear distinctions between oil palm fruits, oil palm seeds and palm kernels.

PORD

(1) CPKO is crude oil as defined under the definition of 'palm oil' under the Act.

(2) There is no ambiguity in the Act.

Decision

The Court of Appeal allowed the taxpayer's appeal for the following reasons:

(1) Since the imposition of cess is within the meaning of taxing statutes, the court is bound by established principles in taxing statutes, in that in a taxing statute, one has only to look at what is clearly said in the statute. There is no room to look into the purpose, the object or intent that the Act was legislated.

(2) A strict interpretation should be given and where there is any ambiguity, it should be decided in favour of the taxpayer.

(3) Cess should not be imposed on CPKO since it is palm oil extracted from kernel. The PORLA Act which is

inter-related to the Act in question shows that PORD knew that there is a distinction between a seed and the kernel.

4.0 LIM TIAN HUAT v. KETUA PENGARAH HASIL DALAM NEGERI (2003) MSTC 3,998 (COURT OF APPEAL)

Facts

The appellant was appointed as the receiver and manager of a company ("the taxpayer") on 14 February, 1994. Subsequent to the appointment, the taxpayer received two notices of assessment and also notifications of increase in income tax for both the years of assessment 1993 and 1994 ("the federal tax").

The taxpayer then sought the direction of the High Court on the Director General of Inland Revenue's (DGIR) priority of claim in relation to the federal tax over payments to be made to the debenture holders.

The High Court ruled that the where a taxpayer was under receivership as opposed to a winding-up, federal tax had to be paid in accordance with the relevant tax law. In this case, the issue of whether federal tax was a preferential debt or not did not arise.

Consequently, the appellant appealed against the decision of High Court.

Issue

Whether federal tax has priority over payments to be made to the debenture holders in the case where a taxpayer was under receivership as opposed to being wound-up

Arguments

Taxpayer

The federal tax was not ranked as a preferential debt on the appointment of a receiver as provided in Section 191 of the Companies Act 1965 (CA). Thus, the federal tax had no priority over payments to be made to the debenture holders.

DGIR

The DGIR contended the fact that since federal tax has to be paid by virtue of Section 103 of the ITA, priority should be accorded to federal tax over other payments to be made to the debenture holders.

Decision

The Appellant's appeal was allowed and it was held that the income tax due to the DGIR has no priority over the claims of the debenture holders.

Where a receiver and manager is appointed (not in the case of a winding up) under Section 191 of the CA, income tax (federal tax) is not one of the preferential debts and therefore, the ranking provided in Section 292 of the CA does not apply.

Section 103 of the ITA only covers the provisions for the payment of tax assessed (i.e. tax became due and payable upon service of the notice of assessment) and it does not mention anything about priority. Accordingly, the DGIR could not rely on Section 103 to claim priority.

5.0 KETUA PENGARAH HASIL DALAM NEGERI V DATO' HANIFAH NORDIN (2003) MSTC 4007 (HIGH COURT OF MALAYA)

Facts

The taxpayer was a partner in Ernst & Whinney (the firm) in accordance with the terms and conditions of a Partnership Deed dated 1 September 1981. On 1 July 1990, the firm merged with another firm. However, the merger could not be effected as 3 partners had voted against it. Subsequently, under the terms of a settlement agreement dated 31 July 1990, the dissenting partners agree to retire thus enabling the merger to be regularised. On 1 July 1990, a new partnership named Ernst & Young came into existence and therefore, the whole business structure was changed.

The taxpayer was paid a compensation amount of RM1,199,651 in 23 equal instalments and RM20,262 being adjustment payments. These amounts were described as consultancy payments in the accounts. The compensation was predetermined, based on 1.5 times the firm's 1989 profits and was not related at all to the firm's profits for the year of assessment 1991 and 1992. The payments were also made in consideration of the taxpayer :

(a) agreeing to cease as a partner on 31 July 1990 ;

(b) losing all rights in the said partnership ;

(c) waiving all rights to challenge the merger ; and

(d) agreeing to refrain from taking any legal action in respect of the said merger.

