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Tax Espresso

Gazette Orders, HASiL Guidelines, Tax Cases and more
September 2024

Greetings from Deloitte Malaysia Tax Services

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Deloitte Malaysia
Inland Revenue Board of Malaysia

Takeaways:

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Upcoming events:

19 September 2024 – Navigating the Tax Appeal Process: Insights and Best Practices
25 October 2024 – Deloitte Tax Challenge 2024

Important deadlines:

Task	Deadline	
	30 September 2024	1 October 2024
1. 2025 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. 11th month revision of tax estimates for companies with October year-end	√	
5. Statutory filing of 2024 tax returns for companies with February year-end	√	
6. Maintenance of transfer pricing documentation for companies with February year-end	√	
7. 2024 CbCR notification for applicable entities with September year-end	√	

1. Expansion of tax incentives for BioNexus Status Company gazetted [*P.U.(A) 208/2024* and *P.U.(A) 209/2024*]

The following Amendment Orders have been gazetted on 6 August 2024 to legislate the proposed expansion of the tax incentives for BioNexus Status Company, as announced in Budget 2023. These Amendment Orders are deemed to have come into operation on 1 January 2023.

- The Income Tax (Exemption) (No. 4) Order 2023 (Amendment) Order 2024 [*P.U.(A) 208/2024*]; and
- The Income Tax (Exemption) (No. 5) Order 2023 (Amendment) Order 2024 [*P.U.(A) 209/2024*].

The tax incentives granted to a BioNexus Status Company under the Income Tax (Exemption) (No. 4) Order 2023 [*P.U.(A) 382/2023*] and the Income Tax (Exemption) (No. 5) Order 2023 [*P.U.(A) 383/2023*] (collectively 'Principal Orders') have been expanded pursuant to the above Amendment Orders. *Please refer to Deloitte Malaysia Tax Espresso – January 2024 issue for relevant details of the exemption under the Principal Orders.*

Extension of Application Period

Under the Principal Orders, the exemption is subject to an application for approval made in writing by the BioNexus Status Company and received by the Minister through the Malaysian Bioeconomy Development Corporation Sdn Bhd on or after 1 January 2019 but not later than 31 December 2022. The Amendment Orders extended the aforesaid application from 1 January 2023 until 31 December 2024.

Exemption

The Principal Orders, *inter alia*, exempt up to 70% of the statutory income of a BioNexus Status Company derived from an approved activity that is a new business or an expansion project relating to agricultural biotechnology, industrial biotechnology, or healthcare biotechnology (qualifying activity) from income tax.

The above exemption shall be either of the following:

(a) Tax exemption for 10 consecutive years of assessment (YA) for a new business or tax exemption for 5 consecutive YAs for an expansion project [*P.U.(A) 382/2023*]; or

(b) Tax exemption equivalent to the amount of qualifying capital expenditure incurred for a period of 5 consecutive years on assets used in Malaysia for the purposes of a new business or an expansion project [*P.U.(A) 383/2023*].

The income tax exemption under *P.U.(A) 382/2023* i.e., item (a) above, was increased from 70% to 100% of the statutory income, pursuant to *P.U.(A) 208/2024*.

The income tax exemption of up to 70% of the statutory income under P.U.(A) 383/2023 i.e., item (b) above, remains unchanged.

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2. HASiL – Dialogue Session between the HASiL CEO and the Malaysian Trade Associations Year 2024

The Inland Revenue Board of Malaysia (HASiL) has issued the following Questions & Answers (Q & A) on the Engagement Session webpage of its website in relation to the Dialogue Session between the HASiL CEO and the Malaysian Trade Associations Year 2024, held on 5 June 2024 at Hotel The Everly, Putrajaya:

- General tax issues, and
- e-Invoice issues.

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3. HASiL – e-Invoice Guideline (Version 3.2), e-Invoice Specific Guideline (Version 3.0) and updated Frequently Asked Questions on e-Invoice

HASiL has issued the following on the e-Invoice webpage of its website:

- e-Invoice Guideline (Version 3.2) dated 30 July 2024 which replaces the e-Invoice Guideline (Version 3.1) issued on 19 July 2024. The summary of changes is listed on page 3 of the revised guideline.

