IN THE COURT OF APPEAL OF MALAYSIA AT PUTRAJAYA

CIVIL APPEAL NO. W-01(A)-53-02/2023

BETWEEN

MERIMEN ONLINE SDN. BHD. … APPELLANT

AND

KETUA PENGARAH HASIL DALAM NEGERI … RESPONDENT

(In the matter of the High Court of Malaya at Kuala Lumpur Civil Appeal No.: WA-14-17-06/2020)

between

Merimen Online Sdn. Bhd. … Appellant

and

Ketua Pengarah Hasil Dalam Negeri … Respondent

(Pesuruhjaya Khas Cukai Pendapatan Rayuan No.: PKCP (R) 151/2016, PKCP (R) 415/2016, PKCP (R) 703-707/2016 dan PKCP (R) 492/2017

between

Merimen Online Sdn. Bhd. … Appellant

and

Ketua Pengarah Hasil Dalam Negeri … Respondent)

CORAM:

RAVINTHRAN N. PARAMAGURU, JCA

COLLIN LAWRENCE SEQUERAH, JCA

AHMAD KAMAL BIN MD. SHAHID, JCA

JUDGMENT

Introduction

[1] This is an appeal against the judgment of the High Court which had, by way of Case Stated affirmed the decision of the Special Commissioners of Income Tax (**SCIT**) which had earlier dismissed the appellant's appeal against the assessments raised by the respondent, the

Director General of Inland Revenue (**DGIR**) under the Income Tax Act 1967 (**ITA**).

[2] Having heard the appeal, examined the appeal records and considered the submissions by parties, we unanimously decided to set aside the decision of the High Court and the SCIT and therefore, allow the appeal, for the reasons which are set out herein.

Key Background Facts

[3] The appellant is a company incorporated in Malaysia and having its registered office at Block D, UPM – MTDC Technology Centre III, University Putra Malaysia, Serdang.

[4] The appellant was granted Multimedia Super Corridor (**MSC**) Malaysia pioneer status tax incentive under section 6 (1AB) of the Promotion of the Investments Act 1986 (**PIA**).

[5] The appellant had fulfilled the MSC qualifying activities which are as follows: -

(i) provision of research, design, development and commercialisation of the following solutions:

(a) Retakaful Portal V1 and above;

(b) Motor Underwriting Solution V1 and above;

(c) Motor Claims Solution V7.0 and above;

(d) Non-motor Claims Solution V3.0 and above; and

(e) Marine Cargo Underwriting Solution V2.0 and above.

(ii) provision of implementation, technical services and maintenance related to the above-mentioned solutions.

[6] Subsequently, a pioneer certificate was issued by the Ministry of International Trade and Industry (**MITI**). The production day of the appellant was stated as 31 July 2008 with the pioneer period granted for a period of five (5) years from 31 July 2008 to 30 July 2013. The pioneer period was subsequently extended five (5) more years from 31 July 2013 to 30 July 2018. It is also an agreed fact that the appellant's financial period ends on 30th June every year.

[7] The appellant has been in operation prior to the grant of the pioneer status and through its tax agents had filed its tax returns on the respective stated dates for the following year of assessments (**YAs**):

(i) for the YAs 2009 and 2010 on 06 October 2010;

(ii) for the YA 2011 on 10 October 2011;

(iii) for the YA 2012 on 7 February 2013;

(iv) for the YA 2013 on 13 February 2014;

(v) for the YA 2014 on 27 February 2015;

(vi) for the YA 2015 on 29 February 2016; and

(vii) for the YA 2016 on 28 February 2017.

[8] The dispute between the parties began when the appellant through its tax agent, Ernst & Young Tax Consultants Sdn Bhd (**Ernst & Young**) sent a letter dated 29 October 2012 to the DGIR requesting a ruling to confirm that 100% of the appellant's statutory income during the pioneer period is exempted from the income tax pursuant to Section 21C of the PIA.

[9] In a letter dated 11 March 2014, the DGIR replied stating that the Subsection 21C(2A) of the PIA is to be read together with the proviso appearing in subsection 21C(2A) of the PIA, and as such, the difference between the statutory income and value-added income is subject to income tax.

[10] In a letter dated 1 April 2015, Ernst & Young replied stating that the ruling was disputed and the appellant would be filing the necessary appeals to the SCIT. In this letter, it was also enclosed the amendments made to the tax returns of the appellant for the YAs 2009, 2010, 2011, 2012 and 2013.

[11] The DGIR made the necessary assessment according to its ruling and proceeded to issue the following notices:

(a) a notice of additional assessment (**Form JA**) dated 27 June 2016 for the YA 2009;

(b) notices of assessment (**Form J**) dated 27 June 2016 for the YA 2010 and the YA 2011; and

(c) Form J dated 28.6.2016 for the YA 2012 and the YA 2013.

[12] In issuing Forms J and Forms JA for the YAs 2009, 2010, 2011, 2012 and 2013, the DGIR also imposed penalties pursuant to Subsection 113(2) of the ITA. The appellant complained that the assessments were unlawfully made and that Forms J and Forms JA for the YAs 2009 and 2010 were issued more than five (5) years after the expiration for the said

YAs respectively. The appellant appealed to the SCIT against the said assessments by way of notice of appeal in Form Q.

