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HASiL Media Releases, Gazette Orders, Tax Cases and more

September 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:

SVDP 2.0, Mandatory e-Invoicing and Employer Obligation: Are you ready?

Important deadlines:

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

1. HASiL Media Release – Instalment Payments for Outstanding Taxes for Prior Years and Temporary Release of Travel Restriction

The Inland Revenue Board of Malaysia (HASiL) has issued a media release dated 26 July 2023, to inform taxpayers that they can apply to make instalment payments for outstanding income tax and real property gains tax (RPGT) for prior years without a tax increase being charged. The application can be made from 6 June 2023 to 31 May 2024, during the Special Voluntary Disclosure Programme 2.0 period.

The above application shall be made in writing and can be submitted to the nearest HASiL branch or the branch where the taxpayer's file is located. Alternatively, taxpayers can also submit such an application using the Customer Feedback Form through the MyTax platform.

Taxpayers will be given a temporary release from travel restrictions under Section 104 of the Income Tax Act 1967 (ITA) for instalment payments of outstanding taxes that are made consistently and in compliance with the payment schedule set by HASiL. Failure to comply with the payment terms may result in a tax increase being charged.

Please refer to the media release for full details.

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2. HASiL Media Release: Mandatory use of e-services in stages from 1 September 2023

HASiL announced via a media release dated 22 August 2023 (available in Bahasa Malaysia only) on the mandatory use of e-services in stages starting from 1 September 2023 through the MyTax Portal. This is in line with the government's aspiration to digitalise HASiL's service delivery systems from End-to-End (E2E) in stages, with full implementation expected to be complete by 1 January 2024.

The mandatory use of e-services is also one of HASiL's efforts to introduce the elements of Awareness, Education, and Services (AES) in all HASiL service counters. Taxpayers are encouraged to switch to the E2E services for all transactions, including the usage of online payment methods that were set up for taxpayers to make payments, to ensure that all transactions are recorded securely and orderly.

Taxpayers may refer to the following additional references for guidance:

- list of mandatory e-services and their descriptions on HASiL's website (available in Bahasa Malaysia only); and
- user manual of e-services on the MyTax Portal, which can be accessed at MyTax > User Manual.

Any questions and related feedback can be forwarded to HASiL via:

a) HASiL Care Line at 03-8911 1000 / 603-8911 1100 (Overseas);
b) HASiL Live Chat; and
c) Feedback Form on the HASiL's official portal at https://maklumbalaspelanggan.hasil.gov.my/Public.

Please refer to the media release for full details.

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3. Income Tax (Deduction for Expenses in relation to Listing on Main Market, Access, Certainty, Efficiency (ACE) Market or Leading Entrepreneur Accelerator Platform (LEAP) Market of Bursa Malaysia Securities Berhad) Rules 2023 [P.U.(A) 235/2023]

P.U.(A) 235/2023 (the Rules) was gazetted on 7 August 2023 and have effect from the year of assessment (YA) 2023 to YA 2025. The Rules legislate the extension of the tax deduction provided under the Income Tax (Deduction for Expenses in relation to Listing on Access, Certainty, Efficiency (ACE) Market or Leading Entrepreneur Accelerator Platform (LEAP) Market of Bursa Malaysia Securities Berhad) Rules 2020 [P.U.(A) 263/2020], which was initially due to end in YA 2022. During the tabling of the Budget 2023, it was proposed that the tax deduction be extended from YA 2023 until YA 2025 and be expanded to include the cost of listing technology-based companies on the Bursa Main Market (Main Market).

The Rules shall apply to a technology-based company:
(a) which is involved in the design, development and manufacture, production, or application in any of the field and activities:
   i. as specified in the Schedule; and
   ii. which have been certified by Bursa Malaysia Securities Berhad as the principal business activity of the technology-based company; and
(b) which has applied for listing on the Main Market, ACE Market or LEAP Market.

