MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

RAYUAN SIVIL NO: 14-6-06/2014

ANTARA

AMLIFE INSURANCE BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI .... RESPONDEN

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Dalam Perkara
Di Hadapan Pesuruhjaya Khas Cukai Pendapatan
Di Putrajaya
Rayuan No.: PKCP (R) 27/2010

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AMLIFE INSURANCE BHD. ... PERAYU

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KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

JUDGEMENT

(Enclosure 1)

INTRODUCTION

[1] This is an appeal by Amlife Insurance Bhd ("the Appellant"), by way of a case stated dated 19 March 2014 ("the Case Stated") pursuant to paragraph 34 schedule 5 of the Income Tax Act 1967 ("ITA") against the deciding order of the Special Commissioners of Income Tax ("SCIT") dated 26 July 2013 in favour of the Inland Revenue Board of Malaysia's ("the Respondent") on the additional tax assessment dated 30.7.2009 showing RM2,138,273.12 being additional tax payable for the year assessment 2004.

[2] Having perused the documents submitted to this Court by way of Case Stated, read the written submissions and heard the oral submissions by the respective learned Counsel for the Appellant as well as for the Respondent, I found that there was no merit in the appeal and dismissed the appeal with cost of RM5.000.00 to the Respondent.

BACKGROUND FACTS

[3] Prior to 2009, the Appellant was known as Am Assurance Berhad and was involved in general insurance business and life insurance business. This includes the year of assessment in dispute, i.e. 2003 to 2005.

[4] In 2009, the Appellant went through a restructuring exercise and had been involved in life insurance business only. Since 2006, general insurance business is managed by AmG Insurance Berhad.

[5] In its life insurance business segment, among others, the Appellant sold life insurance, personal accident insurance, retirement insurance and healthcare insurance.

[6] In its general insurance business segment, among others, the Appellant sold motor insurance, home insurance, property insurance, fire insurance and public liability insurance.

[7] The Appellant's insurance policies are sold through the bank branches of the holding company and independent agents. The independent agents are not the Appellant's employees.

[8] The Respondent completed its field audit on the Appellant on 14 August 2008. Among others, the Respondent's field audit findings were:

(a) the Respondent disagreed with the Appellant's decision to only sets off the current year losses from the shareholders' fund against the income from the general insurance fund. The current year losses were RM1,741,492.00 for the year of assessment 2003 and RM4,799,307 for the year of assessment 2004.

(b) The Respondent apportioned the current year losses and set it off against the income from the general insurance fund and life insurance fund.

(c) The Respondent disallowed the Appellant's decision to deduct the expenses incurred to purchase signboards for its

agents amounting to RM1,575,338.80 in the year of assessment 2004 and RM956,920.00 in the year of assessment 2005 as revenue expenditure.

(d) The Respondent treated the said expenses as capital expenditure and allowed the Appellant to claim capital allowance.

[9] The Appellant disagreed with the Respondent's decision to adjust the Appellant's tax treatment in relation to the items listed in paragraph 8 above.

[10] On 30 July 2009, the Respondent raised notices of additional assessment for the years of assessment 2003 to 2005 with penalties under section 113(2) of ITA. The said notices include the tax adjustments made in relation to items listed in paragraph (8) above.

[11] On 28 August 2009, the Appellant filed notice of appeal ("Form Q") dated 27 August 2009 against the said notices of assessment to the SCIT.

The SCIT had unanimously dismissed the Appellant's appeal and affirmed the Notice of Additional Assessment 2003-2005 dated 30.7.2009.

THE SCIT'S GROUNDS OF DECISION

[12] The SCIT opined that the fundamental question that needs to be determined is, whether the cost of the signboards given to the agents were "promotional expenses". The SCIT have considered **Aspac lubricants (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2007] 5 CLJ 353** (**"Aspac lubricants"**) as submitted by the Appellant, however, SCIT had distinguished **Aspac Lubricants** with the instant case and concluded that **Aspac Lubricants** does not apply as the SCIT found that the signboards were given away to the Appellant's agents and not customers (paragraph 8, page 19 and paragraph 6.1(vi) page 6 of the Case Stated).

[13] The SCIT had also distinguished the unreported case relied by the Appellant, **Office Park Development Sdn. Bhd. v. Ketua Pengarah Hasil Dalam Negeri** (**"Office Park"**) and **OPD Sdn. Bhd. v. KPHDN**

("**OPDB**") as regard to the deductibility of golf membership with the instant case (see page 21 of the Case Stated).

[14] The SCIT had also made their findings of facts that in the instant case there was no contractual obligation on the part of the Appellant to provide the signboards to the Appellant's agents and that the signboards were given to the Appellant's agents gratuitously unlike the facts in all the cases referred by the Appellant.

