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HASiL 2024 Filing Program, Operational Guidelines, FAQs, Public Rulings, Tax Cases and more

February 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:

1. Mutual Agreement Procedure and Advance Pricing Arrangement: Effectiveness in addressing transfer pricing disputes

Important deadlines:

Task	Deadline	
	29 February 2024	**1 March 2024**
1. 2025 tax estimates for companies with March year-end		√
2. 6th month revision of tax estimates for companies with August year-end	√	
3. 9th month revision of tax estimates for companies with May year-end	√	
4. 11th month revision of tax estimates for companies with March year-end	√	
5. Statutory filing of 2023 tax returns for companies with July year-end	√	
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1. HASiL – Return Form Filing Program for the Year 2024

The Inland Revenue Board of Malaysia (HASiL) has uploaded the Media Release and Return Form (RF) Filing Program for the Year 2024 (2024 Filing Program) on its website.

Some of the points to note in the 2024 Filing Program are as follows:

1) Effective from 1 January 2024, HASiL requires the e-Services in the MyTax Portal (https://mytax.hasil.gov.my) to be used for services provided online. Tax agents are required to use the Tax Agent e-Filing System (TAeF) version 2.0 (accessible through the MyTax Portal) to file the RF.

2) The following forms are mandatory to be submitted via e-Filing (i.e., the option to submit manually is no longer available) starting from the year of remuneration or the year of assessment (YA) as indicated:

   - Form e-E (Non-company Employers/Non-Labuan Company Employers) starting Year of Remuneration 2023.
   - Forms e-BE, e-B, e-BT, e-M, e-MT, e-P, e-TF & e-TP (Individuals, Partnership, Association & Deceased Persons' Estate) starting YA 2023.
   - Forms e-CPP & e-CPE (Petroleum) starting YA 2023.
   - Forms e-CS, e-TA, e-TC & e-TR (Co-operative Societies & Trust Bodies) starting YA 2024.

3) Form TJ (Hindu Joint Families) and Form TN (Business Trusts) are to be submitted manually. A grace period of 3 working days is given for postal delivery. There is no grace period for hand delivery.

4) The grace period for the RF submission and payment of the balance of tax (if any) are generally the same as the 2023 Filing Program. Please refer to the 2024 Filing Program for the full details.

5) Prefilling of employee's remuneration information in e-Filing - employers must furnish the 2023 employees' remuneration information using e-Data Praisi/e-CP8D through the MyTax Portal at *https://mytax.hasil.gov.my > ezHASiL Services > e-Data Praisi/e-CP8D* beginning from 1 January 2023 to 25 February 2024.

Please refer to the 2024 Filing Program for full details.

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2. HASiL Operational Guidelines on Monthly Tax Deduction under the Income Tax (Deduction from Remuneration) Rules 1994 [P.U.(A) 507/1994] (GPHDN 1/2024)

HASiL has uploaded the Operational Guidelines on Monthly Tax Deduction (MTD) under the Income Tax (Deduction from Remuneration) Rules 1994 [P.U.(A) 507/1994] (GPHDN 1/2024) *(in Bahasa Malaysia)* dated 2 January 2024 on its website.

GPHDN 1/2024:

- Explains the employer's responsibility in relation to the implementation of MTD on the employee's monthly remuneration and the method of determining the amount of MTD.
- Contains details on the employer's responsibilities, determination of MTD amount, deduction and rebate allowed under the ITA, the formula for computing MTD, and determining the amount of MTD for additional remuneration.
- Supersedes the Operational Guidelines No. 4/2020 (GPHDN 4/2020) dated 17 November 2020.

Please refer to the GPHDN 1/2024 for full details.

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3. HASiL – Frequently Asked Questions released on imposition of surcharge on transfer pricing adjustments

HASiL has released a list of frequently asked questions (FAQs) dated 18 January 2024 in relation to the imposition of a surcharge of up to 5% on all transfer pricing adjustments, under Section 140A(3C) of the ITA. Effective from 1 January 2021, HASiL has been empowered under Section 140A(3C) of the ITA to impose a surcharge of up to 5% on an increase of income or a reduction of any deduction or loss resulting from any transfer pricing adjustment made (i.e., a penalty is leviable even where the taxpayer is in a tax loss position and there is no tax undercharged per se). This article summarises the FAQs and HASiL's responses.

