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SPECIAL COMMISSIONERS OF INCOME TAX

PUAN NIK SERENE BINTI NIK HASHIM

05 MAY 2023

SECTION 44A(9) OF INCOME TAX ACT 1967

TTDSB
V.
DIRECTOR GENERAL OF INLAND REVENUE
PKCP (R) 140/2017

The Taxpayer and BASB are related companies having the same ultimate holding company, BCB. BASB surrendered its adjusted loss of RM5.5 million to the Taxpayer pursuant to Section 44A of the Income Tax Act 1967 ("ITA 1967") (the Group Relief Provision) and the Taxpayer has claimed the same amount from BASB. The DGIR conducted an audit on BASB for Year of Assessments ("YAs") 2011 to 2013. Based on his findings, there was a reduction on BASB's amount of adjusted loss for YA 2010, consequently resulted to the reduction of the maximum amount of losses could be surrendered by BASB from RM5,539,318.00 to RM4,072,114.00. Hence, BASB had over-surrendered its losses to the Taxpayer by RM1,427,886.00 while the Taxpayer had over-claimed the losses. The DGIR issued Notices of Assessment ("Forms G") dated 27.05.2016 for YAs 2010 and 2012 to BASB and Notice of Additional Assessment ("Form JA") dated 02.06.2016 to the Taxpayer for YA 2010. The DGIR also imposed penalty of RM356,971.50 on BASB under Section 44A(9)(b) ITA 1967. Dissatisfied with the DGIR's decision, the Taxpayer appealed to the Special Commissioners of Income Tax ("SCIT").

The Taxpayer argues that Form JA is time-barred by comparing general time bar provision of Section 91(1) ITA 1967 with Section 44A(9)(a) ITA 1967. The phrase "may in that year" are used in both provisions. Some Commonwealth jurisdictions decided the phrase "that year" refers to the year of assessment. Unlike Section 91, Section 44A ITA 1967 does not permit the DGIR to raise an assessment out of time with any exceptions. The Taxpayer further contends that the word "or" in Section 44A(9) ITA 1967 should be read disjunctively. The DGIR can only either make an additional assessment under Section 44A(9)(a) ITA 1967 against the Taxpayer, or impose a penalty under Section 44A(9)(b) ITA 1967 against BASB. If the Parliament had intended for the DGIR to be able to invoke both provisions, Parliament would have surely provided for the same by using the conjunction "and" or "and/or" in connecting both provisions. Plus, as Section 44A(9)(a) and (b) ITA 1967 are separated with a semi-colon coupled with the word "or", in which Malaysian courts on many occasions held that the use of punctuation, i.e. semi-colon denotes a disjunctive meaning.

In response, the DGIR avers that the issue of time-barred assessment is not applicable in this case by merely comparing between Section 44A(9)(a) ITA 1967 and Section 91(1) ITA 1967. Both provisions are different in terms of the words used. The word "appear" is used in Section 91(1) ITA 1967 whereas in Section 44A(9)(a) ITA 1967, the word used is "discover", indicating that the two provisions clearly serve different meaning. It is trite law that words cannot be added to a legislation when they were not intended. The DGIR further submits that both Sections 44A(9)(a) and (b) ITA 1967 are to be applied together and simultaneously against the claimant and the surrendering company, as the word "or" should be read conjunctively. It would be absurd if the amount of the adjusted loss to be surrendered by BASB is RM4,072,114.00 whereas the amount to be claimed by the Taxpayer remains at RM5,539,318.00. This would be inconsistent with the reading of Section 44A(4) ITA 1967 and Section 44A(9)(a) ITA 1967. The court does not necessarily decide that the use of "and" after a punctuation (i.e. comma or semi-colon) to be read conjunctively. The word "and" can be interpreted as disjunctive and not conjunctive, hence the Taxpayer's contention is untenable.

On 05.05.2023, the SCIT disallowed the Taxpayer's appeal and held that the Form JA raised against the Taxpayer was affirmed and final.

Editorial Notes
Taxpayer has the right to file an appeal against the decision by the SCIT within 21 days from the date of the decision