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Tax Espresso

HASiL Gazette Orders, Guidelines, Public Ruling, Tax Cases and more

July 2024

Greetings from Deloitte Malaysia Tax Services

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Deloitte Malaysia
Inland Revenue Board of Malaysia

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Upcoming events:

3 September 2024 – Navigating the Tax Appeal Process: Insights and Best Practices

Important deadlines:

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

1. Income Tax (Exemption) (No. 6) Order 2022 (Amendment) Order 2024 [*P.U.(A) 157/2024*] and HASiL Technical Guidelines in relation to exemption of foreign source dividends received in Malaysia

On 12 June 2024, the Malaysian government gazetted the *P.U.(A) 157/2024* which amends the Income Tax (Exemption) (No. 6) Order 2022 [*P.U.(A) 235/2022*] in respect of the tax exemption of dividend income received in Malaysia from outside Malaysia (i.e., foreign source dividend income) by certain recipients. The amendments relate to foreign-source dividends received by a resident company, a resident limited liability partnership (LLP), or by a resident individual partner in relation to a partnership business in Malaysia (IIP). Following the gazette of *P.U.(A) 157/2024*, the Inland Revenue Board of Malaysia (HASiL) issued the Technical Guidelines on Tax Treatment in Relation to Income received from Abroad (Amendment) dated 20 June 2024 (Amended Technical Guidelines) which replace the Revised Technical Guidelines issued on 29 December 2022 *(reported in Deloitte Malaysia Tax Espresso: Special Alert dated 4 January 2023)*. Based on the provisions of *P.U.(A) 157/2024* and the amended technical guidelines, certain conditions to qualify for the tax exemption for foreign-source dividends are effectively modified retroactively for dividends received on or after 1 January 2022, and some clarifications are provided.

As described further below, one key modification is that the tax exemption is made available to Labuan companies that have elected to be taxed under the Income Tax Act 1967 (ITA). In addition, the conditions for the tax exemption are modified to provide two different options to qualify for the exemption: one option requires the dividends to be subject to tax in the country of origin and for that country to have a minimum headline tax rate, while the other requires the dividend recipient to meet certain economic substance requirements.

A brief summary of the *P.U.(A) 157/2024* and the Amended Technical Guidelines dated 20 June 2024 is provided below.

The tax exemption of foreign dividend income received in Malaysia from <u>1 January 2022 until 31 December 2026</u> by a resident company (including a company incorporated under the Labuan Companies Act 1990 [*Act 441*] which has made an election under Section 3A of the Labuan Business Activity Tax Act 1990 [*Act 445*] to be charged to tax in accordance with the ITA), a resident LLP, or a resident IIP requires compliance with the conditions of "Option A" or "Option B":

<u>Option A</u>

- the foreign-source dividend income has been subjected to tax in the country of origin; and
- the highest rate of tax (headline tax) in the country of origin is not less than 15%;

OR

<u>Option B</u>

The resident company, LLP, or IIP complies with the economic substance requirements.

A resident company, LLP, or IIP will be regarded as having economic substance if it has:

- employed adequate number of employees with necessary qualifications to carry out the specified economic activities in Malaysia; and
- incur adequate amount of operating expenditure for carrying out the specified economic activities in Malaysia.

Paragraphs 5.2.1.4(c)(iii), (iv) and (v) of the Amended Technical Guidelines dated 20 June 2024 provide the following clarifications in respect of economic substance requirements:

- Clarifications regarding the meaning of specified economic activities in respect of an investment holding entity and other than an investment holding entity;

- Clarifications that a service director who is employed based on a contract of service can be considered as an employee; and

- Clarifications that outsourcing of specified economic activities to an outsourcing entity is permitted if the specified conditions are fulfilled.

