IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 218

Tax Appeal No 3 of 2020

Between

Intevac Asia Pte Ltd

… *Appellant*

And

Comptroller of Income Tax

… *Respondent*

JUDGMENT

[Revenue Law] — [Income taxation] — [Deduction]

Intevac Asia Pte Ltd
v
Comptroller of Income Tax

[2020] SGHC 218

High Court — Tax Appeal No 3 of 2020
Choo Han Teck J
21 September 2020

12 October 2020 Judgment reserved.

Choo Han Teck J:

1 This is an appeal against the decision of the Income Tax Board of Review ("ITBR") affirming the Respondent's decision to disallow the Appellant's claims for deductions on research and development ("R&D") expenses incurred under a cost-sharing agreement.

2 The Appellant, a Singapore-incorporated company, is a subsidiary of Intevac, Inc. ("Intevac US"), a US-listed company. The Appellant and Intevac US are both part of the Intevac group, which is engaged in the business of manufacturing, repairing and trading in electromechanical systems and equipment.

3 The Intevac group initially focused on designing and producing thin-film production systems for the manufacturing of hard disk drives ("HDD"). However, sometime in or around the mid-2000s, the Appellant received a

purchase order for a tool designed for the manufacturing of solar cells. As the Appellant did not possess the relevant R&D capabilities to develop such a tool, the Appellant entered into a Research and Development Services Agreement with Intevac US dated 1 October 2008 ("the RDSA"). The RDSA provided that Intevac US would undertake R&D activities in the US for the benefit of the Appellant.

4 In 2009, the management of the Intevac group decided to plan for the possibility that the Appellant would expand its R&D capabilities in relation to non-HDD products. Accordingly, the Appellant and Intevac US entered into a Cost-Sharing Agreement dated 1 November 2009 ("the CSA"), which superseded the RDSA. The purpose of the CSA was to allow the Appellant and Intevac US to combine their R&D efforts and to share the costs and risks of their R&D activities. It differed from the RDSA in the following respects:

(a) Under the RDSA, the Appellant was to acquire all beneficial and economic rights to the Intellectual Property ("IP") developed in the performance of the RDSA. However, under the CSA, the Appellant and Intevac US would each acquire the right to exploit any IP and intangible property generated in the performance of the CSA within their respective sales territories.

(b) The Appellant was the only party that would benefit from the outcome of the R&D activities carried out under the RDSA. However, under the CSA, both the Appellant and Intevac US had a direct stake in any R&D developed for the joint benefit of the parties.

5 Pursuant to the CSA, the Appellant made the following payments to Intevac US in 2009 and 2010:

(a) the sum of US$389,012 for the period from 1 November 2009 to 31 December 2009; and

(b) the sum of US$4,463,538 for the period from 1 January 2010 to 31 December 2010 (collectively, "the Cost-Sharing Payments").

6 The Appellant then claimed deduction of the Cost-Sharing Payments pursuant to s 14D(1)(d) read together with s 14D(3) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("ITA"), which provided:

> **14D.**—(1) For the purpose of ascertaining the income of any person carrying on any trade or business and subject to subsection (4), the following expenditure incurred (other than any amount which is allowable as a deduction under section 14) by that person shall be allowed as a deduction:
>
> (*d*) payments made by that person to a research and development organisation for undertaking on his behalf outside Singapore research and development related to that trade or business.
>
> […]
>
> (3) For the purposes of subsection (1)(d), a claim for deduction shall be allowed to a person only if —
>
> (*a*) there is an undertaking by the person that any benefit which may arise from the conduct of the research and development shall accrue to the person; and
>
> (*b*) the claim is made by the person in such manner and subject to such conditions as the Comptroller may require.

7 The Respondent disallowed the deduction of the Cost-Sharing Payments, and the Appellant's appeal to the ITBR was also dismissed. The present appeal centres on the following issues:

(a) whether the Cost-Sharing Payments qualify as payments made to Intevac US for undertaking R&D on the Appellant's behalf under s 14D(1)(d) of the ITA; and

(b) whether the Appellant has satisfied the requirement under s 14D(3)(a) of the ITA.

