MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

TAX APPEAL NO.: KCH – 14 – 1/8 – 2012

BETWEEN

PIRAMID INTAN SDN BHD **...APPELLANT**

AND

KETUA PENGARAH HASIL DALAM NEGERI **...RESPONDENT**

BEFORE THE HONOURABLE JUDICIAL COMMISSIONER TUAN MAIRIN BIN IDANG @ MARTIN

DECISION

Introduction

[1] This is an appeal by way of Case Stated by both the appellant and the respondent against the decision of the special commissioners of the income tax ("SCIT") made on 23.5. 2012 for the opinion of the High Court pursuant to paragraph 34 of schedule 5 of the Income Act 1967 (the Act).

[2] On the 6.2.2009 the appellant had filed its appeal to the Special Commissioners of Income Tax (SCIT) against income tax assessments raised by the respondent for the year assessment 2003 and 2004 (the assessments):

Year of Assessment Tax payable	Date of Assessment	Penalty
2003 RM2,588,221.00	15.1.2009	RM803,241.00
2004 RM5,155,935.23	15.1.2009	RM1,600,117.83

[3] The Deciding Order of the SCIT made on the 23.5.2012 (See page 17 of the Case Stated dated 2.8.2012) is as follows:-

"Adalah diputuskan bahawa bayaran sebanyak RM21,040,747.00 yang di buat oleh perayu kepada Sarawak Timber Industry Development Corporation (STIDC) dalam Tahun Taksiran 2003 mengikut perjanjian diantara Perayu dengan STIDC pada 19 Ogos 2002 adalah tidak dibenarkan sebagai tolakan dalam perhitungan pendapatan yang dikenakan cukai bagi Tahun Taksiran 2003; dan bayaran sebanyak RM680,000.00 yang dibuat oleh Perayu kepada STIDC dalam Tahun Taksiran 2004 adalah juga tidak dibenarkan sebagai tolakan dalam perhitungan pendapatan yang dikenakan cukai bagi Tahun Taksiran 2004 atau bagi tempoh sepanjang perjanjian; dan

Adalah diputuskan juga bahawa penalty di bawah seksyen 113(2) Akta Cukai Pendapatan 1967 tidak patut dikenakan dalam kes ini kerana fakta kes menunjukkan yang Perayu tidak mengurangkan atau tidak melaporkan pendapatannya tetapi hanya semata-mata

penyelarasan teknikal yang berpunya dari perbedaan interpretasi sahaja

Maka dengan ini adalah diperintahkan bahawa rayuan ini ditolak kecuali penalty yang dibenarkan

Dan diperintahkan selanjutnya bahwa notis-notis Taksiran yang berkaitan dengan rayuan ini dipindah sejajar dengan keputusan diatas"

[4] The English version of the Deciding Order is loosely translated as follows:-

That the payment of RM21,040,747.00 paid by the appellant to the Sarawak Timber Industry Corporation (STIDC) in the year of Assessment 2003 pursuant to the agreement dated 19.8.2002 entered into between the appellant and STDIC should not be allowed as a deduction in the computation of the taxable income of the appellant for year of assessment 2003; and the sum of RM680,000.00 paid by the Appellant to STIDC also in the year of assessment 2004 should not be allowed as a deduction in the computation of the taxable income of the appellant for the year of assessment 2004 or for the period of the Agreement;

That the penalty imposed on the appellant pursuant to s. 113(2) of the Income Tax Act 1967 (ITA) should not be imposed in this case as the fact of the case showed that the appellant did not reduce or failed to report its income but merely made a technical adjustment due to a difference in interpretation only.

Facts

[5] The relevant primary facts as found by the STIC were (See page 5-7 of the Case Stated) as follows:-

i. The appellant was incorporated on 15.12.1992 and commenced business in year 2000

ii. The appellant is in the business of purchase and sale of timber. It did not have a timber licence. Therefore the appellant has to buy timber from other Forest Timber Licensees. One of these is STIDC.

iii. On 19.8.2002 the appellant entered into an Agreement with STIDC for the sale and purchase of timber logs including the extraction of such logs.

iv. Clause 1.1 of the Agreement states that:-

"... in consideration of the rights, power, benefit, terms and conditions under this Agreement ..." the appellant is to pay STIDC RM40,000,000.00 in the following manners:-

(a) An advance payment of RM20,000,000.00 payable as follows:-

a. RM10,000,000.00 upon signing of the Agreement;
b. RM10,000,000.00 one month from the date of the Agreement which is 18.8.2002.