List of FAQs

1) **Please clarify the rationale for imposing a surcharge in cases where the taxpayer is in a loss position or is exempt from tax, as there is no loss of tax revenue in such cases.**

   A surcharge is imposed on a transfer pricing adjustment made under Section 140A of the ITA, which results in an increase in income or a reduction of any deduction or loss. When a taxpayer does not comply with the arm's length principle, a surcharge will be imposed on the adjustment, regardless of whether the taxpayer is in a loss position or exempt from tax.

   The purpose of imposing the surcharge is to ensure equal tax treatment for all taxpayers that fail to comply with the arm's length principle, as required under Section 140A of the ITA, regardless of whether the transfer pricing adjustment made will result in an assessment or additional assessment. This is to also encourage compliance with the transfer pricing legal framework that was introduced in Malaysia more than 10 years ago. In a case where no transfer pricing adjustment is made for a YA that is audited, no surcharge under Section 140A(3C) of the ITA will be imposed for that YA.

2) **Based on the Finance Act 2020 (*Act 831*), Section 140A(3C) of the ITA came into operation from 1 January 2021. Please clarify how this provision applies in the following scenarios:**

   a) **Where a transfer pricing audit commences after 1 January 2021 for YAs prior to financial year 2021:** Section 140A(3C) of the ITA will be applicable for transfer pricing audit cases that commence on or after 1 January 2021, regardless of the YAs covered in those audit processes.

   b) **Where an ongoing transfer pricing audit initiated prior to 1 January 2021 is concluded on or after 1 January 2021:** For audit cases initiated prior to 1 January 2021, Section 140A(3C) of the ITA will not be applicable, even if the audit process is concluded after 1 January 2021. However, if the audit results in an amount of tax undercharged, a penalty under Section 113(2) of the ITA (relating to tax undercharged as a result of an incorrect return or incorrect information) will be applicable.

3) **In the event where there is an amount of tax undercharged arising from a transfer pricing adjustment, please confirm if both the surcharge and the penalty under Section 113(2) of the ITA may be imposed.**

   The surcharge and the penalty under Section 113(2) of the ITA is mutually exclusive. Therefore, HASiL will only impose a surcharge on any transfer pricing adjustments made under Section 140A of the ITA.

4) **Please clarify whether Section 140A(3C) of the ITA is applicable to companies that are granted a 100% tax exemption incentive. If it is applicable, foreign direct investments would be exposed to the risk of a surcharge arising from transfer pricing adjustments, which could adversely affect investors' confidence.**

   In any controlled transaction, compliance with the arm's length principle is vital. Thus, any noncompliance will trigger a transfer pricing adjustment, resulting in the imposition of a surcharge under Section 140A(3C) of the ITA. A surcharge is imposed on the transfer pricing adjustment, not on the amount of tax undercharged. If the audit findings warrant a transfer pricing adjustment, it is irrelevant whether the company has been approved for a full or partial tax exemption. Therefore, even companies that are granted tax incentives are subject to the surcharge if any transfer pricing adjustment is made.

5) **Based on Section 140A(3D) of the ITA, the surcharge will not be treated as tax payable for the purposes of any provision of the ITA, except for Sections 103 to 106 of the ITA. If taxpayers wish to challenge the surcharge imposed, please confirm whether they are eligible to appeal against the surcharge.**

Taxpayers that wish to challenge the surcharge imposed may appeal to the Director General of Inland Revenue (DGIR) for a reduction. Section 124(3) of the ITA empowers the DGIR to abate or remit any surcharge imposed on a case-by-case basis, provided that the taxpayer has submitted a reasonable justification with the appeal. Since the appeal processes under Section 99 of the ITA are not applicable to surcharges, taxpayers may make a written appeal application with a justification to the HASiL office handling their tax file.

6) **Please provide guidance on how the scale of the surcharge, of up to 5%, under Section 140A(3C) of the ITA will be determined. It is suggested that the criteria to be considered include the comprehensiveness and completeness of transfer pricing documentation and the degree of deviation from the arm's length range.**

The general rate to be applied in imposing the surcharge is 5% on a transfer pricing adjustment made under Section 140A of the ITA. No scale will be available as a reference. However, a lower surcharge rate will be offered for voluntary disclosure cases. Further details will be incorporated in the amended transfer pricing audit framework.

7) **Please confirm that the surcharge will be adjusted in line with any adjustment under a mutual agreement procedure (MAP).**

The surcharge rate is imposed on the amount of the transfer pricing adjustment. If there is any adjustment to be made under a MAP, the amount of the surcharge in that case will also be adjusted accordingly.

