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NATIONAL TAX EVENT OF THE YEAR NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

DAY 2: Wednesday, 13 August 2014

Topic :TAX CASES UPDATE

HAZLINA HUSSAIN

DIRECTOR

LEGAL ADVISORY DIVISION

INLAND REVENUE BOARD OF MALAYSIA

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE



INCOME

DEDUCTION

s.140 OF THE ITA - POWER TO DISREGARD TRANSACTION

PENALTY S 113(2) OF THE ITA

APPEAL PROCEDURE – HIGH COURT (JUDICIAL REVIEW) OR SCIT (FORM Q)

S.108 OF THE ITA – (EXEMPTION) (NO. 22) ORDER 2007

ALLOWANCE - SCH 7A OF THE ITA

Topic: TAX CASES UPDATE



NATIONAL TAX EVENT OF THE YEAR NATIONAL TAX CONFERENCE

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Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

LEMBAGA HASIL DALAM NEGERI MALAYSIA v ALAM MARITIM SDN BHD [2014] 2 MLJ 1

ISSUE:

Topic: TAX CASES UPDATE

Whether payment to non resident is subject to withholding tax under s.4A of the ITA

LHDN 5

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

LEMBAGA HASIL DALAM NEGERI MALAYSIA v ALAM MARITIM SDN BHD [2014] 2 MLJ 1

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- Company resident in Malaysia
- Carrying out activities of owning vessels, hiring and managing vessels with third party charterer

LHDN 6

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

LEMBAGA HASIL DALAM NEGERI MALAYSIA v ALAM MARITIM SDN BHD [2014] 2 MLJ 1

FACTS OF THE CASE

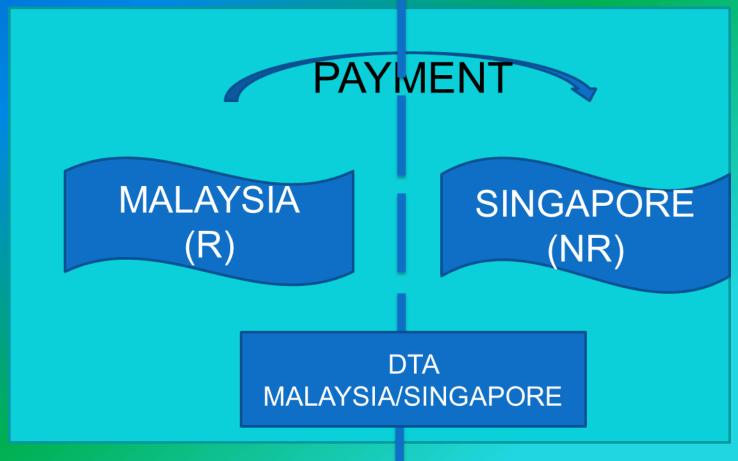
Topic: TAX CASES UPDATE

- taxpayer entered a Uniform Time Charter Party for Offshore Service Vessels with non-resident companies
- taxpayer made full payment without deduction of withholding tax

LHDN 7

NATIONAL TAX CONFERENCE 2014

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Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

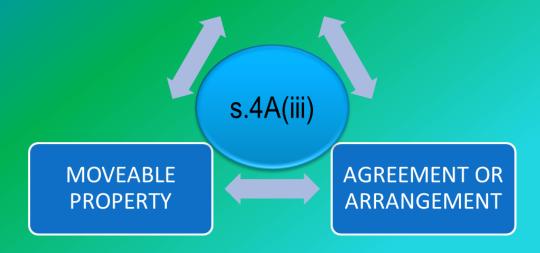


NATIONAL TAX CONFERENCE 2014

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SPECIAL CLASSSES OF INCOME ON WHICH TAX IS CHARGEABLE

RENT OR OTHER PAYMENTS



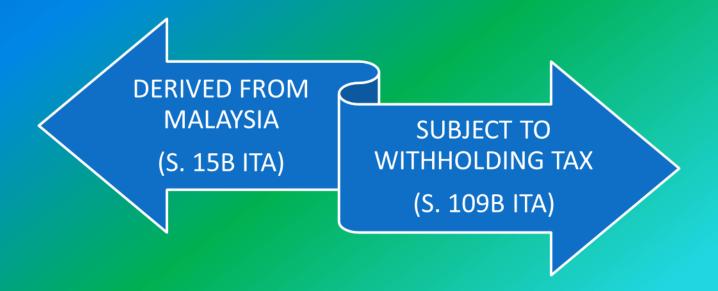
Speaker : HAZLINA HUSSAIN

Topic: TAX CASES UPDATE



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LHDN10 MALAYSIA

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

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- Introduced in 1983 by Finance Act 293/1983
- DGIR v. Euromedical [1983] 2 MLJ 57
- Budget announcement by the Finance Minister:

"In order to resolve problems of taxing non-resident and at the same time to protect government's revenue, with effect from October 21, 1983 the Government decided to amend the Income Tax Act 1967 (Act 53) and introduced a peculiar provision, namely, section 4A."