The taxpayer did not participate in the new or old partnership after 31 July 1990, did not execute any consultancy agreement with the new or old partnership, and did not do any consultancy work for the new or old partnership.

Issue

Was the compensation amount and adjustment payments an income or capital receipt in the hands of the taxpayer?

Arguments

Taxpayer

The taxpayer contended that :

(1) the sums paid are capital consideration for retirement the partnership due to the change in the business structure of the old partnership ;

(2) alternatively, the sums paid are withdrawal of capital in respect of the goodwill upon retirement and therefore, capital in nature;

(3) alternatively, the consideration received is for loss of rights under the partnership agreement dated September 1981 ;

(4) the consideration received is for all the 3 factors stated above as well as for refraining from competition and therefore, are capital in nature ;

(5) the payments are not consultancy payments.

DGIR

The DGIR contended that the compensation amount and adjustment payments are income assessable on the taxpayer.

Decision

The appeal was dismissed on the following grounds ;

(1) Although the compensation amount and adjustment payments were reflected as consultancy payments in the partnership accounts, it is settled law that how parties describe a payment did not decide or determine the nature of payment.

(2) The payments received by the taxpayer was capital in nature as these were paid for his retirement from the partnership, agreeing to lose all his rights under the partnership agreement and taking no legal action against the partnership or to compete with the partnership.

(3) The payments were capital even though they were calculated by reference to work in progress. The method of calculation did not in any way make the payments income.

6.0 ESSO PRODUCTION MALAYSIA INC. V KETUA PENGARAH HASIL DALAM NEGERI (2003) MSTC 4016 (HIGH COURT OF MALAYA)

Facts

The taxpayer was a wholly-owned subsidiary of Esso Eastern Inc ("EEI"), a North American registered corporation, which was in turn a wholly-owned subsidiary of Exxon Corporation ("Exxon"). Exxon was also the ultimate holding company of all Exxon and Esso affiliates.

The taxpayer carried on in Malaysia the business of exploration, development and production of petroleum, and was a chargeable person within Section 2 of the Petroleum (Income Tax) Act 1967 ("PITA").

In 1986, Exxon consolidated its 6 regional head offices outside North America into a single division of Exxon known as Exxon Company International ("ECI"). The cost of restructuring (Head office restructuring costs) were allocated to the taxpayer over a 5 year period from 1986 to 1990. The taxpayer also made payments to its various affiliates for services rendered. Under the payment terms, the taxpayer agreed with its affiliates that they should gross up their bills so that after the withholding tax deduction, the affiliates would still receive the full amount invoiced. A claim was then made on the withholding tax deducted.

The IRB conducted an investigation on the taxpayer in 1993 and on December 1997 and December 1998, additional / reduced assessments were served on the taxpayer.

The taxpayer lost its appeal against the assessments at the Special Commissioner of Income Tax. It then appealed to the High Court.

Issues

(1) Was the DGIR correct in disallowing the withholding tax deducted and remitted for the years of assessment 1984 to 1992 and bringing it to tax as additional income ?

(2) Was the DGIR correct in treating all service charges paid by the taxpayer to its affiliates as falling under Section 4A of the Income Tax Act 1967 ("ITA") ?

(3) Were the Head Office Restructuring Costs deductible against the taxpayer's income pursuant to Section 15(1) of PITA ?

(4) Was the DGIR debarred from raising the assessments for the year of assessment 1984 and 1985 by reason of Section 39 of PITA ?

Arguments

Taxpayer

The taxpayer contended that :

(1) the amount of withholding tax remitted to the DGIR is credited to the account of the non-resident taxpayer and being part of the consideration for the services rendered, represents business expenses of the payer. Under normal circumstances, these expenses would be deductible from the resident payer's own gross income under the provision of Section 15(1) of PITA and Section 33(1) of the ITA.

