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Tax Cases and more

May 2023

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Greetings from Deloitte Malaysia Tax Services

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Deloitte Malaysia
Inland Revenue Board of Malaysia

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Important deadlines:

Task	Deadline
	31 May 2023
1. 2024 tax estimates for companies with June year-end	√
2. 6th month revision of tax estimates for companies with November year-end	√
3. 9th month revision of tax estimates for companies with August year-end	√
4. Statutory filing of 2022 tax returns for companies with October year-end	√
5. Maintenance of transfer pricing documentation for companies with October year-end	√
6. 2023 CbCR notification for applicable entities with May year-end	√

1. Synthesized Texts of Malaysia's DTAs with Australia, Ireland, Romania, and South Africa and their modifications made by MLI

The IRBM has uploaded on its website the Synthesized Texts of Malaysia's Double Taxation Agreements (DTAs) with Australia, Ireland, Romania, and South Africa, and their modifications made by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) to have effect as set out in the table below:

Synthesized Texts of Malaysia's DTAs with:	Modifications made by MLI (in the Synthesized Texts) to have effect with respect to:	
	Withholding tax (WHT)	All other taxes
Australia	Where the event giving rise to WHT occurs on or after 1 January 2022.	For taxes levied with respect to taxable periods beginning on or after 1 December 2021.
Ireland	Where the event giving rise to WHT occurs on or after 1 January 2022.	For taxes levied with respect to taxable periods beginning on or after 1 December 2021.
Romania	Where the event giving rise to WHT occurs on or after 1 January 2024.	For taxes levied by Malaysia with respect to taxable periods beginning on or after 5 October 2023. For taxes levied by Romania with respect to taxable periods beginning on or after 1 January 2024.
South Africa	Where the event giving rise to WHT occurs on or after 1 January 2023.	For taxes levied with respect to taxable periods beginning on or after 1 July 2023.

Note: The above effective dates apply unless it is stated otherwise elsewhere in the Synthesized Texts.

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2. CGSB v Director General of Inland Revenue (DGIR) (SCIT)

The Inland Revenue Board of Malaysia (IRBM) has recently uploaded a case report, "CGSB v DGIR (SCIT)" on its website.

Facts:

The taxpayer obtained loans to finance the acquisition of shares in its subsidiary companies in Malaysia and Indonesia. The taxpayer claimed a deduction of the paid interest on the loans under Section 33(1) of the Income Tax Act 1967 (ITA). The DGIR raised the Notices of Assessment (Forms J) dated 17 March 2017 for the years of assessment (YA) 2008 to 2010 and disallowed the interest expenses claimed under Section 33(1) of the ITA.

The taxpayer contended that the Forms J raised by the DGIR were time-barred. It was argued that there was no negligence on its part since the taxpayer took external and independent professional advice from an established and reputable tax agent. The tax returns were also filed on time and the taxpayer had given full cooperation to the DGIR during the audit exercise.

The taxpayer further contended that the interest claim must be allowed in full under Section 33(1) of the ITA as the DGIR did not have the power to apportion the taxpayer's claim of interest expenses. The dividend income should be treated as one source of income, regardless of whether it was from the taxpayer's local subsidiary company or a subsidiary company outside Malaysia. The DGIR had also acted mechanically and failed to exercise his discretion on the imposition of penalty as it was not justified in law and on the facts.

In response, the DGIR asserted the taxpayer had clearly acted negligently by claiming interest expenses under Section 33(1) of the ITA where it was clear that the dividend income received by the taxpayer was exempted from tax.

The DGIR also argued that in order for any expense to be allowed for a deduction, the taxpayer must fulfil the requirements under Section 33(1) of the ITA. The interest expenses could not be allowed for a tax deduction because the foreign-sourced dividend income which had been received from outside Malaysia was clearly exempted from tax under

Paragraph 28, Schedule 6 of the ITA. Meanwhile, the other dividend income was exempted from tax under Paragraphs 5(3) and 5(6), Schedule 7A of the ITA.

Issue:

Whether the taxpayer was negligent by claiming a tax deduction on the interest expenses under Section 33(1) of the ITA.