8 Parties are in agreement that ss 14D(1)(d) and 14D(3)(a) are to be interpreted purposively in accordance with the approach set out in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*") at [59]:

(a) first, the court should ascertain the possible interpretations of the text, as it has been enacted, having due regard to the context of that text within the written law as a whole;

(b) second, the court is to ascertain the legislative purpose or object of the statute; and

(c) third, the court is to determine the proper interpretation of the text by comparing the possible interpretations of the text against the objects of the statute.

9 I will first address the meaning of s 14D(1)(d). A preliminary issue that arose is whether the relevant timeframe to discern the ordinary meaning and legislative intent of s 14D(1)(d) is (a) 1980, which was the year in which the material phrase "for undertaking on behalf" was first introduced in what was

then s 14D(1)(b) of the ITA; or (b) 2008, which was the year in which the current s 14D(1)(d) was enacted. The ITBR applied the principle that legislative intent is to be discerned at or around the time that the law in question is passed (see *Ting Choon Meng* at [18]) and held that the appropriate timeframe was 2008.

10 I agree with the ITBR's analysis. I need only add that s 14D(1)(b) of the 1980 ITA is not *in pari materia* with the current s 14D(1)(d) even though both provisions share the phrase "for undertaking on his behalf". Section 14D(1)(b) of the 1980 ITA provided that deductions would be allowed on payments made to "approved" R&D organisations. The word "approved" is omitted in the current s 14D(1)(d), which instead stipulates that deductions shall be allowed on payments made to R&D organisations which undertake R&D on a person's behalf "outside Singapore". Given these clear textual differences, the prudent and common sense approach is to adopt the year 2008 as the reference point for ascertaining the ordinary meaning and legislative purpose of the phrase "for undertaking on his behalf" in s 14D(1)(d). The legislative history of s 14D remains relevant but only to the extent that it sheds light on Parliament's intention in enacting s 14D(1)(d).

11 In relation to the first step of the *Ting Choon Meng* approach, counsel for the Appellant, Mr Allen Tan Tiaw Kheng, submits that the phrase "for undertaking on his behalf" is satisfied so long as there is a payment made in return for the benefit of another party performing, carrying on, or committing to perform R&D for the taxpayer. As such, it is irrelevant that Intevac US could also have benefitted from the R&D performed by itself and by the Appellant under the CSA. Conversely, counsel for the Respondent, Ms Quek Hui Ling, argues that "for undertaking on his behalf" imports the concept of agency, and

refers to situations where the taxpayer outsources the R&D to an organisation which then undertakes R&D wholly and exclusively for the taxpayer's benefit.

12 The Respondent's interpretation is preferred as it is more consistent with the overall statutory context. Of particular relevance is s 19C of the ITA, which explicitly provides for the circumstances under which writing-down allowances can be made for approved cost-sharing agreements for R&D activities. Section 19C(1) of the 2008 ITA provided as follows:

> **19C.**—(1) Subject to this section, where a person carrying on a trade or business has incurred expenditure under *any cost-sharing agreement* entered into and approved on or after 17th February 2006, in respect of research and development activities for the purposes of that trade or business (referred to in this section as the relevant trade or business), he shall, subject to such conditions as may be imposed by the Minister or such person as he may appoint, be entitled to a writing-down allowance of 100% of that expenditure in the year of assessment relating to the basis period in which that expenditure was incurred. [emphasis added]

13 In 2012, the s 19C regime was discontinued and replaced by ss 14D(1)(e) and (f), which provide for the deduction of payments under cost-sharing agreements from the year of assessment ("YA") 2012 onwards. However, while the s 19C regime does not apply to expenditure incurred during or after YA 2012, it was still operative when s 14D(1)(d) was enacted in 2008 and thus remains relevant to the present analysis.

