DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
[RAYUAN SIVIL NO: WA-14-8-04/2020]

ANTATA

TRANSOCEAN DRILLING SDN BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

KES DINYATAKAN OLEH PESURUHJAYA KHAS CUKAI PENDAPATAN
BAGI PENDAPAT MAHKAMAH TINGGI
MENURUT PERENGGAN 34 JADUAL 5
AKTA CUKAI PENDAPATAN 1967
DALAM PERKARA
PESURUHJAYA KHAS CUKAI PENDAPATAN
RAYUAN NO. PKCP(R) 92/2016
RAYUAN NO. PKCP(R) 93/2016

ANTATA

TRANSOCEAN DRILLING SDN BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

Judgment

Introduction

[1] This is an appeal by the Appellant by way of Case Stated against the Deciding Order of the Special Commissioners of Income Tax **(SCIT)** dated 18.5.2018 pursuant to paragraph 34 of Schedule 5 of the Income Tax Act 1967 **(ITA).**

[2] The SCIT had unanimously disallowed the Appellant's claim and/or appeal against the imposition of penalties by the Respondent on the Appellant for years of Assessment (YAs) 2011 and 2012.

[3] The Appellant contends that the SCIT had erred in their decision and hence, the present appeal.

[4] After the hearing, I allowed the Appellant's appeal in Enclosure 1. I will now set out the grounds of my judgment.

Background Facts

[5] The facts agreed by both parties can be found in paragraph 2 on pages 2 to 4 of the Case Stated and are as follows

(i) The Appellant is a company incorporated in Malaysia with its registered office address at Level 7, Menara Milenium, Jalan Damanlela, Pusat Bandar Damansara, Damansara Heights, 50490 Kuala Lumpur.

(ii) The Appellant's principal activity is to provide contract drilling services in the petroleum industry.

(iii) On 15.8.2012 and 15.8.2013, the Appellant's tax agent, PricewaterhouseCoopers Taxation Services Sdn Bhd **(PwC)**

submitted its tax returns for the YAs 2011 and 2012 respectively based on its management accounts.

(iv) The directors' report and audited financial statements (audited accounts) for the financial years 2011 and 2012 were signed by the auditor of the Appellant, Messrs Ernst & Young **(EY)** on the following dates:

No.	**Financial Year**	**Date the audited account being signed**
1	2011	13.9.2012
2	2012	28.6.2013

(v) As the audited account for YA 2011 was only signed on 13.9.2012 after the tax return was submitted on 15.8.2012, it was not possible for the Appellant's tax agent, PwC to file the tax return for YA 2011 based on audited account.

(vi) On 13.8.2014, the Appellant revised its tax returns for the YAs 2011 and 2012 based on its audited accounts.

(vii) The revised tax returns filed by the Appellant for YAs 2011 and 2012 on 13.8.2014 has the following impact on the tax liability of the Appellant:

YA	**Tax liability based on original return (RM)**	**Tax liability based on revised return (RM)**	**Difference in tax liability (RM)**
2011	**6,975,613.00**	**7,438,054.25**	**-462,441.25**
2012	**3,935,481.50**	**3,148,098.25**	**+787,383.25**
		Total	**RM324,942.00**

(viii) For YA 2011, the Appellant had a shortfall of RM462.441.25. However, for YA 2012, the Appellant had overpaid tax for RM787,383.25. Accordingly, the net effect was that the Appellant still overpaid an additional amounting to RM324,942.00.

(ix) Vide the letter dated 5.9.2014, the Respondent requested from the Appellant a list of supporting documents in relation to YAs 2011 and 2012 for the purpose of a desk audit.

(x) Vide the letter dated 24.9.2014, the Appellant furnished the supporting documents as requested.

(xi) On 25.8.2015, the Respondent raised notices of assessment for the YAs 2011 and 2012.