LHDN 11 MALAYSIA

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

NATIONAL TAX CONFERENCE 2014

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LEMBAGA HASIL DALAM NEGERI MALAYSIA v ALAM MARITIM SDN BHD [2014] 2 MLJ 1

Federal Court in LHDNM v. Alam Maritim Sdn Bhd decided as follows:

"In the course of construing the relevant provisions of the Act and DTA neither did we find anything unjust or absurd in the purpose of the Parliament."

LHDN 12

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

NATIONALTAX CONFERENCE 2014

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LEMBAGA HASIL DALAM NEGERI MALAYSIA v ALAM MARITIM SDN BHD [2014] 2 MLJ 1

"We find that the respondent in this appeal had made payments to non-resident companies in respect of vessels and crews hired under "Uniform Time Charter Party for Offshore Service Vessels" contracts, with the income received by the non-resident companies from Singapore in the circumstances of the case, and with Article IV being inapplicable to income received under section 4A(iii), the payments received by the non-residents were therefore taxable."

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

LEMBAGA HASIL DALAM NEGERI MALAYSIA v ALAM MARITIM SDN BHD [2014] 2 MLJ 1

COMMENTS:

- A landmark decision by the Federal Court on s. 4A of the ITA.
- The domestic law determines the nature of income.
- The DTA is resorted to in order to determine whether such income is eligible for relief under the DTA.
- S. 4A of the ITA is a peculiar provision.
- It is not business income in nature.
- The test on permanent establishment is inapplicable.

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

NATIONAL TAX CONFERENCE 2014

KETUA PENGARAH HASIL DALAM NEGERI V TERAJU SINAR SDN BHD [21 APRIL 2014]

- Withholding taxes not deducted and paid over to DGIR;
- S.4A and s.15A of the ITA; and
- Double Taxation Agreement.

Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

KETUA PENGARAH HASIL DALAM NEGERI v TERAJU SINAR SDN BHD [21 APRIL 2014]

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- "handling and repacking charges"
- Failure to deduct and remit the withholding tax on payment made to a Singapore Company/non resident company

LHDN 16

NATIONALTAX CONFERENCE 2014

KETUA PENGARAH HASIL DALAM NEGERI V TERAJU SINAR SDN BHD [21 APRIL 2014]

- Failure to comply with s.4A(ii) and s.109B of the ITA
- Income derived from Malaysia under s.15A

Topic: TAX CASES UPDATE

Deduction was not allowed under s.39(1)(i) of the ITA

LHDN 17

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

KETUA PENGARAH HASIL DALAM NEGERI v TERAJU SINAR SDN BHD [21 APRIL 2014]

The SCIT decided in favour of the DGIR

Topic: TAX CASES UPDATE

- The High Court reversed the decision of the SCIT
- The Court of Appeal set aside the decision of the High Court and followed the ratio in LHDNM v. Alam Maritim Sdn Bhd and decided as follows:

LHDN 18

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KETUA PENGARAH HASIL DALAM NEGERI v TERAJU SINAR SDN BHD [21 APRIL 2014]

"[40] It is trite the relationship between ITA and the DTA is that the charging law is the ITA and not the DTA which only determines availability of relief from tax: See *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim (M) Sdn. Bhd.* [2014] 2 MLJ 1. In our view, s. 132 of the ITA provides the special status described in *United Overseas Bank Ltd v Ketua Pengarah Hasil Dalam Negeri* [1997] 3 MLJ 359 as inherent to a DTA that enables the DTA to determine the availability of relief from tax imposed under the ITA."

