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Media Releases, Tax Cases and more

April 2023

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Greetings from Deloitte Malaysia Tax Services

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Inland Revenue Board of Malaysia

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Important deadlines:

Task	Deadline	
	30 April 2023	1 May 2023
1. 2024 tax estimates for companies with May year-end		√
2. 6th month revision of tax estimates for companies with October year-end	√	
3. 9th month revision of tax estimates for companies with July year-end	√	
4. Statutory filing of 2022 tax returns for companies with September year-end	√	
5. Maintenance of transfer pricing documentation for companies with September year-end	√	
6. 2023 CbCR notification for applicable entities with April year-end	√	

1. IRBM's media release - Real Property Gains Tax (RPGT) Return Forms (RFs) for the Year of Assessment (YA) 2023

The Inland Revenue Board of Malaysia (IRBM) recently announced via a media release (available in Bahasa Malaysia language only) that the RPGT RFs for the YA 2023 for reporting the disposal and acquisition of chargeable assets by disposers and acquirers, respectively, pursuant to the RPGT Act 1976 have been uploaded on its website.

Nonetheless, taxpayers are highly encouraged to submit the RFs via e-CKHT in line with IRBM's effort to digitise its services to taxpayers with effect from 2023, which can be accessed by performing the following steps:

i. Log in to MyTax using the taxpayer's Tax Identification Number (TIN) and password. An application can be submitted through the e-Registration service on MyTax if the taxpayer does not have a TIN.
ii. Select e-CKHT from the ezHASiL service menu.
iii. Fill in the relevant RFs.

Any questions and related feedback can be forwarded to IRBM via:

(a) HASiL Care Line at 03-8911 1000 / 603-8911 1100 (Overseas);
(b) HASiL Live Chat; and
(c) Feedback Form on IRBM's official portal at https://maklumbalaspelanggan.hasil.gov.my/MaklumBalas/ms-my/.

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2. IRBM's media release - Payment Centres renamed to Revenue Management Centres

The IRBM recently announced via a media release (available in Bahasa Malaysia language only) that effective 15 March 2023, the Kuala Lumpur, Kuching, and Kota Kinabalu Payment Centres will be respectively renamed as:

i. Kuala Lumpur Revenue Management Centre;
ii. Kuching Revenue Management Centre; and
iii. Kota Kinabalu Revenue Management Centre.

The nomenclature changes are in line with the changes in the IRBM's new structure and are intended to strengthen the management of income tax payments. Despite the renaming of these payment centres, their functions and roles remain the same.

Any questions and related feedback can be forwarded to IRBM via:

a) HASiL Care Line at 03-8911 1000 / 603-8911 1100 (Overseas);
b) HASiL Live Chat; and
c) Feedback Form on IRBM's official portal at https://maklumbalaspelanggan.hasil.gov.my/MaklumBalas/ms-my/.

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3. OASB v DGIR (SCIT)

The IRBM has recently uploaded a case report, "OASB v DGIR (SCIT)" on its website.

Facts:

The taxpayer rented a shop lot for its principal activity of trading in audio, video equipment and related products from the year 2004 to 2017. Due to a compulsory acquisition, the taxpayer was awarded a compensation of RM2,341,817 by Jabatan Ketua Pengarah Tanah dan Galian Persekutuan Negeri Selangor (JKPTG) pursuant to Section 16 of the Land Acquisition Act 1960, as stated in Form H (Pemberitahu Pemberian dan Tawaran Pampasan).

Pursuant to a tax audit conducted on the taxpayer for the YA 2017, the Director General of Inland Revenue (DGIR) raised a Notice of Additional Assessment dated 29 June 2020 [inclusive of a penalty under Section 113(2) of the Income Tax Act 1967 (ITA)] on the taxpayer in relation to the compensation received.

The taxpayer took the position that pursuant to Form H, the compensation received for 'kos penambahbaikan bangunan' is a capital receipt. The taxpayer contended that the compensation was awarded to restore the taxpayer to its original condition based on the replacement cost at the time of compulsory acquisition. The taxpayer further argued that the compulsory acquisition has resulted in a temporary shutdown of its business, leaving it unable to conduct sales and generate profits.

