DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

RAYUAN SIVIL NO: 14-11-08-2014

ANTARA

ENSCO GERUDI (M) SDN BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

KES DINYATAKAN OLEH PESURUHJAYA KHAS CUKAI PENDAPATAN BAGI PENDAPAT MAHKAMAH TINGGI MENURUT PERENGGAN 34 JADUAL 5 AKTA CUKAI PENDAPATAN 1967

DALAM PERKARA

PESURUHJAYA KHAS CUKAI PENDAPATAN
RAYUAN NO. PKCP (R) 98/2012

ANTARA

ENSCO GERUDI (M) SDN BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

GROUNDS OF DECISION

Background

1. This is an appeal by the Appellant, Ensco Gerudi, against a Deciding Order of the Special Commissioners of Income Tax ('**SCIT**') made on 7/2/2014. Vide the Deciding Order, the SCIT dismissed the appeal of the Appellant against additional assessments levied by the Respondent, Ketua Pengarah Hasil Dalam Negeri, for the year of Assessment ('**YA**') 2006. Upon a request of the Appellant, the SCIT on 18/8/2014 stated a case ('**Case Stated**') for the opinion of the High Court pursuant to paragraph 34 Schedule 5 of the Income Tax Act 1967 ('**ITA**').

2. The material part of the Deciding Order reads as follows:

"**Isu Pertama: "Schedule Repair Accounts"**

> **ADALAH DIPUTUSKAN** bahawa perbelanjaan-perbelanjaan berkaitan "Scheduled Repair Accounts" sebanyak RM1,075,402.00 adalah tidak dibenarkan sebagai tolakan di bawah seksyen 33(1) Akta Cukai Pendapatan 1967 kerana ianya tidak merupakan belanja yang kesemuanya dan semata-mata dilakukan dalam penghasilan pendapatan kasar Perayu;

Isu Kedua: "Underwater Inspection In Lien Of Dry-dock"

> **ADALAH DIPUTUSKAN JUGA** bahawa perbelanjaan-perbelanjaan berkaitan "Underwater Inspection In Lien of Dry-dock" sebanyak RM250,783.00 adalah tidak dibenarkan sebagai tolakan di bawah seksyen 33(1) Akta Cukai Pendapatan 1967 kerana ianya tidak merupakan belanja yang kesemuanya dan semata-mata dilakukan dalam penghasilan pendapatan kasar Perayu;

Isu Ketiga: Bayaran Sewa Sebidang Tanah di Kemaman

ADALAH DIPUTUSKAN JUGA bahawa perbelanjaan-perbelanjaan sebanyak RM18,929.00 bersabit penyewaan sebidang tanah di Kemaman adalah tidak dibenarkan sebagai tolakan di bawah seksyen 33(1) Akta Cukai Pendapatan 1967 kerana ianya tidak merupakan belanja yang kesemuanya dan semata-mata dilakukan dalam penghasilan pendapatan kasar Perayu;

Isu Keempat: Penalti

ADALAH DIPUTUSKAN JUGA bahawa penalti sebanyak RM171,064.91 yang dikenakan oleh Responden terhadap Perayu bagi Tahun Taksiran 2006 di bawah seksyen 113(2) Akta Cukai Pendapatan 1967 adalah betul dan berpatutan;

MAKA DENGAN INI ADALAH DIPUTUSKAN SECARA MAJORITI bahawa rayuan Perayu ditolak;

DAN DIPERINTAHKAN SELANJUTNYA bahawa notis taksiran tambahan yang bertarikh 22 Disember 2011 yang menunjukkan cukai berjumlah RM6,355,999.99 bagi Tahun Taksiran 2006 adalah dikekalkan." (pp.35 to 37 of the Case Stated)

3. The question for the opinion of the High Court is whether on the facts as found by the SCIT and contained in the Case Stated the Deciding Order of the SCIT made on 7/2/2014 was correct in law.

Issue for Determination

4. The principal issue in dispute in this appeal is whether certain expenses by the Appellant in YA 2006 are deductible according to s.33(1) of the ITA. S.33(1) of the ITA provides -

> "Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source including ...

(a) ...

(b) ...

(c) ...

(d) ...".

4.1 If the Appellant's expenses in YA 2006 are deductible according to s.33(1) ITA, then the 4 decisions of the SCIT referred to in the Deciding Order mentioned in the preceding para 2 are erroneous.

4.2 The expenses in question namely, (a) Scheduled Repair Accounts amounting to RM1,075,402.00; (b) Underwater Inspection in lieu of Dry Dock (UWILD) amounting to RM250,783.00; (c) and expenses incurred in relation to a rented Kemaman yard amounting to RM18,929.00 are all related to the maintenance of a drilling rig known as Ensco 104. The issue for determination is whether the expenses in question were outgoings and expenses wholly and exclusively incurred in YA 2006 in the production of income for the Appellant.

Facts Admitted or Proved

5. The facts admitted or proved as found by the SCIT in the Case Stated in so far as they are relevant to this appeal are -

"(i) The Appellant is a company incorporated under the Companies Act 1965 and currently has its registered address at V-13-15, Level 13, Menara Prima Tower B, Jalan PJU 1/39, Dataran Prima, Petaling Jaya, 47301 Selangor, Malaysia.

(ii) The Appellant was registered on 29.07.1994 and has been carrying on the business of providing offshore drilling services to the petroleum industry in Malaysia territorial waters for more than 18 years.

(iii) The Appellant is an indirect subsidiary of ENSCO Plc, which is based in the United Kingdom. Its fleet of drilling rigs includes dynamically positioned drill-ships and semi-submersibles, moored semi-submersibles and premium jack-ups.

(iv) The Appellant's customers include national and international oil and gas companies. The Appellant is typically compensated by its customers for this oil and gas well drilling activities on a daily basis. The amount of daily remuneration or "day rate" received by the Appellant is typically a fixed quantum.

(v) In November 2005, the Appellant and an unrelated party, Carigali-Triton Operating Company Sdn. Bhd. ("**CTOC**") entered into a contract entitled "Contract No. CTOC 105/21/016B: Provision of Jack-up Drilling Rig: Drilling Unit ENSCO 104 ("**Contract**").