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN



NATIONAL TAX CONFERENCE 2014

KETUA PENGARAH HASIL DALAM NEGERI V TERAJU SINAR SDN BHD [21 APRIL 2014]

COMMENTS:

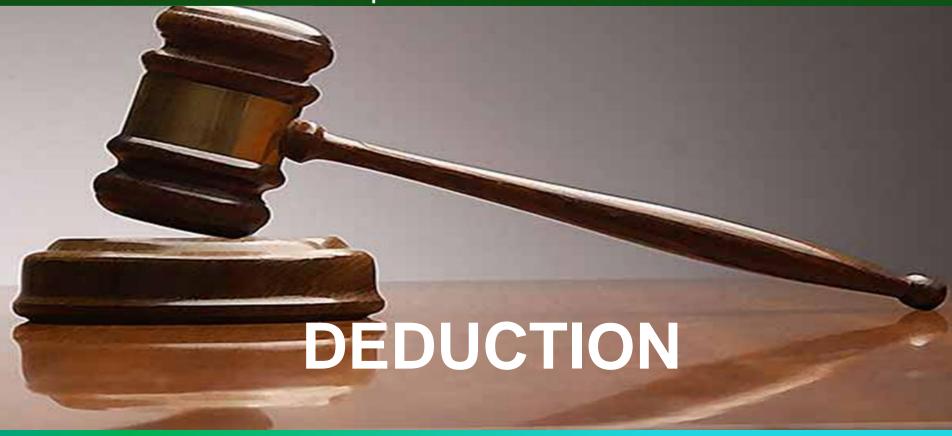
Topic: TAX CASES UPDATE

- The COA followed the ratio of the Federal Court decision in Alam Maritim Sdn. Bhd vs. LHDNM.
- Must determine the income based on the domestic law provision vis a vis the ITA.
- The COA decided that s. 4A of the ITA is a good law.

LHDN 20

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Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

ISSUE:

Topic: TAX CASES UPDATE

Whether the loss suffered by the company from the embezzlement by the company's Finance Manager totaling RM5,499,840 for the Years of Assessment 1998 to 2000 (PYB) is allowable under s.33(1) of the ITA.

LHDN 22

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- The company carries on the business of travel agents and tour operators for both inbound and outbound.
- Mr. X joined the company in 1988 as an account/office administrator
- Subsequently promoted as Finance Manager



NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

- Mr. X scope of duties and responsibilities amongst others, includes-
- Banking in cash and cheque collections of the day received
- Acting as one of the cheque signatories

Topic: TAX CASES UPDATE



NATIONALTAX CONFERENCE 2014

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HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

- On or about 13.2.1999, Mr. X made an admission of misusing the Company's Funds in the sum of approximately RM5.5 million.
- The Company lodged a police report and the report alleged that Mr. X had admitted embezzling funds to an amount of RM5.5 million.

LHDN 25

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

NATIONAL TAX CONFERENCE 2014

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HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

- The Company through its tax agent made claims for tax deductions for those loss in the Year of assessment 1998, 1999 and 2000 (PYB).
- The DGIR disallowed the claims.

Topic: TAX CASES UPDATE

The Company disagreed with the DGIR and filed Form Q.

LHDN 26

NATIONAL TAX CONFERENCE 2014

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HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

- The Company contends that the loss from the embezzlement by Mr. X, the Finance Manager is deductible as an expense under s.33(1) of the ITA and Mr. X is a mere employee and did not hold any share in the company.
- The Revenue on the other hand contends that the loss is not deductible as an expense. Whether or not Mr. X hold any shares in the company is irrelevant.

LHDN 27

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

NATIONAL TAX CONFERENCE 2014

HOLIDAY TOURS & TRAVEL SDN.BHD V
DIRECTOR GENERAL OF INLAND REVENUE

- SCIT decided in favour of the Revenue.
- General provision on deduction is provided for under s.33(1) of the ITA.
- It does not explicitly cover embezzlement of company's fund
- "Wholly and exclusively incurred in the production of gross income" is a question of fact.

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

NATIONAL TAX CONFERENCE 2014

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HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

- The loss was partly contributed by and due to the carelessness and negligence of the Company.
- It was a practice of the Company to pre-sign blank cheques even though there are other cheque signatories beside the managing director.
- The embezzlement would have been prevented or detected if the Company had conducted audit annually.

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

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HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

- SCIT referred to Curtis (H.M.Inspector of Taxes) v J&G Oldfield Limited 9 TC 319.
- Taxpayer filed an appeal to the High Court.

Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

HOLIDAY TOURS & TRAVEL SDN.BHD V
DIRECTOR GENERAL OF INLAND REVENUE

- The High Court confirmed the SCIT's decision.
- Subsequently, the taxpayer filed an appeal to the COA.
- COA confirmed the decision of the SCIT.

Topic: TAX CASES UPDATE

LHDN 31

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HOLIDAY TOURS & TRAVEL SDN.BHD V DIRECTOR GENERAL OF INLAND REVENUE

COMMENTS:

Topic: TAX CASES UPDATE

- Question of fact.
- The onus of proof is on the taxpayer.
- Must satisfy the requirements of s. 33 of the ITA.
- Public Ruling 4/2012
- "Wholly" is defined in Strong & Co of Romsey Ltd 5 TC 215 to exclude expenses which is remotely connected.



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NATIONAL TAX CONFERENCE 2014

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PORT DICKSON POWER BHD v. DGIR W-01-213-05/2012

ISSUES:

Topic: TAX CASES UPDATE

Whether it was proper for the DGIR to invoke s. 140 of the ITA based on the following grounds:

- (a) failure by the DGIR to specify which of the limbs under s. 140(1) of the ITA the DGIR had resorted to;
- (b) failure to comply with s. 140(5) of the ITA.

LHDN 34

NATIONAL TAX CONFERENCE 2014

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PORT DICKSON POWER BHD v. DGIR W-01-213-05/2012

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

Taxpayer is an independent power producer licensed by the Government to exclusively supply electricity to Tenaga Berhad (TNB).



NATIONAL TAX CONFERENCE 2014

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PORT DICKSON POWER BHD v. DGIR W-01-213-05/2012

- Through a shareholder's agreement dated 13.12.1993, shareholders of the taxpayer intended that the taxpayer finance, design, construct, commission, own and operate a power plant and other relevant facilities in Port Dickson.
- The project needed a sum in excess of RM600 million.

Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

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PORT DICKSON POWER BHD v. DGIR W-01-213-05/2012

- This was raised apart from equity, through shareholders' borrowings and third party borrowings-
 - Loan Stock : Share holders' borrowings RM149.7 million
 - Third party borrowings: The balance of funds needed
- A field tax audit was conducted on the taxpayer.

Topic: TAX CASES UPDATE

LHDN 37

NATIONALTAX CONFERENCE 2014

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PORT DICKSON POWER BHD v. DGIR W-01-213-05/2012

- It was found that the taxpayer claimed as deduction the interest on loan stock.
- DGIR invoked s.140(1) of the ITA to disregard the loan stock transaction.
- Application by Judicial Review filed by the taxpayer was allowed. Costs of RM8,000 with interest was granted by the HC.
- The impugned decision of DGIR was quashed.

Topic: TAX CASES UPDATE

LHDN 38

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

PORT DICKSON POWER BHD v. DGIR W-01-213-05/2012

- DGIR being dissatisfied by the HC decision filed an appeal to the Court of Appeal.
- The Court of Appeal had set aside the High Court decision.

LHDN 39

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

PORT DICKSON POWER BHD v. DGIR W-01-213-05/2012

COMMENTS:

Topic: TAX CASES UPDATE

- A landmark decision by the COA on the application of s. 140 of the ITA.
- The High Court decision was set aside.
- No grounds of judgment by the COA.
- The DGIR has an absolute power to invoke s. 140(1) of the ITA.

LHDN 40

NATIONAL TAX CONFERENCE 2014

IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

ISSUES:

Topic: TAX CASES UPDATE

- Whether s.140(1)(a) of the ITA is applicable to the taxpayer's case;
- Whether the penalty under s.113(2) of the ITA was automatically imposed on the taxpayer by the DGIR.

LHDN 41

NATIONALTAX CONFERENCE

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- The taxpayer is a property development company.
- The taxpayer buys, develops and sells lands.
- Any profits arising from such activities are taxed as business income under the ITA.

LHDN 42

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- Sometime in 1992, the taxpayer identified the properties held under lots 8874 to 8918 as being suitable for long term investment.
- The taxpayer intended to build shop houses and complex on the lands.

LHDN 43

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- The taxpayer sought the advice from a reputable tax firm and was advised to set up a subsidiary and thereafter sell the lands to its subsidiary.
- The taxpayer set up a realty company, Ibraco-Peremba Holdings Sdn. Bhd (IPH).