8) **Please confirm that the surcharge applies regardless of which HASiL branch is conducting the tax audit. There have been cases where a HASiL branch has refused to follow the transfer pricing guidelines because it is not a transfer pricing branch, but has made transfer pricing adjustments.**

Effective from 1 January 2021, any audit conducted by a HASiL branch that results in a transfer pricing adjustment under Section 140A of the ITA will be subject to a surcharge of no more than 5%, under Section 140A(3C) of the ITA. All HASiL branches should follow the processes and procedures provided under the Malaysia transfer pricing guidelines and transfer pricing tax audit framework.

Please refer to the FAQs for full details.

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4. HASiL – Public Rulings No. 8/2023, 9/2023 and 10/2023

HASiL has recently uploaded the following Public Rulings (PR) on its website:

PR No.	Remarks
8/2023 - Tax treatment for a company that establishes a Special Purpose Vehicle for the issuance of Sukuk – Section 60I of the ITA (dated 15 December 2023)	This PR is to explain the tax treatment for a company that establishes a Special Purpose Vehicle for the issuance of sukuk under Section 60I of the ITA.
9/2023 - The Deceased (Part I – Introduction) (dated 27 December 2023)	This PR is to explain the administration of the estate and the liabilities of The Deceased.
10/2023 - Pioneer Status Incentive (dated 29 December 2023)	This PR is to explain the pioneer status incentive that is available to companies participating or intending to participate in a business in relation to promoted activities or production of promoted products in Malaysia.

Please refer to the respective PRs for full details and illustrative examples for guidance.

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5. Sovereign Teamwork (M) Sdn Bhd v KPHDN (HC) [2022] 8 MLJ 215

Facts:

The Selangor Land and Mines Office (PTGS) had issued PTG Circular No. 3/2007 regarding the setting of bumiputera quotas in the implementation of land development (the quota). The taxpayer, a housing developer, had applied to the Selangor Housing and Property Board (LPHS) for a quota relief. The application was allowed by LPHS via a letter dated 15 September 2017, provided that the taxpayer made a refund of the 10% bumiputera price deduction and a 5% charge in violation of the bumiputera quota mechanism from the sale price of the 14 office shop units to LPHS before its ownership could be registered. The taxpayer had made the required payment amounting to RM1,810,054 and subsequently claimed a tax deduction thereof under Section 33(1) of the ITA from the DGIR.

In his audit findings, the DGIR did not allow a deduction for the payment of the 10% bumiputera price deduction as it was not an expenditure allowed under Section 39(1)(b) of the ITA. On 15 April 2016, the taxpayer had received Notices of Additional Assessment for the YAs 2011 and 2012 from the DGIR, both dated 8 April 2016. The DGIR also imposed a penalty under Section 113(2) of the ITA for the YA 2011. The DGIR's findings in issuing the Notices of Additional Assessment were based on LPHS Circular No. 1/2011. The taxpayer then filed an appeal through Form Q to the Special Commissioners of Income Tax (SCIT), but the taxpayer's appeal was dismissed (the decision). In making the decision, the SCIT referred to LPHS Circular No. 1/2011 and decided that the payment made by the taxpayer was a penalty or fine and it was not solely for generating gross income as provided under Section 39(1)(b) of the ITA, hence it shall not be deductible under Section 33(1) of the ITA. Dissatisfied with the decision, the taxpayer had filed an appeal via the case stated. In accordance with Paragraph 34, Schedule 5 of the ITA, the SCIT had stated their decision through the case stated for the opinion and consideration of the High Court (HC).

Issue:

Whether the 10% bumiputera price deduction paid by the taxpayer to LPHS amounted to fines and not expense to generate gross income.

Decision:

The HC allowed the taxpayer's appeal and set aside the decision of the SCIT based on the following grounds:

- Based on the LPHS letter dated 15 September 2017, the taxpayer had already fulfilled the conditions imposed by making the payment. Additionally, Paragraph 3.3.2 of PTG Circular No. 3/2007 was applicable to the taxpayer. The taxpayer's return of the bumiputera price deduction to the Selangor State Government was a contribution and not a penalty/fine. Further, the letter did not specifically refer to the payment as a fine.

- The taxpayer was allowed to sell bumiputera lots to non-bumiputera, provided that the bumiputera price deduction was paid to the state government. By selling bumiputera lots to non-bumiputera, it directly generated income for the taxpayer. However, in order to do so, the taxpayer must return and/or pay the amount of the bumiputera discount to the state government. In such cases, the expenses or payments of RM1,810,054 made by the taxpayer were 'wholly and exclusively' incurred for the purpose of generating the taxpayer's gross income and could therefore be deducted from the taxable income. Moreover, the payment made by the taxpayer was not barred by any of the matters provided under Section 39(1) of the ITA.