- e-Invoice Specific Guideline (Version 3.0) dated 30 July 2024 which replaces the e-Invoice Specific Guideline (Version 2.2) issued on 28 June 2024. The summary of changes is listed on page 6 of the revised guideline.

- Frequently Asked Questions (FAQ) on the implementation of e-Invoice in Malaysia updated on 19 July 2024 which replaces the FAQ issued on 28 June 2024.

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4. Technoltic Engineering Sdn Bhd v Government of Malaysia and 2 Others (COA)

HASiL recently uploaded a case report, "Technoltic Engineering Sdn Bhd v Government of Malaysia and 2 Others (COA)" on its website.

Facts:

The taxpayer filed an appeal against the decision of the High Court (HC) dismissing its judicial review application against the deciding order of the Special Commissioners of Income Tax (SCIT). The sole issue before the Court of Appeal (COA) was whether both the HC and the SCIT had committed any error of law in disallowing the extension of time to file the notice of appeal (Form Q).

The Director General of Inland Revenue (DGIR) raised an assessment against the taxpayer under Section 90(3) of the Income Tax Act 1967 (ITA) for the YAs 2009 to 2016 respectively. The taxpayer then filed the return forms (Forms C) in 2020. On 27 July 2021, the taxpayer applied for an extension of time (Form N) to file an appeal under Section 99 of the ITA. However, the DGIR rejected the application, citing that the taxpayer had failed to provide a reasonable cause for failing to file the Forms C within the time required under Section 77A of the ITA. The DGIR then forwarded the taxpayer's Form N to the SCIT for consideration, as stipulated under Section 100 of the ITA. On 15 February 2022, the SCIT rejected the taxpayer's Form N through a deciding order, which the taxpayer received on 1 March 2022. Dissatisfied with the decisions of both the SCIT and DGIR, the taxpayer filed the application for judicial review on 20 May 2022 against the Government of Malaysia (GOM), DGIR and SCIT. The HC dismissed the taxpayer's judicial review application on 30 August 2023. Hence, the present appeal before the COA.

Taxpayer's argument:

The taxpayer submitted several reasons for the delay *inter alia*, that the Notices of Assessment were served and delivered to their former tax agent, PricewaterhouseCoopers Taxation Services Sdn Bhd (PwC), rather than being personally delivered to the taxpayer, changes in their personnel and staff. The Notices of Assessment were merely assessments and not based on the taxpayer's actual income and disruptions caused by the COVID-19 pandemic.

DGIR's argument:

The DGIR argued that the assessments for the YAs 2009 to 2016 were imposed correctly under Section 90(3) of the ITA. The taxpayer was negligent for failure to submit the required Forms C under Section 77A of the ITA within the stipulated timeframe of seven months after the end of the accounting period. Furthermore, the taxpayer did not file any appeal against the Notices of Assessment within 30 days, as mandated by Section 99 of the ITA. Due to this failure, the assessments for YAs 2009 to 2016 became final and conclusive under Section 97(1)(a) of the ITA. The DGIR stated that compliance with Sections 77A, 99 and 100 of the ITA was mandatory and not procedural. The taxpayer's failure to comply with these statutory requirements could not be rectified by any subsequent actions. The taxpayer had in fact, employed a tax agent who should have advised the effect of the omission and non-compliance. Despite this, the taxpayer sought an extension of time to file an appeal via Form N, which was only submitted in July 2021. The DGIR reviewed the appeal and

found no reasonable cause for the delay ranging from 3 to 9 years for YAs 2009 to 2016. Consequently, the application was rejected and forwarded to the SCIT for consideration.

Issue:

Whether the HC and the SCIT had committed any error of law in not allowing the extension of time to file Form Q.

Decision:

The COA unanimously affirmed the decision of the HC and dismissed the taxpayer's appeal with the cost of RM15,000 to the AGC and DGIR. [*Note: In summary, the HC held that the SCIT's deciding order was not tainted with any error or unreasonableness, which rendered it amenable to judicial review. There had been no breach of natural justice as the taxpayer was afforded every opportunity to present its case to the DGIR and SCIT.]* There was no flaw in the decision-making process and the decisions of the SCIT and DGIR were made legally and within the powers granted under the ITA. The taxpayer failed to provide evidence for the delay and did not challenge the fact that the Notices of Assessment were sent to their last known address. Additionally, the taxpayer did not inform the DGIR of any changes regarding their tax agent, and PwC remained as their tax agent until 2021. Moreover, the taxpayer was a habitual defaulter, having failed to submit their tax returns for several years even prior to COVID-19 pandemic.

