DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
[RAYUAN SIVIL NO: WA-14-2-02/2021]

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ...PERAYU

DAN

SANDAKAN EDIBLE OILS SDN BHD ...RESPONDEN

(Dalam Perkara Pesuruhjaya Khas Cukai Pendapatan di Putrajaya
[Rayuan No. PKCP (R) 461/2018]

Antara

Sandakan Edible Oils Sdn Bhd ...Perayu

Dan

Ketua Pengarah Hasil Dalam Negeri ...Responden)

Judgment

Introduction

[1] This is an appeal **(Enclosure 1)** by the Appellant, the Director General of Inland Revenue **(Revenue)** against the decision of the Special Commissioners of Income Tax **(SCIT)** delivered on 4.2.2021 setting aside the notice of additional assessment (Form JA) dated 1.8.2017 for the year of assessment **(YA)** 2010 against the Respondent **(Taxpayer)** pursuant to an adjustment made by

the Revenue under section 140A of the Income Tax Act 1967 **(ITA)** which deals specifically with transfer pricing.

[2] The particulars of tax in the Notice of Additional Assessment dated 1.8.2017 for YA 2010 are as follows:

Year of Assessment (YA)	Date of Notice of Additional Assessment	Additional Tax RM	Penalty @ 25% (s. 113(2) of ITA) RM	Total Amount RM
2010	1.8.2017	6,834,926.95	1,708,731.74	8,543,658.69

(Reference: **Rekod Rayuan Tambahan (Bahagian A, Jilid 2) at pages 300 and 303**)

[3] Central to the issue under appeal is whether the adjustment of the Taxpayer's profit to the median point by the Revenue in determining the arm's length price is in accordance with section 140A of the ITA and the Income Tax (Transfer Pricing) Rules 2012 [P.U (A) 132/2012] **(the Rules)**.

[4] After the hearing, I dismissed the Revenue's appeal (Enclosure 1). The grounds for my decision appear below.

Background Facts

[5] The narration of the background facts herein is adopted with and/or without modification from the Statement of Facts of both parties and the grounds of judgment of the SCIT.

[6] The Respondent (Taxpayer) is a company incorporated in Malaysia with an office address at KM 8, Jalan Batu Sapi, 90009 Sandakan, Sabah.

[7] The Taxpayer's principal activity is, amongst others, to carry out the refining and sale of edible oils and related products, and the packaging and sale of cooking oil.

[8] On 13.3.2014, the Taxpayer through its tax consultants Messrs Ernst & Young Tax Consultants Sdn Bhd **(EY)** submitted its Transfer Pricing Documentation for the fiscal years ended 31.12.2010 to 31.12.2012 **(the 2012 TP Report)** to the Revenue.

[9] Subsequently, on 11.12.2014, the Taxpayer through EY submitted an addendum to the TP Report to the Revenue to cover 31.12.2013.

[10] Pursuant to a letter dated 12.2.2015, the Revenue commenced an audit against the Taxpayer on 16.3.2015.

[11] Since 16.12.2015, the Taxpayer and Revenue exchanged various correspondences through which the Taxpayer had provided various documents, information and explanations to the Revenue. Amongst others, the Taxpayer through EY provided various supporting documents and explanations through EY's letters dated 16.2.2015, 17.4.2015 and 24.4.2015.

[12] Vide its letter dated 30.11.2016, the Revenue requested that the Taxpayer prepare a benchmarking analysis for the years under audit i.e. for the YAs 2010 to 2013 by making a comparison with refinery companies operating in Malaysia.

[13] Vide a letter by EY dated 10.3.2017, the Taxpayer through EY submitted the benchmarking analysis as requested by the Revenue. Amongst others, the Taxpayer suggested four (4) comparable companies for the purpose of the benchmarking analysis.

[14] Vide its audit findings letter dated 17.5.2017, amongst others, the Revenue proposed a list of nine (9) comparable companies for the purpose of the benchmarking analysis.

[15] Vide a letter by EY dated 30.6.2017, the Taxpayer through EY replied to the Revenue's letter dated 17.5.2017. Amongst others, the Taxpayer rejected three (3) of the proposed comparable companies by the Revenue, including Intercontinental Specialty Fats Sdn Bhd **(Intercontinental Specialty)**, Kwantas Oil Sdn Bhd **(Kwantas Oil)**, and Sime Darby Kempas Sdn Bhd **(Sime Darby Kempas)** on the basis that these 3 companies are not functionally comparable to the Taxpayer.

[16] Vide its final audit findings letter dated 17.7.2017, the Revenue replied to the Taxpayer to inform that it would be invoking section 140A of the ITA to raise additional assessments on the Taxpayers shortly. Amongst others, the Revenue, accepted the Taxpayer's rejection of the three (3) comparable companies for the purpose of the benchmarking analysis i.e. Intercontinental Specialty, Kwantas Oil and Sime Darby Kempas. The Revenue proceeded to prepare a benchmarking analysis of the list of comparable companies as proposed in its letter dated 17.5.2017 after excluding these 3 companies. Based on the Revenue benchmarking analysis, the Taxpayer's financial results for all YAs, including YA 2010 fall within the interquartile range.

a) Transfer Pricing issue − YA 2010

The Revenue's position is that the Taxpayer's Total Cost Margin **(TCM)** for YA 2010 should be adjusted to the median point, notwithstanding that the Taxpayer's financial results for YA 2010 fall within the interquartile range. This adjustment resulted in additional taxes of RM6.834, 927.00 being payable by the Taxpayer.

b) Penalty

The penalty would be imposed at the rate of 25% for YA 2010 on the additional tax payable as a result of the transfer pricing adjustment on the Taxpayer. This imposition of penalty resulted in further additional taxes of RM1,708,731.75 being payable by the Taxpayer.