(2) the claim for the Head Office Restructuring Costs was not too remote in that it had benefitted from it in the sense that as a more efficient organization, future administrative costs that would be allocated to it would be at a reduced amount.

(3) what had been done was tax planning and this cannot be construed as an arrangement to commit fraud.

DGIR

The DGIR contended that :

(1) there was a clear breach of Sections 107A, 109 and 109B of the ITA in that tax had not been deducted directly from the actual sums paid to the affiliates and was not paid to the DGIR in accordance to the sub-section (1) of those sections. As such, the taxpayer does not qualify for deductions under Section 15(1) of PITA by virtue of Section 18(1)(h) of PITA.

(2) the scope of Section 4A is that it covers both technical and non-technical assistance or services in connection with any scientific, industrial or commercial undertaking, venture, project or scheme and as such it covers most forms of payments for management or administration services in connection with any industrial or commercial undertaking venture, project or scheme.

(3) the Head Office Restructuring Costs are not allowable as they were not wholly and exclusively incurred in the production of gross income pursuant to Section 15(1) of PITA.

(4) based on the evidence adduced, the taxpayer had committed fraud, wilful default or negligence and therefore DGIR may make assessments beyond the 12 year period specified in Section 39(1) of PITA.

Decision

The appeal was dismissed on the following grounds :

(1) To qualify for tax deduction, a business expense must be wholly and exclusively incurred in the production of gross income. The intention of Sections 107A and 109B of ITA is to tax the non-resident party but it is the responsibility of the resident payer to withhold and remit the tax at the appropriate rate to the DGIR, By regrossing the tax, the taxpayer was able to reduce their tax liability by claiming a deduction for the withholding tax when it was not wholly and exclusively incurred in the production of income.

(2) It is common knowledge that the use of the word "or" and "," (comma) in any provision of the law should be read disjunctively. Section 4A(ii) of ITA should therefore be read as technical advice or assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking or venture or project or scheme. Sections 4A and 109B of the ITA are similarly reflected in the PITA.

(3) The Head Office Restructuring Costs were incurred by the Head Office and not by the taxpayer. The costs to the taxpayer's office were "related to the production of income but not exclusively in the production of income". The expenditure was too remote and therefore did not satisfy the "wholly and exclusively" test.

(4) The taxpayer did not made payments it should have made and thus failed in its duty to make a correct return. It had deliberately committed some form of fraud or wilful default or negligence as envisaged by Section 39(3) of the PITA. The DGIR was therefore, not debarred from raising the assessments for the years of assessment 1984 and 1985.

7.0 PRUDENTIAL ASSURANCE MALAYSIA BERHAD v. KERAJAAN MALAYSIA (2003) MSTC 4,026 (HIGH COURT OF MALAYA)

Facts

On 6 April 1998, the taxpayer notified the Director General of Inland Revenue ("DGIR") that it had been acquired by another company and as such was required to change its financial year to coincide with that of its holding company. Accordingly, the company's accounts were prepared as follows:

- 1 May 1997 to 30 April 1998 (12 months)
- 1 May 1998 to 31 December 1998 (8 months)
- 1 January 1999 to 31 December 1999 (12 months)
- 1 January 2000 to 31 December 2000 (12 months)
- Subsequent years - year ended 31 December

[Note: The change in the accounting year-end was from 30 April to 31 December]

On 23 October 1998, the Minister of Finance announced a change in the tax system, that is, from a 'preceding year basis' to a 'current year basis' effective from the year 2000. To facilitate this change, tax was to be waived on income derived in the year 1999.

The taxpayer sought the DGIR's confirmation that the basis periods for the relevant years of assessment should be as follows:

Year of assessment	Basis period
2000 (preceding year basis)	1 May 1998 to 31 December 1999 (20 months)
2000 (current year basis) 2000	1 January 2000 to 31 December (12 months)

However, the DGIR disagreed and redirected the basis periods to be as follows:

Year of assessment	Basis period
2000 (preceding year basis)	1 May 1998 to 30 April 1999 (12 months)
2000 (current year basis)	1 May 1999 to 31 December 2000 (20 months)
2001 2001	1 January 2001 to 31 December (12 months)

The taxpayer therefore sought a declaration from the Court that, among other things, the DGIR was wrong in the determination of the taxpayer's basis periods.

