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Tax Espresso

HASiL Gazette Orders, Guidelines, Tax Cases and more

August 2024

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Greetings from Deloitte Malaysia Tax Services

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Deloitte Malaysia
Inland Revenue Board of Malaysia

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Upcoming events:

18 September 2024 – Navigating the Tax Appeal Process: Insights and Best Practices
25 October 2024 – Deloitte Tax Challenge 2024

Important deadlines:

Task	Deadline
	31 August 2024
1. 2025 tax estimates for companies with September year-end	√
2. 6th month revision of tax estimates for companies with February year-end	√
3. 9th month revision of tax estimates for companies with November year-end	√
4. 11th month revision of tax estimates for companies with September year-end	√
5. Statutory filing of 2023 tax returns for companies with January year-end	√
6. Maintenance of transfer pricing documentation for companies with January year-end	√
7. 2024 CbCR notification for applicable entities with August year-end	√

1. Income Tax (Exemption for Malaysian Ship) Order 2024 [*P.U.(A) 184/2024*]

P.U.(A) 184/2024 has been gazetted on 5 July 2024 to extend the exemption provided to a person who is a resident in Malaysia and carries on a business of transporting passengers or cargo by sea on a Malaysian ship or letting out on charter a Malaysian ship owned by him on a voyage or time charter basis in the basis period for a year of assessment (YA) from:

a) the application of Sections 54A(1) and (2) of the Income Tax Act 1967 (ITA); and
b) the payment of income tax in respect of the statutory income derived from a source of business consisting of a Malaysian ship.

The above exemption has been extended from YA 2024 to YA 2026. Previously, the above exemption ended in YA 2023 pursuant to the Income Tax (Exemption) (No. 7) Order 2022 [P.U.(A) 312/2022]. You may refer to *Deloitte Malaysia Tax Espresso – November 2022* for relevant details.

To qualify for the exemption, the person shall obtain an annual verification from the Ministry of Transport that the following conditions have been fulfilled:

a) incurs annual operating expenditure of at least RM250,000 for each Malaysian ship; and
b) has an adequate number of full-time employees in Malaysia for each Malaysian ship:
    1) In relation to shore employees, at least 4 of the following employees and majority of the employees shall be Malaysian citizens:
        i) a chief executive officer;
        ii) an administrative and finance officer;
        iii) an operating officer, and
        iv) an officer having in charge of health, protection, safety and environmental affairs; and
    2) In relation to employees who are ship personnel under Part III of the Merchant Shipping Ordinance 1952 [*Ord. 70/1952*], the employees shall be subject to the minimum requirement as specified in the Safe-Manning Certificate issued by the Marine Department of Malaysia.

The person will still need to comply with the requirements to submit any return or statement of account or to furnish any other information under the ITA.

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2. HASiL's Announcement for e-CKHT submission via TAeF available from 11 July 2024

The Inland Revenue Board of Malaysia (HASiL) has announced on the MyTax page that the new e-CKHT (Real Property Gains Tax) submission function for authorised tax agents through the *Tax Agent e-Filing System (TAeF)* is available from 11 July 2024.

Please refer to the HASiL's MyTax page for more information.

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3. HASiL Operational Guidelines No. 3/2024 in relation to procedure for submission of amended return form

On 17 July 2024, HASiL issued the Operational Guidelines No. 3/2024 – Procedure for Submission of Amended Return Form dated 10 July 2024 (GPHDN No. 3/2024) (Available in Bahasa Malaysia only) on its website. It amends the Operational Guidelines No. 1/2020 (GPHDN No. 1/2020) dated 6 March 2020 to reflect the following changes in law via the Finance Act 2023 and Finance (No. 2) Act 2023:

- Effective YA 2023, Section 30C of the Petroleum (Income Tax) Act 1967 (PITA) allows a chargeable person to amend its Petroleum Exploration Return (BN CPE) to revise the amount of exploration expenditure incurred during the exploration period. The amended return (BNT CPE) must be submitted to HASiL within 6 months from the due date for submission of BN CPE, and can only be made once.

