

2023 ASSESSMENT REVIEW COMMITTEE TAX COMPENDIUM

**Issue:
Failure to respond to each ground of objection in
accordance with section 7C of the Mauritius
Revenue Authority Act 2004**

CRAYON MAURITIUS LTD v MRA

ARC/IT/027-22 (04.10.23)

FACTS

The undisputed facts before the Assessment Review Committee, (the “**Committee**”) can be briefly summarised as follows: the taxpayer, holder of a Global Business License, (the “**Applicant**”) was involved in the buying and selling of Microsoft licences and software. The licenses were sold in digital form, typically as a link which was then communicated to and downloaded by customers. The Applicant contended that its chargeable income was taxable pursuant to section 44B of the Income Tax Act 1995 (the “**ITA**”), which provides for a 3% tax rate on the export of goods.

The Applicant also contended that the Mauritius Revenue Authority (the “**MRA**”) failed to specify the reasons for its determination in respect of each of the Applicant’s grounds of objection as required by section 7C of the Mauritius Revenue Authority Act 2004 (the “**MRA Act**”), with the consequence that any grounds not addressed in the notice of determination are deemed to have been allowed.

RULING

On the issue of section 7C of the MRA Act, the Committee was of the view that section 7C of the MRA Act must be read in conjunction with section 131B (8) of the ITA to establish that, where any grounds of objections not addressed within the prescribed delay will be deemed to have been allowed. However, in the present case, the Committee noted that several grounds of objection essentially challenged the MRA’s interpretation of the definition of “export of goods” and therefore have, on the whole, been dealt with in the notice of determination.

The Committee otherwise concluded that the Applicant’s activity did not fall within the meaning of “export of goods” as prescribed by section 2 and section 44B of the ITA since the Applicant was effectively “exporting” an access through a link to a portal or website from which the software and license could be downloaded. While section 2 of the ITA uses the word “includes” (indicative of a non-limitative definition), it was held that “export” was only related to the international buying and selling of goods.

COMMENTARY

- The authors agree with the conclusion of the Committee that a software that does not have any physical form and that is effectively bought and sold through the transmission of a link to a website or portal cannot constitute “goods” within the meaning of sections 2 and 44B of the ITA. The authors consider that this interpretation appear to be in line with the intention of the legislator, particularly considering the backdrop of the OECD’s BEPS project and the reduced risk of profit shifting associated with physical goods.
- More interestingly, the authors consider that the ruling provides some valuable insights into other aspects of the tax controversy process, namely:
 - (i) While section 7C simply bestows a duty on the Director General to specify reasons for its determination in respect of each ground of objection, without expressly stating the implication of not doing so, the Committee was of the view that *“it is clear from a reading of section 7C of the MRA Act together with section 131B(8) of the ITA that such failure of the Director General necessarily means that the said grounds have not been determined within the prescribed delay. These grounds would therefore be deemed to have been allowed”*. This purposive interpretation of the MRA Act and section 131B of ITA (which deals with the objections process) would undoubtedly be welcome by practitioners.
 - (ii) It does not follow, however, that taxpayers may raise this ground indiscriminately whenever a notice of determination appear not to have specifically referred to or provide a reply to a particular ground of objection. In particular, the Committee found that *“where the grounds of objection are repetitive and several grounds raise the same issue, there is no need for the Director General to treat each ground separately and to repeat for the same reason for determination for each of the repetitive grounds... Section 7C envisages grounds of objection which are independent of each other or at least not repetitive”*.

Commentary (Cont.)

(iii) The authors find this approach to be sensible and pragmatic. The Committee seeks to strike the right balance between, on the one hand, holding the MRA accountable to its obligations under the MRA Act and the ITA, and on the other, requiring the taxpayer to be careful in how it drafts grounds of objections. The decision of the MRA under a notice of determination should therefore be viewed in light of the issues raised in the grounds of objection, rather than taking a mechanical approach to how objections are drafted and raised.

(iv) The Committee has on numerous occasions in the past, reminded parties appearing before it that its role is to review a determination and therefore, that the Committee will not consider new issues that the taxpayer did not previously raise with the MRA. In this ruling, the Committee highlights that this principle is equally applicable to the MRA, which “*can certainly not give new reasons that have nothing to do with the reasons for Determination communicated to the Applicant, for the first time before the Committee*”. Holding the taxpayer and the revenue authority accountable to the same standard before the Committee in terms of process and how hearings are conducted will go a long way in ensuring certainty and fairness in the tax dispute resolution process in Mauritius.

(v) In the same vein, the Committee (rightfully, in our humble view) questions “*whether it is proper for an officer from the Assessment Unit of the MRA to depose before the Committee to explain the reason for the assessment when the Committee does not review assessments*”. While in this case, it appears that counsel for the Applicant did not object to the witness deposing, the authors consider that the comment made by the Committee is a valid one, certainly worthy of consideration (and further debate, if the opportunity should arise) in relation to witnesses deposing on behalf of the MRA before the Committee.

AUTHORS



Johanne Hague

DIRECTOR
Barrister at law



Medina Torabally

SENIOR ASSOCIATE
Barrister at law



Béatrice Phanjoo

ASSOCIATE
Barrister at law

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