Salient points

1) For the purpose of ascertaining the adjusted income of the technology-based company from its business for the basis period in a YA, a deduction shall be allowed on the following expenditures incurred by the technology-based company in relation to listing on the Main Market, ACE Market, or LEAP Market:
   (a) payment of fees to Bursa Malaysia Securities Berhad and Securities Commission Malaysia as the authorities;
   (b) payment for the following professional fees:
      i. advisory fee to:
         A. the principal adviser for listing on the Main Market;
         B. the sponsor, being the main adviser for listing on the ACE Market; and
         C. the approved adviser, being the main adviser for listing on the LEAP Market; and
      ii. in relation to the listing exercise, fees to the solicitor, company secretary, tax adviser, reporting accountant, auditor, valuer, independent market researcher, issuing house, and share registrar; and
   (c) payment of fees for underwriting, placement, and brokerage services.

2) The deduction shall only be claimed by the technology-based company for the basis period in a YA in which the technology-based company is listed on the Main Market, ACE Market, or LEAP Market. The total amount of the deduction allowed shall not exceed RM 1,500,000.

3) The amount of deduction in respect of expenditure shall not exceed the adjusted income of the technology-based company for the basis period in that YA, and such adjusted income shall be ascertained before claiming such a deduction.

4) If, due to an absence or insufficiency of adjusted income in that YA, the deduction in respect of expenditure cannot be claimed partially or in full, the deduction in respect of such expenditure shall not be allowed to the technology-based company in any subsequent YAs.

Please refer to the Rules and P.U.(A) 263/2020 for full details.

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4. Income Tax Order & Rules [P.U.(A) 240/2023, 241/2023 & 242/2023] in relation to Relocation of Manufacturing Business to Malaysia

The following were gazetted on 15 August 2023:

➢ Income Tax (Exemption) Order 2023 [P.U.(A) 240/2023]

P.U.(A) 240/2023 (the Order) is deemed to have effect from the YA 2021.

According to the Order:

(a) A qualifying company (QC) is exempted from income tax in the basis period for a YA in regards to statutory income derived from a qualifying activity (QA), which is equivalent to the amount of qualifying capital expenditure (QCE) made by the QC in the basis period for that YA.

(b) An application for the exemption shall be made in writing by the QC and received by the Minister through the Malaysian Investment Development Authority (MIDA) on or after 1 July 2020 but not later than 31 December 2024.

(c) The exemption granted pursuant to the application is subject to the QC complying with all the conditions imposed by the Minister as specified in the approval letter, which includes the following:

i. incurs a minimum amount of investment in fixed assets, excluding land, valued at more than RM300 million, within 3 years from the date of the 1st QCE made; and

ii. employs at least 80% of full-time Malaysian employees on or before the 3rd year from the date of the 1st invoice in relation to the QA issued by the QC until the exemption period ends.

(d) The exemption shall be for a period of 5 consecutive years, commencing from the date of the first QCE made by the QC as determined by MIDA. The date of the first QCE made by the QC shall not be earlier than 1 July 2020.

(e) Where the QC has been granted the exemption, any related company to the QC shall not be entitled to the exemption in respect of the same QA. A related company is a company that has the same meaning assigned to it in Section 2(1) of the Promotion of Investments Act 1986.

(f) A “QA” refers to a new manufacturing activity undertaken by a QC but does not include any activity specified in the Schedule to the Order.

(g) A “QC” refers to an existing company that qualifies for the exemption under the Order. The term “existing company” refers to a company that:
- is incorporated under the Companies Act 2016 and is resident in Malaysia;
- has an existing manufacturing operation in Malaysia; and
- relocates its manufacturing operations to Malaysia for a new business where the product for the new business is not an expansion project for the existing product.

(h) Other provisions in the Order are as follows:
- QCE – Paragraph 4;
- Statutory income – Paragraph 5;
- Disposal of factory, machinery or plant within 5 years – Paragraph 6;
- Determination of QCE for factory, machinery or plant disposed to related company – Paragraph 7;
- Withdrawal of exemption – Paragraph 8;
- Surrender of exemption – Paragraph 9;
- Separate source and separate account – Paragraph 10; and
- Non-application – Paragraph 11.