- Effective YA 2024, Section 77A(1B) of the ITA requires every Company, Limited Liabilities Partnership (LLP), Trust Body, Co-operative Society and Labuan entity that receives profits or gains from the disposal of capital assets to submit a (CGT) Return (BN CKM). Section 77B of the ITA has also been amended to allow the taxpayer to submit an amended CGT return form (BNT CKM).

Some of the key points from the GPHDN No. 3/2024 are as follows:

(a) Taxpayers are allowed to make amendments by reporting additional information and amend the assessment in a return form (BN) / BN CKM / Petroleum Production Return Form (BN CPP) pertaining to:
- Income under-reported / not reported;
- Overclaimed expenses / other claims that are overclaimed; or
- Overclaimed capital allowances / incentive / relief.

(b) The amendment through an amended return (BNT) [other than BNT CKM] shall only be made once for a YA. For the amendment through BNT CKM, it can be made once for each disposal in a YA.

(c) Amendment through a BNT is not allowed if the Director General of Inland Revenue (DGIR) has made an amended assessment under the provision of:

- Section 91 of the ITA within a period of 6 months after the date stipulated by the ITA for the furnishing of return forms; or
- Section 39 of the PITA.

(d) The submission deadlines of BN and BNT for each category of taxpayers are stipulated in Table 1 of the guidelines. For CGT purposes, taxpayers (i.e., Companies, LLPs, Trust Bodies, Co-operative Societies and Labuan entities) are required to submit BN CKM within 60 days from the date of disposal of capital assets. BNT CKM will need to be submitted within 6 months after the submission deadline of BN CKM.

Please refer to GPHDN No. 3/2024 for the full details.

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4. Global Minimum Tax updates

The following have been uploaded on the Global Minimum Tax (GMT) webpage of the HASiL's website:
- Implementation timeline of GMT in Malaysia
- Frequently asked questions (FAQ) on implementation of GMT in Malaysia (Version 2.0)

Please visit the GMT webpage for more information and further updates on GMT.

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5. BND v DGIR (SCIT)

HASiL has recently uploaded a case report, "BND v DGIR (SCIT)" on its website.

Facts:

In pursuant to the redeemable subordinate loan agreement, ULB provides a loan of up to RM875 million to the taxpayer with the total amount of interest accrued, which was RM222,062,659. The taxpayer had claimed interest expense under Section 33(1) of the ITA against two different sources of interest income, namely business income for RM40,198,833 and non-business interest income which amounted to RM181,863,826 in the YA 2003 to 2005. In the year 2006, ULB waived the interest on the loan. Consequently, the taxpayer brought RM40,198,833 to income tax pursuant to Section 30(4) of the ITA (i.e., released debt). However, the taxpayer did not bring the released interest expense of RM181,863,826 to income tax as interest income. The DGIR raised a notice of additional assessment (Form JA) for YA 2006 against the taxpayer based on the tax audit findings that the released interest expense amounting to RM181,863,826 is gross income under Section 22(2)(a)(i) (i.e., insurance, receipt, etc.) and taxable under Section 4(c) of the ITA.

The taxpayer filed an application for judicial review (JR) at the High Court (HC) to quash the said Form JA and did not file an appeal by way of Form Q to the Special Commissioners of Income Tax (SCIT). The primary issue raised by the taxpayer in its JR application was the application of Section 22(2)(a) of the ITA by the DGIR on the issue of released interest. The HC and the Court of Appeal (COA) decided in favor of the taxpayer, but the decisions were set aside by the Federal Court (FC) on 18 October 2016. On 9 November 2016, the taxpayer filed for an extension of time by way of Form N to file the Form Q and it was granted by the SCIT. The grounds of appeal in the Form Q filed by the taxpayer are the same in its JR application.

Taxpayer's argument:

The taxpayer contended that there was no finality of judgment in this case since there was no ground of judgment issued by the FC in setting aside the HC and the COA decisions. Thus, it is irrelevant for the SCIT to decide whether the *res judicata* principle is applicable or not in this case as argued by the DGIR. It also argued that Section 22(2) of the ITA does not cover release of debt and the only provision that brings the release of debt to tax is Section 30(4) of the ITA. Hence, the release of interest which was deducted against the non-business income source is not subject to Section 22(2)(a) of the ITA.