(vi) The title of the Contract and Exhibit 1-1.21 of the Contract specifically identify the jack-up drilling rig to be provided by the Appellant to CTOC as ENSCO 104 ("**Rig**"). The Rig is a vessel flagged in Liberia and built in 2002 at the Keppel FELS Shipyard, Singapore. It has a gross tonnage of 8,887 tonnes and a net tonnage of 2,663 tonnes.

(vii) Exhibit 1-1.17 of the Contract states that parties anticipated the delivery date of the Rig to be "between January and February 2006".

(viii) The Appellant leased the Rig (i.e., ENSCO 104) from ENSCO Offshore International Company ("ENSCO Offshore"), the owner of the Rig. To this end, the Appellant and ENSCO Offshore entered into a Standard Bareboat Charter dated 05.04.2006. Subsequently, the Standard Bareboat Charter between the Appellant and ENSCO Offshore was terminated on 20.09.2006. The Appellant then entered into a Master Bareboat Charter dated 21.09.2006 with ENSCO Labuan Limited ("**ENSCO Labuan**"), which resulted in the Appellant leasing the Rig from ENSCO Labuan instead of ENSCO Offshore. ENSCO Labuan leased the Rig from ENSCO Offshore, and then let out the Rig to the Appellant.

(ix) The expenses incurred by the Appellant which are in dispute are as follows:

	Item	Amount (RM)
(a)	Scheduled Repair Accounts (Account No.:10005-910898-3104-640)	1,075,402
(b)	Underwater Inspection In Lieu of Dry Dock (Account No.:10005-910899-3104-640)	250,783
(c)	Other Direct Cost (Invoice No.:J0608906)	18,929
	Total:	1,345,114

(x) The Appellant carries out its business by leasing rigs from owners, and takes possession of any rig which it leases on a "as is where is" basis as this is a bareboat charter. This would mean that should there be maintenance carried out on the rig, it would be borne by the charterer or the lessee, and not the rig owner or lessor.

(xi) The Appellant would know in advance the relevant maintenance work which must be carried out on the Rig and therefore must know the cost that it must bear in advance. This is because the maintenance is pre-planned and ENSCO has a computer programme to keep track of the scheduled maintenance.

(xii) As the maintenance is pre-planned, parts will be required for maintenance in advance, and would have been booked in advance. For major maintenance, an Authorization for Expenditure ("**AFE**") would be raised.

(xiii) The AFE numbers are unique and specific to a specific repair and maintenance project. As soon as the CTOC contract had been entered into, any repair and maintenance work which is to the benefit of the CTOC contract would be borne by the beneficiary of the CTOC contract, which is the Appellant.

(xiv) The accounting system of the Appellant (and ENSCO group) would be able to accurately capture the costs and apportion them accordingly.

(xv) In the present appeal, AFE 006061, AFE 006137, AFE 006219, AFE 006393 and AFE 005716 are AFEs pertaining to the Rig for the purposes of the CTOC contract.

(xvi) Once an AFE number has been raised, the relevant rig managers would approve the expenditure listed in the AFE. This would allow

the Appellant to ascertain that the expenditure was indeed incurred for the benefit of the Appellant pursuant to the CTOC contract.

(xvii) Replacement parts are sourced from reputable third party vendors all around the world. As the parts for the Rig are highly specialized, they are usually obtained from specific vendors all around the world.

(xviii) To purchase the parts, the local ENSCO entities in the countries which the vendors are located will first make the necessary payments. It will then be charged-back to the beneficiaries of the part (in this case, the Appellant) through intercompany invoices. Therefore, as reflected in Bundle D3, every vendor invoice will be followed by a corresponding intercompany invoice.

(xix) The CTOC contract therefore is the relevant contract which generates income for the Appellant. As the expenditures for the Rig can ultimately be traced back to the CTOC contract for the benefit of the Appellant, the expenses were ultimately borne by the Appellant. They appear on the ledgers supplied to the Respondent during the audit.

(xx) Apart from scheduled maintenance, all rigs are required to undergo periodic UWILD expenditure.

(xxi) UWILD expenditure is a periodic expenditure incurred by the ENSCO group twice every 5 years as part of a mandatory requirement imposed by the American Bureau of Shipping ("**ABS**") to periodically certify the operational efficacy of the Rig.

(xxii) The Lease provides that the Appellant is responsible for maintenance and upkeep of the Rig, including the UWILD expenditure. The UWILD expenses are required to maintain the operations of the Rig.

(xxiii) As part of the ENSCO group's local cost allocation process, the UWILD cost is spread across a period of 24 months and borne by the charterers or lessees of the Rig. This is to ensure that the expenses allocation is fairly spread between all the relevant ENSCO entities that uses the Rig within the period of the 24 months.

(xxiv) In the present appeal, the Appellant had used the Rig for 9 months, which were then charged-back by the Rig Owner to the Appellant. The Appellant would be contractually obliged to make these payments.

(xxv) Following from the above paragraph, the charge-back had occurred in the year of assessment 2006.

(xxvi) The cost would be first borne by the Rig Owner, and subsequently redistributed to the relevant ENSCO entities which uses the Rig within the prescribed 24 months.

(xxvii) The cost must be redistributed because all entities which leases the Rig from the Rig Owner would take the rig on a "as is, where is" basis. This would result in the advantage of fair redistribution of cost of the UWILD expenditure across the ENSCO group.

(xxviii) While the Rig is in operation in Malaysian waters on the CTOC contract, not all parts of the rig can be kept on board.

(xxix) Therefore, the Appellant had to provide an operationally suitable storage yard in Malaysia for this purpose.

(xxx) Towards this end, the Appellant incurred expenses for the storage of parts for the CTOC contract in a rented yard in Kemaman.

(xxxi) Expenses were incurred to ensure the parts can be properly stored in the rented yard. If the modifications were not done, the Appellant would not have been able to store the items in proper condition."