LHDN 44

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- IPH is an investment holding company and wholly owned subsidiary of the taxpayer.
- In 1994, IPH entered into the Turnkey Construction Contract with the taxpayer to develop the lands.
- After completion of the project, it was rented out and rental income was declared as IPH business income.

Topic: TAX CASES UPDATE

LHDN 45

NATIONAL TAX CONFERENCE 2014

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- The DGIR invoked s.140(1) of the ITA to disregard the transactions of IPH.
- Consequently, assessed the taxpayer on the total value of the disposal of properties net of the development cost.



Topic: TAX CASES UPDATE

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- In 2003, the taxpayer sold its shares in IPH to Vendu Sdn Bhd, a related company of the taxpayer.
- In 2004, IPH sold all its properties and made a gain of RM16,900,000.00



Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

NATIONAL TAX CONFERENCE 2014

IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- Before the SCIT, the taxpayer contended that it had disposed of only the lands upon which the project was constructed.
- The disposal of shares in IPH was a realization of an investment and not an adventure in the nature of trade.
- The DGIR on the other hand contended that the taxpayer should be taxed under the Act in respect of the proceeds from the disposal of the properties.

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- The DGIR was correct to invoke s.140(1) of the ITA where the disposal of the lands to IPH was disregarded.
- The DGIR was also correct to impose the penalty under s.113(2) of the ITA.
- The SCIT decided in favour of the DGIR.

Topic: TAX CASES UPDATE



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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- The High Court confirmed the decision of the DGIR and held that there was no commercial nor business reason to set up IPH except for the purpose of the scheme to avoid such disposal from being taxed under the income tax.
- IPH and Vendu were formed for the purpose of disposing the said properties and after that they were wound up.

LHDN 50

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

NATIONAL TAX CONFERENCE 2014

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- The effect of the whole scheme was that the profits from the disposal of the said properties went back to the taxpayer.
- The Court of Appeal confirmed the decision of the DGIR in invoking s.140(1) of the ITA and the imposition of penalty under s.113(2) of the ITA.

LHDN 51

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

- The scheme adopted by the taxpayer did not fall within the meaning of organizing its affairs so as to minimize tax.
- Instead, it was a tax avoidance scheme.



Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

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IBRACO PAREMBA SDN BHD vs. DGIR (R2-14-17-2011)

COMMENTS:

Topic: TAX CASES UPDATE

- Another landmark decision by the COA on the invocation of s. 140(1) of the ITA.
- The DGIR was justified and correct to invoke s. 140 of the ITA based on the factual matrix of the case.
- "Good faith" is not a defence to the taxpayer on the penalty imposed under section 113(2) of the ITA.
- The DGIR has the discretionary power to invoke penalty under s. 113 of the ITA for tax avoidance case under s. 140.

LHDN 53

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Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE



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SYARIKAT PUKIN LADANG KELAPA SAWIT SDN BHD v KETUA PENGARAH HASIL DALAM NEGERI [2012] 6 MLJ 411

ISSUES:

Topic: TAX CASES UPDATE

Whether in restricting the allowance for deductible rental to be based on annual rental basis, the SCIT is unnecessarily restricting the meaning of the word "rental" in s. 33(1)(b) to exclude advanced rental;



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- Whether rental paid in accordance with the lease agreement, which had in fact been paid, are expenses deductible under s. 33(1)(b);
- Whether advanced rental in this case is capital expenses under s. 39 of the ITA;
- Whether the imposition of penalty was correctly made.

Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

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FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- Taxpayer is carrying on the business of planting oil palm.
- Taxpayer took a lease of 17 pieces of land under a lease agreement.
- The lease is for a period of 60 years at a total rental of RM68,000,000.00

LHDN 57

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- Clause 3.1 of the lease agreement provides that an annual average rental for the lease is RM1,133,333.33
- Clause 3.2 provides as follows:

Topic: TAX CASES UPDATE

- (a) advance payment of RM1,392,000 within 7 days from the execution of Form 15A.
- (b) RM16,608,000 upon fulfillment of all relevant approvals.



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Taxpayer claimed as deductions the whole of the lease rentals paid as follows:

YA 2002 - RM1,392,000

YA 2003 – RM16,608,000

Topic: TAX CASES UPDATE

- DGIR allowed as deductions only the sum of RM1,133,333.33 for the respective YA.
- DGIR had added back the excess amount of RM1,133,333.33

LHDN 59

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- Notices of Additional Assessment were raised together with penalty under s. 113(2) of the ITA.
- Taxpayer was aggrieved by the assessments and appealed to the SCIT.
- SCIT, High Court and the COA decided in favor of the Revenue.