[13] In respect of YAs 2014, 2015 and 2016, the appellant filed its tax returns in accordance with the DGIR's ruling on the interpretation of Section 21C of the PIA. This was obviously done under protest as the appellant duly proceeded to appeal against the self-assessment it had made for these YAs.

[14] It is an agreed fact that in view of the appellant's accounting period for its financial year, the appellant's income tax returns for the YA 2009 were only submitted on 6 October 2010. This is about 16 months after the end of the financial year period.

Issues for determination in this Appeal

[15] The central issues in this appeal as they were before the SCIT and the High Court are as follows: -

Issue 1

(i) Whether Form JA for the YA 2009 dated 27 June 2016 and Form J for the YA 2010 dated 27 June 2016 are time-barred under Section 91 of the ITA;

Issue 2

(ii) Whether the appellant's income during the pioneer period for the YA 2009 to 2016 is value-added income pursuant to the PIA?

Issue 3

(iii) Whether the DGIR was correct in imposing penalties under Subsection 113(2) of the ITA for the YAs 2009 to 2013?

The Essence of the SCIT Decision

[16] The SCIT held:

(a) I**ssue 1**: subsection 21C(2) of the PIA is a clear and unambiguous provision, which the appellant had misinterpreted. The appellant has thus, committed negligence and wilful default in the filing of its tax returns for YAs 2009 and 2010, which justifies the issuance of the time-barred assessments.

(b) **Issue 2**: The appellant is only entitled to exemption on its value-added income under subsection 21C(2) of the PIA. The proviso to subsection 21C(2) of the PIA denotes that for a company which had already been in operation in Malaysia, its income for each accounting period of its pioneer business shall be its value-added income.. It is undisputed that the appellant had been in operation prior to the grant of pioneer status.

(c) **Issue 3**: The respondent had correctly exercised his discretion in imposing penalties under subsection 113(2) of the ITA for YAs 2009 to 2013. This is because the appellant had been negligent in filing incorrect returns, and because the rate of 20% - 30% is lower than the usual rates imposed.

The Essence of the High Court Decision

[17] The High Court dismissed the appellant's appeal. The relevant parts of the judgment of the learned High Court Judge are quoted as follows:

> *"[26] What is meant by the phrases 'value-added income' is made plain and clear by Subsection 21C(2A) (a) wherein the phrase is defined to mean: the statutory income for basis period for year of assessment less the inflation-adjusted base income. So, the value-added income of the company is less the' inflation-adjusted base income' of the company and which income is determined by the statutory formula provided by Subsection 21C(2A) (b). Thus, only the whole of the appellant's "value-added income" is exempted while the remaining statutory income is*

chargeable income for tax purposes. There is no ambiguity in the provision. The SCIT did not misdirect itself in law and had correctly interpreted Section 21C of the PIA.

[37] The issue for this Court to determine is whether the SCIT's decision in holding that the DGIR has successfully discharged the proof that the appellant was negligent in connection with or in relation to tax for a special year of assessment. The SCIT has made the following findings from the agreed facts:

(i) The return for the YA 2009 was only filed on 6.10.2010 which was 16 months after the accounting period expired together with the return for YA 2010. It was only after two years and two months by way of letter dated 20.12.2012 the appellant sought confirmation whether 100 percent of its statutory income for the pioneer period was exempt form tax under Section 21C of the PIA. The DGIR informed the appellant by letter dated 11.3.2014 that Subsection 21C(2A) is to be read together with the proviso appearing in Subsection 21C(2) of the PIA, and as such, the difference between the statutory income and value-added income is subject to the income tax.

(ii) The appellant did nothing for about a year and then in letter dated 1.4.2015 stated that it disagreed with the DGIR's ruling and would file the necessary appeals to the SCIT. Most importantly, it was in this letter that the amendments made to the tax returns for YA 2009 and YA 2010 was submitted to the DGIR.

[38] On these facts alone the finding of the negligence by the SCIT can be held. The appellant must take prudent action in seeking the DGIR's view where there is a doubt of the interpretation of a provision by the taxpayer of his tax agent. The appellant contended that the DGIR did not take prompt action and delayed in giving his ruling and issuing the additional assessments. In my mind Subsection 91(3) of the ITA is clear and unambiguous. It expressly empowers the DGIR to make an assessment where the taxpayer has been negligent. There is no limitation to this power, such as, any contributory conduct on part of the DGIR. The appellant has been careless and even reckless in his responsibility to submit correct returns in the instant case. The Responsibility is imposed on the taxpayer by the ITA and the appellant as the taxpayer here clearly failed to give care and intention to the filing of the amended returns promptly according to the ruling of the DGIR.

[42] The SCIT dismissed the appeal against the imposition of penalty under Section 113(2) of the ITA. This was done after due consideration of relevant facts and circumstances. The SCIT found that the DGIR had correctly exercised his discretion in imposing penalty. The undisputed

facts show that the appellant had submitted incorrect return and had further delayed the submission of the amended returns notwithstanding that the DGIR had conveyed his position on the interpretation of Section 21C of the PIA much earlier. The DGIR was clearly authorised to impose penalty where the taxpayer has submitted an incorrect return.

[46] Thirdly, the appellant argues that the appellant should not be penalised with penalty for having a different view on the interpretation of Subsection 21(c) of the PIA after having engaged professional tax agents to prepare or its tax agent has different interpretation does not absolve the taxpayer of its liability. The taxpayer or its agents failed to take prudent action on the facts that the on instant case shown above. I find the point devoid merit."

