



SECTION 33(1), SECTION 39(1)(c) &  
SECTION 113(2)  
INCOME TAX ACT 1967

SYARIKAT SESCO BERHAD  
V.

KETUA PENGARAH HASIL DALAM NEGERI  
RAYUAN SIVIL NO. BA-14-3-09/2022  
RAYUAN SIVIL NO. BA-14-2-02/2023

 HIGH COURT SHAH ALAM

 YA DR SHAHNAZ BINTI SULAIMAN

 15 FEBRUARY 2024

The Appellant appealed against the Deciding Order by the Special Commissioners of Income Tax (“SCIT”) dated 15.12.2022 in respect of the Notices of Assessment for the Year of Assessments (“YAs”) 2011 and 2012. Parties

agreed that the decision of Rayuan No. PKCP(R) 1035/2017 and PKCP(R) 1036/2017 for YAs 2011 and 2012 shall be binding on similar issue for YAs 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020 as well. The issues for determination before the High Court are whether the SCIT was right in law and in facts in deciding that the expenses for feasibility studies (“FS”) in the YAs 2011 and 2012 is not an allowable expense under Section 33(1) Income Tax Act 1967 (“ITA 1967”) and the penalty imposed for YAs 2011 and 2012 under Section 113(2) ITA 1967 is correct in law.

The Appellant’s principal activities are generation, transmission, distribution and sale of electricity. The Appellant had engaged consultants to undertake FS for the purpose of exploring, identifying and developing the hydroelectric sites and dams. The Appellant asserted that the FS expense was wholly and exclusively incurred in the production of business income based on the following reasons namely, (i) The FS allows the Appellant to make an informed decision of new opportunities and projects. This is crucial for the Appellant in identifying potential lucrative projects. It is also necessary to meet the continuous market demand (for e.g. supply of electricity) in Sarawak. (ii) The FS are not limited to hydro as it also includes gas or coal generation potential project. This is to increase business as well as revenue opportunity. It is meant to also increase business opportunities through international investors and local investors; and (iii) The FS are of the utmost importance to the Appellant as a going concern to continuously promote and encourage the generation of energy with a view to maximize profit by identifying and assessing opportunities. The Appellant argued that consideration must always be given to the underlying business and commercial reality (the FS in the Appellant’s case). The Appellant argued that the Learned SCIT failed to consider that the FS conducted by the Appellant in its usual business practice or operations were to fulfil the continuing demand. The imposition of penalty on the Appellant under Section 113(2) ITA 1967 is not justified in law and on facts of the case.

In response, the DGIR submitted that the deductibility of the FS expense must not only fulfil the requirement of wholly and exclusively incurred in the production of gross income under section 33(1) ITA 1967 but should not be prohibited under section 39 ITA 1967. The DGIR highlighted that the FS expense was related to assets and capital in nature hence not for the production of business income. In fact, the FS expense was not incurred by the Appellant as the Appellant was not even a party to the FS Agreement since the duty to pay lies on Sarawak Energy Berhad under the FS Agreement. The DGIR further distinguished the case of *KPHDN v Shell Refining Company (FOM) Bhd [2015] MSTC 30-106* from the current appeal as the FS was related to the physical asset of the Appellant whereas in the Shell Refining’s case, the FS was conducted to obtain and produce a report on “Port Dickson Refinery Hydrocarbon Masterplan” only. It is trite law that for an expenditure to be eligible for a deduction under the ITA 1967, the Appellant must prove that such expenditure is allowable under section 33 ITA 1967. With regard to the issue on penalty, the penalty imposed by the DGIR under section 113(2) ITA 1967 is correct and in accordance with law.

On 15.02.2024, the High Court has dismissed the Appellant’s appeal with costs and upheld the decision of the SCIT.

#### Editorial Notes

- *The Appellant has the right to file an appeal against the decision by the High Court within 30 days from the date of the decision.*