[15] The SCIT was also of the view that in order to determine whether the signboard expenses claimed by the Appellant are capital or revenue in nature, greater details should be given to the available facts.

[16] The SCIT had supplemented their finding on the question of laws based on Sun Newspaper's case. (See paragraph 14, page 23 of the Case Stated).

[17] At the end, based on the evidence and principles, the SCIT found there is no doubt that the expenses incurred by the Appellant in purchasing the signboards for the agents must be regarded as

strengthening and preserving the business organization or entity, the profit-yielding subject, and affecting the capital structure of the Appellant's business undertaking.

[18] The SCIT in paragraph 23 at page 32 of the Case Stated has agreed with the Respondent's submission on how to differentiate capital from revenue and acknowledged that in the instant case the Respondent is not arguing that the expenditure is entertainment expenditure as in **Office Park's** case.

[19] On the deduction under section 60 of ITA, from which 'business' they should be making the deduction, on the facts, it was the SCIT's findings that life Insurance Business and General Insurance Business are two separate businesses and generates two sources of income. Therefore, it should be treated separately for the purpose of section 60(10A) of ITA.

[20] On the imposition of 45% penalty under section 113(2) of the ITA, the SCIT found that the Appellant has given incorrect information in relation to a matter affecting the Appellant's chargeability to tax.

DUTY OF THE COURT IN A CASE STATED

[21] Under the ITA, parties who appeared before the SCIT may appeal to the High Court against the deciding order of the SCIT on a question of law (see paragraphs 34, 39, 41 and 42 of Schedule 5 to the ITA and **Director General of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd [1990] 1 CLJ (Rep) 91 at page 97)**. According to the cases submitted by both the learned counsels, generally, the Appellate courts are particularly slow in interfering with the findings of tribunals specializing in specific fields.

[22] In tax cases, the courts in Malaysia had repeatedly referred to the case of **Edwards v. Bairstow** [1955] 3 All ER 48 where the Court has held that it is the duty of the Court hearing a Case Stated to examine the determination of the SCIT having regard to its knowledge of the relevant law, however this duty is very limited. The High Court cannot reverse the commissioners on their findings of fact except in the following circumstances:

(i) if the case contains anything *ex facie* which is bad in law;

(ii) which bears upon the determination, it is, obviously, erroneous in point of law;

(iii) if the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal;

(iv) if there has been error in point of law;

(v) if the case is one where there is no evidence to support the determination;

(vi) if the case is one where the evidence is inconsistent with and contradictory of the determination; or

(vii) the true and only reasonable conclusion contradicts the determination.

[23] The court had noted the caution made by Court of Appeal in the case of **Kenny Heights Development Sdn Bhd v. Ketua Pengarah**

Hasil Dalam Negeri [2015] 5 CLJ 923 where the Court of Appeal vide the Judgment of His Lordship Abdul Wahab Patail (JCA as His Lordship then was) 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 avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.
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> **[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 SC).

[24] On the burden of proof, paragraph 13, schedule 5 of the ITA provides that the burden of proving an assessment is excessive or

erroneous is upon the taxpayer (See **A.B.C. v. The Comptroller of Income Tax, Singapore (1959) MLJ 162**, **Nicholson v. Morris (Inspector of Taxes) [1976] STC 269**).

[25] Mindful of this Court functions in a Case Stated as discussed above, upon perusal of all the relevant documents filed herein, having considered the oral and documentary evidence adduced before the SCIT, the findings of facts made by the SCIT, the decision of the SCIT and upon reading the written submissions and hearing the oral submissions of the respective parties, my decisions on the Case Stated are as below.

GROUNDS OF APPEALS IN THE CASE STATED

Signboard purchase expenditure

[26] On Signboard purchase expenditure I summarise the Appellant contentions as follows:

(i) the SCIT had failed to find the facts adduced during hearing are uncontroverted evidence which have been tendered in the course of hearing and was unrebutted;

(ii) the SCIT omitted to include the material facts and evidence adduced, established and proved and erred in arriving at conclusion of facts not supported by evidence;

(iii) the expenditure in question which the Appellant sought to deduct was expenditure incurred for signboards used to publicise the Appellant's business;

(iii) the SCIT adopted a vacillating position by firstly averring that there was asset for enduring benefit of the Appellant's trade and then acknowledging that there would be no enduring benefit arising from the signboards;

(iv) the signboards were given to agents to create awareness and sell the Appellant's products, that the agents were conduit for the

Appellant to get more customers and revenue and to publicise the Appellant's business locations to member of the public;

(v) SCIT failed to consider all relevant considerations and circumstances of the Appellant's business including the nature of the Appellant's business and the purpose of the expenditure;

(vi) the facts found in by the SCIT are insufficient and inadequate to assist the High Court in determining the questions of law;

(vii) the SCIT failed to address the legal arguments advanced by the Appellant and the supporting evidence led in support of those legal arguments.

