DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
RAYUAN SIVIL NO: WA-14-6-04/2016

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... PERAYU

DAN

KOMPLEKS TANJONG MALIM SDN BHD ... 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) 2/2016

ANTARA

KOMPLEKS TANJONG MALIM SDN BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN]

[DIGABUNGKAN DAN DIDENGAR BERSAMA DENGAN]

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
<u>RAYUAN SIVIL NO: WA-14-3-02/2017</u>

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... PERAYU

DAN

KOMPLEKS TANJONG MALIM SDN BHD ... RESPONDEN

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

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Grounds of Decision

Azizah Nawawi, J:

Applications

[1] There are two (2) appeals before this Court filed by the Director General of Inland Revenue ("**DGIR**"), by way of a Case Stated pursuant to paragraph 34 of Schedule 5 of the Income Tax Act ("**ITA 1967**") against the Deciding Order made by the Special Commissioner of Income Tax ("**SCIT**"), both in favour of Kompleks Tanjung Malim Sdn Bhd ("**Company**").

[2] The issue in these consolidated appeals relate to the tax deductibility of quit rent payments made by the Company to the State Government of Perak for Years of Assessment ("**Y/A**") 2006 to 2012:

(i) Civil Appeal No. WA-14-6-04/2016 relates to Y/A 2006 – 2009, 2011 and 2012; and

(ii) Civil Appeal No. WA-14-3-02/2017 relates to Y/A 2010.

[3] The Deciding Order (amended) dated 11.7.2014, *inter alia*, reads as follows:

*"**ADALAH DIPUTUSKAN SECARA SEBULAT SUARA** bahawa pihak Responden tidak mempunyai kuasa untuk membahagikan dan/atau menghadkan tututan Perayu berkaitan dengan perbelanjaan bayaran cukai tanah atau "quit rent" yang telah dijelaskan oleh Perayu secara sepenuhnya kepada Kerajaan Negeri Selangor dibawah seksyen 33 (1) Akta Cukai Pendapatan 1967 berkaitan dengan taksiran bagi Tahun-Tahun Taksiran 2006, 2007, 2008, 2009, 2011 dan 2012;*

***ADALAH DIPUTUSKAN JUGA** bahawa Perayu adalah layak untuk menuntut keseluruhan potongan perbelanjaan bayaran cukai tanah atau "quit rent" bagi Tahun-Tahun Taksiran 2006, 2007, 2008, 2009, 2011 dan 2012 tersebut sejajar dengan peruntukan Seksyen 33 (1) Akta Cukai Pendapatan 1967;*

***ADALAH DIPUTUSKAN JUGA** bahawa Responden tidak wajar mengenakan penalti di bawah Seksyen 113 (2) Akta Cukai Pendapatan 1967.."*

Agreed Statement of Facts (before the SCIT)

[4] The Company is a private limited company incorporated in Malaysia under the Companies Act 1965 on 16.5.1991 and has its registered office at Wisma Taiki, No. 1, Jalan S.P. Seeivasagam, 30000 Ipoh, Perak Darul Ridzuan.

[5] The Company's ultimate holding company is Kuala Lumpur Kepong Berhad.

[6] The Company has at all material times been carrying on the business of oil palm plantation only. Hence, the Company's only source of income is plantation income derived from the sales of fresh fruit bunches planted on and harvested from their freehold land known as Ladang Kompleks Tanjong Malim situated in Mukim Hulu Bernam, Daerah Hulu Selangor (the said "**Land**").

[7] The Land was acquired by Tanjong Malim in 1991.

[8] On 31.5.1993, the Company submitted an application to the land Administrator of Daerah Hulu Selangor ("**Land Administrator**") to convert the category of land use of this Land from '***agricultural land***' to '***commercial land***' (the "**Conversion**").

[9] As at Year of Assessment ("Y/A") 2005, the quit rent of the Land was RM219,698. Upon completion of the process of Conversion, the quit rent for the Land was increased and the increased quit rent for Y/As 2006, 2007 and 2011 is as follows:

Y/A	**Increased Quit Rent (RM)**
2006	1,057,244
2007	1,056,804
2011	1,015,157

[10] By letters dated 1.10.2009 and 23.10.2009, the DGIR disallowed the deduction of a portion of the expenditure incurred by the Company for the payment of the quit rent on its Land for Y/As 2006 and 2007 (the DGIR's position).

