

SECTIONS 21A, 55(3) & (4), 77A, 86 & 113(2)
INCOME TAX ACT 1967

NISHIMATSU CONSTRUCTION CO. LTD
(MALAYSIA BRANCH)

V.

DIRECTOR GENERAL OF INLAND REVENUE



BY LEGAL DEPARTMENT



KUALA LUMPUR HIGH COURT



YA DATO' AMARJEET SINGH A/L SERJIT



2nd SEPTEMBER 2024

The Taxpayer together with three other companies formed an unincorporated joint venture (“JV”) to carry out the Pahang-Selangor Raw Water Transfer Project (“JV Agreement”). The Taxpayer’s financial year end and basis period is on the 1st April of a calendar year to 31st March of the next calendar year. The JV’s

financial year end and the basis period for a year of assessment (“YA”) is on the 1st January of calendar year to 31st December of the same calendar year. The Taxpayer only declared its partnership income from the JV for the month of April to December of YAs 2013 to 2016 in its tax returns and then submitted its revised tax returns to declare its divisible income for January, February and March for YAs 2013 to 2016. The Director General of Inland Revenue (“DGIR”) issued the Notices of Additional Assessment for YAs 2013 to 2016 with penalties under Section 113(2) Income Tax Act 1967 (“ITA 1967”) to tax the Taxpayer’s income in full. The Taxpayer appealed by way of Form Q against the said Notices of Assessment. The Special Commissioners of Income Tax (“SCIT”) had dismissed the appeal and the Taxpayer filed an appeal to High Court.

The Taxpayer contended that the partnership income from the JV for the period of 1st January to 31st March for YAs 2013 to 2016 cannot be determined until the end of the JV accounting period which constitutes the basis periods for the relevant YAs which are different from the Taxpayer’s basis period. Thus, it was not possible to conclusively determine the divisible income of the Taxpayer from the JV for the months of January to March of the relevant YAs within the prescribed time. It was further argued that Sections 55(3), 55(4) and 77A ITA 1976 do not allow the Taxpayer to recognize its divisible income from the JV on an estimation basis and/or based on the unaudited management account. The Taxpayer has referred extensively to Section 55 ITA 1967 where it is a mandatory requirement that the JV’s divisible income can only be ascertained after making the allowable tax deductions incurred during the relevant basis periods and subsequently be treated as having accrued evenly over the basis period and thereafter be divided among the JV’s partners. Therefore, the relevant provisions of the ITA 1967 should be construed strictly and any ambiguity arising from these provisions should be interpreted in favor of the Taxpayer.

The Taxpayer further argued by that the DGIR can only impose penalty under Section 113(2) ITA 1967 after giving due consideration to all relevant facts and circumstances and arriving at a decision that such facts and circumstances warrant the imposition of a penalty. Hence, the SCIT had erred in law in upholding the penalties without giving due consideration to the surrounding circumstances.

The DGIR submits that the Taxpayer’s income derived from the JV’s partnership should be brought to tax in full based on the Taxpayer’s basis period notwithstanding to the JV’s partnership basis period. Section 21A ITA 1967 clearly states that the basis year for a YA shall constitute the basis period for that YA. Further, the Taxpayer is a company where its declaration of income earned for each of YA is subject to Section 77A ITA 1967. Unlike Section 77A ITA 1967 which required a company to furnish a tax return based on its audited account, a partnership is not required under Section 86 ITA 1967 to furnish tax return based on an audited account. The Taxpayer had failed and/or deliberately refused to declare the partnership income from the JV for the period of 1st January to 31st March in the tax returns for YA 2013 to 2016 even though it is undisputed that the Taxpayer had earned partnership income from the JV for a complete basis period from 1st April to 31st March for the YAs 2013 to 2016. The DGIR also argued that pursuant to the JV Agreement, the accounts for the JV are kept accurately and can be examined by the parties under the JV partnership including the Taxpayer. The Taxpayer could request for details of the account on monthly basis particularly for the purpose of tax declaration. Under the ITA 1967, the Taxpayer is obliged to declare its chargeable income or income earned in full from each source of income for the basis period in that year. The imposition of penalties under Section 113(2) ITA 1967 by the DGIR are just and correct.

The High Court upheld the SCIT’s decision and dismissed the Taxpayer’s appeal with costs of RM5,000.00.

Editorial Note: The Taxpayer has the right to file an appeal against the decision by the High Court within 30 days from the date of the decision.