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November 2022

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Greetings from Deloitte Malaysia Tax Services

Quick links:

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Inland Revenue Board of Malaysia

Takeaways:

1. Ministry of Finance – Updated Guidelines in relation to COVID-19 Relief Fund and Income Tax Deduction for Community/Charity Projects to curb COVID-19
2. Public Ruling No. 4/2022: Recovery from Persons Leaving Malaysia
3. IRBM's Media Release – Notification of Special Withholding Tax Payment Form for the Submission and Remittance of Withholding Tax not exceeding RM500 per Transaction
4. Income Tax (Exemption) (No. 7) Order 2022 [P.U.(A) 312/2022]
5. Labuan Trusts (Amendment) Regulations 2022 [P.U.(A) 340/2022]
6. Jingga Jaya Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (COA)
7. Mitraland Kota Damansara Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)
8. Belux Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)
9. Maxis Broadband Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)
10. Tenaga Nasional Berhad v Ketua Pengarah Hasil Dalam Negeri (HC)
11. Ketua Pengarah Hasil Dalam Negeri v Kulim (Malaysia) Berhad (HC)
12. Kayusar Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (COA)
13. Allianz General Insurance Company (M) Berhad v Ketua Pengarah Hasil Dalam Negeri (COA)

Upcoming events:

Malaysia: Key changes to the Employment Act 1955 (Amendment 2022) l What you need to know

Important deadlines:

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

1. Ministry of Finance – Updated Guidelines in relation to COVID-19 Relief Fund and Income Tax Deduction for Community/Charity Projects to curb COVID-19

I. Updated Guidelines on application for approval under Section 44(11C) of the Income Tax Act 1967 (ITA) for COVID-19 Relief Fund (1 April 2022)

The updated Guidelines (*Available in Bahasa Malaysia only*) replaced the previous Guidelines. Similar to the previous Guidelines, the updated Guidelines explain the criteria and procedures to apply for an approval under Section 44(11C) of the ITA for the establishment of a COVID-19 Relief Fund. Some of the key updates are as follows:

A. Qualifying contributions to COVID-19 Relief Fund are restricted to:

i) Cash
ii) Equipment e.g., ventilator, patient bed, air conditioner, air purifier / filtration equipment
iii) Consumable e.g., mask, hand sanitiser, glove, test kit, and personal protection equipment (PPE)

B. Qualifying recipients from COVID-19 Relief Fund are restricted to:

i) Government department / agency
ii) Non-governmental agency registered with the Companies Commission of Malaysia, Registrar of Societies of Malaysia or Legal Affairs Division of the Prime Minister's Department
iii) Government hospital
iv) Government school
v) Home for orphans / old folks / the disabled
vi) Homeless / hardcore poor / refugees
vii) Animal shelter / zoo

The updated Guidelines are effective from 1 April 2022 until 31 December 2022.

II. Updated Special Guidelines on Application for Income Tax Deduction for Community/Charity Projects to curb COVID-19 Pandemic (1 April 2022)

The Special Guidelines (*Available in Bahasa Malaysia only*) replace the previous Special Guidelines dated 2 August 2021. Similar to the previous Special Guidelines, the updated Special Guidelines explain the criteria and procedures to apply for a tax deduction under Section 34(6)(h) of the ITA for the contributions. Some of the key updates are as follow:

A. Criteria for qualifying community/charity projects:

i) Project to assist the Government to curb the spread of COVID-19 directly in the transition to the endemic phase.

B. Qualifying contributions are restricted to:

i) Equipment e.g., ventilator, patient bed, air conditioner, air purifier / filtration equipment
ii) Consumable e.g., mask, hand sanitiser, glove, test kit, and PPE

C. Qualifying recipients are restricted to:

i) Government department / agency
ii) Government hospital
iii) Government school

The updated Special Guidelines are effective for contributions made between 1 April 2022 and 31 December 2022.

Back to top

2. Public Ruling No. 4/2022: Recovery from Persons Leaving Malaysia

The Inland Revenue Board of Malaysia (IRBM) recently issued Public Ruling No. 4/2022 (dated 20 October 2022) to replace Public Ruling No. 12/2015 (dated 17 December 2015).

