



📍 Court of Special
Commissioner of Income
Tax, Putrajaya

📅 July 8, 2020

🏛️ Legal Department, IRBM

REDEEMABLE PREFERENCE SHARES FALLS WITHIN THE DEFINITION OF 'ORDINARY SHAREHOLDING' UNDER SECTION 40 OF THE FINANCIAL ACT 2007

CGHSB V. KETUA PENGARAH HASIL DALAM NEGERI

ISSUES FOR DETERMINATION

- (1) Whether the Notices of Assessment for Y/As 2009, 2010, and 2011 dated 8th February 2017 are time barred;
- 2(a) Whether the redeemable preference shares in C.Berhad owned by the Appellant (hereinafter collectively referred to as '**RPS**') fall within the definition of 'ordinary shareholding' under section 40 of the Finance Act 2007 (hereinafter referred to as '**FA**');
- 2(b) If the answer to (a) is yes, whether tax deducted from franked dividends paid by C.Berhad and S.Berhad to the Appellant in respect of those RPS qualifies for set-off under section 110 of the Income Tax Act 1967 (hereinafter referred to as '**ITA**') read together with section 51 of the FA;
- (3) Whether the interest expenses incurred in acquiring the shares of the Appellant's subsidiaries are deductible under section 33(1) of the ITA;
- (4) Whether the common expenses incurred by the Appellant are deductible under Section 33(1) of the ITA;

JUDGES

Puan Hanim Abdul Rahman
Puan Rosidah Abu Bakar
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REVENUE COUNSEL

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FACTS

1. The Appellant was audited due to high repayment on set-off under section 110 ITA 1967 from its dividend income for YAs 2009 - 2012.
2. The crux of the situation started when the Appellant took over SB Sdn Bhd in 2006 in which SB Sdn Bhd still had high amount of section 108 ITA 1967 credit which was not yet utilized to issue frank dividends even though S.Berhad is already dormant with RM2.00 capital.

3. To utilize the credit, the following transactions were made –
 - (i) CGSB on 18 Jun 2009 issued RM1,000 RPS Class B to S.Berhad and paid dividends to S.Berhad
 - (ii) S.Berhad in 2010 issued 1,616,830 RPS valued RM0.01 at issued price of RM1 to the Appellant.
 - (iii) S.Berhad in 2011 issued 18,464,125 RPS valued RM0.01 at issued price of RM1 to the Appellant.
 4. For the period of 2009 to 2012, the Appellant had received dividend income from ordinary shares holding from various investment counters like S.Berhad, CGS and CIBB. The Respondent had allowed all section 110 ITA 1967 set-off on dividend income from the Appellant's ordinary shares holding.
 5. However, the Respondent was of the view that RPS did not fall within the definition of 'ordinary shareholding' under section 40 of the FA and disallowed section 110 ITA 1967 set-off on dividend income from the RPS.
 6. The interest expenses and common expenses claimed under subsection 33(1) were also disallowed by the Respondent.
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THE APPELLANT'S SUBMISSION

1. There is no negligence on the Appellant's part.
2. Parliament used the phrase 'ordinary shareholding' and not 'ordinary shares' in section 40 of the FA and it is beyond a shadow of a doubt that such usage is intentional because the sentence in section 40(3) begins with the words 'In this Part' making it clear that the specific definition is to be used in Section 40.
3. 'Ordinary shares' is not defined under the Companies Act 1965.
4. In regard to the RPS in C.Berhad, as set out in its Memorandum and Articles of Association, 'The Redeemable Preference Shares will not carry any fixed dividend rights.'
5. In regards to the RPS in S.Berhad, based on S.Berhad's Financial Statements for Financial years in dispute stated 'the RPS holders are entitled to dividend only at the discretion of the Company's Board of Directors.'
6. The dividend vouchers for RPS in C.Berhad and S.Berhad clearly confirm that the dividend rates for RPS were different and certainly not fixed.
7. The interest and common expenses are allowable under subsection 33(1) ITA 1967.

RESPONDENT'S SUBMISSION

1. There was negligence on the Appellant's part.
2. RPS does not fall under the definition of 'ordinary shareholding' under subsection 40(2) FA 2007. Shares owned by the Appellant are RPS based on Form 24 filed to SSM, Financial Notes to Financial Statements and treatment by the Appellant to its RPS shareholders. The Appellant's witness was unable to answer pertinent to distribution of dividends and none of the directors were called.
3. Interest expenses and common expenses are not allowable under subsection 33(1) and subsection 60FA(a)(iii) ITA 1967 and paragraph 12B Schedule 6 FA 2007.

COURT'S DECISION

1. The SCIT held that based on Hansard, RPS owned by the Appellant falls within the definition of 'ordinary shareholding' under section 40 FA 2007.
2. Interest and common expenses are allowable under subsection 33(1) ITA 1967 relying on Multi Purpose's case.
3. The SCIT found no negligence on the Appellant's part.
4. All notices of assessment to be discharged.