(xii) The Respondent imposed the following penalty pursuant to Section 112(3) of the ITA:

YA	**Tax liability based on original return (RM)**	**Revised tax liability (RM)**	**% of Penalty impose d (RM)**	**Penalty amount (RM)**
2011	**6,975,613**	**7,438,054.25**	**25%**	**1,859,513. 56**
2012	**3,935,481.50**	**3,148,098.25**	**20%**	**629,619.65**

(xiii) On 23.9.2015, the Appellant filed notices of appeal (i.e. Form Q) dated 21.9.2015 for the YA 2011 and 2012.

(xiv) The SCIT registered the above matter as Rayuan No. PKCP (R) 92/2016 and Rayuan No. PKCP (R) 93/2016.

(xv) In filing the agreed issues to be tried, both parties agreed that the Respondent raised notices of assessment by

rejecting the tax returns furnished on 15.8.2012 and 15.8.2013 based on management accounts.

(xvi) Consequently, the Respondent treated the date the Appellant filed the revised tax returns for YAs 2011 and 2012 (i.e. 13.8.2014) as the date tax returns for YAs 2011 and 2012 were filed. The Respondent treated the tax filed on 15.8.2012 and 15.8.2013 as if it had never been filed by the Appellant. On this basis, the Respondent raised notices of assessment for YAs 2011 and 2012 and imposed late submission penalty under Section 112(3) of the ITA.

[6] The SCIT in its Deciding Order dated 18.5.2018 unanimously dismissed the appeal by the Appellant. The Deciding Order (see pages 48 and 49 of the Case Stated) reads as follows:-

"RAYUAN INI TELAH dibicarakan di Putrajaya pada 3 April 2018 dan ditetapkan untuk keputusan pada hari ini dalam kehadiran Cik Heng Jia, Peguam bela dan peguam cara bagi pihak Perayu dan Puan Farren Eva binti Daud, Peguam Hasil, Lembaga Hasil Dalam Negeri bagi pihak Responden;

ADALAH DIPUTUSKAN SECARA SEBULAT SUARA bahwa Responden betul di sisi undang-undang dalam menolak Borang Nyata Cukai Pendapatan Perayu bagi tahun taksiran 2011 dan 2012 yang difaiikan berdasarkan akaun pengurusan Perayu;

DAN Responden telah mengenakan penalti dengan betul ke atas Perayu di bawah subsekyen 112(3) Akta Cukai Pendapatan 1967;

MAKA DENGAN INI ADALAH DIPUTUSKAN SECARA SEBULAT SUARA bahawa rayuan Perayu ditolak;

DAN DIPERINTAHKAN SELANJUTNYA bahawa Notis Taksiran bertarikh 25 Ogos 2015 bagi tahun taksiran 2011 dan 2012 yang berkaitan dengan rayuan ini dikekalkan."

[7] The issues for the determination by the SCIT were as follows:

(i) **Issue 1: Rejection of Tax Returns**

Whether the Respondent is right in law in rejecting the Appellant's tax returns for YAs 2011 and 2012 which were filed based on the Appellant's management accounts?

(ii) **Issue 2: Penalty**

Whether the Respondent had rightly imposed penalty pursuant to Section 112(3) of the ITA?

The Law

[8] It is trite law that a decision of SCIT can be set aside if the decision is tainted with the error or misconception of law or the decision is not supported by the evidence before the SCIT.

[9] This principle of law has been succinctly explained in the case of *Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541; [1994] 1 MLRA 262; [1994] 2 AMR 1735; [1994] 2 MLJ 713**,** in the following manner:

"First of all, it would be pertinent to say that in consideration of this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v. Bairstow* and Harrison, regarding **the duty of the court when hearing appeals from commissioners in tax cases.** It will be recalled that in that case what Lord Radcliffe said (at pp 35-36) was this:

'I think that the true position of the court on all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being

erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination, I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. **When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous on point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.** It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as those many of the facts are likely to be neutral in themselves, and only to take their color from the combination of circumstances in which they are found to occur'.

