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Gazette Orders, Guidelines, Tax Cases and more

October 2023

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Greetings from Deloitte Malaysia Tax Services

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Deloitte Malaysia
Inland Revenue Board of Malaysia

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Upcoming events:

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Important deadlines:

Task	Deadline
	31 October 2023
1. 2024 tax estimates for companies with November year-end	√
2. 6th month revision of tax estimates for companies with April year-end	√
3. 9th month revision of tax estimates for companies with January year-end	√
4. Statutory filing of 2023 tax returns for companies with March year-end	√
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1. Income Tax (Exemption) (No. 2) Order 2023 [P.U.(A) 251/2023]

P.U.(A) 251/2023 (the Order) was gazetted on 23 August 2023 and is effective retrospectively from the year of assessment (YA) 2019. The Order is applicable to existing principal hubs that are operating in Malaysia which have applied for the incentive during the period from 1 January 2019 to 31 December 2020.

[Note: The Malaysian Investment Development Authority (MIDA) has issued the Guidelines for Principal Hub Incentive 3.0 (the Guidelines) which stipulates the criteria and conditions to qualify for the incentive.]

According to the Order:

1. The Minister of Finance (the Minister) exempts a principal hub in the basis period for a YA from the payment of income tax in respect of the statutory income derived from the hub's core income generating activities for a period of 5 consecutive YAs (exempt YAs) commencing from the YA determined by the Minister.

2. The application for the exemption shall be made in writing by a principal hub and shall be received by the Minister through the MIDA between 1 January 2019 and 31 December 2020 (both dates inclusive). The application shall comply with the conditions imposed by the Minister.

3. To qualify for the tax exemption above, the principal hub shall comply with the conditions specified in Schedule 2 or Schedule 3 of the Order, and any other conditions imposed by the Minister in the approval letter.

4. The statutory income derived from core income generating activities mentioned above during the basis period for each YA shall be determined in accordance with the following formula, upon deducting the allowances which fall to be made under Schedule 3 to the Income Tax Act 1967 (ITA) (despite no claim for such allowances has been made):

   (a) in relation to qualifying services carried on by the principal hub:

$$\frac{A}{B} \times C$$

where

A is the amount of tax charged on the chargeable income of the principal hub from the qualifying services at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act reduced by the amount of tax charged on such chargeable income from the qualifying services at the rate of ten per cent;

B is the amount of tax charged on the chargeable income of the principal hub from the qualifying services at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act; and

C is the amount of the chargeable income of the principal hub from the qualifying services; or

   (b) in relation to qualifying trading activities carried on by the principal hub:

$$\frac{A}{B} \times C$$

where

A is the amount of tax charged on the chargeable income of the principal hub from the qualifying trading activities at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act reduced by the amount of tax charged on such chargeable income from the qualifying trading activities at the rate of ten per cent;

B is the amount of tax charged on the chargeable income of the principal hub from the qualifying trading activities at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act; and

C is the amount of the chargeable income of the principal hub from the qualifying trading activities.

5. The following intellectual property income derived from core income generating activities of the principal hub shall be excluded in ascertaining the statutory income of a principal hub mentioned above (i.e. subject to tax under the ITA at the prevailing rate):
   (a) royalties and other income derived on or after 1 July 2018 but before 1 July 2021 from new intellectual property rights that the principal hub owns; and
   (b) royalties and other income derived on or after 1 July 2021 from all intellectual property rights that the principal hub owns.

   [Note: A principal hub is deemed to own an intellectual property right if the principal hub is the owner or the licensee of the right. Royalties and other income are derived from an intellectual property right if they are receivable as consideration for the commercial exploitation of that right.]

6. Where a principal hub has an adjusted loss, as ascertained by Sections 43(2) and 44(2) of the ITA, during the basis period for a YA within the exempt YAs in respect of a business source consisting of qualifying services or qualifying trading activities, the amount of the adjusted loss shall be disregarded from the source consisting of qualifying services or qualifying trading activities and other businesses. Any amount of adjusted loss pursuant to Sections 43(2) and 44(2) of the ITA in respect of a business source consisting of qualifying services or qualifying trading activities shall be disregarded for the purposes of the ITA during the YA in which the last date of the principal hub's exempt YAs falls, as well as the following YAs after the exempt YAs, as may be the case.

7. The Minister may withdraw the exemption granted if the principal hub fails to comply with any conditions imposed in relation to the exemption in any YA during the exempt YAs. In such a case, the exemption shall be deemed as not granted for that YA. However, if the principal hub fails to comply with any conditions imposed in relation to the exemption during any YA within the exempt YAs, the exemption under Paragraph 4 of the Order shall not be applicable to the principal hub.

8. Unless the principal hub fails to comply with any conditions imposed in relation to the exemption, the Minister may, at any time, allow the principal hub to surrender the exemption granted under this Order by giving a notice in writing to the Minister through the MIDA. The surrender of the exemption shall take effect from the YA in which the application for surrender of the exemption is received by the Minister through the MIDA, provided that all conditions for the relevant category of a principal hub as specified in Schedule 2 or Schedule 3 of the Order are complied with.