(b) RM20,000,000.00 payable progressively by monthly premium of RM85,000,00 or RM30.00 per cubic meter for all

merchantable logs actually harvested whichever is higher until RM20,000,000.00 is fully paid up.

v. Under the Agreement, STIDC is the holder of the Forest Timber Licence for the relevant area whereas the appellant is the timber contractor as stated in the preamble to the Agreement. The contract given was for the Nanga Gaat Kapit concession area.

vi. It was also a term of the Agreement that the appellant shall pay royalties and premium to STIDC based on the total timber logs extracted. This can be seen in clauses 1.2 and 1.3 of the Agreement.

vii. The Agreement also states in clause 5 that it shall take effect from 19.8.2002 until 18.8.2022.

viii. STIDC is a statutory body established by the Sarawak Industry Development Corporation Ordinance 1973.

Decision of SCIT

[6] In determining the eligibility of business deductions the SCIT had referred to sections 33(1) and 39(1) ITA. It was the findings of the SCIT that the adjusted income of a person is arrived at by deducting from the gross income of the expenses which are (a) wholly & exclusively incurred (b) incurred during the basis period for a year of assessment (c) incurred in the production of gross in that basis period (d) revenue in nature and not prohibited by section 39 of ITA. The SCIT had referred to Margaret Luping & Ors v KPHDN [2000] 3 CLJ 409 a case on sections 33(1) and 39(1) ITA.

[7] SCIT's decision was that the payments made by the appellant to STIDC pursuant to the Agreement are capital expenditure. STIC said: "We are of the opinion that an expenditure which relates to the acquisition of a source of income or capital asset would be of a capital nature, whereas expenditure relating to the performance of profit earning operations would be of a revenue in nature." STIC also concluded that: "... the letter and the agreement reflect that the upfront payment of RM20,000,000.00 has no relation with the cost or logging activity from the concession area but it is more of a consideration from the appellant upon being appointed as the contractor to obtain the right to extract, remove and sell timber logs from STIDC's concession area. Therefore the effect of these payments is that the appellant is able to bring into existence an advantage for the enduring benefit of the appellant's trade also expenditure all premium and royalty from October 2002 to August 2004 is also not allowable as there was no production of timber logs for this period."

[8] In arriving at its decision that the payments were capital expenditure the SCIT took into consideration the size of the logging concession granted to the appellant; the upfront payment of RM20,000,000.00 to STIDC and the manner of payment; STIDC being the Forest Timber Licence holder and the appellant being the contractor to fell, extract, process and sell all merchantable timber logs for a period of 20 years. The SCIT had referred to Vallambrosa Rubber Co ltd v Farmer TC 529 and British Insulated & Helsby Cables Ltd v Atherton 19 TC 155.

[9] In deciding on s 113(2) of the Act this was what STIC said: "From the facts of the case, it appears that the appellant did not understate or omit his income but merely a technical adjustment due to a differing interpretation.

Therefore we are of the opinion that the penalty under s 113(2) of the Act should not be allowed."

The parties' appeal

[10] The appellant's appeal:-

a) Whether the payment of RM21,040,747.00 paid by the appellant to STIDC in the year of assessment 2003, pursuant to the Agreement should be allowed as a deduction in the computation of the taxable income of the appellant in the year of assessment 2003 or be allowed for the deduction over the period of the agreement by reference to the quantity of timber extracted as ruled by the respondent in its letter dated 5.11.2008;

b) Whether the sum of RM680,000.00 paid by the appellant to STIDC in the year of assessment 2004 should be allowed as deduction in the computation of taxable income of the appellant in the year of assessment 2004 or be allowed for the deduction over a period of the Agreement by reference to the quantity of timber extracted as ruled by the respondent in its letter dated 5.11.2008

[11] The respondent had cross appealed against the SCIT's decision that penalty under subsection 113(2) of ITA should not be imposed as the facts of the case show that the appellant did not under declare or failed to declare its income but this was just a technical adjustment stemming from a difference in interpretation.