Deloitte's comment:

The modifications that allow taxpayers a choice between complying with the conditions of option A (i.e., being subjected to tax in the country of origin and having a minimum tax rate of 15%) or option B (i.e., meeting the economic substance requirements) for the tax exemption for foreign-source dividends are effective retroactively as from 1 January 2022. Therefore, taxpayers that did not meet the conditions under option A and that have treated foreign-source dividends as subject to tax in tax returns they have submitted may consider filing an amended tax return by the end of 2029 (i.e., within five years after the end of the year the exemption was published in the official gazette) if the condition under option B is fulfilled to claim an exemption for such foreign-source dividends.

Please refer to the Amended Technical Guidelines dated 20 June 2024 and the respective Gazette Orders for full details.

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2. Public Ruling No. 2/2024 - Investment Holding Company

HASiL recently issued Public Ruling (PR) No. 2/2024 - Investment Holding Company (dated 28 May 2024) to replace PR No. 10/2015 (dated 16 December 2015).

The objective of this PR is to explain the tax treatment in respect of an investment holding company (IHC) resident in Malaysia.

The main updates and amendments to PR No. 10/2015 are listed in Paragraph 11 of the PR No. 2/2024 (*Note: On top of this, HASiL has also made some cosmetic changes to several examples in the PR.*). The salient changes are briefly summarised below:

- A new paragraph has been inserted and is numbered as **Paragraph 9.4** to reflect the amendment to Paragraph 12B Schedule 6 of the ITA via the Finance Act 2017. With effect from the year of assessment (YA) 2017, dividend income that is not entitled for tax deduction at source is exempted from income tax while any deductions (*"deductions" instead of expenses incurred*) related to dividend income are also disregarded in determining the chargeable income (*"chargeable income" instead of adjusted income*). This means that other than expenses related to dividends, any allowances under Schedule 3 of the ITA and other deductions including zakat, donations and others which are related to dividend income shall be disregarded in calculating the statutory income/chargeable income. An illustration thereon is provided by HASiL in a new example in the PR, please refer to Example 13.

- A new paragraph has been inserted and is numbered as **Paragraph 9.6** to reflect the amendments to Section 44(5F) of the ITA via the Finance Act 2018 and Finance Act 2021. With effect from YA 2019, any unabsorbed current year adjusted business loss ascertained for a relevant YA can only be carried forward for 10 consecutive YAs. Any unabsorbed business losses after the end of the 10 consecutive YAs are to be disregarded. [*Note: Any unabsorbed capital allowances can be carried forward to subsequent YAs, without any time limit.*] The illustration in Example 14 has been updated accordingly.

Please refer to the PR No. 2/2024 for full details and illustrative examples for guidance.

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3. HASiL Tax Investigation Framework 2024

HASiL has uploaded the Tax Investigation Framework 2024 (2024 Framework) dated 31 May 2024 on its website. This 2024 Framework replaces the Tax Investigation Framework 2023 dated 1 January 2023.

The new updates can be found in the following paragraphs in the 2024 Framework:

- Paragraph 7.1 on page 5 – *Permohonan Dokumen dan Maklumat*
- Paragraph 7.2 on page 5 to 6 – *Lawatan Pemeriksaan*
- Paragraph 7.5 on page 7 – *Penyelesaian Kes Siasatan*

- Paragraph 8.2.5 on page 9 – *Pembayar cukai*
- Paragraph 10.2.2 on page 12 – *Pengemukaan BNCP Yang Tidak Betul*
- Paragraph 11 on page 13 – *Prosedur Bayaran*
- Paragraph 12 on page 13 to 14 – *Rayuan*

Please refer to the 2024 Framework for full details.

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4. Income Tax (Exemption) (No. 19) 2007 (Amendment) Order 2024 [*P.U.(A) 148/2024*] in relation to a Development Manager in the Iskandar Development Region

P.U.(A) 148/2024 was gazetted on 5 June 2024 and is deemed to have come into operation from the YA 2021.

Amendments

The Principal Order, i.e. the Income Tax (Exemption) (No. 19) Order 2007 [*P.U.(A) 417/2007*] is amended as follows:

- The exemption of the statutory income of a development manager derived from the provision of management, supervisory or marketing services to a developer in an approved node within the Iskandar Development Region, which expired in YA 2020, is extended to YA 2024.