Issue

Whether the manner in which the DGIR exercised his discretion under Section 21(3) of the Income Tax Act 1967 ("ITA") was proper and correct in determining the basis periods of the taxpayer?

Arguments

Taxpayer

(1) The taxpayer claimed that Section 10 of the Income Tax (Amendment) Act 1999 (ITAA) in relation to the basis period of not more than 12 months for the year of assessment 2000 (preceding year basis) was not applicable to the taxpayer

(2) The taxpayer's financial year was changed solely to follow the holding company's financial year as required by the Companies Act 1965 and it was not done to take advantage of the tax waiver year.

(3) Although the taxpayer agreed that the DGIR was vested with the discretionary power to direct the basis period of the taxpayer under Section 21(3) of the ITA, it contended that the DGIR had wrongly exercised his discretion by failing to take into account the following:

  i. the DGIR's own guidelines in relation to the interpretation of Section 21 (3) of the ITA;

  ii. the change in the financial year was meant to follow the holding company's financial year;

  iii. the income of the taxpayer had to be pro-rated; and

  iv. the exempt income account of the taxpayer would be less because the period of exemption would be lessened.

DGIR

(1) Section 10 of the ITAA was applicable to the taxpayer as it was the intention of Parliament that the waiver period be not more than 12 months.

(2) The DGIR contended that he had exercised his discretion in determining the basis period of the taxpayer within the ambit of the statute, having regard to the policy and object of the statute, and to those matters which are expressly or by necessary implication stated in the statute that conferred the discretion.

(3) The guidelines in relation to the interpretation of Section 21(3) of the ITA that were issued by the DGIR were solely meant for internal use (not for public dissemination) and these internal guidelines / circulars had no force of law. Further, the change in the Malaysian tax system rendered these guidelines irrelevant during the waiver period.

(4) The DGIR argued that it was an acceptable practice to pro-rate the income of an individual if that individual could not determine the income derived for any particular basis period.

(5) The DGIR contended that it would not be fair to the other taxpayers if the taxpayer were to be allowed to get a waiver for a period of 20 months whereas the other taxpayers would only get 12 months.

Decision

The taxpayer's appeal was dismissed on the following grounds:

(1) The DGIR had exercised his discretion properly under Section 21(3) of the ITA. In determining whether discretion had been exercised properly and reasonably, the relevant factors must be taken into account, for example, exercise of discretion must be within the ambit of the statute and generally all taxpayers must be treated fairly.

(2) The DGIR's direction in relation to the basis periods of the taxpayer at the time of the exempt period was consistent with the policy and object of the ITA together with the ITAA;

(3) The DGIR's direction was fair in that it would avoid an unjust treatment between the taxpayer and the other taxpayers in the country;

(4) The DGIR's direction would not deprive the taxpayer from getting the 12-month exemption period.

8.0 KERAJAAN MALAYSIA v. BEYOND GATEWAY SDN. BHD. (2003) MSTC 4,045 (HIGH COURT OF MALAYA)

Facts

A Notice of Assessment ["Form J"] in respect of the year of assessment 1998 for the amount of RM16,161,412.42 was issued to the taxpayer. As this had not been settled, the Director General of Inland Revenue (DGIR) brought a legal suit against the taxpayer pursuant to Section 106(1) of the ITA to recover the outstanding amount.

The DGIR was granted a summary judgement for the outstanding tax payable at the first instance hearing before the senior assistant registrar on the basis that there was no defence to the claim.

The taxpayer appealed to a Judge in Chambers against the decision of the senior assistant registrar on the grounds that there were triable issues which ought to proceed to full trial.

Issues

(1) Whether the deponent "M" (a senior assistant examiner with the Inland Revenue Board) had the authority to affirm the affidavit that supported the DGIR's application for the summary judgement?

