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Successful Judicial Review Application To Claim Investment Allowance: *BPG v Minister Of Finance*

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On 29.3.2022, the High Court in BPGSB v Minister Of Finance allowed the taxpayer's judicial review application to claim investment allowance amounting to RM 3.3 billion despite the 7 year rule to carry forward the unutilised allowance introduced to Schedule 7B of the Income Tax Act 1967 (ITA). This is a second ruling in favour of the taxpayer by the High Court subsequent to a similar decision a few months ago.

The taxpayer was successfully represented by the firm's Tax, SST & Customs partner S. Saravana Kumar together with pupil, Athena Yu Yun Lei.

Background

The taxpayer is involved in the business of providing electricity utility and power development whereby the taxpayer owns, operates and maintains a coal-fired power plant. In 2015, the taxpayer applied to the Minister of Finance (MOF) for its power plant project to be approved as an Approved Service Project (ASP) in order to claim a tax incentive known as investment allowance under Schedule 7B of the ITA. In 2016, the taxpayer's application was approved by the MOF where the taxpayer was entitled to:

(a) Investment allowance claim at 80% of the qualifying capital expenditure incurred within 5 years from the year of assessment (YA) 2016 to YA 2020 which is to be set off against 85% of the taxpayer's statutory income in each YA.

(b) The taxpayer is entitled to carry forward any unutilised investment allowance to the subsequent YAs indefinitely, until the entire amount of the investment allowance has been fully claimed.

Consequent to the approval, the taxpayer proceeded with its investment by way of the construction of the power plant and incurred significant expenses.

REIMAGINING TAX SOLUTIONS

Subsequently, amendments were introduced to the ITA via Sections 29 and 30 of the Finance Act 2018, where 7 year time limit was imposed on the carrying forward of unutilised investment allowances granted under Schedule 7B of the ITA.

In December 2018, the taxpayer attended a meeting with the representatives of the MOF to discuss on this issue and highlighted the following:

(i) The imposition of the 7 year time limit would result in the taxpayer being unable to enjoy in full the tax incentive granted in the form of investment allowance in 2016.

(ii) The 7 year time limit did not form part of the terms of the 2016 tax incentive approval.

(iii) The 7 year time limit should only be imposed on new projects undertaken from January 2019 onwards.

In July 2019, the MOF rejection the taxpayer's claim for the unutilised investment allowance to be carried forward indefinitely without providing any reasons. Being aggrieved by this decision, the taxpayer filed a judicial review application to challenge the MOF's decision.

The Taxpayer's Arguments

The taxpayer submitted the following:

- The MOF in making its decision had breached the taxpayer's vested right as provided under Section 30 of the Interpretations Act 1948 & 1967 (IA) which states that the repeal of written law in whole or in part shall not affect any right accrued under the repealed law. The taxpayer highlighted that the amendment to the ITA via Section 29 of the Finance Act 2018 cannot take away such vested rights of the taxpayer.

- The MOF failed to consider the recent decisions of our superior courts including *Society of La Salle Brothers* case which held that there is nothing expressed in the ITA to take away the taxpayer's vested right under any amending provisions which are inconsistent with the application of Section 30 of the IA.

- The MOF failed to consider the legitimate expectations of the taxpayer where the taxpayer would be entitled to carry forward any unutilised allowances indefinitely to the subsequent years in line with the tax incentive granted to the taxpayer in 2016.

- Moreover, the absence of the provision in the ITA requiring that reasons be given by the decision maker ought not to be taken to mean that there was no duty on the MOF to give reasons on its decision.

The MOF's Arguments

The MOF submitted the following:

- The MOF claimed that the 7 year time limit does not prejudiced to the taxpayer. The taxpayer still has a long period and could plan to claim all allowances under Schedule 7B of the ITA within the 12 year period (i.e. 5 years for the ASP approved term tax incentive and 7 years for the unutilised investment allowance by virtue of Section 29 of the Finance Act 2018). The imposition of time restriction is in accordance with procedures and legislation as the 7 year limitation policy sought to reduce the outflow of Government's revenue that should be collected in the future for the benefit of the country.

- There was no issue of vested rights of the taxpayer being taken away.

- The decision of not approving the taxpayer's application on the exemption was justified as the taxpayer's application has been scrutinised carefully based on the justification and merits of the application. Additionally, the MOF added that it is not required by law to give any reason for its decision.

The High Court's Decision

Upon reading and hearing submissions by both parties, the High Court ruled in favour of the taxpayer and allowed the application for judicial review. It was held that the tax incentive approval granted in 2016 was not subjected to a 7 year restriction when it comes to utilising the unabsorbed

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investment allowances. Hence, amendments made to Schedule 7B of the ITA after the granting of the tax incentive to the taxpayer cannot have the effect of depriving the taxpayer from enjoying the benefit that was allowed by the MOF.

The court also held that the absence of the express condition of this nature (i.e. the 7 year restriction to utilise the unabsorbed investment allowance) had created a legitimate expectation to the taxpayer that it was entitled to carry forward and utilise the tax incentive indefinitely.

The High Court pointed out that although the ITA does not require the MOF to provide a reason for its decision, recent decisions of the superior courts have held that this does not mean that the MOF as a public authority was not required to provide reasons for its decision.

Conclusion

Through this judicial review application, the taxpayer managed to quash the MOF's decision which deprived the rights of the taxpayer from claiming the unutilised investment allowance indefinitely. This ruling affirms the position of the law as stated in the *Society of La Salle Brothers* case. The principle of law is that a public authority does not have the authority to remove the vested right of a taxpayer arbitrarily.

This decision by the High Court is welcomed as it secures the rights of a taxpayer to claim investment allowance that was granted prior to the amendments introduced subsequently. Taxpayers who have organised their business and tax affairs based on a tax incentive granted to them cannot be in a situation of despair due to a sudden change of the law. This decision demonstrates the importance of balancing the need of the Government to realise the taxes and the need of the taxpayers to be protected against arbitrary decisions by a public authority.

Authored by Athena Yu Yun Lei, a pupil with the firm's Tax, SST & Customs practice.