➢ Income Tax (Relocation of Manufacturing Business Incentive Scheme) Rules 2023 [P.U.(A) 241/2023]

P.U.(A) 241/2023 (the Rules) are deemed to have effect from YA 2021 and shall apply to a QC that applies in writing to the Minister for the Relocation of Manufacturing Business Incentive Scheme (RMBIS).

According to the Rules:

(a) The income tax rate for the specified YAs on the chargeable income of a QC that carries on business in respect of a QA under the RMBIS is 0%.

(b) The specified YAs are a period commencing from the YA determined by the Minister in relation to investment in fixed assets excluding land valued:
i. between RM300 million and RM500 million for 10 YAs; or
ii. more than RM500 million for 15 YAs.

(c) An application for RMBIS by a QC shall be received by the Minister through MIDA on or after 1 July 2020, but not later than 31 December 2024. The QC shall comply with the conditions imposed by the Minister as specified in the approval letter, which include the following:

i. incurs a minimum investment amount in fixed assets, excluding land, within 3 years from the date of the 1st QCE incurred, amounting to:
- RM300 million for approval of 10 YAs; or
- more than RM500 million for approval of 15 YAs; and

ii. employs at least 80% of full-time Malaysian employees on or before the 3rd year from the date of the 1st invoice in relation to the QA issued by the QC until the end of the specified YAs.

(d) A "QA" refers to a manufacturing activity undertaken by the QC but does not include any activity specified in the Schedule to the Rules.

(e) "RMBIS" refers to an incentive scheme for the QC, which carries out the QA and is approved by the Minister.

(f) A "QC" refers to a new company that fulfils the eligibility conditions of the RMBIS and the conditions provided under Section 65B of the Income Tax Act 1967 (ITA). A "new company" refers to a company that:
- is incorporated under the Companies Act 2016 and resident in Malaysia;
- does not have an existing manufacturing operation in Malaysia; and
- relocates manufacturing activity for a QA into Malaysia or establishes a new operation to carry on a QA in Malaysia.

(g) Other provisions in the Rules are as follows:
- Surrender of RMBIS – Rule 9; and
- Non-application – Rule 10.

➢ Income Tax (For an Individual Resident Who is Not A Citizen and Holds C Suite Position in an Approved Company) Rules 2023 [P.U.(A) 242/2023]

P.U.(A) 242/2023 (the Rules) are deemed to have effect from the YA 2021.

According to the Rules:

(a) The income tax rate for the specified YAs on the chargeable income of a qualifying individual (QI) having and exercising employment in an approved company (AC) is 15%.

(b) The chargeable income of a QI mentioned above shall be determined in accordance with the formula specified in Rule 6(2) of the Rules. Any excess of that QI'schargeable income that is subject to tax shall be charged to income tax at the applicable rate under Part I of Schedule 1 to the ITA.

(c) Specified YAs are a period of 5 consecutive YAs commencing from the YA determined by the Minister in the approval letter.

(d) A QI may apply for an incentive under the Rules, subject to the following conditions:

i. the application shall be made in writing by an AC and received by the Minister through MIDA:
   - on or after 7 November 2020, but not later than 31 December 2024, in relation to an AC that has been granted a tax exemption under P.U.(A) 240/2023 or an incentive scheme under P.U.(A) 241/2023; and
   - on or after 7 November 2020 but not later than 31 December 2022, in relation to an AC that has been granted an incentive scheme under P.U.(A) 398/2022.

ii. the QI has never been granted an incentive under the Rules.

A QI is an individual resident who is not a citizen, employed by an AC, and holds a C Suite position during the specified YAs. The number of QIs for every AC is limited to 5.

(e) A QI whose application is approved shall fulfil the conditions imposed by the Minister as specified in the approval letter, which include the following:
- is resident in Malaysia for each YA in the specified YAs;
- receives income from employment with an AC in the specified YAs;
- holds a C Suite position in the AC in the specified YAs; and
- receives a minimum basic salary of RM25,000 per month.

(f) The term “C Suite position” refers to the position of top senior executives which rely on functional know-how and technical skills such as Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, and Chief Information Officer.

