Tax Espresso

IRBM's Media Release, Guidelines, Tax Cases and more

June 2023

Greetings from Deloitte Malaysia Tax Services

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Deloitte Malaysia
Inland Revenue Board of Malaysia

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2. Deloitte Webinar: Voluntary Disclosure Program for Indirect Tax

Important deadlines:

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

1. Finance Act 2023

The Finance Bill 2023 has been gazetted as the Finance Act 2023 (English and National Language versions) on 31 May 2023, and has come into operation on 1 June 2023.

The Finance Act 2023 includes amendments proposed in the Finance Bill 2023 (Amendment in Committee), which were approved by the Senate (*Dewan Negara*) on 10 April 2023.

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2. IRBM's Media Release: Collaboration between IRBM, Media Practitioners and Influencers, and Industry Players to strengthen the Implementation of e-Invoicing

Through a media release dated 22 May 2023, the Inland Revenue Board of Malaysia (IRBM) announced that it recently held an engagement session with almost 220 participants comprising media practitioners and influencers, and industry players to provide early exposure on e-Invoicing as well as to obtain direct feedback on marketing strategies that can be implemented to assist the IRBM in disseminating to taxpayers the importance of implementing e-Invoicing.

The proposed measure to implement e-Invoicing was announced during the tabling of Budget 2023 by the Government of Malaysia to ensure effective management of the country's tax administration to keep up with the rapid digitisation and technological developments of businesses.

Salient points

1) The implementation of e-Invoicing will be held in stages beginning in January 2024, focusing on the development of the e-Invoicing system and the launch of a pilot project with selected taxpayers. Mandatory adoption of e-Invoicing will begin in June 2024 for businesses that fall within the revenue threshold set by the IRBM. Details of the proposed implementation of e-Invoicing are as follows:

Year	Details
January 2024	Launch a pilot project for selected companies. Other companies may implement it voluntarily.
June 2024	Mandatory implementation for businesses that achieve a revenue threshold of RM100 million per year.
January 2025	Mandatory implementation for businesses that achieve a revenue threshold of RM50 million per year.
January 2026	Mandatory implementation for businesses that achieve a revenue threshold of RM25 million per year.
January 2027	Mandatory implementation for all businesses.

2) The implementation of e-Invoicing is expected to improve the quality of services offered by the IRBM as well as provide benefits to taxpayers in terms of improving the efficiency of their business operations, facilitating record-keeping, and reducing their tax compliance costs. The implementation of e-Invoicing is also expected to address tax leakages arising out of the shadow economy by creating more transparent business transactions.

3) Any questions and related feedback can be forwarded to IRBM via:
   a) HASiL Care Line at 03-8911 1000 / 603-8911 1100 (Overseas);
   b) HASiL Live Chat; and
   c) Feedback Form on the HASiL official portal at https://maklumbalaspelanggan.hasil.gov.my/Public/.

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3. Guidelines on Tax Deduction under Section 34(6)(h) of the Income Tax Act 1967 for Contributions for Smart Artificial Intelligence-Driven Reverse Vending Machines

The Ministry of Finance recently issued the Guidelines on Tax Deduction under Section 34(6)(h) of the Income Tax Act 1967 (ITA) for Contributions for Smart Artificial Intelligence (AI)-Driven Reverse Vending Machines (RVM) (the Guidelines) on its website. The tax incentive was announced during the National Budget 2023, which extended the existing tax incentive under Section 34(6)(h) of the ITA to include donations or sponsorships for a Smart AI-Driven RVM made by certain taxpayers with business income.

With that, the Guidelines (*available in Bahasa Malaysia only*) were issued to provide taxpayers with clarification on the general criteria and procedures for the application of the tax incentive for the purpose of computing income tax. The term "tax deduction" and "tax incentive" are used interchangeably.

Salient points

1) A tax deduction under Section 34(6)(h) of the ITA shall only be allowed for the contributions made in cash or through endowment of Smart RVM that utilise Smart AI by the following persons with business incomes:
   (a) companies;
   (b) individuals;
   (c) partnerships;
   (d) trust bodies; and
   (e) cooperative societies.

2) Eligible taxpayers are required to substantiate the contributions made by submitting the following supporting documents:
   (a) official receipts of contributions made;
   (b) letter of acceptance (*see Appendix 1 to the Guidelines*);
   (c) endowment agreement which states the duration, location, and serial number of the Smart RVM; and
   (d) verification from the Ministry of Natural Resources, Environment and Climate Change on the value of cash, equipment, and services (*see Appendix 2 to the Guidelines*).