The Principal Grounds of Appeal

[18] The appellant's grievances against the decision of the High Court may be summarized as follows: -

18.1 The learned Judge erred in law and fact in failing to consider that the notice of additional assessment for the YA 2009 and the notice of assessment for YA 2010 raised by the respondent both dated 27 June 2016 are time-barred under Section 91(1) of the ITA as they have been issued more than five (5) years after ITA 2009 and 2010 respectively.

18.2 The learned Judge has erred in law and fact in failing to consider that the SCIT does not have *suo moto* jurisdiction to

decide that the appellant had been guilty of wilful default despite this not being an issue raised by the parties.

18.3 The learned Judge has erred in law and fact in failing to consider that the SCIT cannot go off on a frolic of its own and that if SCIT does so, as it had done in finding the appellant guilty of wilful default, this would amount to an obvious jurisdictional error which renders its decision legally unsustainable.

18.4 The learned Judge has erred in law and fact in failing to consider that the appellant could not be said to have committed wilful default where it had voluntarily written to the respondent to request for a ruling, prompting the respondent to look into the case, amended its returns and computations in good faith, to comply with the respondent's stance after this was made known and filed its tax returns for YAs 2014 – 2016 in good faith, in accordance with the respondent's stance.

18.5 The learned Judge has erred in law and fact in failing to consider that the Appellant could not be said to have acted negligently. The learned Judge has erred in law and fact in failing to consider that a mere error in claiming a tax

incentive/misinterpretation of a statutory provision is insufficient on its own to establish negligence and that proof is required that the error had been made negligently. Otherwise the time-bar provision would be redundant.

18.6 The learned Judge has erred in law and fact in failing to consider that the appellant could not be said to have acted negligently as it had engaged reputable and professional tax agents, voluntarily written to the respondent to request for a ruling, and amended its tax returns in good faith to comply with the respondent's stance.

18.7 The learned Judge has erred in law and fact in failing to consider that the delay in raising the Assessment were caused entirely by the respondent themselves and therefore the issuance of the Assessment were time-barred.

18.8 The learned Judge has erred in law and fact in failing to consider that the Article 96 of the Federal Constitution (**FC**) affords constitutional protection to taxpayers including the appellant against the levying of taxes which are not authorised by the law.

18.9 The learned Judge has erred in law and fact in failing to consider that pursuant to the clear wording of Section 3 of the ITA, income tax is only charged upon the income of a person. This is consistent with the trite principle that income tax "is a tax of income".

18.10 The learned Judge has erred in law and fact in failing to consider that section 21C of the PIA ought to be read and construed together with the ITA, including the charging provision in Section 3 of the ITA. The learned Judge has erred in law and fact in failing to consider that pursuant to the clear wording of the proviso in subsection 21C(2) of the PIA, only the "value-added income" of the appellant shall be income. The appellant's income excludes inflation adjusted based income" in the first place.

18.11 The learned Judge has erred in law and fact in failing to consider that the respondent has failed to provide any basis, either in authority or in statute to justify its interpretation that the appellant's inflation adjusted based income should also be income that is taxable.

18.12. The learned Judge has erred in law and fact in failing to consider and apply the principle of strict interpretation which applies in construing tax legislation. The learned Judge has also erred in law and fact in failing to consider and apply the principle that if there is any ambiguity or doubt as to whether income tax is to be imposed, such ambiguity or doubt must be resolved in the taxpayer's favour.

18.13. The learned Judge has erred in law and fact in failing to consider that the respondent has acted in breach of natural justice by failing to provide any reasons for the imposition of penalties. The learned Judge has erred in law and fact in failing to consider that the respondent cannot impose penalties under Section 113(2) of the ITA at its whims and fancies but must consider all relevant facts and circumstances.

18.14 The learned Judge has erred in law and fact in failing to consider that it is not Parliament's intention to punish innocent taxpayers. Even if the respondent had been right in its interpretation of the provisions in the PIA, it had never been the intention of the appellant at any time to under-report its income or

to under-pay taxes. The technical nature and difficulty in interpreting the said provisions is evident from the lengthy time in which the respondent itself took to respond.

Principles Governing Appellate Intervention in Appeals Against Decisions of SCIT

[19] This Court recently had the occasion to restate the applicable principles governing appellate intervention in appeal against decisions of the SCIT in the case of **International Naturopathic Bio-tech (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2024] 2 MLRA 326; [2024] 2 MLJ 706; [2024] 2 CLJ 519**. We find it useful for the relevant, self-explanatory parts of the judgment to be produced hereunder:

> "[13] First, the tax statute states that the decision of the SCIT is final; and it is appealable only on a question of law. Paragraph 23 of Schedule 5 to the ITA provides:
>
> 23. As soon as may be after completing the hearing of an appeal, the Special Commissioners shall give their decision on the appeal in the form of an order which shall be known as a deciding order and which, subject to this Schedule shall be final.
>
> [14] Paragraph 34 of the same Schedule 5 further states as follows:
>
> 34. Either party to proceedings before the Special Commissioners may appeal to the High Court on a question of law against a deciding order made in those proceedings.
>
> [15] And to further augment the position that an appeal to the High Court is only on a question of law, para. 39 of Schedule reads thus:

39. The High Court shall hear and determine any question of law arising on an appeal under paragraph 34 and may in accordance with its determination thereof:

(a) order the assessment to which the appeal relates to be confirmed, discharged or amended;

(b) remit the appeal to the Special Commissioners with the opinion of the court thereon; or

(c) make such other order as it thinks just and appropriate.