DGIR's argument:

The DGIR argued that there was a finality of decision by the FC in this case and clearly the principle of *res judicata* applies. The DGIR further argued that the present appeal involved the question of facts and law which had been fully ventilated during the JR application as the issues, facts and provisions of law are identical. The DGIR further argued that the taxpayer's argument that there is no finality of the judgment just because no ground of judgement was issued by the FC is blatantly misconceived. It also noted that the release of interest, which had previously been deducted under Section 33(1) of the ITA by the taxpayer against its non-business interest income, is subjected to Section 22(2)(a) and is therefore taxable under Section 4(c) of the ITA. Section 22(2)(a)(i) of the ITA should be construed in the context of the ITA in its entirety, where the expense that had been claimed previously, which was not incurred in the end, should be brought back to tax under the said provision.

Issues:

Whether the released interest expense amounting to RM181,863,826 is gross income subjected to Section 22(2)(a)(i) and taxable under Section 4(c) of the ITA.

Decision:

The SCIT had on 28 June 2024 dismissed the taxpayer's appeal and held that the taxpayer failed to prove its case as required under Paragraph 13 of Schedule 5 of the ITA. The SCIT is bound to follow the FC's decision given on 18 October 2016. As such, the Form JA for YA 2006 and the penalty imposed under Section 113(2) of the ITA raised by the DGIR against the taxpayer is justified and confirmed.

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

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6. Eng Chin Tian & 3 Others v DGIR (COA)

HASiL has recently uploaded a case report, "Eng Chin Tian & 3 Others v DGIR (COA)" on its website.

Facts:

The taxpayers filed an appeal against the decision of the HC in dismissing the taxpayers' appeal against the deciding order of the SCIT.

Gagah was the beneficial owner of a 906.60-acre piece of agricultural land in Sungai Lokan Telupid, Beluran, Sabah (land). The taxpayers were shareholders of Gagah, a real estate company. On 27 April 2004, Gagah entered into a sale and purchase agreement with Express Credit Sdn Bhd to acquire the land for RM6,799,500 and obtained a loan facility of RM4,000,000 from Public Bank Berhad (PBB) to partially finance the purchase. On 30 November 2004, the taxpayers and

others entered into a share sales agreement (SSA) with Yap Lam Boon and Ang Kun Huat (vendor) to dispose of their shares in Gagah. The DGIR raised an assessment on 28 April 2017 and 4 May 2017 against the taxpayers for the YA 2004, taking RM6,799,500 as the disposal price of the 1,000,000 shares. The taxpayers disagreed with the assessments stating that the disposal price of the shares was only RM2,799,500, being the only payment they received from the vendor.

Taxpayer's argument:

The taxpayers argued that under Paragraph 34A, Schedule 2 of the Real Property Gains Tax Act 1976 (RGPTA), the disposal price of the 1,000,000 units of shares should be RM2,799,500 instead of RM6,799,500. In addition, the taxpayers claimed that the DGIR had misconstrued the ratio of *Ketua Pengarah Hasil Dalam Negeri v Chan Lian Yen (MSTC 30-013)* wherein the HC had decided that in determining the disposal price of the shares, the liability shall be part of the disposal price of the shares. Unlike in Chan Lian Yen's case, the payment of the loan of RM4,000,000 was optional. The shares were transferred from the taxpayers to the purchasers without the loan of RM4,000,000 being settled as a one-off payment within 7 days of the completion date of the SSA. The consideration amount of RM6,799,500 was not a definitive and conclusive price but rather a conditional price, dependent on the existing loan. Consequently, the parties intention regarding the consideration of the shares in the SSA was either RM6,799,500 (including the loan of RM4,000,000) or RM2,799,500 (excluding the amount of RM4,000,000). Therefore, only RM2,799,500 was the actual consideration paid by the purchasers to the taxpayers and others.

