

29 JULY 2022

Group Relief Claim: High Court Rules Taxpayer May Claim The Excess Losses

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
☎ +603 6209 5404
✉ sara@rdslawpartners.com

Recently, the High Court allowed the taxpayer's appeal in *BGSB v Ketua Pengarah Hasil Dalam Negeri* and held that the taxpayer (being the 2nd claimant company) could claim the excess surrendered loss available to BASB (being the surrendering company) under Section 44A of the Income Tax Act 1967 (ITA).

The taxpayer was successfully represented by our firm's Tax, SST & Customs Partner, S. Saravana Kumar together with tax associate, Nur Hanina Mohd Azham.

This alert discusses the key aspects of the case.

Brief Facts

The taxpayer is a company incorporated in Malaysia. Its principal business is property investment and development in addition to providing management services and golf and recreation club operator.

In the year of assessment (YA) 2013, by applying Section 44A(5)(a) of the ITA, BASB (being the surrendering company) surrendered RM14,615,512.00 of its losses to a related company known as BLB (being the first claimant company) and RM1,684,688.00 to the taxpayer (being the second claimant company). BLB and the taxpayer filed their tax returns and claimed the respective losses surrendered to them.

Subsequently in 2014, the Director General of Inland revenue (DGIR) conducted a tax audit on BLB and reduced BLB's chargeable income for the YA 2013 to RM3,939,862.00. As BLB's chargeable income had been reduced, it notified BASB that it no longer requires the losses amounting to RM14,615,512.00 in full. Accordingly, BASB revised its group relief form for the YA 2013 whereby RM3,939,862.00 was surrendered to BLB and the balance RM12,360,338.00 was surrendered to the taxpayer. In light of this revision, the taxpayer also filed its revised tax computation and tax return for the YA 2013 by invoking the provision for relief for error or mistake under Section 131(1) of the ITA.

However, the DGIR rejected the Applicant's revision, which was filed pursuant to Section 131(1). Aggrieved by the DGIR's decision, pursuant to Section 131(5), the taxpayer appealed the Special Commissioners of Income Tax (SCIT).

**REIMAGINING
TAX
SOLUTIONS**

The SCIT's Ruling

The main issue considered by the SCIT was whether the taxpayer may revise its tax return for the YA 2013 to claim the revised sum of losses surrendered by BASB.

The SCIT disallowed the taxpayer's appeal based on the following reasons:

- BASB and BLB, respectively being the surrendering company and the first claimant company had erroneously determined the amount of adjusted loss which can be surrendered by BASB and claimed by BLB.
- Section 44A(2)(a)(iv) of the ITA ought to be interpreted strictly and thus, it was wrong for BASB to allocate the excess losses to the taxpayer (the second claimant company) as BASB had made an irrevocable election.
- The SCIT had relied on *Cape Brady Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 and *National Land Finance Co-operative v Director General of Inland Revenue* [1993] 2 AMR 52 in deciding that a strict interpretation must be applied in interpreting Section 44A(2)(a)(iv) of the ITA.
- Section 131(1) of the ITA was not applicable to the taxpayer as there is no mistake or error which is apparent in this case where the relief can be applied.

The taxpayer filed an appeal at the High Court against the SCIT's decision.

The Taxpayer's Contention

The submission for the taxpayer can be summarised as follows:

- The taxpayer submitted that the SCIT had erred in disallowing the taxpayer's claim for the excess of surrendered loss of BASB under Section 44A and Section 131(1) of the ITA by:
 - Erroneously concluding that BASB and BLB had erred in determining the amount of adjusted loss which can be surrendered by BASB and claimed by BLB.
 - Applying a strict interpretation of Section 44A(2)(a)(iv) of the ITA, where the SCIT found that it was wrong for BASB to revise and reallocate the excess loss to the

OUR EXPERTISE:

Income Tax

- Tax Litigation & Appeal
- Judicial Review
- Dispute Resolution Proceedings
- Tax Audit & Investigation
- Tax Advisory & Restructuring (Legal)
- Employment Tax
- Transfer Pricing
- Tax Avoidance & Evasion
- Civil Recovery Proceedings
- Criminal Tax Investigation

Sales & Service Tax

- SST Litigation & Appeal
- SST Audit & Investigation
- SST Advisory (Legal)

Customs Duty, Excise Duty, Safeguard Duty & Anti-Dumping Duty

Trade Facilitation & Incentives

Real Property Gains Tax

Stamp Duty

Anti-Profiteering

GST Disputes

taxpayer because the election made by BASB was an irrevocable election.