Decision:

The Special Commissioners of Income Tax (SCIT) dismissed the taxpayer's appeal and held that the taxpayer had failed to prove its case under Paragraph 13, Schedule 5 of the ITA. The Forms J were rightfully raised by the DGIR and ought to be maintained.

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

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3. DGIR v SAP Malaysia Sdn Bhd (HC)

The IRBM has recently uploaded a case report, "DGIR v SAP Malaysia Sdn Bhd (HC)" on its website.

Facts:

SAP Malaysia Sdn Bhd (the taxpayer) filed its income tax returns for the YAs 2010 and 2011 (i.e. the initial tax returns) based on draft financial statements. Subsequently, the taxpayer filed revised tax returns based on the audited financial statements. The DGIR raised the Notices of Assessment (i.e. Forms J) against the taxpayer for the YAs 2010 and 2011 and with the imposition of penalties under Section 112(3) of the ITA.

The DGIR contended that the purported initial tax returns submitted by the taxpayer were not deemed as assessments under Section 90(1) of the ITA as the taxpayer failed to furnish its tax returns in accordance with Section 77A(1) of the ITA. Thus, the DGIR issued Forms J for the YAs 2010 and 2011, respectively, in accordance with Section 90(3) of the ITA. The DGIR further claimed that the SCIT had committed an error of law in concluding that the said Forms J were time-barred pursuant to Section 91(1) of the ITA.

The DGIR also contended that the tax return must be filed using the prescribed form (i.e. Form C), pursuant to Section 152 of the ITA. Therefore, the taxpayer is statutorily obliged to provide information as required under Form C, where the tax computation must be prepared based on audited accounts. The insertion of Section 77A(4) of the ITA in YA 2014 vide the Finance Act 2014 further confirmed the DGIR's position that a company is required to furnish a tax return based on audited accounts.

In response, the taxpayer contended that Section 90(3) of the ITA must be read together with Section 91(1) of the ITA, which is the specific provision governing the DGIR's powers to raise assessments and to restrict a time limit for the DGIR to act. Due to DGIR's contention that no assessment was raised since the initial tax returns were void, Section 91(1) of the ITA applies, and the DGIR must raise an assessment within five years. After five years, an assessment can still be raised, but only to make good on any loss of tax pursuant to Section 91(3) of the ITA. In the present case, there was no loss of tax as there was an overpayment and overreporting of income by the taxpayer.

The taxpayer further argued that Section 77A(1) of the ITA does not mandate the filing of an accurate return, and Section 112 of the ITA certainly does not criminalise or penalise the filing of an inaccurate return. It was only with effect from YA 2014 that Section 77A(4) of the ITA was inserted, which expressly required the mandatory use of audited accounts. The penalty imposed by the DGIR under Section 112(3) of the ITA is not unfettered and must not be exercised at whims and fancies.

Issue:

Whether DGIR was right in law to raise Forms J against the taxpayer for the YAs 2010 and 2011 pursuant to Section 91(1) of the ITA.

Decision:

The High Court (HC) dismissed DGIR's appeal and upheld the decision of the SCIT.

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

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4. SUSB v DGIR (SCIT)

The IRBM has recently uploaded a case report, "SUSB v DGIR (SCIT)" on its website.

Facts:

The principal activity of SUSB (the taxpayer) is property development. The taxpayer was exempted from constructing 20% low-cost houses, 20% medium low-cost houses, and 10% medium-cost houses and was required to pay a contribution payment to Lembaga Perumahan Hartanah Selangor (LPHS).

The DGIR raised a Notice of Additional Assessment under Section 91(3) of the ITA for the YA 2011, in which the DGIR disallowed the taxpayer's claim under Section 33(1) of the ITA on expenditure incurred in relation to the contribution payment of low-cost houses made to LPHS.

The taxpayer contended that the payment made to LPHS was an allowable expense under Section 33(1) of the ITA as the sole purpose of obtaining the low-cost exemption was to eliminate a burdensome requirement imposed on the land to generate its business income. The taxpayer was obligated to comply with "*Pekeliling Pengarah Tanah Dan Galian Selangor Bilangan 3/2007*" as well as "*Pekeliling Lembaga Perumahan dan Hartanah Selangor Bilangan 1/2011*", and without making the contribution payment to LPHS, the taxpayer had to develop low-cost houses. Due to that, the taxpayer argued that the payment was wholly and exclusively incurred for its business. The contribution payment was a revenue expenditure and not a penalty in nature. The DGIR had also failed to discharge his burden of proof under Section 91(3) of the ITA to raise the time-barred assessment.