[17] Together, the transfer pricing adjustment on the Taxpayer for YA 2010 (pursuant to the Revenue's decision to adjust its financial result to the median), and the imposition of penalty resulted in total additional taxes of RM8, 543, 658.75 payable by the Taxpayer.

[18] On 1.8.2017, the Revenue raised the following impugned notice of additional assessments with a penalty upon the Taxpayer.

YA	**Additional Assessment with a penalty**
2010	RM8, 543, 658.75

[19] On 28.8.2017, the Taxpayer made an appeal under section 99 of the ITA against the Revenue decision vide a letter to the Revenue enclosing duly completed and signed copies of the Notices of Appeal **(Forms Q)** for the YA 2010.

[20] The SCIT then allowed the appeal by the Taxpayer. The material part of the Deciding Order of the SCIT reads as follows: -

RAYUAN INI TELAH ditetapkan untuk keputusan pada hari ini dalam kehadiran Dato' Nitin Nadkarni bersama Encik Jason Tan Jia Xin dan Encik Chris Toh, peguam bela dan peguam cara bagi pihak Perayu dan Encik Muhammad Farid bin Jaafar Bersama Puan Norsalwani binti Muhd Nor dan Puan Norhidayah binti Yasin, Peguam Hasil, Lembaga Hasil Dalam Negeri bagi pihak Responden;

ADALAH DIPUTUSKAN SECARA SEBULAT SUARA bahawa Perayu telah berjaya membuktikan rayuan Perayu selaras dengan perenggan 13 Jadual Kelima Akta Cukai Pendapatan 1967 [Akta 53] (ACP 1967);

DAN bahawa Perayu telah berjaya menunjukkan bahawa taksiran tambahan yang dikenakan oleh Responden berlebih-lebihan atau salah sebagaimana yang diperuntukkan di bawah perenggan 13 Jadual Kelima ACP 1967;

DAN bahawa Perayu telah membuktikan bahawa tiada pernyataan fakta yang menunjukkan keputusan pelarasan kepada titik median tersebut merupakan harga selengan dan berlandaskan kepada mana-mana peruntukan undang- undang ataupun garis panduan.

DAN bahawa ketiadaan pernyataan fakta yang menunjukkan harga median yang diguna pakai oleh Responden merupakan harga selengan bercanggah dengan maksud kuasa yang diperuntukkan dalam seksyen 140A ACP 1967 dan subkaedah 13(1) Kaedah-Kaedah Cukai Pendapatan (Penentuan harga Pindahan) 2012;

DAN DENGAN ITU rayuan Perayu dibenarkan dan Notis Taksiran Tambahan bertarikh 1 Ogos 2017 bagi tahun taksiran 2010 yang berkaitan dengan rayuan ini dan juga penalti yang dikenakan adalah diketepikan.

[21] In gist, the SCIT had made the following findings: -

(a) The Taxpayer has proved that there is no fact which shows the decision for adjustment to the median point is the arm's length price and is based on any provisions of law or guidelines; and

(b) There are no facts that show the median price as applied by the Revenue is the arms' length price and thus, contradicts the power as provided in section 140A of the ITA and sub rule 13(1) of the Rules.

[22] The Revenue being aggrieved by the decision of the SCIT filed a Notice of Appeal on 8.2.2021 appealing on the question of law against the Deciding Order under para 34, Schedule 5 of the ITA.

The Law

[23] It is trite law that a decision of SCIT can be set aside if the decision is tainted with the error or misconception of law or the decision is not supported by the evidence before the SCIT.

[24] This principle of law has been succinctly explained in the case of *Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 1 MLRA262; [1994] 3 CLJ 541; [1994] 2 AMR 1735; [1994] 2 MLJ 713, in the following manner:

"First of all, it would be pertinent to say that in consideration of this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in Edwards v. Bairstow and Harrison, regarding **the duty of the court when hearing appeals from commissioners in tax cases.** It will be recalled that in that case what Lord Radcliffe said (at pp 35-36) was this:

'I think that the true position of the court on all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination, I do not think that inferences drawn from

other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. **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 on 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. So there, too, there has been error in point of law. I do think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as those many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur'.