...

[17] We should add in this regard that a true appreciation of the law, as so legislated, cannot be emphasised enough. This was highlighted by the Court of Appeal in **Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 4 MLRA 114 [2015] 5 CLJ 923; [2015] 4 MLJ 487; [2015] 3 AMR 205**, where the following observation was made:

> [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 specialised bodies such as the 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 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.

[18] Secondly, and it follows from the first, findings of primary facts by the SCIT are unassailable. The High Court cannot interfere with such findings. This much was made clear by the Privy Council in an appeal from Malaysia in the case of **Chua Lip Kong v. Director-General of Inland Revenue [1981] 1 MLRA 757; [1982] 1 MLJ 235**, where it was stated as follows:

> Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; ... From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always

> questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law...

[19] The third principle that may be distilled from the authorities is that where the appeal is by way of a case stated, like presently, the High Court is only concerned with the points of law on the facts stated as given in the case stated as set out by the SCIT. It cannot go beyond the case stated from the SCIT. The former Federal Court in **UHG v. Director General of Inland Revenue [1974] 1 MLRA 494, [1974] 2 MLJ 33**, in the judgment written by Raja Azlan Shah FJ (as HRH then was) had stated thus:

> It is well established that where the appeal is by way of a Case Stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The Court of Appeal is not concerned with the evidence given in the Case Stated but with the facts therein stated and it is points of law upon those facts the court has to decide. The question for the Court of Appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach.

[20] Fourthly, the High Court is not entitled to interfere with the decision of the SCIT even if the High Court would not have come to the same conclusion, on the same material. In the same case of UHG v. Director General of Inland Revenue (supra), the Federal Court explained thus:

> But where there is evidence to consider, the decision of the Special Commissioners is final, even though the court might not, on the materials, have come to the same conclusion. In treating the question, I can desire no more apt exposition of the law than what is contained in Lord Atkinson's speech in Great Western Railway Co v. Bater (1928) 8 TC 231 244...

[21] A similar outcome was arrived at in **Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd [1977] 1 MLRA 246**, where Lee Hun Hoe CJ (Borneo) observed as follows:

> "With respect, the learned judge was wrong to interfere with the decision of the Special Commissioners as there was sufficient evidence to support their conclusion. The learned judge, in exercising appellate jurisdiction, was not supposed to alter conclusion of facts simply because he feels that on the evidence the Special Commissioners should not have arrived at the conclusion of facts they did.

> [22] The fifth principle, another corollary of the others, is that even if the primary facts found by the SCIT are capable of two alternative inferences, the High Court would not substitute its own preferred inference. This is trite since an appellate court would only set aside the decision of the tribunal if the tribunal had acted without any evidence or on a view of facts which could not reasonably be supported. But if the primary facts, as found, were capable of supporting two alternative inferences, the appellate court would not substitute its preferred inference over the one validly drawn by the tribunal (see Furniss v. Dawson [1984] STC 153 at 166 per Lord Brightman, Lim Foo Yong Sdn Bhd v. Comptroller-General of Inland Revenue [1986] STC 255 at 259 per Lord Oliver and reaffirmed in Richfield International Land And Investment Co Ltd v. IRC [1989] STC 820)".

[20] We must, as such, reiterate that the court may only set aside the decision of the SCIT if the SCIT had acted either without any evidence or on a view of the facts which could not reasonably be supported.

Analysis and Findings of This Court

Issue 1

Whether Form JA for the YA 2009 dated 17 June 2016 and Form J for the YA 2010 dated 27 June 2016 are time-barred under section 91 of the ITA.

[21] The SCIT and the learned High Court Judge ruled that based on the facts proven in the present appeal, the tax returns (Borang Nyata Cukai Pendapatan) for YA 2009 was only filed by the appellant on 6 October 2010 which was outside the time frame given under subsection 77A(1) of the ITA.

[22] For the YA 2010, the SCIT and the learned High Court Judge ruled that the appellant had been negligent in submitting its tax returns for YA 2010 to the respondent by misinterpreting the provision under the PIA namely, subsection 21C(2) and 21C(2A).

[23] The learned High Court Judge also ruled that the facts that the appellant engaged professional tax agent and has different interpretation does not release the appellant of its liability and duty under the provisions of the ITA.

[24] The relevant judgment by the learned High Court Judge on this time-barred issue can be found in paragraphs 34-39 of the Grounds of Judgment dated 29 May 2023.

[25] The relevant findings of the SCIT pertaining to this issue can be found in paragraphs 10.29 – 10.36 of the Case Stated.

[26] It is trite that the respondent may only raise an assessment beyond the time-bar period if it comes within subsection 91(3) of the ITA.

[27] Subsection 91(3) of the ITA provides as follows:-

"The Director General where it appears to him that –

a) any form of fraud or wilful default has been committed by or on behalf of any person; or
b) any person has been negligent.

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question."

[28] Based on the above, the following elements have to be proven before subsection 91(3) of the ITA applies:-

a) the taxpayer/appellant must have been committed any form of fraud or wilful default or negligent; and
b) the loss of the tax must be the proximate cause of the taxpayer's/appellant's fraud, wilful default or negligence.

[29] The burden to prove that the appellant had committed fraud, wilful default and/or negligence in relation to tax under subsection 91(3) of the ITA lies with the respondent.