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

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5. Ooi Chieng Sim v DGIR (COA)

HASiL has recently uploaded a case report, "Ooi Chieng Sim v DGIR (COA)" on its website.

Facts:

The taxpayer filed a judicial review application under Order 53 of the Rules of Court 2012 against the decision of the DGIR in the Notice of Assessment for the YA 2019 and Notices of Additional Assessment for YAs 2014, 2016, 2017, and 2018 on grounds that the decision was illegal, void, unlawful, irrational, unreasonable and made without due consideration of the taxpayer's legitimate expectations or natural justice.

The HC dismissed the taxpayer's leave application and hence, this appeal, before the COA.

Taxpayer's argument:

The taxpayer argued that the assessment and additional assessments raised against the taxpayer based on the capital statement summary that had been attached to the letter dated 14 October 2020 were vague and provided neither details nor reasoning on how the final assessments were computed. In the absence of reasons, the taxpayer was unable to ascertain the accuracy of the assessment and additional assessments. The taxpayer also contended that the DGIR had acted in an unreasonable manner in his letter dated 13 October 2020 where the DGIR had given twenty-one (21) days for the taxpayer to respond before raising the assessment and additional assessments and yet, on the following day vide the decision dated 14 October 2020 had raised the assessment and additional assessments.

DGIR's argument:

The DGIR submitted that the HC was correct in dismissing the taxpayer's judicial review application at the leave stage as the taxpayer failed to demonstrate exceptional circumstances for the case to proceed to the substantive stage. The DGIR also argued that the taxpayer must satisfy the threshold test of an arguable case to succeed in the judicial review application at the leave stage where the application must not be frivolous or vexatious, and further arguments at the substantive stage are justified. Thus, the application for leave to commence judicial review must be dismissed where an alternative remedy was available for the aggrieved party.

The DGIR further argued that the ITA provided a statutory right of appeal to the SCIT. The DGIR submitted that the main issue on this case was about the tax raised based on the Capital Statement. By looking at the Capital Statement, it involved questions of facts. All the objection on the finding based on Capital Statement should be ventilated before the SCIT as the taxpayer had filed an appeal by way of Form Q on 5 April 2021.

Issue:

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

Decision:

The COA unanimously dismissed the taxpayer's appeal with the cost of RM5,000. The COA agreed with the decision made by the HC, that issues involving question of facts must be ventilated before the SCIT.

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

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6. CIMB Bank Berhad v Pemungut Duti Setem (COA)

HASiL has recently uploaded a case report, "CIMB Bank Berhad v Pemungut Duti Setem (COA)" on its website.

Facts:

The taxpayer and Air Asia Berhad (AAB) entered an International Swaps Derivatives Association (ISDA) master agreement to enter into foreign exchange and derivative transactions (transactions) by way of confirmations from time to time. The ISDA master agreement was duly stamped with fixed duty of RM10. Various amounts had become due and payable by AAB to the taxpayer under the said transactions. Due to failure to pay those outstanding amounts, AAB requested to restructure the payment of the said outstanding amounts (said amount).

The taxpayer and AAB entered into Settlement Agreement dated 18 December 2020 for the said amount to be amortised and payable over a series of instalments. The Collector of Stamp Duty (Collector) imposed ad valorem duty of RM1,337,565 and a late stamping penalty of RM66,878.25 on the Settlement Agreement. The taxpayer objected on the grounds that the Settlement Agreement is a subsidiary instrument pursuant to Section 4(3) of the Stamp Act 1949 (SA) and the stamp duty of RM1,337,565 imposed by the Collector together with the late penalty of RM66,878.25 were wrong.

Taxpayer's argument:

The taxpayer argued that the Settlement Agreement is a subsidiary or supplementary document to the ISDA master agreement, and that the settlement agreement does not fall under the category of instruments in Item 22 and Item 27, First Schedule of the SA. The taxpayer also relied on the contents of the letter dated 9 December 1999 sent by the Association of Banks in Malaysia (ABIM) to the Collector, where it was stated that the stamp duty to be imposed on any ISDA master agreement and other documents related to the derivative transaction is RM10 under Item 4, First Schedule of the SA. Alternatively, it was argued that Item 27(a)(ii), First Schedule of the SA would apply as the settlement agreement is a loan in foreign currency.

