Tax Espresso

HASiL Updates on Tax Corporate Governance Framework, Tax Cases and more

April 2024

Greetings from Deloitte Malaysia Tax Services

Quick links:

Deloitte Malaysia
Inland Revenue Board of Malaysia

Takeaways:

1. HASiL – Updates on Tax Corporate Governance Framework (TCGF)
2. Syarikat Sesco Berhad v DGIR (HC)
3. Etiqa Family Takaful Berhad & Etiqa General Insurance Berhad v DGIR (HC)
4. Tan Sri Leonard Linggi Jugah & Keresa Plantations Sendirian Berhad v DGIR (HC)
5. JSL v DGIR (SCIT)
6. ACSB v DGIR (SCIT)
7. HLAB v DGIR (SCIT)

Upcoming events:

M&A Talk Series – Tax, Legal, and Financial highlights

Important deadlines:

Task	Deadline	
	30 April 2024	**1 May 2024**
1. 2025 tax estimates for companies with May year-end		√
2. 6th month revision of tax estimates for companies with October year-end	√	
3. 9th month revision of tax estimates for companies with July year-end	√	
4. 11th month revision of tax estimates for companies with May year-end	√	
5. Statutory filing of 2023 tax returns for companies with September year-end	√	
6. Maintenance of transfer pricing documentation for companies with September year-end	√	
7. 2024 CbCR notification for applicable entities with April year-end	√	

1. HASiL – Updates on Tax Corporate Governance Framework (TCGF)

The Inland Revenue Board of Malaysia (HASiL) has issued a Media Release dated 5 March 2024 on its website in relation to the following:

➢ Guidelines on Tax Corporate Governance Framework (TCGF Guidelines) updated as of 23 February 2024 *(the previous TCGF Guidelines was dated 27 July 2022)*

The changes in the TCGF Guidelines cover matters related to:

- monitoring;
- the effectiveness of the tax control framework;
- reporting control testing;
- reporting tax governance, control, and risk management.

The updates and new paragraphs are indicated in the updated TCGF Guidelines.

➢ Frequently Asked Questions (FAQs) updated as of 23 February 2024 *(the previous FAQ was dated 27 July 2022)*

➢ Bahasa Malaysia version of TCGF dated 23 February 2024 *(translated for wider understanding)*

The updated TCGF Guidelines and FAQ are based on the feedback received from a series of engagement sessions conducted with government agencies, organisations, tax practitioners, and best practice studies in the effective implementation of the Tax Corporate Governance programme.

Back to top

2. Syarikat Sesco Berhad v DGIR (HC)

HASiL has recently uploaded a case report, "Syarikat Sesco Berhad v DGIR (HC)" on its website.

Facts:

The taxpayer appealed against the Deciding Order by the Special Commissioners of Income Tax (SCIT) dated 15 December 2022 in respect of the Notices of Assessment for the year of assessments (YAs) 2011 and 2012. The Parties agreed that the decision of Rayuan No. PKCP(R) 1035/2017 and PKCP(R) 1036/2017 for the YAs 2011 and 2012 shall be binding on the similar issue for the YAs 2013 to 2020.

Taxpayer's argument:

The taxpayer's principal activities are generation, transmission, distribution, and sale of electricity. The taxpayer had engaged consultants to undertake feasibility studies (FS) for the purpose of exploring, identifying, and developing the hydroelectric sites and dams. The taxpayer asserted that the FS expense was wholly and exclusively incurred in the production of its business income based on the following reasons, namely:

- The FS allowed the taxpayer to make an informed decision regarding new opportunities and projects. This was crucial for the taxpayer in identifying potential lucrative projects. It was also necessary to meet the continuous market demand in Sarawak (e.g., supply of electricity);
- The FS were not limited to hydro as it also included gas or coal generation potential projects. The purpose was to increase business and revenue opportunity. It was meant to also increase business opportunities through international investors and local investors;
- The FS were of the utmost importance to the taxpayer as an ongoing concern to continuously promote and encourage the generation of energy with an aim to maximise profit by identifying and assessing opportunities.