In *Chua Lip Kong v. Director-General of Inland Revenue, Lord Diplock* when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to

the observations of Lord Radcliffe aforesaid in the following terms:

'.... It is **plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law.** Whichever way it is looked at, it falls within the well-known principles laid down by *Viscount Radcliffe in Edwards v. Bairstow*. **It is a conclusion or decision of the special commissioners which the High Court was entitled to the ought to have set aside',**

And, in *Lim Foo Yong Sdn Bhd v. Comptroller-General* of Inland Revenue, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners. Here is what his Lordship said [at p 169]:

'The special commissioners are, of course, as the Federal court rightly observed, the judges of fact, but in finding the facts and drawing interferences of secondary fact from them, they must not misdirect themselves and they **must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions'."**

(emphasis added)

[10] Further guidance can be gleaned from the decision of the Federal Court in *I Investment Ltd v. Comptroller General of Inland Revenue* [1975] 1 MLRA 669; [1975] 2 MLJ 208 where Raja Azlan Shah FCJ (as the late Royal Highness then was) held:-

[28] "It has been said more than once that when we come to deal with income tax cases, **we must look at all the surrounding circumstances,** not for the purpose of considering what one's own conclusion might be, but for the purpose of seeing, in fact, whether there is evidence both ways - whether there is evidence upon which the Special Commissioners could arrive at their conclusion "

(emphasis added)

[11] Further the then Supreme Court in the case of *Director-General of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd.* [1990] 2 CLJ 160; [1990] 1 MLRA 373; [1990] 2 MLJ 415 **at 419** held as follows:-

"It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967 (paras 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and then to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore, conclusive. In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in *Griffiths v. JP Harrison (Watford) Ltd* at p 916.

'Now the powers of the High Court on an appeal are very limited. **The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is "erroneous in point of law'.** Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained

by them. **It is not sufficient that the judge would himself have come to different conclusion.** Reasonable people on the same facts may reasonably come to different conclusions; and often do. Juries do. So, do judges. And are they not all reasonable men? **But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere'.**

A court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see *Edwards v. Bairstow, Director-General of Inland Revenue v. LCW* at p 251 and *Kota Kinabalu Industries Sdn Bhd v. Director-General of Inland Revenue* at p 190)."

(emphasis added)

[12] Aside from this, the finding of facts by the SCIT is conclusive and as such an appeal against its decision is limited to question of law. This is clearly provided under paragraph 34, Schedule 5 of the ITA which states:

"34. Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to paragraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal."

[13] The Court also has to be remindful of the caution made by the Court of Appeal in *Kenny Heights Developments Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923; [2015] 4 MLRA 114; [2015] 4 MLJ 487; [2015] 3 AMR 205 where it had stated as follows:-

> "[24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialized bodies such as SCIT. **The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance. It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.**
>
> [25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. **Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT.** (see *Lower Perak Co- operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri,* [1994] 3 CLJ 541; [1994] 2 MLJ 713; [1994] 2 AMR 1735; [1994] 1 MLRA 262).

(emphasis added)

The decision of the Court

Whether the Respondent is right in law in rejecting the Appellant's tax return for YAs 2011 and 2012 which were filed based on the Appellant's management accounts?

[14] The relevant legislation in force for YAs 2011 and 2012 are reproduced below.

[15] Section 77A of the ITA states:

"(1) **Every company,** trust body or co-operative society **shall** for each year of assessment **furnish to the Director General a return in the prescribed form** within seven months from the date following the close of the accounting period which constitutes the basis period for the year of assessment.

(2) .....

(3) For the purposes of **this section,** a return for a year of assessment shall

a. specify the chargeable income and the amount of tax payable (if any) on that chargeable income for that year; and

b. contain such **particulars** as may be **required** by the Director."

(emphasis added)

[16] However, with effect from YA 2014, a new subsection 77A(4) was added by section 21 (b) of Finance Act 2014 which, for the first time, imposed a statutory requirement to submit tax returns on audited accounts:

"(4) The return furnished by a company under this section shall be **based on accounts audited** by a professional accountant, together with a report made by that accountant which shall contain, in so far as they are relevant, the matters set out in subsections 174(1) and (2) of the Companies Act 1965."