9. The Order shall not apply to a principal hub which, during the exempt YAs:
   (a) has made a claim for reinvestment allowance under Schedule 7A to the ITA or investment allowance for the service sector under Schedule 7B to the ITA;
   (b) has been granted any incentive under the Promotion of Investments Act 1986 (PIA);
   (c) has been granted an exemption under Section 127(3)(b) or Section 127(3A) of the ITA; or
   (d) has made a claim for deduction under any rules made under Section 154 of the ITA except:
      i. the rules in relation to allowance under Schedule 3 to the ITA;
      ii. the Income Tax (Deduction for Audit Expenditure) Rules 2006 [P.U.(A) 129/2006];
      iii. the Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2014 [P.U.(A) 336/2014]; or
      iv. the Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2020 [P.U.(A) 162/2020].

Relevant definitions

The term "core income generating activities" refers to activities undertaken by a principal hub in relation to qualifying services or qualifying trading activities.

The term "qualifying trading activities" refers to activities undertaken by a principal hub in respect of the procurement and sale of raw materials, components, and finished products from the principal hub to a network company within or outside of Malaysia.

The term “qualifying services” refers to services specified in Schedule 1 of the Order.

A “principal hub” is a company which:
(a) is incorporated under the Companies Act 2016 and is resident in Malaysia;
(b) is already operating in Malaysia which:
   i. does not have an operational headquarters, international procurement centre, or regional distribution centre status; or
   ii. has been approved by the Minister as having an operational headquarters, international procurement centre, or regional distribution centre status; and
      - has been approved with an incentive for operational headquarters, international procurement centre, or regional distribution centre; or
      - has not been approved with an incentive for operational headquarters, international procurement centre, or regional distribution centre; and
(c) has a paid-up capital of more than RM2,500,000.

A “network company” refers to:
(a) a related company;
(b) an entity within the same group of companies as the principal hub, including a subsidiary, branch, joint venture, or franchise; or
(c) a company that has a contractual agreement with the principal hub or the principal hub’s ultimate holding company which relates to the principal hub’s supply chain and business for at least three years.

The term “related company” has the same meaning assigned to it in Section 2(1) of the PIA.

An "intellectual property right" is a right arising from any patent, utility innovation and discovery, copyright, trademark and service mark, industrial design, layout-design of an integrated circuit, secret processes or formulae and know-how, geographical indication, the grant of protection of a plant variety, and other like rights, whether registered or registrable.

A “new intellectual property right” is an intellectual property right in relation to the core income generating activities of the principal hub that comes into the ownership of the principal hub:
(a) on or after 1 July 2018; or
(b) after 16 October 2017 but before 1 July 2018, as a result of an acquisition by the principal hub, directly or indirectly, from a related company.

Please refer to the Order for full details.

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2. Income Tax (Exemption) (No. 3) Order 2023 [P.U.(A) 252/2023]

P.U.(A) 252/2023 (the Order) was gazetted on 23 August 2023 and is effective retrospectively from the YA 2019. The Order is applicable to new principal hubs that are operating in Malaysia which have applied for the incentive during the period 1 January 2019 and 31 December 2020.

[Note: The MIDA has issued Guidelines for Principal Hub Incentive 3.0 (the Guidelines) which stipulates the criteria and conditions to qualify for the incentive.]

According to the Order:

1. The Minister exempts a principal hub from the payment of income tax in respect of the statutory income derived from core income generating activities during the basis period for a YA for a period of 5 consecutive YAs (exempt YAs). The commencing YA is determined by the Minister.

2. The application for the exemption shall be made in writing by a principal hub and received by the Minister through the MIDA between 1 January 2019 and 31 December 2020 (both dates inclusive) and shall comply with the conditions imposed by the Minister.

3. To qualify for the tax exemption above, the principal hub shall comply with the conditions for the relevant category of principal hub specified in Schedule 2 of the Order, and any other conditions imposed by the Minister in the approval letter.

4. The statutory income derived from core income generating activities mentioned above during the basis period for each YA shall be determined in accordance with the following formula, upon deducting the allowances which fall to be made under Schedule 3 to the ITA (despite no claim for such allowances has been made):

   (a) in relation to qualifying services carried on by the principal hub:

      i) in the case of a principal hub under Category 1 of Schedule 2 to the Order:

$$\frac{A}{B} \times C$$

where

A is the amount of tax charged on the chargeable income of the principal hub from the qualifying services at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act reduced by the amount of tax charged on such chargeable income from the qualifying services at the rate of zero per cent;

B is the amount of tax charged on the chargeable income of the principal hub from the qualifying services at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act; and

C is the amount of the chargeable income of the principal hub from the qualifying services; or

ii) in the case of a principal hub under Category 2 of Schedule 2 to the Order:

$$\frac{A}{B} \times C$$

where

A is the amount of tax charged on the chargeable income of the principal hub from the qualifying services at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act reduced by the amount of tax charged on such chargeable income from the qualifying services at the rate of five per cent;

B is the amount of tax charged on the chargeable income of the principal hub from the qualifying services at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act; and

C is the amount of the chargeable income of the principal hub from the qualifying services; or

