

# The taxpayer involved in oil palm cultivation law equity essay

[Law](#)



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\n[/toc]\n \nMSTC 3, 381The FactsThe taxpayer was a Malaysian citizen employed by a Malaysian Company (M. Co). In the year of assessment 1997 (YA97), the taxpayer was resident within the meaning of Section 7 of the Income Tax Act, 1967 (ITA), despite the fact that the taxpayer was present in the United States of America (USA) for 302 days during YA97, (i. e. during 1996). As part of his employment with M. Co. the taxpayer was required to be in the USA for the period of time mentioned above. During this time, his wages and bonuses were paid into his personal account at his bank account in Malaysia. As his duties in the USA were incidental to the exercise of his employment with M. Co, the income arising there from was deemed derived from Malaysia pursuant to sections 13(2)(a) and 13(2)(c) of the ITA. The taxpayer paid Malaysian tax on this income, as well as federal and state taxes in the USA. The taxpayer sought unilateral relief in respect of the federal tax suffered in the USA amounting to RM1, 798. 38. The claim was made pursuant to paragraph 15 of Schedule 7, ITA. The Inland Revenue Board (IRB) did not allow the claim on the basis that the income was not

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foreign income, as it was deemed derived from Malaysia pursuant to section 13(2), ITA. The ArgumentsThe taxpayer argued that the phrase " income from an employment exercised outside Malaysia" in paragraph 15, Schedule 7, referred to income in respect of an employment pursuant to which the employee is required to perform duties outside Malaysia regardless of whether :(a) the duties are incidental to the exercise of such employment;(b) such employment is in Malaysia; and(c) such income is derived (or deemed to be derived) from Malaysia or from outside Malaysia. DecisionWhile it is important to read paragraphs 13 to 15 of Schedule 7, as well as Section 13(2), etc., the clear language used in paragraph 15, means that this paragraph can stand alone. It is clearly " specific only to employment income in respect of an employment exercised outside Malaysia involving Malaysian as well as foreign tax." In statutory interpretation, effect should be given to the ordinary meaning of a word. Paragraph 15 uses the word " may", and in this connection, it should be construed as " shall" and does not give the IRB the discretion to decide whether or not to grant unilateral relief.(Note: The IRB had subsequently withdrawn its appeal to the High Court.)

## **Case Law 2**

Ketua Pengarah Hasil Dalam Negeri v Chellam Investment Sdn BhdThe

FactsThe taxpayer involved in oil palm cultivation, property letting and investment. In 1981, the taxpayer sold part of its estate to a developer and this land was to be developed as a housing estate, anticipated to be completed by 1984. An agreement was reached with the taxpayer conceding to secure houses for the displaced workers; and for this purpose, the taxpayer requested for 50 houses to be reserved for these workers.

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Eventually, only 30 of the 50 units were taken up by the workers, leaving the taxpayer to fulfil its obligation to purchase the remaining 20 units. In 1995, the taxpayer sold 19 of the 20 units it held to various purchasers, reserving one unit for its own occupation. The ArgumentsThe appeal was dismissed was due to the intention of the respondent at the time was purchased the house and that it was to provide for houses for its displaced workers. The SCIT specifically found that it was not in the normal courses of its business which is oil palm plantation and investment. The court held that appeal dismissed due to the Special Commissioners' finding of fact - that the intention of the taxpayer at the time the residential units were purchased was to provide housing for its displaced workers - was not to be disturbed. The purchase and subsequent disposal of the property was not done in the course of the taxpayer's business. The transaction became an investment due to a change in circumstances, and not due to a change of intention on the part of the taxpayer. The decision of the Special Commissioners that the gain on disposal of the property was subject to RPGT and not income tax under s4 (a) of the ITA 1967 is affirmed. DecisionThe decision of the Special Commissioners that the gain on disposal of the property was subject to RPGT and not income tax under s4 (a) of the ITA 1967 is affirmed.