In response, the DGIR asserted that the taxpayer was exempted from building the low-cost and medium-cost houses and was aware of its duty to pay the contribution amount to LPHS before the construction commenced. As a result, the DGIR claimed that the contribution payment made to LPHS fell under Section 39(1)(b) of the ITA and was therefore not an allowable expense under Section 33(1) of the ITA.

The DGIR further argued that the taxpayer did not have the intention to develop any low-cost and medium-cost houses to generate its gross income. Any outgoings and expenses that are allowed as deductions must be incurred wholly and exclusively in the production of gross income. The contribution payment to LPHS was solely made to produce a higher income for the taxpayer by developing high-cost houses. Besides, the requirement to pay the contribution had already existed before the construction has begun.

Not only that, the DGIR argued that the taxpayer should only claim the expenses incurred based on the year the projects were completed by virtue of the Income Tax (Property Development) Regulations 2007 (P.U.(A) 277/2007). The projects were deemed to have been completed on the date the Certificate of Completion and Compliance (CCC) was issued, which was in YA 2011, but the taxpayer only claimed the construction costs for deduction in YA 2012. Therefore, the documentary evidence of the CCC ought to have been read with P.U.(A) 277, which showed that the taxpayer had negligently submitted its tax return to the DGIR.

Issue:

Whether DGIR had a basis to raise the time-barred assessment under Section 91(3) of the ITA on the taxpayer for YA 2011.

Decision:

The SCIT dismissed the taxpayer's appeal and held that the DGIR had a basis to raise the time-barred assessment under Section 91(3) of the ITA. The SCIT also held that the taxpayer failed to discharge its burden of proof under Paragraph 13, Schedule 5 of the ITA and that the DGIR was correct to impose a penalty.

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

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5. WWSB v Ketua Pengarah Hasil Dalam Negeri (KPHDN) (SCIT)

The IRBM has recently uploaded a case report, "WWSB v KPHDN (SCIT)" (available in Bahasa Malaysia only) on its website.

Facts:

WWSB (the taxpayer) is a company that carries out business as a Class B civil engineering contractor. In the year 2010, the taxpayer was appointed by the main contractor, ICSB, as the rescue contractor for the "Dataran Usahawan Alor Setar" ("DUAS") project owned by Perbadanan Kemajuan Negeri Kedah ("PKNK"). All the contract work was carried out by the taxpayer on behalf of ICSB. The taxpayer received payments from ICSB for the contract work performed in stages via Interim Payment Certificates, starting from the 16th to the 28th payment.

The DGIR conducted an audit on the taxpayer and found a shortfall in reported contract income relating to the DUAS project, which amounts to RM1,747,521 for the YA 2010. Based on the audit findings, the DGIR raised an assessment on the taxpayer through Form J dated 19 June 2017.

The taxpayer contended that the contract income required to be reported was only RM3,244,899.40, which was the amount received by the taxpayer from ICSB. Meanwhile, the DGIR asserted that the amount of contract income that should be recognised and reported by the taxpayer was RM4,992,420.66, which comprises the total contract amount for the DUAS project as stated in the Interim Payment Certificates, starting from the 16th to the 23rd payment. This is in line with the provision of Section 24(1)(b) of the ITA. The taxpayer also failed to prove there were variation orders or changes in the contract value received from PKNK as the project owner.

Issue:

Whether the assessment raised through Form J by the DGIR on the taxpayer for the YA 2010 was wrong and excessive.

Decision:

Due to the absence of relevant documents and relevant witnesses by the taxpayer, the SCIT dismissed the taxpayer's appeal and held that the taxpayer failed to prove that the assessment raised by the DGIR for the YA 2010 was incorrect and excessive pursuant to Paragraph 13, Schedule 5 of the ITA. With that, the SCIT concluded that the DGIR had legal and factual basis to impose penalties against the taxpayer under Section 113(2) of the ITA.