Collector's argument:

The Collector argued that Section 4(3) of the SA would not be applicable as its application was specific only to sale, lease, charge, settlement, exchange and partition. If the ISDA master agreement was the principal agreement, the Settlement Agreement would not be a subsidiary instrument under Section 4(3) as the ISDA master agreement did not fall under any of the said categories. Furthermore, even though the Settlement Agreement was termed as a 'settlement', it did not fall within the meaning of settlement under the SA. The Settlement Agreement would fall under Item 22(1)(a), First Schedule of the SA as an "instrument of any kind whatsoever", being the only or principal or primary security for any sum of money at stated periods in which the payment was for a definite and certain period and the total amount ultimately payable can be ascertained. The ISDA master agreement merely provided for the terms, conditions and rights of parties when entering the transactions. Thus, the Settlement Agreement would be an independent instrument as it created a new obligation to pay for the said amount by way of instalment. Even if ISDA master agreement was to be accepted as the principal agreement, Section 29A of the SA would be applicable as the ISDA master agreement was not stamped as a primary instrument under Item 22(1) of the First Schedule of the SA. The ABIM's letter was not law, had no force of law and not an authority to decide on the chargeability of the Settlement Agreement under the SA.

Issues:

1) Whether the Settlement Agreement was a principal instrument or a subsidiary instrument under Section 4(3) of the SA.

2) Whether the stamp duty and penalty that were imposed on the Settlement Agreement were wrong and should be dismissed.

Decision:

The COA unanimously affirmed the decision of the HC and dismissed the taxpayers' appeal with cost of RM20,000 to the collector. [*Note: In summary, the HC dismissed the taxpayer's appeal against the Collector's decision that the ISDA master agreement and Settlement Agreement were executed for different purpose and intentions. Both documents stand as a single and principal document. Therefore, the Collector did not make an error in imposing the stamp duty and penalty on the Settlement Agreement.]*

The COA agreed that since the Settlement Agreement did not fall within any of the expression of sale, lease, charge, settlement, exchange or partition, thus, Section 4(3) of the SA would not be applicable. Independently, even if the Settlement Agreement did come within Section 4(3) of the SA, it created a new payment obligation. Similarly, the Settlement Agreement was not a settlement under the SA as the word "settlement" denoted a transfer or disposition of property, for example to a trustee to constitute a trust or an inter-vivos transfer of property.

> [*Below is an extract of the definition of the term "settlement" under Section 2 of the SA for easy reference:*
>
> *"settlement" means any non-testamentary disposition in writing whether made voluntarily or upon a good or valuable consideration other than a bona fide pecuniary consideration whereby any definite and certain property is settled or agreed to be settled in any manner for any purpose whatsoever.]*

On the applicability of Item 22 and Item 27 of the First Schedule of the SA, the COA held that the Settlement Agreement would come within Paragraph (b) of the definition of bond in Section 2 of the SA but the words "instrument of any kind whatsoever" are also sufficiently broad to cover the Settlement Agreement. Thus, Item 22(1)(a) of the SA would be applicable. The Collector was not bound by the ABIM's letter, and the liability would remain unaffected under the SA.

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7. CIMB Group Sdn Bhd v DGIR (HC)

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

Facts:

The taxpayer obtained loans to finance the acquisition of shares in its local and Indonesian companies. The taxpayer claimed a deduction of the loan interest under Section 33(1) of the ITA. The DGIR disallowed the interest expense claimed under Section 33(1) of the ITA and raised Notices of Assessment for the YAs 2008 to 2010, all dated 17 March 2017. The taxpayer appealed against the assessment by way of Form Q which was heard before the SCIT. The taxpayer's appeal was dismissed by the SCIT. Aggrieved with the SCIT's decision, the taxpayer then appealed to the HC.