The updates and amendments to Public Ruling No. 12/2015 are listed in Paragraph 10 of the Public Ruling No. 4/2022.

Salient points

1) Addition of **Paragraph 4.1.2(e)** to reflect amendment made to Section 104 of the ITA via the Finance Act 2019 as shown below:

   Under Section 104 of the ITA, if the Director General (DG) is of the opinion that a taxpayer is about to leave Malaysia without paying all sums payable by him, including the increase in tax imposed on tax payable pursuant to Section 107C(10A) of the ITA, i.e.:

   i) no estimate is furnished and no Notice of Instalment Payments (CP 205) is given by the Director General of Inland Revenue (DGIR) to make payment by instalment under Section 107C(8) of the ITA;

   ii) no prosecution under Section 120(1)(f) of the ITA has been instituted in relation to failure to furnish such estimate; and

   iii) tax is payable by the company, limited liability partnership, trust body or co-operative society pursuant to an assessment for that year of assessment (YA),

   then, the DG may issue a certificate to a Commissioner of Police or a Director of Immigration requesting for that taxpayer to be prevented from leaving Malaysia until he has paid all the tax, sums, and debts so payable or furnishes security to the satisfaction of the DG for the payment.

2) Addition of **Paragraph 4.4** to reflect the amendment made to Section 104 of the ITA via the Finance Act 2020:

   With effect from 1 January 2021, the DG can submit a taxpayer travel restriction certificate to the Malaysian Immigration Department by using electronic medium under the provision of Section 104(1A) of the ITA.

Please refer to the Public Ruling No. 4/2022 for full details.

Back to top

3. IRBM's Media Release - Notification of special withholding tax payment form for the submission and remittance of withholding tax not exceeding RM500 per transaction

Further to Tax Espresso - Special Alert dated 17 August 2022, the IRBM issued a Media Release on 27 October 2022 (*Available in Bahasa Malaysia only*) to notify taxpayers that the special withholding tax (WHT) payment form (PF) for the submission and remittance of WHT to the IRBM involving an amount not exceeding RM500 per transaction has been uploaded on the IRBM's website as follows:

Categories of WHT payment	PF
Interest or royalty paid to a non-resident recipient under Section 109 of the ITA	CP37S
Special classes of income paid to a non-resident recipient under Section 109B of the ITA	CP37DS

The special WHT PFs are applicable to taxpayers that meet the following deferment of payment conditions effective from 1 August 2022:

(a) the amount of WHT payment of a particular transaction paid/credited to the non-resident recipient does not exceed RM500 per transaction; and

(b) the WHT payment involving an amount not exceeding RM500 per transaction will be made more than once during the six-month period allowed.

The submission of the PF and the WHT payment shall be made on or before:

(a) 30 June for the payment in respect of transactions made to the non-resident recipient between 1 December of the preceding year until 31 May of the current year; and
(b) 31 December for the payment in respect of transactions made to the non-resident recipient between 1 June to 30 November of the current year.

Please refer to the Media Release and Tax Espresso – Special Alert dated 17 August 2022 for full details.

Back to top

4. Income Tax (Exemption) (No. 7) Order 2022 [P.U.(A) 312/2022]

P.U.(A) 312/2022 (the Order) was gazetted on 6 October 2022 and is in effect from YA 2021 until YA 2023.

The Order shall apply to a person resident in Malaysia who carries on the business of:
(a) transporting passengers or cargo by sea on a Malaysian ship; or
(b) letting out on charter a Malaysian ship owned by him on a voyage or time charter basis.

Salient points

1) The Minister exempts the above-mentioned person in the basis period for a YA from the provisions of Section 54A(1) and Section 54A(2) of the ITA, and from the payment of income tax in respect of the statutory income derived from a source of business consisting of a Malaysian ship.