- The provision of Paragraph 7 – Non-Application is substituted with the following provision:

  This Order shall not apply to a development manager which in the basis period for a year of assessment —

  (a) has not obtained annual certification in relation to its activity referred to in subparagraph 3(1) from the node project development company; and

  (b) has been granted an exemption under paragraph 127(3)(b) or subsection 127(3A) of the Act.

Please refer to *P.U.(A) 148/2024* for full details.

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5. Income Tax Exemption Amendment Orders [*P.U.(A) 154/2024* and *P.U.(A) 155/2024*] in relation to Sabah Development Corridor

The Income Tax (Exemption) (No. 11) Order 2018 (Amendment) Order 2024 *[P.U.(A) 154/2024]* and Income Tax (Exemption) (No. 12) Order 2018 (Amendment) Order 2024 *[P.U.(A) 155/2024]* were gazetted on 11 June 2024.

Amendment

P.U.(A) 154/2024 and *P.U.(A) 155/2024* amend the respective Principal Orders [*P.U.(A) 390/2018* and *P.U.(A) 391/2018*] to further extend the application period *(previously extended to 31 December 2022 via the Income Tax (Exemption) (No. 11) 2018 (Amendment) Order 2022 [P.U.(A) 75/2022] and Income Tax (Exemption) (No. 12) 2018 (Amendment) Order 2022 [P.U.(A) 76/2022] respectively)* by another two years to 31 December 2024 for a qualifying company to apply for the exemption to the Minister of Finance through the Sabah Economic Development and Investment Authority.

Please refer to the respective Gazette Orders for full details.

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6. Stamp Duty (Exemption) (No. 8) Order 2018 (Amendment) Order 2024 [*P.U.(A) 153/2024*] in relation to a Qualifying Tourism Project carried on in the Sabah Development Corridor

P.U.(A) 153/2024 (Amendment Order) was gazetted on 11 June 2024.

Amendment
The Amendment Order amends the Principal Order [*P.U.(A) 397/2018*] to extend the stamp duty exemption on any instrument chargeable with *ad valorem* duty for transfer of the real property, used for the purposes of carrying on a qualifying tourism project, which is executed on or after 20 November 2012 but not later than 31 December 2024. (*Previously, the stamp duty exemption under P.U.(A) 397/2018 applies to any instrument executed on or after 20 November 2012 but not later than 31 December 2020*).

Please refer to the respective Gazette Orders for full details.

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7. Keysight Technologies Malaysia Sdn Bhd v DGIR (COA)

HASiL has recently uploaded a case report, "Keysight Technologies Malaysia Sdn Bhd v DGIR (COA)" on its website.

Facts:

The Director General of Inland Revenue (DGIR) raised an additional assessment on gain received by the taxpayer from the transfer of technical know-how (i.e., the marketing and manufacturing intangibles) to Agilent Technologies International (ATIS) for RM821,615,000 being income under Section 4(f) of the ITA together with the penalty under Section 113(2) of the ITA.

Taxpayer's argument:

The taxpayer argued that the DGIR was time-barred under Section 91(1) of the ITA from raising the Notice of Additional Assessment for the YA 2008. The taxpayer also argued that the gain from the transfer of technical know-how to ATIS was capital in nature and therefore should not be subject to tax under Section 4(f) of the ITA. The "badges of trade test" would be applicable in determining whether the gain/income was revenue or capital in nature.

DGIR's argument:

The DGIR contended that Section 91(3) of the ITA provided that the DGIR may issue an assessment after the expiration of the 5-years period on grounds of fraud or willful default or negligence. The findings of negligence on the part of the taxpayer include failure to support the claim that the gain from the transfer of technical knowhow by the taxpayer to ATIS was an outright sale and failure to furnish the document and information as requested by the DGIR in the audit letter on the valuation of the marketing and manufacturing intangibles.