3) The above-mentioned tax deduction shall only be allowed for contributions or sponsorships made and applications received by the Minister of Finance (the Minister) between 1 April 2023 and 31 December 2024 (both dates inclusive). The application for the tax deduction as mentioned must be submitted in writing to the Minister for approval, together with the information required based on the format stated in Appendix 3 to the Guidelines, to the following address:

   Setiausaha
   Bahagian Cukai
   Perbendaharaan Malaysia
   Tingkat 6, Blok Tengah, Kompleks Kementerian Kewangan
   Precint 2, Pusat Pentadbiran Kerajaan Persekutuan 62592,
   Putrajaya.

4) The tax deduction for contributions made for community or charitable projects approved by the Minister must be claimed in the Income Tax Return Form for the relevant year of assessment (YA). Taxpayers that are eligible for the tax deduction are required to keep the following documents properly so that they are able to provide such documents to the Inland Revenue Board of Malaysia in the event of a tax audit or upon request:
   (a) original approval letter by the Minister;
   (b) official receipt or letter of acceptance of the contribution from the recipient of the contribution; and
   (c) verification letter on the value of services or the project costs by the relevant Government agencies.

Please refer to the Guidelines for full details.

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4. Ketua Pengarah Hasil Dalam Negeri v Mitraland Kota Damansara Sdn Bhd (COA)

This was an appeal by the Director General of Inland Revenue (DGIR) against the decision of the High Court (HC) delivered on 19.5.2021 on a Case Stated from the Special Commissioners of Income Tax (SCIT) reversing the decision of the SCIT.

Issues:

1) Whether the findings of the SCIT were unassailable.

2) Whether the payments to Lembaga Perumahan dan Hartanah Selangor (LPHS) are deductible under Section 33(1) of the ITA.

3) Whether the imposition of penalty under Section 113(2) of the ITA was warranted.

Decision:

The Court of Appeal (COA) allowed the DGIR's appeal in part based on the following grounds:

<u>Issue 1</u>

The COA disagreed with the DGIR that the findings of the SCIT were unassailable. Paragraph 34, Schedule 5 of the ITA clearly stipulated that an appeal from the SCIT against a deciding order may be made to the HC on a question of law. The Courts can review the conclusions reached by the SCIT to ascertain if indeed these conclusions were borne out by the facts and evidence in that case.

<u>Issue 2</u>

The COA agreed with the HC that the payment or refund of the sum of RM4,468,090 to the LPHS, which was equivalent to the Bumiputera discount, was a revenue expense that was deductible under Section 33(1) of the ITA.

However, the COA was of the view that the DGIR and the SCIT were correct in their decision that the additional 5% payment of RM1,050,497 for the breach of the circular was not deductible under Section 33(1) of the ITA. The circulars prohibit the sale of the Bumiputera units to non-Bumiputeras without the approval of the LPHS. If the taxpayer breaches this prohibition, then a penalty of 5% is imposed on top of the payment of the equivalent of the Bumiputera discount to LPHS. This payment was avoidable. The taxpayer could have sold these units after the LPHS approval was obtained, which would be a matter of course if they have fulfilled all the stipulations in the circulars for their release for sale to the general public. Hence, the additional 5% payment cannot be said to be expenses wholly and exclusively incurred in the production of gross income under Section 33(1) of the ITA. Thus, the order of the HC that had allowed a deduction for the RM1,050,497 was varied and disallowed by the COA.

<u>Issue 3</u>

The COA agreed with the HC that Sections 113(1) and 113(2) of the ITA do not apply to situations where there was a genuine difference of opinion between the DGIR and the taxpayer on the interpretation of the law. The taxpayer had taken a reasonable and considered legal position in submitting its returns and took the view that all payments to the LPHS were deductible under Section 33(1) of the ITA. The facts disclosed that the taxpayer had acted in good faith and had made full disclosure. Hence, the COA affirmed the HC's ruling to set aside the said penalty imposed under Section 113(2) of the ITA.