   Note:
   Under the prevailing Section 54A(1) of the ITA which was effective from YA 2012, a person meeting the above eligibility criteria is exempted from tax on 70% of its statutory income from that business for that YA. The Income Tax (Exemption) (No. 2) Order 2012 [P.U. (A) 167/2012], effective for YA 2012 and YA 2013, provided 100% exemption on the same income of the same qualifying person. This exemption was extended for another 7 years from YA 2014 to YA 2020 via the Income Tax (Exemption) Order 2018 [P.U.(A) 38/2018] and the Income Tax (Exemption) (No. 2) Order 2018 [P.U.(A) 48/2018].

2) To qualify for the exemption, the above-mentioned person shall obtain an annual verification from the Ministry of Transport Malaysia that the following conditions have been fulfilled:

   (a) incurs annual operating expenditure of at least RM250,000 for each Malaysian ship; and

   (b) has a number of full-time employees in Malaysia for each Malaysian ship:

      i. in the case of shore employees, at least four of the following employees and majority of the employees shall be Malaysian citizens:
         - a chief executive officer;
         - an administrative and finance officer;
         - an operating officer; and
         - an officer in charge of the health, protection, safety and environmental affairs; and

      ii. in the case of employees who are ship personnel as provided under Part III of the Merchant Shipping Ordinance 1952 [Ord. 70/1952], shall be subject to the minimum requirement as specified in the Safe-Manning Certificate issued by the Marine Department Malaysia.

   Note:
   A person resident in Malaysia who qualifies for the above-mentioned exemption but has submitted the Income Tax Return Form (ITRF) for the relevant period may apply for a relief in writing to the IRBM within five years after the end of the year the Order was gazetted i.e., an application for relief shall be made on or before 31 December 2027.]

Please refer to the Order for full details.

Back to top

5. Labuan Trusts (Amendment) Regulations 2022 [P.U.(A) 340/2022]

P.U.(A) 340/2022 (the Amendment Regulations) was gazetted on 19 October 2022 and will come into operation on 1 January 2023. The Amendment Regulations amend the Labuan Trusts Regulations 2010 [P.U.(A) 415/2010] in the Third Schedule to impose a new fee for the registration of a Labuan trust or a Labuan special trust.

P.U.(A) 415/2010 specified the general requirements for documents to be filed with the Labuan Financial Services Authority (the Authority) as well as the prescribed fee to be paid to the Authority for the registration of a Labuan trust or a Labuan special trust. Effective from 1 January 2023, the prescribed fee to be paid to the Authority for the registration of a Labuan trust or a Labuan Special Trust is USD200 [currently at a fee of RM750 pursuant to P.U.(A) 415/2010] pursuant to the Amendment Regulations.

Please refer to the Amendment Regulations and P.U.(A) 415/2010 for full details.

Back to top

6. Jingga Jaya Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (COA)

The IRBM has recently uploaded a case report, "*Jingga Jaya Sdn Bhd v DGIR (COA)*" on its website.

The taxpayer appealed against the notice of assessment issued by the DGIR for disposal of 6 pieces of land purportedly held by the taxpayer as a trustee for its shareholder, Datuk C. The appeal was dismissed by the Special Commissioners of Income Tax (SCIT) which has also been confirmed by the High Court (HC).

Issue:

Whether the real property gains tax (RPGT) on the disposal of the lands ought to be imposed on the taxpayer or Datuk C, under the provisions of the Real Property Gains Tax Act 1976 (RPGT Act).

Decision:

The Court of Appeal (COA) unanimously held that the HC had not erred in deciding that the Declaration of Trust was not valid or enforceable as there was a clear case of purchase of shares and not purchase of land by Datuk C. Datuk C could not have owned the land as the taxpayer remained as the legal and beneficial owner of the land. The sale and purchase agreement for the disposal of lands on 15 May 2014 did not disclose any fact that the lands were held by the taxpayer as a trustee of Datuk C. Be it as a company or trustee (*), Part II of Schedule 5 of the RPGT Act applies to the taxpayer.

(*) The RPGT Act was amended via the Finance Act 2019 to provide that the RPGT rates under Part II of Schedule 5 shall apply to a trustee of a trust with effect from 1 January 2020. Prior to the said amendment, we were made to understand the IRBM had taken the view that even if the trustee is an individual, the RPGT rates under Part II of Schedule 5 shall apply instead of Part I of Schedule 5.

