



**SECTIONS 4, 33(1), 39(1), 60(8) & 91
INCOME TAX ACT 1967**

AAGIB

V.

**DIRECTOR GENERAL OF INLAND REVENUE
PKCP(R) 283/2016, PKCP(R) 32-33/2019,
MOF.PKCP.700-7/1/524**



SPECIAL COMMISSIONERS OF INCOME TAX



YA PUAN FAJRUL SHIHAR BINTI ABU SAMAH



17 NOVEMBER 2023

The Taxpayer involves in activity of underwriting of all classes of general insurance business. The Taxpayer obtained prior approval from Bank Negara Malaysia (“BNM”) for the acquisition of shares in BH Insurance (M) Bhd (“BHI”) which also carries on

similar business activity. In 2009, the Taxpayer made an application to BNM to acquire shares in BHI. The application was approved by BNM with a condition that the business of BHI was to be merged with the Taxpayer. In 2010, the Taxpayer purchased the entire shares of BHI from the shareholders before enter into a Business Transfer Agreement with BHI to transfer the BHI’s business to the Taxpayer. The Taxpayer declared dividend income from BHI for Years of Assessment (“YAs”) 2010, 2011, 2012 and 2013 under Section 4(c) Income Tax Act 1967 (“ITA 1967”). The Taxpayer claimed for deduction of interest expenses on loans for acquisition of BHI for the respective YAs and professional fees related to Risk-Based Capital Certification (“RBCC”) for YA 2013 under Section 33(1) ITA 1967. The DGIR conducted audits for YAs 2010, 2011, 2012 and 2013 and raised additional assessments including penalties on the Taxpayer. The Taxpayer appealed to the Special Commissioners of Income Tax (“SCIT”) against the assessments raised.

The Taxpayer contended that the additional assessments raised were time barred. The Taxpayer argued that dividend income received from BHI was subject to tax under Section 4(c) ITA 1967. It was not incidental to the Taxpayer’s general insurance business but a passive source solely by virtue of the Taxpayer’s ownership of BHI. Hence, Section 60(8) ITA 1967 was inapplicable. It further averred that interest expenses were deductible under Section 33(1)(a)(ii) ITA 1967 since it fulfilled the requirements under the provision. The interest expenses were interest payable upon money borrowed via subordinated and senior loans obtained to finance the acquisition of BHI’s shares. As the Taxpayer held an asset i.e. the shares of BHI which produced dividend income, the money borrowed was laid out on assets held for the production of the Taxpayer’s gross income. They were not capital in nature since the purpose of the loans was to acquire BHI’s shares and not BHI’s business. Even if it did not qualify for deduction under Section 33(1)(a)(ii) limb, the deduction is still qualified under opening part of section 33(1) ITA 1967 as outgoings and expenses wholly and exclusively incurred in the production of the Taxpayer gross income. Further, the professional fees paid by the Taxpayer to a provider who performed RBCC of the Taxpayer’s general business were deductible under Section 33(1) ITA 1967 as the management expenses which reported in the Taxpayer’s annual report to BNM were revenue in nature.

In response, the DGIR asserted that time-bar issue was only applicable to YA 2011. The determination of five years period was based on the end of the calendar year by the use of the words “year of assessment” in Section 91(1) ITA 1967 which was defined under Section 2 ITA 1967. Further, Form JA for YA 2011 was raised in accordance with Section 91(3) ITA 1967 due to negligence of the Taxpayer whom had declared its dividend income under Section 4(c) ITA 1967 and claimed for deduction of non-allowable interest expenses. The DGIR averred that the dividend income was subject to Section 60(8) ITA 1967 which would fall as income under Section 4(f) ITA 1967. Section 60 ITA 1967 prevails over other general provisions based on principal of “*generalia specialibus non derogant*”. After conducting an audit, the DGIR found out that the dividend income was not from the Taxpayer’s general insurance business activity but from the acquisition of 100% shares in BHI with the specific intention to merge the general business of BHI with the Taxpayer’s business as approved by BNM. The DGIR also argued that interest expenses from loans to acquire BHI’s shares were capital in nature, and hence, are not deductible under Section 33(1) and to be read together with Section 39(1)(b) ITA 1967. The shares acquired were not used to produce the Taxpayer’s gross income but to fulfill the specific purpose of transferring the business of BHI and subsequently merged with the Taxpayer’s business. The transaction required approval from BNM and had been affirmed by the High Court through a vesting order. It also did not meet the requirements under Section 33(1)(a)(ii) ITA 1967 to be qualified for deduction as it was not laid out on assets used or held for the production of gross income. The professional fees paid by the Taxpayer in relation to the RBCC were also not deductible as Section 39(1)(c) ITA 1967 specifically disallows deduction of any capital withdrawn or any sum employed or intended to be employed as capital. The expenses were paid for RBCC in order to comply with the requirement of minimum reserve or the capital of the Taxpayer as required by BNM.

On 17.11.2023, the SCIT rejected the Taxpayer’s appeals and held that the Taxpayer failed to prove its case as required under Paragraph 13 Schedule 5 ITA 1967. The SCIT ruled that the DGIR was right to impose penalties on the Taxpayer. As such, the Forms JA for YAs 2010, 2011, 2012 and 2013 issued by the DGIR were confirmed.

Editorial Note:

- *The Taxpayer has the right to file an appeal against the decision by the SCIT within 21 days from the date of the decision.*