- Based on the case stated, both parties had agreed to use PTG Circular No. 3/2007 in addressing the issue of payment of the 10% relief of the bumiputera quota. The application of LPHS Circular No. 1/2011 was unrelated and irrelevant to the quota relief applied by the taxpayer for the YA 2011 (i.e., for the financial year ended 30 June 2011). LPHS Circular No. 1/2011 only came into effect on 7 September 2011. There was nothing in the case stated which indicated the application of the two circulars and/or for the two circulars to be read together. However, the SCIT used both circulars in reaching its decision on the grounds that LPHS Circular No. 1/2011 complemented PTG Circular No. 3/2007. The HC found that LPHS Circular No. 1/2011 was a rule with a separate application and not an extension of PTG Circular No. 3/2007. Both circulars have their respective functions. The SCIT should not 'depart' from the facts agreed upon by the parties in reaching its decision.

- Both parties had their respective interpretations and views on the application of Section 33(1) of the ITA by the taxpayer. Therefore, the HC disagreed with the SCIT's opinion that the taxpayer had deliberately claimed the tax deduction even though it was still in the nature of a penalty and was not a business loss. The HC also disagreed with the DGIR's submission that the taxpayer's ground of acting in good faith, having acted with legal advice and the advice of a professional tax agent did not waive the imposition of a penalty under Section 113(2) of the ITA. The DGIR had imposed a strict liability under Section 113(2) of the ITA even though it was discretionary. The DGIR had failed to exercise his discretionary power by acting mechanically.

- The taxpayer had successfully shown that there was a misunderstanding of the law by the SCIT in interpreting the provisions of Section 33(1) of the ITA and PTG Circular No. 3/2007. The legal conclusions made by the SCIT were not supported by material facts and/or the conclusions or findings of facts and laws made by the SCIT could not be reasonably made by other SCITs if the SCIT had properly directed themselves in their findings.

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6. Guppyunip Sdn Bhd v DGIR (HC)

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

Facts:

The taxpayer is a company incorporated in Malaysia on 9 December 2009, and its principal activities are property development and, inter alia, the sale and rent of industrial properties. On 9 July 2010, the taxpayer and Awan Megah Sdn Bhd (AMSB) executed a Joint Venture Agreement (JVA). Following this, the taxpayer paid RM2 million to AMSB in 2012. On 3 May 2013, the JVA was rescinded via a Deed of Mutual Rescission (DMR). The joint venture could not materialise as AMSB was unable to obtain ownership of the lands that were the subject of the JVA (hereinafter referred to as "the said lands") due to the rejection of AMSB's application to subdivide and issue separate titles for the said lands by the Selangor State Authority. Pursuant to the DMR, AMSB paid the taxpayer a sum of RM7 million, of which RM2 million was a refund of the amount paid by the taxpayer to AMSB and RM5 million as a compensation to the taxpayer for rescinding the JVA.

In a letter dated 13 January 2014, the taxpayer's tax agent explained the background facts relevant to the JVA and how the taxpayer received the amount of RM5 million as compensation for the mutual rescission of the JVA via the DMR. In the same letter, the taxpayer's tax agent provided justification and stated that the compensation received by the taxpayer is capital in nature. In reply, the DGIR, via a letter dated 16 June 2014, informed the taxpayer that the compensation was for the loss of income due to the termination of the contract and not a capital receipt. The DGIR opined that the compensation was taxable under Section 4(a) of the ITA.

The SCIT decided in favour of the DGIR that the RM5 million was compensation for loss of income, which was subject to Section 22(2)(b) of the ITA and hence taxable under Section 4(a) of the ITA.

Taxpayer's argument:

It is the taxpayer's contention that the RM5 million is a capital receipt. A forced sale cannot constitute a sale whose proceeds are subject to tax because the element of compulsion vitiates the intention to trade. The taxpayer had been compelled to enter the DMR and to terminate the JVA due to circumstances beyond their control. This was not done voluntarily. As such, Section 22(2)(b) of the ITA could not apply.