The DGIR found that there was no proof of outright sale of the technical know-how as the Intellectual Property (IP) Agreement and Manufacturing Services (MS) Agreement showed no evidence that the legal rights had been transferred to ATIS since the agreements merely stated the transfer of beneficial rights. Further, facts have shown that the technical know-how was still used by the taxpayer in a similar manner prior to and post the IP Agreement and MS Agreement. It was proven that the gain of RM821,615,000 represent the future income that would have been received by the taxpayer for the years 2008 to 2015 should the taxpayer continue to carry out its function as a full-fledged manufacturing company of which the function had subsequently changed to being a contract manufacturing company due to the global restructuring exercise of the group. As such, the gain was taxed as other income under Section 4(f) of the ITA.

Issues:

1) Whether the gain from the transfer of technical know-how/sale of marketing and manufacturing intangibles by the taxpayer to ATIS was capital in nature (not subject to tax under the ITA) or revenue in nature (subject to tax under the ITA); and

2) Whether the DGIR was time-barred under Section 91(1) of the ITA from raising the Notice of Additional Assessment for the YA 2008.

Decision:

The Court of Appeal (COA) had unanimously allowed the taxpayer's appeal against the Notice of Additional Assessment dated 13 June 2017 for an additional assessment of RM311,057,602.46 for the YA 2008. Confining to the peculiar facts of the case, the decision of the High Court (HC) and the Special Commissioners of Income Tax (SCIT) were overturned.

The COA allowed the taxpayer's appeal based on the following grounds:

- Whilst the SCIT and the HC had agreed with the DGIR's argument, the COA had affirmed the application of the "badges of trade" test as argued by the taxpayer in determining whether the income was capital or revenue in nature and the test was not confined to disposal of land. The COA held that the taxpayer was not in the business of buying and selling of IP and the IP was not its stock in trade. No special effort had been made by the taxpayer to attract purchasers. The transfer of technical know-how was due to global restructuring of the group of the company.

- There had been an actual sale by way of agreement. The title to technical know-how was not registrable due to protection of confidential information. The outright sale test thus was not a proper test and the valuation report as requested by the DGIR was irrelevant.

- There was no failure on the part of the taxpayer to adduce valuation report as it was not requested during audit. Thus, there was no negligence on the part of the taxpayer and hence the additional assessment was time-barred.

[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 – July 2022 for details of the case at HC level.]

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8. Keysight Technologies Malaysia Sdn Bhd v DGIR (COA) regarding the application for award of interest on tax refund

HASiL has recently uploaded a case report, "Keysight Technologies Malaysia Sdn Bhd v DGIR (COA)" regarding the application for award of interest on tax refund, on its website.

Facts:

The taxpayer sought for an order for award of interest to be granted in respect of the refund sum of RM286,285,621.01 at the rate of 3.21% per year from 27 October 2017 until 24 May 2024 and post-judgment interest on the judgment debt of RM346,724,084.37 at the rate of 5% per annum from 25 May 2024 until full settlement thereof. The application was to cover its actual borrowing cost on the loan that was taken to pay the tax and to compensate for the loss of use of money that belonged to the taxpayer. The rate of 3.21% was claimed to be at arm's length and lower than the standard prescribed rate of 5% for post-judgment interest.

Taxpayer's argument:

The taxpayer relied on Section 11 of the Civil Law Act 1956 (CLA) to argue that the court was vested with discretion to impose interest payment as compensation. The taxpayer contended that it was entitled to restitution on any money paid to the DGIR pursuant to unlawful or erroneous demand and relied on the decisions in *Woolwich Building Society v Inland Revenue Commissioners (No. 2) [1992] 3 All ER 737* and *Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] 1 MLJ 825* to support its contention that, pursuant to the decision of the court in allowing the Appellant's appeal, the tax which had been paid must be refunded together with interest.