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5. Ketua Pengarah Hasil Dalam Negeri v Persatuan Nelayan Kebangsaan (HC) [(2022) MSTC 30-503]

This was an appeal filed by the DGIR by way of a case stated against the Deciding Order of the SCIT. The SCIT had unanimously allowed the taxpayer's claim and/or appeal against the DGIR's decision to raise additional assessments for the YAs 2008, 2009, and 2010. The SCIT had decided that the bank guarantee fees incurred by the taxpayer were an expense allowable under Section 33 of the ITA and had equated the commission paid by the taxpayer for the bank guarantee to the interest paid on the loan.

Issues:

1) Whether the bank guarantee fees incurred by the taxpayer to guarantee its payment for the supply of diesel are capital in nature pursuant to Section 39(1)(c) of the ITA and therefore not allowable as a deduction under Section 33(1) of the ITA; and

2) Whether the penalty under Section 113(2) of the ITA imposed by the DGIR on the taxpayer was correct and justifiable.

Decision:

The HC allowed the DGIR's appeal based on the following grounds of judgement:

- It is trite law that a decision of the SCIT could be set aside if the decision was tainted with the error or misconception of law or the decision was not supported by the evidence before the SCIT [as per *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri (1994) 1 MLRA 262*]. The SCIT erred in its decision when it held that the commission for the bank guarantee incurred by the taxpayer was deductible under Section 33(1) of the ITA on the grounds that such expenses were directly attributable to the creation of the taxpayer's income. The SCIT had overlooked the fact that an expense must be "wholly and exclusively" incurred in the production of gross income to be eligible for deduction under Section 33(1) of the ITA. According to the case of *Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2012) 6 MLJ 411*, an expenditure that was incurred in the production of gross income refers to an expenditure that was performed for the purpose of earning income and must be attached to the performance of business operations that were performed bona fide for earning income. The test of "wholly and exclusively" had to be based on the facts of each case and ordinary commercial trading.

- The HC ruled that for an expense to be deductible, both Sections 33(1) and 39(1) of the ITA must be read in tandem. The expenses must first pass the test of being "wholly and exclusively incurred in the production of gross income" under Section 33(1) of the ITA. Once it has passed the test, it must not be disallowed by Section 39(1) of the ITA [see *DGIR v LTS (1974) 1 MLRH 6*]. The commission expenses incurred by the taxpayer for the bank guarantee facility obtained from the bank were capital in nature because the bank guarantee was not made directly for the purpose of purchasing the diesel but rather was a precondition imposed by the suppliers to enable the taxpayer to purchase the diesel. In other words, the bank guarantee was not made in the ordinary course of the taxpayer's business but rather was made to run the business. The HC asserted that expenditure incurred prior to the commencement of a business was capital in nature since it was not incurred to earn profit but to set the profit-earning machinery in motion.

- With that, the commission expenses incurred by the taxpayer for the bank guarantee facility obtained from the bank shall be disallowed under Section 39(1)(c) of the ITA. The SCIT was wrong to conclude that the bank commission was part of the cost of trading stock because it went against its own finding of facts, according to which the bank guarantee was merely obtained as a security for the payment and not directly for the payment of the diesel. The SCIT was also wrong to rely on the court's decision in the case of *Fernrite Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2004) 7 MLJ 600* to allow the taxpayer's appeal, as in that case, the bank guarantee was not a precondition to the sale and purchase.

- With the above in mind, the HC ruled that the taxpayer had made an incorrect return, and thus, the penalty imposed by the DGIR under Section 113(2)(b) of the ITA was correct and justifiable. The DGIR has the discretionary power to impose a penalty under Section 113(2) of the ITA after considering all relevant facts and circumstances of the case. The penalty imposed at the rate of 45% was reasonable, fair, and in accordance with the law based on the audit findings of the case.

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6. Transocean Drilling Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC) [(2022) MSTC 30-496]

This was an appeal filed by the taxpayer against the Deciding Order of the SCIT under Paragraph 34, Schedule 5 of the ITA. The SCIT had unanimously disallowed the taxpayer's claim and/or appeal against the imposition of penalties by the DGIR on the taxpayer for the YAs 2011 and 2012.

Issues:

1) Whether the DGIR was legally correct in rejecting the taxpayer's tax returns for the YAs 2011 and 2012 which were filed based on the taxpayer's management accounts; and

2) Whether the DGIR had rightly imposed a penalty under Section 112(3) of the ITA on the taxpayer.