(emphasis added)

[17] The relevant Explanatory Note in the Finance Bill 2014 states:

> "Clause 21 further seeks to insert a **new subsection 77A(4) into Act** 53 **to provide that a company must submit its return based on audited accounts** prepared by a professional accountant.
>
> These amendments have **effect for the year of assessment 2014** and subsequent year of assessment."

(emphasis added)

[18] Section 112 of the ITA states:

"(1) Any person who **makes default in furnishing a return in accordance with subsection 77(1) or 77A(1)** or in giving a notice in accordance with subsection 77(3) shall, if he does so without reasonable excuse, be guilty of an offence and shall, on conviction, be liable to a fine of not less than two hundred ringgit and not more than two thousand ringgit or to imprisonment for a term not exceeding six months or to both.

(2) ....

(2A) ....

(3) Where in relation to a year of assessment a person makes default in furnishing a return in accordance with subsection

77(1) or 77A(1) or in giving a notice in accordance with subsection 77(3) and no prosecution under subsection (1) has been instituted in relation to that default -

(a) the Director General may require that person to pay a penalty equal to treble the amount of the tax which, before any set-off, repayment or relief under this Act, is payable for that year, and

(b) if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to the charged on the same with an offence under subsection (1)."

(4) ....

(emphasis added)

[19] Section 113(2) of the ITA states:

"(2) Where a person -

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person, then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay **a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information** or which would have been undercharged if the return or

information had been accepted as correct; and, if that person says that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1)."

(emphasis added)

[20] At the material time, there was no offence under the ITA for non-compliance of section 77A(3)(b). However, with effect from 31.12.2015, section 120(1)(h) was introduced by section 20(c) Finance Act 2015 to remedy this *lacuna* in the law. Section 120(1)(h) states:

"(1) Any person who without reasonable excuse–

.....

(h) fails to furnish the correct particulars as required by the Director General **under paragraph 77(4)(b) or 77A(3)(b);...**

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than two hundred ringgit and not more than two thousand ringgit or to imprisonment for a term not exceeding six months or to both."

[21] The relevant Explanatory Note in the Finance Bill 2014 is as follows:-

"17. Subclause 20(c) seeks to insert a new paragraph 120(1)(h) into Act 53 to provide that the **failure to furnish correct particulars as required by the Director General** under paragraph 77(4)(b) or 77A(3)(b) of Act 53 **shall be an offence under that section.**

This amendment comes into operation on the coming into operation of this Act", (emphasis added)

[22] Having perused the grounds of judgment of the SCIT, I am of the view that the SCIT had erred in holding that section 112(3) of the ITA applies to any non-compliance with section 77A(3)(b) of the ITA. Non-compliance with section 77{3)(b) of the ITA was only penalised with effect from 31.12.2015 under section 120(1)(h) of the ITA.

[23] It is to be noted that a breach of section 77A(1) of the ITA entails a criminal sanction under section 112(1) of the ITA. It is only in cases where no prosecution is brought that a civil penalty can be imposed by the Respondent under section 112(3) of the ITA.

[24] It is trite that a penal statute should be strictly construed in favour of the subject. Therefore, since section 112(3) of the ITA being premised upon the commission of a criminal offence under section 112(1) of the ITA and which imposes penalties, it should be strictly interpreted.

[25] In *Liew Sai Wah v. PP* [1968] 1 MLRA 641; [1968] 2 MLJ 1**,** the Privy Council through the speaking judgment of Viscount Dilhorne J quoted the following passage from Halsbury Laws of England as foliows:-

> "It is a general rule that **penal enactments are to be construed strictly and not extended beyond their clear meaning.** At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, **there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of doubt."**

(emphasis added)

(See *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1993] 1 MLRA 512; [1994] 1 MLJ 99; [1993] 2 AMR 3581)

[26] Therefore, it is my view that based on the scheme of the ITA and language of sections 112(3), 113, 114 & 120(h), it is clear that the Respondent could only impose a penalty under section 112(3) for breach of section 77A(1) and not section 77A(3) or section 77B(1) &(2).

[27] Upon reading section 77A(1) of the ITA, it is clear that section 77A(1) only requires the taxpayers to:-

a. Furnish tax return to the Respondent in the prescribed form; and

b. Furnish the tax return within the prescribed timeline.