(see paras 7.1(i) to 7.1(ix), paras 7.2(i) to 7.2(xxii) Case Stated)

Applicable law

6. In **Chua Lip Kong v. DGIR [1981] 1 MLJ 235** at 236 B-E right column, the Privy Council stated the following:

> "Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".
>
> From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; **but they may be, or may involve (and very often do),**

assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shewn to have proceeded upon some erroneous assumption as to the relevant law."
(Emphasis added)

7. In **Edwards (H.M. Inspector of Taxes) v. Bairstow & Harrison 36 TC 207** (House of Lords) at 224, Viscount Simonds stated -

"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the Court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

8. In **Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713** at p.732F-H the Supreme Court approved and followed the principles enunciated in **Edwards v. Bairstow and Harrison [1956] AC 14** pertaining the duty of the Court when hearing appeals from the SCIT-

"When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination."

8.1 Regarding the aforesaid statement, the Supreme Court at 733 A-B stated -

"In *Chua Lip Kong v Director-General of Inland Revenue*, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:

> ... it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in *Edwards v Bairstow*. It is a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside."

9. The Court is also mindful that in an appeal to the High Court just like an appeal by the taxpayer to the SCIT against an assessment under the ITA, the onus of proof is on the taxpayer to demonstrate that the assessment should not have been made (see **Lower Perak Co-operative Housing Society Bhd** (supra) at p.733 H-I to p.734 A).

Findings

10. As to the interpretation to be accorded to s.33(1) ITA, both Counsel for the Appellant and the Respondent cited the case of **Ampat Tin Dredging Ltd. v. Director-General of Inland Revenue [1982] CLJ (Rep) 402**. The Respondent relied on the following dictum of Mohd. Azmi J (as he then was) at 403 [d-e] Held 6:

> "The question whether money is "wholly and exclusively incurred in the production of gross income" within the meaning of s.33(1) of the Income Tax Act 1967, is a question of fact to be decided on the circumstances of each case. In this particular case, on the facts before the Special Commissioners, there was sufficient evidence to support their decision, and they are correct in law that the disputed sum is not deductible under s.33(1) of the Income Tax Act 1967."

10.1 The Appellant on the other hand drew the Court's attention Mohd. Azmi J's dictum in the same case at 405 [g-i] -

> "In this case, we are dealing with the provision of s.33(1) of Income Tax Act 1967, the relevant parts of which read:
>
> > Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained **by deducting from the gross income** of that person from that source for that period **all outgoings and expenses wholly and exclusively incurred** during that period by that person **in the production of gross income** from that source ..." (The emphasis is mine).
>
> As I have occasion to state in the past that it is a well settled principle of law that the rule of strict construction must be applied in interpretation of statutes which impose pecuniary burden on the subject. If a statute professes to impose a charge, "the rule", said the Judicial Committee in *Oriental Bank v. Wright* [1879] AC 842, 856 is "that the intention to impose a charge upon a subject must be shown by clear and unambiguous language"."

10.2 Further at p.406 [b-e] of the same case, Mohd. Azmi J referred to the oft quoted words of Rowlatt J in **Cape Brandy Syndicate v. Inland Revenue, Commissioners [1921] 1 KB 64** at 71 as follows:

> "... in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax: there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax.

Applying the above principles of construction of fiscal legislation to the present case, there should be no room for doubt as to what s.33(1) Income Tax Act 1967 requires, as regards deductions that can be made in ascertaining a taxpayer's adjusted income from a source for a particular taxing year. From the clear, words of s.33(1), in order for outgoings and expenses to be allowed as deductions they must

be wholly and exclusively incurred in the production of gross income."
(Emphasis added)

11. It is to be observed that aforesaid dicta of Mohd. Azmi J in **Ampat Tin Dredging Ltd.** (supra) and the oft quoted words of Rowlatt J in **Cape Brandy Syndicate** referred therein were cited with approval by the Court of Appeal in **Margaret Luping & Ors v. Ketua Pengarah Hasil Dalam Negeri [2000] 3 CLJ 409** at 420 [h-i] to 421[a-g] in the determination of whether the net proceeds payments are allowable deductions under s.33(1) of the Act. The Court of Appeal found that the net proceed payments were wholly and exclusively incurred in the production of the appellant's income from timber operations and were allowable deductions under s.33(1) of the Act amongst others for the reason -

> "The net proceeds payments were somewhat similar to royalty payments. In our view the net proceeds payments were a requirement under the licence whereby the appellants were compelled to make those payments. The taxable income of the appellants in the present appeal came from the timber operations for which the appellants were given the licence. Without the licence there would be no income from the timber operations upon which the respondent could raise the tax."

12. Further in **RB Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1995] 2 MSTC** 2360, the SCIT when considering the requirements of s.33(1)(a)(i) of the Act which in substance says that any sum payable by way of interest upon any money borrowed and employed in the production of gross income is deductible. The SCIT cited with approval the case of **Port Elizabeth Electric Tramway**

Company Ltd v. Commissioner For Inland Revenue (1935) 8 SATC 18 as follows:

> "**The purpose of the act entailing expenditure must be looked to. If it is performed for the purpose of earning income, then the expenditure attendant upon it is deductible ...** The other question is, what attendant expenses can be deducted? How closely must they be linked to the business operation? **Here, in my opinion, all expenses attached to the performance of a business operation bona fide performed for the purpose of earning income are deductible** whether such expenses are necessary for its performance or attached to it by chance or are bona fide incurred for the more efficient performance of such operation provided that they are **so closely connected with it that they may be regarded as part of the cost of performing it.**
> (emphasis ours)"
> (Emphasis added)

13. I find the proposition in **Port Elizabeth**'s case is supported in **Strong And Company of Romsey, Limited v. Woodifield [1906] 5 TC 215** where Lord Davey at 220 held-

> "These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade. &c. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. **It must be made for the purpose of earning the profits**. In short, I agree with the judgment of the Master of the Rolls."
> (Emphasis added)

13.1 In fact the same proposition of Lord Davey in **Strong**'s case was cited with approval by LP Clyde in **Robert Addie And Sons' Collieries, Limited v. The Commissioners of Inland Revenue 8 TC 671** at 676, a case cited by learned Revenue Counsel for the determination of the meaning of "wholly and exclusively" in s.33(1) of the Act.