Decision:

The HC allowed the taxpayer's appeal based on the following grounds of judgement:

- It is trite law that a decision of the SCIT could be set aside if the decision was tainted with an error or misconception of law or if the decision was not supported by the evidence before the SCIT [as per *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri (1994) 1 MLRA 262*]. The SCIT erred in holding that Section 112(3) of the ITA applied to any non-compliance with Section 77A(3)(b) of the ITA. Non-compliance with Section 77A(3)(b) of the ITA was only penalised with effect from 31 December 2015 under Section 120(1)(h) of the ITA. It should be noted that a breach of Section 77A(1) of the ITA entails a criminal sanction under Section 112(1) of the ITA. Only in circumstances where no prosecution is brought can a civil penalty be imposed by the DGIR under Section 112(3) of the ITA.

- It is trite that a penal statute should be strictly construed in favour of the subject. Therefore, Section 112(3) of the ITA, which imposes penalties, should be strictly interpreted (i.e., not extended beyond its clear meaning) [as per *Liew Sai Wah v PP (1968) 1 MLRA 641*]. Hence, the HC was of the view that the DGIR could only impose a penalty under Section 112(3) of the ITA for a breach of Section 77A(1) of the ITA and not Sections 77A(3), 77B(1), and 77B(2) of the ITA, based on the scheme of the ITA and the language of Sections 112(3), 113, 114, and 120(1)(h) of the ITA.

- The HC held that the taxpayer had fully complied with Section 77A(1) of the ITA. The SCIT's decision, however, was not premised on finding a default in complying with Section 77A(1) but was based entirely upon finding a default regarding Sections 77A(3)(b), 77B(1), and 77B(2). Although the revised tax returns filed by the taxpayer were beyond the statutory prescribed time limit pursuant to Sections 77B(1) and 77B(2) of the ITA, the HC ruled that a breach of Sections 77B(1) and 77B(2) of the ITA did not warrant a penalty under Section 112(3) of the ITA, which only penalised a default under Section 77A(1) of the ITA.

- The HC was of the view that the SCIT erred in holding that the enactment of Section 77A(4) of the ITA was intended only to state clearly the pre-existing legal requirement to file tax returns based on audited accounts. This was because Section 77A(4) of the ITA, which required returns furnished by a company under Section 77A to be based on audited accounts, was only inserted vide the Finance Act 2014, effective from YA 2014 and subsequent YAs. If the pre-amended Section 77A of the ITA had already required a tax return to be filed based on audited accounts, then it begs the question of why Parliament had to enact Section 77A(4) of the ITA. It is an established rule of interpretation that the Parliament does not act in vain.

- Further, the accompanying notes and the reminder in Form C for the YAs 2011 and 2012 were merely best practices or guidance from the Inland Revenue Board, which was not made mandatory by the ITA at the material time and was not legally binding [see *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformers Manufacturer Sdn Bhd (2012) MSTC 30-039*]. Any requirement for the use of audited accounts in the preparation of tax returns bearing criminal consequences should be specified in the legislation, not under the accompanying notes and the reminder in Form C.

- The word "particulars" in Section 77A(3)(b) of the ITA refers to the "details" required to be declared by the taxpayer when filing a tax return and is a separate matter from the requirement that the tax return should be filed and computed based on audited accounts. The HC held that the SCIT erred in extending the meaning of the word "particulars" to include conditions or instructions stated in the accompanying notes and the reminder in Form C.

- The HC held that the penalties imposed by the DGIR for YAs 2011 and 2012 were excessive and disproportionate compared to the taxes underpaid for YA 2011 (i.e., 538.26% of the taxes underpaid). Discretionary powers conferred on the DGIR were not unfettered, and when such discretion was wrongly exercised or not explained, the HC has a duty to intervene [as per *Datuk Bandar Kuala Lumpur v Zain Azahari Zainal Abidin (1997) 2 CLJ 248*]. The SCIT had overlooked Section 113(2) of the ITA in upholding the DGIR's assessments and given little consideration to the factors that would have resulted in a much lower penalty imposed under Section 113(2) of the ITA in respect of YA 2011. With that, the HC ruled that the SCIT had failed to scrutinise the evidence presented before it and had misapplied the law and facts, which warranted the HC's interference.