(b) in relation to qualifying trading activities carried on by the principal hub:

i) in the case of a principal hub under Category 1 of Schedule 2 to the Order:

$$\frac{A}{B} \times C$$

where

A is the amount of tax charged on the chargeable income of the principal hub from the qualifying trading activities at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act reduced by the amount of tax charged on such chargeable income from the qualifying trading activities at the rate of zero per cent;

B is the amount of tax charged on the chargeable income of the principal hub from the qualifying trading activities at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act; and

C is the amount of the chargeable income of the principal hub from the qualifying trading activities; or

ii) in the case of a principal hub under Category 2 of Schedule 2 to the Order:

$$\frac{A}{B} \times C$$

where

A is the amount of tax charged on the chargeable income of the principal hub from the qualifying trading activities at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act reduced by the amount of tax charged on such chargeable income from the qualifying trading activities at the rate of five per cent;

B is the amount of tax charged on the chargeable income of the principal hub from the qualifying trading activities at the prevailing tax rate as provided for in paragraph 2 of Part I of Schedule 1 to the Act; and

C is the amount of the chargeable income of the principal hub from the qualifying trading activities.

5. The following intellectual property income derived from core income generating activities of the principal hub shall be excluded in ascertaining the statutory income of a principal hub mentioned above (i.e. subject to tax under the ITA at the prevailing rate):
   (a) royalties and other income derived on or after 1 July 2018 but before 1 July 2021 from new intellectual property rights that the principal hub owns; and
   (b) royalties and other income derived on or after 1 July 2021 from all intellectual property rights that the principal hub owns.

   *[**Note:** A principal hub is deemed to own an intellectual property right if the principal hub is the owner or the licensee of the right. Royalties and other income are derived from an intellectual property right if they are receivable as consideration for the commercial exploitation of that right.]*

6. Where a principal hub has an adjusted loss, as ascertained under Sections 43(2) and 44(2) of the ITA, during the basis period for a YA within the exempt YAs in respect of a business source consisting of qualifying services or qualifying trading activities, the amount of the adjusted loss shall be disregarded from the source consisting of qualifying services or qualifying trading activities and other businesses. Any amount of adjusted loss pursuant to Sections 43(2) and 44(2) of the ITA in respect of a business source consisting of qualifying services or qualifying trading activities shall be disregarded for the purposes of the ITA during the YA in which the last date of the principal hub's exempt YAs falls, as well as the following YAs after the exempt YAs, as may be the case.

7. The Minister may extend the exempt YAs for another period of five YAs, subject to the principal hub fulfilling the following conditions:
   (a) the total number of its full-time new employees in Malaysia with a minimum salary of RM5,000 per month is more than 20% of the total number of its full-time new employees in Malaysia at the end of the last year of the exempt YAs; and
   (b) the total amount of its annual operating expenditure is more than 30% of the total amount of its annual operating expenditure at the end of the last year of the exempt YAs.

8. An application for the extension of the exempt YAs shall be made by the principal hub in writing to the Minister through the MIDA not later than 60 days before the expiration of the exempt YAs. The extension of the exempt YAs shall begin from the subsequent YA after the expiration of the exempt YAs and continue for a period of five YAs.

9. The Minister may withdraw the exemption granted if the principal hub fails to comply with any conditions imposed in relation to the exemption during any YA within the exempt YAs. In such a case, the exemption shall be deemed to not have been granted to the principal hub for that YA. However, if the principal hub fails to comply with any conditions imposed in relation to the exemption during any YA within the exempt YAs, the exemption under Paragraph 4 of the Order shall not be applicable to the principal hub.

10. Unless the principal hub fails to comply with any conditions imposed in relation to the exemption, the Minister may, at any time, allow the principal hub to surrender the exemption granted under this Order by giving a notice in writing to the Minister through the MIDA. The surrender of the exemption shall take effect from the YA in which the application for surrender of the exemption is received by the Minister through the MIDA, provided that all conditions for the relevant category of a principal hub as specified in Schedule 2 of the Order are complied with.

11. The Order shall not apply to a principal hub which, in the exempt YAs:
    (a) has made a claim for reinvestment allowance under Schedule 7A to the ITA or investment allowance for the service sector under Schedule 7B to the ITA;
    (b) has been granted any incentive under the PIA;
    (c) has been granted an exemption under Section 127(3)(b) or Section 127(3A) of the ITA; or
    (d) has made a claim for deduction under any rules made under Section 154 of the ITA except:
        i. the rules in relation to allowance under Schedule 3 to the ITA;
        ii. the Income Tax (Deduction for Audit Expenditure) Rules 2006 [P.U.(A) 129/2006];
        iii. the Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2014 [P.U.(A) 336/2014]; or
        iv. the Income Tax (Deduction for Expenses in relation to Secretarial Fee and Tax Filing Fee) Rules 2020 [P.U.(A) 162/2020].

<u>Relevant definitions</u>

The term "core income generating activities" refers to activities undertaken by a principal hub in relation to qualifying services or qualifying trading activities.