[30] Having perused the evidence presented before the SCIT, this Court finds that the respondent contends that the appellant was negligent in submitting and preparing its tax returns for YA 2009 and YA 2010. The

respondent did not raise or contend that the appellant was guilty of wilful default.

[31] This court finds that the issue of wilful default had neither been raised nor particularized by the parties.

[32] However, we find that the SCIT, in holding that the appellant guilty of wilful default in paragraphs 10.34 – 10.35 of the Case Stated went off on a frolic of its own and made a finding on an unpleaded issue. This amounts to a jurisdictional error which renders its decision legally unsustainable.

[33] We are of the view that the legislation does not give the SCIT *suo moto* jurisdiction to apply subsection 91(3) of the ITA when the respondent has not sought to apply it or to decide on issue that has not been raised or argued. (See: **Seiwa Podoyo Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 6 MLRH 765; [2022] CLJU 1226 ("Seiwa Podoyo")**)

[34] In any event, based on the facts and circumstances of this case, we are of the view that the appellant could not be said to have committed wilful default where:

a) it had voluntarily written to the respondent to request for a ruling of its tax treatment;

b) after the respondent had made known its views on 11 March 2024, the appellant had amended its returns and computations for YA 2009 – 2013 in accordance with the respondent's view; and

c) for the subsequent YAs i.e. YAs 2014 – 2016, the appellant had filed its tax returns for YA 2014 – 2016 in accordance with the respondent's view.

[35] Based on the facts in the present case, we are of the view that the appellant could not be said to have acted negligently as the delay in issuing assessment had been caused by the respondent itself. This is because: -

a) In 2012, the appellant wrote voluntarily to the respondent to seek clarification, despite having no legal obligation to do so.

b) The respondent responded only after two (2) years. No reasons were given for the long delay, especially on a provision that is supposed to have been clear and unambiguous.

c) After yet another two (2) years, the respondent finally issued a time-barred assessment on 21 June 2016.

[36] Further, we find that the SCIT had erred in its decision by deciding that the respondent has proven that the appellant was 'negligent' for the sole reason that there is a huge difference between the tax returns the appellant filed between YAs 2009 to 2013.

[37] The SCIT failed to take into consideration that each and every year of the appellant's expenditure or income are differentiated and cannot be compared to conclude that the huge difference between each year automatically equates to having irregularities or negligent by the appellant in certain years.

[38] Further, we find that the amendments by the appellant were done out of good faith and in no way constitute an admission of the appellant in filing an incorrect return. This has been clearly shown in the appellant's tax agent letter dated 1 April 2015 to the respondent where the appellant

sought to amend the tax returns but at the same time also strongly objected and protested against the assessments by the respondent.

[39] We also find that the SCIT failed to take into account the legal principle that a taxpayer is not automatically said to have committed negligence by virtue of merely claiming for deductions that were not allowed by the DGIR.

[40] We find support of our view by referring to the following cases:-

a) Ketua Pengarah Hasil Dalam Negeri v. Procter & Gamble (Malaysia) Sdn Bhd [2022] 1 LNS 754, [2022] MLRHU 657

> "[47] In addition, it must be emphasized that **the mere act of claiming a tax treatment which the appellant disagrees with, cannot amount to negligence**. This had been held by the High Court in the case of Infra Quest Sdn Bhd v. KPHDN [2016] MSTC 30-133. The High Court stated:
>
> > "[72] Hence, it was the finding of this Court that on an evaluation of the facts and the law pertaining to the issue of negligence, it was proved that the respondent/revenue did not lead any evidence that the appellant/taxpayer was actually negligent. **This Court opined that mere act of the Appellant claiming capital allowances could not amount to negligence.**""

(Note: Ketua Pengarah Hasil Dalam Negeri's appeal to the Court of Appeal vide Civil Appeal No. W-01(A)-612-10/2021 has been withdrawn on 9 August 2023).

b) Seiwa Podoyo (supra)

> "61. **The mere fact that the appellant may have committed an error in claiming RA without more, is insufficient to establish negligence unless there is proof that the error was committed negligently**… This Court agrees with the appellant's submission that while a taxpayer may be "punished" for submitting an inaccurate return, there was no legal duty under the ITA requiring the appellant to be correct**, if the requirement of negligence is satisfied by the filing of an incorrect return as contended by the respondent, then section 91 (1) of the ITA would in effect be rendered redundant** as the respondent would be allowed to raise an assessment no matter how much time has passed if there has been an error in the return. Pertinently, the appellant could not have been negligent in not complying with the Public Ruling which has no force of law."
>
> (Emphasis added)
>
> **(Note: Ketua Pengarah Hasil Dalam Negeri's appeal to the Court of Appeal vide Civil Appeal No. W-01(A)-710-12/2021 was dismissed on 6 December 2023).**

[41] It is to be noted that the test to determine whether the appellant has committed negligence is the test of "what a reasonable man would do or would not do".

[42] In the present case, we find that the appellant at all materials times:

a) obtained professional service of a tax agent in filing of its tax returns;

b) provided full cooperation by providing all documents requested by the respondent;

c) made full and frank disclosure to its tax treatment;

d) filed the tax returns within prescribed statutory time frame for YA 2010 onwards;

e) was not given an opportunity to explain otherwise nor the respondent gave any reasons at all to justify the basis for raising the time-barred assessments;

f) only learned the reasons of time-barred assessment in the course of hearing before the SCIT;

g) did not attempt at any time to evade or avoid tax;

h) was a good corporate tax payer that duly paid all payable taxes within prescribed statutory time frame; and

i) never been investigated or reprimanded by the respondent on the past time.