The taxpayer argued that consideration must always be given to the underlying business and commercial reality (i.e., the FS in the taxpayer's case). The taxpayer argued that the Learned SCIT failed to consider that the FS conducted by the taxpayer in its usual business practice or operations were for the purpose of fulfilling the continuous demand. Therefore, the imposition of penalties on the taxpayer under Section 113(2) of the Income Tax Act 1967 (ITA) were not justified in law and facts of the case.

DGIR's argument:

In response, the Director General of Inland Revenue (DGIR) submitted that for the FS expense to be deductible, it must not only fulfil the requirement of wholly and exclusively incurred in the production of gross income under Section 33(1) of the ITA, but it also should not be prohibited under Section 39 of the ITA. The DGIR highlighted that the FS expense was related to the taxpayer's assets which was capital in nature and hence, it was not incurred for the production of business income. In fact, the FS expense was not incurred by the taxpayer as the taxpayer was not even a party to the FS Agreement since the duty to pay lies on Sarawak Energy Berhad under the FS Agreement. The DGIR further distinguished the case of *KPHDN v Shell Refining Company (FOM) Bhd [2015] MSTC 30-106* from the current appeal on the basis that the FS was related to the taxpayer's physical assets in this case whereas in *Shell Refining's* case, the FS was conducted to obtain and produce a report on "Port Dickson Refinery Hydrocarbon Masterplan". It is trite law that for an expenditure to be eligible for a deduction under the ITA, the taxpayer must prove that such expenditure is allowable under Section 33 of the ITA. Therefore, the penalties imposed by the DGIR under Section 113(2) of the ITA were correct and in accordance with the law.

Issues:

1) Whether the SCIT was right in law and facts in deciding that the expenses for FS in the YAs 2011 and 2012 were not deductible under Section 33(1) of the ITA.

2) Whether the penalties imposed for the YAs 2011 and 2012 under Section 113(2) of the ITA were correct in law.

Decision:

On 15 February 2024, the High Court (HC) had dismissed the taxpayer's appeal with costs and upheld the decision of the SCIT.

[Details of the above tax case at both the SCIT and HC levels are not available as of date of publication.]

Back to top

3. Etiqa Family Takaful Berhad & Etiqa General Insurance Berhad v DGIR (HC)

HASiL has recently uploaded a case report, "Etiqa Family Takaful Berhad & Etiqa General Insurance Berhad v DGIR (HC)" on its website.

Facts:

The first taxpayer's principal activities are general takaful, family takaful, and takaful investment-linked business. The second taxpayer's principal activities are general insurance, life insurance, and investment-linked business. The taxpayers opined that interest and profit payments on Tier 2 subordinated bond and sukuk were incurred in order to comply with the requirement set by Bank Negara and therefore, the payments were deductible under Section 33 of the ITA. They did not claim the said expenses in their tax returns for all the YAs under dispute (i.e., YAs 2014 to 2018). Subsequently, they filed appeals to the SCIT upon submission of the returns.

The SCIT dismissed the appeal and held that that the taxpayers are not entitled to claim deduction on both payments of profit and interest under Section 33(1) of the ITA because there were specific provisions on takaful and insurance business. Both payments were also not deductible because they were not listed under allowable expenses under Sections 60AA(9)(b)(iii) and 60(3A)(b)(ii) of the ITA.

Taxpayers' argument:

It was the taxpayers' contention that the profit and interest payments were deductible expenses under the general provision of Section 33(1) of the ITA. Sections 60(3A) and 60AA(9) of the ITA did not preclude the application of Section 33(1) of the ITA as Section 33(1) of the ITA can be applied to all businesses. Additionally, the interest and profit payments fulfilled the requirement under Section 33(1)(a) of the ITA. There was no prohibition of such a deduction under Section 39 of the ITA. The expenses were incurred to comply with the Bank Negara requirement.