Setting Off Current Year Losses from Shareholders' Fund

[27] On the Setting Off Current Year Losses from Shareholders' Fund, the Appellant contends that:

(i) the Appellant's treatment of only setting off the current year losses in the shareholders' fund against income from the general insurance fund is correct in law;

(ii) the Appellant's insurance business was divided into life insurance business and general insurance business and under the Insurance Act 1996 ("IA"), there is a requirement that separate funds be maintained;

(iii) the income of life insurance business and shareholders' fund is treated and taxed as separate sources of income and income from the life insurance fund is treated separately at a concessionary rate of 8%;

(iv) the intention of Parliament is for the life insurance fund to be dealt with separately as seen from the Finance (No. 2) Bill 1994;

(v) Sections 43(1) and 43(2) of the IA which provides for the treatment of surplus from general insurance fund and life

insurance fund separately. Any surplus of assets over liabilities from life insurance fund can only be transferred into shareholders' fund upon actuarial valuation of the life insurance fund at the recommendation of an appointed actuary;

(vi) Section 60(2)(c) of the ITA which provided that where an insurer carries on life business, the income from the life fund shall be treated as a separate source of income from the income of the shareholders fund;

(vii) Section 60(AB) of the IT A which clearly states that the adjusted income of the life business as ascertained under Section 60(3) of the ITA is to be regarded as the chargeable income of the taxpayer;

(viii) the SCIT erred in failing to afford parties the opportunity to respond to the SCIT's opinion that the issue was wrongly phrased. The SCIT in the Case Stated stated that *"the issue is wrongly phrased. This could also be the reason why the*

parties are arguing over which "fund" they should be deducting the current year losses when the right issue should be from which "business" they should be making the deduction as provided by section 60 of the ITA". As a consequence, parties have been deprived of fundamental rules of natural justice;

(ix) the SCIT erred in holding that the Appellant's responsibilities under the IA should not and does not interfere with the application of the ITA and that the two laws have distinctive application notwithstanding that the ITA clearly makes reference to the provisions of the IA;

Penalty under section 113(2) of ITA

[28] The Appellant contends that in affirming the penalty under **section 113(2) of ITA** against the Appellant, the SCIT had failed to take into account salient facts which have been adduced in the course of hearing and consequentially, failed to recognise that the Appellant has always

acted in good faith, took professional advice and made full disclosure in respect of determining its tax liability;

ISSUES FOR DETERMINATION

[29] From the above grounds of complaints, it can be summarized to three issues as follows:

Issue 1: Signboards

Whether the Respondent is entitled to vary the expenditure incurred by the Appellant for the purchase of signboards in the years of the assessment 2004 and 2005 to capital expenditure as opposed to revenue expenditure on the facts of this appeal?

Issue 2: Deduction of Current Year Losses from Shareholders' Fund

Whether the Appellant's treatment of only setting off the current year losses from the shareholders' fund against the income from the general insurance fund is correct in law?

Issue 3: Penalty

Notwithstanding the above or in the alternative, whether the Respondent exercised its discretion correctly to impose a penalty under Section 113(2) of ITA on the additional tax assessed by the Respondent?

DECISION

Issue 1: Signboard

Whether the Respondent is entitled to vary the expenditure incurred by the Appellant for the purchase of signboards in the years of the assessment 2004 and 2005 to capital expenditure as opposed to revenue expenditure on the facts of this appeal?

[30] In respect of the 1st issue, the Appellant is claiming to deduct expenditure for the purchase of signboards for its Agents under section 33(1) of the ITA which provides that all outgoings and expenses wholly and exclusively incurred by a taxpayer in the production of its gross income is deductible from its gross income.

[31] If the answer of the above issue is "no", then the said expenditure is revenue expenditure as treated by the Appellant and thus, the Appellant is entitled to deduct the said expenditure under section 33(1) of the Income Tax Act 1967 ("ITA") or alternatively, by virtue of proviso (vi) to section 39(1) (l) of the ITA.

[32] The Respondent contends that the cost of providing signboards is not deductible under section 33 (1) of the ITA but is in the nature of a capital expenditure for the Appellant's business. The Respondent also in their alternative submission, argued that the proviso to section 39(1)(l) of the ITA relates to the provision of promotional gifts to employees and does not apply in this case because the Appellant gave the signboards to its agents who are not its employees.