[43] Given the above, we are of the view that the appellant could not be said to have acted negligently.

[44] Similarly, we are of the view that if the respondent was assured that the appellant has filed an incorrect return, the respondent could have issued the assessment at the start of the audit which is in 2012 when the

appellant wrote to them for confirmation, or even in 2014 when the respondent replied to the appellant stating their stance. Instead, they waited till 5 July 2016 to do so. It is pertinent to note that subsection 91(3) of the ITA only allows the respondent to issue an assessment "for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question".

[45] Based on the facts in the present case, we are of the view that if there had been any loss of tax, this was not attributable to any negligence on the appellant's part, but rather to the respondent's own delay. We find that the respondent had led no evidence whatsoever to justify the reason for its delay in acting between 2012 and 2014, or between 2014 and 2016. Where the respondent is entitled as of right to raise an assessment within the limitation period, once the limitation period is exceeded, the burden shifts to the respondent to bring itself within the exceptions set out in section 91(3) of the ITA. However, we find that they have failed to do so. [See **Seiwa Podoyo** (supra)]

Issue 2

Whether the Appellant's Income during the Pioneer Period for YA 2016 is Value-added Income Pursuant to the PIA?

[46] Having perused the submissions filed by the parties, we find that the parties agree that: -

a) the proviso in subsection 21C(2) of the PIA applies to the appellant as a company that is already operating in Malaysia;
b) by virtue of this proviso, the appellant's income is only its value-added income and not its inflation adjusted base income. Value -added income excludes inflation adjusted base income by virtue of the definition in subsection 21C(2A) of the PIA; and
c) by virtue of exemption granted by Malaysian Investment Development Authority (**MIDA**) in the pioneer certificate dated 31 July 2008; the appellant's value-added income is exempted from tax.

[47] However, parties disagree on the taxability of the appellant's inflation adjusted base income i.e. the remaining income after exemption of its value-added income by MIDA.

[48] According to the respondent, the appellant's income consists of both the value-added income and the inflation adjusted base income. The appellant received **MSC** status, which entitled the appellant to 100% tax exemption from the Ministry of Finance (**MOF**) (**MOF Exemption**) should

it receive pioneer status. The MOF Exemption only applies to the value-added income. The inflation–adjusted base income is not exempted and hence taxable. In short, section 21C of the PIA is a provision for computation of exempted income.

[49] The appellant on the other hand contends that Parliament has expressly stipulated that only the value-added income is income. Inflation adjusted base income has been specifically excluded as income by the clear wording of the proviso to subsection 21C(2) of the PIA (**the Disputed Proviso**). The question of exemption does not even arise because there is no liability to tax for it in the first place.

[50] The provision of subsection 21(2) of the PIA is as follows: -

> "**Computation of income during tax relief period**
>
> 21. (1) The income of a pioneer company for each accounting period of its pioneer business shall be computed in accordance with the principal Act by-
>
> (a) treating each such accounting period as the basis period for the year of assessment which includes the last day of the accounting period in question; and
> (b) ascertaining the income in question as if it were the statutory income from the pioneer business for that year of assessment.
>
> (2) The amount of the income of a company ascertained under subsection (1) shall be subject to-
>
> (a) any condition which may be specified in the pioneer certificate of the company issued under section 7;

(b) any restriction under section 21A."

[51] The provision of subsection 21C of the PIA is as follows: -

"Computation of income during tax relief period in respect of pioneer status granted under subsection 6(1AB)

21C. (1) This section shall apply to a company which has been granted pioneer status under subsection 6(1AB).

(2) Subject to any condition which may be specified in the pioneer certificate of a company issued under section 7, the income of a pioneer company for each accounting period of its pioneer business shall be computed in accordance with the principal Act by-

(a) treating each such accounting period as the basis period for the year of assessment which includes the last day of the accounting period in question; and

(b) ascertaining the income in question as if it were the statutory income from the pioneer business for that year of assessment:

Provided that in the case of a company that is already operating in Malaysia, the income of the company for each accounting period of its pioneer business shall be value-added income of the company."

(Emphasis added)

[52] The value-added income is defined under subsection 21C (2A) (a) of the PIA as follows: -

"(2A) For the purpose of this section –

(a) "value-added income" means the **statutory income** for the basis period for the year of assessment **less the inflation adjusted base income**;"

(Emphasis added)

[53] From the above, it is clear that value-added income means the statutory income minus inflation–adjusted base income.

[54] Inflation-adjusted base income has been defined in subsection 21C (2A) (b) of the PIA as follows:-

> "(b) "inflation adjusted base income" shall be determined in accordance with the formula –
>
> (i) for the first year, from the production day:
>
> A (1 + B)
>
> where:
>
> A is the average statutory income for up to three years prior to the production day; and
> B is the rate of inflation for the basis year;
>
> (ii) for the second year, from the production day onwards:
>
> C (1 + B)
>
> where:
>
> C is the inflation adjusted income for the preceding year; and
>
> B is the rate of inflation for the basis year."

[55] It is not disputed that the appellant has already been operating in Malaysia and thus comes within the scope of the Disputed Proviso.