Taxpayer's argument:

The taxpayer contended that there was no negligence on its part since the taxpayer took external and independent professional advice from big and reputable tax agent. The taxpayer's tax returns were also filed on time and the taxpayer had given full cooperation to the DGIR during the audit exercise. The taxpayer strongly relied on the decided cases of *Multi-Purpose Credit Sdn Bhd [2002] 1 MLJ 22, Kok Fai Yin (2014) MSTC 7 926 and Kompleks Tanjong Malim [Mahkamah Rayuan Sivil No. W-01(A)-366-10/2017]* where the courts held that the DGIR did not have the power to apportion the taxpayer's interest expense into allowable and non-allowable portions and as such, the taxpayer's claim of interest expense must be allowed in full under Section 33(1) of the ITA. The dividend income received from CIMB Niaga in Indonesia should be treated as one source of dividend income, regardless of whether it is from the taxpayer's local company or the taxpayer's company outside Malaysia. The DGIR had also acted mechanically and failed to exercise his discretion on the imposition of penalty which was not justified in law and in facts.

DGIR's argument:

The DGIR asserted that the taxpayer had clearly acted negligently by claiming interest expense under Section 33(1) of the ITA where it was clear that the dividend income received by the taxpayer was exempted under Paragraph 28, Schedule 6 of the ITA and Paragraphs 5(3) and 5(6), Schedule 7A of the ITA. The taxpayer also failed to show that the purchase of the RM2 shares needs to be financed. The cases referred to by the taxpayer especially *Multi-Purpose (supra)* can be easily distinguished with the present case since the facts were different. Any expense incurred by the taxpayer must fulfill the requirements under Section 33(1) of the ITA in order to be allowable for deduction. The interest expense could not be allowable for deduction because the foreign source dividend income which had been received by the taxpayer from outside Malaysia was clearly exempted from tax under Paragraph 28, Schedule 6 of the ITA. The other dividend income was also exempted under Paragraphs 5(3) and 5(6), Schedule 7A of the ITA. The DGIR had also relied on the case of *Federal Furniture (2016) MSTC 30-120* to support his argument.

Issue:

Whether the interest expense incurred in respect of the loans obtained by the taxpayer to finance the acquisition of shares in its local and foreign companies is deductible under Section 33(1) of the ITA.

Decision:

On 12 August 2024, the HC allowed the taxpayer's appeal with costs and reversed the decision of the SCIT.

[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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8. Hovid Berhad v DGIR (HC)

HASiL has recently uploaded a case report, "Hovid Berhad v DGIR (HC)" on its website.

Facts:

The taxpayer's principal activity is manufacturing of pharmaceutical and herbal products. The taxpayer had carried out research and development (R&D) activities and has been claiming double deduction on research expenditure incurred under Section 34A of the ITA. The taxpayer claimed for double deduction under Section 34A of the ITA for the operating expenses incurred in respect of its own R&D activities for the YAs 2006, 2007, 2008 and 2009. The taxpayer also claimed for double deduction under Section 34B of the ITA for YA 2010 for the service fees paid to Hovid Research Sdn Bhd (HR) which was an approved research company by the Malaysian Investment Development Authority (MIDA) for the purposes of Section 34B of the ITA. However, on 3 June 2011, the MIDA had withdrawn HR's status as an approved R&D company. Upon audit, the DGIR took the view that the taxpayer did not qualify for the double deductions made under Sections 34A and 34B of the ITA respectively. Hence, the DGIR raised the Notices of Additional Assessment together with the penalties under Section 113(2) of the ITA (all dated 31 December 2013) for the YAs 2006 to 2010. The taxpayer appealed against the Notices of Additional Assessment to the SCIT and the appeal was dismissed on 24 June 2019. The taxpayer then appealed to the HC.

Taxpayer's argument:

Section 34A of the ITA – The taxpayer argued that it was not required to obtain annual approval for all on-going R&D projects that have been approved in the commencement year until after the period of three years. As long as an approval on a R&D project has been obtained by the taxpayer, the taxpayer was eligible to claim the double deduction for up to three years. The taxpayer also sought confirmation from the DGIR's officer (Officer) who purportedly confirmed that no annual approval is required.

Section 34B of the ITA – The taxpayer argued that they had a legitimate expectation that HR had been granted the status of approved research company and argued that the withdrawal of the HR's status could not be interpreted to be effective *ab initio* (from the beginning).

DGIR's argument:

Section 34A of the ITA – The DGIR contended that, based on the clear wordings as enshrined under Section 34A of the ITA, the said approval must first be obtained by the taxpayer from the DGIR before the taxpayer can claim for double deductions on research expenditure. The statement purportedly made by the Officer is merely hearsay and should be inadmissible as during the trial stage, the Officer was not called to testify before the SCIT.