DGIR's argument:

The DGIR argued that even though the court had the discretion to award interest, the discretion must be exercised in appropriate circumstances. It would be inappropriate to impose interest on the DGIR, considering Sections 91, 97, 99, 103 and 106 of the ITA. The court should give full effect to the spirit, intention, and whole framework of tax legislation that

emphasised the speedy collection of tax despite appeal and expressly excluding compensation/interest when dealing with refund arising from tax appeal. It would be against the public interest to punish the DGIR by imposing interest on the refund as the collection of tax was one of the DGIR's most important duty in serving its public purpose.

The DGIR submitted that Section 11(1) of the CLA only applied to trial proceedings for recovery of debt or damages. The instant case was not for the recovery of debt or damages and the payment of tax did not create a debtor-creditor relationship between the taxpayer and the DGIR. Moreover, in *Woolwich's* case, since the law had been declared to be void or *ultra vires*, then the demand itself was *ultra vires* and unlawful. It was not a case where in the normal course of appeal, the demand was made pursuant to an assessment which was then decided in favour of the taxpayer. Similarly, the decision in *Pelangi's* case was distinguishable and peculiar to the facts of its case.

More importantly, the ITA did not provide for payment of interest in refunding money to the taxpayers when the assessment had been determined upon appeal. Section 111D(4) of the ITA had specifically excluded a situation whereupon tax was to be refunded pursuant to an appeal under Section 99 of the ITA.

Issue:

Whether the award of interest on tax refund should be granted to the taxpayer.

Decision:

The COA unanimously dismissed the taxpayer's application for award of interest on tax refund. The COA held that as a matter of award of interest, it was under the discretion of the COA. In all circumstances of the case, this was not an appropriate case where payment of interest ought to be given. Therefore, the tax that had been paid was to be refunded without interest.

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

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9. Embunan Harian Sdn Bhd v DGIR (COA)

HASiL has recently uploaded a case report, "Embunan Harian Sdn Bhd v DGIR (COA)" on its website.

Facts:

This is an appeal filed by the taxpayer against the decision of the HC in dismissing its appeal against the SCIT's decision.

The taxpayer claimed for a deduction of RM925,000 under Section 33(1) of the ITA for the YA 2010 on the basis that the amount was a part payment from the total amount of RM4,600,000 for the purchase of logs from Syarikat Kuruak Sawmill Sdn Bhd (SKS). Upon audit, the amount claimed by the taxpayer was disallowed by the DGIR under Section 39(1)(g) of the ITA as the payment was found to be part of the payment by the taxpayer to SKS to obtain the exclusive right to extract timber from the land area that had been awarded to SKS by the Terengganu State Authority.

Consequently, the DGIR raised an additional assessment for the YA 2010. The taxpayer disagreed with the assessment and filed an appeal under Section 99 of the ITA. The SCIT's opinion was that the payment made by the taxpayer to SKS by virtue of the Sale and Purchase Agreement dated 12 June 2006 (Agreement) was for the purpose of obtaining the exclusive right to extract timber from the land area which was awarded/licensed to SKS. The SCIT dismissed the taxpayer's appeal and confirmed the Notice of Additional Assessment dated 15 May 2014 for the YA 2010. The taxpayer then appealed to the HC against the SCIT's decision. The HC held that there was no error committed by the SCIT in their conclusion of fact and law and dismissed the taxpayer's appeal.

Taxpayer's argument:

The taxpayer submitted that it was principally engaged in the extraction and trading of timber logs. It was undisputed that the taxpayer had incurred expenditures for the purchase of trading stock. The SCIT found that the stock purchase expenditure was incurred for the purchase of timber logs. Hence, the stock purchase expenditure was deductible under Section 33(1) of the ITA and did not fall under Section 39(1)(g) of the ITA as it was not a payment for the use of the license to extract timber and SKS did not transfer its license to the taxpayer.

DGIR's argument:

However, the DGIR argued that based on the Agreement, the taxpayer assumed all the duties to pay the deposit and premiums and all other payments due from SKS, as a license holder, to the State Authority. Thus, the responsibility to pay all the premium deposits and royalties which was due from the license holder to the State Government or any relevant authority, lied on the taxpayer. The fact that the payment of premiums and royalties were incurred by the taxpayer was not disputed and the expenses were captured in the taxpayer's Profit and Loss Account for the YAs 2007, 2008 and 2009 as expenses for "Log premium and royalty".