[56] It was not disputed by both parties that the appellant has been granted the pioneer status under subsection 6(1AB) of the PIA. However, the disputed issue deals with the computation of income during tax relief period throughout its pioneer status as provided under section 21C of the PIA.

[57] The main issue turns solely on the interpretation of the Disputed Proviso. Therefore, it is a pure question law involving interpretation of the Disputed Proviso.

[58] Given the above, we are of the view that the Disputed Proviso provides that for a company "that is already operating in Malaysia":-

a) the income of the company shall be its value-added income; and
b) value-added income means "statutory income" less "inflation-adjusted base income";

[59] The SCIT ruled in favour of the respondent when it held that tax has to be paid on the inflation adjusted base income as section 21C of the PIA provides that only the value-added income is to be exempted.

[60] The learned High Court Judge in his Grounds of Judgment stated as follows:-

> "[18] This is the second issue raised by the appellant but the first issue on which submissions were made. I will accordingly address this issue first. The SCIT held that there was no ambiguity in Subsection 21C(2) of the PIA and that the appellant was only entitled to exemption from income tax on its 'value-added income' under the said subsection.
>
> [26] What is meant by the phrase 'value-added income' is made plain and clear by Subsection 21C(2A)(a) wherein the phrase is defined to mean: the statutory income for the basis period for the year of assessment less the inflation-adjusted base income. So, the value-added income of the company is less the 'inflation-adjusted base income' of the company and which income is determined by the statutory formula provided by Subsection 21C(2A)(b). Thus, only the whole of the appellant's 'value-added income' is exempted while the remaining statutory income is chargeable income for tax purposes. There is no ambiguity in the provision. The SCIT did not misdirect itself in law and had correctly interpreted Section 21C of the PIA."

[61] Having read the grounds of the decision of the SCIT and the learned High Court Judge, we are of the opinion that they have committed clear misdirection in law in their interpretation of the Disputed Proviso: -

61.1 The SCIT held that the appellant was only entitled to exemption on its 'value-added income' but did not appear to have considered the issue of whether the "inflation adjusted base income" was taxable income;

61.2 The High Court appears to have been cognizant of the SCIT's omission and sought to address it by holding that "the remaining statutory income is chargeable income for tax

purposes". However, we find the High Court failed to support and justify this interpretation.

[62] It is to be noted that under the ITA, income tax can only be charged upon the income of a person.

[63] Section 3 of the ITA reads as follow:

> "**Charge of income tax**
>
> 3. Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia"

[64] Based on the above, it is clear that only when there is income, there can be liability to tax, and where there can be income tax charged. It is only when there is liability to tax, the question of exemption can arise.

[65] The Court of Appeal in **Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 2 MLRA 245; [2009] 4 MLJ 682; [2009] 5 CLJ 518** held that:

> "[23] To be disregarded under the Act, an exemption from tax should legally be deducted or claimed from the chargeable income and not the gross income. **This is because gross income per se may or may not be exigible to tax at all. When no tax is exigible, there is no question or necessity for the taxpayer to utilise or claim the exemption**. In the context of section 127[5], **exemption means immunity,**

dispensation, exclusion, freedom, relief or exoneration from tax (see "The New Oxford Thesaurus of English" 2000).

[24] It is essential to hark back to the **simple and basic rule that the "income tax is a tax on income**": per Lord Macnaghten in London Country Council v. AG [1901] AC 26; Raja's Commercial College v. Gian Singh & Co. Ltd [1976] 1 MLRA 82; [1976] 2 MLJ 41 PC; and Lower Perak Co-operative Housing Society Bhd, supra. In other words, **where there is no income, there can be no liability to tax, in which case no question to be of exemption can ever arise. Exemption is only relevant when there is chargeable income but not otherwise**."

(Emphasis added)

[66] Subsection 1(2) of the PIA provides that the PIA shall be read and construed as one with the ITA.

"1. Short title, construction and commencement

(1) This Act may be cited as the Promotion of Investments Act 1986.

(2) Subject to Section 2, this Act shall be read and construed as one with the Income Tax Act 1967 (hereafter referred to as the "principal Act")."

[67] In the instant case, it is not disputed that the appellant was granted Pioneer Status pursuant to subsection 6(1AB) of the PIA. Pioneer Status under subsection 6(1AB) of the PIA is granted pursuant to an application made under subsection 5(1A) of the PIA.

[68] It is also undisputed that the appellant comes within section 21 of the PIA and the Disputed Proviso as a company "that is already operating in Malaysia".

[69] The Disputed Proviso states simply that:

> "Provided that in the case of a company that is already operating in Malaysia, the income of the company for each accounting period of its pioneer business shall be the value-added income of the company."

[70] However, contrary to the respondent's, SCIT's and the High Court's decision, we find nothing in the entire PIA or ITA suggests that "inflation adjusted base income" is taxable income, or that the Disputed Proviso is only for the computation of exempted income.

[71] Section 21C of the PIA itself is expressed to be a provision for the "computation of income" during the relevant period. The respondent's submission requires this court to write in words into section 21C of the PIA, so that it reads of "computation of detracted income". The Courts have always refused the respondent's attempts to re-write legislation.