Appellant's submission

Revenue Expenditures

[12] The appellant had filed three submissions (submission by appellant, appellant's reply and appellant's reply by way of clarification). The gist of the appellant's submissions was that the appellant is in the business of a timber contractor of logging and selling timber and once it had commenced business, expenses incurred for the purpose of producing income should be deductible in the computation of the taxable income pursuant to s 33(1) ITA. The appellant contended that "there needs to be no direct link between every ringgit spent with every ringgit of revenue generated before the expense can be deducted, it would be sufficient that payment is made in the course of gaining or producing income". (See Ash v Federal Commissioner of Taxation 61 C.L.R 263 at 272). It is also the appellant's contention that even if there was no actual production of timbers or no generation of income, so long as the expenses were incurred wholly and exclusively by the appellant for the production of gross income for the years of assessment they were deductible under s 33(1) ITA. Therefore it should not be deductible in future based on the quantity of logs produced in those relevant years (See Margaret Luping & Ors v. KPHDN [2003] 3 CLJ 409 at 419 h to I).

[13] The appellant further submitted that the payments they made to STIDC are revenue expenditures therefore deductible. It was the appellant's contention the payments did not result in the appellant "acquiring any right to the standing timber or any right to the land. It is to secure an exclusive right to fell, extract and purchase timbers from STIDC,

without which the appellant would have loss one of its sources of income." The appellant also submitted that they do not have neither own the timber licence but the concession period of 20 years was necessary in the logging business. The appellant had also asserted that the payments were not made in respect of the concession Land or for STIDC's licence but were upfront payments of the costs of production of timber logs. Thus the appellant submitted that the payments made to STIDC was similar in character to the payment made by the taxpayer in the case of DGIR v. Hup Cheong Timber (Labis) Sdn Bhd [1985] 2 MLJ 322. Thus the appellant's acquisition of right to log has been held as not the acquisition of any capital asset (see ML & 2 Other v Ketua Hasil Pengarah Dalam Negeri [2000] MSTC 3804 pages 3811-3812). Learned counsel for the appellant had also relied on the following cases on relevant factors for determining whether payments were capital or revenue: Brennan, Dawson, Toohey, Gaudron and McHugh JJ in GP International Pipecoaters Pty Ltd (1990) 170 CLR 124, Commissioner of Taxation v Montgomery [1999] HCA 34; 198 CLR 639, 164 ALR 435; 73 ALJR 1160, Fernrite Sdn Bhd v KPHDN [2004] 7 MLJ 600, ML & Ors v KPHDN [2000] MSTC 3804, BP Australia Ltd v Commissioner of Taxation of the Commonwelth of Australia [1966] AC 224,Ketua Pengarah Hasil Dalam Negeri v James Menzes [2000] 3 AMR 3535

[14] The appellant also submitted that the respondent agreed in their letter dated 5.11.2008 and during subsequent cross examination that the payments made were "deductible but the quantum of deduction is limited to the actual quantity of timbers produced. If there are premiums which are not allowed to be deducted, it may be allowed in the future when there is

timbers produced based on the quantity of timbers produced at the relevant years". Therefore the respondent should not be allowed to approbate and reprobate.

Penalty

[15] The appellant submitted that the decision of the SCIT was correct on the penalty imposed by the respondent pursuant to s 113(2) ITA was invalid. It is the appellant's contention that such penalty should not be imposed as the appellant did not give any incorrect information to the respondent. The appellant did pay out the amount of RM21,040,747.00 and RM680,000.00. The reduction made by the appellant was merely a result of a technical adjustment made by the appellant i.e. it is due to a differing interpretation of the tax legislation by the respondent. (See Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ 479 para **51** and Ketua Pengarah Hasil Dalam Negeri v Firgos (Malaysia) Sdn Bhd [2013] 1 MLJU 1147, para 16, MM Sdn Bhd v KPHDN [2013] MSTC 10-046,Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil dalam Negeri [1999] 3 MLJ 145).