DGIR's argument:

In response, the DGIR argued that the compensation is a trading receipt that is subject to the imposition of income tax under Section 4(a) of the ITA due to the following reasons:

(a) The JVA was merely an ordinary commercial contract entered into by the taxpayer in their ordinary course of business. It did not regulate the taxpayer's activities in any way and did not restrict the taxpayer from entering into business activities with other parties;
(b) There was no evidence that the JVA was related to the overall structure of the taxpayer's profit-making apparatus. The taxpayer entered an ordinary contract, under which they were to provide certain services for the purposes of generating income;

(c) The compensation paid by AMSB due to the termination of the JVA was payment for services rendered under Section 24(1)(b) of the ITA or compensation for loss of income under Section 22(2)(b) of the ITA and was therefore subject to income tax under Section 4(a) of the ITA; and
(d) The termination of the JVA did not adversely affect the structure of the taxpayer's profit-making apparatus and did not destroy the taxpayer's ability to generate future income.

Issue:

Whether the DGIR was right in law to view that the compensation of RM5 million paid to rescind the JVA was taxable under Section 4(a) of the ITA.

Decision:

The HC dismissed the taxpayer's appeal and upheld the decision of the SCIT.

[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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7. Tee Lee Heng & Ors v DGIR (HC)

HASiL has recently uploaded a case report, "Tee Lee Heng & Ors v DGIR (HC)" on its website.

Facts:

This is an appeal by the taxpayers against the decision of the SCIT on 27 September 2022 by way of Notice of Appeal (Form Q) dated 17 October 2022 against the Notices of Assessment for the YAs 2011, 2012, 2013 and 2015 raised by the DGIR under Section 4(a) of the ITA.

The taxpayers owned a piece of agricultural land held under GM 430 Lot 584, Mukim Lebak, Paia Tratai Place, Temerloh Area, Pahang (the Land), which was acquired in stages. On 28 October 2009, the taxpayers entered into a JVA with Nova Megah Development Sdn Bhd (the Developer) to develop the Land into a residential area. Pursuant to the JVA, the taxpayers shall be entitled to 15.5% of the project's value (equivalent to 13 housing units) while the remaining 84.5% shall belong to the Developer. The housing project is divided into three stages. After construction of the housing units, the taxpayers sold 12 out of the 13 units. The gains received by the taxpayers from the disposal of the residential units were subjected to tax under Section 4(a) of the ITA by the DGIR. The SCIT held that the disposal of the residential units was an adventure in the nature of trade and dismissed the taxpayers' appeal. Dissatisfied with the SCIT decision, the taxpayers appealed to the HC.

Taxpayer's argument:

The taxpayers contended that no badges of trade existed in this appeal and the dominant intention in acquiring the Land was to help the original landowner to pay off the debts owed to Cempaka Finance Bhd. The fact that the taxpayers have kept the Land for more than 20 years indicated that the taxpayers were holding the Land for investment. The Land was kept as a permanent investment by the taxpayers due to its unique feature such as absence of an access road. The Land was also unsuitable to be used for agricultural purposes due to its uneven surface causing water retention on the surface. It is erroneous for the SCIT to hold that the said Land is a trading stock because it did not generate any income. The taxpayers further contended that the SCIT had erroneously concluded the taxpayers' intention to conduct trading activities when they entered the JVA with the Developer. The taxpayers and the Developer were different entities and should not be treated as one. Therefore, the disposal of the Land should be subjected to tax under the Real Property Gains Tax Act 1976 (RPGTA). The DGIR also failed to exercise his discretion on the imposition of penalty.

DGIR's argument:

In response, the DGIR submitted that the evidence tendered before the SCIT, whether documentary or oral, supported the existence of the elements of badges of trade. The taxpayers' actual or dominant intention at the time of the Land's purchase is to resell it at a higher value. The taxpayers signed the JVA and the Power of Attorney with the Developer to develop the Land for commercial purposes. The taxpayers' action negated their original intention to buy the Land for helping a friend as alleged. Instead, it was bought to resell it for a multiplied profit. The ownership period was short from the time of the unit selection at the launching until the houses were sold, which only took two to three years. The involvement of the taxpayers who had knowledge in real property business and the fact that the Land has been altered and enhanced for it to be saleable showed the taxpayers' intention to trade in the Land.

Issue:

Whether the Land was acquired by the taxpayers for investment purposes (where the disposal of the Land is subjected to tax under the RPGTA) or for trading purposes (where the disposal of the Land is subjected to tax under the ITA).

Decision:

On 28 November 2023, the HC allowed the taxpayers' appeal and no order as to costs.