[33] In evidence the witness of the Appellant testified that the Appellant largely depends on its agents to sell the insurance policies. The sales volume by the agents is high due to their mobility and presence in local areas. It was also testified that the Appellant offered incentive schemes that are more attractive than its competitors to motivate the agents to stay with the Appellant so that the agents would continue to sell the Appellant's

insurance policies. The witness testified further that the signboards assisted in promoting the Appellant's business as the public became aware that the agents were representing the Appellant. It was also testified that the agents were keen and motivated by the signboard incentives to promote the Appellant's insurance policies to the general public and the agents became the Appellant's product ambassadors by promoting and recommending its insurance policies and by displaying the Appellant's signboards prominently at their offices. All these create an enduring benefit to the Appellant's trade.

[34] Section 33(1) of the ITA reads as follows:

> (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,
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> (Emphasise added)

[35] The Appellant contends that the cost of these signboards should be treated as revenue expenditure as the Appellant had given away the signboards to the agents as an effective business promotion strategy to

promote the Appellant's business and to sell more insurance policies to the public. The agents are the conduit for the Appellant to get more customers and more revenue. The Appellant's further submission is that the sales volume by the agents is high due to their mobility and presence in local areas. In contrast the Respondent submitted that it is trite law 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 a revenue nature (See **Vallambrosa Rubber Co. Ltd v. Farmer (Surveyor of Taxes) 1910 TC v. 529; Hallstroms Proprietry Limited v. The Federal Commissioners of Taxation [1946] 72 CLR 634 ("Hallstroms Proprietary Limited")**; **Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. [1964] 1 All ER 208**; **Robert Addie & Sons' Collieries, Limited v. The Commissioners of Inland Revenue 8 TC 671**; **British Insulated and Helsby Cables, Limited v. Atherton 1926 AC 205**).

[36] The Appellants relied on the Court of Appeal decision in **Aspac lubricants** where it was held that promotional expenses incurred with the

sole purpose of promoting the business are not entertainment and therefore, are deductible under section 33(1) of the ITA.

[37] In **Aspac Lubricants**, the Appellant had given away certain promotional items to its customers and dealers. There were two categories of promotional items; one for the dealers and one for the customers and it was only in respect of the category of promotional items for the customers ("customers' items") that the Court of Appeal dealt with in **Aspac Lubricants**. The customers' items consisted of items such as mugs, "T" shirts and umbrellas bearing the Appellant's logo which were given away to customers who purchased the Appellant's products. The Appellant deducted the expenses incurred on the purchase of all these customers' items from its gross income because it took the view that those were expenses wholly and exclusively incurred in the production of gross income. The Revenue Board, after initially allowing those deductions, declined to permit them because on the ground that they were entertainment expenses and hence the Appellant was liable to be taxed without the benefit of any deduction. However, the Court of Appeal found in favour of **Aspac Lubricants** and allowed the expenses incurred

in purchasing the customers' items to be deducted from its gross income.

[38] In para 12 at p 361 of its decision, the Court of Appeal concluded as follows:

> "Viewed from any perspective, the transactions in respect of the customers' items were plainly bargains made by the appellant for the sole purpose of business promotion and hence fall within the basket provision' of S33 (1) of the ITA. The appellant was accordingly entitled to deduct them as revenue expenditure under section 33(1) of the ITA for the relevant years of assessment."

[39] In this appeal before me, the SCIT found after evaluation of evidence that the signboards were given away to the Appellants' agents and not to the Appellant's customers. Thus, the SCIT found that the facts were distinguishable between **Aspac Lubricants** with the present case. In the present case, the agents are not the customers of the Appellant, unlike in **Aspac Lubricants.** As found by the SCIT the signboard is not given to the customer as an incentive or bargain for him to purchase the Appellant's policy but as an incentive to the agents to sell more of the Appellant's policies which is an enterprise or organization function. They are used to publicise the whereabouts of Appellant's authorized agents

and for the promotion of the Appellant so that the agents can sell more of the Appellant's products. It was a finding of fact of the SCIT that there is no bargain here for the Appellant's customers that the Court of Appeal spoke of in **Aspac Lubricants.** I am in agreement with the SCIT that **Aspac Lubricants** cannot be relied on by the Appellants to claim deductions for expenses that will fall into the 'dealers' items' and Aspac Lubricants does not assist the Appellant.