DGIR's argument:

In contrast, the DGIR submitted that the profit and interest payments incurred by the taxpayers on the Tier 2 capital subordinated bond and sukuk were not deductible under Sections 33(1), 60AA(9)(b)(iii) and 60(3A)(b)(ii) of the ITA. There was a specific provision of Section 60AA of the ITA inserted vide Finance Act 2007 [*Act 683*] which had effect for the YA 2008 and subsequent YAs, with the purpose of complying with the *Syariah* requirement and to provide for a specific provision to determine the taxation of takaful business for the first taxpayer. There was also a specific provision of Section 60 of the ITA, which is in existence since the introduction of the ITA to determine the taxation of insurance business for the second taxpayer. Therefore, Section 33 of the ITA was not applicable to the taxpayers since there were specific provisions, i.e., Sections 60AA(9)(b)(iii) and 60(3A)(b)(iii) of the ITA respectively. Complying with the requirement set by Bank Negara had no bearing in tax treatment. The principle of *generalia specialibus non derogant* (i.e., specific statutory provision should override general provision) should be applied.

Issue:

Whether the profit and interest payments by the taxpayers on Tier 2 subordinated bond and sukuk were deductible under Section 33(1) of the ITA.

Decision:

On 8 February 2024, the HC decided that there are no merits on the appeals and dismissed the taxpayers' appeals with cost of RM3,000 for each case.

[Details of the above tax case at both the SCIT and HC levels are not available as of date of publication.]

Back to top

4. Tan Sri Leonard Linggi Jugah & Keresa Plantations Sendirian Berhad v DGIR (HC)

HASiL has recently uploaded a case report, "Tan Sri Leonard Linggi Jugah & Keresa Plantations Sendirian Berhad v DGIR (HC)" on its website.

Facts:

The taxpayers were originally shareholders of Arus Plantation Sdn Bhd (Arus), a real property company (RPC) in Malaysia. On 9 November 2009, Asian Plantations Limited (APL) took over Arus through a Share Swap Agreement (SSA) with the taxpayers. Pursuant to the SSA, the First Appellant (LLJ) received 2,026,000 units of APL shares worth RM8,289,379 and the Second Appellant (KPSB) received 13,383,000 units of APL shares worth RM54,756,544.50 in exchange for their shares in Arus. By virtue of the "shares swap" exercise, both LLJ & KPSB had been upgraded from being the majority shareholder of Arus (i.e., an RPC), to be APL's majority shareholder. The word "swap" can also mean "exchange". Under Section 2 of the Real Property Gains Tax Act 1976 (RPGTA), the definition of the word "acquire" also includes "exchange". On 13 October 2014, both LLJ and KPSB disposed of their shares in APL to FGV Holdings Berhad (FGVHB). LLJ disposed of 2,026,00 units of APL shares to FGVHB for RM23,381,818.00 while KPSB disposed of 13,383,000 units of APL shares to FGVHB for RM153,460,720.

Subsequently, the taxpayers have submitted the Form CKHT 1B (Disposal of Shares in Real Property Company) to the DGIR as required under Section 13(1) of the RPGTA. The DGIR was of the opinion that the disposal of APL shares should be subjected to real property gains tax (RPGT) because APL was an RPC during the acquisition date of Arus shares (i.e., 9 November 2009). The DGIR raised the Notices of Assessment for RPGT (Forms K) dated 10 February 2015 with the sum of RM2,017,229.40 for LLJ and RM14,805.626.25 for KPSB.

Taxpayers' argument:

The taxpayers contended that APL was not an RPC at all material times. Even if it was, it had ceased to be one the moment it was listed in the London Stock Exchange (LSE) on 30 November 2009. Therefore, the disposal of any APL shares should not be subjected to RPGT. After APL was listed on the LSE, its group of companies had acquired more lands. By the disposal date of APL shares (i.e., 13 October 2014), APL Group had 24,486 hectares of land in Sarawak. At the very most, if at all, only the original portion of BJ Corporation Sdn Bhd's land of 4,795 hectares should be subjected to RPGT. The disposal of APL shares by the taxpayers after the shares swap on 9 November 2009 were not RPC shares as defined in the RPGTA. Furthermore, the disposal was concluded during the RPGT exemption period from 1 April 2007 until 31 December 2009. There was no evidence that APL was an RPC. The DGIR did not even properly determine whether APL was an RPC at the material time.