14. By virtue of the preceding authorities which I have discussed, it is clear that for the Appellant to obtain a deduction for expenses made, it must satisfy the following elements:

(a) outgoings and expenses;

(b) wholly and exclusively;

(c) incurred during that period; and

(d) in the production of income.

In fact this position was echoed in **Margaret Luping**'s case (supra) where the Court of Appeal at 418 [h-i] stated -

> "The relevant requirement is whether at the time when the gross income was produced, the net proceeds were expenditure wholly and exclusively incurred in the production of that gross income."

Scheduled Repair Accounts – RM1,075,402.00

15. In respect of Scheduled Repair Accounts expenses, the SCIT found the facts admitted or proved at para 7.2(i) to para 7.2(x) in the Case Stated (see paras 5(x) to 5(xix) above). Under this head of expenses, I note that the SCIT has captured the essence of the -

(i) Appellant's contention -

> "It was the Appellant's contention that based on the CTOC contract the expenses incurred are revenue expenses and hence deductible, as they were incurred for the purpose of production of income."
> (para 10.2 of Case Stated)

(ii) Respondent's contention -

> "The Respondent did not allow the claim, contending that the expenses were incurred before the Standard Bareboat Charter commenced, which Said Charter the Respondent recognises as the primary document to be given effect to, not the CTOC agreement. The Respondent argued that Clause 4 of the Bareboat Charter provides that the effective date of the Charter is subject to the delivery date of the vessel i.e. ENSCO Rig 104. The Standard Bareboat Charter is dated 5.4.2006. Thus the Respondent's stand is that ENSCO Rig 104 was not yet in the Appellant's possession on

10.11.2005 and the Standard Bareboat Charter was not yet in force when the expenses were incurred."
(para 10.3 of Case Stated)

In fact this is in essence the submission of the Respondent in this appeal.

16. On this issue of the Appellant's claim for deduction of **RM1,075,402.00**, the SCIT rejected the Appellant's claim for deduction for the same, amongst others, for the following reasons drawn from the Case Stated:

"10.5 ... On our part we cannot agree with and cannot accept the Appellant's contention that the CTOC contract be given primary and sole effect simply because on the date that the CTOC contract was signed we find the Appellant was not yet in possession of the ENSCO Rig 104 in Malaysian territorial waters to be engaged in activities and providing services to its customer (CTOC) for the production of income.

10.6 ... [W]e find the Standard Bareboat Charter i.e. the leasing agreement for the relevant rig to be of paramount importance, as it would provide for and state the material date on which the Appellant was to obtain, possession of ENSCO Rig 104 and forthwith generate income for the Appellant. Yes, we agree with and give effect to the crucial Clause 4 of the said leasing agreement which states that "This charter shall become effective upon the date and time of delivery of the vessel" (i.e. ENSCO Rig 104 to the Appellant). The real question for us to determine is when was the said Rig delivered to the Appellant?

10.7 In this regard firstly we find the Appellant's tax agent's email to the Respondent states, inter alia, that the said Rig "completed its contract with Premier Oil Indonesia @ 5.30 hours on April 05, 2006. The rig entered shipyard in Singapore for several days preparing for upcoming contract with CTOC in Malaysia ... ..."

Secondly, we take note that the learned Appellant's counsel too has confirmed the contents of the abovesaid email, ...
"... ... The Rig was attached to Premier Oil in Indonesia. Upon completion of its assignment in Indonesia, it sailed to Singapore on 5.4.2006, being the mobilization centre identified in the CTOC

contract. Here, repair and maintenance was carried out in connection with the CTOC contract in Malaysia ... ... The Rig then sailed to Malaysian waters on 12.4.2006."

10.8 ... [B]ased on the facts of this case, we interpret Clause 4 of the said Standard Bareboat Charter to mean that delivery of the said ENSCO Rig 104 would be the delivery date on which the same sailed to Malaysian waters on 12.4.2006. This is so because only on that date would the Appellant be deemed to be given delivery of the said rig for its business operations and be subject to the Malaysian income tax regime! We do not accept the Appellant's contention that the repairs and maintenance work at the Singapore shipyard was part and parcel of the CTOC contract because we find **the expenses incurred and payable/paid to the Singapore shipyard (foreign entity) are not subject to the Malaysian Income Tax regime, as the foreign entity does not pay taxes to the Malaysian Inland Revenue Board**! We therefore agree with the Respondent's contention that the expenses were incurred before the relevant rig entered Malaysian waters and hence before the coming into effect of the Standard Bareboat Charter, and hence not deductible because the performance of the contract between Appellant and CTOC had not yet become effective without the relevant rig being in the physical possession of the Appellant.

...

10.10 ... **Secondly and more importantly and surprisingly we find from AW2's testimony on the remaining sixteen (16) line items in the Index for the Appellant's Bundle of Documents, part II (Exhibit marked "D2") have vendors Invoices with the company names such as:**

(i) Pentagon Freight Services, Ltd;

(ii) Global Manufacturing of Acadiana. Inc.;

(iii) Vetco Gray Controls Ltd;

(iv) MTQ Engineering Pte. Ltd;

(v) Keppel FELS Ltd.

Certainly, the above companies are Singapore registered companies and American registered companies, not Malaysian registered companies, and coupled with the fact that no repairs and maintenance work were ever carried out after 12.4.2006 at Malaysian port in Malaysian territorial waters, we find AW2's

testimony on the 16 line items purportedly to have been incurred for ENSCO Rig 104 after 12.4.2006 to be highly dubious, if not a blatant lie and not probable in all the circumstances of this case."