[40] To further support the findings of fact that the signboard is not revenue nature, the SCIT has also relied on the case of ME **Holding Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] AMTC 1195** and the Australian case the **Sun Newspapers Ltd and Associated Newspaper Ltd v Federal Commissioner of Taxation 61 C.L.R. 337. Hallstroms Proprietary Limited; Director-General of Inland Revenue v. L.T.S. [1974] 1 MLJ 187; Ralli Estates Ltd. v. Income Tax Commissioner [1961] 1 WLR 329 ("Ralli Estates Ltd")**

[41] Guided by the above cases that if the expenditure is not 'of a recurrent nature' and 'not an incident, whether normal or unusual, of the regular conduct of the organization for earning profits', then it is capital

expenditure and the fact that 'the benefit was not perpetual does not deprive it of its capital attributes'. Based on this principle, the SCIT made a finding of fact that the expenditure for the signboards for the independent agents to sell the Appellant's insurance policies for the purpose of earning and increasing its profits means that the expenditure is in the nature of an outgoing of capital. These agents do not buy the policies or re-sell the policies but instead sell the policies on behalf of the Appellant to other end consumers. Having the signboards with the names of the agents and the Appellant's logo will build up the name and business of the Appellant. Goodwill is important to the Appellant's business as well. The Appellant had submitted that the signboards were a cost effective way for the Appellant to promote its business and to make the public aware of the fact that the agents were authorised by the Appellant. Hence even though some agents may leave the Appellant's organization, thereby not giving the Appellant perpetual benefit and requiring the Appellant to incur extra expenses to purchase more signboards for the services of another agent, these factors do not make the expenditure incurred by the Appellant for the purchase of signboards for its agents change into a new character and become a revenue expenditure. The SCIT further found as a fact that

the making of the signboards for its independent agents have brought "into existence as asset or an advantage for the enduring benefit of the Appellant's trade", that is, a network of agents who are mobile and present in local areas as submitted by the Appellant. Therefore, the expenses incurred by the Appellant for making the signboards remain as capital expenditure and cannot be allowed for deduction under section 33(1) of the ITA.

[42] In the case of **Hallstroms Proprietary Limited**, where the Court enunciated certain principles on the distinctions between what is a capital expenditure and what is revenue as follows:

(i) on the first principle, the distinction should be made between the acquisition of the means of production and the use of them;

(ii) on the second principle, that there should be a distinction between establishing or extending a business organization and carrying on the business;

(iii) on the third principle, that is distinction should also be made between the implements employed in work and the regular performance of the work in which they are employed, the agents are the implements employed by the Appellant to sell the insurance policies for the Appellant.

[43] I agree with the Respondent that the giving of the signboards to the agents is akin to acquiring the means of production. In this sense, the agents are the means of production, the product being the insurance policies.

[44] The Respondent further contends that the giving of the signboards as testified by the Appellant's witness:

(a) motivates the agents to stay with the Appellant so that the agents would continue to sell the Appellant's insurance policies; and

(b) promotes the Appellant's business as the public became aware that the agents were representing the Appellant; and

(c) establishes or extends the Appellant's business organization especially coupled with the facts as established via the Appellant's witness that the Appellant largely depends on its agents to sell the insurance policies and the sales volume by the agents is high due to their mobility and presence in local areas.

[45] In other words, the gist of these arguments is that the expenditure on the signboards were incurred not in the production of gross income but for the production of gross income.

[46] In **Director-General of Inland Revenue v. L.T.S. [1974] 1 MLJ 187**, the Court referred to the judgment in the case of **Ralli Estates Ltd. v. Income Tax Commissioner [1961] 1 WLR 329 ("Ralli Estates Ltd")** where the Privy Council set out guidelines on how to determine whether a particular expense is one of revenue or capital.

[47] In my view based on decided cases mentioned above, the expenditure on the signboards were incurred to create an enduring benefit to the Appellant which colours the expenses as being of a capital nature, hence, not deductible as a revenue expense. I have no reason to disturb the finding of fact of the SCIT.

[48] On this basis, the issue whether the expenditure for the signboards is deductible under section 33(1) of the ITA is not relevant. The Respondent's tax treatment by not allowing a deduction under that provision and instead treating the expenditure as claimable for capital allowance is due and proper and in line with section 39(1)(e)(ii) of the ITA. In addition, even though the signboards were installed or put at the insurance agents' business premise, the Appellant still qualifies for a claim to capital allowance as the Appellant incurred the expenditure and the signboards were used to advertise the Appellant's business.

[49] Finally, the audit conducted by the Respondent on the signboard issue focused on the years of assessment 2004 and 2005. In a self-assessment system, only upon an audit would the nature of an expense be determined. The year of assessment 2003 did not come into focus.