14 Ms Quek argues that the opening words "subject to this section" and the phrase "any cost sharing agreement" in s 19C(1) indicate that relief for R&D expenses incurred under cost-sharing agreements was governed exclusively by s 19C until YA 2012. Mr Tan asserts, in response, that there is no reason why s 14D(1)(d) cannot also apply to cost-sharing arrangements, as overlapping provisions are not uncommon within the ITA.

15 I am not persuaded by Mr Tan's submission. That Parliament intended to create a differentiated scheme for cost-sharing arrangements is evident from the fact that taxpayers had to satisfy a specific set of conditions in order to qualify for writing-down allowances under s 19C. For example, the cost-sharing arrangement had to be "approved" by the Minister, and the Minister could impose a cap on the amount of writing down-allowance under s 19C(2). These conditions were not prerequisites to deduction under s 14D(1)(d). Allowing cost-sharing expenditure to be deducted under s 14D(1)(d) would have enabled taxpayers to circumvent the s 19C conditions via a backdoor route. This could not have been Parliament's intention.

16 In my view, the legislative framework created a clear demarcation between cost-sharing arrangements where the costs and benefits of undertaking R&D are to be shared amongst two or more parties, and arrangements in which the benefits of undertaking R&D accrue solely to the taxpayer. In 2008, when s 14D(1)(d) was first enacted, the former category was governed exclusively by s 19C, while the latter category was governed exclusively by s 14D and its related provisions, s 14DA and s 14E.

17 I now proceed to examine the legislative purpose or object of s 14D(1)(d). When s 14D was first introduced in 1980, Mr Goh Chok Tong, then Minister for Trade and Industry, explained its purpose as follows in the 1980 Annual Budget Speech (*Singapore Parliamentary Debates, Official Report* (5 March 1980), vol 39 at col 616):

> … To encourage multinational companies to shift some of their research activities to Singapore, as well as local industries to undertake R & D, we shall be introducing tax concessions. …

18 Subsequently, during the Second Reading of the Income Tax (Amendment) Bill 1980 (Bill No 6/1980) (*Singapore Parliamentary Debates,*

Official Report (17 March 1980), vol 39), Mr Hon Sui Sen, then Minister for Finance, further explained (at col 1033) that:

> [The insertion of ss 14C and 14D] also provides for deduction on expenditure incurred by new manufacturing companies on scientific research projects. The scientific research project must be carried out in Singapore. This concession is in line with our industrial development policy of promoting local expertise and technology.

19 These statements collectively suggest that the purpose of s 14D was to benefit companies in Singapore and to promote local expertise and technology. The corollary is that s 14D was not intended to subsidise the costs of R&D efforts which would not benefit the local economy.

20 This conclusion is buttressed by the following observation made by Dr Richard Hu, then Minister for Finance, when he was explaining the introduction of s 19C during the Second Reading of the Income Tax (Amendment) Bill 1993 (Bill No 23/1993) (see *Singapore Parliamentary Debates, Official Report* (30 August 1993), vol 61 at col 468):

> … Currently, payments made under cost-sharing agreements are treated as capital expenses and are therefore not tax-deductible for income tax purposes. To encourage the transfer of technology as well as to attract research and development activities to Singapore, clause 17 inserts a new section 19C to allow tax deduction of payments for technology under bona-fide cost-sharing agreements.

21 It is thus evident that s 14D had never been intended to allow relief for payments made under cost-sharing agreements in respect of R&D activities, and that s 19C was specifically enacted to create a new and distinct regime that provided allowances for such cost-sharing agreements. The s 19C regime continued to be available even after s 14D(1)(d) was enacted in 2008, and was only discontinued in YA 2012. Seen in this light, the phrase "for undertaking

on his behalf" in s 14D(1)(d) must refer to an arrangement where payments are made by the taxpayer to an organisation which has undertaken R&D outside Singapore for the exclusive benefit of the taxpayer only. This is the interpretation which best coheres with Parliament's intention.