(g) Other provisions in these Rules are as follows:
- Withdrawal of incentive – Rule 8; and
- Cessation of application – Rule 9.

Please refer to the above Order and Rules for full details.

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5. Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (FC) [(2023) MLJU 827]

This was an appeal filed by Wiramuda (M) Sdn Bhd against the decision of the Court of Appeal (COA), which upheld the decision of the High Court (HC) that dismissed the taxpayer’s application for a judicial review to quash the notice of assessment for the YA 2018 issued by the Director General of the Inland Revenue (DGIR).

Issue:

Whether Section 4C of the ITA is in contravention with Article 13(2) of the Federal Constitution (the Article) as it deprived the taxpayer of adequate compensation granted in accordance with the Land Acquisition Act 1960.

Decision:

The Federal Court (FC) allowed the taxpayer’s appeal based on the following grounds of judgement:

- It was an established principle of law that adequate compensation placed the landowner in the original position as if the land had not been acquired by referring to the market value of the land. Section 4C of the ITA considers compensation from compulsory acquisitions to be a form of profit or gain. The FC was of the view that profit and compensation have different meanings, as profit or gain means that there is a pecuniary advantage, while adequate compensation means that there is no more or no less than the loss resulting from the compulsory acquisition of the land. Thus, Section 4C of the ITA is fundamentally flawed in providing that a business’ profits or gains include compensation from compulsory acquisition, as adequate compensation has no element of profit or gain nor any pecuniary advantage.

- According to the cases of *Ketua Pengarah Hasil Dalam Negeri (KPHDN) v Penang Realty Sdn Bhd and another appeal [2006] 3 MLJ 597* and *Lower Perak Co-operative Housing Society Bhd v KPHDN [1994] 2 MLJ 713*, compulsory acquisition of land could not constitute a sale as the element of compulsion has vitiated the intention to trade, hence compensation received from compulsory acquisitions should not be subject to income tax. The FC was of the view that equating adequate compensation to the taxpayer as a gain for the disposal of a stock in trade was contrary to the provision of the Article, which guaranteed the right to property and the right to adequate compensation for the deprivation of the property. In other words, Section 4C of the ITA had taken away the safeguard of adequate compensation guaranteed under the Article as it effectively reduced the compensation paid to the taxpayer by charging income tax on the compensation received.

- Paragraph 3 of Schedule 2 to the Real Property Gains Tax Act 1976 (RPGTA) also clearly stipulates that a transaction involving the disposal of an asset due to compulsory acquisition is a transaction in which the disposal price is deemed to be equal to its acquisition price. When the disposal price is deemed to be equal to its acquisition price, the transaction yields a nil-tax effect. Even though the above provision relates to a different legislation, it supports the proposition that in a situation where there is compulsory land acquisition, it results in a no gain or loss transaction, and thus, no profit was earned.

- With the above in mind, the question of law was therefore answered in the affirmative and Section 4C of the ITA was thus unconstitutional and liable to be struck down.

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6. Petronas Carigali Sdn Bhd v Pemungut Duti Setem (HC) [(2023) MSTC 30-605]

This stamp duty appeal under Section 39 of the Stamp Act 1949 (SA) was filed by Petronas Carigali Sdn Bhd for a declaration that the notice of stamp duty assessment issued by the Collector of Stamp Duties (the Collector) was erroneous, null and void.

Issue:

Whether the stamp duty required to be paid by the taxpayer on the agreement was to be assessed under Item 4 or Item 22(1)(a) of the First Schedule of the SA.

Decision:

The HC allowed the taxpayer's application and set aside the assessment issued by the Collector based on the following grounds:

- The agreement was a contract with the sole purpose of supplying material or equipment, i.e., supplying gas compressor bundle assembly and casing. It was not a contract for services and there was no absolute contract value for the agreement. The Collector erred by treating the optional services fee in the agreement as the actual price of the agreement.