Section 34B of the ITA – The DGIR argued that the aforesaid withdrawal letter from MIDA has given the effect that HR has never been given the status of an approved R&D company. As such, the taxpayer was not entitled to claim for double deduction.

Issues:

1) Whether the taxpayer is eligible to claim double deduction under Section 34A of the ITA for the operating expenses incurred in respect of its own R&D activities for the YAs 2006, 2007, 2008 and 2009.

2) Whether the taxpayer is eligible to claim double deduction under Section 34B of the ITA for YA 2010 in respect of the service fees paid to HR.

Decision:

On the application of Section 34A of the ITA, the HC held that the certificate of approval is only valid for a YA. The legitimate expectation did not arise as the evidence to support this argument was merely hearsay. The Officer was not called during trial before the SCIT. Whereas on the application of Section 34B of the ITA, the HC held that if the taxpayer is aggrieved with MIDA's decision to withdraw HR's status as an R&D company, the remedy lay elsewhere. The inference that can be made on MIDA's withdrawal letter was that the R&D status should not have been granted in the first place. The HC also affirmed the SCIT's finding that the taxpayer had committed negligence in claiming double deduction for YA 2006 and the penalty imposed by the DGIR under Section 113(2) of the ITA was also justified. The HC dismissed the taxpayer's appeal with costs and upheld the Deciding Order of the SCIT.

[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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9. EFTB v DGIR (SCIT)

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

Facts:

The taxpayer's principal activities are management of general takaful, family takaful and takaful investment-linked business. The taxpayer was of the opinion that the profit payment on Tier 2 Subordinated Bond and Hibah incurred and paid from Shareholders' Fund to Annuity Fund were allowable under Section 33 of the ITA. The said expenses were not claimed in the tax return for YA 2019 and subsequently, the taxpayer filed an appeal to the SCIT upon submission of its return.

Taxpayer's argument:

It was the taxpayer's contention that the profit payment and Hibah incurred by the taxpayer were allowable expenses under the general provision of Section 33(1) of the ITA. Sections 60AA(9)(b) of the ITA did not preclude the application of Section 33(1) of the ITA as Section 33(1) of the ITA can be applied to all businesses and the profit payment and Hibah fulfilled the requirement under Section 33(1)(a) of the ITA. There was no prohibition of such deduction under Section 39 of the ITA. The expenses were incurred to comply with the Bank Negara requirement and to strengthen the taxpayer's financial position.

DGIR's argument:

The DGIR submitted that the profit payment and Hibah incurred by the taxpayer were not deductible under Sections 33(1) and 60AA(9)(b) of the ITA. There was a specific provision of Section 60AA of the ITA inserted vide Finance Act 2007 [*Act 683*] which had effect for the YA 2008 and subsequent YAs with the purpose to comply with the *Syariah* requirement and to provide for a specific provision to determine the taxation of takaful business of the taxpayer. Therefore, Section 33 of the ITA is not applicable to the taxpayer since there is a specific provision which is Section 60AA(9)(b) of the ITA. Compliance with the requirement set by Bank Negara has no bearing in tax treatment. The principle of *generalia specialibus non derogant* (i.e., a specific statutory provision should override a general provision) should apply.

The DGIR also submitted that the same issue of profit payment was decided by the SCIT in *Etiqa Family Takaful Berhad PKCP(R) 453/2016, PKCP(R) 276/2017, PKCP(R) 1026/2017, MOF.PKCP.700/7/331 & MOF.PKCP.700.7/1/687 (2020)* for the YA 2014 to YA 2018 on 2 September 2022 in which the SCIT dismissed the appeal and held that the profit payments incurred on the Tier 2 capital subordinated bond cannot be allowed under Sections 33 and 60AA(9)(b) of the ITA. It was brought to appeal to the HC vide WA-14-21-09/2022 and the decision of SCIT was affirmed by YA Dato' Ahmad Kamal bin Md Shahid on 8 February 2024. [*Please refer to Deloitte Malaysia Tax Espresso – April 2024 issue for the summary of the case at HC level*.]

Issue:

Whether the profit payment on Tier 2 Subordinated Bond and Hibah incurred and paid from Shareholders' Fund to Annuity Fund were deductible under Section 33(1) of the ITA.