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 principles 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 the ought to have set aside'.**

And, in Lim Foo Yong Sdn Bhd v. Comptroller-General of Inland Revenue, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners. Here is what his Lordship said [at p 169]:

'The special commissioners are, of course, as the Federal court rightly observed, the judges of fact, but in finding the facts and drawing interferences of secondary fact from them, they must not misdirect themselves and they **must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions'."**

(emphasis added)

[25] Further guidance can be gleaned from the decision of the Federal Court in *I Investment Ltd v. Comptroller General of Inland Revenue* [1975] 1 MLRA 669; [1975] 2 MLJ 208 where Raja Azlan Shah FCJ (as the late Royal Highness then was) held:-

[28] "It has been said more than once that when we come to deal with income tax cases, **we must look at all the**

> **surrounding circumstances**, not for the purpose of considering what one's own conclusion might be, but for the purpose of seeing, in fact, whether there is evidence both ways - whether there is evidence upon which the Special Commissioners could arrive at their conclusion ……"

(emphasis added)

[26] Further the then Supreme Court in the case of *Director-General of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd.* [1990] 1 MLRA 373; [1990] 2 CLJ 160; [1990] 2 MLJ 415 at 419 held as follows: -

> **"It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967 (paras 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and then to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore, conclusive.** In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in Griffiths v. JP Harrison (Watford) Ltd at p 916.
>
> > 'Now the powers of the High Court on an appeal are very limited. **The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous in point of law'**. Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. **It is not sufficient that the judge**

would himself have come to different conclusion. Reasonable people on the same facts may reasonably come to different conclusions; and often do. Juries do. So, do judges. And are they not all reasonable men? **But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere'**.

A court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see Edwards v. Bairstow, Director-General of Inland Revenue v. LCW at p 251 and Kota Kinabalu Industries Sdn Bhd v. Director-General of Inland Revenue at p 190)."

(emphasis added)

[27] Aside from this, the finding of facts by the SCIT is conclusive and as such an appeal against its decision is limited to the question of law. This is clearly provided under paragraph 34, Schedule 5 of the ITA which states:

"34. Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to paragraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal."

[28] The Court also has to be remindful of the caution made by the Court of Appeal in *Kenny Heights Developments Sdn Bhd v.*

Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923; [2015] 4 MLRA 114; [2015] 4 MLJ 487; [2015] 3 AMR 205 where it had stated 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 an 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 specialisation. 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.** (see *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri,* [1994] 3 CLJ 541; [1994] 2 MLJ 713; [1994] 2 AMR 1735; [1994] 1 MLRA262).

(emphasis added)

The Issues

[29] The agreed issues for determination are as follows: -

Issue 1: Transfer Pricing Adjustments (YA 2010)

In performing transfer pricing adjustment on the Taxpayer for the YA 2010 pursuant to section 140A of the ITA, whether the Revenue is required under the Organisation for Economic Co-operation and Development **(OECD)** Transfer Pricing Guidelines and the Revenue's Transfer Pricing Guidelines to adjust the Taxpayer's profits to the median in a case where its margin is within the inter-quartile range?

In any event, whether the Revenue has correctly invoked section 140A of the ITA in raising the notice of additional assessment on the Taxpayer for YA 2010?

Issue 2: Penalty (YA 2010)

Notwithstanding issue 1 above, whether there is any legal or factual basis for the Revenue to impose a penalty under section 113(2) of the ITA for YA 2010?

The decision of the Court

Issue 1: Transfer Pricing Adjustments

In performing transfer pricing adjustment on the Taxpayer for YA 2010 pursuant to section 140A of the ITA, whether the Revenue is required under the OECD Transfer Pricing Guidelines and the Revenue's Transfer Pricing Guidelines to adjust the Taxpayer's profits to the median in a case where its margin is within the inter-quartile range?

In any event, whether the Revenue has correctly invoked section 140A of the ITA in raising the notice of additional assessment on the Taxpayer for YA 2010?

[30] The basis for issuance of the notice of additional assessment dated 1.8.2017 for YA 2010 is pursuant to the adjustment made under section 140A of the ITA and the Rules which is to determine that the price for the sale in the transaction between the Taxpayer and its related entities is at arm's length.

[31] The Revenue is empowered to substitute the price relating to the transaction that is entered between the Taxpayer and its related entities if it is not made at arm's length under section 140A(3) of the ITA.

[32] However, section 140A(2) of the ITA also specifically provides for the responsibility of the Taxpayer to determine the price relating to the transaction between the Taxpayer and its related entities (i.e. sale of edible oils and related products) made at arm's length.

[33] The procedures to determine the arm's length price for the transaction between the Taxpayer and its related entities are further provided under the Rules which are prescribed through section 140A(1)ofthe ITA.

[34] Section 140A of the ITA reads as follows: -

Power to substitute the price on certain transactions

"140A.

(1) This section shall apply notwithstanding section 140 and subject to any rules prescribed under this Act.

(2) Subject to subsections (3) and (4), where a person in the basis period for a year of assessment enters into a

transaction with an associated person or that year for the acquisition or supply of property or services, then for all purposes of this Act that person shall determine and apply the arm's length price for such acquisition or supply.

(3) Where the Director General has reason to believe that any property or services referred to subsection (2) is acquired and or supplied at a price which is either less than or greater than the price which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length, he may in determination of the gross income, adjusted income or adjusted loss, statutory income, total income or chargeable income of the person, substitute the price in respect of the transaction to reflect an arm's length price for the transaction.

[35] The Revenue alleged, and bears the burden of proving, that the Taxpayer had engaged in transfer pricing in YA 2010, by reducing its profits in Malaysia and inflating the profits of its related parties outside Malaysia.

[36] Parties agreed that this issue was to be determined by the application of the OECD Transfer Pricing Guidelines 2010 **(OECD Guidelines)**, read with the Revenue's Transfer Pricing Guidelines 2003 and 2012 **(Revenue TPG)**, to a benchmarking analysis **(Benchmarking Analysis)** prepared by EY.