DGIR's argument:

The DGIR argued that it was not disputed that Gagah was a real property company under Paragraph 34A, Schedule 2 of the RPGTA and the taxpayers were its shareholders. In determining the disposal price of the chargeable assets, i.e. the shares, Paragraph 34A(4) of Schedule 2 has clearly laid out the manner based on the amount of value of the consideration in money or money's worth for the disposal of the chargeable assets. Based on the SSA, the purchase price of Gagah's ordinary shares was agreed between the parties at RM6,799,500. From the reading of clause 2 of the SSA, the amount of RM2,799,500 was a part payment of the purchase price. Further, Clause 3 of the SSA stated that the purchasers were given an option to pay the full sum of RM4,000,000 but the option was not taken by the purchasers. It was evident from Clause 3 of the SSA that stated that the purchasers shall ensure the principal sum of RM4,000,000 in respect of the loan together with the interest and all other sums levied by PBB were duly paid by Gagah at the time and manner required by PBB. This entailed that the loan which was the responsibility and / or liability of the taxpayers has now, in accordance with the SSA, became the responsibility of the purchasers. It could be concluded that the taxpayers had benefited by no longer having to ensure the payment of the loan to PBB. This benefit amounted to a consideration under the SSA. The purchase price of the shares in Gagah as per the SSA was RM6,799,500 (reference was made to the case of *Mulpha Pacific Sdn Bhd v. Paramount Corn Bhd [2003] 4 CLJ 294)*.

Issues:

The sole issue before the COA was whether both the HC and the SCIT had committed any error of law in holding that the consideration for the disposal of the 1,000,000 units of shares in Gagah by the taxpayers was RM6,799,500 and not RM2,799,500.

Decision:

The COA unanimously upheld the HC's decision and dismissed the taxpayers' appeal with cost of RM10,000 to the DGIR. [*Note: In summary, the HC dismissed the taxpayer's appeal against the SCIT's decision that the disposal price of the shares was RM6,799,500.00, which had been clearly stated in the agreement. Therefore, the SCIT did not make an error in law.*]

[Details of the above tax case at the SCIT and COA levels are not available as of date of publication. Please refer Deloitte Malaysia Tax Espresso – October 2023 for details of the case at HC level.]

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7. Executive Offshore Shipping Sdn Bhd v DGIR (HC)

HASiL has recently uploaded a case report, "Executive Offshore Shipping Sdn Bhd v DGIR (HC)" on its website.

Facts:

The taxpayer filed the JR application against the DGIR's decision to quash the notices of assessments for YAs 2014, 2015 and 2016, all dated 30 November 2021.

The issue was whether the transactions between the taxpayer and Eagle High (L) Limited (EHLL) in respect of charter hire and crew management services were within the arm's length principle. The taxpayer submitted that the DGIR issued the Forms J for YA 2014 to YA 2016 because the taxpayer had engaged in tax avoidance transactions and the comparable and transfer pricing method selected by the taxpayer was inappropriate. Moreover, the markup rate of 35% for the charter hire fees of vessels and the crew management fees were not at arm's length.

Taxpayer's argument:

The taxpayer alleged that the DGIR never invoked or specified which provisions in the ITA that the DGIR would rely on. In both DGIR's audit findings letter dated 17 September 2021 and the final audit findings letter dated 26 November 2021, the DGIR did not state the provisions that had been relied on by the DGIR. Further, the taxpayer also alleged that the DGIR also failed to consider that EHLL was governed by the Labuan Business Activity Tax Act 1990 (LBATA) in which case the arm's length principle did not apply prior to the coming into effect of Section 17D of the LBATA on 1 January 2020. Failure to specify the subsection rendered the impugned assessments null and void. The DGIR had acted arbitrarily for failing to provide any justifications or explanations before the assessment was raised.

DGIR's argument:

DGIR submitted that Section 140A of the ITA should be read together with the Income Tax (Transfer Pricing) Rules 2012 (TP Rules) which regulated the methods and manner of determining the arm's length price. The DGIR also introduced and published the Transfer Pricing Guidelines 2012 (TP Guidelines) in line with the introduction of transfer pricing legislation under Section 140A of the ITA. TP Guidelines provided the application of law on controlled transactions and guidance for parties in the transfer pricing arrangements to operate in accordance with the methods and manner as provided in the TP Rules as well as complying with administrative requirements of the DGIR on the types of records and documentations to be maintained.

The DGIR's decision was made after evaluating all the evidence and he formed his opinion based on his knowledge and understanding of the transfer pricing principle. Both guidelines i.e., OECD TP Guidelines and TP Guidelines were the core reference that must be referred to by the DGIR on TP issues.