The term "qualifying trading activities" refers to activities undertaken by a principal hub in respect of the procurement and sale of raw materials, components, and finished products from the principal hub to a network company within or outside of Malaysia.

The term “qualifying services” refers to services specified in Schedule 1 of the Order.

A “principal hub” is a company which:
(a) is incorporated under the Companies Act 2016 and is resident in Malaysia;
(b) is already operating in Malaysia which:
    i. does not have an operational headquarters, international procurement centre, or regional distribution centre status; or
    ii. has been approved by the Minister as having an operational headquarters, international procurement centre, or regional distribution centre status; and
        - has been approved with an incentive for operational headquarters, international procurement centre, or regional distribution centre; or
        - has not been approved with an incentive for operational headquarters, international procurement centre, or regional distribution centre; and
(c) has a paid-up capital of more than RM2,500,000.

A “network company” refers to:
(a) a related company;
(b) an entity within the same group of companies as the principal hub, including a subsidiary, branch, joint venture, or franchise; or
(c) a company that has a contractual agreement with the principal hub or the principal hub’s ultimate holding company which relates to the principal hub’s supply chain and business for at least three years.

The term "related company" has the same meaning assigned to it in Section 2(1) of the PIA.

An "intellectual property right" is a right arising from any patent, utility innovation and discovery, copyright, trademark and service mark, industrial design, layout-design of an integrated circuit, secret processes or formulae and know-how, geographical indication, the grant of protection of a plant variety, and other like rights, whether registered or registrable.

A "new intellectual property right" is an intellectual property right in relation to the core income generating activities of the principal hub that comes into the ownership of the principal hub:

a) on or after 1 July 2018; or
b) after 16 October 2017 but before 1 July 2018, as a result of an acquisition by the principal hub, directly or indirectly, from a related company.

Please refer to the Order for full details.

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3. Operational Guideline 2/2023 and FAQ on Special Voluntary Disclosure Programme 2.0 (Amended)

The Inland Revenue Board of Malaysia (IRBM) has recently updated the Operational Guidelines No. 2/2023 (the amended Guideline) and Frequently Asked Questions (FAQ) on the Special Voluntary Disclosure Programme 2.0 (SVDP 2.0), respectively. The amended Guideline and the updated FAQ supersedes the previous Guideline and FAQ, both dated 2 June 2023.

Salient changes

1. A new **Paragraph 5.10(a)** has been inserted in the amended Guideline, which specifies that audit or investigation action can be carried out in the future on transfer pricing (TP) issues for the YA in which the voluntary disclosure is made on non-TP issues. Similarly, if voluntary disclosure is only made on TP issues for a YA, audit and investigation action can be taken on issues other than TP for that YA.

2. The **updated FAQ** amended the superseded FAQ to clarify the following:

   (a) SVDP 2.0 does not apply to voluntary disclosures made on incorrect tax rates, as tax rate amendment is not part of the income or expenses that can be reported or claimed in SVDP 2.0. [*Please refer to item 4 of the updated FAQ for guidance on the scope of SVDP 2.0.*]

   (b) The term "new taxpayer" also refers to taxpayers who do not have any tax transactions in the IRBM's records. Taxpayers are deemed to have made tax transactions if an estimated assessment has been raised or if they have made a Monthly Tax Deduction (MTD), in which case the taxpayer is regarded as having opted not to submit an Income Tax Return Form (ITRF) and the MTD is regarded as the final tax.

   (c) The IRBM will issue a SVDP 2.0 letter to taxpayers who meet the eligibility requirements of SVDP 2.0. Taxpayers who meet the eligibility requirements but have submitted a voluntary disclosure through ITRF or the Real Property Gains Tax Return Form (RPGTRF) via e-Filing shall contact the nearest State IRBM or Special Branch to obtain the SVDP 2.0 Letter.

   (d) Tax agents shall submit the voluntary disclosures through the following methods (bulk submissions are not permitted):
      i. by submitting ITRF or RPGTRF for new taxpayers and existing taxpayers that have not submitted ITRF or RPGTRF previously through the TAeF system and e-CKHT under MyTax Portal, respectively:
      ii. by logging in to MyTax Portal to submit the SVDP 2.0 Additional Income Reporting Form and tax computation by using an individual identity and choosing the tax agent category for existing taxpayers that have previously submitted ITRF with undeclared income.

   (e) The phrase "any transfer pricing adjustment arising from the voluntary disclosure under SVDP 2.0 can be subjected to a surcharge under subsection 140A(3C), ACP 1967, even if no additional assessment is raised" under paragraph 5.5.6 of the amended Guideline means that the 0% surcharge provided under SVDP2.0 will not be

granted to voluntary disclosures made on TP issues involving downward TP adjustments, regardless of whether it resulted in an assessment or not, unless the taxpayers and related parties are engaged in domestic controlled transactions and have a positive net tax effect. Nonetheless, both parties shall fulfill the condition of making voluntary disclosures on such TP issues to be eligible for the 0% surcharge provided under SVDP 2.0. [*Please refer to item 42 of the updated FAQ for illustrative guidance.*]

(f) If related parties of a taxpayer that is eligible for SVDP 2.0 benefit from tax incentives or have carried forward losses and huge unabsorbed capital allowances, only those related parties with domestic controlled transactions and TP adjustments that result in a positive net tax impact will be eligible for SVDP 2.0. [P*lease refer to the examples in item 43 for illustrative guidance].*

Please refer to the amended Guideline and updated FAQ for full details.

