



📍 Court of Appeal, Putrajaya

📅 September 7, 2020

🏛️ Legal Department, IRBM

## “TAXPAYER COMMITTED NEGLIGENCE FOR FAILURE TO MAKE AMENDMENTS TO THE ACTUAL RECOGNITION OF INCOME”

### OIB v KETUA PENGARAH HASIL DALAM NEGERI

1. This is an appeal by way of Case Stated. The issues are:

*Issue 1: Burden of proof*

*Whether the Respondent has successfully discharged the burden of proof as required under section 91(3) of the Income Tax Act 1967 (hereinafter referred to as “ITA”)?*

*If the Respondent has failed to discharge its burden, then the notice of additional assessment is null and void.*

*Issue 2: Recognition of income*

*If the answer to question 1 above is in the affirmative,*

*Whether the Respondent has any legal basis to bring the payment for project management fee amounting to RM19,473,324.13 to income tax in the year of assessment 1999?*

### JUDGES

Y.A. Datuk Kamardin Hashim, (HMR)

Y.A. Dato’ Hadhariah Syed Ismail  
(HMR)

Y.A. Dato’ Lee Heng Cheong, (HMR)

### REVENUE COUNSEL

Ashrina Ramzan Ali  
Kwan Huey Shin

*Issue 3: Penalty*

*Notwithstanding Issue 1 and 2, whether the Respondent was correct in law to impose penalty under section 113(2) of the Income Tax Act 1967?*

2. The Appellant is in the business of providing project management whereby its principal activity is to manage the construction of Malaysia-Singapore Second Crossing (“MSSC”).
3. On 19.1.1995, United Engineers (M) Bhd (“UEM”), Linkedua (M) Bhd (“Linkedua”) and the Appellant entered into a Project Management Supplemental Agreement (“PMSA”). Based on the PMSA, the total management fee was based on 7% of the Final Construction Cost but the interim management fee was based on the Estimated Amount of Tender of RM860,000,000.00.
4. As the project manager of the MSSC Project, the duties of the Appellant to Linkedua were divided into 3 stages: pre-construction, during construction and post construction.

5. On 2.5.2000, the account between Likedua and the Appellant was finalized. The total construction cost had increased from RM860,000,000 to RM1,148,155,045, which was the final cost.
6. The Respondent conducted an audit in year 2007 and found that the MSSC project had been completed in the year 1998, but there were two Invoices dated 24.12.1999 and 26.4.2004 respectively totaling RM 19,473,324.13 issued after the completion of the project.
7. The Appellant had declared the total management fee of RM60,200,000 which was 7% of the Estimated Total Tender of RM860,000,000 in Year of Assessment ("Y/A") 1999 and the payments for the said 2 Invoices totaling RM 19,473,324.13 were declared as income for Y/A 2000.
8. The Respondent contended that the Appellant should have declared the actual total of service fee of RM80,370,853 (7% x RM1,148,155,045.00) in Y/A 1999 (basis period 1998) pursuant to Section 24(1)(b) of the ITA as it should be recognized based on services rendered in the relevant period and the total income receivable by the Appellant was RM80,971,764.14.
9. The Appellant had rendered services in 1999 and 2000 and the payments received were RM552,071.00. Therefore, the payments for the said 2 invoices should be declared in Y/A 1999 (basis period 1998) amounting to RM 18,921,253.00 and in Y/A 2000 (basis period 1999) amounting to RM552,071.00. Based on the audit findings, the Respondent issued Notices of Additional Assessment for Y/A 1999 in 2009.
10. The Appellant contended that the Invoices were for post construction work thus it was correct to recognize the payments as income for year 2000.
11. The Special Commissioners of Income Tax ("SCIT") made facts findings that the Appellant was entitled to receive the project management fee of RM RM80, 971,764.14 as at 31.12.1998. The balance of RM19,473,324.13 claimed via Invoices dated 24.12.1999 and 26.4.2004 were not for post construction works but were for services rendered in the year 1998, therein should be recognized in Y/A 1999 pursuant to Section 24(1) (b) of the ITA.
12. The SCIT dismissed the Appellant's appeal.
13. The Appellant appealed to the High Court and the High Court concurred to the SCIT's decision and held that that the Appellant had committed negligence when the Appellant failed to make amendments to the actual recognition of income for Y/A 1999 when the account was finalized in 2000. The Appellant was also negligent for not reporting its actual income in accordance with section 24(1) (b) of the ITA 1967, thereby causing the tax losses in Y/A 1999.
14. The High Court found that based on the findings of facts, the SCIT correctly found that the Respondent had discharged their burden of proof in that the Appellant had committed negligence as envisaged by subsection 91(3) of the ITA 1967. Therefore the Respondent's action in raising the tax after the period of 6 years was valid. Penalty was correctly imposed under Section 113(2) of the ITA.

15. The Appellant appealed to the Court of Appeal and contended that the Appellant was not negligent in not correcting the Return for Y/A 1999 because the Appellant was not obligated and had no rights to amend the Return and no provision of the law provides the venue for the Appellant to amend their Return. The provision which allows tax payers to amend their Return forms only came into existence with the introduction of Section 77B of the ITA which comes into effect in Y/A 2009.
16. Further, the Appellant contended that the Appellant had declared their income in Y/A 1999 and Y/A 2000 respectively and at that period of time it was the official assessment system wherein the responsibility to compute and determine the Appellant's tax liabilities was the Respondent's. The Respondent argued otherwise and stated that all assessments are subject to audit irrespectively.
17. The court of Appeal dismissed the appeal with cost and confirmed the High Court's decision.