[28] Having perused the evidence produced before this Court, i am of the view that the Appellant had fully complied with section 77A(1) of the ITA when:-

a. the SCIT conceded in paragraph 10.3 (iv) of the Case Stated that PwC filed the tax returns for YA 2011 on 15.08.2012 and YA 2012 on 15.08.2013 through e-filing and both returns were filed within the extended time period allowed by the Respondent; and

b. it is not disputed that in filing the tax returns, PwC used the electronic Form C prescribed by the Respondent.

[29] Further, I find that the SCIT's decision is not premised upon finding of a default in complying with section 77A(1). Instead, the SCIT's decision was based entirely upon finding of a default in section 77A(1)(3)(b) and section 77B(1)&(2).

[30] Further, I also find that the SCIT considered irrelevant factors, namely that the Revised Returns were filed by the Appellant beyond the statutory prescribed time limit under section 77B(1)&(2) of the ITA. I view that a breach of section 77B(1) & (2) of the ITA does not warrant a penalty under section 112(3), which only penalises a default in section 77A(1) of the ITA.

[31] Therefore, premised on the above, it is my judgment that the Respondent has no power to impose penalties under section 112(3) of the ITA where there is no default committed by the Appellant under section 77A(1) of the ITA.

Was there a legal requirement to file tax return based on audited accounts before YA 2014

[32] Upon perusal of the SCIT grounds of judgment, it is not disputed that the SCIT agreed that

a. at the material time (YAs 2011 & 2012), there was no express provision in the ITA that required taxpayers to file tax returns based on accounts audited by professional accountant; and

b. this was introduced with effect from YA 2014.

[33] However, at paragraphs 10.8-10.14 of the Case Stated, the SCIT held that paragraph 2(B) of the Accompanying Notes (Nota Iringan) and the "Reminder" (Peringatan) in the Form C, which reminds taxpayer to compute taxes based on audited account, has imposed a legal requirement.

[34] The implication of this ruling is that the Respondent could by the mere act of issuing Nota Iringan and "Peringatan", create a criminal offence under section 112(1) of the ITA.

[35] I am of the view that the SCIT erred in holding that the enactment of section 77A(4) of the ITA was intended only to state clearly, the pre- existing legal requirement to file tax returns based on audited account.

[36] I find that section 77A(4) of the ITA which required returns furnished by a company under section 77A to be based on audited account was only inserted by section 21(b) of the Finance Act 2014 with effect from YA 2014 and subsequent YAs.

[37] If the pre-amended section 77A of the ITA had already required a tax return filed under s.77A to be based on audited account, as contended by the SCIT, then it begs the question why the Parliament had to enact section 77A(4).

[38] It is an established rule of interpretation that Parliament does not act in vain. The Federal Court in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 5 AMR 585; [2006] 6 MLJ 97; [2006] 2 MLRA 61 held that the legislative is deemed not to waste its words or to say anything in vain.

[39] Section 77A(3)(a) of the ITA only requires that a return for a year of assessment shall specify:

a. the chargeable income; and

b. the amount of tax payable (if any) on that chargeable income for that year.

[40] Section 77A(3)(a) of the ITA does not require the Appellant to specify chargeable income based on audited accounts.

[41] Therefore, it is my view that any requirement for the use of audited accounts in the preparation of tax returns, bearing criminal consequences, should be specified in the legislation, not under the Nota Iringan and the Peringatan of Form C.

[42] It is my view that a statute should be read as a whole and construed with reference to other clauses of the Act to give a harmonious and consistent interpretation.

(See *Projek Lebuhraya Utara-Selatan Bhd v. Permas Forwarding Agency Sdn Bhd* [2014] 2 MLJ 893; [2013] MLRAU 447; [2014] 3 AMR 176)**.**

[43] It is my judgment that reading sections 77A, 112 and 120 of the ITA holistically, the logical inference to be drawn is that there was no provision under the ITA that:

a. requires tax returns to be filed based on audited accounts before section 77A(4) of the ITA came into force in 2014; and

b. penalises the breach of section 77(1)(b) before section 120(1)(h) came into force in 2015.