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7. Government of Malaysia v Low Taek Jho (HC) [(2023) 8 MLJ 650]

This was a case in which the DGIR applied to the HC to enter a summary judgement order against the taxpayer to seek payment for the sums allegedly owed by the taxpayer, which were taxes due for the YAs 2013 and 2014 by virtue of Sections 103 and 106 of the ITA.

The taxpayer failed to file the required tax returns to the DGIR for the YAs 2013 and 2014, resulting in the DGIR assessing both YAs in accordance with the powers granted under Section 91 of the ITA. The taxpayer then did not pay the taxes assessed within the prescribed 30-day time limit, together with the 10% late payment penalty imposed by the DGIR, which resulted in the DGIR issuing a tax claim by virtue of Section 106 of the ITA.

Issue:

Whether a summary judgment order should be entered against the taxpayer in accordance with Sections 103 and 106 of the ITA.

Decision:

The HC allowed the DGIR's application to enter a summary judgement order against the taxpayer based on the following grounds of judgement:

- Going by the cases of *Sun Man Tobacco Ltd v Government of Malaysia (1973) 2 MLJ 163, Arumugam Pillai v Government of Malaysia (1975) 2 MLJ 29, Chong Woo Yit v Government of Malaysia (1989) 1 MLJ 473 and Kerajaan Malaysia v Dato' Hj Ghani Gilong (1995) 2 MLJ 119,* the HC has no power to consider any assertion that the assessed tax amount in a tax claim proceeding is excessive, incorrectly assessed, under appeal, or incorrectly increased by virtue of Section 106(3) of the ITA. In other words, the HC has no power to challenge the merits, propriety, or correctness of the tax assessment, including assertions that the DGIR did not observe the rules of natural justice or that the DGIR acted arbitrarily or in a non-judicial manner. The issue of limitation was for the SCIT, who are the judges of facts, to decide. Otherwise, taxpayers at large will refuse to pay the tax assessed and will challenge the propriety of the assessment or the tax claim itself, which will cause a deliberate delay in tax collection. Therefore, the issue of limitation was not a triable issue that defeated DGIR's application for summary judgement.

- The taxpayer's argument that the DGIR did not plead the basis for the tax assessment and hence failed to disclose a cause of action against the taxpayer is unsustainable. The notices of assessment were issued to the taxpayer, and the taxpayer did not pay the taxes assessed. The HC ruled that the taxpayer was bound by Section 103(2) of the ITA to pay the outstanding tax liability once notices of assessment were issued to the taxpayer [see *Chong Woo Yit v Government of Malaysia (1989) 1 MLJ 473*]. Since the taxpayer did not pay the outstanding tax, the DGIR filed the tax claim to recover the tax amount as a debt due to the Government. Hence, the HC held that the DGIR had adequately pleaded the material facts to support its statutory cause of action to recover the tax amount assessed as a debt due and payable. Therefore, the taxpayer's argument failed to constitute a triable issue that defeated DGIR's application to enter summary judgement.

- The taxpayer's contention on the 'jurisdictional threshold requirements' was unclear. However, the HC was of the view that such an assertion was a challenge to the legality of the assessments raised by the DGIR. The HC held that it was not open to the taxpayer to raise this issue of legality as a triable issue in an Order 14 of the Rules of Court 2012 proceeding of a statutory tax claim. In a tax claim for the recovery of tax, the taxpayer could not say to the presiding court that the assessment was not made in accordance with the provisions of the ITA. Therefore, the taxpayer's assertion on the 'jurisdictional threshold requirements' failed to constitute a triable issue that defeated DGIR's application to enter summary judgement.

- The DGIR was not obliged to serve the notices of assessment to the taxpayer at his then-current residential address. The notices of assessment that were sent by the DGIR to the taxpayer's registered post were deemed properly served on the taxpayer by virtue of Sections 145(1) and 145(2)(c) of the ITA (i.e., the taxpayer's last known address).

Furthermore, the taxpayer did not deny receiving the notices of assessment and presented no evidence to substantiate that the address used by the DGIR was not the taxpayer's last known address, which defeated the DGIR's application for a summary judgement.