Back to top

7. Mitraland Kota Damansara Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)

This was an appeal against the deciding order (DO) of the SCIT made on 18 October 2019. By the DO, the SCIT had determined that the taxpayer's claim for deduction of expenditure paid to Selangor State Government through the Lembaga Perumahan dan Hartanah Selangor (LPHS) in relation to the sale of Bumiputera quota units to non-Bumiputera purchasers was not allowed for tax deduction under Section 33(1) of the ITA. The SCIT had further determined that the imposition of penalty under Section 113(2) of the ITA by the DGIR was fair, reasonable, and in accordance with the law.

Issue:

Whether the determination of the SCIT was correct in law.

Decision:

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

- Without the payments to the Selangor State Government through LPHS, the taxpayer would not have been able to sell the Bumiputera units to the non-Bumiputera purchasers and generate its income. By selling the Bumiputera lots to non-Bumiputera purchasers, it directly generated the taxpayer's income as a property developer. The payment was in fact made in the course of operating the taxpayer's business. The expenses or payments incurred by the taxpayer were not just 'wholly and exclusively' borne for the purpose of generating income, it was also closely related, incidental and relevant to the taxpayer's business. Thus, such expenses/payment should be made deductible under Section 33(1) of the ITA.

- The payment was not of capital in nature since the taxpayer had all along, the right to sell. The payment was made so as to enable the taxpayer to widen its group or class of people it could sell to. The payment was therefore a normal business payment to produce income. The refunds to LPHS recurs every time a Bumiputera lot was sold to a non-Bumiputera purchaser. As such, it was a clear indication that the expenditure was revenue, as opposed to capital in nature.

- The payment to the LPHS was not to improve the value of the fixed capital for the taxpayer because the taxpayer was returning the Bumiputera discount, not to contravene the circular. There was no asset or enduring benefit that had been acquired by the payment. A payment made to remove an obstacle to profitable trading did not create any new asset or enduring benefit.

- The taxpayer would not make further profit again through the reduction of taxable income after deducting these expenses as the taxpayer declared the full non-Bumiputera price stated in the invoice or sale and purchase agreement as the turnover, and not the discounted Bumiputera purchase price. As such, the taxpayer was merely reducing its taxable income to the true income amount, excluding payments of the Bumiputera discount which the taxpayer was obliged to pay.

- The wordings in Sections 113(1) and 113(2) of the ITA did not apply to situations where there was a difference in opinion between the DGIR and the taxpayer on the interpretation of a particular provision of the ITA even where the court ultimately finds in favour of the DGIR. The taxpayer had taken a reasonable and genuine position in submitting its returns and took the view that the payments made to the state government were deductible. The taxpayer had acted in good faith and made full disclosure.

Note:
The issue of payment for the release of Bumiputra quota units had been argued before a COA in Ketua Pengarah Hasil Dalam Negeri V Taman Equine (M) Sdn Bhd (COA) and it was decided in favour of the DGIR.

Back to top

8. Belux Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)

Issue:

Whether there are exceptional circumstances that justify an application for leave to commence judicial review proceedings.

Decision:

The HC dismissed taxpayer's application for leave to commence judicial review based on the following grounds:

- There are no special circumstances (i.e. a lack of jurisdiction, error of law, blatant failure to perform some statutory duty, abuse of power or breach of natural justice) that would merit the taxpayer's case to be reviewed by the HC.

- The difference in interpretation of the law, i.e. whether Section 4C of the ITA applies only to tax compensation received by a property developer, should not be construed as "exceptional circumstances" that justify an application for judicial review.

- The SCIT, as a special court in dealing with tax appeal cases raised under the ITA and other relevant tax laws by the taxpayers, should be referred, to resolve the issue of dispute over facts and interpretation of the law before further appeals can be forwarded to the HC and the COA.

- Further, since the taxpayer has filed an appeal to the SCIT under Section 99 of the ITA, it is an abuse of the court process to maintain the judicial review application.