Based on the Agreement, the taxpayer shall have the total rights over all the benefit derived from the land area. This amplified the fact that the taxpayer had the exclusive rights over the land area. The Agreement also made it an obligation on the taxpayer to make and maintain all the access and internal roads including all the necessary roads including drains culvert and bridges in the land area. Thus, the Agreement was not a mere sale and purchase agreement.

The Agreement also expressly stated that the taxpayer would abide by all the rules and regulations and with the terms and conditions of the permit and the taxpayer would indemnify SKS against any claim or demands. Though the permits were issued to SKS and any actions taken would be taken against SKS, but it was also stated that whatever claims made against SKS, as the permit holder, would be indemnified by the taxpayer. This signified the intention of SKS to hand over all the affairs relating to the land area to the taxpayer save only the permits was under its name. As such, the Agreement was for the taxpayer to secure and obtain the exclusive rights to use SKS's permit and license to extract timber from the land area.

The case of Hup Cheong Timber, as referred to by the taxpayer, was distinguishable as the taxpayer in that case, held such license which was contrary to the present case before the court.

Issues:

1) Whether the stock purchase expenditure incurred in the YA 2010 should be disallowed under Section 39(1)(g) of the ITA; and

2) Whether the DGIR was correct in imposing a penalty under Section 113(2) of the ITA.

Decision:

The COA, by unanimous decision, dismissed the taxpayer's appeal and affirmed the decision of the HC. The COA was of the view that the HC did not err by upholding the findings of the SCIT. The nature and character of the Agreement was to use the license for its intended purpose, and not for the purchase of standing timber.

The COA agreed that the DGIR was empowered under Section 113(2) of the ITA to impose a penalty of up to 100% of the amount of tax undercharged.

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

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10. Tun Hamdzah Bin Ismail v Government of Malaysia (COA)

HASiL has recently uploaded a case report, "Tun Hamdzah Bin Ismail v. Government of Malaysia (COA)" on its website.

Facts:

This is an appeal by the taxpayer against the decision of the HC and the Sessions Court (SC) which ruled that the delivery made by the Government of Malaysia through a registered AR card and Statement of Claim together with an acknowledgment of receipt being "returned" was in order.

Taxpayer's argument:

The taxpayer argued that the delivery of the Writ and Statement of Claim was not in order. Referring to the case of the *Federal Court Goh Teng Whoo & Anor v Ample Objectives Sn Bhd [2021] 3 MLJ 159* where the delivery by a registered AR

card should be made to the person being sued or to a person authorised to receive the summons on behalf of the taxpayer. Furthermore, the taxpayer argued that the exhibit filed in the Affidavit of Service of the Government of Malaysia was only a copy of the registered AR card, where the recipient's name is Sahirah Saufi with identification card number 990708-05-8182, instead of the taxpayer. Additionally, there is no indication in the exhibit showing or proving that the Writ and Statement of Claim were sent to the taxpayer's address because there is no cover letter indicating the address to which the Writ was delivered.

The taxpayer also argued that the amount referred to in the Statement of Claim and the Notice of Assessment is different. Furthermore, the Notices of Assessment for the real property gains tax (RPGT) raised against the taxpayer are incomplete as they do not indicate which properties were being disposed of, and there is lack of property information in these Notices of Assessment.

Government of Malaysia's argument:

The Government of Malaysia argued that the default judgment obtained against the taxpayer was in order and valid in accordance with the applicable laws. In this case, the Writ and Statement of Claim were delivered to the taxpayer through the registered AR card at taxpayer's last known address at that time. The registered AR card which contained the acknowledgment of receipt was returned and exhibited in the Affidavit of Service (Writ and Statement of Claim).

Issue:

Whether the Writ and Statement of Claim delivered through a registered AR card by the Government of Malaysia to the taxpayer was in order.