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4. MIDA – Guidelines & Procedures for Application of Tax Incentives for Manufacturing Sector

The MIDA has recently issued the following guidelines and procedures:

1) Special Tax Incentive (Relocation) for Manufacturing Sector (dated 14 August 2023)

Tax incentive for relocating manufacturing operations to Malaysia

(a) For new company:
- 0% tax rate for 10 years for new investment with capital investment (excluding land) between RM300 mil to RM500 mil; or
- 0% tax rate for 15 years for new investment with capital investment (excluding land) above RM500 mil.

(b) For existing company:
- 100% investment tax allowance on qualifying capital investment (excluding land) above RM300 mil incurred within 5 years to offset 100% statutory income.

(c) For C-Suite individuals (maximum 5 non-citizens):
- 15% tax rate for 5 consecutive YAs.

The tax incentives are implemented respectively through P.U.(A) 240/2023, P.U.(A)241/2023 & P.U.(A) 242/2023 [reported in Deloitte Malaysia Tax Espresso September 2023 issue].

Application to be received by MIDA within:

- 1 July 2020 - 31 December 2024 for Items 1(a) & 1(b); and
- 7 November 2020 - 31 December 2024 for Item 1(c).

2) Tax Incentive for Manufacturer of Electric Vehicle Charging Equipment (dated 14 August 2023)

Tax incentive for new & existing companies undertaking expansion and/or diversification activity

- 100% income tax exemption on statutory income from YA 2023 to YA 2032; or
- 100% investment tax allowance on qualifying capital expenditure incurred within 5 years to offset 100% statutory income

The tax incentives are implemented through P.U.(A) 112/2006 & P.U.(A) 113/2006, respectively.

Application to be received by MIDA within:

- 25 February 2023 - 31 December 2025

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5. MSB v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (SCIT)

The IRBM has recently uploaded a case report, "MSB v KPHDN (SCIT)" on its website.

Facts:

The taxpayer is principally engaged in the business of providing quarry contractor services. On 5 August 2014, the taxpayer entered into a contract with LASB (Main Agreement) for a quarry project in Simpang Pulai for a period of five (5) years. The taxpayer then appointed OFSB (the taxpayer's parent company) as a sub-contractor by adopting the terms in the Main Agreement to carry out the quarry project with the agreed payment of 1% to 2% to the taxpayer on each sale. On 25 October 2016, LASB terminated the contract for the quarry project and paid a compensation of RM850,000 to the taxpayer as a full and final settlement. The taxpayer then paid compensation to OFSB and claimed a deduction on the said compensation payment under Section 33(1) of the ITA. The Director General of Inland Revenue (DGIR) was of the view that the payment of such compensation to OFSB was not deductible because it was not wholly and exclusively incurred in the production of the taxpayer's gross income.

The taxpayer argued that the purpose and motive behind the compensation payment was related to the ordinary course of the taxpayer's business and that it was eligible for tax deduction because it was not a prospective or contingent liability. In addition, the taxpayer argued that the compensation payment was not a provision because the taxpayer's obligation to pay OFSB already existed. Furthermore, the taxpayer argued that if the compensation payment was not made, the taxpayer will face the risk of legal action, which will threaten the taxpayer's business.

On the other hand, the DGIR argued that based on the Main Agreement, the works at the quarry should be determined and confirmed by LASB, and in the event of a cancellation of the contract, LASB will make a payment to the taxpayer based on the works that have been completed. Therefore, the compensation value of RM850,000 was a provision and contingency payment by the taxpayer to OFSB that cannot be verified as the actual value of the contract works after the termination of the contract due to the absence of detailed information for the quarry works that will be carried out in 3 - 5 years after the termination of the contract based on the Schedule of Scope of Work in the Main Agreement. The audit results also showed that OFSB has a common interest as a related company because it is the sole shareholder of the taxpayer's company.

Issue:

Whether the compensation paid to OFSB by the taxpayer due to the termination of the contract for the quarry project is deductible under Section 33(1) of the ITA.

Decision:

The Special Commissioners of Income Tax (SCIT) decided that the taxpayer's appeal was in accordance with Paragraph 13 of Schedule 5 to the ITA. The DGIR did not have a legal and factual basis to impose a penalty on the taxpayer under Section 113(2) of the ITA. In this connection, the taxpayer's appeal was allowed, and the Notice of Additional Assessment dated 25 September 2020 for the YA 2017 relating to this appeal and the said penalty was set aside.

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

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

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

Facts:

Gagah Makmur Sdn Bhd (Gagah Makmur) owned a piece of land which was purchased for RM6,799,500. The taxpayers were the registered shareholders of Gagah Makmur, who later sold 1,000,000 units of their shares to a third party. Based on Form CKHT 1, which was filed by the taxpayers, the DGIR raised the Notice of Assessment for RM1,076,527.70 together with a penalty under Section 29(3) of the Real Property Gains Tax Act 1976 (RPGTA 1976).