On the other hand, the DGIR asserted that the total amount of compensation received by the taxpayer from JKPTG as a tenant of the shop lot is a revenue receipt and taxable under Section 4(f) of the ITA, since the taxpayer did not own the land and building for which compensation was granted. The DGIR also argued that Section 4(f) of the ITA allows gains or profits that do not fall under Sections 4(a) to 4(e) of the ITA to be taxed.

Issue:

Whether the compensation received from JKPTG due to the compulsory acquisition is a revenue receipt and taxable under Section 4(f) of the ITA.

Decision:

The Special Commissioners of Income Tax (SCIT) dismissed the taxpayer's appeal and decided that the Notice of Additional Assessment raised on the taxpayer for YA 2017 is reasonable and just. The SCIT also ruled that there is a basis in law and facts for the DGIR to impose a penalty under Section 113(2) of the ITA.

[Details of the above tax case at the SCIT level are not available as of the date of publication.]

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4. TLP v DGIR (SCIT)

The IRBM has recently uploaded a case report, "TLP v DGIR (SCIT)" on its website.

Facts:

TLP (the taxpayer) manages and operates a nightclub business under the brand name CDR (i.e. not a registered entity). The taxpayer had prepared its own set of accounts and submitted the income tax returns for the YAs 2015, 2016, and 2017 in accordance with Section 77A of the ITA. During the investigation, the DGIR obtained relevant documents containing information on the taxpayer's business. Furthermore, the DGIR had also taken statements from the taxpayer's director and accounts clerk pursuant to Section 81 of the ITA.

The DGIR's audit finding revealed that the amount reported in the taxpayer's audited accounts, which were submitted to the DGIR, was less than the amount recorded in the management accounts by RM36,259,042. The funds were transferred to HE, a sole proprietor who operated under the same club and in the same location as the taxpayer but had a different bank account. As a result, the DGIR issued Notices of Assessment under Section 91(1) of the ITA on the taxpayer for the unreported income of RM36,259,042. Dissatisfied with the DGIR's assessments, the taxpayer filed an appeal with the SCIT.

The taxpayer claimed that the amount recorded or transferred to HE was HE's income. CDR's net profit was derived by deducting costs and expenses from gross income (sales). Thus, by treating the entire net profit of the CDR as the taxpayer's net profit, the DGIR had ignored HE's gross income in the club's income statement and treated those sales as the taxpayer's sales. As a result, the same income was taxed twice by the DGIR, once on HE and once on the taxpayer. Furthermore, the taxpayer contended that the DGIR has a statutory duty under Section 140(5) of the ITA to provide particulars together with the Notices of Assessment (as per the case of *Bandar Utama City Corporation v DGIR*).

In response, the DGIR asserted that the audit finding was based on discrepancies in two primary pieces of evidence adduced during trial – namely the audited accounts and the management accounts. Based on the documents adduced before the SCIT, CDR was wholly owned by the taxpayer. All invoices and payment vouchers produced before the SCIT clearly show that they were issued by CDR in their ordinary business transactions without any linkage to HE. The statements taken from the taxpayer's director and accounts clerk during the investigation under Section 81 of the ITA and produced during trial had become incontrovertible evidence as the taxpayer failed to discredit the said statements before the SCIT. The taxpayer's failure to call its tax agent and/or its director and/or auditor to explain the material discrepancies

amounting to RM36,259,042 in the taxpayer's management accounts and audited accounts was fatal. The DGIR therefore invoked Section 114(g) of the Evidence Act 1950 against the taxpayer on this issue. The application of Section 140 of the ITA was irrelevant because no evidence was presented during trial that the DGIR had applied Section 140 of the ITA. With that, the DGIR contended that the taxpayer had intentionally understated its income.

Issue:

Whether the DGIR was right in law to issue Notices of Assessment under Section 91(1) of the ITA on the taxpayer.