- The HC held that the taxpayer's residency or country of residency was not a triable issue that defeated DGIR's application to enter summary judgement. This was because Section 3 of the ITA provides that income tax is chargeable on the taxpayer's income accruing in or derived from Malaysia or received in Malaysia, even if it came from abroad. The taxpayer's residency status shall not be a matter of dispute to his obligation to pay the tax that was assessed by the DGIR. The HC opines that the issue of residency should be argued before the SCIT, who are the judges of the facts surrounding this tax claim. The HC also disregarded the taxpayer's assertion that the amounts stated in the statement of claim as the chargeable income for the YAs 2013 and 2014 were not income accrued in or derived from Malaysia. The HC ruled that such an issue must be dealt with by the SCIT and not by the HC [see *Chong Woo Yit v Government of Malaysia (1989) 1 MLJ 473*]. Since the taxpayer did not lodge an appeal against the notices of assessment issued by the DGIR, such notices of assessment became final and conclusive by virtue of Section 97(1) of the ITA, which warranted the tax claim by the DGIR by virtue of Section 106 of the ITA.

- The HC held that the DGIR was not required to specify the provisions under the ITA to issue the notices of assessment as long as the DGIR pleaded the material facts to sustain this tax claim [as per *Karun Klasik v Tenaga Nasional Berhad (2018) 3 MLJ 749*]. The DGIR found its cause of action to issue the notices of assessment on the taxpayer, and the taxpayer did not pay the tax assessed. Besides, the DGIR was not wrong to rely on Section 142(1) of the ITA, as the certificate constituted sufficient evidence to prove the DGIR's tax claim for the amount stated and sufficient authority to grant judgement against the taxpayer for the amount.

- The HC ruled that 1Malaysia Development Bhd (1MDB), and the Inland Revenue Board of Malaysia are different entities, even though 1MDB was owned by the Government of Malaysia through the Minister of Finance (Incorporated). Thus, the monies claimed in Suit 330 were not related to the tax amount claimed by the DGIR in this case. The HC was of the view that it was unreasonable to investigate whether the money claimed in Suit 330 was the same as the tax money claimed in this case and held that the taxpayer's argument was speculative, remote, and unsustainable. Further, the taxpayer did not plead the material facts that may have been necessary to defeat the DGIR's application for a summary judgement.

- The HC also disregarded the taxpayer's allegation that the DGIR's application for a tax claim was an abuse of the process of the court and a challenge against the propriety of the DGIR's notices of assessment. This was because it bears directly on the 'incorrectly assessed' prohibited plea and the 'excessive' plea, which shall not be entertained by the HC pursuant to Section 106(3) of the ITA.

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8. Sethuram A/L Kuppusamy v Director General of Inland Revenue (HC)

The IRBM has recently uploaded a case report, "Sethuram A/L Kuppusamy v Director General of Inland Revenue (HC)" on its website.

Facts:

The taxpayer, who is a seafarer, works as a chief engineer for EMAS (Malaysia) aboard Lewek Scarlet, Lewek Petrel, and Lewek Ariel, which are supply vessels (the Ships).

The taxpayer entered into a Seafarer Employer Agreement (SEA) with EMAS (Malaysia), a company resident in Malaysia, on 16 June 2015. Based on the SEA, the taxpayer's employment with EMAS (Malaysia) is effective from 22 November 2012. However, the taxpayer contended that he is exempted from tax under the ITA because the Ships at which he was instructed to work were owned, and operated by a company not resident in Malaysia, which is EMAS (Singapore). On this basis, the taxpayer contended that the gains or profits from his employment aboard the Ships were not derived or deemed derived from Malaysia pursuant to Section 13(2)(e) of the ITA.

The DGIR raised a Notice of Additional Assessment for the YA 2012 and Notices of Assessment for YAs 2013 until 2016 on the taxpayer. The DGIR contended that the gains or profits received by the taxpayer were employment income derived from his employment with EMAS (Malaysia) and thus should be subjected to income tax under Section 4(b) of the ITA. This was further strengthened by the fact that EMAS (Malaysia) prepared the EA Forms for the taxpayer and made contributions to the taxpayer's EPF and SOCSO based on the taxpayer's pay slips. Further, the taxpayer did not provide evidence of whether he had paid income tax to the Singapore Tax Authority.

The taxpayer argued that his case falls squarely under Section 13(2)(e) of the ITA, which is the specific provision that determines the derivation of employment income for a seafarer. Since the Ships on which the taxpayer exercised his employment were operated by EMAS (Singapore), the taxpayer was of the view that he should not be subject to income tax in Malaysia. The taxpayer also contended that the employment income is exempted from tax pursuant to Paragraph 28, Schedule 6 of the ITA and penalties should not be imposed as the DGIR failed to provide reasons behind its imposition.