[37] The Benchmarking Analysis contained the following table **(Table 1).** Table 1 compares the profitability over 4 years (YA 2010 to 2013) of the Taxpayer and the 6 comparable companies **(6 Comparables)** selected and agreed by the Taxpayer and the Revenue:

TABLE 1

No.	Company Name	Trade description	Average Turnover (RM)	Total Cost Mark-up			
				2010	2011	2012	2013
1.	Lee Oils Sdn Bhd (1840-V)	Manufacturing of Edible oil and it's by-product.	393,287,211	1.60%	2.37%	1.20%	3.31%
2.	Siang Kee Edible Oils Sdn Bhd (29234-V)	Processing and marketing of palm kernel oil and related product.	215,965,845	0.66%	4.26%	2.63%	2.89%
3.	Sawit Raya Sdn Bhd (105130-K)	Processing and marketing of palm oil products and investment	721,599,124	2.91%	1.77%	0.03%	2.30%
4.	Southern Edible Oils Industries (M) Sdn Bhd (13087-H)	Refinery and marketing of edible oil.	308,063,425	2.28%	-1.57%	-0.90%	1.58%
5.	Wilner Edible Oils Sdn Bhd (28300-A)	Manufacturing and export of palm and edible oils.	941,568,894	-0.11%	0.72%	0.92%	1.86%

6.	Sepang Dynamics Sdn Bhd (287631-P)	Processing and trading of coconut and palm oil products.	111,952,805	2.53%	1.04%	0.52%	0.15%
7.	Sandakan Edible Oils Sdn Bhd (Respondent)	Refining & sale of edible oils and related products, packaging and sale of cooking.	3,986,652,810	1.23%	1.50%	1.92%	3.98%

Single Year	**2010**	**2011**	**2012**	**2013**
Minimum Value	2.91%	4.26%	2.63%	3.31
Upper Quartile	2.46%	2.22%	1.13%	2.74
Median	1.94%	1.41%	0.72%	2.08
Lower Quartile	0.89%	0.80%	0.15%	1.65
Minimum Value	-	-1.57%	-	0.15
Average	1.64%	1.43%	0.73%	2.01

[38] The Revenue contended that Table 1 proves the Taxpayer to have engaged in transfer pricing in YA 2010, but not in YAs 2011, 2012 and 2013. The sole basis for this contention is that in YA 2010. The taxpayer's profitability (1.23% margin) was below the median profitability of the 6 Comparables.

[39] Further, it is to be noted that: -

(a) In YAs 2011 to 2013, the Taxpayer was above the median profitability of the 6 Comparables; and

(b) In all 4 YAs, the Taxpayer's profitability was in the interquartile range of the 6 Comparable. In this regard, the SCIT has previously held in **Procter & Gamble Sdn Bhd v. KPHDN (PKCP(R) 189 - 193/2013)** that "apabila harga atau margin keuntungan berada dalam julat selengan iaitu dalam interquartile yang diterima maka pelarasan tidak perlu dibuat (perenggan 3.60 Garis Panduan OECD 2020). The SCIT decision was recently upheld by this Honourable Court on 7.4.2020.

[40] In essence, to reach its conclusion, I find that the Revenue's assessing officer adopted a method that automatically determines the Taxpayer to have engaged in transfer pricing in any YA in which it was not one of the 3 most profitable companies amongst its competitors i.e. by achieving its profit margin above the median point.

[41] In doing so, I find that the Revenue disregarded the fact that:

(a) The profitability of companies fluctuates every year due to various factors such as business decisions and economic factors. As Table 1 shows, none of the 6 Comparables consistently achieves the same level of profitability in every year.

(b) It is common ground that the 6 Comparables do not engage in transfer pricing. However, all 6 Comparables had a profitability less than the median in at least one year. Further, all 6 Comparables also had lower profitability than the Taxpayer in at least one year.

(c) Even amongst the 6 Comparables, some companies will have a higher profitability than their competitors in some

years and a lesser profitability in other years. The mere fact that the Taxpayer's profitability is below the median in one out of four consecutive years does not mean that the Taxpayer had engaged in transfer pricing.

(d) The Taxpayer was one of the top 3 most profitable companies amongst its competitors for YAs 2011, 2012 and 2013 i.e. by achieving its profit margin above the median point.

(e) The median point artificially assumes that a company is engaging in transfer pricing if it does not perform in the top 50% of its competitors every single year. However, as recognized by the OECD Guidelines, "because transfer pricing is not an exact science, there will also be many occasions when the application of the most appropriate method or methods produces a range of figures all of which are relatively equally reliable."
(See: **OECD Guidelines, paragraph 3.55 on page 272 @ 296 of Enclosure 26**)

(f) The median point in a YA can only be determined retrospectively. In YA 2010, the Taxpayer could not have known what the median point was of the 6 Comparables. It is impossible for the Taxpayer to have intentionally achieved its profitability below the median point in YA 2010, as the Revenue contended.

[42] Therefore, I am of the view that the Revenue erred in adopting this arbitrary measure i.e. the median point, as the method for determining arm's length pricing.

[43] Upon perusing the evidence produced before the SCIT, I find that RW1 admitted in cross-examination that the use of the median was not the practice of the Revenue, but rather a

decision made in this case by RW1 herself as the assessing officer. RW1 also admitted that she did not make this decision, to use the median, on the basis of any calculations or comparability adjustments as provided for under the OECD Guidelines. Instead, RW1 applied the median point solely on her interpretation of paragraph 3.57 of the OECD Guidelines.

