Tax e-Alert

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Erroneous Reliance On Public Ruling: Relief For Error Or Mistake

With the technicalities shrouding the interpretation of tax law provisions, it is not uncommon for taxpayers to make a mistake in filing their tax returns. Section 131(1) of the Income Tax Act 1967 (**ITA**) specifically provides an avenue for taxpayers to claim relief for excessive tax paid due to error or mistake.

However, Section 131(4) provides for an exception — no relief would be granted if the error or mistake was made on the basis of the *practice of the Director General generally prevailing at the time* when the return or statement was made. The absence of any judicial consideration on this particular phrase has left taxpayers and tax practitioners uncertain as to whether the *practice of the Director General* would include the Inland Revenue Board's stance contained in public rulings issued under Section 138A(1).

This question was recently answered by the Court of Appeal in *RGTSB v Ketua Pengarah Hasil Dalam Negeri*, where the Director General of Inland Revenue (**Director General**) relied on Section 131(4) in contending that no relief should be granted to a taxpayer due to an error or mistake made in reliance on a public ruling. We successfully represented the taxpayer in this appeal and persuaded the Court of Appeal otherwise.

Facts

The taxpayer, RGSTB, claimed reinvestment allowance for the capital expenditure incurred in the construction of a new factory. At that point in time, Public Ruling No 2/2008 stated that reinvestment allowance was to be limited to the production areas of the factory only. The taxpayer decided to comply with the public ruling in order to avoid the risk of being penalised. They excluded certain expenditure that did not constitute part of the production areas as per the public ruling in their reinvestment allowance claim.

Contact persons:

Datuk D. P. Naban
Senior Partner,
Tax, GST & Customs Practice
+603-6208 5858
dpn@lh-ag.com

S. Saravana Kumar
Partner,
Tax, GST & Customs Practice
+603-6208 5813
sks@lh-ag.com

Upon filing its tax returns, RGTSB learnt of court cases that had ruled that the Director General's stance as per the Public Ruling was erroneous. This was consequent to our success in representing taxpayers in *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformers Manufacturer Sdn Bhd* (2012) MSTC 30-039 and *Firgos (M) Sdn Bhd v Ketua PengarahHasil Dalam Negeri* (MSTC) 30-065.

In the light of these decisions, RGTSB claimed reinvestment allowance for the capital expenditure that it had restricted previously. RGTSB's application was rejected by the Director General based on Section 131(4), and they lodged an appeal to the Special Commissioners of Income Tax (**SCIT**).

The law

Section 131(4) reads:

> "No relief shall be given under this section in respect of an error or mistake as to the basis on which the chargeability of the applicant ought to have been computed if the return or statement containing the error or mistake was in fact made on the basis of, or in accordance with, the practice of the Director General generally prevailing at the time when the return or statement was made."

Although the SCIT ruled in favour of RGTSB, the High Court allowed the Director General's appeal and held that the public ruling represented the Director General's prevailing practice in respect of reinvestment allowance claims. Aggrieved by the High Court's decision, RGTSB appealed to the Court of Appeal, which is the final appeal court for tax appeals originating from the SCIT.

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122
Email: tax@lh-ag.com

The Court of Appeal's Decision

On behalf of RGTSB, we submitted that the High Court had erred in its interpretation of Section 131(4) for the following reasons:

Public rulings made under Section 138A are not 'practice'

- Public rulings are the Director General's interpretation of the law and can only serve as a guideline to the public. If Parliament had intended for the *practice of the Director General prevailing at the time* to include public rulings, this would have been stipulated explicitly in the ITA and also in the public ruling itself.

- A clear distinction between public rulings and practice of the Director General was made by Parliament in Section 99(4), where it is stated that:

  > "This section shall not apply to an assessment made under subsection 90(1) or section 91A, except where a person in respect of such assessment is aggrieved by the public ruling made under section 138A or any practice of the Director General generally prevailing at the time when the assessment is made."

- Further, the Director General had also distinguished public rulings from the *practice of the Director General prevailing at the time* in a separate public ruling. Paragraph 4.8.2 (b) of Public Ruling No 7/2015 reads:

  > "If a person who has submitted ITRF for a year of assessment is not liable to tax or is liable to tax on other income such as interest but has no statutory income from a business source and intends to appeal against a tax treatment mentioned in any PR **or** any known stand, rules and practices made by the DGIR, the person has to apply to IRBM in writing for a NONC."

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Fax: +603 6201 0122
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- Following *Hap Seng Plantation (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 4 CLJ 641, it is axiomatic that when different words are used in a statute, they refer to different things.

'Practice' does not include interpretation of the law

- The principles of law relating to the interpretation of a taxing statute have been aptly laid down by the Federal Court in *Palm Oil Research and Development Board of Malaysia v Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265:

  (a) Words are to be given their ordinary meaning

  "Practice" is not defined in the ITA. Hence, in its plain and ordinary meaning, it means what is customary, habitual or expected procedure or a way of doing something and does not include interpretation of the law. In *J Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1999] MSTC 3037, "practice" in Section 131(4) was confined to matters relating to *administrative machinery* only, and not to matters that would result in violation of explicit provisions of the Act.

  (b) No room for intendment and nothing is to be implied

  The High Court had erred in stating that "practice"' in Section 131(4) may include interpretation of the law. Since Section 131(4) made no mention of the phrase "interpretation of the law", the High Court has erred in implying such inclusion.

Fairness to taxpayers

- If the interpretation of Section 131(4) submitted by the Director General is accepted, this provision would bar a law-abiding taxpayer from claiming relief due to his reliance on the erroneous interpretation of the Director General. In effect, any good taxpayer would be bound by the mistaken interpretation of the Director General and

would have to bear the consequences for the Director General's mistake.

A good and law-abiding taxpayer should not be discriminated against and prejudiced solely for choosing to adhere to a public ruling issued by the Director General.

- Public rulings are not binding on the courts or taxpayers as the power to interpret laws that are binding lies solely with the court itself and not the Director General. The public should only be bound by the clear provisions of the ITA itself.

After considering the arguments put forth by both parties, the Court of Appeal unanimously reversed the decision of the High Court and ruled in favour of RGTSB.

Conclusion

Not only does this landmark decision shed light on the scope of Section 131 of the ITA in providing relief, it also fortifies the principle that Public Rulings are merely interpretations of the law made by the Director General. They should not be binding on the public.

Although taxpayers may be expected to consider the Director General's stance as contained in the public rulings when filing their tax returns, they should obtain proper legal advice on the correctness of such interpretation when in doubt and to challenge any public rulings that are in conflict with the ITA. Further, with this decision, taxpayers who have erroneously relied on a public ruling may now claim for relief from the Director General without any impediment.

Please contact our tax partners Datuk D P Naban or Mr S Saravana Kumar at **tax@lh-ag.com** if you have any queries pertaining to taxes paid by mistake.

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Lee Hishammuddin Allen & Gledhill

Contact persons:

Datuk D. P. Naban
Senior Partner,
Tax, GST & Customs Practice
+603-6208 5858
dpn@lh-ag.com

S. Saravana Kumar
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sks@lh-ag.com