The DGIR submitted that Section 13(2) of the ITA must be read as a whole, and the taxpayer should not be exempted from income tax solely on the grounds that Section 13(2)(e) of the ITA is not applicable.

Issue:

Whether the DGIR was right in raising the Notice of Additional Assessment for the YA 2012 and Notices of Assessment for the YAs 2013 until 2016 on the taxpayer.

Decision:

The HC dismissed the taxpayer's appeal and held that the SCIT was not wrong in concluding that the taxpayer's employment income should be subjected to income tax under Section 4(b) of the ITA. The DGIR was right in contending that the taxpayer is an employee of EMAS (Malaysia) based on the SEA. The taxpayer was not entitled to claim an exemption under Paragraph 28, Schedule 6 of the ITA. The HC also held that there was no statutory requirement for the DGIR to provide reasons behind the imposition of a penalty.

[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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9. Wealthy Growth Sdn Bhd v Menteri Kewangan Malaysia & Anor (HC) [(2022) MSTC 30-524]

This was an application by the DGIR to intervene in the taxpayer's judicial review application under Order 53 of Rule 8 of the Rules of Court 2012. The taxpayer had filed an application for leave to apply for an order of certiorari for the Minister of Finance (the Minister) to exercise his powers under Section 135 and/or Section 127(3A) of the ITA to set aside or exempt the taxes raised by the DGIR against the taxpayer on the grounds that the taxes raised were illegal, void, unlawful, and/or in excess of authority, unreasonable, irrational, and in denial of the legitimate expectation of the taxpayer.

Issue:

Whether the DGIR should be allowed to intervene at the leave stage of the judicial review application by the taxpayer.

Decision:

The HC dismissed the DGIR's application to intervene based on the following grounds of judgement:

- Although the HC's decision to dismiss the DGIR's application for intervention was overturned by the COA in the case of *Puncak Niaga Construction Sdn Bhd v Menteri Kewangan Malaysia* (*Puncak Niaga*), the HC in the present case was of the view that the *ratio decidendi of Puncak Niaga* cannot be ascertained as the written grounds of COA's judgement were not available. Thus, any attempt to rely on the COA's overrule judgement in *Puncak Niaga* will be deemed speculative [see *Petronas Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2014) MSTC 30-078*].

- The HC held that the DGIR's application should be ventilated at the substantive stage and not at the leave stage. This was because the DGIR's legal reasoning would not be in access to the Minister's argument, and both their arguments would be similar. Allowing the DGIR's application at the leave stage would risk delaying the taxpayer's leave application, which had a low threshold for determining whether the application was frivolous and whether there was an arguable case. Besides, the existence of a domestic remedy, which formed part of the DGIR's argument to intervene, should be decided at the merit stage of the proceedings and not at the leave stage [as per the cases of *QSR*

Brands Bhd v Suruhanjaya Sekuriti & Anor (2006) 3 MLJ 164 and *Chin Mee Keong & Ors v Pesuruhjaya Sukan (2007) 5 CLJ 363*].

- Even though the DGIR acts as the tax collecting agent for the Minister, the HC ruled that the sole question to be determined in the leave application for judicial review filed by the taxpayer was the exercise of the discretionary power of the Minister and the Minister alone. The HC was of the view that the DGIR had an indirect interest in the taxpayer's application since the DGIR did not indicate that it had advised the Minister or aided the Minister in the decision-making process pursuant to Sections 127(3A) and/or 135 of the ITA. The reasons given by the DGIR were insufficient to substantiate that it was a proper person with direct interest, and any additional arguments that the DGIR wishes to raise could be raised through the Minister. The DGIR's interest in collecting taxes for the Minister was purely financial, and financial interest was not a direct interest [as per *Majlis Agama Islam Selangor v Bong Boon Chuen (2009) 6 MLJ 307*].

- The taxpayer's judicial review application was solely filed to review the Minister's decision-making process under Sections 127(3A) and/or 135 of the ITA. Thus, the DGIR's application at this stage was premature, as the DGIR does not have a say in the Minister's decision-making process. The HC had also not decided at the leave stage whether a decision was in fact made by the Minister or whether such a decision was amenable to a judicial review. It was solely between the Minister and the taxpayer to resolve this issue. Further, the powers granted under Sections 127(3A) and/or 135 of the ITA were exclusively vested in the Minister. It was trite law that discretionary power must be exercised by the person to whom the Parliament had vested the power [as per *De Smith's Judicial Review of Administrative Action (1995); Wade Administrative Law, 9th Edition*]. It was also clear that the Parliament did not intend to confer any discretion on the DGIR to intervene in the Minister's decision-making process [as per *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano (1997) 1 MLJ 94*].