(2) Whether the certificate (which was annexed to the affidavit) in relation to the authorisation letter in favour of "M" that was signed by the former DGIR was still valid and subsisting?

Arguments

<u>Appellant</u>

(1) The taxpayer argued that the senior assistant examiner did not have the authority to affirm the affidavit submitted by the DGIR; and

(2) The certificate that was signed by the former DGIR was invalid.

<u>DGIR</u>

(1) The DGIR contended that the affidavit was submitted in accordance with the Rules of the High Court 1980.

(2) "M", the senior assistant examiner, was duly authorised by the DGIR to carry out his duty by virtue of Sections 136(5), 2(1) and 106 of the ITA.

Decision

The taxpayer's appeal was dismissed on the basis that the appellant had failed to raise any triable issue against the respondent's summary judgement.

"M" was authorized by the relevant provisions of the legislation. As such, the affidavit deposed by "M" was in order. The certificate granting authorisation to "M" that was signed by the former DGIR was still valid and subsisting.

9.0 KETUA PENGARAH JABATAN HASIL DALAM NEGERI V ENESTY SDN BHD (2003) MSTC 4,053

Facts

The taxpayer's tax agents had requested that the IRB issue notices of assessment under Section 96(1) of the ITA for 1982, 1983 and 1984. The IRB replied that notices of assessment could not be issued because the taxpayer had no chargeable income. The IRB could only produce tax computations, which showed nil chargeable income for those years.

The taxpayer appealed against the decision of the High Court in refusing to grant an order of mandamus to direct the IRB to issue and serve on the taxpayer notices of assessment for those years of assessment.

Issue

(1) Whether the IRB had made assessments for 1982, 1983 and 1984. If so, the IRB was bound by Section 96(1) of the ITA to cause notices of assessment to be served on the taxpayer. If on the contrary, then there was no case for demanding service of notices of assessment.

(2) Whether it was mandatory to make an assessment under Section 90(1) of the ITA where there was no chargeable income.

(3) Whether making an assessment under any other form (besides the prescribed form under Section 93 of the ITA) was still considered as making an assessment.

Arguments

Taxpayer

(1) The IRB had made an assessment for those years and was therefore bound by Section 96(1) of the ITA to cause notices of assessment to be issued to the taxpayer.

(2) The IRB has a statutory duty to make an assessment. An assessment is not just the piece of paper, but it is the official act or operation. This means that any work or exercise done by the IRB to ascertain whether or not a person has chargeable income is the making of an assessment.

IRB

(1) No assessments were made for those years because the taxpayer had no chargeable income.

Decision

The taxpayer's appeal failed for the following reasons:

(1) It is a question of construction whether Section 90(1) of the ITA makes it mandatory that an assessment must be made in the case of each person who has delivered a return under Section 77 of the ITA.

Based on Section 90(1) of the ITA, since in every case the IRB has to determine either from the information given in the return or by using their own judgment, whether the person concerned has chargeable income and what is the amount, it is by implication that Section 90(1) of the ITA requires that an assessment has to be made only if there is chargeable income.

(2) The efforts made by the IRB to ascertain the assessment, could not point to an assessment being made by the IRB. Any work, inquiry or calculation done before that would not be the making of an assessment but an effort towards the making of an assessment

(3) Pursuant to Section 93 of the ITA, there is formality, ritual and deliberateness in making an assessment. The prescribed form must be used. The date on which the form is duly completed must be specified in the appropriate space in the form. Any other determination as to chargeable income or tax liability made in some other medium, for some other purpose other than for completion of the assessment form, or made before that date, is not, or is not yet the making of an assessment.

(4) As such, in view of Section 93 of the ITA and the fact that no assessment forms had been completed for the years of the assessment in question, no assessments had been in made in respect of those years and the IRB was under no duty under section 96(1) of the ITA to have notices of assessments served on the taxpayer.