The Respondent accepted the Appellant's income report as per the return filed but this should not in any way indicate acceptance of the deductibility of an expense. The case of **DD Development Sdn. Bhd. v. Ketua Pengarah Hasil Dalam Negeri (2008) MSTC 3726** involved years of assessment during the formal assessment system whereby all documents and proof of the nature of expenses are filed together with the return forms and considered by the Respondent before an assessment is issued by the Respondent. In such system, inconsistencies in approach should be justified as the Respondent had availed itself to the documents, proofs and such matters affecting the tax liability of a taxpayer. Therefore, that decision should not be applicable.

[50] Based on the evidence and principles, there is no doubt that the expenses incurred by the Appellant in purchasing the signboards for the agents must be regarded as strengthening and preserving the business organization or entity, the profit-yielding subject, and affecting the capital structure of the Appellant's business undertaking as Dixon J aptly phrased such expenses in Sun Newspaper Ltd at p 364. Even though the Appellant submitted that '***unlike mugs and golf memberships***, ***the signboards do not last for long***', there were no evidence that

signboards were changed by the agents on a recurrent basis for every year of assessment.

[51] The SCIT in paragraph 23 at page 32 of the Case Stated has agreed with the Respondent's submission on how to differentiate capital from revenue and acknowledged that in the instant case the Respondent is not arguing that the expenditure is entertainment expenditure as in **Office Park's** case. I find that the SCIT has considered the relevant facts and has made a correct finding.

Appellant's Alternative Submission

[52] On the Appellant's alternative submission that the expenses incurred falls within the ambit of section 39(1)(l) of ITA, i.e. promotional gifts, regards shall be made to the wording in section 39(1)(l) itself in determining to the correctness of the Appellant's alternative argument. The SCIT in paragraph 26 page 35 of the Case Stated has stated that this section does not apply because the Appellant gave the signboards to its agents who are not its "employee". Therefore, the alternative submission

cannot be upheld. In my view the SCIT has correctly interpreted and applied the law.

[53] The Appellant had referred to the case of **Commissioners of Inland Revenue v Carron Company (1966-1969) 45 TC 18** ("**Carron Company**") to support its contention that the expenses incurred for the purchase of the signboards are revenue in nature. The SCIT in paragraph 28 at page 36 of the Case Stated has distinguish the case of **Carron Company**. The issue that arose in the **Carron Company** is whether the company is entitled to deduct, in the computation of its trading profits an aggregate sum comprising (i) legal expenses for obtaining a supplementary charter; (ii) legal expenses in connection with litigation with a shareholder; (iii) legal expenses paid to that shareholder in connection to the litigation and for buying out her shares; and (iv) a sum paid to another shareholder to buy out his shares. This case then turns on the findings of the Special Commissioners based on the special circumstances in that case and the agreement of the parties to treat the expenses as an aggregate and not individually. Hence the ratio decidendi has to be very carefully applied. The company in that case had to undergo a series of legal

actions for several years to enable it to change its charter of 1773 which was found to be archaic and unsuitable to modern conditions and according to the Special Commissioners, no new capital asset was brought into existence unlike the present case where the SCIT have made a finding of fact that there is a purchase of tangible capital assets, namely signboards and the intangible acquisition of goodwill. Thus, this case does not support the Appellant in its submission that the purchases of the signboards are not capital in nature and the Appellant's appeal in respect of this issue is dismissed.

[54] On the alleged inconsistent treatment of signboard expenditure by the Respondent, the Appellant had submitted that the Respondent is bound by the treatment it had given to the expenditure incurred for the signboards on the same basis as it did for the year of assessment 2003. at the outset, it is best to clarify that estoppel does not apply in tax cases and it is trite law the Respondent cannot be prevented from carrying out its statutory duty to collect whatever tax is due in the year of assessment 2004 just because it failed for whatever reason to do so in the previous years of assessment secondly, RW1 had clearly explained in cross examination that the audit she had carried out

with regards to the expenditure for the signboards is only with respect to the years of assessment 2004 and 2005 and that she had believed the Appellant's personnel who informed her that no claims were made for the signboards in 2003. be that as it may, based on the decision in **Sarawak Properties Sdn Bhd V DGIR [1974] 4 AMR 3181,** which was recently reaffirmed in the Court of Appeal decision of **Ketua Pengarah Hasil Dalam Negeri V Lai Keng Chong & Anor [2012] 6 CLR 29** at para 15 p 35, I find that the Appellant has the statutory power to conduct the audit and issue the notices of assessment for year of assessment 2004 and 2005. The decision in **DD Development Sdn Bhd** does not apply as in that case the Commissioners of Income Tax had found as a fact that the DGIR had reopened assessments that were contrary to his own guidelines and that the earlier assessments had become final and conclusive under section 97(1) of the ITA which is not the case here. In paragraph 30 at page 39 of the case stated, it has distinguished the case of **DD Development Sdn Bhd**. further, the SCIT has stated that estoppel is not applicable in tax cases and it's trite in law that the Respondent cannot be prevented from carrying out its statutory duty to collect whatever tax is due. I also find the SCIT has correctly stated the law.