[44] In the instant case, I find that although the Accompany Notes and Reminder to Form C for YAs 2011 and 2012 advised taxpayers to file their tax returns based on audited accounts, it was merely a best practice or a guide which had not been made mandatory by the ITA at the material time.

[45] Furthermore, it must be noted that a guideline and internal ruling by the IRB merely acts as a guideline and is not legally binding.

(See *Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformers Manufacturer Sdn Bhd* [2012] MSTC 30-039 **and** *Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121; [2006] 1 MLRA 40; [2006] 2 MLJ 498)

Particulars in Tax Return

[46] Further, I am of the view that the word "particulars" in section 77A(3)(b) of the ITA does not refer to the Respondent's reminder under paragraph 2(B) of the Accompanying Notes (Nota lringan) to taxpayers. The word "particulars" refers to the "details" required to be declared by taxpayer when filing a tax return.

[47] In this case, the dictionary meaning of the word "particulars" and "details" are in fact synonymous, and in ordinary parlance convey the same meaning, see Advanced Law Lexicon by P Ramanatha lyar (3rd Edition 2005).

[48] The word "particulars" is also defined in the New Shorter Oxford English Dictionary (Volume 2 N-Z) as: "....a detail, an item, a feature, a factor; in pi., items or details of information; information as to details; a detailed account...:. The word "detail" is defined in The New Shorter Oxford English Dictionary (Volume 1 A-M) as: "relate or describe minutely; give particulars of, itemize."

[49] The ordinary meaning provided by these dictionaries is consistent with the Bahasa Malaysia version which translates the word "particulars" as "butir-butir".

[50] Therefore, it is clear that the particulars that are required by the Director General to be contained in a tax return pursuant to section 77A(3)(b) of the ITA is a separate matter from the requirement that the tax return should be filed and computed based on audited account.

[51] Section 77A(3)(b) of the ITA states that a return for a YA shall contain such particulars as may be required by the Director General and not "shall be prepared using audited account" or "shall be computed using audited account".

[52] To me, Nota Iringan of the Form C is a guideline issued by the Respondent for taxpayer to compute their tax returns. It has no force of law and does not fall within the ambit of section 77A(3)(b) of the ITA.

[53] Based on the above, it is my judgment that the SCiT erred in extending the meaning of the word "particulars" to include conditions/instructions stated in the Reminder and Nota Iringan of the Respondent's Form C.

Whether the Respondent had rightly imposed the penalty pursuant to section 112(3) of the ITA

[54] The Respondent contends that the penalties were imposed after taking into account the merits of the case.

[55] In the instant, I am of the view that the Respondent should have explained why penalties were imposed:-

a. for YA 2012, even though the Appellant had overpaid taxes by RM 787,383.25; and

b. for YA 2011, why penalties were not imposed only on the shortfall in taxes.

[56] However, I noticed that the Respondent did not adduce any evidence on its exercise of discretion. Instead, explanations were only given through written and oral submissions from the bar table. With respect, I view that deficiencies in evidence from the witnesses cannot be rectified by counsel giving evidence from the bar table.

[57] It may be that in some cases, the rationale for imposition of a penalty would be self-evident. For example, one could understand a decision to impose the 25% penalty on the shortfall in taxes (RM 462,441.25) for YA 2011.

[58] However, where the penalties have been imposed on taxes already paid, and one of the agreed issues (no 2) expressly challenges this penalty, evidence explaining this exercise of discretion ought to be produced by the Respondent.

[59] In the instant case, i find that the Respondent could have imposed a penalty under section 113(2) in respect of YA 2011 on the amount of taxes which were underpaid by the Appellant as a result of the incorrect return.

[60] However, the Respondent arbitrarily chose to reject the Appellant's Original Returns which were validly filed and imposed late submission penalties on the entire amount of taxes payable for YAs 2011 and 2012.