LHDN 60

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

NATIONAL TAX CONFERENCE 2014

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S.33 of the ITA

Topic: TAX CASES UPDATE

- "... the adjusted income of a person ... shall be an amount ascertained by deducting from the gross income ... all outgoings and expenses including –
- (b) rent payable for that period in respect of any land or building or part thereof for the purpose of producing gross income for that source"

LHDN 61

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- Advance rental are expenses to be incurred in future for the production of gross future income.
- Advance rental cannot be construed to be expenses for the purpose of earning profit in the relevant basis year.
- On the penalty, the contention by the taxpayer that the reporting of income was made in good faith due to differing interpretation of the law cannot hold because ignorance of law cannot be a defence.

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

NATIONAL TAX CONFERENCE 2014

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- On the penalty imposed under s. 113(2) of the ITA, the contention by the taxpayer that the returns were made in good faith due to differing interpretation of the law cannot hold because ignorance of law cannot be a defence.
- The DGIR had correctly imposed the penalty.

Topic: TAX CASES UPDATE



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COMMENTS:

Topic: TAX CASES UPDATE

- "Good faith" is not a defence under s. 113(2) of the ITA.
- Contention by taxpayer that returns were made in good faith due to differing interpretation of the law cannot hold because ignorance of law is not a defence.

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SRI BINARAYA SDN. BHD. vs. DGIR W-01-448-10/2012
ISSUES

- Whether the DGIR is correct in taking the YA 2003 as the year the actual profits were made
- Whether the DGIR was correct in imposing penalties under s. 113(2) of the Act.

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

NATIONAL TAX CONFERENCE 2014

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FACTS OF THE CASE

Topic: TAX CASES UPDATE

- The DGIR contended that the Certificate of Practical Completion marks the completion of the construction works.
- The Certificate of Practical Completion is the cut-off date to determine the taxpayer's gross profit.

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- Based on the facts, the Certificates of Practical Completion were issued in 2003.
- The Certificate of Practical Completion is the cut-off date to determine the taxpayer's gross profit.
- DGIR's treatment is consistent with s. 24(1) of the ITA

Topic: TAX CASES UPDATE

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- The DGIR was correct to impose the penalty under s. 113(2) of the ITA.
- The taxpayer is not entitled to claim 'good faith' as a defence as it is not explicitly provided under s. 113(2) of the ITA.
- "good faith" is a defence in a prosecution proceeding under s. 113(1) of the ITA.

Topic: TAX CASES UPDATE

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COMMENTS:

Topic: TAX CASES UPDATE

- "Good faith" is a defence in a prosecution proceeding under s. 113(1) of the ITA and not under s. 113(2) of the ITA.
- On the merits of the appeal, the DGIR had issued a regulation P.U.(A) 277/2007 in respect of property developers carrying out property development business.
- The Regulation renders the decision in Bandar Nusajaya academic.

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APPEAL PROCEDURE – HIGH COURT (JUDICIAL REVIEW) OR SCIT (FORM Q)

NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

BANDAR NUSAJAYA DEVELOPMENT SDN.BHD vs. DGIR R2-25-257-2011

FACTS OF THE CASE:

- The DGIR challenged the Judicial Review application filed by the taxpayer on the basis that there is an alternative remedy of appeal to SCIT.
- The Court decided that the availability of an alternative internal remedy will not bar an application for judicial review

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

NATIONALTAX CONFERENCE 2014

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BANDAR NUSAJAYA DEVELOPMENT SDN.BHD vs. DGIR R2-25-257-2011

COMMENTS:

- There are two distinct COA decisions on this issue whether taxpayer may file a judicial review application when there is an alternative internal remedy.
- Taxpayer is advised to file appeal to the SCIT.
- Three tier of appeal process.
- Dispute Resolution Proceeding.
- Save cost and time.

Topic: TAX CASES UPDATE

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NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

TA WU REALTY SDN BHD vs. DGIR M-01-40-04

FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- The DGIR challenged the Judicial Review application filed by the taxpayer.
- There is an alternative remedy of appeal under s. 99 of the ITA.

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The COA decided that the remedy of certiorari is a discretionary one from which has emerged the proposition that an application will fail where there is an alternative remedy.