Decision:

The COA allowed the taxpayer's appeal against the decision of the HC [*Note: The HC ruled that the taxpayer's appeal was clearly without merit and unfounded].* The COA found that the failure to exhibit a cover letter together with the registered AR card clearly indicates that there is no certainty as to whether the Writ and Statement of Claim were delivered or not. The delivery of the Writ was not in order. The judgments of the HC and SC were set aside. The case was referred to the SC for a full trial.

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

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11. Impianika Development Sdn Bhd v DGIR (HC)

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

Facts:

The taxpayer filed a judicial review (JR) application to quash the decision of the DGIR made vide a Notice of Assessment dated 10 December 2020 for the YA 2017 amounting to RM41,978,355.07 in additional taxes and penalties including the audit finding letters dated 21 May 2020, 14 August 2020, 29 September 2020, 1 October 2020, 1 December 2020, and 8 December 2020 (collectively referred to as "Decision").

The taxpayer entered into a Privatisation Agreement dated 25 November 2014 and a Supplementary Agreement dated 14 August 2015 with the Mayor of Kuala Lumpur (DBKL) for the construction of a project known as "Razak Mansion". The total contract sum for the Razak Mansion project is RM284,411,335.63. The 19.91-acre "Exchanged Land" consisting of Parcel A, Parcel B, Parcel C1, Parcel C2 and Parcel C3 would be transferred to the taxpayer in return for the construction of the Razak Mansion. On 16 June 2017, the Exchanged Land was transferred to the taxpayer vide Form 14A. The Exchanged Land was developed as the Razak City Residence project, a mixed development of 5,748 units of serviced apartments and 121 units of office shop. Based on an investigation, the DGIR found that the gross income of the taxpayer for Phase 1 (Razak Mansion) submitted in the tax calculation amounting to RM137,444,534 and the total claimed cost was RM155,834,508 (audited account) and thus the Razak Mansion project had a carry-forward loss of RM20,043,759 (actual loss). Phase 2 (Razak City Residence) recorded an estimated loss (unfinished projects) of RM24,690,527 and the total loss carried forward for the YA 2017 was RM44,734,286. The cost of land used in Phase 2 was RM284,411,336. The taxpayer considered Phase 1 and Phase 2 as one project. However, upon review of the audited accounts for the year ended 2017

and the income tax calculation for the YA 2017, it was found that the taxpayer reported the total gross income and total cost of the Razak Mansion project upon completion as follows:

Details	RM
Contract Revenue	137,444,534
Add: MAIWP Income	2,500,000
(Less): Project Costs	(155,834,508)
Actual Loss	(15,889,974)

The reported Contract Revenue of RM137,444,534 equalled to the total Contract Sum as stated in the Supplementary Agreement. The income tax calculation for the YA 2017 reported an actual loss on the construction of the Razak Mansion project amounting to RM20,043,759. Meanwhile, the estimated gross loss of the Razak City Residence project for the YA 2017 was RM24,690,527. The taxpayer had included the actual loss of the Razak Mansion project and the estimated gross loss of the Razak City Residence project. The taxpayer had reported the construction of Razak Mansion project and Razak City Residence project as one project. The taxpayer also failed to provide progress billing and final account for the purpose of income claims. No cash payment was accepted and a Contract Sum of RM284,411,336 was recorded as the land cost for the Razak City Residence project. The land assessment by the Valuation and Property Services Department confirmed that the market value of the Exchanged Land at the date of transfer was RM443,860,000. Meanwhile, the audited accounts for the year ended 2017 showed that the Exchange Land had been charged to the bank. The bank approved a Syndicated Facilities Agreement amounting to RM480,000,000. Based on the investigation, the DGIR raised 2 issues; namely whether the Razak Mansion project and Razak City Residence project were the same project, and if they were 2 separate projects, what was the contract value (revenue) for the Razak Mansion project.