Respondent's Submission

Capital Expenditure

[16] It is the contention of the respondent that the full RM40,000,000.00 or alternatively the RM20,000,000.00 (advance payments) to be paid under the Agreement is a capital expenditure. The respondent submitted that in determining the eligibility of business deductions the relevant provisions are s 33(1) and 39(1) ITA. The respondent submitted that the payments made

by the appellant to STIDC are capital in nature and should be restricted under s 39(1)(c) ITA and even if they were not considered as capital expenditure the payments of RM21,040,747.00 and RM680,000.00 that were paid to STIDC were not incurred in the basis period upon which the related income was produced as such had not fulfilled the basic requirements in s 33(1) ITA and therefore not allowable as deductions. The respondent had cited The Naval Colliery Co Ltd v The Commissioners of Inland Revenue (1930) TC 1017 and Mengawarti Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2009] 5 MLJ 53.

[17] The respondent submitted that generally expenditure which relates to the acquisition of a source of income or a capital asset would be of a capital nature whereas expenditure relating to the performance of profit earning operations would be of a revenue nature. That a capital expenditure is a thing that is going to be spent once and for all and a revenue expenditure is a thing that recurs (See Vallambrosa Rubber Co. Ltd v Farmer TC 529). It is also the respondent's submission that there are distinctions between what is a capital expenditure and what is revenue and they are these: A distinction should be made between the acquisition of the means of production and the use of them; there should also be a distinction made between establishing or extending a business organization and carrying on the business; a distinction should also be made between the implements employed in work and the regular performance of the work in which they are employed and a distinction should be made between an enterprise itself and the sustained effort of those engaged in it (See Hallstroms Pty Ltd v FC of T). It is also the submission of the respondent that a contrast should also be established between the cost creating,

acquiring or enlarging the permanent structure of which the income is to be the produce or fruit and the cost of earning that income itself of performing the income earning operations. Thus the court should put forth queries: Are the expenses part of the company's working expenses? Are the expenses laid out as part of the process of profit earning? Or are the expenses capital outlays? Are the expenses necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all? (See Robert Addie & Sons Collieres Ltd v CIR at page 676). The learned counsel for the respondent had also urged the court to refer to the case of British Insulated & Helsby Cables Ltd v Atheron 19 TC 155 on what Viscount Cave had to say on capital expenditure: "Where an expenditure is made not only once and for all but with a view to bringing into existence an advantage for the enduring benefit of a trade, there is very good reason (in the absence of a special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but capital."

[18] Learned counsel for the respondent therefore contended that the full sum of RM40,000,000.00 or alternatively the sum of RM20,000,000.00 (advance payments) to be paid to STIDC under the agreement is a capital expenditure. The respondent is saying so because the appellant is in the business of extracting, buying and selling timber logs thus its stock in trade is timber logs and not standing timber; the concession area is large approximately 84,234 hectares for a period of 20 years; the payment of RM40 million and especially the upfront payment of RM20 million was more of a consideration for the appellant to obtain the right to extract, remove and sell timber logs from the concession area. The respondent had cited

the following cases: DGIR v LTS [1974] 1 MLJ 187 at page 188; Stow Bardolph Gravel Co. Ltd v Poole (H.M Inspector of Taxes) (1952-1955) 35 TC 459; Commissioners of Inland Revenue v Adam (1928-1929) 14 TC 34; Regent Oil Co Ltd v Strick (1965) 3 AER 174; Director General of Inland Revenue v HCT (L) Sdn Bhd (1950-1985) MSTC 268.

Penalty

[19] The respondent submitted that it was right in law to impose a penalty under s 113(2) ITA in respect of the tax undercharged for the years of Assessment 2003 and 2004. The respondent's submission was that on the factual matrix there was a failure by the appellant to submit correct information regarding the nature of the payments made under the Agreement as such it was a correct exercise of discretion by the respondent to impose a penalty of 45% as under the law a maximum of 100% could have been imposed of the tax which had been undercharged. It is also the respondent contention that good faith is not a defence against the imposition of penalty. The following cases were cited: KT & Co v KPHDN [1966] MSTC 2 594, KTSM Sdn Bhd v KPHDN and UCM S & S Sdn Bhd v KPHDN.