10.0 KETUA PENGARAH HASIL DALAM NEGERI V PERBADANAN KEMAJUAN EKONOMI NEGERI JOHOR (2003) MSTC 4,059

Facts

The IRB had assessed the taxpayer to income tax by including to include income in arriving at the aggregate income of the taxpayer. In addition, the IRB had apportioned the gifts made by the taxpayer in arriving at the chargeable income.

The Special Commissioners of Income Tax (the 'commissioners') ruled that the gift made by the taxpayer should only be deducted against the non-exempt income. As such, the commissioners held that the assessments by the IRB were wrongfully made and ordered that it be revised accordingly.

Issue

(1) Whether the treatment of income exempt from tax by the IRB is correct.

(2) Whether apportionment of gifts as allowable deduction against aggregate income is correct.

Arguments

Taxpayer

In the absence of a definition of the word 'income' under Section 127(5) of the Income Tax Act, 1967 (ITA), the term income under the ITA should not be construed as a technical word with specific meaning like adjusted income, statutory income, aggregate income, total income and chargeable income.

As such, pursuant to Section 2(2) of the ITA, income under Section 127(5) of the ITA must mean gross income.

IRB

The word 'income' in Section 127(5) must mean chargeable income, and not gross income.

Whilst there is no special provision requiring income to be apportioned between exempt and non-exempt income, the act of apportionment is logical.

Decision

The IRB's appeal was dismissed for the following reasons:

(1) The legislature would have inserted a special provision if there was an intention that gifts made in relation to the liability to income tax ought to be deducted in proportion to the dividend income as well as the business income exempted from tax.

(2) On the matter of levying tax, the reliance on logic is misplaced considering that a tax statute imposes pecuniary burdens on the subject.

11.0 KERAJAAN MALAYSIA V ONG KAR BEAU (2003) MSTC 4,061

Facts

The taxpayer had failed to pay tax due to the Government of Malaysia (the 'plaintiff') and as a result penalties were imposed. The plaintiff then filed a writ to recover the sum and penalties due. Subsequently, the plaintiff sought to enter summary judgment against the taxpayer.

The taxpayer then lodged an appeal to the Special Commissioners of Income Tax (the 'commissioners') and submitted that the assessment and penalties raised by the plaintiff was excessive and incorrectly assessed.

The senior assistant registrar allowed the plaintiff's application for summary judgment. The taxpayer filed against an appeal.

Issue

(1) Whether upon service of the notice of assessment, the tax becomes payable eventhough the taxpayer appeals against the assessment.

(2) Whether the High Court could enter summary judgment where the plaintiff claimed that the assessment and the penalties imposed were excessive and incorrectly assessed.

(3) Whether the High Court sitting on appeal against the decision of the special commissioners by way of case stated was the proper forum to hear the taxpayer's challenge against the assessment.

Arguments

Taxpayer

(1) The amount claimed was payable notwithstanding the lodgement of the appeal.

(2) The challenge by the defendant that the tax raised was excessive and incorrectly assessed was no reason that the court could not enter summary judgment against the taxpayer.

Decision

The taxpayer's appeal failed for the following reasons:

(1) The tax payable under the assessment becomes due and payable upon service of a notice of assessment on the person assessed, whether or not that person appeals against the assessment. The failure to pay would attract penalties provided under sections 103(4) and 103(5A) of the Income Tax Act, 1967.

(2) The amount assessed and penalty imposed can be recovered by way of civil proceedings as a debt due to the government.

(3) The High Court sitting on appeal against the decision of the special commissioners by way of case stated is the proper forum to hear the taxpayer's challenge against the assessment.

12.0 FERNRITE SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI (2003) MSTC 4,065

Facts

The taxpayer was an investment holding company and agreed to purchase shares and warrants from Perbadanan Nasional Berhad ('PNS'). So as to facilitate the Sale and Purchase Agreement, the taxpayer entered into a Guarantee Facility Agreement with Overseas Chinese Banking Corporation ('OCBC').