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

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8. GSB v DGIR (SCIT)

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

Facts:

The taxpayer is involved in the business of oil palm plantations and has claimed reinvestment allowance (RA) for cultivation of oil palm for the YAs 2010 and 2011. The DGIR had raised a notice of assessment (Form J) for YA 2010 and a Notice of Additional Assessment (Form JA) for YA 2011 against the taxpayer on 16 December 2015, citing that the taxpayer is not entitled to claim RA for the cultivation of oil palm. It is the DGIR's stance that oil palm does not fall within the ambit of "cultivation of fruits" under Paragraph 9(cc) of Schedule 7A to the ITA. The taxpayer, being aggrieved with the DGIR's stance, filed notices of appeal by way of Forms Q against the Forms J and JA raised by the DGIR.

Taxpayer's argument:

The taxpayer contended that the cultivation of oil palm falls within the definition of "cultivation of fruits" as stated in Paragraph 9(cc) of Schedule 7A to the ITA. Notwithstanding the original stance, the taxpayer also contended that the cultivation of oil palm falls within the ambit of "cultivation of vegetables" under Paragraph 9(bb) of Schedule 7A to the ITA.

DGIR's argument:

In response, the DGIR maintained his position that oil palm does not fall within the ambit of "cultivation of fruits" under Paragraph 9(cc) of Schedule 7A to the ITA, as oil palm being a fruit per se is not a 'fruit' in the ordinary meaning as understood in common parlance. The DGIR cited that the agreed issues to be tried under this appeal are similar to the facts and issues that have been decided by the HC in the case of *Ketua Pengarah Hasil Dalam Negeri v. Bintulu Lumber Development Sdn Bhd [2014] 1 LNS 1914*, which was upheld by the Court of Appeal (COA) *[Q-01-240-07/2014]*. As such, the SCIT is bound by the decisions of the HC and the COA under the doctrine of stare decisis. For the issue of "cultivation of vegetables", the word "vegetables" should not be construed in any technical sense or from a botanical point of view but as understood in common parlance. As such, the taxpayer's claim should fail in this regard.

Issue:

Whether the DGIR was right in law to cite that the taxpayer was wrong to claim RA for the cultivation of oil palm for the YAs 2010 and 2011.

Decision:

The SCIT dismissed the taxpayer's appeal and upheld the Forms J and JA raised by the DGIR against the taxpayer. Furthermore, the SCIT held that the DGIR has basis in fact and law to impose the penalty under Section 113(2) of the ITA.

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

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9. TRMSB v DGIR (SCIT)

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

Facts:

The taxpayer is a company incorporated in Malaysia and a part of Thomson Reuters Group. Thomson Reuters Global Resources (TRGR) executed the Local Vendor Agreements: Information and Dealing Products in 2003, 2008 and 2010. Pursuant to the Agreements, the taxpayer was appointed to market and sell TRGR's products in the form of "information services" and "dealing services" in Malaysia. The taxpayer prepared Transfer Pricing Documentation for fiscal years ended 31 December 2006, 31 December 2007, 31 December 2008, 31 December 2009, and 31 December 2010 (Transfer Pricing Documentation) where it was stated that the taxpayer had made payment for distribution fee to its related parties. The "Operating Margin" (OM) was selected as the profit level indicator (PLI) for its distribution activities. The taxpayer selected nine (9) companies for the purposes of the benchmarking study. However, the DGIR rejected five (5) of them and replaced them with three (3) new comparable companies. The DGIR applied Section 140 of the ITA for YAs 2007 and 2008 and applied Section 140A of the ITA for YAs 2009 to 2011 in raising the additional assessments vide the issuance of Notices of Additional Assessment (Forms JA) for YAs 2007 to 2011 respectively. Dissatisfied with the additional assessments raised, the taxpayer filed notices of appeal against the said Forms JA.

Taxpayer's argument:

The taxpayer contended that it had earned a 2% OM on its distribution activities, which was within the interquartile range earned by comparable, independent distributors under similar circumstances and consistent with the arm's length standard. No adjustment should be made when the adopted profit margin was considered as a price within the interquartile range. The DGIR did not dispute the 2% targeted operating profit margin that resulted from the distribution activities for YAs 2007 and 2008. However, for YAs 2009 to 2011, the DGIR rejected the 2% targeted operating profit margin by including Selling, General and Administrative (SGA) costs to the taxpayer's computation of the operating profit margin. Paragraph 2.80 of the Organization for Economic Cooperation and Development (OECD) Transfer Pricing Guidelines (OECD Guidelines) provided that non-operating income and expenses were considered as "exceptional and extraordinary" and should not be part of determining the taxpayer's operating profit margin. It was further contended that Pan-Asian comparables were permissible to be used in a comparability analysis if they were sufficiently comparable. No local company conducted similar distribution services as the taxpayer conducted globally and the local comparable used by the DGIR did not have business operations in various continents.

