

## Revenue's Decision To Impose Penalty Under Both Limbs Of Section 44A(9) Group Relief Set Aside

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In a recent decision concerning the interpretation of Section 44A(9) of the Income Tax Act 1967 (ITA), the Special Commissioners of Income Tax (SCIT) allowed the taxpayer's appeal against the penalty imposed by the Director General of Inland Revenue (Revenue) under Section 44A(9)(b).

The SCIT held that the Revenue had no legal basis to impose penalties under Section 44A(9)(b) after having already raised additional assessments against the taxpayer company under Section 44A(9)(a) in respect of the same group relief adjustments.

This decision reaffirms the importance of giving effect to the plain and ordinary meaning of statutory provisions and clarifies that the alternative mechanisms under Section 44A(9) cannot be invoked concurrently in the circumstances of this case.

The taxpayer was successfully represented by the firm's Tax, SST & Customs Partner, S. Saravana Kumar, together with Senior Associate, Dharshini Sharma and Pupil, Rita Soong.

### Background

The taxpayer was the surrendering company for the purposes of group relief under Section 44A and another related company, L, was the claimant company for the same purpose.

Following a tax audit, the Revenue disallowed interest expenses which was connected with a tripartite debt settlement arrangement involving the taxpayer. This resulted in a reduction of the losses which the taxpayer could surrender to L, as a result of which, the group losses that L could claim was also correspondingly reduced.

Consequent to the adjustment, the Revenue issued notices of additional assessment to L, being the claimant company under Section 44A(9)(a) to recover the additional taxes arising from the overclaimed losses.

Thereafter, the Revenue also issued notices of assessment against the taxpayer under Section 44A(9)(b) where penalty was imposed on the taxpayer in relation to the same group relief adjustment i.e. the losses over surrendered by the taxpayer.

The taxpayer informed the Revenue that as an assessment had been issued under Section 44A(9)(a) on L, there is no basis for the Revenue to impose penalty on the taxpayer under Section 44A(9)(b) as both the provisions are to be read and applied disjunctively due to the presence of the word “or” separating the 2 provisions.

As the Revenue maintained its decision, the taxpayer appealed to the SCIT.

### Can The Revenue Invoke Both Limbs Of Section 44A(9)?

Section 44A(9) of the ITA provides the Revenue with powers to address incorrect group relief claims. The provision distinguishes between two statutory mechanisms:

- Section 44A(9)(a): Raising an additional assessment against the claimant company to recover tax arising from an adjustment to group relief.
- Section 44A(9)(b): Imposing a penalty on the surrendering company in respect of the relevant group relief adjustment.

Section 44A(9) reads as follows:

*(9) Where—*

*(a) in the basis year for a year of assessment the Director General discovers that the adjusted loss as mentioned in subsection (4) ought not to have been deducted in arriving at the total income of the claimant company, the Director General may in that year or within five years after its expiration make an assessment or additional assessment in respect of that company in order to make good any loss of tax; or*

*(b) the surrendering company gives an incorrect information in the return furnished under section 77A in respect of the amount of adjusted loss surrendered, the Director General may, by a notice in writing, require the surrendering company to pay a penalty equal to the amount of tax which had or would have been undercharged by the claimant company in consequence of the incorrect information and where the surrendering company is dissatisfied with the penalty, the surrendering company may within thirty days of being notified appeal to the Special Commissioners as if the notice were a notice of assessment and the provision of this Act relating to appeals shall apply accordingly with any necessary modifications.*

The central question was whether the Revenue could invoke both paragraphs concurrently in respect of the same group relief adjustment, thereby raising an additional assessment against the claimant company and imposing a penalty on the surrendering company in light of the word “or” separating the two provisions.

### **The Taxpayer's Contention**

The taxpayer contended that the word “or” in Section 44A(9) must be given its ordinary meaning of “either one” or “alternatively”. Accordingly, the two paragraphs prescribe mutually exclusive mechanisms and cannot be invoked simultaneously in respect of the same group relief adjustment.

