KPMG

Tax Alert

Sony Holdings Limited vs Commissioner of Domestic Taxes (Commercial Building Allowance prior to 2010)

Introduction

This alert brings to your attention the High Court's judgment in the case of ***Commissioner of Domestic Taxes (Appellant) vs Sony Holdings Ltd (Respondent), Case No. HCCOMMITA/E052/2020 KLR.***

The Respondent completed construction of the Westgate Shopping Mall (Mall) and commissioned it in 2007. On 25 May 2016, the Respondent applied to the Commissioner to amend its self-assessment returns for the years of income 2010 to 2015 to include a deduction for Commercial Building Allowance (Allowance) at the rate of 25% per year.

The Commissioner rejected the Respondent's application on the ground that the Mall on which the Respondent sought to claim the Allowance was completed and used in 2007, which was before the law allowing taxpayers to claim the Allowance came into force (1st January 2010).

Aggrieved by the Commissioner's decision, the Respondent filed its Notice of Objection which the Commissioner dismissed via a letter dated 8 March 2017 precipitating the appeal to the TAT.

In allowing the appeal, the TAT held that the Appellant had erred in holding that the Allowance only applied to, *"buildings that were completed and put to use on or after 1st January 2010"* yet the statutory provision applied to any claim made, *"for any year of income commencing on or after 1st January 2010".*

Dissatisfied with the TAT's decision, the Appellant lodged an appeal at the High Court.

The Appellant's grounds of appeal

The Appellant challenged the TAT's decision on the following grounds: -

a) Capital allowance cannot be claimed by owners of buildings whose construction was completed and the buildings put into use before the Finance Act, 2009 came into force;

b) The provisions of the Finance Act 2009 that allowed taxpayers to claim the Allowance as an expense came into effect on 1st January 2010 and could therefore not be applied retrospectively. The law only affected taxpayers who were constructing buildings and who incurred that expenditure from the date when the law came into effect going forward; and

c) TAT's interpretation would lead to an absurdity as it would mean that all taxpayers who constructed commercial buildings prior to 1st January 2010 could claim the Allowance.

The Respondents submissions

In rebutting the Appellant's arguments, the Respondent submitted to the High Court that:

a) Statutes must be given their ordinary meaning and the TAT was right in holding that the Appellant had introduced words which were not in the statute;

b) The Appellant's position that the Allowance is deductible on the date when the capital expenditure is incurred is a misconception of the law, as the deduction of the costs is given in subsequent years and at a specified rate;

c) **Paragraph 5(1)(ee)** of the Second Schedule to the ITA was not concerned with the date when the infrastructure was built but rather whether it is being claimed for a year of income commencing 1st January 2010. Further, if it was intended that the provision should apply either from the year of occupation or from the year of creation of infrastructure, it would have clearly stated so.

d) The Appellant's submission that upholding the Tribunal's decisions would lead to an absurdity as all commercial buildings owners from time immemorial would qualify for the deduction was not correct since a taxpayer could not claim the Allowance in perpetuity and once a taxpayer recovers his capital cost, which would be within 4 years at the rate of 25% per year, the same is extinguished. In any case other conditions such as providing social infrastructure would limit the persons qualifying for the allowance; and

e) The Appellant's position is negated by an amendment introduced by the **Finance Act, 2012** which deleted **Paragraph 1(1) (ee)** and replaced it with **Paragraph 6A** which introduced the year of occupation as a basis for claiming the Allowance.

Issue for determination

From the parties' submissions, the facts giving rise to the appeal were not in dispute.

Accordingly, the High Court isolated the following to be the issue for determination:

"The issue for determination in this appeal is fairly straightforward and concerns interpretation and application of ***Paragraph 1(1)(ee)*** *of the Second Schedule of ITA which states as follows:*

1(1) Subject to this schedule, where a person incurs capital expenditure on the construction of an industrial building to be used in a business carried on by him or his lessee, a deduction equal-

.....

(ee) in a case referred to in paragraph 5(1)(f) for any year of income commencing on or after 1st January 2010, where roads, power, water, sewers and other social infrastructure have been provided by the person incurring the capital expenditure, twenty-five per cent."

The High Court's finding

In dismissing the Appellant's claim and upholding the TAT's decision in its entirety, the High Court cited the case of ***Cape Brandy Syndicate v Inland Revenue Commissioner (1) [1930] 12 TC 358***, where it was stated that:

"In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

The Court held that the language of **Paragraph 1(1) (ee)** of the Second Schedule of ITA is clear and did not require any technical interpretation.

The Court rejected the Appellant's submission that the words, *"for any year of income commencing …."* included *"buildings that were completed and put to use on or after 1st January 2010 …"* on account that such an interpretation was not supported by well-established authority.

The Court further held that the issue of retrospective application of the provision does not arise and the Commissioner's fear that building owners from time immemorial would claim the Allowance was unfounded.

Additionally, the argument by the Appellant that for the taxpayer to qualify, they should have constructed the building from scratch was thwarted by the Court which cited the provisions of **Paragraph 1(3)** of the Second Schedule of ITA which defines construction to include *"the expansion or substantial renovation or rehabilitation of an industrial building, but does not include routine maintenance or repair"*.

In its judgement, the Court held that the Respondent was entitled to the Commercial Building Allowance and that there was no valid reason why the Commissioner had rejected the Respondent's application for amendment of the self-assessments for the subject period.

Our opinion on the judgment

This judgment has provided clarity on the contentious issue on Commercial Building Allowance for the period prior to 1st January 2010. According to the High Court, taxpayers are entitled to the Allowance for commercial buildings that were completed before 2010 subject to fulfilling the conditions that prevailed then. The decision is likely to open a pandoras' box for the Kenya Revenue Authority (KRA) and taxpayers especially where KRA's assessments were based on the argument that the Allowance was only available after 2010. Taxpayers with no pre-existing assessments should however be mindful of the 5 years limit within which a taxpayer can amend their returns. In this case they may not benefit from the decision since they cannot amend the returns now to claim the Allowance.

KPMG is happy to assist with any matters arising from the above decision.

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