Decision:

In dismissing the taxpayer's appeal, the SCIT held that the DGIR was right in law to raise the Notices of Assessment on the taxpayer. The SCIT ruled that the taxpayer failed to discharge its burden of proof under Paragraph 13 of Schedule 5 to the ITA.

[Details of the above tax case at the SCIT level are not available as of the date of publication.]

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5. Medan Prestasi Sdn Bhd v DGIR (HC)

The IRBM has recently uploaded a case report, "Medan Prestasi Sdn Bhd v DGIR (HC)" on its website.

Facts:

The taxpayer was in the business of property development and investment and had disposed of 12 parcels of land (i.e. land parcels). Subsequently, the taxpayer submitted the RPGT returns for the disposal of the land parcels to the DGIR.

The DGIR raised Notices of Additional Assessment for the YAs 2002, 2003, and 2004 under the ITA for the disposal of the land parcels on the basis that the gains derived from the disposal were business income to the taxpayer under Section 4(a) of the ITA.

The taxpayer contended that the main intention of acquiring the land parcels was for investment. This was evidenced by the testimony of the company's director, where the director, together with the co-founder of the company, intended to use the land parcels for the construction of office buildings and showrooms, which will be rented out after the surrounding areas have been developed.

Furthermore, the taxpayer claimed that the SCIT ignored the taxpayer's accounting treatment of the land parcels as investment assets. The mere possibility that the land parcels could be sold is a neutral matter with no probative value as all real property can be bought and sold. The SCIT also erred in its interpretation and conclusion based on the Privatisation Agreement dated 21 April 1995, which stated that the taxpayer had been trading because the land parcels were to be alienated to the taxpayer for "own development" and "pre-approved commercial and industrial use or such other use as may be requested".

In response, the DGIR asserted that the SCIT's finding in the case clearly showed that there was no rental activity, nor any preliminary development activity carried out on the said land parcels. The taxpayer's reference to the office buildings and showrooms to generate rental income was disputed during trial. The authenticity of the building plan tendered by the taxpayer's counsel during trial was disputed, and the said documents were not supported and/or corroborated by any other evidence.

The DGIR further argued that the taxpayer's contention that it was facing financial difficulties was clearly untenable. There was no evidence produced before the SCIT that corroborated the taxpayer's allegation, and the statement therefore became mere assertions by the taxpayer without any merit.

Issue:

Whether the DGIR was right in law to subject the gains derived from the disposal of the land parcels to tax under Section 4(a) of the ITA for the YAs 2002, 2003, and 2004.

Decision:

The High Court (HC) dismissed the taxpayer's appeal and upheld the decision of the SCIT. The HC agreed with the DGIR's submission that the taxpayer failed to prove its financial position. The taxpayer's intention to develop the land parcels so that it could generate rental income was not supported by any corroborative evidence. The taxpayer had also failed to show that it had taken any steps to develop the land parcels.

Additionally, the HC also held that the architect's drawing of the proposed office building and showroom was an afterthought on the taxpayer's part. It was never produced during the tax audit and was only presented during trial before the SCIT. The drawing was also not signed by a certified architect to prove its authenticity.

[Details of the above tax case at both the SCIT and HC levels are not available as of the date of publication.]

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6. KPHDN v Selectcool Sdn Bhd (HC) [(2023) MSTC 30-602]

This is an appeal by the Ketua Pengarah Hasil Dalam Negeri (KPHDN) against the Deciding Order of the learned SCIT dated 26 August 2020 according to Paragraph 34, Schedule 5 of the ITA. The SCIT had allowed the appeal by way of Form Q by the taxpayer against the Notice of Additional Assessment for the YA 2013 raised by KPHDN.

The KPHDN, partially dissatisfied with the aforesaid Deciding Order, filed a Notice of Appeal dated 14 September 2020 requesting the SCIT to give their grounds of judgment for the opinion of the HC.

Issues:

1. Whether the gains / profits arising from the disposal of the Land (i.e. HS(D) 202186, PT 23994, Mukim Rasah, Seremban, Negeri Sembilan) are taxable under Section 4(a) of the ITA; and

2. Whether the SCIT was right in law and in fact to set aside the penalty under Section 113(2) of the ITA imposed by the KPHDN on the taxpayer.