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

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6. SALK v DGIR (SCIT)

The IRBM has recently uploaded a case report, "SALK v DGIR (SCIT)" on its website.

Facts:

SALK (the taxpayer), who initially worked at the Malayan Banking Berhad (MBB) Klang branch, was later assigned, and seconded to Maybank Limited Papua New Guinea (MPNG) until 30 April 2016, after being appointed as MPNG's Head of Operations on 19 January 2009. MPNG was wholly owned by MBB. The taxpayer then opted for an early retirement due to medical reasons, effective from 3 June 2016. MBB submitted a Notification of Cessation of Employment dated 18 May 2016 to the DGIR. The DGIR raised Notices of Assessment against the taxpayer for the YAs 2009 to 2015 on the basis that the taxpayer's income from MPNG during that period was deemed to be derived from Malaysia under Section 13(2)(c) of the ITA. Dissatisfied with the assessments raised by the DGIR, the taxpayer filed Form Q with the SCIT on 10 January 2017.

The taxpayer relied heavily on Public Ruling (PR) No. 1/2011 (Taxation of Malaysian Employees Seconded Overseas) and submitted that the 2nd until the 6th factors or circumstances stated in PR No. 1/2011 were not met in order to establish that the duties performed by the taxpayer during his secondment to MPNG were incidental to the duties performed in

Malaysia, and thus his income during that period was deemed derived from Malaysia. The duties performed by the taxpayer in MPNG had no connection with, nor were they a part of, his previous regular duties in Malaysia. During his MPNG assignment, he was responsible for furthering the goals of MPNG, and not MBB. The taxpayer did not resume his work with MBB upon completing his secondment. Besides, MBB had no supervision, direction, or control over the taxpayer's duties during the secondment period. All salaries paid by MBB to the taxpayer were reimbursed by MPNG to MBB.

In response, the DGIR asserted that an employment relationship existed between the taxpayer and MBB, as MBB was the one who appointed the taxpayer as the Head of Operations of MPNG. His appointment was to strengthen and enhance the effectiveness of his job performance in his Malaysian-based regional employment. After the secondment period was over, the taxpayer was transferred back to MBB. However, owing to his medical condition, the taxpayer chose not to return to work and requested an early retirement from MBB. Besides, MBB had the final say in the taxpayer's employment, including the power to dismiss him, and MBB was paying the taxpayer's salary and making the Employees Provident Fund (EPF) contribution during his secondment period. The reimbursement of salary as alleged was charged from MBB's nostro account, which MBB has with MPNG's bank in foreign currency.

Issue:

Whether the Notices of Assessment raised by the DGIR on the taxpayer for the YAs 2009 to 2015 were excessive and erroneous.

Decision:

The SCIT allowed the taxpayer's appeal and held that the Notices of Assessment raised on the taxpayer were excessive and erroneous. The taxpayer had successfully proven his appeal pursuant to Paragraph 13, Schedule 5 of the ITA.

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

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7. KPHDN v Pulau Pinang Clinic Sdn Bhd (HC) [(2022) MSTC 30-516]

This was an appeal by the DGIR against the decision of the SCIT. The SCIT had allowed the taxpayer's claim for investment tax allowance and industrial building allowance in respect of capital expenditure incurred on a multi-storey car park of its hospital.

Issue:

Whether the SCIT was correct in deciding that the capital expenditure incurred by the taxpayer to construct an integrated multi-storey car park as part of its hospital was eligible for:

- Investment tax allowance under the Income Tax (Exemption) (No. 12) Order 2006 (Exemption Order 2006) and Income Tax (Exemption) Order 2012 (Exemption Order 2012); and
- Industrial building allowance under Paragraph 37A, Schedule 3 of the ITA.

Decision:

The HC dismissed the DGIR's appeal based on the following grounds of judgement:

<u>Investment tax allowance under the Exemption Orders 2006 and 2012</u>

- Under Paragraphs 34 and 39, Schedule 5 of the ITA, the power of the HC to hear an appeal against the decision of the SCIT was limited to the question of law. The SCIT was correct in deciding that the taxpayer had fulfilled all the conditions under the Exemption Order 2012 and had properly considered the evidence tendered by the taxpayer. Hence, the capital expenditure incurred by the taxpayer for the construction of the new hospital building qualified for the exemption provided under Exemption Order 2012.