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Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

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COMMENTS:

Topic: TAX CASES UPDATE

- A ratio by the COA on the proposition that an application will fail where there is an alternative remedy.
- DGIR strongly upholds this proposition.
- Taxpayer is advised to file appeal by way of Form Q to the SCIT.

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NATIONAL TAX EVENT OF THE YEAR NATIONAL TAX CONFERENCE

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Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

POSITIVE VISION LABUAN LIMITED vs. DGIR W-01-67-02/2013

ISSUE:

Topic: TAX CASES UPDATE

Whether the DGIR was correct in law to disallow the tax exemption to the taxpayers under the Income Tax (Exemption) (No. 22) Order 2007.

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FACTS OF THE CASE:

- The issue involved two other similar appeals.
- The taxpayers are in the business of investment holding.
- The taxpayers were known as "Labuan companies" amd Labuan entities under the Labuan Offshore Business Activity Tax Act 1990 (Act 445).

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN

NATIONAL TAX EVENT OF THE YEAR NATIONAL TAX CONFERENCE

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FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- In the YA 2011, the taxpayers received dividends.
- Taxpayers have made irrevocable elections under s. 3A of the LOBATA to be taxed under the ITA.

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- The taxpayers' tax consultants sought confirmation from the DGIR that a Labuan Company which made election under vs. 3A LOBATA to be taxed under the ITA is exempted from income tax on dividends received by virtue of the Exemption Order.
- The DGIR informed that the Exemption Order is no longer available to the taxpayers who have made election irrevocable elections under s. 3A of the LOBATA to be taxed under the ITA.

Topic: TAX CASES UPDATE

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- The taxpayers being dissatisfied with the response from the DGIR filed judicial review application to quash the DGIR's decision.
- The High Court decided in favour of the DGIR.

Topic: TAX CASES UPDATE

The COA confirmed the High Court's decision and decided that:

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- The Exemption Order no longer applies to the taxpayers effective from the date of election.
- The learned High Judge decision that the date 11.2.2010 determined by the Minister as being the date when the Exemption Order no longer apply to "chargeable offshore company" is neither unreasonable nor contrary to the ITA.

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Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE

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COMMENTS:

Topic: TAX CASES UPDATE

- Adopts the approach which promotes the purpose or object underlying a particular statute including taxing statute.
- The application of purposive approach in interpreting taxing statute.
- Exemption Order must be read subject to and consistent with the substantive law or parent Act (ITA).

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NATIONAL TAX EVENT OF THE YEAR NATIONAL TAX CONFERENCE

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Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

12 & 13 AUGUST 2014 | KUALA LUMPUR CONVENTION CENTRE

DGIR vs. SUCCESS ELECTRONICS & TRANSFORMER MANUFACTURER SDN BHD R1-14-14-09
ISSUES:

- The interpretation of the word "factory" for the purpose of Reinvestment Allowance (RA) as claimed by the taxpayer in the tax computation for the YA 2002.
- Whether "meeting room, office spaces, toilets, staircases, void areas, lift lobby, surau and warehouse, lightning adjustment, installations of air-conditioning, electrical fitting and partition wall" were part of "factory".

Speaker: HAZLINA HUSSAIN

Topic: TAX CASES UPDATE



NATIONAL TAX CONFERENCE 2014

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ISSUES:

Topic: TAX CASES UPDATE

Whether the DGIR was correct to impose the penalty under s. 113(2) of the ITA when it is shown that the taxpayer had acted in good faith, made full disclosure and obtained professional advice.



NATIONAL TAX CONFERENCE 2014

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FACTS OF THE CASE:

Topic: TAX CASES UPDATE

- The taxpayer contended that a liberal approach to interpreting the word "factory" should be adopted.
- The ITA does not define "factory" for the purpose of RA.
- The ordinary English dictionary meaning of the word "factory" should be adopted.
- The DGIR on the other hand, adopted a narrow interpretation of the word "factory" that it should confine to "production area".

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The SCIT, HC and COA decided against the DGIR.

COMMENTS:

- The ITA has been amended by Act 742/2012 to insert the definition of "factory" into the ITA.
- Generally, the DGIR follow the ratio in this case.
- Case to case basis.
- Characteristics/functions of the expenditure must be similar with this case.

Topic: TAX CASES UPDATE Speaker: HAZLINA HUSSAIN



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