[44] I am of the considered view that RW1 in doing so had clearly adopted the wrong approach. I find that the proper approach is that where there is a pattern which shows fluctuating profits between the companies as one would expect in business, a range rather than a single point should be used to determine arm's length pricing. This is the proper interpretation of the OECD Guidelines. This is the approach taken in **Procter & Gamble** (supra). RW1's decision to use the median point is thus not based on the OECD Guidelines, the Revenue's own TP Guidelines or case law.

[45] I noticed that to justify the adjustment made to the median by the assessing officer, Revenue counsel submitted at the SCIT that the 6 Comparables agreed upon by the parties during the audit were in fact defective. This, according to the Revenue justified the exercise of its powers under section 140A(2) of the ITA to adjust the Taxpayer's results to the median point.

[46] On 4.2.2021, the SCIT unanimously allowed the Taxpayer's appeal and set aside the Form JA with a penalty. The SCIT found that there was no basis in fact or law for the Revenue's Decision when it held as follows: -

> "81. Responden seterusnya telah mengguna pakai seksyen 140A ACP 1967 dan subkaedah 13(1) Kaedah 2012 dan melaraskan harga margin Perayu dengan penggunaan titik median 1.23% yang berada dalam julat antara nilai minimum -0.11% dan nilai maksimum 2.91%.

82. Namun **Responden gagal untuk menyokong keputusan mereka dalam menggunakan titik median** yang berada dalam julat minimum - 0.11% dan nilai maksimum 2.91% tersebut.

83. **Alasan yang dikemukakan oleh Responden adalah wujudnya kecacatan perbandingan/comparability defect** dan kegagalan memenuhi peruntukan di bawah subkaedah 6(3) Kaedah 2012.

84. **Panel tidak dapat menerima alasan yang diberikan oleh Responden** kerana **ianya tidak selaras dengan tindakan Responden yang telah bersetuju menerima 6 syarikat perbandingan untuk diguna pakai** dalam keadaan terdapatnya comparability defect dalam 6 syarikat perbandingan tersebut. **Malahan Responden masih mengambil kira julat yang disandarkan kepada 6 syarikat perbandingan tersebut.**

85. Responden **tidak dapat menunjukkan fakta bahawa keputusan pelarasan kepada titik median tersebut merupakan harga selengan** dan keputusan itu dibuat **berlandaskan kepada mana-mana peruntukan undang-undang mahupun garis panduan**.

89. Sehubungan dengan ini, Panel berpandangan bahawa Perayu telah membuktikan (non-existence of the state of facts) bahawa **tiada fakta yang menyokong keputusan/penilaian Responden untuk membuat pelarasan harga pindahan dengan penggunaan titik median semasa membuat pelarasan** ke atas harga selengan Perayu.

92. Oleh itu, **tanpa fakta yang menunjukkan harga median itu merupakan harga selengan** maka pelarasan

yang dibuat adalah bercanggah dengan maksud kuasa yang diperuntukkan dalam seksyen 140A ACP 1967 dan subkaedah 13(1) Kaedah-Kaedah 2012."

(emphasis added)

[47] Having perused the cause papers i.e. Appeal Records and the evidence produced before the SCIT, I find that the SCIT are judges of facts and its findings were consistent and intelligible and their conclusions supported by evidence led before them. Further, the SCIT's decision is consistent with the SCIT decision in **Procter & Gamble** (supra) which was upheld by this Honourable Court on 7.4.2020.

[48] Despite the above findings of the SCIT, I find that the Revenue had attacked the SCIT's finding. Firstly, the Revenue submits that the SCIT's decision is inconsistent and/or contradicts with the purported finding of facts by the SCIT which has found that there is a comparability defect to the comparable companies under subrule 6(3) of the Rules that are being used to determine, the arm's length price for the transaction between the Taxpayer and its related entities.

[49] The Revenue referred to the SCIT decision that: -

"[95] Oleh itu:

- …
- …
- DAN bahawa Perayu telah membuktikan bahawa tiada pernyataan fakta yang menunjukkan keputusan pelarasan kepada titik median tersebut merupakan harga selengan dan berlandaskan kepada mana-mana peruntukan undang-undang ataupun garis panduan;

- DAN bahawa ketiadaan pernyataan fakta yang menunjukkan harga median yang diguna pakai oleh Responden merupakan harga selengan bercanggah dengan maksud kuasa yang diperuntukkan dalam seksyen 140A ACP 1967 dan subkaedah 13(1) Kaedah-Kaedah Cukai Pendapatan (Penentuan harga Pindahan) 2012;
- …"

[50] Secondly, the Revenue submits that: the SCIT has erred in finding that "the Revenue has agreed to accept the 6 comparable companies" as:

(a) The SCIT has failed to consider that the 6 Comparables were accepted "upon the agreement of the Taxpayer and there are no other comparable companies which have been selected and provided by the Taxpayer to be used as a comparable".

(b) "Further, the Taxpayer has failed to explain or call any witness to explain on the difference of turnover between the Taxpayer and the comparable companies".

In support of this submission, the Revenue refers to certain extracts from the SCIT's grounds of judgment.