(Emphasis added)

17. With respect I am of the view that the SCIT has erred in the following manner:

17.1 It is pertinent to bear in mind the nature of the Appellant's business as proved in the Case Stated, paras 7.2(i), 7.2(ii), 7.2(iii), 7.2(iv), 7.2(v), 7.2(vi), 7.2(vii), 7.2(viii), 7.2(ix) and 7.2(x). The Scheduled Repair Accounts reflected the expenses incurred under the AFEs 6061, 6137 and 6219 (disputed AFEs) for maintenance projects to prepare the ENSCO 104 for the CTOC contract. The AFEs were approved in advance on 22/11/2005, 17/1/2006 and 20/3/2006 with a future looking scheduled start date consistent with the estimated start date for the CTOC contract (see pp.141-143 of Respondent's Bundle of Documents (Bundle E)/Tab 8 of Appellant's Core Bundle).

17.2 It is pertinent to appreciate the relevance of the unchallenged documentary evidence that the AFEs were authorization orders for specialized replacement parts to be placed in advance of planned use, sourced from specific vendors around the world. Then these expenses were incurred by the Appellant when they were charged back by the Ensco entities that made the purchases on its behalf. It is the cost of such parts that appear in the Appellant's ledgers under the Scheduled Repairs Account in YA 2006 (see Ledger entry at p.140 of Respondent's Bundle of Documents (Bundle E)/Tab 8 of Appellant's Core Bundle). It can be seen from the Ledger entry with

entries running from 30/4/2006 till 28/8/2006 that the majority of the expenses took place anyway after the lease took effect on 5/4/2006.

17.3 To reiterate the SCIT had found AFEs 6061, 6137 and 6219, 6393 and 5716 are AFEs pertaining to the Rig for the purposes of the CTOC contract as a fact proved. In para 10.9 Case Stated, the SCIT made a finding, amongst others, -

> "[I]t is not disputed between the parties and we so find that upon sailing into Malaysian waters on 12.4.2006, ENSCO Rig 104 did not undertake any further repairs or maintenance work in any Malaysian port (Kuantan, Kemaman or elsewhere) ..."

17.3.1 With respect, I find the aforesaid finding of the SCIT is inaccurate as neither the Appellant nor the Respondent averred that no further works were done when the Rig sailed into Malaysia after 12/4/2006.

17.3.2 Further the said finding is in direct contradiction with unchallenged evidence before the SCIT in that -

(a) a subsequent AFE 6293 was conceded by the Respondent as deductible (approved 10/5/2006 (at p.144 of Respondent's Bundle of Documents (Bundle E)/Tab 8 of Appellant's Core Bundle);

(b) the various charge back invoices for parts shipped after 12/4/2006 (extract of the full ledger and sampling of documents supplied by the Appellant to the Respondent (at pp.140, 145-154 of Respondent's Bundle of Documents (Bundle E)/Tab 8 of Appellant's Core Bundle);

(c) evidence given by the Appellant's witness who was not cross examined on these points, that maintenance on the Rig was frequently conducted – some daily, some bi-weekly, some monthly and some annually. As explained, it was a key part of maintenance to

replace worn out parts (Questions 16-17 of Witness Statement of Dirk Friedj Touboul (AW1) Tab 3 of Appellant's Core Bundle).

17.3.3 In submission before the SCIT and repeated in this appeal, the Respondent relied on the information gleaned from the AFEs as tabulated -

"

	AFE 6061	AFE 6137	AFE 6219
Schedule date	01.12.2005	01.01.2006	01.04.2006
Est. Completion Date	31.03.2006	06.05.2006	31.05.2006
Project location	Singapore	Jakarta/KL	Singapore
Approval date	21.11.2005	17.01.2006	20.03.2006

"

It can be seen observed the evidence relied on by the Respondent contradicted the aforesaid finding of the SCIT as the tabulation shows the maintenance project contemplated under AFEs 6137 and 6219 were estimated to run into May 2006.

17.3.4. In the light of the proved facts of the nature of the pre-planned maintenance and the requirement for AFEs to be accordingly issued as part of the Appellant's planning process, the dates on the AFEs were only estimates as it could not be ascertained with certainty in November 2005, where the Rig would be located and when materials ordered for the repairs and maintenance would arrive. Thus, the schedule dates and the estimated completion dates in the AFEs do not denote the actual date that the maintenance is due. AW-1 in his Witness Statement (Q&A5) that "[O]perations must be carried out efficiently and expeditiously without delay [and] maintenance will be carried out while operations are ongoing."

17.4 Learned Counsel for the Appellant submitted that during the course of the proceedings, the Respondent did not submit any

evidence to contradict the evidence of AW-2, Ronald Crescencio Carvalho; neither was AW2 cross-examined on the veracity of the documentation used by him to support the expenses were incurred by the Appellant. In the circumstances, the failure to cross-examine AW2 on a material part of the case means what is stated by the witness is true and correct and not disputed. Support for this proposition of law can be gathered from **Abu Bakar Pangis & Ors v Tung Cheong Sawmill Sdn Bhd & Ors [2014] 1 LNS 570** (CA) at para 24(c)(i)(ii)(iii), **Mat Zuki Ismail v Public Prosecutor [2014] 1 LNS 674** (CA) at para 31, **Chua Beow Huat v. Public Prosecutor [1968] 1 LNS 24** (CA). Hence with respect the finding of the SCIT "AW2's testimony on the 16 line items purportedly to have incurred for ENSCO Rig 104 after 12.4.2006 to be highly dubious, if not a blatant lie and not probable in the circumstances of this case" clearly is erroneous given that AW2's reliability as a witness has not been challenged.

17.5 I find the SCIT in agreeing with the Respondent's contention (at para 10.3 Case Stated) has erred by overly focusing on the point that (i) "*the Appellant was not in possession of the Ensco Rig 104 ... to be engaged in activities and providing services to CTOC for the production of income*" and (ii) "... *there is no generation of income without the Appellant having physical possession of the Rig and operating it*" before there can be deductibility of expenses. In so doing so the SCIT with respect has ignored the unique aspect of the AFEs and the fact AFEs are issued and parts are booked in advance by virtue of the pre-planned maintenance required throughout the operation of the Rig.