The question referred to the court

[20] The question for the opinion of the High Court is whether on the facts as stated by the SCIT its decision was correct in law (See page 18 of the Case stated). In Edwards v Bairstow & Harrison 36 TC 207 (HL) Lord Redcliffe had this to say on what the court ought to do when giving its opinion: "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law" and

in Lower Perak Co-operatives housing Society Bhd v KPDHN [1994] 3 MLJ 265 where His Lordship Edgar Joseph Jr (as he then was) had this to say on the role of the Judge '.... to examine the special commissioners' determination having regard to the law. If there is anything ex-facie which is bad law, or where no person could have come to that determination, or where it is not supported by the evidence or is inconsistent with and contradictory of it, the court must intervene' (See also Aspac Lubricants (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2007] 5 CLJ 353 at p. 359, CA).

[21] Now let me say that both the appellant and respondent do not dispute the facts as found by the SCIT. The appellant had cited an English case of Edwards v Bairstow and Harrison [1955] 3 All R.R. 48 (HL). The respondent had cited Chua Lip Kong v Director General of Inland Revenue [1982] 1 MLJ 235 (PC). On reading both authorities I think the gist of both cases is this. The finding of primary facts by the Special Commissioners are not assailable. They cannot be overruled or supplanted by the High Court. If the facts are insufficient for the Court to decide the question of law raised by the Case Stated then it would be necessary to remit the case to the Commissioners for further findings.

Who has the burden and standard of proof

[22] I shall first address on the burden and standard of proof since this was also raised by both parties. I have read ABC v Comptroller of Income Tax, Singapore [1959] MLJ 1963 and Nicholson v Morris (Inspector of Taxes) [1976] STC 269. I agree with learned counsel for the respondent that the burden lies with the appellant and that the standard of proof is on

the balance of probabilities (See also Ketua Pengarah Hasil Dalam Negeri v. Hock Lee Holdings Sdn Bhd [2008] 3 CLJ 51). On the other hand since there was a cross appeal by the respondent the latter too have the onus to prove on the imposition of penalty. In this particular appeal where both had appealed it cannot be correct to say that only the appellant had the onus to show that the assessment was wrong. The onus is on the respondent to show that the SCIT was wrong on the penalty. (See Ketua Pengarah Hasil Dalam Negeri v Woodville Development Sdn Bhd [2013] 3 MLJ 832.

Capital or Revenue expenditure

[23] Now capital expenditure is not defined in the ITA. Hence resort to case laws and the dictionary should be made.

[24] In Words, Phrases & Maxims on Capital and Revenue Expenditure:

> "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, such expenditure must properly be attributed not to revenue but to capital. But when the expenditure is incurred for the maintenance and preservation of an existing asset, it's not a capital expenditure, but an income or revenue expenditure."

> "Where the expenditure is made for the initial outlay or for extensive of a business or a substantial replacement of the equipment it is a capital expenditure. If the expenditure is for running the business or working it with a view to produce the profits it is a revenue expenditure. Assam Bengal Cement Co Ltd v Commissioner of Income Tax AIR 1955 SC 89 [Income Tax Act 1922, s 10(2)(v)].

"If the expenditure is made not for the purpose of bringing into existence any assets or advantage but for running the business or working it with a view to produce profits it is a revenue expenditure: See Assam Bengal Cement Co Ltd v Commissioner of Income Tax AIR 1955 SC 89 at 96."

[25] In **Webster Encyclopedic Dictionary of the English Language** capital expenditure is defined to be "money spent on improvement or additions". In **KH Aiyers Judicial Dictionary Fourteenth Edition** Lexis Nexis capex is defined as:-

"Capital expenses. An expenses made by a business to provide a long-term benefit; a capital expenditure. A capital expenses is not deductible, but it can be used for depreciation or amortization."

"Expenditure and revenue expenditure. Where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business, it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand, it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure."

[26] In Sharikat K M Bhd v The Director- General of Inland Revenue [1972] 1 MLJ 224 per Gill F.J, at page 225 I left column: "In Bombay Steamship Navigation Co's Case AIR 1965 SC 1201 at 1205 it was

held: "Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying or conduct of the business, that it may be regarded as an integral part of the profit earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on the business, the expenditure may be regarded as revenue expenditure." And also at page 225 G right column: In Robert Addie & Sons' Collieries Ltd v Commissioners of Inland Revenue 8 TC 671, 676 the Lord President (Clyde) said: "... no disbursement or expense can be deducted in ascertaining the amount of the company's profits or gains except it be 'money wholly and exclusively laid out or expended for the purposes of the trade'. What is 'money wholly and exclusively laid out for the purposes of trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary accordingly to attend to the true nature of the expenditure, and to ask one's self the question, is part of the process of profit-earning? – or, on the other hand, is it a capital outlay? – is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?