DGIR's argument:

In response, the DGIR asserted that the acquisition of shares in Arus (which was an RPC) by both the taxpayers through the shares swap exercise shall be considered an acquisition of a chargeable asset. Where such shares are disposed of to FGVHB, such disposal shall be deemed to be a disposal of a chargeable asset, notwithstanding that at the time of disposal of such shares, the relevant company was no longer regarded as an RPC.

The DGIR further argued that pursuant to Paragraph 34A(4), Schedule 2 of the RPGTA, the disposal price of the chargeable asset was the amount or value of the consideration in money or money's worth for the disposal of the chargeable asset. Both the SSA and the Form CKHT 1B submitted by the taxpayers had declared and specified the total disposal price of shares. Furthermore, the taxpayers were not entitled to the RPGT Exemption No. 2/2007, granted for the period from 1 April 2007 until 31 December 2009.

Issue:

Whether the disposal of APL shares by the taxpayers is subject to RPGT.

Decision:

The HC affirmed the decision of the SCIT and dismissed the taxpayers' appeal with costs of RM10,000. The HC held that the taxpayers failed to discharge the onus of showing that the Forms K raised by the DGIR were excessive and erroneous. In the HC's view, the DGIR was not wrong in treating APL as an RPC, and there was no error on the part of the DGIR in the computation of the RPGT payable.

[Details of the above tax case at both the SCIT and HC levels are not available as of date of publication.]

Back to top

5. JSL v DGIR (SCIT)

HASiL has recently uploaded a case report, "JSL v DGIR (SCIT)" on its website.

Facts:

The taxpayer is a company where its principal business activity is a dealer and wholesaler of stationaries and other goods. The taxpayer owns six (6) shop houses which were rented to hoteliers. Despite recognising the rental income as a non-business income, which was subjected to tax under Section 4(d) of the ITA, the taxpayer had claimed Industrial Building Allowance (IBA) for the YAs 2015, 2016, and 2017 under Paragraph 60, Schedule 3 of the ITA, on the basis that the shop houses were being used as industrial building under Paragraph 37F, Schedule 3 of the ITA. The taxpayer also applied the tax treatment under Paragraph 75, Schedule 3 of the ITA by carrying forward the unabsorbed IBA in the relevant YAs. The DGIR disallowed the unabsorbed IBA to be carried forward and raised additional assessments for the YAs 2015, 2016, and 2017 respectively. Dissatisfied with the assessments, the taxpayer filed an appeal to the SCIT.

Taxpayer's argument:

It was the taxpayer's contention that although the rental income received was treated as a non-business income, which was subjected to tax under Section 4(d) of the ITA, the taxpayer was still entitled to carry forward the unabsorbed IBA for the YAs 2015, 2016, and 2017 as the Public Ruling No. 12/2018 (Income from Letting of Real Property) was silent on such treatment. The taxpayer argued that since the DGIR had allowed the IBA for the relevant YAs, hence the unabsorbed IBA should be allowed to be carried forward by virtue of Paragraph 75, Schedule 3 of the ITA.

DGIR's argument:

In contrast, the DGIR submitted that under Schedule 3 of the ITA, IBA is given to a taxpayer who is in the pursuit of business and has incurred qualifying capital expenditure on an industrial building. The DGIR had only allowed the current year IBA claimed by the taxpayer but disallowed the unabsorbed IBA to be carried forward by virtue of Paragraph 60, Schedule 3 of the ITA as the shop houses rented out by the taxpayer were being used as industrial buildings under Paragraph 37F, Schedule 3 of the ITA. Furthermore, in accordance with Paragraph 75, Schedule 3 of the ITA, the unabsorbed IBA can only be carried forward if the income is a business income that is subjected to tax under Section 4(a) of the ITA, in which the taxpayer had failed to fulfill as the rental income received was treated as a non-business income which was subjected to tax under Section 4(d) of the ITA. Having allowed only the current year IBA, the DGIR had acted accordingly by not allowing the taxpayer to carry forward the unabsorbed IBA for the YAs 2015, 2016, and 2017 in computing its statutory income.