The DGIR submitted that disputes involving questions of fact and law which revolved around the merit of assessment need to be heard and determined by the SCIT, as the most appropriate forum to exercise the function of 'judges of fact' as decided by the FC in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563.* Issues involving transfer pricing should be heard and decided by the appeal proceeding before the SCIT as per the COA's case in *Ketua Pengarah Hasil Dalam Negeri v Ensco Gerudi (M) Sdn Bhd [2023] 5 MLJ 159.*

Issues:

(a) Whether the transactions between the taxpayer and EHLL in respect of charter hire and crew management services complied with the arm's length principle.
(b) Whether the DGIR had any legal and/or factual basis to reject the taxpayer's benchmarking analysis in the transfer pricing documentation provided by the taxpayer.
(c) Whether the taxpayer had under-declared their income in relation to the charter hire of vessels and the crew management.

Decision:

The HC dismissed the taxpayer's JR application with a cost of RM3,000.

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

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8. Radimax Group Sdn Bhd v DGIR (HC)

HASiL has recently uploaded a case report, "Radimax Group Sdn Bhd v DGIR (HC)" on its website.

Facts:

The taxpayer is principally involved in investment holding and had furnished its return form for the YA 1996 to YA 2000 on 29 January 2007. The submission for the YA 1996 was made 11 years after the time allotted for the said return forms to be furnished, which was during the period of self-assessment system. The tax computation for the YA 1996 was enclosed together with the return forms. There was a tax refund claimed by the taxpayer amounting to RM859,942.80.

The DGIR issued a notification, Form CP-63 (Notis Bayaran Balik), to the taxpayer and stated that the taxpayer had credit under Section 110 of the ITA amounting to RM842,331.36. The taxpayer then requested the DGIR to process its tax refund for the YA 1996 and YA 2000. Upon reviewing the taxpayer's application, the claim for tax refund for YA 1997 *(Note: While 1997 is stated, it may potentially be a typo error for 1996 instead)* and YA 2000 were not allowed under Section 111 of the ITA as they were made and submitted after more than six years. The DGIR then issued a notice of assessment (Form J) for the YA 1996 dated 27 February 2015 to make good the loss of tax for the aforesaid YA amounting to RM842,331.36 which had been wrongly refunded to the taxpayer.

Taxpayer's argument:

The taxpayer contended that there is a clear distinction between Section 110 and Section 111 of the ITA. Section 110 of the ITA relates to the set-off for tax deducted while Section 111 of the ITA relates to tax refund for overpayment of tax. Section 111(1) of the ITA states clearly that if a taxpayer had overpaid its tax, either by deduction or otherwise, one is entitled to claim the excess if it is proved to the satisfaction of the DGIR. It was argued that once the DGIR had issued a notice of computation of repayment dated 24 March 2008 and upon receiving the notice, the taxpayer immediately claimed the tax credit by offsetting it with, amongst other, the tax payable for YA 1996 and other YAs.

DGIR's argument:

DGIR asserted that the taxpayer's tax computation, which was enclosed in the return form consists, *inter alia*, interest on long term loan and a set-off under Section 110 of the ITA. These claims were applied in a formula and computed to determine the net tax payable or tax refunded. The taxpayer had claimed a set-off under Section 110 of the ITA amounting to RM948,000 which resulted in the tax refund amounting to RM859,942.80. The set-off under Section 110 of the ITA is also known as tax credit amount, where the said amount of tax credit applied under tax computation would give reference to the amount of tax payable before considering the tax set-off as provided under Section 111(1B) of the ITA. The set-off under Section 110 of the ITA was integral to the appellant's tax computation as provided in Section 111(1B) of the ITA.

Further, the claim mentioned under Section 111(2) of the ITA is the amount inserted in the formula of tax computation, which will give effect to tax payable or tax refund. The DGIR argued that set-off under Section 110 of the ITA and Section 111 of the ITA are inter-related and were integral to the appellant's tax computation in the return form for the YA 1996, which will affect the amount of tax to be paid or the amount of repayment of tax receivable by the appellant. Without inserting Section 110 of the ITA tax credit into the tax computation, the tax refund will not be applicable.