[51] Thirdly, the Revenue submits that the adjustment made to the median point of the financial results for the 6 Comparables is justified, again by referring to purported findings by the SCIT on the comparability defects for the 6 Comparables:

(a) "Further, **the SCIT has found facts pertaining to the agreement by the Company on the use of the 6 comparable companies** and that the Company has not provided with any other comparable companies. Hence,

these 6 comparable companies are the only available companies to be compared to the Company for the determination of the arm's length price."

(b) **"The findings by the SCIT have stated on the comparability defects** for the comparable companies particularly on the huge difference of the amount of turnover between the Company and the comparable companies."

(c) "It is submitted that **on the basis that the use of 6 comparable companies as a comparable have not fulfilled the comparability factors** under subrule 6(3) (b) of the Rules, the Director General of Inland Revenue has reason to believe that the transaction between the Company and its related entities is not made at arm's length due to comparability defect on the comparable companies."

(d) "It is further submitted that the adjustment to the median point is exercised by the Director General of Inland Revenue after considering the price in the transaction of the Company with its related entities is being compared to the comparable **companies which have comparability defect."**

(See: **paragraphs 30,31,34 and 37 of Enclosure 30**)

(emphasis added)

[52] Upon careful perusal of the SCIT's decision, contrary to the Revenue's contention, I find that there is no inconsistency between the SCIT's decision and their fact findings.

[53] I find that the 'finding of facts' referred to by the Revenue in Enclosure 30 is in fact, merely summaries by the SCIT of the Revenue's contentions at the SCIT.

[54] This can be clearly seen at the SCIT's grounds of judgment as follows: -

54.1 paragraph 47 - clearly states "6 syarikat perbandingan bagi pertimbangan Perayu dalam pemerhatian Responden adalah seperti berikut ……;"

54.2 paragraph 67 - clearly begins with "Responden menghujah 6 syarikat perbandingan ini tidak memenuhi faktor comparability di bawah subkaedah 6 (3) Kaedah 2012 dan terdapatnya comparability defect di mana syarikat perbandingan yang diguna pakai adalah cacat dari segi perbezaan perolehan yang besar, risiko dan fungsi yang berbeza berbanding Perayu ……;" dan

54.3 paragraph 74 – clearly begins with "Dalam hal ini Responden menyatakan bahawa Responden ……berdasarkan keterangan saksi Responden (SR-1) yang menyatakan bahawa walaupun 6 syarikat perbandingan telah ditambah dalam analisa perbandingan, masih terdapat comparability defects dalam syarikat perbandingan, iaitu ……"

[55] Based on the above, it is clear that the so called 'finding of facts' as alleged by the Revenue are in fact, merely summaries by the SCIT of the Revenue's contention at the SCIT.

[56] On the issue of the Revenue's suggestion that there were comparability defects with the 6 Comparables, the SCIT was clear in their finding of facts when they held as follows: -

"78 Panel juga mengambil kira **fakta bahawa Responden**

telah pun bersetuju kepada penggunaan 6 syarikat perbandingan dalam menentukan harga selengan. Walaupun Responden mengatakan 6 syarikat perbandingan tersebut tidak memenuhi faktor comparability di bawah subkaedah 6(3) Kaedah 2012 namun Responden sepatutnya membenarkan kaedah lain yang memberikan tahap kebolehbandingan yang paling tinggi antara transaksi itu digunakan seperti mana diperuntukkan di bawah subkaedah 5 (3) Kaedah 2012 ...

80. **Tindakan Responden dalam memberikan alasan bahawa 6 syarikat perbandingan yang diguna pakai** dalam menentukan harga selengan **tidak memenuhi faktor comparability** di bawah subkaedah 6(3) Kaedah 2012 dilihat **tidak konsisten dengan tindakan Responden yang bersetuju dengan pemakaian 6 syarikat perbadingan dalam penentuan kepada harga selengan Perayu**. Responden juga sedan bahawa wujudnya comparability defect semasa pemilihan syarikat perbandingan dibuat.

84. **Panel tidak dapat menerima alasan yang diberikan oleh Responden** kerana ianya tidak selaras dengan **tindakan Responden yang telah bersetuju menerima 6 syarikat perbandingan untuk diguna pakai** dalam keadaan terdapatnya comparability defect dalam 6 syarikat perbandingan tersebut. **Malahan Responden masih mengambil kira julat yang disandarkan kepada 6 syarikat perbandingan tersebut**.

85. **Responden tidak dapat menunjukkan fakta bahawa keputusan pelarasan kepada titik median tersebut merupakan harga selengan** dan keputusan itu dibuat berlandaskan kepada mana-mana peruntukan undang-undang mahupun garis panduan.

92. Oleh itu, tanpa fakta ynag menunjukkan harga median itu merupakan harga selengan maka pelarasan yang dibuat adalah bercanggah dengan maksud kuasa yang diperuntukkan dalam seksyen 140A ACP 1967 dan subkaedah 13(1) Kaedah-Kaedah 2012."

(emphasis added)

[57] The Revenue further submits that the SCIT has erred in finding that "the Revenue has agreed to accept the 6 comparable companies":

(a) The 6 Comparables were accepted "upon the agreement of the Taxpayer and there are no other comparable companies which have been selected and provided by the Company to be used as a comparable".

(b) "Further, the Company has failed to explain or call any witness to explain on the difference of turnover between the Company and the comparable companies."

