



Tax Appeal – Deduction Section 33(1) ITA – Commission Expenses – Wakalah Fee – Takaful Business Section 60AA ITA – Time Bar Section 91(3) ITA – Penalty Section 113(2) ITA

(1) ETIQA FAMILY TAKAFUL BERHAD v. KETUA PENGARAH HASIL DALAM NEGERI [W-01(A)-726-09/2022]

(2) KETUA PENGARAH HASIL DALAM NEGERI v. ETIQA FAMILY TAKAFUL BERHAD [W-01(A)-746-10/2022]

The Taxpayer, Etiqa Family Takaful Berhad appealed against the decision of the High Court which dismissed the Taxpayer’s appeal on the merit of assessment for the years of assessment (“YA”) 2011, 2012 and 2013 and the Revenue appealed against the High Court’s decision on the issue of time bar under Section 91(3) of the Income Tax Act 1967 (“ITA”) for YA 2008, 2009 and 2010 and penalty under Section 113(2) ITA for YA 2008 until YA 2013.

 **MAHKAMAH RAYUAN, PUTRAJAYA**

YA DATUK HAJJAH AZIZAH BINTI HAJI NAWAWI

 **YA DATUK SEE MEE CHUN**
YA DATO’ LIM CHONG FONG

 **28 NOVEMBER 2024**

The Taxpayer’s principal business was managing the general and family takaful business. From 1.12.2007, the Taxpayer commenced the business of managing takaful investment-linked business upon the transfer of the takaful assets, liabilities and business of Mayban Takaful Berhad (now known as Sri MTB Berhad). The Taxpayer changed its name from Takaful Nasional Sdn Bhd to Takaful Nasional Berhad on 31.10.2007, and then to its present name, Etiqa Takaful Berhad on 12.11.2007. The Appellant was now known as Etiqa Family Takaful Berhad. The Taxpayer claimed the commission expenses incurred in the Shareholders’ Fund for YA 2008 to 2013 to earn the Wakalah Fee from the General Takaful Fund as deductible expenses of the Shareholders’ Fund under Section 33 ITA.

The Revenue raised the additional assessments for YA 2008 to 2013 including penalties under Section 113(2) ITA amounting to RM75,695,975.00. The Taxpayer appealed against the assessments at the Special Commissioner of Income Tax (“SCIT”) on 3 main issues:

- (i) Whether the Revenue has successfully discharged its burden of proof under Section 91(3) ITA in raising the assessments for YA 2008 to 2010;
- (ii) Whether the commission expenses incurred by the Taxpayer in the Shareholders’ Fund for YA 2008 to 2013 to earn the Wakalah Fee from the General Takaful Fund are deductible as the expenses of the Shareholders’ Fund under Section 33 of ITA; and
- (iii) Whether there is any factual or legal basis for the Revenue to impose a penalty under Section 113(2) of ITA for YA 2008 to 2013.

On 19.2.2021, the SCIT disallowed the Taxpayer’s appeal and the Taxpayer subsequently filed an appeal to the High Court where the High Court had dismissed the Taxpayer’s appeal on 14.9.2022 on the merit of assessment (1st issue) and allowed the appeal on the issue of time bar (2nd issue) and penalty (3rd issue). The High Court held that the commission expenses incurred by the Taxpayer in the Shareholders’ Fund for YA 2008 to 2013 to earn the Wakalah Fee from the General Takaful Fund were not deductible as the expenses of the Shareholders’ Fund under Section 33 of ITA. Further, in the absence of any proof of intentional wrongdoing on the Taxpayer’s part, the Revenue had not successfully discharged its burden of proof under Section 91(3) of ITA and there was no legal basis for the Revenue to exercise his discretion in imposing a penalty against the Taxpayer under Section 113(2) of ITA for YA 2008 to 2013.

On merits, the Revenue argued that the ITA treated the takaful business as a separate and distinct business and the issue of allowable expenses of a takaful operator must be construed in light of purpose and intention behind the specific provisions inserted by the Parliament via Section 60AA of ITA that governs the takaful business. Section 60AA of ITA was inserted vide Finance Act 2007 (Act 683) which has effect for YA 2008 and subsequent years of assessment with the purpose to comply with syariah requirement and to provide for a specific provision to determine the taxation of takaful business consisting of family solidarity fund, general fund, inward retakaful, offshore takaful and retakaful. The Court of Appeal affirmed the High Court’s decision and the SCIT’s finding on merits that if indeed Section 33(1) of ITA, the so called basket provision, is sufficient to cover the commission expenses incurred by the Taxpayer, why is the necessity for Parliament to enact Section 60AA ITA in the first place. Hence, Section 60AA of ITA prevails over Section 33(1) of ITA in the context of takaful business based on the maxim of *generalia specialibus non derogant*.

The Court of Appeal further affirmed the decision of the High Court on the issue of time-bar and penalty in that the SCIT had erred in concluding that the Taxpayer was negligent and the Revenue had not successfully discharged its burden of proof under Section 91(3) of ITA in relation to the additional assessments raised for YA 2008 to 2010. The Court of Appeal also agreed with the High Court that the SCIT has also erred in concluding that the Revenue was right in imposing the penalties under Section 113(2) of ITA.

The Court of Appeal dismissed the Taxpayer’s appeal on merits and further dismissed the Revenue’s appeal on time-bar and penalty with no order as to cost.