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10. TTDSB v Director General of Inland Revenue (SCIT)

The IRBM has recently uploaded a case report, "TTDSB v Director General of Inland Revenue (SCIT)" on its website.

Facts:

The taxpayer and BASB are related companies with the same ultimate holding company, BCB. BASB surrendered its adjusted losses of RM5.5 million to the taxpayer pursuant to Section 44A of the ITA, the same amount of which was claimed by the taxpayer. The DGIR conducted an audit on BASB for the YAs 2011 to 2013 and found that there was a reduction in BASB's adjusted loss for the YA 2010, which consequently resulted in a reduction of the maximum amount of losses that could be surrendered to the taxpayer, i.e., from RM5,539,318.00 to RM4,072,114.00. Hence, BASB had over-surrendered its losses to the taxpayer by RM1,427,886.00, while the taxpayer had over-claimed the losses. The DGIR raised Notices of Assessment (Forms G) dated 27 May 2016 on BASB for the YAs 2010 and 2012 and a Notice of Additional Assessment (Form JA) dated 2 June 2016 on the taxpayer for the YA 2010. The DGIR also imposed a penalty of RM356,971.50 on BASB under Section 44A(9)(b) of the ITA. Dissatisfied with the DGIR's decision, the taxpayer appealed to the SCIT.

The taxpayer argued that the Form JA was time-barred by comparing the general time-bar provision under Section 91(1) of the ITA with Section 44A(9)(a) of the ITA. The phrase "may in that year", which is used in both provisions, refers to YA according to the decisions of some Commonwealth jurisdictions. Unlike Section 91 of the ITA, Section 44A of the ITA does not permit the DGIR to raise an out-of-time assessment with any exceptions. The taxpayer further contended that the word "or" in Section 44A(9) of the ITA should be read disjunctively. The DGIR was only allowed to make an additional assessment under Section 44A(9)(a) of the ITA against the taxpayer or impose a penalty under Section 44A(9)(b) of the ITA against BASB. If the Parliament had intended for the DGIR to be able to invoke both provisions, the Parliament would have provided for the same by using the conjunction "and" or "and/or" in connecting both provisions. Further, Section 44A(9)(a) and (b) of the ITA are separated by a semi-colon coupled with the word "or" in which the Malaysian courts have on many occasions, held that the use of punctuation, i.e., semi-colon, denotes a disjunctive meaning.

In response, the DGIR asserted that the issue of time-barred assessment was not applicable in this case by merely comparing Section 44A(9)(a) of the ITA with Section 91(1) of the ITA. Both provisions are different in terms of the words used. The word "appear" is used in Section 91(1) of the ITA, whereas in Section 44A(9)(a) of the ITA, the word used is "discover", indicating that the two provisions clearly serve different meanings. It is a trite law that words cannot be added to legislation when they were not intended. The DGIR further submitted that both Sections 44A(9)(a) and (b) of the ITA must be applied together and simultaneously against the claimant and the surrendering company, as the word "or" should be read conjunctively. It would be absurd if the amount of the adjusted loss to be surrendered by BASB was RM4,072,114.00, whereas the amount to be claimed by the taxpayer remained at RM5,539,318.00. This would be inconsistent with the readings of Section 44A(4) of the ITA and Section 44A(9)(a) of the ITA. The court does not necessarily decide that the use of "and" after a punctuation (i.e., comma or semi-colon) should be read conjunctively. The word "and" can be interpreted as disjunctive and not conjunctive. Due to that, the DGIR held that the taxpayer's contention was untenable.

Issue:

Whether the DGIR was right in issuing the Form JA for the YA 2010 against the taxpayer.

Decision:

The SCIT dismissed the taxpayer's appeal and held that the Form JA issued against the taxpayer was affirmed and final.

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

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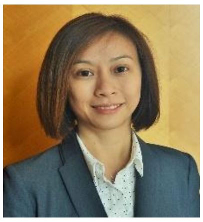

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