(See: **paragraphs 23 and 24, pages 26, 27 and 28 Enclosure 30**)

[58] Contrary to the Revenue's submission and having perused the documentary evidence i.e. exhibits and evidence given by both AW1 and RW1, I find that the following facts are clear: -

(a) The Taxpayer has selected the Comparable Uncontrolled Price **(CUP)** method as the appropriate transfer pricing methodology to determine arm's length pricing and maintained this position throughout the audit.

(b) The Revenue has rejected the CUP method. Instead, the Revenue requested the Taxpayer to prepare a benchmarking analysis using the Transactional Net Margin Method **(TNMM).** (a transactional profit method)

In doing so, the Revenue stated that there are many comparable companies to the Taxpayer. RW1 has also confirmed this in cross-examination. The Revenue also provided its reasons for rejecting the CUP method. In other words, the Revenue applied the TNMM method based on its view that it is the "most appropriate method".

(c) The final list of 6 comparables has been accepted and set out by the Revenue itself in its final letter before the Form JA was raised. The SCIT found as a fact that the 6 comparables were agreed between parties.

(d) Prior to that, I find that: -

i) The Taxpayer proposed 4 initial comparables in EY's letter dated 10.3.2017;

ii) Through its audit findings letter dated 17.5.2017, the Revenue accepted 3 out of the 4 proposed comparables and selected 6 additional comparables through a search on the SSM and Oriana database. The additional comparables were said to be "lebih setara" with the Taxpayer;

iii) Through EY's letter dated 30.6.2017, the Taxpayer has proposed to remove 3 of the 9 comparables selected by the Revenue; and

iv) Subsequently, the final list of 6 comparables was then accepted and set out by the Revenue itself in its final letter dated 17.7.2017. As confirmed by RW-1 in re-examination, no outliers have been eliminated as the margin of the selected comparables "adalah sekitar". None of the 6 comparables have been eliminated as being less comparable pursuant to paragraph 3.65 of the OECD Guidelines.

(e) Further, apart from the issue of turnover, the Revenue did not raise any issues at all with the comparability of the final comparables or made any reference to comparability defects under the TNMM method. The other alleged issues were not raised in relation to the benchmarking analysis under the TNMM method. Rather they were raised to explain the Revenue's decision to reject the CUP method of assessing transfer pricing which is the method preferred by both the Taxpayer and the OECD and TPG. In any event, the difference in turnover is also not a comparability defect.

[59] Based on the above, I am of the view that the Revenue's submissions are without merits as they do not accord with the Revenue's contemporaneous actions during the audit.

[60] The SCIT correctly rejected the Revenue counsel's submissions that the 6 Comparables suffered from comparability defects as being inconsistent with the Revenue's assessing officer's actions in agreeing to the comparables during the audit. In fact, 3 of the 6 Comparables were proposed by the Revenue itself.

[61] This court is of the view that it is not fair for the Revenue to now allege in submissions on appeal that the Taxpayer has failed to provide other comparables and accuse the Taxpayer of failing to explain the supposed differences in turnover.

[62] Further, contrary to what the Revenue suggests, this court is of the view that there is no responsibility on the part of the Taxpayer to explain its difference in turnover with its competitors. Nothing in transfer pricing legislation requires taxpayers to achieve the same turnover as its competitors. In the words of this Honourable Court in *Port Dickson Power Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2012] MSTC 30-045:

"The cases are replete in that regard in **that it is never the province of either the DGIR or even the courts to tell people how to conduct their business.** That was clearly spelt out in the case of *Reed v. Nova Securities* [1982] BTC 300."

(emphasis added)

[63] Further, this court finds that the SCIT correctly held that there was no basis for the Revenue to adjust the Taxpayer's profits to the median of the 6 Comparables.

[64] This is because the Taxpayer has demonstrated that: -

(a) The purported findings cited by the Revenue are in fact merely the SCIT's summary of the Revenue's contentions;

(b) It is a factual finding that the 6 Comparables have been agreed on between the Taxpayer and the Revenue, and that the Revenue's allegations of comparability defects have been rejected by the SCIT. I see no reason why I should disturb this factual finding;

(c) In Q & A 20 of PSR-1, the Revenue alleged that there were 4 comparability defects which require adjustments to be made to the median. However, RW1 confirmed during cross-examination that apart from the issue of turnover stated at A20(i) of PSR-1, the other alleged issues were not raised in relation to the benchmarking analysis under the TNMM method. Rather they were raised to explain the Revenue's decision to reject the CUP method of assessing transfer pricing which is the method preferred by both the Taxpayer and the OECD and TPG. In any event, the difference in turnover is also not a comparability defect; and

(d) Taxpayers cannot possibly be expected to achieve the same turnover as their competitors, much lessjustify any differences in the same.

[65] Based on the above, the SCIT has correctly held at paragraph 89 of the grounds of judgment that "Perayu telah membuktikan (non-existence of the state of facts) bahawa tiada fakta yang menyokong keputusan / penilaian Responden untuk membuat pelarasan harga pindahan dengan pengunaan titik median semasa membuat pelarasan ke atas harga selengan Perayu."