17.5.1 In this regard I adopt the analogies submitted by the learned Counsel for the Appellant below which demonstrate that the Respondent's argument on 'physical possession translates to deductibility' is flawed -

> "(a) a lawyer, incurring expense for stacks of paper purchased wholly and exclusively for the purpose of a single identifiable litigation, be denied of deduction simply because he has yet to receive the physical possession of the stacks of paper when he had already incurred the expenses?
>
> (b) a contractor, incurring expense for cement purchased wholly and exclusively for the purpose of a single identifiable project, be denied of deduction simply because he has yet to receive the physical possession of the cement when he had already incurred the expenses?"

UWILD Expenses – RM250,783.00

18. In respect of UWILD expenses, the SCIT found the facts admitted or proved at para 7.2(xi) to para 7.2(xviii) in the Case Stated (see paras 5(xx) to 5(xxvii) above).

19. The Respondent submitted based on the Appellant's tax agent, Messrs. Price Waterhouse and Coopers to the Respondent dated 23/2/2010 (p.136 Exh. E), the UWILD expenses were incurred prior to the effective date of the agreement/charter of 5/4/2006 and the expenses were incurred in Singapore -

> "(iii) <u>Account 10005-910899-3104-640 - RM250,783</u>
>
> This cost represents UWILD expense incurred on ENSCO 104 which was undertaken in 2005 while the rig was in Singapore ...
>
> Enclosed in Appendix 3 is the listing of "ENSCO 104 UWILD AFE details" and "GL details for account 910899"."

19.1 The Respondent further submitted that (i) the UWILD expenses were correctly added back by the Respondent on the ground that the expenses were made in YA 2005 and not YA 2006; (ii) although the Appellant's ledger for UWILD expenses attached as Appendix 3 (p.166 Bundle E) shows that the journal date is 2006 but the latter is not the real date of expenses as the heading of the journal states "GL details for account 910899-Rig 104 Dry dock Amortization expenses."

20. In dealing with this head of expenses, at para 10.12 to 10.18 in the Case Stated, the SCIT, amongst others, stated -

> "10.13 From the facts of this case, we understand the UWILD expenditure was made in the years 2005 for a certification inspection conducted outside Malaysia. For the period of 9 months that the Rig was used in Malaysian territorial waters, no certification inspection was conducted. The claim for RM250,783.00 deduction under this second issue, was a charged-back amount to the Appellant for having leased the Rig for 9 months in the year 2006."

Then relying on the following cases of **Liquidator bagi YF Devt. Sdn Bhd v KPHDN (1996) MSTC 2526**, **SPK Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 10-026**, the SCIT dismissed the Appellant's claim for UWILD expenses as -

> "[10.18] ... we find the "overarching internal accounting systems" governing the business relationship between related companies of a multinational company must still be subject to the provisions of the Malaysian Income Tax Act 1967 wherein in section 33(1) of the same the basis year period is only up to one financial year, and hence expenses incurred prior to the tax year under appeal as in the present appeal for the second issue for determination is not recognized and irrelevant for our consideration and due determination."

21. With respect I am of the view that the SCIT has erred in its aforesaid finding for these reasons. In my view it is important to bear in mind the purpose, objective of UWILD expenses and the ENSCO's group policy of distribution of expense account over a period of 24 months and allocate the monthly costs to whichever ENSCO entity is using the particular rig. In fact whilst the SCIT has accepted the proved facts regarding UWILD expenses at para 7.2(xi) to para 7.2 (xviii) in the Case Stated, unfortunately the SCIT has not given the same the due consideration having regard to the elements to be proved by the Appellant under s.33(1) ITA to qualify as deductible expenses. Albeit it is not denied that UWILD was physically carried out in 2005 and associated costs incurred by the owner of ENSCO Rig 104 then, as correctly submitted by the Appellant, the Respondent and SCIT has failed to appreciate that the "UWILD Expense deduction claimed by the Appellant was simply its share in proportion to the period of time in which the ENSCO 104 was used in YA 2006 for the CTOC contract, and chargeable as part of its income generating operations".

22. In **ME Holding Sdn Bd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 10-013** at p.709, the SCIT held -

> "In regard to the expenditure incurred to derive the income from a sources of business it has been recognised by the accounting and legal principles that such expenditure should be matched (i.e. deducted) against the corresponding income provided that –
>
> (a) the Appellant is under a legal obligation to incur the expenditure; and
>
> (b) the expenditure is sufficiently accurate.

...

The next question is whether the expenditure is sufficiently accurate or capable of reasonable estimate."

22.1 The evidence has been adduced by the Appellant by its ledger at p.166 Respondent's Bundle of Documents (Bundle E). I am unable and neither do I regard it safe to accept the Respondent's submission that "The heading [of the journal date at p.166] clearly tells the amount has been amortized by the Appellant" as there is no evidence to show the same save on the Respondent's reliance on the heading.

22.2 In so far as the SCIT's treatment of the accounting evidence by relying on the cases: **Shadford v H. Fairweather & Co. Ltd 43 TC 291** at p.299, **I. Investment Ltd. v. Comptroller-General of Inland Revenue [1975] 2 MLJ 208** (FC) at p.212, **Bukit Yew Sdn. Bhd. v. Director-General of Inland Revenue [1987] 2 MLJ 379**. I noticed that the common thread that runs through these authorities referred to by the SCIT is the phrase '**the other evidence**' appearing in the passages relied on by the SCIT as follows:

"For, however genuinely the accounts may have been framed by those responsible for them, and however carefully they may have been studied by those responsible for auditing them, **the other evidence may show that in fact they do not truly indicate the nature of the relevant operations**." (see **Shadford** (supra));
(Emphasis is that of SCIT)

"The way in which a company keeps its accounts may be evidence of the company's intention but **such evidence must be weighed against other evidence to decide the nature of the transaction**: Shadford (H.M. Inspector of Taxes) v H. Fairweather & Co. Ltd. 43 TC 291." (see **Bukit Yew** (supra)).
(Emphasis added)

In this connection I have not seen what is 'the other evidence' which the Respondent has adduced and upon which the SCIT has relied on which makes the accounts /ledger of the Appellant not acceptable. With respect there is none; hence this finding of the SCIT of not allowing the Appellant's UWILD expenses of RM250,783.00 is misconceived.