Issue 2

Whether the Appellant's treatment of only setting off the current year losses from the shareholder's fund against the income from the general insurance fund is correct in law?

[55] The contention by the Appellant:

(a) The current year losses from the shareholders' fund must be deducted from the general insurance fund and not from the life insurance fund because the Appellant is holding the money in the life insurance fund on trust for the policy holders;

(b) Section 60(10A) of the Income Tax Act 1967 clearly states that any unabsorbed losses of the life insurance business shall only be available for deduction against the statutory income in respect of the life fund; and

(c) The Respondent cannot apportion and set off the current year losses in the shareholders' fund from the life insurance fund. Section 60 of the ITA is a specific provision and the

Respondent has wrongly applied other provisions of the ITA in ascertaining the chargeable income of the Appellant.

[56] The Respondent on the other hand took the stand that the tax treatment applicable to the current year losses from the shareholders' fund is to apportion those and set it off against the income from the general insurance fund and the life insurance fund (refer to Section 60 of the ITA - special provision for insurance business; section 60(4B) of the ITA – statutory income; Section 60(1) of the ITA – ascertaining adjusted income; Section 60(2)(a) of the ITA). On this basis, therefore, in determining its aggregate income, total income and chargeable income, the general provisions under the heading "Manner in which chargeable income is to be ascertained" (section 5 of the ITA).

[57] Taking on the steps provided in section 5 of the ITA, next in line would be section 43 which comes into play or determining aggregate income. Subsection 43(2) of the ITA provides for the tax treatment for business losses from business sources to be carried forward from previous years of assessment. Other than that, most importantly, section 44 of the ITA provides how total income is to be computed. The total

income of a year of assessment is determined by computing the aggregate income for that year of assessment and pushing off from that figure certain deductions, in the provided sequence, including adjusted business losses as stated under subsection 44(2) of the ITA.

[58] Therefore, if subsection 44(2) of the ITA is applicable, there would be an exclusion clause in that provision catering for that, as can be seen in subsection 60(10A) of the ITA which provides that the unabsorbed losses of a life insurance business shall only be available for deduction against the statutory income. Another analogy on point, would be the exclusion provided under subsection 60(10B) which talks about unabsorbed allowances of the life business being available for deduction against the adjusted income for the life insurance fund.

[59] Based on the above, I am in agreement with the Respondent submissions that:

(a) the Respondent's tax treatment with regards to the losses for the shareholders' fund is due and proper under subsection 44(2) of the ITA. For the Appellant to say that the Respondent has no legal

or factual basis to apportion the losses from the shareholders' fund to the life insurance funds and the general insurance does not hold water. It could be that the Appellant disagrees with such treatment as the tax rate imposed on the life insurance business, at 8%, the general insurance business and the shareholder' fund, at 28, is different;

(b) the issues regarding the Appellant's responsibilities under the IA should not come into consideration as the Appellant should abide with the ITA on taxation matters. It does not mean that complying with the provisions of the IA would mean a disregard of the provisions of the ITA (**Lim Moon Heng v. The Government of Malaysia & Anor [2002] 2 CLJ 659 ("Lim Moon Heng")**;

(c) on the apportionment of the losses, the Respondent's witness had testified that when she apportioned the losses she wanted to ensure appropriateness of the assessment and to bring in line with the relevant provisions of the ITA. In other words, she came up with a formula for the apportionment (**Ketua Pengarah Hasil Dalam**

Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518 (Court of Appeal)).

[60] The SCIT in the Case Stated (at paragraph 31) pointed out that the issue was wrongly phrased by the Appellant. According to the SCIT, the right issue should be: ***"From which 'business' they should be making the deduction as provided by Section 60 of the ITA".***

[61] It was the SCIT's finding that life Insurance Business and General Insurance Business were two separate businesses and generates two sources of income. This finding is supported by subsection 60 (2) of ITA which read as follows:

> (1) **This section shall apply for ascertaining the adjusted income** for the basis period for a year of assessment from the insurance business of an insurer.
>
> **(2) For the purposes of this section -**
>
> > *(a)* subject to paragraph *(b)*, **where an insurer carries on life business in conjunction with general business, the life business and the general business shall be treated as separate insurance business**;

(b) where an insurer carries on re-insurance business, the re-insurance business and the general business (excluding the re-insurance business) shall be treated as separate general businesses;

Therefore, it should be treated separately for the purpose of section 60(10A) of ITA.