[27] In *Vallambrosa Rubber Co. Ltd. v. Farmer* 5 TC 529 at p. 536 the Lord President stated the criteria as follows:

> ... Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year.

[28] The Federal Court in Director-general Of Inland Revenue V. Hup Cheong Timber (Labis) Sdn. Bhd. [1985] CLJ 107 made a distinction between revenue expenditure and capital expenditure in a timber operation business within the meaning of s. 33(1) of the Act. Wan Hamzah, SCJ (as he then was) when delivering the judgment of the court at p. 327 said:

> "As already stated, the other issue in this case is whether the payment was a capital or a revenue expenditure. Relating to this issue several decided cases were cited to us for the Revenue and for the taxpayer. Some of the cases cited were cases of acquiring right to extract timber, some were cases of acquisition of land with the right to extract the timber thereon and some were cases of outright purchase of standing timber.
>
> Bearing in mind that the present case is not a case of outright purchase of standing timber but one of acquiring the right to extract timber,..."

His Lordship then went to examine the various authorities and at p. 331 he said:

"We find a number of features in the instant case which point to the conclusion that the sum of $1,400,000 incurred and paid by the taxpayer was revenue expenditure. Reading Clauses 3 and 7 together with the schedule in Appendix A as extracted above, we find that the taxpayer had to commence timber felling and extraction operations soon after March 29, 1973 (the date of the licence to extract timber), and to complete such operations in the first 2,000 acres not later than March 29, 1974, in the next 2,000 acres in 1975 and in the last 1,500 acres in 1976. So the period for extraction and removal was short just as in *Mohanlal* 's case. The instant case was not one in which the taxpayer acquired an interest in the land or the taxpayer could wait for a long or an indefinite time before felling, or the taxpayer could allow the trees to grow on the land deriving sustenance and nutriment from it until they became right for felling, as in *Hood Barrs'* case or the case of *Kauri Timber.* Under the agreement in the instant case the taxpayer's obligation was to complete the felling and extraction of timber within a period of less than four years from 1973 to 1976. Similar to *Mohanlal*'s case the present case was a case of implied right of the taxpayer to appropriate the timber on felling the trees and extracting them, and just as in *Hopwood* 's case the taxpayer acquired proprietary interest in all the trees on the land, not in trees to be selected, because under the agreement no selection of trees was to be done as in *Hood Barr* 's case but the taxpayer had to fell and remove all trees. It appears that the land had to be swept clean of all trees and other vegetation in order to prepare for the planting of oil palm and pepper. There is no doubt that the taxpayer was carrying on the business of

dealing in timber. This is shown by the statements of accounts of the taxpayer included in the Agreed Bundle of Documents. It incurred an expenditure of $1,400,000 and thereby acquired a ready source of instant supply of stock-in-trade, ie, timber, which was utilised within a short period. The expenditure was thus incurred on revenue account."

"Applying the principle as stated by his Lordship in that case we are of the view that the payments made by the appellants were revenue in nature. The payments were not done to acquire an interest on the land or the purchase of standing timber or the acquisition of land with the right to extract the timber on it. These payments were made for the extraction of timber. We are of the view that the payments were revenue in nature."

Analysis

[29] Now from the case laws in order for a taxpayer to qualify for deduction of any expenditure incurred by him, he must first ascertain that the expenditure is an allowable deduction under s. 33 of the Act. Once that is ascertained, he has to find out if the expenditure is barred by the provisions of s. 39(1) of the Act from being so deductible. In revenue law, any income or expenditure must be viewed in that year of assessment.

[30] Let me now reproduce s 33 and 39 of ITA as follows:-

S. 33 ITA

(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 wholly and exclusively incurred during that period by that person in the production of gross income from that source,...

S. 39 ITA

(1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of:

(a)...
(b) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of producing the gross income;
(c) any capital withdrawn or any sum employed or intended to be employed as capital;
(d)...
(e)...
(f)...
(g) any sum, by whatever name called, payable (otherwise than to a State Government or with the approval of the Minister, a statutory authority, or other body the capital or fund of which is wholly or substantially owned by a State Government or a statutory authority) for the use of a licence or permit to extract timber from a forest in Malaysia;

(h)...
(i)...
(j)...
(k)...
(l)...
(m)...

