



**Tax Appeal - Income Tax (Exemption) Order 2009
[P.U.(A)152/2009] – “control” - Penalty under Section 113(2)
ITA**

**LAM KAM WING
v.
KETUA PENGARAH HASIL DALAM NEGERI
[Q-01(A)-461-06/2022]**

 **MAHKAMAH RAYUAN, KUCHING**


**YA DATO' AHMAD ZAIDI BIN IBRAHIM, HMR
YA DATUK MOHAMED ZAINI BIN MAZLAN,
HMR
YA DATO' DR. HJ ALWI BIN HJ. ABD WAHAB**

 **23 MEI 2025**

This is an appeal by the Taxpayer against the High Court’s decision on 17.3.2022 dismissing the Appellant’s appeal against the Deciding Order of the Special Commissioners of Income Tax (“SCIT”) dated 26.2.2021 in respect of the Notices of Additional Assessment for the Years of Assessment (“YA”) 2011 and 2012 both dated 10.12.2015. By those High Court’s decision and the SCIT’s Deciding Order, both courts unanimously disallowed the Taxpayer’s appeal against the assessments raised by the Respondent.

Issues in this appeal are whether the meal, petrol, parking and telephone allowances received by the Taxpayer in YA 2011 and 2012 are exempted from income tax under the Income Tax (Exemption) Order 2009 [P.U.(A)152/2009] (“the Exemption Order”) and whether the Revenue is correct in imposing penalty under Section 113(2) of the Income Tax Act 1967 (“ITA”) for YA 2011 and 2012?

On 25.3.2014, the Revenue had conducted an audit of Scheduled Tax Return (“STD”) for YA 2011, 2012 and 2013 upon Tasmanco which is the Taxpayer’s employer. Upon audit, it was found that Tasmanco had under-reported the STD amount for YA 2011 and 2012 on the basis that the STD amount deducted does not include the allowances which were enjoyed by the Taxpayer since they were exempted under the Exemption Order. The Revenue during audit found that the Taxpayer was not eligible to the exemption by virtue of Paragraph 3(a)(i) of the Exemption Order thus raised assessments and imposed penalty under Section 113(2) of the ITA. The Respondent issued Notices of Additional Assessment for YA 2011 and 2012 both dated 10.12.2015 amounting to RM5,011.20 including penalties under Section 113(2) ITA for each YA. The Taxpayer then appealed via Form Q against the additional assessments and claimed that he is eligible to tax exemption for meal, petrol, parking and telephone allowances received by him in YA 2011 and 2012 under the Exemption Order. Facts found by the SCIT were that the Taxpayer is the Managing Director of Tasmanco Consultancy Services Sdn Bhd (“Tasmanco”) and holds 3,000 units of shares (30% shareholding) out of 10,000 units of general authorized capital issued in Tasmanco shows “control” over the company as provided under Paragraph 3(a)(i) of the Exemption Order (Non-Application).

The SCIT finds that the wordings are clear and unambiguous that 'This Order shall not apply to an employee where the employee has control over his employer in the manner where his employer is a company the employee has the power to secure that the affairs of the company by means of the holding of shares in the company of such other company.’ The SCIT found that the Taxpayer cannot avail himself to the benefit of the exemption as he was an employee who has control over the employer's company Tasmanco by holding of shares in Tasmanco in YA 2011 and 2012 and also holding as the Managing Director of Tasmanco at the material time. The Taxpayer failed to prove the specific facts specified in paragraph 3(a)(i) of the Exemption Order.

The Taxpayer argued that he has no “control” over Tasmanco and that the allowances received are exempted from income tax under the Exemption Order and hence, were not declared in his tax return in YA 2011 and 2012. The Revenue argued that the language of the Exemption Order was clear and unambiguous.

Decision: The Court of Appeal in its unanimous decision allowed the appeal in part whereas the Taxpayer’s appeal on the assessment YA2011 and 2012 is dismissed but the appeal on penalty Section 113(2) ITA is set aside. The Court agrees with the Revenue’s submission that the Taxpayer has “control” over the company since the Taxpayer is the largest shareholder and will be entitled to greater part of the company’s asset and hence, allowances claimed by the Taxpayer are not exempted as provided under Paragraph 3(a)(i) of the Exemption Order. The Court also refers to the case of Ketua Pengarah Hasil Dalam Negeri v Ensco Gerudi Sdn Bhd [2023] 6 CLJ 350. However, on the issue of penalty Section 113(2) ITA, the Court cross referred to Section 124(3) of the ITA and saw no attempts or intention by the Taxpayer to deceive the Revenue. Benefit of doubt should be given to the Taxpayer. No order as to cost.