[11] The Company disagreed with the DGIR's position and stated vide letter dated 8.12.2009 that the payments of the increased quit rent should qualify for full deduction because such payments were incurred wholly and exclusively in the production of the Company's plantation income under section 33 (1) of the Income Tax Act 1967.

[12] Despite the above, the DGIR maintained their position and raised a Notice of Assessment for Y/A 2006 and a Notice of Additional Assessment for Y/A 2007 against the Company on 29.12.2009 with penalties.

[13] The Company then lodged Notices of Appeal with the DGIR on 26.1.2010 to appeal against the Notice of Assessment for Y/A 2006 and Notice of Additional Assessment for Y/A 2007.

[14] In light of the DGIR's position, the Company has filed all the relevant appeals, and the particulars of the Y/As, assessment and Form Q, which are the subject matter of the appeals before the SCIT are as follows:

Y/A	Date of Assessment	Date of Form Q	Total Tax and/or Penalties Payable (RM)
2006	Form J 29.12.2009	26.1.2010	275,391.42
2007	Form J 29.12.2009	26.1.2010	390,070.24
2011	Form C – 30.4.2012 (deemed assessment)	30.5.2012	661,404.75

[15] Subsequent to the above, on 18.12.2012, the DGIR raised additional assessment in Form J against Company for the Y/As 2008 and 2009 on the same issue and also impose penalties therein under section 113(2) of the ITA 1967.

[16] The Company proceeds to lodge appeals against the said additional assessments and these appeals were registered with the SCIT.

[17] All the appeals have been consolidated and heard together before the SCIT.

Issues Before The SCIT

[18] The issues for determination before the SCIT are as follows:

(i) whether the DGIR is empowered to apportion the Company's claim to deduct its quit rent payments to the Bendahari Negeri Selangor in respect of its Land known as Ladang Kompleks

Tanjong Malim situated in Mukim Hulu Bernam, Daerah Hulu Selangor (the "**Quit Rent payments**") into allowable and disallowable portions under section 33(1) of the ITA 1967, instead of allowing the Company to deduct the Quit Rent payments in full under section 33(1) of the ITA 1967; and

(ii) whether the DGIR's imposition of penalties on the Company under section 113(2) of the ITA 1967 is correct in law, and if so, whether the penalties are reasonable and warranted taking into account all relevant fact and circumstances of the Taxpayer's case.

The Findings of the Court

[19] Parties are on common ground with regards to the legal principles when dealing with an appeal from the decisions of the SCIT. The relevant cases are as follows:

(i) The Privy Council in the case of **Chua Lip Kong v. Director General of Inland Revenue** [1981] 1 LNS 157; [1982] 1 MLJ 235 held as follows:

> *Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their*

decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. ***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 shown to have proceeded upon some erroneous assumption as to the relevant law****. It is therefore desirable that in a Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: viz - whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were. (emphasis added)*

(ii) The Court of Appeal in the case of **Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2013] 3 CLJ 813 also made reference to *Chua Kip Long* 's case and further held as follows:

> *"****As a general rule finding of facts of trier of facts is rarely disturbed by appellate court more so when it relates to physical facts****. As long as the trier of facts has directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness, the finding of facts relating to physical facts will not*

be ordinarily disturbed notwithstanding the judgment is brief and direct to the point. However, when it relates to psychological facts the trier of facts is expected to give more cogent reasons to ensure every aspect of the relevant evidence has been considered in the right perspective to pass the test of reasonableness, [see Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor [2004] 4 CLJ 309; [2003] 2 MLJ 97]. Failure to give sufficient reasons in the grounds of judgment may result in appellate interference. This is evident from decided criminal cases and very seldom in civil cases as psychological facts may not be relevant unless it is a probate matter, consisting of issues such as animus testandi, undue influence or fraud etc. or in civil cases relating to conspiracy or motive etc. ***When it relates to statutory appeals concerning SCIT the test for appellate interference is much stricter*** *[see Edwards v. Bairstow & Harrison 36 TC 207].*" (emphasis added)

(iii) In **Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2015] 5 CLJ 923, the Court of Appeal held as follows:

"[24] We make the general observation that courts, acting in accordance with the law, are at all

times bound by the legislation placing jurisdiction and authority in specialized bodies such as SCIT. ***The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance.*** *It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.*

[25] Courts must also bear in mind the SCIT's specialization. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. ***Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT...****"* (emphasis added)

[20] Guided by the aforesaid cases, I will now deal with the two (2) issues raised before the SCIT.