(2) It is hereby declared that section 33, except in so far as it relates to expenses of the kind specified in subsection (1)(a) to (d) thereof, is not an express provision of this Act within the meaning of this section.

[31] The relationship of these two sections is found in the case of Director-general Of Inland Revenue V. Rakyat Berjaya Sdn. Bhd. [1984] 1 CLJ 108. At pp. 253 and 254 Lee Hun Hoe, CJ (as he then was) said:

> "The relationship between the deduction allowing provisions of s. 33 and the deductions disallowing provisions of s. 39 is explained by Chang Min Tat J, as he then was, in Dgir V. Lts [1985] 1 BLJ 166.
>
> To be deductible a payment must (i) be authorised as a deduction by s. 33(1), and (ii) not be disallowed by s. 39. The Taxpayer accepts that, if the interest payments were, as it contends, outgoings or expenses wholly and exclusively laid out in the production of income from its timber trade so as to comply with s. 33(1), it would still fail to obtain relief if the interest payments were also caught by any of the disallowing provisions of s. 39."

[32] "Referring to s. 33 of the Act, only expenses which are wholly and exclusively incurred during that period by that person in the production of gross income from that source are deductible. Latham CJ provided an explanation of what the words "in the production of income" meant in *Nevill & Co v. FC of T*, and based on his *dicta*, deductible expenses can only refer to income or revenue expenses" as per Datuk David Wong Dak Wah J (as he then was) in Kanowit Timber Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2008] 6 CLJ 542)

[33] Premised on the above I now examine whether the RM21,040,747.00 and RM680,000.00 paid to STIDC can be allowed as deductions to determine the adjusted income of a person. Were the payments incurred during the basis period for a year of assessment and incurred in the production of gross income in that basis. The SCIT said: "Therefore the letter and the agreement reflect that the upfront payment of RM20,000,000.00 has no relation with the cost or logging activity from the concession area but it is more of a consideration from the appellant upon being appointed as the contractor to obtain the right to extract, remove and sell timber logs from STIDC's concession area. Therefore the effect of these payments is that the appellant is able to bring into existence an advantage for the enduring benefit of the appellant's trade also expenditure, all premium and royalty from October 2002 to august 2004 is also not allowable as there was no production of timber logs for this period." To me such upfront payments were not wholly and exclusively incurred in the production of gross income for the year of assessment 2003

and 2004. Thus the appellant had not justified the payment or the expenditure incurred by them were allowable deduction under s 33(1) ITA.

[34] Were the payments capital expenditure? The respondent concluded so and so did the SCIT. The appellant on the other hand had submitted that the payments they made to STIDC are revenue expenses. With respect such contention would not be consistent with the findings of STIC that STIDC is the licensee holder; the timber concession is 84,234 hectares, the agreement is for a period of 20 years and there was the upfront payments. The appellant sought to rely on the Federal Court decision in Director General of Inland Revenue v Hup Cheong Timber [1985] 2 MLJ 322. With respect this case is distinguishable in that Hup Cheong Timber was the timber licensee holder not Persatuan Peladang Negeri Johor ("the Persatuan") although there was an agreement between the Persatuan and Hup Cheong Timber and payment was made to the Persatuan. In such scenario the Federal Court had decided that the payment made was capital expenditure. Thus the said payments were also caught under s 39(1) ITA.

[35] Now on the penalty. Section 113(2):-

"(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 chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a 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; and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1)."

[36] In giving their decision this is what the STIC said in paragraph 9: "Having heard the facts, the evidence adduced and the submission of both parties and having read the documentary exhibits tendered..". I can deduced with certainty that the SCIT had found as facts that the appellant did not understate or omit their income but merely it was a technical adjustment due to a differing interpretation and as such it was the opinion of the SCIT the penalty under s 113(2) of ITA should not be imposed. In arriving at their decision the SCIT would have taken into account that the appellant had paid STIDC the sum of RM21,040,747.00 and RM680,000.00 respectively; that there was full disclosure of information to the respondent; that there was no deliberate submission of incorrect tax return and information. The reduction made by the appellant was merely a technical

adjustment due to a differing interpretation of the tax legislation by the respondent.