### **Case Law 3**

In *Ho Soon Guan v KPHDN* (Civil Appeal No. R1-14-3-99)The FactsThe taxpayer worked for his employer, a bank which offered a separation scheme, (" the Scheme") that provided for early retirement with payment of benefits. Officers were invited to apply to the Scheme. The taxpayer applied to join the Scheme. When he applied to join the Scheme he had taken a

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special post with the bank which was lower than that which he had occupied before, because he was afflicted with polymyositis which necessitated him having to wear a neck collar. His application was approved and he left the service of the bank about one year before he was actually due to retire. On retirement under the Scheme, he was paid RM390, 437 as " compensation for loss of employment". The Inland Revenue Board (IRB) imposed a tax of RM113, 021. 60 on this amount. The ArgumentsArgument between Employment Law and Trade Union Dispute due to the breach of collective agreement. - Interpretation of the provisions of the collective agreement - Article 33 of the eighth collective agreement - Whether the employees were forced to retire - Whether the dismissal with just cause or excuse - Whether the complainants come within the scope of Section 56(1) of the Industrial Relations Act - Whether the complainants come within the scope of Section 17(1)(b) of the Industrial Relations Act. DecisionEvery company, trust body or co-operative society shall for each year of assessment furnish to the Director General a return in the prescribed form within seven months from the date following the close of the accounting period which constitutes the basis period for the year of assessment.

## **Case Law 4**

In LCC V. KPHDN [(SCIT)(Appeal No. PKCP(R)86/99)the taxpayer was a Malaysian citizen employed by a local company, ITSB. During the basis year for the year of assessment 1997, he was a tax resident in Malaysia. As part of his employment with ITSB, he performed overseas duties in the United States of America (" USA") for 302 days in that year of assessment. While the taxpayer was in USA, his salary was paid by ITSB into his bank account in

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Malaysia. The taxpayer's income was subjected to tax both in Malaysia and USA. On this account, the taxpayer contended that " income from an employment exercised outside Malaysia" in paragraph 15, Schedule 7 of the Act refers to income in respect of an employment pursuant to which the employee performs duties outside Malaysia and thus he is entitled to a unilateral tax credit under Section 133 of the Act. The IRB however, contended that notwithstanding the double tax in respect of the taxpayer's income, that phrase " income from an employment exercised outside Malaysia" refers only to foreign income. Since the taxpayer's income was banked into his Malaysian account, it could not constitute foreign income, thus disentitling the taxpayer to the credit. The SCIT allowed the taxpayer's appeal as they found that the provision was specific to employment income in respect of an employment exercised outside Malaysia involving Malaysian as well as foreign tax. As such, the taxpayer was entitled to the unilateral tax credit.

The Arguments

Employment Law - Dismissal - Poor performance - Constant failure to meet set performance standards - Whether employer has issued warning to the employee - Whether employee was accorded sufficient opportunity to improve performance - Whether employee failed to improve performance despite warnings - Whether poor performance established - Whether dismissal with just cause or excuse. Decision

For the purposes of this Act the Director General shall at all times have full and free access to all lands, buildings and places and to all books, documents, objects, articles, materials and things and may search such lands, buildings and places and may inspect, copy or make extracts from any such books, documents,

objects, articles, materials and things without making any payment by way of fee or reward.

## Case Law 5

EPM Inc v KPHDN [Appeal No. PKCP(R)25/99] The Facts Civil/Structural engineer of an engineering company in Malaysia since 2003. Plans, evaluate, co-ordinate, recommend and implement maintenance, consultancy, research or construction projects and services and engineering designs to serve the needs of the company according to specifications and standards set. In China from 1. 1. 2007 to 31. 12. 2008 (2 years). The secondment overseas was temporary in nature as Peng continued his employment with the same employer on his return to Malaysia after the completion of the overseas duties. The employer in Malaysia credited the employee's bank account with the monthly remuneration but did not bear the remuneration of the employee for the duration of the overseas secondment. The remuneration was recharged to the company in China. The Arguments Subsidiary company in China was responsible for the decision making and issued all the instructions for work carried out in China. All plans and evaluation reports were sent to the company in China. The risk related to the work that was carried out by the employee was borne by the company in China and the benefits were also enjoyed by the company in China based on the decision making of the company in China. The duties performed as a civil/structural engineer in both Malaysia and overseas are similar. The work done in China is related to a project that is not connected to the employer in Malaysia as the subsidiary company in China bears all the risks and receives the benefits from the work done in China. The duties performed overseas was

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independent of the duties in Malaysia as the subsidiary company in China was responsible for all the decision-making of the job done in China.