The taxpayers claimed that the SCIT had wrongly applied the principles by the High Court (HC) in *KPHDN v Tan Teik Kin (2010) MSTC 30018,* and *KPHDN v Chan Lian Yen (2010) MSTC 30013*. The principle of law enunciated by *Tan Teik Kin's case (supra)* was that the "consideration which has moved between the parties in the transaction" for the realisation of the agreement shall be the consideration under Paragraph 34A(4) of Schedule 2 to the RPGTA 1976.

In *Tan Teik Kin's case (supra)*, the liability of the company amounting to RM969,705.00 was a condition precedent or mandatory clause for the realisation of the share sale agreement. Otherwise, the agreement will be terminated. In this current appeal, the taxpayers claimed that the RM4,000,000 loan from Public Bank was not a consideration that had moved between the parties in the transaction. Furthermore, the liability of Gagah Makmur to Public Bank amounting to RM4,000,000 was not paid by the purchasers within 7 days after completion of the agreement, but the purchasers have chosen to continue the said loan with Public Bank. Unlike *Tan Teik Kin's case (supra)*, the payment clause was optional for the realisation of the share sale agreement. Thus, the RM4,000,000 loan from Public Bank does not qualify as a consideration for the purpose of Paragraph 34A(4) of Schedule 2 to the RPGTA 1976. The taxpayers further argued that the disposal price of the 1,000,000 units of shares should amount to RM2,799,500 and not RM6,799,500.

The DGIR submitted that the taxpayers have never denied that Gagah Makmur is a real property company, and therefore the disposal price of the 1,000,000 units of shares should be determined according to Paragraph 34A(4) of Schedule 2 to the RPGTA 1976. The DGIR further submitted that the wording used in Paragraph 34A(4) of Schedule 2 to the RPGTA 1976, is clear in highlighting that the disposal price of the chargeable asset is the amount or value of the consideration in money or money's worth for the disposal of the chargeable asset.

Issue:

Whether the disposal price of the 1,000,000 units of shares to the third party falls under the ambit of Paragraph 34A(4) of Schedule 2 to the RPGTA 1976.

Decision:

On 12 September 2023, the HC confirmed the SCIT's decision and dismissed the taxpayers' appeal with costs of RM3,000.00.

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

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7. ALHE v KPHDN (SCIT)

The IRBM has recently uploaded a case report, "ALHE v KPHDN (SCIT)" on its website.

Facts:

The taxpayer, a chartered accountant, auditor, and full-time tax agent, disposed of 2 properties called The Light Point and The Light Point Collection (collectively known as the properties) in 2015 and 2016, respectively. The DGIR granted an exemption in respect of real property gains tax (RPGT) on such disposals. However, based on the facts found, the DGIR opined that the gains from the disposal of the properties should not be subject to RPGT. Instead, the gains should be regarded as trade receipts under Section 4(a) of the ITA. As a result, the DGIR raised the Notices of Additional Assessment for the YAs 2015 and 2016 on the taxpayer.

The taxpayer argued that the properties were purchased for investment purposes, i.e., acquired with the intention of capital appreciation rather than trading. Furthermore, the taxpayer contended that he has no time to engage in real estate trading, given that he is a chartered accountant. There were also no proven signs of the taxpayer being involved in trading at the time he acquired the properties.

The taxpayer also asserted that the 30-year bank loan obtained to purchase the properties substantiates his claim that the properties were acquired for long-term investment purposes. Additionally, the taxpayer did not make any modifications to the properties for the purpose of enhancing their value. The taxpayer decided to dispose of the properties because of the attractive disposal price offered by the real estate agent.

The DGIR countered by stating that the taxpayer has expertise in the real estate industry, given that he serves as a director and shareholder of several companies that are engaged in property development and investment. The DGIR was of the view that the taxpayer had planned acquisitions and disposals on a regular basis to evade tax by using his knowledge and expertise in the property industry in addition to that of a tax agent, as disposals had been made after a period of 6 years (*Note: RPGT rate at that time was 0% for disposal of real property by individuals in the 6th year after the date of acquisition or thereafter*). If the properties were indeed acquired for long-term investment purposes, as argued by the taxpayer, the taxpayer would have rented out the properties during the period he held the properties.

The DGIR also contended that the taxpayer had disposed of a total of 6 properties during the period from 2010 to 2016, and each property was held for no more than 6 years, which reinforces the fact that the taxpayer had the intention to trade the properties instead of acquiring them for long-term investment purposes.

Issue:

Whether the DGIR was right in assessing the gains from disposal of the properties as trade receipts under Section 4(a) of the ITA.

Decision:

The SCIT held that the taxpayer had successfully proved that the Notices of Additional Assessment raised by the DGIR on the taxpayer for the YA 2015 and YA 2016 were incorrect and excessive. The SCIT held that the taxpayer's appeal was in accordance with Paragraph 13 of Schedule 5 to the ITA, and the DGIR had no legal and factual basis for imposing penalties on the taxpayer pursuant to Section 113(2) of the ITA.