Issue:

Whether the DGIR is correct in law in raising the additional assessments for the YAs 2015, 2016, and 2017 by disallowing the unabsorbed IBA to be carried forward.

Decision:

On 22 January 2024, the SCIT dismissed the taxpayer's appeal and held that the taxpayer had failed to prove its case as required under Paragraph 13, Schedule 5 of the ITA. The SCIT ruled that the DGIR was correct in law in raising the additional assessments for the YAs 2015, 2016, and 2017.

[Details of the above tax case at the SCIT level are not available as of date of publication.]

Back to top

6. ACSB v DGIR (SCIT)

HASiL has recently uploaded a case report, "ACSB v DGIR (SCIT)" on its website.

Facts:

The taxpayer is a general contractor involved in various construction projects in Malaysia. A tax audit was conducted by the DGIR following the taxpayer's failure to submit its income tax return (Form C) for the YAs 2016 and 2017. After various reminders sent to the taxpayer to submit documents for the purpose of tax audit, the DGIR finally received incomplete documents from the taxpayer. The DGIR made a third party's verification with regards to the taxpayer's income for the YAs 2015, 2016, and 2017. As the documents submitted by the taxpayer were incomplete, the DGIR used the Gross Profit Margin (GPM) method for the YA 2015 and Net Profit Margin (NPM) method for the YA 2016 to determine the taxpayer's income for both YAs. Dissatisfied with the assessments, the taxpayer filed an appeal to the SCIT.

Taxpayer's argument:

It was the taxpayer's contention that the DGIR's assessment was merely on the assumption that the taxpayer had completed the projects in the YA 2016. Additionally, the assessments were made by apportioning the value of the projects between the YAs 2015 and 2016. The taxpayer alleged that the DGIR ought to have raised the assessment by referring to the calculation provided in Paragraph 5.7 of the Public Ruling 2/2009, as the formula adopted by the taxpayer was on the percentage of completion based on the cost of the contract.

DGIR's argument:

The DGIR submitted that due to the taxpayer's failure to report the actual income for the YA 2015, coupled with the failure to submit all documents requested by the DGIR, the tax computation for the YA 2015 was based on the GPM at a rate of 19% while the tax computation for the YA 2016 was based on the NPM at a rate of 10%. This is in line with the GPM rate reported in the taxpayer's Financial Statement for the year ended 30 June 2014, at the rate of 19%. Furthermore, the DGIR was not made aware of the time extension and completion date of the project since no supporting documents were provided by the taxpayer before the assessments were raised. As such, the taxpayer's allegation that the formula in Public

Ruling 2/2009 ought to be used by the DGIR is irrelevant. The DGIR contended that the additional assessment for the YA 2015 and the assessment for the YA 2016 raised against the taxpayer under Sections 90(3) and 91(1) of the ITA were correct and in order.

Issue:

Whether the additional assessment for the YA 2015 (computed using the GPM method) and the assessment for the YA 2016 (computed using the NPM method) raised against the taxpayer under Sections 90(3) and 91(1) of the ITA respectively, were correct and in order.

Decision:

On 5 February 2024, the SCIT dismissed the taxpayer's appeal and held that the taxpayer had failed to prove its case as required under Paragraph 13, Schedule 5 of the ITA. The SCIT ruled that the DGIR was correct in law in raising the additional assessment and assessment for the YAs 2015 and 2016 respectively.

[Details of the above tax case at the SCIT level are not available as of date of publication.]

Back to top

7. HLAB v DGIR (SCIT)

HASiL has recently uploaded a case report, "HLAB v DGIR (SCIT)" on its website.

Facts:

The taxpayer is principally engaged in the business of underwriting life insurance. The taxpayer issued two subordinated debt instruments and paid interest payments gradually to the subscribers (Interest Expenses). The funds generated from the subordinated debt was deployed for investments in unit trusts, bonds, and investment property (the Investments). The taxpayer also derived rental income from its fixed asset properties (the Properties). To maintain the Properties, the taxpayer also incurred various expenses (Expenses Relating to the Properties Rented Out). The taxpayer made an application under Section 131 of the ITA (Relief Application) on 27 December 2020 for the YAs 2014 and 2015 in respect of its error and mistake in not claiming for deductions on the Interest Expenses and Expenses Relating to the Properties Rented Out, which were then rejected by the DGIR. The taxpayer also claimed deductions under Section 33(1) of the ITA on the said expenses for the YAs 2019 and 2020. The DGIR contended that Section 60 of the ITA is a specific provision which governs insurance business and the expenses claimed by the taxpayer are not listed under the said section.