Issue (i) ***whether the DGIR is empowered to apportion the Company's claim to deduct its quit rent payments into allowable and disallowable portions under section 33(1) of the ITA 1967, instead of allowing the Company to deduct the Quit Rent payments in full under section 33(1) of the ITA 1967.***

[21] The salient facts as agreed by the parties are that the Company's only business is the palm oil plantation on agricultural land. In 1993, the Company applied to convert the category of land from agricultural to commercial land. Before the conversion, the quit rent for the land premised on agricultural land category was only RM215,698.00. After the conversion, the Company had to pay a higher scale of quit rent based on commercial rate, that is, the sum of RM1,057,244.00 for 2006, RM1,056,804.00 for 2007 and RM1,015,157.00 for 2011. The Company had claimed as expenditure the full quit rent based on commercial land category that it has paid to the Selangor State Government.

[22] However, the DGIR has disallowed the deduction of the full sum of quit rent based on commercial value of land incurred by the Company as part of expenditure incurred. The DGIR issues Notices of Additional Assessment. Being aggrieved by the additional notices, the company appealed to the SCIT.

[23] The SCIT held that the DGIR has no power to apportion the taxpayer's claim into allowable, that is the quit rent premised on agricultural land and disallow the portion of quit rent based on commercial land.

[24] The Company had claimed for the full deduction of the quit rent based on commercial category of land as expenditure under section 33(1) of the ITA 1967, which reads:

> *"33. (1) 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 <u>wholly and exclusively incurred</u> during that period*** *by that person in the* ***<u>production of gross income from that source</u>****, including - .."* (emphasis added)

[25] In the case of **Krishnadas Achutan Nair & Ors v. Manivam Samykano** [1997] 1 CLJ 636; [1997] 1 MLJ 94, the Federal Court has held that:

> *"The function of a Court when construing an Act of Parliament is to interpret the statute in order* ***to ascertain legislative intent primarily by reference to the words appearing*** *in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For*

Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs J in Beckwith v. R. [1976] 12 ALR 333, at p. 337."

[26] In **Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor** [1994] 1 MLJ 156, Justice Edgar Joseph JR SCJ stated that although dictionaries are not to be taken as authoritative exponents of the meaning of the words used in the Acts of Parliament, it is a well-known rule that words should be taken to be used in their ordinary sense.

[27] In '**Oxford Advanced Learner's Dictionary of Current English**' (**3rd Edition**), the word "**wholly**" is defined to include "*entire; complete*" whilst the word "**exclusively**" is defined to mean, *inter alia*, "*solely; completely*". Therefore, under section 33(1) of the ITA 1967, the deduction is only applicable to the outgoings and expenses where the said expenses are entirely and solely incurred in the production of gross income from that source. In **Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v. Ketua Pengarah Hasil**

Dalam Negeri [2012] 6 MLJ 411, Justice Rohana Yusouf (as Her Ladyship then was) held as follows:

> *"[17] If we were to look If we were to look at the s. 33 of ITA above, expenses that are deductible includes all outgoings and expenses wholly and exclusively incurred during that basis period. Further, such expenses must be wholly and exclusively incurred for the production of gross income for that year is allowed deduction. As for rental, s. 33(1)(b) clearly states that deductible rental refers to rent payable for that period (or for any part of that period) in respect of any land or building or part thereof occupied by the tax payer in that period for the purpose of producing gross income from that source. Therefore, it may be said that under s. 33, before expenses can be allowed deduction it must fulfill two following elements and they must be read conjunctively:*
>
> *(i)* ***The expenses must be wholly and exclusively incurred in that basis year****; and*
>
> *(ii)* ***The expenses must be wholly and exclusively incurred in the production of gross income****."* (emphasis added)

[28] Therefore, the issue here is whether the payment of quit rent premised on industrial land category is wholly/entirely and

exclusively/solely incurred in the production of gross income from the palm oil plantation business.