DecisionThe overseas duties are for an independent purpose and not to further the purpose of the employer in Malaysia since the decision making of the work done overseas lies with the company overseas. The employer in Malaysia did not bear any of the risks or receive the benefits from the job done overseas.

## Case Law 6

Petroleum engineers seconded overseasThe FactsPetroleum engineers of an Oil & Gas company in Malaysia since 1990. Carry out data analysis and interpretation of technical studies for formulation and implementation of petroleum engineering projects. Overseas for a period of 1 to 3 years with effect from 2007. The employer in Malaysia credited the employee's bank account with the monthly remuneration but did not bear the remuneration of the employee for the duration of the overseas secondment. The remuneration was recharged to the companies overseas. The ArgumentsCompany overseas was responsible for the decision making and issued all the instructions. The company overseas bore the risks and received the benefits from the work that was carried out by the employees seconded overseasbased on the decisions of the overseas company.

Although the duties performed as a petroleum engineer in both Malaysia and overseas were similar, the work done overseas was determined by the overseas company which bore all the risks and enjoyed the benefits from the completed job. The overseas duties were not connected to and not part and parcel of the duties in Malaysia. The duties performed overseas were for an

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independent purpose as all the instructions were issued by and all reports were made to the overseas companies. DecisionThe overseas duties are not for an independent purpose but to further the purpose of the employer in Malaysia, which is responsible for the decision making of the work done overseas. Furthermore, the employer in Malaysia bears all the risks and receives the benefits from the work that was carried out (based on its decision making) by the employee overseas.

## Case Law 7

LIM MOON HENG @ LIM BOON SIANG V THE GOVERNMENT OF MALAYSIA & ANOR (2002) MSTC 3, 957 (HIGH COURT)The FactThe taxpayer, an adjudged bankrupt, had applied to the Official Assignee (" OA") for leave to travel outside Malaysia and a bank guarantee of RM 50, 000 was furnished. The taxpayer then instructed his advocates to write to the IRB to seek leave to travel outside Malaysia. The application was rejected by the IRB under Section 104 of the ITA unless the income tax assessment of RM197, 140. 09 was settled in full or a bank guarantee of RM200, 000 is furnished. The ArgumentsThe taxpayer argued that the ITA is only applicable to a person who is not adjudged as a bankrupt and was therefore not applicable to the taxpayer who was an adjudged bankrupt. The only appropriate legislation governing the affairs, interests and assets of the taxpayer being an adjudged bankrupt was therefore the Bankruptcy Act, 1967 (" BA"). It was further argued that the defendants by submitting their claims for unpaid income tax revenue from the taxpayer to the OA, the OA under Sections 8, 24(4) and 58 of the BA has jurisdiction over all affairs in respect of the assets and interests of the taxpayer and that the IRB is therefore the same as any other creditor

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of the plaintiff. It follows that the IRB therefore has no authority to intervene by issuing a Section 104 certificate under the ITA. As such, the IRB had no right or jurisdiction to restrict or hinder the taxpayer's freedom of movement as guaranteed by the Federal Constitution by prohibiting the taxpayer from travelling freely out of Malaysia under Section 104 of the ITA. RespondentThe IRB had the right to restrict the Defendant pursuant to Section 104 of the ITA. Decision(1) Both the BA and the ITA have distinct applications and as such the question of which of the two Acts take precedence over the other does not arise. The ITA was enacted to regulate the collection of revenue of the country and the BA is to protect the creditors' interests(2) Where a bankrupt did not owe the IRB any tax, Section 38(1)(c) of the BA was applicable and the OA was the full and final authority to grant leave to a bankrupt to travel abroad. On the other hand, where the taxpayer still owed tax to the IRB or where the IRB had filed a claim with the OA, although the OA had granted leave to a bankrupt to travel abroad, the Director General of Inland Revenue (DGIR) still retains the power under Section 104(1) of the ITA to stop the bankrupt from leaving unless he has fulfilled certain conditions imposed therein.(3) An international passport was not " property" as defined under Section 2 of the BA. Since the taxpayer's international passport was not vested in the OA, the IRB still possessed the right to stop the taxpayer from leaving Malaysia unless he fulfilled the conditions stipulated.(4) Where a bankrupt had settled his tax and was granted leave by the DGIR to travel abroad, the bankrupt still, under Section 38(1) of the BA required the approval of the OA for such trips if he owed other claimants.

