



High Court, Kuala Lumpur

May 6th, 2021

Legal Department, IRBM

JUDGE

Dato' Ahmad Kamal Md Shahid

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HIGH COURT AFFIRMED GAINS FROM THE TRANSFER OF TECHNICAL KNOW-HOW AS INCOME UNDER SECTION 4(f)

KEYSIGHT TECHNOLOGIES MALAYSIA SDN BHD v. DIRECTOR GENERAL OF INLAND REVENUE

Keywords: paragraph 4(f) Income Tax Act 1967

The High Court had affirmed the decision of the SCIT that the Appellant's gains on the transfer of technical know-how in the amount of RM821,615,000.00 is assessable as income under section 4(f) of ITA 1967. The appeal was filed on the grounds that the Revenue is time-barred under Section 91(1) of the ITA 1967 to raise additional assessment for the year of assessment 2008; and that the proceeds from the sale of marketing and manufacturing intangibles by the Appellant to its related company Agilent Technologies International s.a.r.l ("Agilent") is capital in nature, and therefore not subjected to tax under ITA 1967.

The transfer of technical know-how (i.e. the marketing and manufacturing intangibles) to Agilent was made pursuant to the Appellant's group of companies global restructuring exercise which resulted in the Appellant's change of function from a full-fledged manufacturer to a

contract manufacturer for Agilent. To achieve this, the technical know-how developed by the Appellant was transferred to Agilent by way of sale agreement and the Appellant entered into a contract manufacturing agreement with Agilent where the technical know-how is licensed for the Appellant's use. The proceeds from the sale was declared as a sale of capital assets not taxable under the ITA 1967.

The Appellant argued that negligence was not proved by the Revenue as the non-production of the IP Valuation Report is not a material consideration in determining

whether the Appellant had behaved negligently. The Appellant's negligent conduct, if any, should only be assessed on its completion and submission of its tax returns.

The Appellant also contended that the gains from the sale of the technical know-how is capital in nature. Applying the Badges of Trade test, the sale was not income as the Appellant is not in the business of selling IPs. The technical know-how developed by the Appellant is not a registrable/patentable rights under Malaysian law. As the technical know-how is not registrable under statute, no legal rights were transferred and the beneficial rights to the IP Rights was transferred by way of the sale agreement.

The Revenue argued that the assessment is raised under paragraph 4(f) of the ITA and not under paragraph 4(a) of the ITA. Badges of trade test would only be applicable if the gains is being taxed as business income under paragraph 4(a) of the ITA. Paragraph 4(f) of the ITA 1967 is a 'catch all' provision for income that does not fall under paragraph 4(a)-(e) ITA 1967.

The gains from the sale is taxable under paragraph 4(f) of the ITA as 'other income' as it arises from the Appellant's Group restructuring exercise where the Appellant changed its function to a contract manufacturer. The sale of the technical know-how took place due to the restructuring and the Appellant carried on the same business using the technical know-how after the restructuring. The technical know-how was also not recorded in the audited accounts as part of the Appellant's assets.

The valuation of the IP is based on the projection of the Appellant's future income which the Appellant would have received from the use of the technical know-how. Hence, the gains from the sale is received as the Appellant's other income.

The Appellant was negligent in preparing the tax return as the gains from the sale of the technical know-how was declared under business source of the Appellant's manufacturing business which has pioneer status and tax exempted. Thus, the Revenue is not barred from raising the additional assessment.

The Appellant's appeal was accordingly dismissed with costs.

Editorial Note: This case is pending appeal to the Court of Appeal.