22 Applying this interpretation, I find that the Cost-Sharing Payments, which were made pursuant to an arrangement involving the pooling of resources to undertake R&D for the joint benefit of the Appellant and Intevac US, do not fall within the ambit of s 14D(1)(d). Although the Respondent allowed deductions for payments made under the RDSA, the CSA and the RDSA were fundamentally different in scope and purpose. The fact that payments under the RDSA were deductible does not inexorably lead to the conclusion that payments under the CSA are similarly deductible.

23 I note in passing that Ms Quek asserts, in her submissions, that the legislative intent behind s 14D(1)(d) can also be inferred from the enactment of ss 14D(1)(e) and (f) in 2012. She argues that the introduction of ss 14D(1)(e) and (f) would have been unnecessary if s 14D(1)(d) bears the interpretation that the Appellant seeks, but I do not think this is relevant. Legislative amendments which took place after the enactment of s 14D(1)(d) in 2008 cannot be taken into consideration for the purposes of ascertaining the legislative intent behind that provision. I agree with Lai Siu Chiu J who held in *BFC v Comptroller of Income Tax* [2013] 4 SLR 471 at [46] that:

> … [L]egislative intent is to be determined at or around the time the law is passed. If Parliament enacts subsequent legislation having proceeded on a particular interpretation of earlier legislation, Parliament's interpretation … is of no relevance to the interpretation of the earlier legislation. Similarly, ministerial statements uttered years after legislation is passed are unhelpful as interpretive instruments.

24 Given my conclusion on s 14D(1)(d), it is unnecessary to consider whether the Appellant has satisfied s 14D(3)(a) of the ITA. Nevertheless, I will briefly state my views on this issue for completeness.

25 Section 14D(3)(a) provides that the taxpayer must make an undertaking that "any benefit which may arise from the conduct of the [R&D] shall accrue to the [taxpayer]". Mr Tan argues that s 14D(3)(a) merely imposes a procedural requirement on the taxpayer to make an undertaking that it will obtain the benefit of the intellectual property that it has paid for, if any. Since the Appellant has furnished such an undertaking to the Comptroller, it has satisfied all that is required under s 14D(3)(a). Conversely, Ms Quek submits that s 14D(3)(a) requires the taxpayer to undertake that all benefits which arise from the conduct of the R&D would accrue solely to him.

26 In my view, the ordinary meaning of s 14D(3)(a) accords with Ms Quek's interpretation. Read in light of the statutory context and, in particular, the bifurcation of the ss 14D and 19C regimes at the material time, the word "any" in s 14D(3)(a) must mean "all", and the word "may" must mean that if there is even an iota of benefit produced by the conduct of the R&D, such benefit must accrue to the taxpayer.

27 Furthermore, this interpretation is consistent with Parliamentary intent, as discerned from the extraneous materials set out above. As the Respondent points out, if deduction of a share of R&D costs were allowed, this would lead

to a risk of "revenue leakage" whereby the State subsidises R&D expenses without obtaining the commensurate benefits from the R&D undertaken. Mr Tan has attempted to rebut this argument by suggesting that there is no mismatch between the Appellant's undertaking and the benefit which the Appellant has obtained in this particular instance. Even if he were right, one cannot ignore the risk of "revenue leakage" that might occur in other cases if the Appellant's interpretation is adopted. That is not an outcome intended by Parliament.

28 Applying the Respondent's interpretation of s 14D(3)(a), I find that the Appellant has not made the requisite undertaking and that it is accordingly disentitled to relief under s 14D(1)(d).

29 Tax Appeal 3 of 2020 is thus dismissed. I will hear arguments on costs at a later date.

- Sgd -
Choo Han Teck
Judge

Allen Tan Tiaw Kheng, Soh Zi Qing Jeremiah and Ng Boon Kiat Kevin (Wong & Leow LLC) for the appellant;
Quek Hui Ling, Zheng Sicong and Shawn Joo Jian Hua (Inland Revenue Authority of Singapore) for the respondent.