- Paragraph 2 of the Exemption Order 2012 in defining "qualifying capital expenditure" had specifically disqualified capital expenditure incurred for living accommodation but not car parks. Had parliament intended to exclude car

parks from the investment tax allowance claim provided under the Exemption Order 2012, it would have been spelt out in Paragraph 65(3), Schedule 3 of the ITA.

- The DGIR had no basis in fact or in law under the Exemption Order 2012 or the ITA to disallow the taxpayer's investment tax allowance claim on the multi-storey car park. Accordingly, the SCIT had correctly allowed the taxpayer's claim under the Exemption Order 2012.

- Contrary to the DGIR's contention that the SCIT had failed to consider the applicability of the Exemption Order 2006, the SCIT was fully cognisant of Exemption Order 2006 by correctly observing that the Malaysian Investment Development Authority (MIDA) had granted the investment tax allowance to the taxpayer under Exemption Order 2006 and the exemption would adopt Exemption Order 2012. Hence, the proper exemption order to be viewed was Exemption Order 2012. The taxpayer had fulfilled both the requirements of Exemption Orders 2006 and 2012.

Industrial building allowance under Paragraph 37A, Schedule 3 of the ITA

- The SCIT had correctly allowed the taxpayer's claim for industrial building allowance on the expenses incurred in constructing an integrated multi-storey car park. The evidence tendered by the taxpayer that the multi-storey car park was necessary for the expansion of its hospital building, and that it was essential, integral, and formed part and parcel of the hospital building was not disputed or challenged by the DGIR. Therefore, it could be concluded that the DGIR had accepted the taxpayer's evidence.

- The DGIR had admitted that the multi-storey car park was an industrial building and had agreed that the car park was part of the hospital building. The DGIR had also agreed that nothing in the Exemption Orders 2006 and 2012 stated that car parks were not qualified for the investment tax allowance claim, and that Schedule 3 of the ITA did not contain any condition which imposed a restriction on car parks.

- The DGIR had no legal or factual basis in disallowing the industrial building allowance on the multi-storey car park when it was clearly an industrial building under the ITA. As such, the DGIR had no basis to contend that the SCIT erred in allowing the taxpayer's claim under Paragraph 37A, Schedule 3 of the ITA. The DGIR's reliance on Paragraph 66, Schedule 3 of the ITA to disallow the taxpayer's investment tax allowance and industrial building allowance claim was erroneous.

- The mere fact that the taxpayer outsourced the management of parking bays did not negate the fact that the taxpayer incurred capital expenditure on a qualifying project and was entitled to claim investment tax allowance and industrial building allowance on its multi-storey car park. The DGIR had no authority to dictate how a taxpayer should conduct its business.

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8. NPC Resources v KPHDN (HC) [(2022) MSTC 30-515]

This was an appeal by the taxpayer by way of a case stated against the deciding order of the SCIT according to Paragraph 34, Schedule 5 of the ITA.

Issues:

1. Whether the SCIT was correct in deciding that the real property gains tax (RPGT) assessment was based on the actual consideration sum of disposal of the shares amounting to RM35,500,000.00.

2. Whether the taxpayer's disposal of the shares fell under Paragraph 34A, Schedule 2 of the Real Property Gains Tax Act 1976 (RPGTA).

3. Whether the sum of RM14,611,777.29, being the existing bank liabilities, could not be deducted in determining the disposal price of the shares to Budaya Potensi Sdn Bhd (the acquirer).

Decision:

The HC dismissed the taxpayer's appeal based on the following grounds:

- The shares in Sungai Ruku Oil Plantation Sdn Bhd (Sungai Ruku), being a real property company (RPC), that were disposed of by the taxpayer to the acquirer were subject to Paragraph 34A, Schedule 2 of the RPGTA. Therefore, the RPGT assessment raised by the DGIR on the taxpayer was correct. The computation of the disposal price of RPC shares was specifically provided for in Paragraph 34A(4), Schedule 2 of the RPGTA whereby deduction of expenses from the consideration price as provided under Paragraph 5, Schedule 2 of the RPGTA is not applicable in determining the disposal price of RPC shares.