Kemaman Rented Yard- RM18,929.00

23. The SCIT dismissed the Appellant's claim for deduction of RM18,929.00 for the rented yard in Kemaman for these reasons:

(i) the expenses were capital in nature having regard to the pictures of the yard in Bundle C;

(ii) the SCIT accepted the Respondent's contentions at paras 7.2 (xl) and 7.2(xli) under Proved Facts;

(iii) the nature of the work done for the following purpose was more in the nature of improvements rather than repairs -

(a) constructing a 30 feet reinforced concrete bridge;

(b) relocating existing chainlink fencing;

(c) to fabricate a 30 feet metal sliding door;

(d) 2" crusher run;

(e) rental of backhoe; and

(iv) based on the authorities cited by the Respondent namely, **British Insulated and Helsby Cables, Limited v Atherton 10 T.C. 155**; **O'Grady v Bullcroft Main Collieries, Ltd 17TC 93**; and **William P Lawrie v CIR 34 TC 20**.

(see para 10.19 in the Case Stated)

24. In my view the correct approach to address the issue of whether the expenses is capital in nature and therefore not deductible under s.33(1) of the ITA is that submitted by the Appellant as follows:

> "(a) **whether or not there was an identifiable asset** created from the expenditure. If in the affirmative, it is indicative of capital expenditure. This is based on the authority of *CIR v Carron Company* (45 TC 18), confirmed by this the High Court in *Fernrite Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2004) MSTC 4065, in support of the Court of Appeal case in *ML & 2 Ors v Ketua Pengarah Hasil Dalam Negeri* (2000) MSTC 3804, and *SFouthern v Borax Consolidated Ltd* [1941] 23 TC 597;
>
> (b) **whether or not the asset was brought into existence or an advantage was granted for the enduring benefit of the trade**. This position is confirmed by *British Insulated and Helsby Cables v Atherton* [1926] AC 205 and followed by our Federal Court in *Director-General of Inland Revenue v Kulim Rubber Plantations Ltd* [1980] 1 LNS 141."

24.1 In **Carron**'s case (supra), Lord Reid opined -

> "In a case of this kind what matters is the nature of the advantage for which the money was spent. This money was spent to remove antiquated restrictions which were preventing profits from being earned. **It created no new asset**. It did not even open new fields of trading which had previously closed to the company ..."
> (Emphasis added)

Under the 'Carron test' of whether the expenditure resulted in the creation of new asset, AW-1 in his testimony stated -

> "(i) bridge is needed to roll the tubular off the ground;
>
> (ii) chain link fence was removed and new fence was built to prevent theft;
>
> (iii) gate is required because there was initially no gates; and
>
> (iv) crushed stones were laid on the premises to ensure trucks can move in the premises."

24.2 In **Atherton**'s case (supra) the House of Lords held -

> "When an expenditure is made, not only once and for all, but **with a view to bringing into existence an asset** or **an advantage for the enduring benefit of a trade**, there is a very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."
> (Emphasis added)

Under the 'Atherton test', in order for the expenditure to qualify as a capital asset -

> "(a) there needs to be a view to bringing into existence - i.e., the intention of creating an asset;
>
> (b) there needs to be an advantage for the enduring benefit of a trade - i.e., must have sufficient durability, whether by effluxion of time or otherwise."

24.3 Having regard to the evidence of AW-1 in re-examination, the intention of the Appellant with regard to the rented yard is clear: it will only be needed so long as there are rigs are available in Malaysia. If there are none, then the rented yard will not be needed. There are no associated long term plans to the yard, and only the bare minimum expenditure will be required to ensure that the yard is in a usable condition. According to AW-1, the duration of the CTOC contract is 1 year.

24.4 Therefore I am of the view the SCIT erred in not applying the tests under the **Carron**'s case and **Atherton**'s case which if so applied, I agreed with the Appellant's submission that the only reasonable conclusion that can be reached is that there is no intention to create profit making apparatus assets from the expenditure for the Kemaman rented yard.

24.5 As for the **O'Grady**'s case (supra) relied heavily on by the Respondent in this appeal, the case can be distinguished on the facts from present case in this appeal. Further, I am of the view the proper test is to follow the 2 prong test in **Carron**'s case and **Atherton**'s case in the determination of whether it is capital or revenue expenditure.

Penalty imposition

25. S.113(2) of the ITA (relevant part) provides -

> "113(2) Where a person -
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own changeability to tax or the changeability to tax or the changeability to tax of any other person
>
> then, ... the Director General may require that person to pay penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct ..."

25.1 The Respondent, amongst others, submitted under s.113(2) of the ITA, the Respondent is given the power to impose a penalty up to equal to the amount undercharged due to incorrect return made. The Respondent further submitted the Respondent instead of imposing 100% penalty permitted by law imposed the penalty of 45% after taking into consideration the facts and merits of the Appellant's case.

26. In upholding the penalty imposed by the Respondent on the Appellant, the SCIT stated "[W]e see no good reason to doubt and

dispute the penalty imposed on the Appellant. We see no redeeming feature in the Appellant's position regarding all the issues for our determination. We agree completely with the contents of paragraphs 71, 72 and 73 in the Respondent's Written Submission marked Exhibit "G". The Appellant had filed an incorrect tax return for YA 2006". The SCIT cited the following passage (**italicized**) where Abang Iskandar bin Abang Hashim J (as he then was) in **KPHDN v. Dr. Zanariah binti Ramli, Rayuan Sivil No.R1-14-12-2011** stated as follows:

> "As was indicated by the learned counsel for the Revenue, the issue of penalty was not covered in the appeal, *but as the Revenue was successful in the appeal, that means that the Respondent Dr Zanariah had filed an incorrect or inaccurate tax return for the years under review and it is only fair that the penalty that was imposed by the Revenue be reinstated as part of this order of this Court that has allowed the appeal.* I agree that section 113(2) of the ITA does not provide for good faith as a defence in a situation where no prosecution has been mounted against the Respondent taxpayer."