- Erroneously concluding that Section 131(1) of the ITA is not applicable to the taxpayer as there is no mistake apparent in this case where relief can be provided.
- (b) The irrevocable election made by the taxpayer was consistent with the wordings of Section 44A(5)(a) of the ITA. The amount of adjusted loss surrendered by BASB must be fully deducted to the first claimant (BLB) before any excess of the adjusted loss is surrendered and deducted to the second claimant (the taxpayer).
 - (c) The revision in relation to the amount surrendered by BASB and the revised amount of losses subsequently claimed by BLB and the taxpayer were consequent to the tax audit conducted by the DGIR on BLB.
 - (d) Section 44A of the ITA ought to be construed in its entirety as the the amount of losses subsequently claimed by the taxpayer was dependent on BLB's utilisation of the losses as BLB was the first claimant company in accordance to the order of priority provided Section 44A(5)(a) of the ITA.
 - (e) The taxpayer's revision of the amount of losses claimed from the surrendering company was as a result of an erroneous belief that it was only entitled to claim up to the maximum of RM1,684,688.00 from BASB.
 - (f) Furthermore, nothing in Section 131(1) of the ITA precludes the applicability of the provision in relation to making revision to group relief claims. If Parliament were to preclude the applicability of Section 131(1), then Parliament would have surely made this clear.
 - (g) The concept of error or mistake for the purposes of Section 131(1) is very wide as it includes a mistaken or false conception or application of the law to the facts as well as an error in calculation. The taxpayer erred by claiming for RM1,684,688.00 from BASB in its tax return for the YA 2013 instead of RM12,360,338.00.

OUR EXPERTISE:

Income Tax

- Tax Litigation & Appeal
- Judicial Review
- Dispute Resolution Proceedings
- Tax Audit & Investigation
- Tax Advisory & Restructuring (Legal)
- Employment Tax
- Transfer Pricing
- Tax Avoidance & Evasion
- Civil Recovery Proceedings
- Criminal Tax Investigation

Sales & Service Tax

- SST Litigation & Appeal
- SST Audit & Investigation
- SST Advisory (Legal)

Customs Duty, Excise Duty, Safeguard Duty & Anti-Dumping Duty

Trade Facilitation & Incentives

Real Property Gains Tax

Stamp Duty

Anti-Profiteering

GST Disputes

The DGIR's Contention

The DGIR averred that the decision of the SCIT was correct for the following reasons:

- a) There was no mistake apparent in this case where relief can be provided pursuant to Section 131(1) of the ITA. In this

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
☎ +603 6209 5404
✉ sara@rdslawpartners.com



case, the party that has been audited and affected by the audit was BLB and not the taxpayer. Thus, nothing has been changed and the taxpayer's position has not been affected by the audit conducted by the DGIR on BLB. As such, there was no error or mistake on the taxpayer's part.

- b) Further, the DGIR also contended that the adjusted loss must first be utilised and fully deducted by the first claimant (BLB) before it is claimed by the second claimant (the taxpayer).
- c) Even if BLB cannot fully utilise the adjusted loss that was surrendered to them, the taxpayer had made an irrevocable election to claim a sum of adjusted loss pursuant to Section 44A of the ITA. Thus, the taxpayer was not entitled to revoke or amend the said amount.
- d) There is no provision under the law that allows for the taxpayer to claim the sum that has not been utilised.

The High Court's Ruling

Upon hearing the submissions by both parties, the High Court allowed the taxpayer's appeal and accepted the arguments advanced by the taxpayer. The High Court ruled that the SCIT had erred in its decision and that the DGIR had no basis to disallow the taxpayer's revised claim. Nothing in Section 131(1) which precludes the application of the said provision in relation to group relief claims. The High Court in exercising its jurisdiction as the appellate court has the power to set aside the decision of the SCIT where they have misdirected themselves on the law.

About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

Authored by Nur Hanina Mohd Azham, an Associate with the firm's Tax, SST and Custom department.

**REIMAGINING
TAX
SOLUTIONS**