Back to top

9. Maxis Broadband Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (HC)

Issues:

1) Whether the application for leave for judicial review was not frivolous and the taxpayer had an arguable case at the substantive stage.

2) Whether special circumstances existed to warrant the grant of an interim stay.

Decision:

The HC allowed the taxpayer's application for leave for judicial review and an interim stay of proceedings based on the following grounds:

- Leave might be granted if the leave application was not frivolous. An application was not frivolous if the applicant could show that it had an arguable case, unless the matter for judicial review had absolutely no room for success.

- The mere fact that the DGIR was allowed to make a submission did not, *ipso facto*, change the character of the *ex parte* hearing to become an *inter partes* hearing, thereby obviating the substantive stage.

- There was nothing in Order 53 of the Rules of Court 2012 (ROC) that state that the existence of a domestic remedy would bar an application for judicial review. The existence of the statutory appeal mechanism under Section 99 of the ITA did not, by itself, bar an application for leave for judicial review under Order 53 of the ROC as per *Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] 7 CLJ 487 (Flextronics).*

- The only avenue available to the taxpayer was an application for judicial review under Order 53 of the ROC because Order 53 Rule 3(5) empowered the court to grant an interim stay. The effect of the interim stay was that it temporarily prevented the IRBM from commencing civil action under Sections 103 and 106 of the ITA. There was no corresponding power stipulated in Paragraph 19 of Schedule 5 of the ITA that enabled the Special Commissioners of Income Tax to grant an interim stay that would prevent the IRBM from commencing civil action against the taxpayer.

- The taxpayer had established an arguable case that would be fully examined at the substantive stage. Thus, the application for leave for judicial review was not frivolous.

- Order 53 of the ROC was concerned with public law remedies and should not be equated with an injunction, interim or otherwise. It was observed in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289 CA* that an order of stay had the effect of temporarily suspending the effect of a public law decision pending the outcome of certiorari or prohibition proceedings. Such proceedings were not civil proceedings for the purposes of the *Government Proceedings Act 1956* (GPA), and Section 29 of the GPA consequently had no application to these proceedings.

- The court had the power to order a stay of a decision of a local authority pending the conclusion of a challenge to the decision-making process by way of judicial review.

- Going by the cases of *Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695 CA* and *Flextronics*, special circumstances existed to warrant the grant of an interim stay pending the disposal of this judicial review.

Back to top

10. Tenaga Nasional Berhad v Ketua Pengarah Hasil Dalam Negeri (HC)

This was a judicial review application by Tenaga Nasional Berhad, for an order for certiorari to quash the DGIR's decision in disallowing the taxpayer's reinvestment allowance (RA) claim.

Issue:

Whether the taxpayer's principal activity of generating electricity was in the business of manufacturing electricity and fell under "qualifying project" for the taxpayer to be entitled to RA under Schedule 7A of the ITA.

Decision:

The HC allowed the taxpayer's judicial review application and set aside the DGIR's assessment for the YA 2018 based on the following grounds:

- For a company to be entitled to claim an RA, it has to fulfill all the criteria of "qualifying project" under Paragraph 8(a) of Schedule 7A of the ITA. It was apparent that a taxpayer was entitled to claim the RA when the taxpayer had incurred capital expenditure on a factory, plant or machinery for the purposes of a qualifying project. There was no dispute that the taxpayer had met the required criteria to claim the RA. The taxpayer first claimed an RA in the YA 2003 and was originally entitled to claim it for 15 years. Consequent to Paragraph 2B of Schedule 7A of the ITA, the taxpayer was entitled to claim the RA until, and for, YA 2018.

- The specific circumstances where a taxpayer could not claim an RA were stated in Paragraph 7 of Schedule 7A of the ITA. Rule 2 and the Schedule of the Income Tax (Prescription of Activity Excluded from the Definition of Manufacturing) Rules 2012 listed the activities to be excluded from manufacturing. This legislation did not state that generating electricity was excluded from the activity of manufacturing.