[72] The law in respect of interpreting taxing statutes is settled. The then Supreme Court in **National Land Finance Co-operative Society Ltd v.**

Director General of Inland Revenue [1993] 4 CLJ 339; [1993] 1 MLRA 512; [1994] 1 MLJ 99; [1993] 2 AMR 3581 has reiterated the principle of strict interpretation whereby:

> "…. In construing the said amendments certain principles relating to the interpretation of taxing statutes must be followed. Firstly, **there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words tax cannot be imposed**… Another principle is that **where the meaning of a statute is in doubt the ambiguity must be construed in favour of the subject**. Yet another principle is that **an exemption from tax cannot be removed except by sufficiently clear words to achieve that purpose…**
>
> There are ample authorities to show that **Courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists.** In Re Micklewait [1855] 11 Exch 452 it was held that **a subject was not to be taxed without clear words**… we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J. in Cape Brandy Syndicate v. I.R.C. (supra):
>
> … in a taxing Act one has to look merely at what is clearly said. **There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied.** One can only look fairly at the language used…"
>
> (Emphasis added)

[73] Further, the Court of Appeal in the case of **Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 2 MLRA 335; [2006] 1 MLJ 428; [2005] 4 CLJ 810,** held that:

> "… **the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour**. The maxim in revenue law is this: **no clear provision; no tax**. **If there is any doubt then it must be resolved in the taxpayer's favour."**
>
> (Emphasis added)

[74] In **Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd and another appeal [2019] 5 MLRA 584; [2020] 6 MLJ 224; [2019] 5 AMR 516; [2019] 8 CLJ 433**, the Federal Court held:

> "It is well-established principle of interpretation that **the court cannot rewrite, recast or reframe then legislation because it has no power to do so. The court cannot add words to a statute or read words which are not there**. It is also well settled canon of construction that words in a statute cannot be read in isolation, their colour and content derived from their context and every word in a statute is to be examined in its context. The word context has to be taken in the widest sense where the court must take into consideration not only the enacting provisions of the same statute, but its preamble, the existing state of law, other statutes in *pari materia*, and the mischief which the statute is intended to remedy."
>
> (Emphasis added)

[75] Applying the trite principle in tax law established by the above case laws, we are of the view that section 21C of the PIA unequivocally provides that the income of the appellant shall be the value-added income, it does not provide that the inflation adjusted base income is the appellant's income.

[76] To put it simply, we find that there is no provision that the inflation-adjusted base income is income. Hence, we are of the view that no tax ought to be imposed on the appellant.

[77] Added to that, we also find that the MSC Status Certificate issued to the appellant was signed by both MITI and MOF. This entitled the

appellant to 100% tax exemption should the appellant receive Pioneer Status i.e., the MOF Exemption. The granting of the MOF Exemption is consistent with the MOF's powers under subsection 127(3A) of the ITA.

> **"127 Exemption from tax: general**
>
> (3A) The Minister may, in any particular case exempt any person from all or any of the provision of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind."

[78] We further found that nothing in the MSC Status Certificate indicates that MOF had intended the appellant to pay tax on its "inflation adjusted base income". The Minister's intention as expressed in the Pioneer certificate is clear and unambiguous. The appellant is to receive 100 % tax exemption.

[79] In **Majlis Perbandaran Seremban v Tenaga Nasional Bhd [2020] 6 MLRA 379; [2020] 12 MLJ 1; [2020] 10 CLJ 715; [2020] 8 AMR 213**, the Federal Court held that if a general word is used, it must be given an unrestricted and unfettered meaning.

[80] In the instant case, we are of the considered view that the wording "100% tax exemption" is self-explanatory. We find that there is no basis to

restrict these wording to mean "value-added income tax exemption" as submitted by the respondent.

[81] Having said so, we are of the considered view that the Minister's power to override subsection 21C(2) of the PIA does not render the rest of the subsection 21C(2) of the PIA, including the proviso, superfluous. The proviso would still be relevant in cases where the Minister had not specified the rate of the exemption to be granted to the taxpayer.

[82] By contrast, we find that the respondent's, SCIT's and High Court's interpretation has rendered the word "subject to any conditions which may specified in the pioneer certificate..." to be entirely meaningless. This is contrary to the trite presumption that Parliament does nothing in vain. [See: **Krishnadas Achutan Nair & Ors v Maniyam Samykano [1996] 2 MLRA 194; [1997] 1 MLJ 94; [1997] 1 CLJ 636; [1997] 1 AMR 997**]

[83] Hence, we are of the view that no tax ought to be imposed on the Appellant.

Issue 3

Whether the DGIR was Correct in Imposing Penalties under subsection 113(2) of the ITA for the YAs 2009 to 2013?

[84] Based on our findings on Issue 2 above, we find that there is no necessity for us to answer this Issue 3.

Conclusion

[85] Based on the above, we are of the view that the High Court failed to consider the well-established legal principles which led to a misdirection in law.

[86] We therefore set-aside the decision of the SCIT as well as the High Court and accordingly allow this appeal with costs of RM 10,000.00 to the appellant here and below.

Dated: 12 December 2024

AHMAD KAMAL BIN MD SHAHID
JUDGE
COURT OF APPEAL

Counsel Appearing:

For the Appellant:	Dato' Nitin Nadkarni (Mr. Chris Toh Pei Roo and Miss Chang Jin Yee with him) Messrs Lee Hishammuddin Allen & Gledhill
For the Respondent:	Miss Ashrina Ramzan Ali, Senior Revenue Counsel (Mr. Wan Khairuddin Wan Montil and Miss Surani Che Ismail, Revenue Counsel with her) Lembaga Hasil Dalam Negeri Malaysia