[29] The SCIT has made a finding of fact that sole purpose of the conversion from agricultural lands to commercial lands is merely to enhance the capital value of the lands. This can be seen from paragraph 7.2 (vi) – '*Fakta Yang Dibuktikan*':

> *"(vi)* ***Tujuan Perayu menukarkan status penggunaan tanah tersebut hanyalah semata-mata untuk meningkatkan modal atau nilai tanah tersebut sahaja.*** *Oleh yang demikian,* ***jika terdapat pengambilan wajib tanah Perayu oleh Kerajaan atau pihak berkuasa, nilai perolehan yang kena dibayar kepada Perayu akan menjadi lebih tinggi.****"* (emphasis added)

[30] Therefore, the conversion of the Land to commercial land by the Respondent has nothing to do with the palm oil production, as the conversion of the Land category is to enhance the capital value of the lands. As the purpose of the conversion to commercial land has nothing to do with the palm oil production, then it cannot be said that the payments of the quit rent premised on commercial land is wholly and exclusively incurred for the palm oil production. In **Ketua Pengarah Hasil Dalam Negeri v. Shaklee Products (Malaysia) Sdn Bhd** (MTKL/RKK/Rayuan No: R1-14-07-2008), Justice Aziah Ali (as Her Ladyship then was) held that the franchise fees paid by the respondent is not solely for the production of the respondent's

gross income, as the purpose of the franchise fees is to obtain the right to commence the business, and is not an expenditure incurred wholly and exclusively to produce income.

[31] Therefore, the Company cannot claim for the deduction of payment of quit rent premised on commercial land, and they can only claim for deduction of the payment of quit rent based on agricultural land.

[32] The next issue then is whether the DGIR has power to apportion, that is to allow deduction of quit rent based on agriculture land, and to take out the quit rent premised on commercial lands. If the DGIR cannot apportion, then as submitted by learned counsel for the Respondent, either he allows all or he disallows all.

[33] The SCIT has applied the case of **DGIR v. Kok Fai Yin** [MTKL Rayuan Cukai No. 14-1-90] where the High Court finds that section 33(1) of the ITA 1967 does not empower the DGIR to consider and determine what reasonable fees should have been paid to the directors and to disallow the excess from deduction under the section.

[34] In **Kok Fai Yin's** case, the company has paid directors' fees to its three (3) directors. However, the DGIR is of the view that the amount paid to each director was unreasonably excessive and proceeded to deduct a certain portion from the amount and adding the deducted amount back to the gross income of the company. The issue before the Court is whether the appellant has power to

apportion the director's fees paid by the company into allowable and disallowable parts under section 33(1) of the ITA 1967. The Court then held as follows:

> "*My finding is that section 33 of the Income Tax Act* ***1967 does not empower the appellant to consider and determine what reasonable fees should have been paid to the directors by the respondent****, and to disallow the excess from deduction under that section.*" (emphasis added)

[35] The facts in **Kok Fai Yin's** case are distinguishable from our case, as there is no issue in that case as to whether the directors' fees are wholly and exclusively incurred in the production of gross income. The DGIR was only concerned that the directors' fees were unreasonably excessive and sought to deduct the amount accordingly to his perception. The Court rightly held that he cannot consider and determine what is the reasonable fees that should have been paid to the directors by the respondent.

[36] In our case however, it is very clear from the SCIT's finding of facts that the conversion of the Land to commercial land by the Company has nothing to do with the palm oil production. In fact, the Company can still continue with the palm oil plantation business on the said Land without the conversion of the land use category. As the purpose of the conversion to commercial land has nothing to do with the palm oil production, then the payments of the quit rent premised

on commercial land is not wholly and exclusively incurred for the palm oil production. Therefore, the Company simply cannot deduct the full quit rent based on commercial land category as this is against section 33(1) of the ITA 1967.

[37] As such, it is only proper for the DGIR to disallow the deduction of quit rent payment based on commercial land category. The DGIR cannot allow the full deduction, as that will be contrary to section 33(1) of the ITA 1967. He cannot disallow all as that will be prejudicial to the Company as the Company did pay the quit rent for the said land and is entitled to such deduction under section 33(1) as part of its expenses.