Taxpayer's argument:

The taxpayer contended that the application of Section 60 of the ITA does not preclude the application of Sections 33(1)(a) and 33(1)(c) of the ITA but merely supplements it. The filed tax returns were based on the mistaken belief that the Interest Expenses and the Expenses Relating to the Properties Rented Out are deductible under Section 33(1) of the ITA. The taxpayer also contended that it had satisfied the statutory requirements of filing a Relief Application, and the DGIR's act of disallowing the simultaneous applicability of Section 33(1) together with Sections 60(3) and (3A) of the ITA cannot be considered a 'practice' without the issuance of a Public Ruling. Therefore, there is no existence of any 'prevailing practice' in this regard.

DGIR's argument:

In response, the DGIR asserted that at the time when the taxpayer filed its tax returns for the YAs 2014 and 2015, the DGIR's position in relation to the Interest Expenses and the Expenses Relating to the Properties Rented Out under Life Fund and Shareholders' Fund were in accordance with Section 60(3) of the ITA. It was the DGIR's practice to not allow deductions on the Interest Expenses in that matter. Therefore, the taxpayer's tax returns were based on the 'practice of Director General prevailing at the time the returns were made'. Furthermore, there was no 'error and mistake' within the meaning of Section 131 of the ITA committed by the taxpayer as the tax returns were prepared in accordance with the DGIR's prevailing practice and/or position at that point of time.

The DGIR further argued that Section 60 of the ITA, being the specific provision governing the insurance business, has specifically provided for the mechanism in ascertaining the adjusted income of the Life Fund and Shareholders' Fund.

Sections 60(3) and 60(3A) of the ITA must be read with Section 52 of the ITA in determining whether the deductions on expenses incurred by the taxpayer should be allowed under Section 33(1) of the ITA. The word 'inconsistency' under Section 52 of the ITA refers to any inconsistency between the application of Sections 60(3) and 60(3A), as well as Section 33(1) of the ITA in relation to the allowable deductions that can be claimed by the taxpayer. The DGIR also highlighted that the word 'void' in Section 52 of the ITA clearly refers to 'the inconsistency' of the application of the special provision [i.e., Sections 60(3) and 60(3A) of the ITA] and the application of general provision [i.e., Section 33(1) of the ITA] only. It is an exception to the general provision, *Generalia Specialibus Non Derogant*.

Additionally, the word "shall" as stated in Section 131(4) of the ITA, is mandatory for the DGIR to deny any relief under Section 131(1) of the ITA to be granted to the taxpayer as the alleged 'mistake' falls within the exception under Section 131(4) of the ITA. The taxpayer contended that there was no proof of the DGIR's 'prevailing practice' as there was no Public Ruling issued, which is clearly against the spirit of Sections 137A and 131 of the ITA. The position in relation to the insurance business has been consistently maintained by the DGIR as to date. This shows that the DGIR's 'prevailing practice' is to disallow any expenses that is not prescribed under Sections 60(3) and 60(3A) of the ITA.

Issue:

Whether the deductibility of the Interest Expenses and the Expenses Relating to the Properties Rented Out are hindered by Section 60 of the ITA.

Decision:

On 1 April 2024, the SCIT unanimously held that the taxpayer failed to discharge its burden of proof under Paragraph 13, Schedule 5 of the ITA and the DGIR was correct in disallowing the taxpayer's Relief Application under Section 131 of the ITA.

[Details of the above tax case at the SCIT level are not available as of date of publication.]

Back to top

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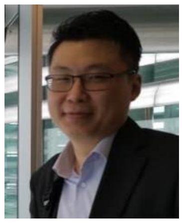

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