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Ruling issued by the Assessment Review Committee

Crayon Mauritius Ltd ("Applicant")

v/s

Director General, Mauritius Revenue Authority ("Respondent" or "MRA")

ARC/IT/027-22

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On 4 October 2023, the Assessment Review Committee ("ARC") issued its ruling in favor of the MRA with regards to the meaning of "export of goods".

Executive Summary

- The Applicant is a company incorporated in Mauritius which holds a Global Business Company licence.
- It is engaged in the selling of Microsoft licenses and software to clients mostly in Africa. The software is bought by the Applicant from its subsidiary in Dubai or Ireland. The software is received by the Applicant by way of a link and is sold to customers by giving them access to the link for downloading the software.
- For the year of assessment 2019/2020, the Applicant filed an amended tax return to apply Section 44B of the Income Tax Act 1995 ("ITA"). That is, the Applicant applied the reduced tax rate of 3% on its income derived from the sale of software, as according to the Applicant, the income qualified as income attributable to export of goods.
- The MRA disagreed with the application of Section 44B of the ITA.
- In this case the ARC ruled in favor of the MRA.

Our Commentary

There were two matters disputed in the present case, as follows:

1. The definition of "export of goods"; and
2. Whether an objection is deemed to have been allowed by the MRA where it is not determined in respect of each ground of objection within the specified period.

1. Export of goods

Pursuant to Section 44B of the ITA, where a company is engaged in the export of goods, it shall be liable to income tax at the rate of 3% on the chargeable income attributable to that export based on a set formula.

What are "*goods*"?

In order to assess whether the sale of the software by the Applicant qualifies as export of goods, it should first be established whether the software should be classified as "goods" or "services".

The ITA does not define "goods" or "services". By applying the dictionary meaning, which the Applicant rightly used, "goods" means "*Things that are produced in order to be sold*". The definition of "things" is very wide and does not exclude a digital good such as a software.

Reference to the case *The Software Incubator Ltd v/s Computer Associates UK Ltd* was also made by the Applicant. In this case, the European Court of Justice ruled that software can be classified as "goods" irrespective of whether it is supplied on a tangible medium or by electronic download. The officer of the MRA, in his email to the Applicant on 11 June 2021 also confirmed that a software falls within the category of "goods".

In this respect, the software sold by the Applicant falls within the category of "goods" for the purpose of Section 44B of the ITA.

However, for completeness the author makes a nuance with item 10 of the Third Schedule of the Value Added Tax Act, which categorises "The development, sale or transfer of computer software" as a supply of services.

Does the sale of the software or links to download the software qualify as export of goods?

The next test is to determine whether the sale of the software or links to download the software, by the Applicant qualifies as "export of goods".

According to Section 2 of the ITA, "export of goods" is defined as follows:

"includes international buying and selling of goods by an entity in its own name, whereby the shipment of such goods is made directly by the shipper in the original exporting country to the iinal importer in the importing country, without the goods being physically landed in Mauritius" (emphasis is ours).

MRA's case

The MRA held the view that the sale of the software/links does not qualify as "export of goods" for the below reasons:

- There was no physical delivery of the software;
- There were no proof of physical export and actual shipment;
- There was no nexus between the activities of the Applicant and Mauritius;
- The definition of "export" under the Customs Act was considered, as according to the MRA, it was *pari materia* to the ITA and may be resorted to; and
- The definition of "export of goods" under the ITA includes a closed category; it does not encompass all types of international buying and selling but only those where the shipment of goods is made directly by the shipper to the final exporter, without the goods being physically landed in Mauritius. Although the activity of the Applicant purported to international buying and selling, as the software/links were never sent to Mauritius and were released through a server outside Mauritius, they were not taken out or caused to be taken out of Mauritius and hence cannot fall within the closed category mentioned above.

Applicant's contention

The Applicant maintained that the MRA wrongly interpreted the term "export of goods", through the below arguments:

- Section 44B of the ITA makes no distinction between physical and digital goods;
- The use of the word "includes" in the definition of export of goods means that it is not essential to have shipment in an export of goods and other scenarios apart from actual shipment are possible;
- The definition of "export" under the Customs Act cannot be considered, as the ITA and the Customs Act deal with different types of taxes and are therefore not in *pari materia*; and
- The requirement to have the goods physically taken out of Mauritius did not form part of MRA's determination and cannot be invoked as a criterion.

Ruling of the ARC

In the present case, the ARC found that there was no issue as to whether the software was classified as "goods" or not, but the issue was with regard to shipment.

In the circumstance where the Applicant was providing an access through a link to a portal or website from which the software and license can be downloaded, the ARC raised the question whether this activity can be said to be "*the shipment of such goods is made directly by the shipper in the original exporting country to the final importer in the importing country*".

According to the ARC, although the word "includes" is used and the "export" relates to international buying and selling of goods, the ARC was of the view that if the legislator had intended electronic transactions and transfers to form part of the definition, the legislator would have clearly said so in the definition.

The ARC also flagged that if the current transaction was to fall within the definition of export of goods, the legislator would have had to regulate each import and export and every download of applications using the internet.

Hence, there should clearly be some kind of transportation as opposed to transmission for there to be shipment.

The ARC therefore ruled that the transaction did not fall within the ambit of export of goods. The Applicant was therefore not entitled to the reduced 3% tax rate on its income derived from the sale of the software/links.

2. Whether an objection is deemed to have been allowed by the MRA where it is not determined in respect of each ground of objection within the specified period.

For this point raised by the Applicant, the ARC ruled that where the grounds of objection are repetitive and several grounds raise the same issue, there is no need for the MRA to treat each ground separately and to repeat the same reason for determination for each of the repetitive grounds.

Concluding remarks

Not all international buying and selling of goods would qualify as "export of goods". Based on the ruling of the ARC in the present case, there needs to be actual shipment of the goods by the shipper in the original exporting country to the final importer in the importing country for the transaction to fall within the scope of export of goods and to qualify for the reduced 3% tax rate.

We also wish to highlight that although the MRA invoked the nexus criteria, the ITA provides for no substance requirements to be satisfied by a company to be eligible for the reduced tax rate under the export regime.

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