27. I observed paras 71, 72 and 73 of the Respondent's Written Submission marked as Exhibit "G" referred to by the SCIT in the Case Stated and endorsed by them have been repeated in the Respondent's Submission before this Court in the instant appeal. The said paras are now reproduced as the relevancy of the same will become apparent later -

> "71. However, even if merit of the case were to be taken in consideration, the Respondent submits still the defence of good faith is not applicable to the Appellant as the facts shows that the incorrect return was not occur out of misconception or misinterpretation but rather intentional.
>
> 72. In the first and second issue (Scheduled Repair Accounts and UWILD expenses), it is clear that the agreement/charter has not been effective yet. The expenses were all incurred before the

Appellant took delivery of the rig ENSCO 104. The Appellant was well aware the fact that as long as they did not took delivery of the vessel, the agreement is yet to be effective, but still the Appellant made claimed on the expenses on rig ENSCO 104 despite the agreement was yet to come into existence.

73. And in Issue 3 (Kemaman rented yard), from the nature of the works as stated in the invoice, it is crystal clear that the work on Kemaman Yard was for the purpose of creating new structure i.e. the concrete bridge, sliding metal gate, chainlink fence and crusher run. These are all new structure which was not in existence when the Appellant took possession of Kemaman Yard and any prudent taxpayer would know that when one incurred an expenses to bring into existence something new, the expenses is capital in nature. But yet the Appellant made claim on the expenses."

28. Learned Senior Revenue Counsel (SRC) for the Respondent, Encik Ahmad Isyak, submitted that under penalty imposed under s.113(2) of the ITA, the defence of good faith is not applicable and is not a valid defence taking into account the implementation of self assessment system in Malaysia in 2001. In support learned SRC relied on **Dr. Zanariah binti Ramli**'s case (supra) and **Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2012] 6 MLJ 411** at 424 [46], 425 [47] and [48]. The latter two passages in the latter case state -

"[47] The evidence in this case shows that the Revenue Board became aware of the RM18,000,000 claimed as deduction only upon auditing. Not for the auditing the respondent would not be aware that the deductable rental should be lesser instead. The appellant therefore would be paying less tax. The contention by the appellant that it was made in good faith due to the differing interpretation of the law cannot hold because ignorance of law cannot be a defence.

[48] This country is now adopting a self-assessment regime. Thus in line with the present policy where submission of returns are based on self assessment by tax payer, a tax payer must be mindful of his responsibility to submit correct returns and must necessarily do so upon necessary consultation to ensure correct returns are submitted."

29. It is important to note that whilst the Respondent is conferred the discretion to impose penalty, in **Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 2 MLJ 708** at 713[H] the Supreme Court held that this provision does not vest unfettered discretion in the Revenue Board to be exercised at whim and fancy (followed by Rohana Yusuf J (as she then was) in **Syarikat Pukin Ladang Kelapa Sawit** (supra)).

29.1 Whilst I agreed with the views expressed by the learned Judges in **Syarikat Pukin Ladang Kelapa Sawit** and **Dr. Zanariah binti Ramli**'s case that s.113(2) of the ITA does not provide for good faith as a defence in a situation where no prosecution has been mounted against the taxpayer, the facts of the present appeal is different. In **Syarikat Pukin Ladang Kelapa Sawit**, the learned Judge made the observation if not for the auditing the Revenue Board would nor even be aware of the RM18,000,000.00 claimed as deduction by the appellant company. In **Dr. Zanariah binti Ramli**'s case, it is pertinent to note that the learned Judge made the point *"[T]he issue of penalty was not covered in the appeal*", but the learned Judge felt it was fair to reinstate the penalty imposed by the Revenue Board as part of the order of the Court that has allowed the appeal because the learned Judge held "[*A]s Revenue was successful in the appeal, that means that the Respondent, Dr. Zanariah had filed an incorrect or inaccurate tax return for the years under review [2 year period].*"

29.2 The question is has the Respondent exercised its discretion properly according to the facts and circumstances of this case. With respect I could not agree with the submission of learned SRC at

paras 71, 72 and 73 of Respondent's Submission referred to above to show that the incorrect return was intentional. Based on the factual matrix of this case under appeal, I am of the opinion this is certainly not an outright case of the Appellant intentionally submitting incorrect return. The Appellant did not attempt to evade or avoid tax nor to conceal any evidence but had made full and frank disclosure and given its full co-operation to the Respondent during the tax audit. This is crystal clear from the whole array of exchange of correspondence between the auditor of the Appellant and the Respondent found in Respondent's Bundle of Documents (Bundle E). For example, it can be seen in the differing positions held by the Respondent with regard to the deductibility of UWILD expenses at p.134 Respondent's Bundle of Documents (Bundle E). In fact the Appellant has at all material times sought professional advice in the discharge of the burden that the assessment should not have been made by the Respondent. This is in tandem with the principle in **Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ 479** (HC) at 493[51] where Alizatul Khair J (as she then was) cited the Canadian Court of Appeal in **Yarrows v Frowde Ltd [1934] 3 DLR 711** and held "*The penalty provision in ss 113(1) and 113(2) is to punish taxpayers who deliberately submit incorrect tax return and information. It cannot be the intention of Parliament to punish taxpayers who innocently submit incorrect tax returns or* ***those taxpayers who engage professional tax agents to prepare and submit their tax returns***." (Emphasis added). It is observed a similar approach is adopted in **Syarikat Pukin Ladang**

Kelapa Sawit of the need of "*necessary consultation to ensure correct returns are submitted.*"

Conclusion

30. For the reasons given I had allowed the appeal of the Appellant with costs of RM10,000.00 to be paid by the Respondent to the Appellant after taking into account that the issues ventilated are of importance to the Appellant in the conduct of its business and this appeal turns largely on the interpretation to be accorded to the 'timing' in which the deductions under s.33(1) of the ITA can be made in the factual circumstances of the case in this appeal.

Dated: 11/6/2016

(SGD)

SGD. (LAU BEE LAN)

Judge

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