Decision:

The HC allowed the KPHDN's appeal based on the following grounds:

Issue 1

- The SCIT appeared to have placed undue reliance on the Memorandum and Articles of Association (MAA) of the taxpayer and accepted the contention of the taxpayer that because purchasing lands for investment was one of the objects listed in the MAA, this was in law conclusive that in retaining the said Land prior to the sale, it was carrying on activities in investment in land. However, the SCIT failed to consider that the objects as stated in the MAA of the taxpayer were not conclusive.

- The intention of the taxpayer was not for investment but an adventure in the nature of trade, as there was clear evidence showing a motive to seek profit rather than for investment. This could be seen from the evidence adduced in relation to the position of the taxpayer with only a capital of RM2.00 and its dormant status, both of which were a combination that showed that the taxpayer was merely a shell of a company that existed for the purpose of keeping and disposing of the Land in order to gain profit.

- The SCIT failed to take into account the fact that material alterations or improvements had been made to the Land acquired or that its character or quality had been changed to render it more merchantable, which would indicate that the Land was derived from a profit-making undertaking or scheme. The taxpayer's action in hiring Metropolis Planning Sdn Bhd, Bellatron Sdn Bhd, and AZ Engineering Consultant to do the alterations on the Land was evidence of the taxpayer's intention to gain profit from the disposal of the Land.

- The SCIT erred in its finding as it had failed to consider that there were two disposals from the same subject matter done by the taxpayer via two agreements with two different purchasers, i.e. Nada Network Sdn Bhd and Condolink Sdn Bhd. These two disposals were transactions made for the purpose of profit trading.

- The SCIT failed to take into consideration that the construction and the opening of the Seremban - Port Dickson Highway had in many ways affected the price of the surrounding lands. This resulted in a price and/or value increase for the surrounding lands, including the subject matter of this appeal. Therefore, there was no necessity for the KPHDN to produce the Valuation Report as mentioned by the SCIT.

- The taxpayer did not conduct any business activities, knowing well that the price of the Land would increase over time due to its location, position, and category for the usage of the Land. In addition, the taxpayer's action in borrowing money from the director and/or shareholders (free from interest, and the money could be returned when the taxpayer had sufficient funds to operate) for the purpose of acquisition of the Land from the State Government of Negeri Sembilan supported the fact and argument that the motive and intention of the taxpayer when acquiring the Land was to resell at a profit.

Issue 2

The taxpayer made an incorrect return that resulted in less chargeable income and tax assessed. The KPHDN was correct in imposing a penalty under Section 113(2)(b) of the ITA. The penalty imposed at the rate of 45% is reasonable, fair, and in accordance with the law based on the audit finding of the case.

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7. Amat Muhibah Sdn Bhd v Menteri Kewangan Malaysia (HC) [(2022) MSTC 30-518]

This was an application by the taxpayer for leave to apply for an order for the Ministry of Finance (MOF) to exercise its power under Section 135 and/or Section 127(3A) of the ITA to set aside or exempt the Notice of Assessment for the YA 2017 issued by the DGIR on the grounds that the assessment was ultra vires, illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable, and constituted a denial of the taxpayer's legitimate expectation.

Issues:

1. Whether the taxpayer had an arguable case and the application was not frivolous; and

2. Whether a stay of the MOF's decision ought to be granted.

Decision:

The HC allowed the taxpayer's application based on the following grounds:

- Going by the authorities in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60* and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413*, a purported non-decision such as in the taxpayer's case was amenable to judicial review. The fact remained that the taxpayer was aggrieved with the MOF's non-response. So long as the non-response, which could be deemed to be a decision, affected the taxpayer either by altering or by depriving its rights of the benefits which it had been permitted to enjoy, then the decision was amenable to judicial review.