Further, the DGIR only requested for the use of local comparable companies for YAs 2009 to 2011 despite knowing that the taxpayer's business as a distributor did not change in YAs 2009 to 2011. The DGIR also had no basis to reject the taxpayer's local comparable companies merely because these comparable companies recorded lower revenues. The DGIR did not provide a transfer pricing report or detailed functional analysis to the taxpayer to explain his basis for rejecting the comparable companies selected by the taxpayer. The taxpayer argued that it had duly provided all Transfer Pricing Documentation and relevant supporting documents. They even went beyond the minimum requirement by providing a local benchmarking analysis to the DGIR despite this not being a mandatory requirement.

DGIR's argument:

In response, the DGIR argued that the computation in arriving at the rate of 2% based on the formula of OM was not shown in the Transfer Pricing Documentation. It merely concluded that the OM for distribution activities was 2% and was within the interquartile range of the comparable companies.

The adjustments by the DGIR, which were based on the information furnished by the taxpayer, showed that the rate of OM for YAs 2007 and 2008 was below 2% and was not at arm's length as reported in the Transfer Pricing Documentation. Paragraphs 2.77 and 2.78, including 2.80 of the OECD Guidelines, showed that the exclusion of non-operating items from determining the net profit indicator was to determine whether the independent comparable companies would be materially affected by such exclusion of the non-operating items. The taxpayer excluded certain expenses from their SGA costs without providing an explanation or reasons for such exclusions.

For YAs 2009 to 2011, besides the issue of the operating profit margin computation for distribution activities, Section 140A of the ITA was applied, in which the taxpayer was required to prepare a benchmarking analysis in accordance with sub rule 6 of the Income Tax Transfer Pricing Rules 2012 (TP Rules 2012). Out of nine (9) local comparable companies that had been selected by the taxpayer, five (5) of the comparable companies had low turnover, a different function from the taxpayer, and did not fulfill the requirement of the comparability factors as provided under the sub rule. Hence, the DGIR rejected these five (5) comparable companies and replaced them with three (3) new comparable companies, which resulted in tax adjustments for YAs 2009, 2010 and 2011. The benchmarking analysis by the DGIR had shown that the taxpayer's OM was below the lower quartile range of the seven (7) comparable companies (i.e., outside the interquartile range) and hence, the DGIR had made adjustments to the taxpayer's profit margin.

Issue:

Whether the DGIR was correct in law and facts to raise additional assessments pursuant to Sections 140 and 140A of the ITA and impose penalties under Section 113(2) of the ITA for YAs 2007 to 2011.

Decision:

On 1 December 2023, the SCIT rejected the taxpayer's appeal and decided that the taxpayer had failed to prove that the Forms JA were excessive and wrong. Furthermore, the DGIR was correct in law and facts to impose penalties under Section 113(2) of the ITA for the YAs 2007 to 2011.

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

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10. BRSB v DGIR (SCIT)

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

Facts:

On 28 April 2003, the taxpayer acquired a piece of agriculture land known as Lot 564, Block 11 Muara Tebas Land District for RM1,012,300 (Lot 564). On 20 April 2015, the taxpayer executed a Power of Attorney (POA) to authorise LT Homes Development Sdn Bhd (LTH) to develop Lot 564 and to apply for Planning Approval. The said approval was obtained on 23 July 2015. On 28 June 2016, the taxpayer entered into a Sale and Purchase Agreement with LTH to dispose Lot 564 for RM15,918,000. The DGIR issued a Form JA for the YA 2017 to tax the gains as the taxpayer's business income under Section 4(a) of the ITA, together with a penalty under Section 113(2) of the ITA amounting to RM4,213,071.72. Dissatisfied with the Form JA, the taxpayer filed a Form Q to the SCIT.

Taxpayer's argument:

The taxpayer contended that the gains received from the disposal of Lot 564 should be subjected to tax under the RPGTA. Lot 564 was acquired for a long-term investment purpose and not for trading. The taxpayer consistently classified Lot 564 as a fixed asset in its Audited Account since its acquisition until its disposal to LTH. Therefore, the disposal of Lot 564 was for a realisation of capital asset. At the time of its acquisition, there was no development surrounding Lot 564. The taxpayer also contended that no development was made on Lot 564 when it was disposed as it remained an agriculture land. The POA granted to LTH was necessary to allow LTH to apply for Planning Approval. LTH would not purchase Lot 564 if the Planning Approval was not obtained. The taxpayer also denied that its director has knowledge in the real estate business.