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

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8. KPHDN v Ensco Gerudi (M) Sdn Bhd (COA) [(2023) MSTC 30-614]

This was an appeal by the DGIR against the decision of the HC, which allowed the taxpayer, Ensco Gerudi (M) Sdn Bhd's (EGSB) application, to quash the decision of the DGIR.

Issues:

1) Whether the decision in *Ensco Gerudi (M) Sdn Bhd v KPHDN* (Application for Judicial Review No: 25-101-05-2013) (*Ensco Gerudi 2013*) was binding on the parties and that the DGIR's decisions were illegal and in excess of its jurisdiction.

2) Whether the DGIR's actions and/or failures amounted to exceptional circumstances for a judicial review application.

3) Whether EGSB and Ensco Labuan Ltd (ELL) were controlled by the same third person for Section 140A of the ITA to be invoked.

4) Whether the DGIR had a duty to give reasons for their decisions, and whether the DGIR had breached that duty.

Decision:

The Court of Appeal (COA) allowed the DGIR's appeal and set aside the decision of the HC on the following grounds:

- The *Ensco Gerudi 2013* case was not binding on the present case as the provisions relied on by the DGIR were different. In *Ensco Gerudi 2013*, the DGIR invoked Section 140(1)(c) of the ITA to disregard the transaction between EGSB and ELL. In the present appeal, the DGIR's assessment was based on Section 140A of the ITA. While both sections were anti-avoidance provisions, the application of these 2 provisions was different. While the application of Section 140 of the ITA was wider, Section 140A of the ITA was more specific and confined to the power of the DGIR to make adjustments and substitute the price on a particular transaction if the DGIR viewed that the transaction was not at arm's length, in particular on matters relating to TP and capitalisation. Therefore, the DGIR was acting within their jurisdiction in their decision regarding EGSB's tax assessments under Section 140A of the ITA.

- Since the DGIR had acted within their jurisdiction to impose the taxes under Section 140A of the ITA, this did not amount to exceptional circumstances for a judicial review application. The substantive review application should have been dismissed for the parties to proceed with their appeal before the SCIT. It was not disputed that EGSB had also filed an appeal to the SCIT. Therefore, it was an abuse of the court process for EGSB to apply for a judicial review while prosecuting an appeal before the SCIT at the same time.

- EGSB was correct in contending that the DGIR could not invoke Section 140A(5A) as the provision only took effect on 1 January 2019. For the purpose of the word "control" under Section 140A(5)(c) of the ITA, the relevant provision was Section 139 of the ITA. The facts in the present case clearly showed that the majority of the shares in EGSB, which comprise 49% of the total shares, belonged to the Ensco Group. The remaining 51% of shares were held by 3 different local companies. Therefore, even though the local companies held a total of 51% cumulatively, each of them held less shares than the Ensco Group. As such, the HC had erred in law and in fact in combining the shareholding by the 3 different and separate entities in EGSB in order to make a finding that a related company, the Ensco Group, was not a majority shareholder of EGSB. The 3 different companies could not be said to have control over EGSB, as decided by the HC. Ensco Group, which held 49% of the shares in EGSB, was the real majority shareholder, which was in line with Section 139 of the ITA.

- The issue of control was not just a legal issue but also a factual issue. The issue of control was not only limited to the 51% shareholding control as submitted by EGSB and accepted by the HC. Section 139 of the ITA provided several circumstances of control, including if the company possessed, or was entitled to acquire the greater part of the share capital in the company, or if the company possessed or was entitled to acquire the voting power in the company. The voting rights were factual issues which should be tried before the SCIT.

- The issue of TP was a factual issue that should be left to the SCIT. The HC was wrong in going into the merits of TP, accepting EGSB's submission, and quashing the DGIR's decision. Contrary to the HC's finding on the non-availability of the DGIR's own TP document to justify the adjustments made, the DGIR had clearly laid down the reasons for the adjustments in 3 separate letters to EGSB. The DGIR had explained how they concluded that EGSB and ELL were associated persons within the meaning of Section 140A(2) of the ITA. The DGIR had also explained the reason for the DGIR's rejection of EGSB's accounting method. The application of the different accounting methodologies and their consequences must be left to the accounting experts to argue before the SCIT, as these were essentially factual issues that must be decided by the SCIT.

- Contrary to the HC's finding, the DGIR had explained the reasons for their decision, as evident from the correspondence between the parties. The documents in the course of the negotiations between the parties were self-explanatory. Thus, the need to give an overt explanation was redundant. Whether or not the DGIR's reasons were acceptable would be up to the SCIT to make a finding. Therefore, it could not be said that the DGIR had failed to explain the reasons to EGSB. As per *KPHDN v Alcatel-Lucent (M) Sdn Bhd & Anor (2016) MSTC 30-134; [2017] 1 MLJ 563 (Alcatel-Lucent)*, it was held that in tax cases, there were no statutory provisions that mandated the DGIR to give reasons.

