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SPECIAL COMMISSIONERS OF INCOME TAX

PUAN NIK SERENE BINTI NIK HASHIM

10 MARCH 2023

**SECTION 91(1) OR SECTION 140 OF THE INCOME TAX ACT 1967**

**TLP**
**V.**
**DIRECTOR GENERAL OF INLAND REVENUE**
(MOF.PKCP.700-7/1/647-649)

The Taxpayer manages and operates a night club business under the brand name of CDR. CDR is not a registered entity but merely a brand name. The Taxpayer prepared its own set of accounts and had submitted the returns included Years of Assessment ("YAs") 2015, 2016 and 2017 in accordance with Section 77A Income Tax Act 1967 ("ITA 1967"). The DGIR had obtained relevant documents containing information on the Taxpayer's business during investigation exercise. Statements pursuant to Section 81 ITA 1967 were taken from the Appellant's Director and the Account Clerk, which had disclosed material information and admission.

The DGIR's audit finding discovered that the amount reported in the Appellant's Audited Accounts submitted to DGIR was lower than the amount recorded in the Management Accounts with the difference of RM36,259,042.00. The said amount was transferred to one HE (sole proprietor), operating under the same club and in the same premise but held different bank account. Hence, the DGIR raised Notices of Assessment under Section 91(1) ITA 1967 as under declared income amounting to RM36,259,042.00. Dissatisfied with the DGIR's assessments, the Taxpayer appealed to the Special Commissioners of Income Tax ("SCIT").

The Taxpayer contended that the said amount recorded/transferred to HE was the income of the said HE. The net profit of CDR was derived after subtracting the gross income (sales) with cost and expenses. Thus, by treating the whole net profit of the CDR as the net profit of the Taxpayer, the DGIR has disregarded the gross income (sales) of HE in the Club's Income Statement and treated that sales as the Taxpayer's. Further, the DGIR has a statutory duty to provide particulars under Section 140(5) ITA 1967 together with the Notices of Assessment (*Bandar Utama City Corporation v DGIR (1999) MSTC 3725*). The DGIR has taxed the same income twice, one on HE and the other one is on the Taxpayer.

In response, the DGIR asserted that the audit finding was based on discrepancies in two primary evidence adduced during trial, namely the Audited Accounts and Management Accounts. Based on the documents adduced before the SCIT, CDR was wholly owned by the Taxpayer. All invoices and payment vouchers adduced before SCIT clearly shows that they were issued by CDR in their ordinary business transaction without any linkage to HE. The statements taken during investigation under Section 81 ITA 1967 and produced during trial had become incontrovertible evidence as the Taxpayer failed to discredit the said statements before the SCIT. The Taxpayer's failure to call its tax agent and/or its director and/or auditor to explain the material contradiction on the discrepancies amounting to RM36,259,042.00 in the Taxpayer's Management Accounts and Audited Accounts was fatal. The DGIR therefore invoked Section 114(g) Evidence Act 1950 against the Taxpayer on this issue. The application of Section 140 ITA 1967 was not relevant as no single evidence was adduced during trial that the DGIR has applied Section 140 ITA 1967. The Taxpayer had intentionally under-declared its income to DGIR in this case.

The SCIT dismissed the Taxpayer's appeal and held that the Taxpayer failed to discharge its burden of proof under Paragraph 13 of Schedule 5 ITA 1967 and DGIR has the basis in law to raise an additional assessment.

*Editorial Note:*

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