- The existing bank liabilities of the shares in Sungai Ruku formed part of the consideration in the 2016 share sales agreement between the taxpayer and the acquirer as evidenced by the termination clause in the agreement, which provided that failure to settle the existing bank liabilities will render the agreement to be terminated by the taxpayer for breach of terms of the agreement. The taxpayer had also admitted that merely paying RM20,888,222.71 to the taxpayer (less the existing bank liabilities) would not make it possible for the share sales agreement to be concluded. Therefore, the RPGT must be assessed on the "total consideration sum", which was RM35,500,000.00 as reflected in the share sales agreement and not RM20,888,222.71.

- The 2016 share sales agreement, the acquirer's acknowledgement of the payment made in acquiring the shares, and the Form of Transfer of Securities relating to the transfer of shares, clearly stated that the total consideration sum and the disposal price was in the amount of RM35,500,000.00. The SCIT's decision, which held that existing bank liabilities in Sungai Ruku could not be deducted in determining the disposal price, and the RPGT raised by the DGIR based on the total consideration sum of RM35,500,000.00, was correct in law.

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9. Government of Malaysia v Innoapps Sdn Bhd (HC) [(2022) MSTC 30-492]

This was a case in which the DGIR applied to the HC to enter a summary judgement order against the taxpayer to seek payment for the sums allegedly owed by the taxpayer, which were taxes due for the YAs 2019 and 2020 by virtue of Sections 103 and 106 of the ITA.

The taxpayer failed to file the required tax returns to the DGIR for the YAs 2019 and 2020, resulting in the DGIR assessing both YAs in accordance with the powers granted under Section 91 of the ITA.

Issues:

1. Whether a summary judgment order should be entered against the taxpayer in accordance with Sections 103 and 106 of the ITA; and

2. Whether special circumstances existed for the taxpayer to be granted a stay of execution of the summary judgement order pending the appeal before the SCIT.

Decision:

The HC allowed the DGIR's application to enter a summary judgement order against the taxpayer, subject to it being stayed based on the following grounds of judgement:

- Based on the decisions of the respective courts in the cases of *Ta Wu Realty Sdn Bhd v KPHDN & Anor (2008) MSTC 4,362* and *Government of Malaysia v Mohd Najib Abd Razak (2020) MSTC 30-401*, the HC held that a summary judgement order should be entered against the taxpayer in accordance with Sections 103 and 106 of the ITA.

- The HC held that the issue of the certificate's validity, as well as the claim that the YA 2019 was allegedly time-barred, did not justify rejecting the application for a summary judgement. The required certificate was duly issued by the officer authorised in accordance with the requirements of Sections 136(5) and 142(1) of the ITA. Besides, the taxpayer's failure to file the required returns for the YAs 2019 and 2020 justified the exercise of powers by the DGIR under Section 91(1) of the ITA. As a result, the issue of the alleged time bar was a non-starter.

- However, the HC found that the exercise of powers by the DGIR may be excessive and not reasonable, as it is trite law that the DGIR is under a duty to explain and give reasons for any decision that he undertakes that may result in additional taxes on taxpayers [as per *Uniqlo (Malaysia) Sdn Bhd v Ketua Pengarah K*astam dan Eksais (2020) MSTC 30-410*].

- According to Order 14(3) of the Rules of Court 2012 and Section 106 of the ITA, the HC was not prohibited from granting a stay of execution of the summary judgement order pending the outcome of an appeal before the SCIT in an appropriate case or where special circumstances existed that warranted such an order.

- The HC held that special circumstances existed where the taxpayer should be granted a stay of execution of the order for summary judgement pending the appeal before the SCIT. This was because the DGIR did not provide an explanation for the substantial increase in the taxpayer's chargeable income for the YAs 2019 and 2020 for the HC to be satisfied that an unconditional summary judgement should be entered against the taxpayer [as per *Kerajaan Malaysia v Dato Ghani Gilong (1995) 2 MSTC 3487*].

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