[38] Therefore, I am of the considered opinion that since section 33(1) allows deductions wholly and exclusively incurred for the production of the income, the Company can only claim that amount as a deduction of its expenses, and any claim in excess to that will trigger the statutory duty of the DGIR to disallow such expenses not wholly and exclusively incurred for the production of the income concerned. The duty of the DGIR is to ascertain that only statutory deductions allowed by the ITA 1967 may be claimed by the taxpayer, nothing more and nothing less. This was also considered by the Court in **Kok Fai Yin** where the Court said this:

> *"I can appreciate the concern of the appellant that an item of* ***expenditure for 'the production of income' must be distinguished from that was 'incurred for the***

protection for the income' because while the former is deductible, the latter is not*. It may be used as a device to reduce the chargeable income of a company (the tax payer) or artificially to reduce the profits of a taxpayer."* (emphasis added)

[39] Therefore, I am of the considered opinion that where the Company has made a claim for deductions that is not sanctioned by the ITA 1967, that is, deductions that falls outside the ambit of section 33(1) of the ITA 1967, the DGIR can apportion the Company's claim to deduct its quit rent, by allowing deduction of quit rent based on agricultural land and disallow the portion that relate to the value of commercial lands. In the present appeals, the DGIR was legally correct when he restricts the Company's deduction to quit rents based on agricultural land and exclude the quit rents based on the value of commercial land.

[40] In **Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd** (**supra**), the Court has affirmed the decision of the SCIT which had maintained the decision of the DGIR in restricting the deduction of rentals paid in Y/A 2002 and Y/A 2003 only to the extent of RM1,133,333.33 per year (based on annual rental) and not the whole of the rental actually paid, that is the sum of RM1,392,000 for Y/A 2002 and RM16,608,000 for Y/A 2003.

Issue (ii) whether the DGIR's imposition of penalties on the Company under section 113(2) of the ITA 1967 is

correct in law, and if so, whether the penalties are reasonable and warranted taking into account all relevant fact and circumstances of the Taxpayer's case.

[41] The DGIR has imposed penalties against the Company premised on section 113 of the ITA 1967, which reads:

"Incorrect returns

113. (1) .....

(2) Where a person-

(a) makes an incorrect return 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 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 has been accepted as correct..."*

[42] Therefore, before the penalty can be invoked, the DGIR must be satisfied that the Company has made an incorrect return by omitting or understating any income or has given any incorrect information.

[43] In **Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd (supra)**, **Justice Rohana Yusuf held as follows on section 113(2) of the ITA 1967**:

> *"[46] Under s. 113(1) where a person makes incorrect return or gives incorrect information he can be guilty of an offence and be liable to fine and special penalty double the undercharged tax consequential to that incorrect returns or information. A defence of good faith is provided under s. 113(1) of the ITA. Section 113(2) would operate if there is no prosecution made under s. 113(1). Thus for the same wrong, that is, making incorrect returns or wrongful information, a person who is not charged under s. 113(1) can be imposed with penalty under s. 113(2). Reading the two provisions quite obviously it is implied this provision operates with or without bad faith. The Supreme Court in Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 2 MLJ 708; [1993] 1 BLJ 25 explained that the objective of assessment of tax contemplates filing of correct returns*

by taxpayer. Filing incorrect returns attracts a penalty under s. 113(2) of the ITA. The court in that case held that this provision vested discretion in the Revenue Board, a discretion that cannot be exercised at whim and fancy.

[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 deductible 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 return is based on self-assessment by taxpayer, 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."

[44] In the present case, the Company did not file the correct return to the DGIR during the relevant years of assessment. If the DGIR did not conduct the audit, the DGIR would not have been aware that the

Company had been deducting the full quit rent based on commercial land category. It is on this basis that the DGIR has issued the Notices of Additional Assessments. Therefore, I am of the considered opinion that there is a legal basis for the DGIR to invoke his discretion in imposing the penalty. In the case of **Sri Binaraya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri**, Rayuan Sivil No. R1-14-16-2011, the Court of Appeal held that:

> *"14. ..... From the facts of this case,* ***the taxpayer in this case had submitted inaccurate tax return after an audit exercise was conducted on its accounts for the year 2003, and once that fact has been established as in this case, the DGIT was within his discretion to impose the penalty on the taxpayer.****"* (emphasis added)

[45] With regards to the issue raised by the Company that the filing of the tax returns is based on their interpretation of the law, I echo the findings of Justice Rohana in **Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd** (**supra**), that ignorance of law cannot be a defence.

