



**Section 44A & Section 131 of the
Income Tax Act 1967**

KETUA PENGARAH HASIL DALAM NEGERI

v.

BERJAYA GOLF & RESORT BERHAD

[W-01(A)-649-09/2022]



COURT OF APPEAL



**YA DATO' LEE SWEE SENG
YA DATUK AZIMAH BINTI OMAR
YA DATO' WAN AHMAD FARID BIN WAN SALLEH**



12th DECEMBER 2024

The Taxpayer was part of a member of Berjaya group of companies. For the Year of Assessment (“YA”) 2013, Berjaya Air Sdn Bhd (“Berjaya Air”) being a member of the Berjaya group surrendered its losses amounting to RM16,300,200 to two companies in Berjaya group, namely Berjaya Land Sdn Bhd (“Berjaya Land”) as the first claimant for an amount of RM14,615,512 and the Taxpayer as the second claimant for an amount of RM1,684,688.

This exercise was made pursuant to the Group Relief provision under Section 44A(5)(a) of the Income Tax Act 1967 (“ITA 1967”).

Both Berjaya Land and the Taxpayer had made a claim in their tax returns for YA 2013 under Section 44A(2) ITA 1967 for the loss that had been surrendered by Berjaya Air through its tax return for YA 2013. The Revenue conducted an audit on Berjaya Land and consequently, Berjaya Land’s aggregate income was reduced from RM14,628,484 to RM3,939,862. Subsequent to Berjaya Land’s aggregate income being reduced pursuant to the audit, Berjaya Air revised its group relief form (Form RK-S) on 25.9.2014. The claimants remained the same but the amounts that were surrendered to each claimant had been revised. The amount of loss to Berjaya Land was revised to RM3,939,862 whilst the amount to the Taxpayer was revised to RM12,360,338. On 29.9.2014, the Taxpayer submitted a revised tax computation, tax return and form C (RK-T) together with an application for relief under Section 131(1) ITA 1967 to revise the adjusted loss claimed from the original amount of RM1,684,688 to RM12,360,338. The application was rejected by the Revenue on the basis that the irrevocable election had been made by Berjaya Air, Berjaya Land and the Taxpayer to fulfil the conditions of group relief under paragraph 44A(2)(a)(iv) ITA 1967.

The appeal revolved around the following issues:

- (a) Whether a surrendering and claimant company who have made an irrevocable election under Section 44A(2)(iv) ITA 1967 may subsequently revise the amount of adjusted loss that have been surrendered and claimed;
- (b) Whether there is any error or mistake on the part of the Taxpayer that justifies the application for relief under Section 131(1) of the ITA 1967.

The Revenue argued that Berjaya Air as the surrendering company, Berjaya Land as the first claimant and the Taxpayer as the second claimant were bound to the whole contents of irrevocable election made in their tax returns under Section 44A(2)(iv) ITA 1967. Thus the irrevocable election includes the amount of adjusted loss being surrendered and claimed. Consequently, they had no option to revise the amount of adjusted loss. The audit findings that resulted in Berjaya Land’s income being reduced did not constitute error or mistake within the meaning of Section 131(1) ITA 1967. The group relief was a conscious and deliberate act by all parties, carried out despite the knowledge that an audit was being conducted on Berjaya Land at the material time.

The Taxpayer argued that the Taxpayer had revised the amount of losses claimed as a consequence from the Revenue’s audit on Berjaya Land as the first claimant where its chargeable income was reduced. The act of revising the amount of loss claimed was the result of their erroneous belief that the Taxpayer was only entitled to claim up to the maximum of RM1,684,688.00 from Berjaya Air. It was the Revenue that allowed Berjaya Land’s deduction of expenditure incurred in rendering management services. As such the aggregate income of Berjaya Land was reduced and eventually affected the utilisation of the balance of the loss by the Taxpayer.

The Court of Appeal held that the claimant had not revoked the irrevocable election but merely making adjustments on the amount to be set off.

The Court of Appeal unanimously dismissed the Revenue’s appeal with cost of RM15,000 payable to the Taxpayer.