[62] It is my considered view that the fact in this case was carefully examined by the SCIT in determining the correct method of computation in setting off the current year losses as stated in paragraph 34 – 50 at page 42 – 53 of the Case Stated. I find no error in the computation as it is based on the relevant provisions of the ITA.

Issue 3: Penalty

Whether the Respondent exercised its discretion correctly to impose a penalty under Section 113(2) of ITA on the additional tax assessed by the Respondent?

[63] The Respondent has imposed a 45% penalty under section 113(2) of the ITA on the basis, as testified by the Respondent's witness, that the

Appellant has given incorrect information in relation to a matter affecting the Appellant's chargeability to tax.

[64] It is not disputed that the Respondent has discretionary power to impose a penalty against taxpayer 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)

[65] Based on the above provisions, the Respondent is empowered and right in law to impose penalty in respect of the tax undercharged for the years of assessment 2004 and 2005.

[66] In the instant case the Respondent's witness has testifies on the basis and the background upon which the penalty was imposed before the SCIT. It can be grasped that the Appellant has submitted incorrect

information regarding the nature of the expenditure on the signboards and the treatment of the losses. The Respondent has exercised due discretion when imposing the 45% penalty as under the law, that discretion may be exercised to impose up to a maximum of 100% of the tax which has been undercharged.

[67] It is an established fact that the matters in issue arose out of the findings obtained during an audit exercise and as such the Respondent has considered facts and circumstances of the case before proceeding to impose the penalty **(Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 1 CLJ (Rep) 135 (Supreme Court))** **("Kim Thye")**. During the audit exercise the relevant facts and circumstances were looked at by the audit officer and the Director General henceforth imposed a penalty of 45% as opposed to the ceiling of 100% and in that sense, taking on the portion of the principle in **Kim Thye**, the Respondent has exercised a discretion and it is not one which is at the director general's whim and fancy but after an audit exercise and an audit finding.

[68] The principles established on the imposition of penalties in support of the Respondent's submission that the penalty imposed is correct. Good

faith is not a defence against the imposition of penalty **(KT & CO. V. Ketua Pengarah Hasil Dalam Negeri (1996) MSTC 2, 594)** ("**KT& CO**"). In **K.T.S Mutual Sdn. Bhd. v. Ketua Pengarah Hasil Dalam Negeri,** the SCIT recognized that if not because of the audit conducted by the Respondent, the incorrect return would not be discovered. The SCIT in the instant case considered the case as a whole and found no reason to interfere with the penalty imposed against the taxpayer. I have no reason to disturb the finding of the SCIT.

CONCLUSION

[69] Having perused all the facts and evidence presented before the SCIT during the trial, I am of the considered view that the SCIT's finding is consistent with the evidence produced before it. Therefore, I see no reason why I should disturb the finding of fact made by the SCIT.

[70] 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 Appellant to establish that there was a misdirection by the SCIT to warrant interference by this court. Unfortunately, the Appellant has not

demonstrated any such errors in the facts of this case to warrant appellate interference.

[71] I am of the view that the finding of the learned SCIT is based on the totality of the evidence adduced before it. 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.

[72] Upon perusal of the cause papers, the written and oral submissions of the parties herein and upon hearing the learned counsels for the Appellant and the Respondent respectively and upon giving this matter a serious consideration, I am of the view that the decision of the SCIT did not suffer from any of the infirmities as highlighted in the case of **Edwards v. Bairstow** [1955] 3 All ER 48 as well as other cases submitted to this Court to merit curial intervention. I have taken into consideration all the points that were submitted by both the learned counsels. On the whole, I also agree with the points raised by the learned counsel for the Respondent.

[73] It is my considered view that based on the above, the finding of facts made by the SCIT was very comprehensive which has answered all issues raised. The reasons were well supported by the facts and legal authorities. Therefore, the Appellant's appeal against the decision of the SCIT is dismissed with costs and the assessments is affirmed. RM5,000.00 costs to the Respondent.

DATED: 8 NOVEMBER 2022

(HAS ZANAH BINTI MEHAT)
JUDGE
HIGH COURT, KUALA LUMPUR

FOR THE APPELLLANT
Dato' DP Naban and Cik Janice Tan Ying with him
(TETUAN LEE HISHAMMUDDIN ALLEN & GLEDHILL)

FOR THE RESPONDENT
En. Abdul Aziz, The Revenue Counsel

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