[37] Now the respondent had interpreted s 113(2) that good faith is not a defence for the penalty imposed under s 113(2). The respondent had relied on Syarikat Ibraco-Paremba Sdn Bhd v Ketua Pengarah Hasil dalam Negeri (Civil Appeal No. W-01-177-04/2013- Decision on 29.05. 2014. But Syarikat Ibraco-Paremba Sdn Bhd supra was not canvassed before the SCIT. Be that as it may both counsels had referred cases post STIC hearing. Learned counsel for the appellant had also brought to my attention the case of Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ 479 and Ketua Pengarah Hasil Dalam Negeri v Woodville Development Sdn Bhd [2013] 3 MLJ 832.

[38] The differing interpretation of whether the payments made are capital or revenue expenditure is very much an issue in this case. And here the appellant had interpreted that they were entitled to treat the payments they made to STIDC as revenue expenditure which if their interpretation was correct would be allowable as deduction and I may also add that the appellant in this case had relied on professional tax consultant. Surely all documents and payments made had been disclosed in the appellant's annual return and audited financial statements for 2003 and 2004. The respondent knew of the disclosure. As submitted by learned counsel for the appellant at paragraph 24 pages 11 and 12 of Submission by appellant dated 26.5.2014 which was the view of RW1 for the respondent:-

"Q: I refer you to page 21 of Exhibit B being a letter from Ernst & Young to you dated 12.08.2008, this letter is in response to your letter dated 22.07.2008, do you consider the letter Ernst & Young dated 12.08.2008.

A: yes.

"Q: I refer you to sub-paragraph 5 of paragraph 2.1 inyour letter dated 05.11.2008 as found in pg. 27 of Exhibit B that "Jumlah premium yang tidak dibenarkan itu boleh dibenarkan apabila berlaku pengeluaran di masa yang akan datang, dengan syarat ia sepadan dengan jumlah kayu balak yang dikeluarkan pada ketika itu."

A: Yes."

[39] Now from the evidence given by RW1 the respondent had agreed that the payments that were not allowed as deductions would be allowed at a later date when timbers were in production. Surely these views constitute differing interpretation because it was the appellant's interpretation that the payments they had made could be considered as deductions believing that the payments were revenue expenditure. Certainly such differing interpretation cannot be view as escaping from paying tax. This surely cannot be equated with the facts of Syarikat Ibraco-Paremba Sdn Bhd, *supra* where ... 'the facts as found by SCIT showed that there was tax avoidance when the transactions entered into by the appellant through the shell companies revealed the factual situation that the tax position was altered; that STIC found the appellant had in fact implemented a scheme following the advice of the Tax Consultant in perpetuating one original

intention of selling of the properties as intended to do from the start." (paragraph 27 line 4 page 24 of the Judgment). There was none of this in the present case.

[40] I think the SCIT came to the right conclusion that the respondent in exercising its discretion had not given the due consideration of all relevant facts and the circumstances of the case in imposing the penalty: Ketua pengarah Hasil Dalam Negeri v Kim Thye and Co [1992] 1 CLJ (Rep) 135 (at page 141). Thus STIC's decision in not imposing the penalty is correct in law. Here we are talking about s 113(2) and good faith is not an issue. Section 113(2) ITA clearly confers a discretion on the respondent as to whether to impose a penalty or not (see paragraph (16), Ketua Pengarah Hasil dalam Negeri v Firgos (M) Sd n Bhd [2014] 1 MLJ 701).

Conclusion

[41] In view of the above I affirm the deciding order of the SCIT dated 23.5 2012. And both appeals by the appellant and the respondent are dismissed with each party to bear their own costs.

-sgd-

Mairin Bin Idang @Martin
Judicial Commissioner
High Court Kuching

Date of Grounds of Judgement: 20.10.2014

Date of Delivery of Decision: 26.08.2014

For the Appellant: Mr. George Lim
Battenberg & Talma
Sibu

For the Respondent: Mr. Norhisham Ahmad

Note: This document is subject to editorial revision.

Certified true copy supplied to: (pg 1 - 29)
Messr. Lembaga Hasil Dalam Negeri
Secretary to Judicial Commissioner
High Court Kuching
Date: 9/9/15