[46] The Company also submits that where the incorrect return or information are made in good faith, it is wrong to impose penalties under section 113(2) of the ITA 1967. However, in respect of the use of the words '*good faith'* in section 113, the Court of Appeal in **Syarikat Ibraco Paremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2015] 10 CLJ 114, has held that 'good faith' in not

relevant where the DGIR had exercised his discretion under subsection 113(2). The Court held as follows:

> *"[40] "It is without doubt that section 113(2) of the Act gives a discretion to the Respondent to impose on a person who has failed to observe the requirements of the law as provided in paragraph 2(a) or (b) of section 113. Hence the use of the phrase "the director General may require that person to pay penalty".* ***There is a clear distinction between subsection 113(1) and subsection 113(2). Although paragraphs 113(1)(a) and (b) and paragraph 113(2)(a) and (b) are almost identical, but the effect of subsection 113(1) is different form subsection 113(2).*** *Subsection 113(1) provides for an offence being committed in the circumstances provided for in paragraph (a) or (b) unless that person "satisfies the court that the incorrect return or incorrect information was made in good faith". Whereas subsection 113(2) provides for a situation where there is no prosecution under subsection 113(1) has been instituted in the circumstances provided for in paragraph 113(2)(a) and (b), the Director General may require that person to pay penalty.* ***That being the case, the defence of "good faith" as found in subsection, and not found under subsection 113(2), does not apply to the Director's discretion under subsection 113(2).*** *We therefore*

disagree with the Appellant's submission on this score." (emphasis added)

[47] The same position was taken by the Court of Appeal in **Sri Binaraya Sdn Bhd** (**supra**):

"16. Premised on the above finding by this Court on the imposition of penalty issue, this Court is of the view that the learned SCIT were in error when they found that no penalty ought to have been imposed on the taxpayer account of what they perceived as "good faith" having been exhibited by the taxpayer in the overall scheme of things pertaining to this case. ***This court is of the view that good faith is not an element that ought to feature and be considered, in cases of imposition of penalty by the KPHDN under section 113(2) of the ITA****, that could provide the taxpayer with a semblance of a shield of immunity against the imposition of such penalty. The language, as was employed in that subsection, as compared to the one immediately preceding it, would strongly convey the message that such has not been the intention of Parliament, namely that good faith is not a defence in a section 113(2) imposition of penalty by KPHDN."* (emphasis added)

[48] In the present case, since there was no prosecution against the Company under subsection 113(1) of the ITA 1967, and that the penalties are imposed under subsection 113(2), then the issue of whether the mistake in the tax returns were made in good faith is not relevant.

[49] Therefore, with regards to issue (ii), I am of the considered opinion that the DGIR's imposition of penalties on the Company under section 113(2) of the ITA 1967 is correct in law, as the DGIR has the discretion to impose the same in accordance with the law.

Conclusion

[50] Premised on the reasons enumerated above, I am of the considered opinion that there are merits in these appeals and the appeals are allowed with costs. The decisions of the SCIT are set aside and the decisions of the DGIR are reinstated.

(AZIZIAH BINTI HAJI NAWAWI)
JUDGE
HIGH COURT OF MALAYA
(Appellate and Special Powers Division 2)
KUALA LUMPUR

Dated: 2nd November 2018

For the Apellant	:	SRC, Tuan Ahmad Isyak Hassan / RC, Puan Ruzaidah Bt. Yaacob Jabatan Undang-Undang LHDN Cyberjaya, Selangor.
For the Respondent	:	Anand Raj / Foong Pui Chi / Boo Sha-Lyn Tetuan Shearn Delamore & Co Kuala Lumpur.

Cases referred:

1. Chua Lip Kong v. Director General of Inland Revenue [1981] 1 LNS 157; [1982] 1 MLJ 235.

2. Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813.

3. Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923.

4. Krishnadas Achutan Nair & Ors v. Manivam Samykano [1997] 1 CLJ 636; [1997] 1 MLJ 94.

5. Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156.

6. Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2012] 6 MLJ 411.

7. Ketua Pengarah Hasil Dalam Negeri v. Shaklee Products (Malaysia) Sdn Bhd (MTKL/RKK/Rayuan No: R1-14-07-2008).

8. DGIR v. Kok Fai Yin [MTKL Rayuan Cukai No. 14-1-90].

9. Sri Binaraya Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri, Rayuan Sivil No. R1-14-16-2011.

10. Syarikat Ibraco Paremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 10 CLJ 114.

Salinan Diakui Sah

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Setiausaha Kepada
Y.A. Datuk Hajjah Azizah Binti Haji Nawawi
Rayuan dan Kuasa-Kuasa Khas 2
Mahkamah Tinggi Kuala Lumpur