- The taxpayer could not be said to be merely providing the service of generating or supplying electricity. The cases from the Commonwealth countries clearly illustrated that the activity or business of generating electricity was manufacturing.

- There was no legal or factual basis for the DGIR to state that the taxpayer was a company that provided services. A utility company could also be a manufacturing company. The DGIR had failed to proffer any case law to support its averment that the taxpayer was not a manufacturing company or to provide any case law to support its averment that companies similar to the taxpayer were just a service provider. Definitions, and how electricity was produced from internet sources, had no legal value, not being binding or persuasive.

- The RA claimed by the taxpayer is in respect of items which are related to the manufacturing of electrical energy. There was no requirement prescribed under the law that there had to be a new product in order for the taxpayer to claim an RA. The requirement was only stated in the DGIR's public ruling, which was not binding on the taxpayer. Going by the definition of "qualifying project", an RA could be claimed for a project that involved expansion of the same product.

- The definition of "manufacturing" that was first introduced in the ITA in 2009 for the purposes of RA with effect from YA 2009 onwards did not apply to the taxpayer, as the RA claim was first made in YA 2003. The taxpayer's existing right could not be impaired or affected by the insertion of a new definition.

- When a taxpayer/company wanted to apply for the special incentive relief under the ITA, it was up to the taxpayer/company to choose to claim in accordance with either Schedule 7A or 7B of the ITA. It was not for the DGIR to dictate to the taxpayer/company which incentive they should apply for.

Back to top

11. Ketua Pengarah Hasil Dalam Negeri v Kulim (Malaysia) Berhad (HC)

This was an application filed by the taxpayer, Kulim (Malaysia) Berhad to strike out the appeal by the DGIR against the decision of the SCIT, for failing to serve the notice of appeal on the taxpayer within the time limit provided under the ROC and/or Schedule 5 of the ITA.

Issues:

1) Whether it was mandatory for the DGIR to serve the notice of appeal on the taxpayer in accordance with Paragraphs 42 and 42A of Schedule 5 of the ITA and Order 55 Rule 3(4) of the ROC; and

2) Whether the DGIR's failure to comply with the mandatory provisions of the ITA and the ROC caused prejudice to the taxpayer.

Decision:

The HC allowed the taxpayer's application and struck out the DGIR's appeal based on the following grounds of judgement:

- It was mandatory for the DGIR to serve the notice of appeal on the taxpayer under Paragraphs 42 and 42A of Schedule 5 of the ITA and Order 55 Rule 3(4) of the ROC. Therefore, non-compliance on the part of the DGIR might render the appeal to be fatal and/or struck out.

- The DGIR failed to serve a copy of the notice of appeal on the taxpayer within 21 days from the date the decision of the SCIT was served to the DGIR as provided under Paragraph 42 of Schedule 5 of the ITA and Order 55 Rule 3(4) of the ROC. Therefore, the appeal was not brought properly before the court [as per *Ketua Pengarah Hasil Dalam Negeri v Continental Automotive Instruments (M) Sdn Bhd*].

- Going by the cases of *Gurbachan Singh v Seagrott & Campbell (No 2)* and *Dato' Valumalai @ M Ramalingam S/O V Muthusamy v Dato' Tan Chin Woh*, when an appeal which was not brought properly in time came for hearing, it should be struck out irrespective of its merits. The failure to serve the notice of appeal on the other party within the stipulated time was not an irregularity that can be cured.

- Although the taxpayer had received the draft case stated from the SCIT and subsequently provided its comments, it did not remedy the fact that the DGIR had failed to serve the notice of appeal on the taxpayer within the time stipulated under Paragraphs 42 and 42A of Schedule 5 of the ITA and Order 55 Rule 3(4) of the ROC. This was further backed by a letter from the taxpayer's solicitor which acknowledged that the DGIR had failed to serve the notice of appeal and therefore the DGIR's appeal was defective.

- Furthermore, the DGIR failed to make an application for an extension of time to serve the notice of appeal out of the prescribed time.