[66] All in all, I find that the SCIT's decision is consistent with their earlier decision in **Procter & Gamble** (supra) that "apabila harga atau margin keuntungan berada dalam julat selengan iaitu dalam interquartile yang diterima maka pelarasan tidak perlu dibuat (perenggan 3.60 Garis Panduan OECD 2010). The SCIT's decision was recently upheld by this Honourable Court on 7.4.2020.

[67] The SCIT's decision is also consistent with RW1's own evidence that nothing in the Guidelines requires an adjustment to be made to the median, and the legal position in other jurisdictions applying the arm's length principle under the OECD Guidelines.

[68] The finding of facts of the SCIT will only be disturbed by this court when the SCIT was wrong in the evaluation of the evidence. It is for the Revenue to establish that there was a misdirection by the SCIT to warrant interference by this court. Unfortunately, the Revenue has not demonstrated any such errors in the facts of this case to warrant appellate interference.

[69] I view the SCIT's findings as rational and cogent and there are no flaws in its reasoning or the conclusions therein. Based on

the evidence before the SCIT, it cannot be said that the findings of the SCIT are irrational or perverse.

[70] I am of the view that the finding of the SCIT is based on the totality of the evidence adduced before them. To me, the SCIT had scrutinized the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinize every piece of evidence adduced before the SCIT and to make another finding of fact. That task of fact-finding fall within the jurisdiction of the SCIT.

Issue 2: Penalty (YA 2010)

Notwithstanding issue 1 above, whether there is any legal or factual basis for the Revenue to impose a penalty under section 113(2) of the ITA for YA 2010?

[71] The Revenue submitted that the penalty under section 113(2) of the ITA is correctly imposed after considering all the facts and circumstances of the Taxpayer's case.

[72] It is not disputed that the Revenue has discretionary power to impose a penalty against taxpayers under subsection 113(2) of the ITA which reads as follows: -

Incorrect returns

(1) Any person who -

(a) Makes an incorrect return by omitting or understanding 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 of any other person,

shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

(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 consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information has 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).

(emphasis added)

[73] Based on the above, it is clear that it is the discretion of the Revenue to impose penalties under subsection 113(2) of the ITA after taking into consideration all relevant facts and circumstances of the case.

[74] The Revenue submits that the Taxpayer has failed to provide any reply to the Revenue on the issue of huge difference of turnover as stated in the grounds of the decision by the SCIT.

[75] It is submitted by the Revenue that the facts of the case relate to the transaction between the Taxpayer and its related entities. Upon discovery from the audit that the price for the transaction is not made at arm's length under section 140A of the ITA, the adjustment has been made to the profits of the Taxpayer which has been understated in its returns.

[76] Hence, the penalty under section 113(2) of the ITA is imposed on the amount of tax undercharged as consequence of the Taxpayer submitting incorrect returns or giving wrong information affecting its own charge ability.

[77] It is not disputed that in the instant case, the Taxpayer had obtained professional advice from EY, a reputable firm in determining its tax liability in relation to the issues at hand.

[78] This, to my mind clearly indicates that the Taxpayer did not deliberately or recklessly submit an incorrect return. The fact that the Taxpayer consulted an independent professional illustrates that they had no intention to evade or avoid tax.

[79] I view that the fact that the Taxpayer had acted in good faith, took professional advice and made full disclosure to the Revenue constitutes sufficient grounds to set aside the penalties imposed.

[80] I find support in my view by referring to the case of *Office Park Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2011] 13 MLRH 493; [2011] 9 MLJ 479; [2011] MSTC 30-023 where Alizatul Khair J (as she then was) held as follows: -

> "[51] ...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 return.**
>
> [52] Further, it is not mandatory for the respondent to impose penalty in all tax audits. I agree that the fact that the respondent has a discretion amplifies the Appellant's submission that a **penalty should not be imposed in this case as the Appellant had acted in good faith and made full disclosure of information".**
>
> (emphasis added)
>
> (See: *Ketua Pengarah Hasil Dalam Negeri v. Firgos (Malaysia) Sdn Bhd* [2013] MLRHU 876; [2013] MSTC 30-065; [2014] 1 MLJ 701; [2014] 8 CLJ 943; [2014] 1 AMR 176)

[81] Further, in the then Supreme Court case of *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 1 MLRA 184; [1992] 1 CLJ (Rep) 135; [1992] 1 AMR 413; [1992] 2 MLJ 708 it was held that section 113(2) of the ITA is not a mandatory provision, but only confers discretion on the Revenue as to whether penalties should be imposed.

[82] Based on the above, it is clear that the Revenue should not act mechanically and must take into account all factors and

circumstances of the case before imposing any penalty on the Taxpayer.

Conclusion

[83] Premised on the aforesaid reasons, I am of the view that: -

83.1 There is no basis in law or fact for the Revenue to adjust the Taxpayer's margin to the median when it already falls within the arm's length interquartile range;

83.2 In any event, there is no basis in law or in fact for the Revenue to impose a penalty as the Taxpayer could not possibly have intentionally fixed its price below the median point as alleged by the Revenue;

83.3 I am of the view that the decision of the SCIT is not tainted with any error or misconception of law and is supported by evidence and therefore, I find that the Revenue's appeal has no merits; and

83.4 As such, the Revenue's appeal is dismissed with costs of RM5,000.00 subject to the allocator fee.

Dated: 05 APRIL 2023

(AHMAD KAMAL MD SHAHID)
Judge
High Court Kuala Lumpur

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