- Due to the nature of the business, the optional incidental services were necessary for the purchase of the compressor. The list of optional incidental services did not reflect the contract value as the duration or frequency of the services was unable to be determined due to the uncertainty of the scope of work. This was contrary to Item 22(1)(a) of the First Schedule of the SA where one of the conditions is that the instrument must be a principal or primary security/agreement for any annuity.

- Under the SA, stamp duty is imposed on an instrument,not on a transaction. Therefore, stamp duty on the agreement should be assessed under item 4 of the First Schedule of the SA.

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7. Ketua Pengarah Hasil Dalam Negeri v Sandakan Edible Oils Sdn Bhd (HC) [(2023) MSTC 30-606]

This was an appeal by the DGIR against the decision of the Special Commissioners of Income Tax (SCIT) delivered in 2021. The SCIT had set aside a notice of additional assessment issued by the DGIR on the taxpayer for the YA 2010. The additional assessment was based on an adjustment made by the DGIR under Section 140A of the ITA, which dealt specifically with transfer pricing.

Issues:

1) Whether the DGIR was required under the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines (OECD Guidelines) and the DGIR's Transfer Pricing Guidelines (TP Guidelines) to adjust the taxpayer's profits to the median in a case where its margin was within the interquartile range;

2) Whether the DGIR had correctly invoked Section 140A of the ITA in raising the notice of additional assessment on the taxpayer for YA 2010; and

3) Whether there was any legal or factual basis for the DGIR to impose a penalty under Section 113(2) of the ITA for YA 2010.

Decision:

The HC reaffirmed the decision made by the SCIT and dismissed the DGIR's appeal on the following grounds:

- The DGIR had erred by adopting the median point as the method for determining arm's length pricing. The DGIR had disregarded the fact that the profitability of companies fluctuated yearly due to various factors. The fact that the taxpayer's profitability was below the median in 1 out of 4 consecutive years did not mean that the taxpayer had engaged in transfer pricing. The taxpayer was one of the top 3 most profitable companies among its competitors for YAs 2011, 2012, and 2013 by achieving profit margin above the median point. The selected 6 comparable companies did not engage in transfer pricing and had a profitability less than the median in at least one year. Furthermore, all 6 comparable companies had lower profitability than the taxpayer in at least one year.

- The median point artificially assumed that a company was engaging in transfer pricing if it did not perform in the top 50% of its competitors every single year. However, the median point in a YA could only be determined retrospectively. In YA 2010, the taxpayer could not have known what the median point was, and it was impossible for the taxpayer to have intentionally achieved its profitability below the median point, as the DGIR contended. Based on the evidence produced before the SCIT, the DGIR's decision to use the median point was not based on the OECD Guidelines, the DGIR's Transfer Pricing Guidelines or case law. In determining arm's length pricing, the proper approach was to use a range of values rather than a single point when there was a consistent pattern of fluctuating profits among companies, as was typical in business. The HC agreed with the SCIT that there was no basis for the DGIR to make transfer pricing adjustments to adjust the taxpayer's profits to the median of the 6 comparable companies as there was no transfer pricing legislation that required taxpayers to achieve the same turnover as their competitors.

- The taxpayer had obtained professional advise from a reputable firm which clearly indicated that it had no intention to evade or avoid tax. The taxpayer did not deliberately or recklessly submit an incorrect return and made full disclosure to the DGIR. This provided sufficient grounds to set aside the penalties imposed. The DGIR should not act mechanically but instead consider all factors and circumstances of the case before imposing any penalty on the taxpayer.

- The taxpayer could not have intentionally fixed its price below the median point as alleged by the DGIR. There was no basis in law or fact for the DGIR to adjust the taxpayer's margin to the median when it was already within the arm's length interquartile range and thus, the penalty should not be imposed.

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8. Pinehill Plantations (Malaysia) Sdn Bhd & Anor v Ketua Pengarah Hasil Dalam Negeri (HC)

This was an appeal filed by the following taxpayers against the decision of the SCIT. The SCIT upheld the DGIR's assessment in agreeing with the rate of tax imposed on the sale of certain lands owned by the taxpayers.

