



**JUDICIAL REVIEW ORDER 53 RULES OF COURT 2012,  
SECTION 99 & SECTION 140A INCOME TAX ACT 1967**

**EXECUTIVE OFFSHORE SHIPPING SDN BHD  
v.  
DIRECTOR GENERAL OF INLAND REVENUE  
[WA-25-388-12/2021]**

 KUALA LUMPUR HIGH COURT BKK 3  
 YA DATO' WAN AHMAD FARID BIN WAN SALLEH  
 2 JULY 2024

The Taxpayer filed the Judicial Review application against the decision of the Director General of Inland Revenue (“DGIR”) to quash the Notices of Assessments for the Years of Assessment (“YA”) 2014, 2015 and 2016 all dated 30.11.2021.

The issue was that whether the transactions between the Taxpayer and Eagle High (L) Limited (“EHLL”) in respect of charter hire and crew management services was within the arm’s length transaction. The Taxpayer submitted that the DGIR issued the Forms J for YA 2014 to 2016 on the grounds that the Taxpayer had engaged in tax avoidance transactions and the comparable and Transfer Pricing Method selected by the Taxpayer were inappropriate. Moreover, the markup rate of 35% for the charter hire fees of vessels and the crew management fees were not at arm’s length.

The Taxpayer alleged that the DGIR never invoked or specified which provisions in the Income Tax Act 1967 (“ITA 1967”) that the DGIR would rely on. In both of the DGIR’s audit findings letter dated 17.9.2021 and the final audit findings letter dated 26.11.2021, none of those letters stated the provisions that had been relied on by the DGIR. Further, the Taxpayer also alleged that the DGIR also failed to take into account that EHLL was governed by Labuan Business Activity Tax Act 1990 (“LBATA”) in which case the arm's length principle did not apply prior to the coming into effect of Section 17D of the LBATA on 1.1.2020. Failure to specify the subsection rendered the impugned assessment null and void. The DGIR had acted arbitrarily for failing to provide any justifications or explanations before the assessment were raised.

The Revenue submitted that Section 140A of the ITA 1967 should be read together with the Income Tax (Transfer Pricing) Rules 2012 (“TP Rules”) which regulated the methods and manner of determining the arm’s length price. The DGIR also introduced and published the Transfer Pricing Guidelines 2012 (“TP Guidelines”) in line with the introduction of transfer pricing legislation under section 140A of the ITA 1967. TP Guidelines provided the application of law on controlled transactions and guidance for parties in the transfer pricing arrangements to operate in accordance with the methods and manner as provided in the TP Rules as well as complying with administrative requirements of the DGIR on the types of records and documentations to be maintained.

The DGIR’s decision was made after evaluating all the evidence and he formed his opinion based on his knowledge and understanding on the transfer pricing principle. Both guidelines i.e OECD TP Guidelines and TP Guidelines were the core reference that must be referred to by the DGIR on TP issues. The material issue before this Honorable Court brought by the Taxpayer involved question of facts and/or mixed question of facts and law i.e. on the following questions-

- (a) Whether the transactions between the Taxpayer and EHLL in respect of charter hire and crew management services complied with the arm’s length principle;
- (b) Whether the DGIR had any legal and/or factual basis to reject the Taxpayer’s benchmarking analysis in the Transfer Pricing Documentation provided by the Taxpayer; and
- (c) Whether the Taxpayer had under-declared their income in relation to the charter hire of vessels and the crew management.

The DGIR submitted that disputes involving questions of fact and law which revolved around the merit of assessment need to be heard and determined by the Special Commissioners of Income Tax (“SCIT”), as the most appropriate forum to exercise the function of ‘judges of fact’ as decided by the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563*. Issues involving transfer pricing should be heard and decided by the appeal proceeding before the SCIT as per the Court of Appeal’s case in *Ketua Pengarah Hasil Dalam Negeri v Ensco Gerudi (M) Sdn Bhd [2023] 5 MLJ 159*.

The High Court dismissed the Taxpayer’s Judicial Review application with cost of RM3,000.00.

**Editorial Notes:** *The Taxpayer has the right to appeal to the Court of Appeal within 30 days from the date of the decision.*