DGIR's argument:

In response, the DGIR asserted that the taxpayer did not hold Lot 564 for a long-term investment purpose. The taxpayer's intention to trade can be seen from two perspectives. Firstly, Lot 564 was left idle for almost 13 years and did not yield any income to the taxpayer. Secondly, during the audit, there was a discrepancy on the Memorandum of Association (MOA) submitted by the taxpayer compared to the MOA from Companies Commission of Malaysia's *MyData* system. The DGIR also contended that Lot 564 had commercial value since its acquisition by the taxpayer as it was located near the Kuching International Airport. It was evidenced in Sarawak Bulletin 2003 which was issued by the same valuer who prepared the Land Valuation Report dated 8 August 2016. There was some alteration and development made on Lot 564 as the Planning Approval was granted by the State Authority which improved Lot 564's status. This was confirmed in the Land Valuation Report. There was improvement on Lot 564 because the taxpayer authorised it to be done by LTH by way of POA. Thus, it enhanced the land's value and rendered it more saleable. The DGIR further argued that the imposition of a penalty under Section 113(2) of the ITA was just and correct as the taxpayer had made an incorrect return relating to the disposal of Lot 564.

Issue:

Whether Lot 564 acquired by the taxpayer was for investment purposes (where disposal of the Lot 564 is subjected to tax under the RPGTA) or for trading purposes (where disposal of the Lot 564 is subjected to tax under the ITA).

Decision:

On 6 November 2023, the SCIT dismissed the taxpayer's appeal and held that the taxpayer failed to prove its case as required under Paragraph 13, Schedule 5 of the ITA. The SCIT ruled that the DGIR was right to tax the gains of RM15,918,000 under Section 4(a) of the ITA. As such, the Form JA for YA 2017 amounting to RM4,213,071.72 raised by the DGIR was confirmed.

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

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11. MNWRSB v DGIR (SCIT)

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

Facts:

The taxpayer is a company incorporated in Malaysia and acquired one (1) unit of a two-storey shop house (said Property) on or around 30 May 1994. The taxpayer entered into a sale and purchase agreement dated 13 August 2020 to dispose of the said Property with the disposal price of RM6,300,000.

The DGIR issued a Notice of Assessment for the YA 2020 dated 23 December 2020 (Notice of Assessment) against the taxpayer in respect of the assessment of the real property gains tax (RPGT) payable. The DGIR assessed the real property chargeable gains for the sum of RM5,225,000 based on the market value of the said Property on 30 May 1994 at RM1,075,000, valued by Jabatan Penilaian dan Perkhidmatan Harta Malaysia (Kuala Lumpur) in its letter dated 14 December 2020.

Taxpayer's argument:

The taxpayer contended that in assessing the chargeable gains, the DGIR ought to have considered the acquisition price of the said Property based on the market value of RM7,000,000 as of 1 January 2013, pursuant to Paragraph 2A(1), Schedule 2 of the RPGTA.

DGIR's argument:

In response, the DGIR asserted that the taxpayer is a private limited company incorporated and domiciled in Malaysia. Therefore, the taxpayer should be subjected to tax under Part II, Schedule 5 of the RPGTA. Paragraph 2A(1), Schedule 2 of the RPGTA is applicable to a disposal of chargeable asset which is subjected to tax under Part I, Schedule 5 of the RPGTA. As such, the taxpayer is not entitled to claim that the said Property ought to be valued as of 1 January 2013 pursuant to Paragraph 2A(1), Schedule 2 of the RPGTA. The taxpayer's allegation that the market value of the said Property in year 2013 was RM7,000,000 was baseless as the taxpayer failed to provide any supporting documents or call for any material witness to testify in court.

Issue:

Whether the taxpayer should be subjected to RPGT based on the market value of the said Property pursuant to Paragraph 2A(1), Schedule 2 of the RPGTA.

Decision:

On 1 December 2023, the SCIT dismissed the taxpayer's appeal and held that the taxpayer failed to prove its case as required under Paragraph 13, Schedule 5 of the ITA. As such, the Notice of Assessment for the YA 2020 dated 23 December 2020 amounting to RM5,225,000 raised by the DGIR was confirmed.

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

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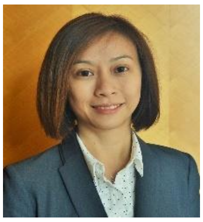
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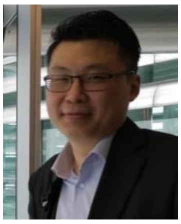
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