On the issue of whether the taxpayer was negligent for the late submission of return form for the YA 1996, the taxpayer's new tax agent had testified and admitted during trial that the act of late filing of the return forms was an act of negligence and confirmed that the previous tax agent was negligent in its action of late filing of the return forms, 11 years after the due date. Further, the taxpayer failed to provide any explanation on the long delay and the claims made in the tax computation enclosed together with the return form, and failed to call their previous tax agent, who prepared the return forms and the tax computation for the YA 1996 nor its own director to explain the taxpayer's claim in its tax computation and the delay. Therefore, the DGIR had successfully discharged his burden of proving that there was negligence on the part of the taxpayer pursuant to Section 91(3) of the ITA. Due to the taxpayer's negligence, the DGIR had mistakenly made repayment or refund to the taxpayer in contravention of Section 111(2) of the ITA.

Issue:

1) Whether Section 111(2) "claim to be made within 5 years" applies to a claim for refund of credit under Section 110 of the ITA.
2) Whether the taxpayer was negligent, and the notice of assessment is correctly raised under Section 91(3) of the ITA.

Decision:

On 4 June 2024, HC dismissed the taxpayer's appeal and upheld the decision of the SCIT. The HC held that the SCIT had not erred in its finding of facts and the DGIR was right to claim back the amount of RM842,331.36. The taxpayer was negligent, and the notice of assessment is correctly raised under Section 91(3) of the ITA.

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

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9. DGIR v Jonathan James Law (HC)

HASiL has recently uploaded a case report, "DGIR v Jonathan James Law (HC)" on its website.

Facts:

The taxpayer was an employee of Three Sixty Financial Inc. (the Company) in Labuan. The taxpayer claimed an exemption, comprising 50% of his gross income under the Income Tax (Exemption) (No. 8) Order 2011 [*P.U.(A) 420/2011*] (Exemption Order) and submitted Form CP21 (Notification by Employer of Employee's Departure from Malaysia) when he left the Company in 2017. The Exemption Order provides an exemption of 50% from gross income of a non-Malaysian individual exercising employment in a managerial capacity with any Labuan entity. Based on the Form CP21 submitted by the taxpayer, the DGIR decided/concluded that the taxpayer did not qualify for the exemption. Thus, Notices of Additional Assessment for the YAs 2015 and 2016 and a Notice of Advance Assessment under Section 92 of the ITA for the YA 2017, all dated 11 January 2018, were raised by the DGIR against the taxpayer.

DGIR's argument:

The DGIR submitted that the taxpayer had failed to discharge his onus of proof under Paragraph 13, Schedule 5 of the ITA to show that the post held by him as a Financial Advisor/Senior Manager fell within the meaning of 'managerial capacity' as required under the Exemption Order and therefore the assessments raised by the DGIR were not excessive or erroneous. Based on the facts found and facts proven together with the documents tendered during the trial before the SCIT, the taxpayer's position in the Company did not fit within the meaning of 'managerial capacity' and therefore, the taxpayer was not entitled to the exemption on 50% of his gross income under the Exemption Order. The DGIR further submitted that all facts submitted by the taxpayer in his testimony should be disregarded as these were not corroborated by any witness nor any document tendered by the taxpayer. Hence, the testimonial given by the taxpayer was unacceptable and should be ignored.

Taxpayer's argument:

The taxpayer contended that his employment contract and the Company's corporate structure that was submitted to the DGIR has outlined the taxpayer's managerial duties and his role as a manager in the Company. The taxpayer further contended that the DGIR's claim that a manager should be the most senior position in a company was an unsupported claim in any business organisation as an organisation will always have different levels of management that consists of different managers, directors and board members. It was a known practice within an organisation that a level of management would report and answer to a more senior position, often it would be to a director or to the board members. The taxpayer added that he was responsible for managing the sales team in the Company which he will later report on and discuss the team's performance with the board of directors. The taxpayer also argued that he has failed to call any witnesses due to COVID-19 pandemic which resulted in his witnesses not being available to testify during the hearing.

Issue:

Whether the taxpayer's position in the Company fits within the meaning of 'managerial capacity' and is entitled to the exemption on 50% of his gross income under the Exemption Order.

Decision:

On 21 April 2024, the HC confirmed the SCIT's decision that the taxpayer's position in the company fit within the meaning of 'managerial capacity' and dismissed the DGIR's appeal with no order as to costs.

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

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