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BY LEGAL DEPARTMENT

HIGH COURT KUALA LUMPUR

YA DATO' AHMAD KAMAL MD. SHAHID

13 FEBRUARY 2023

SECTIONS 4A(ii) and 109B(1)(b)
INCOME TAX ACT 1967
(prior to the Finance Act 2018 amendment)

MALAYSIA LNG SDN BHD
V.
DIRECTOR GENERAL OF INLAND REVENUE
WA-14-12-06/2020

The Taxpayer is in the business of purchasing natural gas, liquefied natural gas and the marketing of the liquefied natural gas all over the world.

The Director General Inland Revenue ("DGIR") raised Notices of Assessment under Sections 4A(ii) and 109B(1)(b) Income Tax Act 1967 ("ITA 1967") (*prior to the Finance Act 2018 amendment*) against the Taxpayer for its failure to withhold tax for the payment of services rendered from Jamalco, Samsung, Bonny Gas and Surveyors which were not tax residents.

The Taxpayer contended that payment of the said services was not subjected to withholding tax as the services do not constitute "*technical services*", but rather "*a liaison service*" and "*day-to-day routine services*" by referring to the case of *Esso Production Malaysia Inc v KPHDN (2003) MSTC 4,016 ("*EPMI case*")*. Sections 4A(ii) and 109B(1)(b) ITA 1967 (*prior to the Finance Act 2018 amendment*) were limited to "*technical services*" only. The Taxpayer further submitted that relief shall be applicable to Jamalco and Samsung based on the Double Taxation (Relief) (Korea) Order 1982 ("DTA Malaysia-Korea") and Double Taxation (Relief) (Japan) Order 1971 ("DTA Malaysia-Japan").

While, the DGIR asserts that the Taxpayer's heavy reliance on EPMI case was misplaced as the Court has laid down the principle in the EPMI case in reading Section 4A(ii) ITA 1967 (*prior to the Finance Act 2018 amendment*) where it includes *"technical and non-technical"* services and with the exclusion of the word *"technical"* from Section 4A(ii) ITA 1967 in year 2018, any services rendered, whether technical or non-technical, is inconsequential. By reading the Hansard, it is clear that the intention of Parliament in introducing Section 4A(ii) ITA 1967 covers both technical and non-technical payments. The decision in EPMI case was in line with the intention of Parliament as illustrated in the Hansard.

The DGIR further argued that the payments made by the Taxpayer for the services rendered by Jamalco and Samsung were within the scope of Section 4A(ii) ITA 1967 which is "*the income of a person not resident in Malaysia, which was derived from Malaysia"*. Furthermore, the Taxpayer has a statutory duty to withhold the amount of tax for the payment made to non-resident pursuant to Section 109B ITA 1967. The Director-General's Circular No.: 1 of 1984 ("the Circular") also provides guidelines for the implementation of the amendments. Based on the Circular, it was further reiterated that Section 4A(ii) ITA 1967 consists of technical and non-technical services.

The DGIR also argued that relief is not applicable under the DTA Malaysia-Japan and Malaysia-Korea as the income of the surveyors are not characterized as business income. Instead, the income is taxable under Section 4A(ii) ITA 1967. Additionally, the Taxpayer was not a taxable person under DTA.

The High Court held on 13.02.2023 that the Taxpayer's appeal was without merit and dismissed the Taxpayer's appeal and upheld the decision of the Special Commissioners of Income Tax.

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