



SECTION 113(2), PARAGRAPH 38, 39, & 40  
SCHEDULE 3 INCOME TAX ACT 1967

AHSB  
V.  
DIRECTOR GENERAL OF INLAND REVENUE  
MOF.PKCP.700-7/1/1366-1370

 SPECIAL COMMISSIONERS OF INCOME TAX

 PUAN NIK ASMA ANITA BINTI MAKHTAR

 22<sup>nd</sup> NOVEMBER 2024

The Taxpayer is an investment holding company incorporated in Malaysia. The company is 90% owned by YCL and the remaining 10% is owned by YTC. Additionally, YCL and YTC also own equal shares in TSSB.

A tax audit was conducted on the Taxpayer, resulted in the Director General of Income Tax (DGIR) issued Notices of Non-Chargeability for the Year of Assessments (YAs) 2014 to 2017 and Notice of Assessment for YA 2018. Aggrieved by the DGIR's decision, the Taxpayer filed an appeal to the Special Commissioners of Income Tax (SCIT) through Forms Q dated 25.9.2020 for YAs 2014 to 2018. The issues raised are whether the disposal of assets by TSSB to the Taxpayer falls within the ambit of "controlled disposal of assets" subject to Paragraph 38 until Paragraph 40 Schedule 3 Income Tax Act 1967 (ITA 1967) and whether the imposition of penalty on the Taxpayer under Section 113(2) ITA 1967 for YA 2018 is correct in law.

The Taxpayer contended that the DGIR has failed to establish the element of "control" as defined in ITA 1967 as the said element hinges upon four fundamental elements; (i) power of a person to secure, (ii) power of a person in holding share or voting powers, (iii) power of an authority from regulatory documents, and (iv) a power to conduct the affairs of the company as he wishes as derived from Paragraph 38(2) Schedule 3 ITA 1967. The Taxpayer also contended that Section 2 and Section 139 ITA 1967 are not applicable in determining the element of "control" under Paragraph 38 Schedule 3 ITA 1967. It is a long-standing principle that tax statutes should be interpreted strictly and a specific provision should take precedence over a general one. For the imposition of penalty, the DGIR must exercise his discretion judiciously based on a thorough evaluation of all the relevant facts.

In response, the DGIR argued that Paragraph 38(1) Schedule 3 ITA 1967 is applicable in the current appeal (in which there is a presence of "controlled disposal of assets") based on the fact that YCL holds equal shares with YTC in TSSB. As the managing director for both, the Taxpayer and TSSB, YCL would *prima facie* have indirect control of the company. An individual is a beneficial owner in a company limited by shares based on whether he has the right to exercise ultimate effective control, formal or informal over the company, the director or the management of the company. Since YCL holds 90% of shares in the Taxpayer while also being a director in TSSB, it could be observed through circumstantial facts that YCL indeed has indirect control and thus, the disposal of assets between TSSB and the Taxpayer could be determined as a "controlled transfer/sale" within the meaning of Paragraph 38 Schedule 3 ITA 1967. Where two companies have a common director or common directors, they would be treated as being connected with the other. In addition, the imposition of penalty under Section 113(2) ITA 1967 was due to the failure of the Taxpayer to observe the requirement of the law as provided in Paragraph 2(a) or (b) of the same provision. The DGIR further contended that the defence of 'good faith' is only applicable for penalties imposed under Section 113(1) ITA 1967 and not applicable for penalties imposed under Section 113(2) ITA 1967.

On 22.11.2024, the SCIT had dismissed the Taxpayer's appeals and held that the Taxpayer has failed to prove its case as required under Paragraph 13 Schedule 5 ITA 1967 including penalties for YAs 2014 to 2018 are correct and justified to be imposed. As such, the issuance of Notices of Non-Chargeability for YAs 2014 to YA 2017 and Notice of Assessment for YA 2018 together with the imposition of penalties are 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.*