- The DGIR's failure to comply with the serving of the notice of appeal had caused prejudice to the taxpayer. The taxpayer was not aware that the DGIR intended to pursue an appeal against the decision of the SCIT and continued to conduct its financial affairs as if there was no appeal by the DGIR. Consequently, the taxpayer did not make any provision for any tax for the basis year. The taxpayer also continued its business and made no changes to its business, or the financial payments incurred, on the assumption that there was no appeal by the DGIR. The act of prejudice on the taxpayer was further substantiated when the taxpayer was afforded the right to file a cross-appeal against the DGIR's appeal but was not allowed to do so.

Back to top

12. Kayusar Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (COA)

The IRBM has recently uploaded a case report, "*Kayusar Sdn Bhd v DGIR (COA)*" on its website.

The taxpayer entered into a sale and purchase agreement to sell a condominium unit at a price equivalent to its acquisition price. The DGIR disregarded the disposal price by virtue of Section 25(2) of the RPGT Act and subjected the gain from the disposal of the condominium to the RPGT based on the market value determined by Jabatan Penilaian dan Perkhidmatan Harta (JPPH). Section 25(2) of the RPGT Act empowers the DGIR to disregard and/or vary the transaction if a transaction has a direct effect on the chargeability of tax. The taxpayer had failed to prove to the DGIR's satisfaction that the market value determined by JPPH was erroneous and excessive. The SCIT findings were based on Section 25(2) of the RPGT Act. The taxpayer's appeal at the SCIT and the HC were dismissed respectively.

Issue:

Whether Section 25(2) of the RPGT Act can be invoked when the transaction was not carried out between connected persons under Paragraph 23, Schedule 2 to the RPGT Act.

Decision:

The COA unanimously found that the SCIT and the HC did not commit any error of law in their decision. The DGIR was entitled to consider the market value of the property especially when the duration between acquisition and disposal of the property was within 3 years. The onus was on the taxpayer to prove that the market value determined by JPPH was erroneous. The taxpayer had failed to discharge its burden under its own name on 15 May 2014. Additionally, there was also no indication of trust in the sale.

Back to top

13. Allianz General Insurance Company (Malaysia) Berhad v Ketua Pengarah Hasil Dalam Negeri (COA)

This was an appeal filed by the taxpayer, Allianz General Insurance Company (Malaysia) Berhad against the decision of the HC in dismissing the taxpayer's application for leave to commence judicial review proceedings against the DGIR for its decision in issuing the notice of reduced assessment and notice of additional assessment for YA 2013 and YA 2014.

Issue:

Whether the availability of an alternative remedy (i.e., statutory appeal to the SCIT) that was not exhausted by the taxpayer, would bar the taxpayer from obtaining leave to commence judicial review proceedings against the DGIR.

Decision:

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

- Going by the cases of *Government of Malaysia & Anor v Jagdis Singh* and *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*, it was a trite law that mere availability of alternative remedy did not automatically oust the power of the courts to hear the judicial review application. The discretion to grant leave was still with the courts. However, discretion should only be exercised in very exceptional circumstances, for instance, if there was an obvious lack of jurisdiction, a blatant failure to perform a statutory duty, or a breach of the principles of natural justice. The exceptional circumstances would be determined depending on the factual matrix of each case.

- The question of alternative remedy was best decided during the substantive stage of the judicial review proceeding [as per *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan*]. The taxpayer had successfully proved that it had an arguable case to be addressed at the substantive stage of the judicial review proceeding. Thus, the taxpayer's application for leave was not frivolous or vexatious. In the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*, it was held that leave may be granted if the leave application was not thought of as frivolous.

- The threshold in granting leave was low as long as the strict requirements under Order 53 of the Rules of Court 2012 had been complied with [as per *Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors And Another Appeal*].

- In the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor*, it was held that only those with a legitimate grievance may cross the threshold and enter the court.

- With the above in mind, the COA held that the taxpayer successfully passed the threshold to be granted leave to commence judicial review proceedings against the DGIR. The matter is remitted back to the HC for case management.

Back to top

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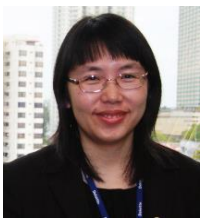

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