[61] I find that the total amount of penalties imposed is RM2,489,133.21 for both YA 2011 & 2012, even though taxes were only underpaid for YA 2011 and only by RM462,441.25. In fact, the Appellant had overpaid taxes by RM787,383.25 for YA 2012. To me, the penalties imposed are clearly excessive and disproportionate compared to the taxes underpaid.

[62] It must be noted that in the present appeal, the Respondent's assessment was not raised as a result of an audit as the Appellant made voluntary disclosures by filing the Revised Returns. Yet, the Respondent imposed the penalties to the Applicant 538.26% of the taxes underpaid.

[63] Therefore, it is clear that the discretion to impose penalty by the Respondent was not properly exercised, more so when no reasons were given.

[64] It is my view that discretionary powers conferred on a public body such as the Respondent are not unfettered and when such discretion is wrongly exercised or not explained, this Court has a duty to intervene.

(See *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 1 MLRA 26; [1997] 2 MLJ 17; [1997] 2 AMR 1671)

[65] Upon perusal of the SCIT grounds of judgment, I find that the SCIT should have given due consideration to the fact that:-

a. the Appellant had engaged reputable and professional tax agents to handle their tax affairs;

b. the Appellant voluntarily submitted the Revised Returns and made frank and full disclosure, acting in good faith at all material times;

c. for YA 2011 where there was underpayment of taxes, the audited account was only signed on 13.09.2012 after the tax return was submitted on 15.08.2012. It was not feasibly possible for PwC to file the tax return for YA 2011 based on the audited account; and

d. the total penalties imposed were excessive, totalling RM2,489,133.21. Whereas, the taxes underpaid is only RM 462,441.25 for YA 2011. In fact, the Appellant still overpaid taxes by a total of RM324,942.00 overall.

[66] Unfortunately, I find that the SCIT had overlooked section 113(2) of the ITA and upheld the Respondent's assessments. Little consideration has been given to the above factors which would have concluded that a much lesser penalty should be imposed under section 113(2) of the ITA in respect of YA 2011 instead.

Conclusion

[67] Based on the aforesaid reasons, I am of the view that the SCIT had failed to scrutinise the evidence presented before it and has

misapplied the law and facts that merit the interference by this Court.

[68] As such, I allowed the Appellant's appeal (Enclosure 1) with costs of RMS,000.00.

Dated: 6 OCTOBER 2022

(AHMAD KAMAL MD SHAHID)
Judge
High Court Kuala Lumpur

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Case(s) referred to:

Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 1 MLRA 262; [1994] 3 CLJ 541; [1994] 2 AMR 1735; [1994] 2 MLJ 713

I Investment Ltd v. Comptroller General of Inland Revenue [1975] 1 MLRA 669; [1975] 2 MLJ 208

Director-General of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd. [1990] 2 CLJ 160; [1990] 1 MLRA 373; [1990] 2 MLJ 415

Kenny Heights Developments Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923; [2015] 4 MLR A 114; [2015] 4 MLJ 487; [2015] 3 AMR 205

Liew Sai Wah v. PP [1968] 1 MLRA 641; [1968] 2 MLJ 1

National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339; [1993] 1 MLRA 512; [1994] 1 MLJ 99; [1993] 2 AMR 3581

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195; [2006] 5 AMR 585; [2006] 6 MLJ 97; [2006] 2 MLRA 61

Projek Lebuhraya Utara-Selatan Bhd v. Permas Forwarding Agency Sdn Bhd [2014] 2 MLJ 893; [2013] MLRAU 447; [2014] 3 AMR 176

Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformers Manufacturer Sdn Bhd [2012] MSTC 30-039

Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri [2006] 1 CLJ 1121; [2006] 1 MLRA 40; [2006] 2 MLJ 498

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248; [1997] 1 MLRA 26; [1997] 2 MLJ 17; [1997] 2 AMR 1671

Legislation referred to:

Income Tax Act 1967, ss. 77(3)(b), 77A(1), (3)(a), (b), (4), 77B(1), (2), 112(1), (3), 113(2), 114, 120(1)(h), Schedule 5

Finance Act 2014, 21(b)

Finance Act 2015, s. 20(c)