Decision:

On 12 July 2024, the SCIT dismissed the taxpayer's appeal and held that the taxpayer was not entitled to claim the profit payment on Tier 2 Capital Subordinated Bond and Hibah paid from Shareholders' Fund to Annuity Fund under Section 33(1) of the ITA because there was a specific provision for takaful business. Both expenses were also not deductible because there were not listed under allowable expenses under Section 60AA(9)(b) of the ITA. As such, the Notice of Assessment for the YA 2019 raised by the DGIR against the taxpayer was justified and confirmed.

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

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10. RBH v KPHDN (SCIT)

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

Facts:

On 23 February 2011, the taxpayer purchased a plot of land in Mukim Hulu Langat, Selangor at the price of RM312,000. The taxpayer had also acquired a piece of land in Mukim Kota Lama Kanan, Kuala Kangsar, Perak from the taxpayer's mother by way of love and affection on 23 February 2011. The taxpayer then changed the category of land use from 'agricultural' to 'building', and subdivided the land in Mukim Kota Lama Kanan into seven (7) lots. In 2017, the taxpayer disposed of five (5) lots of land in Mukim Kota Lama Kanan at a total price of RM305,000 and the land in Mukim Hulu Langat at a price of RM1,250,000 (the said land). Although the said land has been disposed of after a holding period of six (6) years and is no longer subject to real property gains tax, the DGIR is of the opinion that the disposal is a trade receipt under Section 4(a) of the ITA. A notice of additional assessment with penalty under Section 113(2) of the ITA was raised by DGIR for the YA 2017 on 2 September 2020 with a tax payable of RM354,655.38.

Taxpayer's argument:

The taxpayer argued that the original intention of acquiring the said land was for the purpose of giving it to his child and not for commercial purposes as argued by the DGIR. However, the taxpayer decided to sell the land because he no longer resides in the area and his parents have moved to an urban area. The taxpayer also did not make any improvement on the said land and only performed land maintenance such as cleaning and land survey. There was no intention to trade during the holding period of the said land. The taxpayer also did not use the services of agents or real estate brokers and did not advertise for the disposal of the said land.

DGIR's argument:

The DGIR argued that the taxpayer has expertise in the real estate industry because the taxpayer is a registered real estate consultant with the real estate company, NPRSB. The taxpayer has used his skills and knowledge in the real estate industry to improve on the land and to increase the value of the land. The taxpayer has disposed of the land in an orderly manner where the disposal was made after a six (6)-year holding period. The DGIR also argued that the taxpayer did not receive any rental income from the said land. During the audit process, the taxpayer has admitted to the DGIR that the profit from the disposal of the said land will be used as capital to start a real estate business. The DGIR also argued that the taxpayer's action of claiming legal expenses and maintenance costs indicates that the disposal of the land was for commercial purpose and not for investment purpose.

Issue:

Whether the gain from disposal of the said land is taxable under Section 4(a) of the ITA.

Decision:

The SCIT had on 26 July 2024 dismissed the taxpayer's appeal and held that the taxpayer failed to prove that the additional assessment raised by DGIR for YA 2017 was incorrect and excessive in accordance with Paragraph 13 of Schedule 5 of the ITA.

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

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		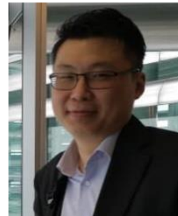		
Tan Eng Yew	Senthuran Elalingam	Kelvin Yee Rung Hua	Mohd Fariz Mohd Faruk	Subhabrata Dasgupta
Philip Yeoh	Gagan Deep Nagpal	Vrushang Sheth	Tan Wei Chuan	Toh Hong Peir
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Chandran TS Ramasamy

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Nicholas Lee Pak Wei

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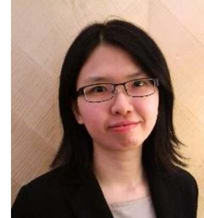
Tan Chia Woon

Wong Yu Sann

Anil Kumar Gupta

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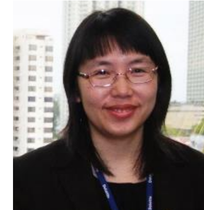
Au Yeong Pui Nee

Monica Liew

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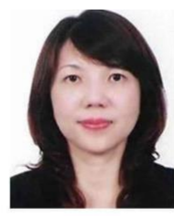
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