Under the Guarantee Facility Agreement, the Guarantee Facility was granted for the purpose of enabling the taxpayer to furnish to PNS an irrevocable bank guarantee. In consideration of the banking service (Banking Guarantee Facility), the taxpayer undertook to pay and did pay quarterly payments of bank commission at the rate of 1.2% per annum.

The Bank Guarantee was a precondition for the purchase price of the shares and warrants and PNS shall return the Bank Guarantee to the taxpayer upon receipt of the payment of the full purchase price of the said shares and warrants. The shares and warrants were to be used as collateral for the bank guarantee.

The full settlement of the purchase price was to be made within twelve months after the date of completion of the Sale and Purchase Agreement. At the end of the twelve months period, due to the economic situation, the value of the shares had depreciated. The taxpayer was given an additional twelve months to make full settlement.

After the extended twelve months, the Bank Guarantee was surrendered back to the bank and the taxpayer paid interest at the rate of 8% per annum to PNS on the unpaid amount of the purchase price of the shares and warrants. To date, no payments for the purchase price of the shares and warrants were made by the taxpayer to PNS.

The title to the shares and warrants was transferred to the taxpayer upon issuance of the irrevocable Bank Guarantee and the taxpayer received the dividends on those shares from thereon.

Issue

(1) Whether the Bank Guarantee was a precondition for the purchase price of the shares and warrants.

(2) Whether the bank commissions paid were capital in nature.

(The Special Commissioners found that it was capital as the purpose of the bank guarantee facility was to enable the taxpayer to acquire the shares and warrants which constitute the capital assets of the taxpayer. Therefore the bank commission paid by the taxpayer represent the cost of acquiring those assets.)

(3) Whether the bank commission fees is cost of acquiring the assets.

(4) Whether an investment holding company was be viewed as carrying on the business of an investment holding company (where its business income is dividends received from the shares).

Arguments

Taxpayer

(1) The bank commission fees was a recurrent expenditure and therefore, of a revenue nature.

(2) An investment holding company is carrying on a business of investment holding as it's business income is the dividend received from the shares.

IRB

(1) The bank commission fees is instalments of a capital sum for the purchase of the asset.

(2) As an investment holding company is not viewed as carrying on a business, therefore the income of the taxpayer by way of dividends is assessable under Section 4(c) of the Income Tax Act, 1967.

Decision

The High Court allowed the appeal of the taxpayer for the following reasons:

(1) There was no document to prove that the Bank Guarantee was a precondition for the purchase price of the shares and warrants.

(2) The Bank Commission was not the purchase price of the shares and warrants, as the purchase price was already determined at the outset.

(3) The bank commission fees is not the cost of acquiring the assets but rather consideration for the banking service, i.e., the Banking Guarantee Facility and the use of the Guarantee Facility.

(4) The bank commission fees do not become capital because they form no part of the purchase price. It is not that the bank commission fees was the same as interest which is allowable under Section 33(1)(a) of the Income Tax Act, 1967 but that the bank commission fees is analogous to interest payments on loans and should be considered as falling under revenue expenditure under Section 33(1) of the Income Tax Act, 1967.

(5) Bank guarantee commissions need not refer to cost of raising capital where they are incurred in the course of operation of a business as in the case here because the business was that of holding investments producing dividends which needed financial assistance (which is the Bank Guarantee). At any rate, bank commission cannot be described as capital since it is recurring expenditure and does not add to the cost of the shares and warrants but to the cost of earning the dividend income.

(6) The bank commission is to be distinguished from the arrangement fees which was paid in respect of the bank guarantee. While the bank commission was annual and thus recurring, the arrangement fees was paid once and for all. The arrangement fees is capital since it is preparatory to the bank guarantee.

(7) Expenses relating to capital assets are fully deductible when such expenses do not bring in an asset or an intangible asset. Bank commission payments do not create any intangible assets nor does it create any assets.

(8) A company may carry on business as an investment or holding company deriving its gains or profits from dividends and interest from the securities it owns (re-iterating the position in American Leaf Blending v. Director General of Inland Revenue [1979] 1 MLJ 1).