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9. Embunan Harian Sdn Bhd v KPHDN (HC) [(2022) MSTC 30-513]

This was an appeal by the taxpayer by way of a case stated against the deciding order of the SCIT pursuant to Paragraph 34 of Schedule 5 to the ITA. The SCIT had disallowed the taxpayer's appeal against the additional assessment raised by the DGIR, where the taxpayer's claim for stock purchase expenditure was disallowed for the YA 2010.

Issues:

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

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

Decision:

The HC dismissed the taxpayer's appeal based on the following grounds:

Issue 1

- The SCIT had correctly made a finding of facts that the purported sale and purchase agreement entered between the taxpayer and Syarikat Keruak Sawmill Sdn Bhd (SKS) was in fact a scheme for the taxpayer to obtain exclusive rights to extract timber. The said agreement was purposely drafted in such a way to frustrate the application of Section 23 of the National Forestry Act 1984 and, by extension, to frustrate Section 39(1)(g) of the ITA to avoid tax.

- The part payment was for the purpose of paying for the exclusive rights to extract timber on the land on which SKS had obtained a permit rather than buying logs and timber as stock in trade. Thus, the expenses were caught under Section 39(1)(g) of the ITA and correctly disallowed by the DGIR.

- The fact that the payment of all premiums and royalties were borne by the taxpayer showed that the agreement was not a mere sale and purchase agreement, as there was no necessity for a buyer to bear all the unnecessary costs in a normal trading agreement since this would increase the cost of purchase. To purchase timber with the additional expenses of paying a premium and royalties amounting to millions of Ringgit was beyond a normal sale and purchase transaction.

- The fact that the payments were made by the taxpayer directly to the State Authority did not change the character of the payment, i.e., the payment for premiums and royalties, and the premium deposit due from the licence holder to the State Authority.

- The fact that SKS agreed to refund the permitted security deposit payment to the taxpayer proved that the deposit payment was borne by the taxpayer.

- The agreement clearly provided that all the benefits derived by the taxpayer from the said land belonged to the taxpayer, with the taxpayer having exclusive rights over the land, and SKS having no claim over it. In the agreement, there was also an obligation on the taxpayer to make and maintain all the roads inside the land, including drains, culverts, and bridges, at the taxpayer's own expense, which indicated that the agreement was not an ordinary sale and purchase agreement as claimed by the taxpayer. The agreement further provided that the taxpayer would abide by all the relevant rules and regulations, as well as the terms and conditions of the permit, and that SKS would be indemnified against any claims and demands. It signified SKS' intention to hand over all the affairs relating to the said land to the taxpayer.

- The SCIT had taken a holistic approach in interpreting the alleged sale and purchase agreement in totality instead of merely looking at the title of the agreement. The SCIT had looked beyond what was recited in the preamble of the agreement to decipher the true intention of the parties in the agreement.

- The SCIT had made a correct finding that the true intention of Section 39(1)(g) of the ITA was to curb the "Ali Baba" practice, where the SCIT referred to its earlier decision in *MRD v KPHDN (2001) MSTC 3248*. It was the situation with the taxpayer and SKS whereby, despite being awarded the licence to extract timber by the Terengganu State Government, SKS had done nothing or anything, nor worked on the said land. Instead, it was the taxpayer who had done everything on the said land.

Issue 2

- Based on the case of *KT Co v Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur (1992) 1 MSTC 3255* and other authorities, it was the discretion of the DGIR to impose penalties under Section 113(2) of the ITA after taking into consideration all relevant facts and circumstances of the case.

- In this matter, the DGIR had considered all the relevant facts before raising the assessment together with the penalty. Therefore, as found by the SCIT, the DGIR was correct in imposing a penalty under Section 113(2) of the ITA.

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10. Synthesised Texts of Malaysia's Double Tax Agreements with Albania, Bosnia & Herzegovina, Chile, China, Croatia, Denmark, Egypt, Finland, France, & Hong Kong & their modifications made by MLI

The IRBM has uploaded the Synthesised Texts of Malaysia's Double Tax Agreements with Albania, Bosnia and Herzegovina, Chile, China, Croatia, Denmark, Egypt, Finland, France, and Hong Kong on its website and their modifications made by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) to have effect as set out in the table below:

ST of Malaysia's DTAs with:	Modifications made by MLI (in the ST) to have effect with respect to:	
	Withholding tax (WHT), where the event giving rise to WHT occurs on or after:	All other taxes levied with respect to taxable periods beginning on or after:
Albania	1 January 2022	1 December 2021
Bosnia & Herzegovina	1 January 2022	1 December 2021
Chile	1 January 2022	1 December 2021 (Malaysia) 1 January 2022 (Chile)
China	1 January 2023	1 March 2023
Croatia	1 January 2022	1 December 2021
Denmark	1 January 2022	1 December 2021 (Malaysia) 1 January 2022 (Denmark)
Egypt	1 January 2022	1 December 2021
Finland	1 January 2022	1 December 2021 (Malaysia) 1 January 2022 (Finland)
France	1 January 2022	1 December 2021
Hong Kong	1 January 2024 (Malaysia) 1 April 2023 (Hong Kong)	23 September 2023 (Malaysia) 1 April 2024 (Hong Kong)

Please refer to the respective Synthesised Texts for full details.

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