1) Tahir, Roslan and Tasariff Sdn Bhd v KPHDN
2) Syarikat Kaum Melayu Hilir Perak Sdn Bhd v KPHDN
3) Pinehill Plantations (Malaysia) Sdn Bhd v KPHDN

Issue:

Whether the SCIT is correct in deciding that the gains from the disposal of the lands should be subjected to RPGT at the rate of 10% (instead of 5%) under Part II, Schedule 5 of the RPGTA.

Decision:

The HC upheld the decision of the SCIT and dismissed the taxpayers' appeal based on the following grounds:

- In view of Paragraph 16, Schedule 2 of the RPGTA and given the fact that the sale and purchase agreements (SPAs) are conditional contracts, the date of disposal is the date when the last of the conditions was satisfied and not the date of signing of the SPAs. The last of the conditions was, for each SPAs, fulfilled on 29 May 2019. It was only on 29 May 2019 that the tax implications in respect of the RPGTA arose. Therefore, 29 May 2019 is the date of disposal for the purpose of determining the chargeable gain from the sale of the said lands. The chargeable gain arose after the date the amendment of Paragraph (b), Section 70 of the Finance Act 2018 had become operative (i.e. 1 January 2019). The amendment of Paragraph (b), Section 70 of the Finance Act 2018 provides that where a chargeable asset is disposed of in the fifth year after the date of acquisition or thereafter, the tax rate is 10%. As such, the SCIT had applied the correct rate of 10% in regards to the disposal of chargeable assets under the SPAs. On the undisputed facts, the SCIT did not misdirect itself or commit any error of law. The SCIT's decision was made according to law.

- Section 69 of the Finance Act 2018 mandated that the liability to RPGT commences from 1 January 2019 at the rate provided in the amended Part II, Schedule 5 of the RPGTA. The provision is not enacted to be retrospective in application but is prospective in nature. The right to pay, or more appropriately, the liability to pay tax had not even arisen at the time the SPAs were executed. The liability to pay RPGT only arose when the last of the conditions was satisfied as provided under the second exception to Paragraph 16, Schedule 2 of the RPGTA. Therefore, there is no retrospective application of Section 70 of the Finance Act 2018 as submitted by the taxpayers.

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9. Director General of Inland Revenue v Sin Seng Bee Transport Sdn Bhd (HC)

HASiL has recently uploaded a case report, "Director General of Inland Revenue v Sin Seng Bee Transport Sdn Bhd (HC)" on its website.

Facts:

The taxpayer is in the business as manufacturers, importers, exporters, distributors, and dealers in agricultural produce and operators and contractors of transportation. The taxpayer bought a rubber land in 1995 (the Land) and sold the same in 2011.

The DGIR contended that the disposal of the Land falls squarely within the elements of badges of trade. Firstly, the Land was acquired for a purpose of resale at a profit. The DGIR further asserted that the dealing in lands was more profitable than the taxpayer's business in transportation and agriculture, and the reason for acquiring the Land was to resell it when it fetches a high price. Furthermore, there were also repetition of sales by the taxpayer on several lands, i.e., 11 transactions in total between the years 2007-2008. There was also an alteration to the Land to render it more saleable, as a Planning Permission to develop housing projects and industrial area on the Land was obtained in 1996. This Planning Permission was in fact an adventure in trade. It is further contended that from the beginning, the taxpayer had the intention or motive to sell the Land if the right price was offered by any purchaser. The taxpayer admitted that they did not plan to replant old rubber trees on the Land since the main objective was to sell the Land at a higher price. This evidence was extracted during cross examination and was unrebutted by the taxpayer. The learned SCIT failed to acknowledge the testimony by the taxpayer's witness that the value of the Land had increased drastically after a portion of it was acquired by the State Government to develop a school even though this evidence was also unrebutted.

The taxpayer, on the other hand, argued that, as the Land was purchased in 1995 and sold in 2011,the taxpayer had no intention to trade in the said Land, with the witness clearly stating that his father bought the Land for investment. Furthermore, the Land was not acquired in the ordinary course of trade, and it was classified as a fixed asset in the account since 1995. This clearly indicated that the Land was held for a long-term investment.