13.0 YONG SIEW CHOON v. KERAJAAN MALAYSIA (2004) MSTC 4,086 (COURT OF APPEAL)

Facts

Yong Siew Choon (the appellant) appealed against the legal proceedings instituted by the Government (the respondent) in relation to the outstanding tax payable for the year 1989 due from her deceased husband's estate. The Notice of Assessment for the year 1989 was addressed to "Yong Siew Choon the Representative of the Estate of Abdul Hamid bin Tun Azmi" and the appellant was sued as such. However, the appellant was not the executrix or administratrix of the deceased's estate. No letters of representation of any sort were applied for or taken out in respect of the deceased's estate.

Issue

Could the action against the appellant be maintained in light of the Rules of the High Court 1980 ("RHC") and given that no letters of representation were applied nor extracted?

Arguments

Appellant

The appellant was not the representative of the estate of the deceased. Hence, the claim against the appellant was null and void.

Respondent

Action was instituted pursuant to the relevant provisions in line with the Rules of the High Court.

Decision

The appeal was allowed on the ground that although the action was commenced in accordance with the provisions in the Rules of the High Court, however, the manner in which it was prosecuted was in defiance of the mandatory provisions of the said Rules. Such non-compliance means that action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. Thus, the suit brought against the appellant was illegal and null.

14.0 KOPERASI SERBAGUNA KEBANGSAAN BERHAD v. PEMUNGUT DUTI SETEM (2004) MSTC 4,091 (HIGH COURT OF MALAYA)

Facts

Koperasi Serbaguna Kebangsaan Berhad (the plaintiff) was a co-operative society incorporated under the Co-operative Society Act 1993.

The plaintiff purchased a property and entered into a sale and purchase agreement dated 24 May 1995. Accordingly, the appropriate forms for the adjudication of the stamp duty payable for the transfer under Section 35 of the Stamp Act 1949 (the Act) were submitted to the Collector of Stamp Duty (the defendant) and stamp duty of RM30,000 was paid on 10 October 1995.

On 6 August 1997, the plaintiff became aware that pursuant to Section 35 (General Exemptions) First Schedule Paragraph 5 of the Act, co-operatives were exempted from paying stamp duty. As such, the plaintiff sought for a refund of the stamp duty already paid. However, the defendant rejected the claim for refund on the grounds that Section 57 of the Stamp Act 1949 was applicable.

Issue

Was the plaintiff entitled to a refund of the stamp duty paid previously by virtue of Section 35 First Schedule Paragraph 5 (General Exemptions) of the Stamp Act 1949?

Arguments

Plaintiff

On the basis that it was a co-operative society, the plaintiff argued that it was exempted from paying any stamp duty pursuant to Section 35 (General Exemptions) First Schedule Paragraph 5 of the Act. As such, the defendant had wrongly imposed the stamp duty on the purchase of the property.

Defendant

Based on Section 57 of the Act, the defendant contended that the period for the application for a refund had lapsed as the application was made more than 12 months after the date of execution of the transfer instrument.

Decision

The High Court dismissed the plaintiff's appeal on the following grounds:

(1) The defendant was wrong to rely on Section 57 of the Act for rejecting the plaintiff's claim for a refund as this section provided for "Allowance for spoiled stamp" and this was not the case.

(2) The stamp duty exemptions provided under Section 35 (General Exemption) First Schedule Paragraph 5 of the Act are not granted automatically on all instruments executed.

(3) The onus was on the plaintiff to seek and apply for the exemption by submitting the relevant document to prove that it was to be exempted under the relevant provisions of the Act when submitting the appropriate form for the adjudication of the proper stamp duty. As this was not done at the time the forms were submitted, the defendant could not be held at fault in imposing the stamp duty.

(4) Finally, the plaintiff was not entitled to the refund because the application for a refund had surpassed the time limit of 12 months as specified under Section 58 of the Act.