- There was no statutory appeal procedure and/or domestic remedy in the ITA that provided for the challenge of the MOF's decision under Sections 135 and/or 127(3A) of the ITA. Section 99 of the ITA only provided for the appeal of a Notice of Assessment. Therefore, in challenging the decision of the MOF and the MOF alone, the taxpayer's application did not fall under the jurisdiction of the SCIT and when there was no alternative remedy provided under the ITA, the MOF's decision was amenable to judicial review.

- As the MOF held a position of authority and was empowered under Section 135 of the ITA to issue directions of a general character to the DGIR in accordance with the ITA, such directions should be given effect by the DGIR. In deciding not to respond to the taxpayer's request to issue directions under the same section of the ITA or exempt the taxes alleged to have been arbitrarily raised via the Notice of Assessment under Section 127(3A) of the ITA, the MOF's decision was therefore amenable to judicial review.

- The MOF's contentions were all questions of law, the merits of which could only be determined at the substantive stage.

- The taxpayer's complaint could not be said to be frivolous. The points raised by the taxpayer, such as irrationality, unreasonableness, and legitimate expectation, require careful consideration of their merits and should not be rejected simply because a domestic remedy was available at the low threshold stage.

- As per *Islamic Finance Services Board v Marlin Fairol Mohd Faroque & Anor [2010] 8 CLJ 173; R (H) v Ashworth Special Hospital Authority [2003] 1 WLR 127*, a stay in a judicial review application should be given a wide interpretation to enhance the effectiveness of the judicial review jurisdiction. Thus, it was essential that a stay be granted in this case for the preservation of the status quo, preventing any ineffective outcomes or denial of the taxpayer's full benefits of success in the present application.

- There were merits to the taxpayer's judicial review application, and the application was neither frivolous nor vexatious. The granting of a stay in this case would ensure that the taxpaying public would be adequately protected from having to unjustly suffer the negative effects of arbitrary or incorrect assessments until the full and final determination of the case by the court.

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8. Etiqa Family Takaful Berhad v KPHDN (HC) [(2022) MSTC 30-510]

This was an appeal filed by the taxpayer against the decision of the SCIT. The dispute evolved over the deductibility of commission expenses to earn the "Wakalah" fee under Section 33(1) of the ITA. The SCIT dismissed the taxpayer's appeal and held that the commission expenses on the "Wakalah" fee could not be deducted as expenses of the shareholders' fund under Section 33(1) of the ITA.

Issues:

1. Whether the commission expenses incurred by the taxpayer to earn the "Wakalah" fee for the YAs 2008 to 2013 are deductible under Section 33(1) of the ITA;

2. Whether the taxpayer was negligent within the meaning of Section 91(3) of the ITA; and

3. Whether the DGIR was right to impose penalties on the taxpayer under Section 113(2) of the ITA.

Decision:

The HC allowed the taxpayer's appeal on issues 2 and 3 and disallowed the appeal on issue 1 based on the following grounds of judgement:

- The HC held that commission expenses in the context of a takaful business were not covered by Section 33(1) of the ITA. Otherwise, the parliament would not have inserted Section 60AA of the ITA vide Finance Act 2014 to deal with a takaful operator's specific business. The HC agreed with the finding of the SCIT that Section 60AA of the ITA prevailed over Section 33(1) of the ITA in the context of a takaful business based on the maxim of *generalia specialibus non derogant*. With that, the HC held that commission expenses incurred by the taxpayer for the YAs 2008 to 2013 to earn the "Wakalah" fee from the general takaful fund do not qualify for deduction under Section 33(1) of the ITA.

- The HC ruled that the SCIT was wrong to conclude that the taxpayer was negligent under Section 91(3) of the ITA. This is because the taxpayer filed its tax returns for the YAs concerned within the statutorily prescribed period and duly provided the DGIR with the documents requested, even though the tax audit was conducted six years after the expiration of YAs 2008 to 2010. Besides, there was nothing in the notes of the proceedings that indicated a breach of the taxpayer's duty of care. The taxpayer merely adopted a different interpretation of the relevant provision of the law. The HC was of the view that a different interpretation of the relevant provisions in the ITA could not be held as negligence within the meaning of Section 91(3) of the ITA [see *Piramid Intan Sdn Bhd v KPHDN ([2015] 10 MLJ 436)*].