Issue:

Whether the income arising from the disposal of the Land is subjected to income tax under Section 4(a) of the ITA or RPGT under Section 3(1) of the RPGTA.

Decision:

On 1 August 2023, the HC dismissed the DGIR's appeal and upheld the decision of the SCIT which was in favour of the taxpayer. The HC held, inter alia, the Land was for a long-term investment by the taxpayer based on all the evidence adduced, and none of the elements of badges of trade existed.

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

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10. Director General of Inland Revenue v CIMB Group Holdings Bhd (HC)

HASiL has recently uploaded a case report, "Director General of Inland Revenue v CIMB Group Holdings Berhad (HC)" on its website.

Facts:

The DGIR appealed against the Deciding Order by the SCIT dated 8 July 2020 in respect of the Notices of Assessment for the YAs 2009, 2010, 2011 and 2012 dated 8 February 2017 (the Assessments) raised against CIMB Group Holdings Berhad.

The DGIR submitted that redeemable preference shares (RPS) clearly do not fall under the definition of 'ordinary shareholding' under Section 40 of the Finance Act 2007 (FA 2007) and therefore do not qualify for set-off under Section 110 of the ITA and read together with Section 51 of the FA 2007. Interest expenses incurred by the taxpayer in acquiring the shares of the taxpayer's subsidiaries and common expenses are not deductible under Section 33(1) of the ITA, Section 60FA(3)(a)(i) of the ITA and Paragraph 12B, Schedule 6 of the ITA. It was further argued that the DGIR has the power under the ITA to further apportion the common expenses to exempt dividends and disallow the same. The DGIR contended that the taxpayer was negligent in their conduct, and is, subject to Section 91(3) of the ITA. The Assessments are valid and good in law and not deemed as being time-barred. The imposition of penalty at the rate of 45% upon the taxpayer under Section 113(2) of the ITA is justified in law and on the facts.

In response, the taxpayer asserted that RPS clearly fall within the definition of "ordinary shareholding" under Section 40 of the FA 2007. It follows that tax deducted from franked dividends, paid by CIMB Bank Berhad and SBB Berhad to the taxpayer in respect of those RPS, qualifies for set-off under Section 110 of the ITA reads together with Section 51 of the FA 2007. The interest expenses and common expense incurred by the taxpayer in acquiring the shares is deductible under Section 33(1) of the ITA. The DGIR has no power under the ITA to further apportion the common expenses to exempt dividends to disallow the same. The taxpayer further argued that the Assessments are time-barred and there was no negligence on their part. The imposition of penalties on the taxpayer under Section 113(2) of the ITA is not justified in law and on the facts.

Issues:

Whether the SCIT was right in law and in facts in deciding that:

1) the RPS in CIMB Bank Berhad and SBB Berhad owned by the taxpayer fall within the definition of 'ordinary shareholding' under Section 40 of the FA 2007;

2) the tax deducted from franked dividends paid by CIMB Bank Berhad and SBB Berhad to the taxpayer in respect of those RPS qualifies for set-off under Section 110 of the ITA read together with Section 51 of the FA 2007;

3) the interest expenses incurred in acquiring the shares of the taxpayer's subsidiaries are deductible under Section 33(1) of the ITA;

4) the common expenses incurred by the taxpayer are deductible under Section 33(1) of the ITA;

5) the DGIR is not empowered to further apportion the common expenses to exempt dividends to disallow the same under the Malaysian law;

6) the Assessments are time-barred; and

7) the DGIR's imposition of penalties on the taxpayer under Section 113(2) of the ITA is incorrect in law.

Decision:

On 15 August 2023, the HC dismissed the DGIR's appeal and upheld the decision of the SCIT which was in favour of the taxpayer.

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

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Service lines / Names	Designation	E-mail	Telephone
Business Tax Compliance & Advisory			
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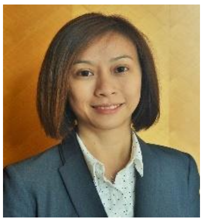

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