The taxpayer contended that the DGIR had committed errors of fact and law by deciding that the taxpayer had received taxable income pursuant to the Privatisation Agreement and Supplemental Agreement entered with DBKL. The purpose of the Agreements was for the taxpayer to acquire and purchase the Exchanged Land from DBKL in exchange for consideration. The taxpayer had purchased the Exchanged Land from DBKL in exchange for the following consideration: (a) the taxpayer was to develop the Razak Mansion Project to be handed over to DBKL, the cost of which was valued at RM137,444,534; and (b) the taxpayer was to pay a cash consideration of RM146,966,801.63 to DBKL. The DGIR had committed errors of fact and law by deciding that the taxpayer had under-declared its income for the YA 2017 amounting to RM152,774,775, pursuant to the Privatisation Agreement and Supplemental Agreement.

Issue:

Whether the taxpayer had an arguable case for JR application and can bypass the alternative remedy of appeal to the SCIT under Section 99(1) of the ITA.

Decision:

The HC dismissed the taxpayer's application for JR with cost of RM5,000 and held that such issue fell within the purview of the SCIT.

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

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12. GCSB v DGIR (SCIT)

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

Facts:

The DGIR raised a Notice of Additional Assessment for the YA 2015 against the taxpayer based on the tax audit findings that the taxpayer had understated its income or failed to recognise the progress claim of the development project in full. The taxpayer also failed to prove that the claim of subcontractor expenses can be allowed for deduction pursuant to Section 33(1) of the ITA.

The taxpayer only recognised RM48,633,077.81 as its sales/revenue in YA 2015. In contrast, it was discovered by the DGIR during the tax audit that the developer had recognised the progress payment that is claimed as cost and paid to the

taxpayer amounting to RM52,267,996.90. This fact was not disputed or challenged by the taxpayer. Hence, the difference of RM3,634,918.92 is the taxpayer's understatement of income.

With regards to the subcontractor expenses of RM5,067,434.04, the DGIR discovered that the expenses did not match to the progress payment claimed and variation orders No 19 to 22 as provided by the subcontractor to the DGIR. The taxpayer claimed that the subcontractor expenses should be allowed as the taxpayer's construction cost even though the amount claimed is different.

Taxpayer's argument:

The taxpayer contended that the DGIR failed to consider the Settlement Agreements entered by the taxpayer's previous management in order to settle unpaid bills for works done and goods supplied. The taxpayer also asserted that it had approached the DGIR for a settlement out of court and had amended the audited accounts and ledgers to reflect the purported expenses claimed and payments made to the taxpayer's former director amounting to RM8,000,000 and to the subcontractor for an amount of RM2,100,000 pursuant to the Settlement Agreements.

DGIR's argument:

The DGIR argued that the taxpayer failed to justify the purported Settlement Agreements as mentioned above were connected to the tax audit finding issues raised by the DGIR. The DGIR further argued that the settlement out of court proposal to the DGIR did not take place and any forms of communication in respect of the settlement proposal was made strictly without prejudice basis. The purported expenses claimed by the taxpayer in the amended audited accounts and ledgers were afterthought where the taxpayer also failed to adduce evidence that the alleged expenses is an allowable deduction under Section 33(1) of the ITA.

The DGIR further argued that the taxpayer had deliberately failed and/or refuse to declare the sales/revenue amounting to RM3,634,918.92 and overclaimed the subcontractor expenses amounting to RM5,067,434.04. As a consequence, the taxpayer had failed to furnish a correct return by understating its income for the YA 2015.

Issue:

Whether the taxpayer had deliberately failed and/or refuse to declare the sales/revenue amount in full and overclaimed the subcontractor expenses, and therefore, furnished an incorrect return under Section 113 of the ITA.

Decision:

On 10 May 2024, the SCIT dismissed the taxpayer's appeal and held that the taxpayer had failed to prove its case as required under Paragraph 13, Schedule 5 of the ITA. As such, the Notice of Additional Assessment for the YA 2015 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 are not available as of date of publication.]

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			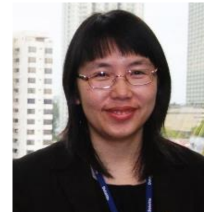	
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