- The HC ruled that the DGIR failed to discharge its burden of proof under Section 91(3) of the ITA in relation to the Notices of Additional Assessments for the YAs 2008 to 2013, because there was no evidence of intentional wrongdoing on the taxpayer's part. Hence, there was no legal basis for the DGIR to exercise its discretion in imposing the penalties against the taxpayer under Section 113(2) of the ITA for the YAs 2008 to 2013.

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9. Dialog Catalyst Services Sdn Bhd & Ors v KPHDN (HC) [(2022) MSTC 30-519]

These applications were filed by the eight (8) Applicants for leave to commence proceedings under Order 53 Rule 3 of the Rules of Court 2012 (ROC) for, inter alia, a certiorari order to move the Court to quash the decision of KPHDN in the form of the Notices of Additional Assessment for the YAs 2017 and 2018, all dated 29 April 2022 (the Decision).

The Applicants further pray for an order that any and all proceedings, enforcement actions, administrative actions, statutory actions, increase of tax and/or any other proceedings in relation to, arising from, or in connection with, any part or the Decision, whether present or future, including, without limitation, demand for payment of the taxes and penalties purportedly payable under the alleged erroneous assessments, be stayed until these applications for judicial review are determined fully and finally or otherwise resolved or pending the determination of the merits of the Applicants' appeal under Section 99 of the ITA (including any appeals therefrom) or until otherwise ordered.

Issues:

1. Whether the Applicants had prima facie arguable case for judicial review and the application was not frivolous or vexatious; and

2. Whether the Applicants met the test for leave to be granted and had established special circumstances warranting the grant of a stay.

Decision:

The HC held that the Applicant has a prima facie arguable case for judicial review and the application is not frivolous or vexatious. The HC granted an order in terms of the application based on the following grounds:

- There is no presumption in law that the KPHDN acts in good faith. It cannot be disputed that there is also no prohibition of the expenses incurred by the Applicants to pay its ultimate holding company for the value of the employee compensation in the form of share options rewarded to its employees through an Employee Share Option Scheme (ESOS) under Section 39(1) of the ITA, which explicitly provides for the disallowance of the deduction of certain expenses.

- In addition, there are Public Ruling No. 2/2013 on "Perquisites from Employment" and Public Ruling No. 5/2019 on "Perquisites from Employment", which state that employers are eligible to claim a deduction for expenses in respect of the employment of its employees, including all types of perquisites paid to the employees, as provided for under Section 33(1) of the ITA, and that shares granted to employees are perquisites. Therefore, there is the issue of the legitimate expectation of the Applicants as taxpayers, and that the KPHDN shall apply the provision in relation to the person and the arrangement in accordance with the rulings.

- There is no dispute as to the facts. The only dispute is a question of law, namely, can the KPHDN disregard the express provisions of the ITA and the decision of the Court of Appeal in the case of *KPHDN v Asia Energy Services Sdn Bhd*. Further and in the face of the express provisions of the law, the KPHDN must reply as to his refusal to apply and departure from his own public rulings.

- There were special circumstances warranting the grant of a stay. The taxes that the KPHDN imposed on the Applicants are substantial, which would have a potential impact on every facet of the Applicants' business and have far-reaching effects on business decisions that need to be made. Any decision on these costs would be impacted pending the determination of the applications for judicial review. The Applicants will suffer irreparable damage if a stay is not granted. Damages will not be an adequate remedy if the Applicants succeed.

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10. Budget 2023 – RM8,000 Tax Relief for SSPN Contributors extended to YA 2024

The Finance Bill 2023 (Amendment in Committee), which has undergone some changes, specifically the extension of the RM8,000 personal tax relief for National Education Savings Scheme (SSPN) contributors by another two years, was approved by the Senate (Dewan Negara) on 10 April 2023.

The amendment is in line with the recent announcement by the Minister of Finance which extends the personal tax relief of up to RM8,000 for contributions made to the SSPN until YA 2024 (initially expired after YA 2022).

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