The taxpayer further contended that, having already issued the notices of additional assessment against L under Section 44A(9)(a), the Revenue could not subsequently invoke Section 44A(9)(b) to impose penalty against the taxpayer as the surrendering company for the same adjustments.

The taxpayer relied on established principles of statutory interpretation including the Federal Court's decision in *Dato' Azizan bin Abd Rahman & Ors v Concrete Parade Sdn Bhd & Ors and other appeals* [2024] 3 MLJ 223, which affirmed that the word “or” denotes an alternative and cannot be construed to mean “and”.

### **The Revenue's Contention**

On the other hand, the Revenue contended that paragraphs (a) and (b) of Section 44A(9) should be read conjunctively to enable the Revenue to recover the tax shortfall from the claimant company and impose a penalty on the surrendering company.

The Revenue argued that the amount of penalty under Section 44A(9)(b) could not be determined without first ascertaining the tax undercharged in respect of the claimant company under Section 44A(9)(a).

On this basis, the Revenue maintained that both provisions could be applied concurrently to give effect to the legislative intention of safeguarding the Revenue against improperly claimed group relief.

### **The SCIT's Decision**

The SCIT allowed the taxpayer's appeal and set aside the Revenue's assessments under Section 44A(9)(b) against the taxpayer.

#### **1. The word “or” denotes alternative mechanisms**

The SCIT emphasised that statutory words must be given their plain and ordinary meaning and that Parliament does not legislate in vain. It held that the word “or” connecting Section 44A(9)(a) and Section 44A(9)(b) denotes an alternative and cannot be interpreted to mean “and”.

In reaching this conclusion, the SCIT relied on the Federal Court's decision in *Dato' Azizan bin Abd Rahman & Ors v Concrete Parade Sdn Bhd & Ors and other appeals* [2024] 3 MLJ 223 and *Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd* [2017] 4 CLJ 24 which consistently affirmed that "or" must be construed as "alternatively".

## **2. The Revenue could not invoke both provisions concurrently**

The SCIT found that the Revenue had already exercised its powers under Section 44A(9)(a) by issuing notices of additional assessment against L. Having exercised that statutory mechanism in respect of the group relief adjustments, the Revenue had no legal basis to invoke Section 44A(9)(b) subsequently to impose penalty against the taxpayer for the same adjustments.

The SCIT therefore rejected the Revenue's position that both statutory mechanisms could be applied concurrently.

## **3. Legislative intent does not override the express statutory language**

The SCIT held that Section 44A(9) was intended to safeguard the Revenue against fiscal shortfalls arising from improperly claimed group relief. However, this objective did not justify disregarding the express statutory language. This is because that objective was fully satisfied either by recovering the tax loss from the claimant company under paragraph (a) or by imposing an equivalent penalty on the surrendering company under paragraph (b).

The SCIT considered that applying both paragraphs concurrently would allow the Revenue to recover an amount exceeding the same actual tax loss, contrary to legislative the disjunctive intent, and would constitute unwarranted double recovery.

The SCIT's decision reinforces the principle that the legislative purpose of a provision must be pursued within the limits of the powers conferred by Parliament.

## **Conclusion**

This decision is significant for taxpayers facing group relief adjustments and related penalties. It demonstrates the importance of examining not only the substantive basis of a tax adjustment but also whether the Revenue has exercised its statutory powers in accordance with the governing legislation.

Where the Revenue seeks to impose multiple liabilities arising from the same underlying adjustment, taxpayers should scrutinise whether the relevant statutory provisions permit cumulative action or prescribe alternative mechanisms.

More broadly, the decision serves as a reminder that the Revenue's enforcement objectives, including the recovery of tax shortfalls and the imposition of penalties, must remain within the boundaries established by Parliament. The express wording of the legislation cannot be displaced merely to achieve a particular revenue-collection outcome.

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