## Case Law 8

PARAMOUNT (M) (1963) SDN BHD V PESURUHJAYA KHAS CUKAI PENDAPATAN

& ANOR (2002) MSTC 3, 908 (HIGH COURT) The Facts This case concerned a

taxpayer seeking a Declaratory Order before the High Court, that

proceedings in the income tax appeal to the Special Commissioners was

invalidated and thereby the Deciding Order of the Special Commissioners

was invalid on grounds, inter alia, for the failure of the DGIR to comply with

section 140(5) of the ITA and rules of natural justice. In this case, following

investigations conducted by the DGIR, it was alleged that the taxpayer was

evading tax. Accordingly, there were " fictitious purchases" and " fictitious

lodgments" amounting to willful misconduct by the taxpayer. However, in

spite of the mandatory statutory requirement expressly provided for under

section 140(5) of the ITA, no particulars of the alleged willful misconduct

were provided to the taxpayer with the Notice of Assessments. The DGIR

merely provided a " Summary of Account Irregularities". The chronology of

proceedings commenced with the taxpayer seeking leave to apply for an

Order of Certiorari (" the Certiorari Application) to quash the assessments.

The High Court granting leave, at the same time granted an Interim Order

that " all proceedings arising from or relating to or for enforcement of the

assessments be stayed" until the Certiorari application is disposed of and

determined (" the Interim Order"). Notwithstanding the Interim Order, the

taxpayer had requested the DGIR to forward the appeal to the Special

Commissioners, CPA Tax & Investment Review 2003 242 which the DGIR did.

As a result, the Certiorari Application was adjourned. Later when the

Certiorari Application was heard, the application was dismissed. (The

taxpayer appealed against the dismissal to the Court of Appeal). When the appeal before the Special Commissioners was heard, it was ruled that there was " fraud or willful default or negligence committed by the taxpayer under section 9(3)" of the ITA. The taxpayer then appealed against the Deciding Order by way of Case Stated. Upon reviewing of the relevant papers, the new solicitors engaged at that time advised the taxpayer that the proceedings before the Special Commissioners were held in direct breach of the High Court Order which ordered a stay of proceedings. This and the aforesaid contravention of section 140(5) of the ITA formed the " grave concerns" which were brought to the attention of the Special Commissioners, where it was decided that taxpayer seek a Declaratory Order on the validity of the appeal. The Arguments Section 140 of the ITA is a power given to the respondent to disregard certain transactions. It is not a provision for making an assessment but for making adjustments as the respondent thinks fit, with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction. As such, the fundamental rules on natural justice, in particular, audi alteram partem (hear the other side), had no application in relation to the respondent in the circumstances of the case. A taxpayer can never seek judicial review under Order 53 of the Rules of the High Court 1980 as section 99 of the ITA provides taxpayers with a statutory right of appeal to the Special Commissioners. As such, the High Court Order or any other order obtained for judicial review proceedings would be null and void and can be ignored. Decision Held: The applicant's appeal was upheld on the following grounds:(1) In order to enable the applicants rightfully to discharge the burden of disproving the assessments, the applicants require particulars

thereof. The respondent's failure to provide these particulars to the applicants would not only be a breach of its statutory duty under section 140(5) of the ITA but also a breach of the rules of natural justice, if not an outright denial of justice itself.(2) In addition, since an adjustment under section 140(1)(c) of the ITA would inevitably encompass an additional assessment or an ordinary assessment, the law imposes a duty on the respondent to furnish the applicant with "particulars" of the adjustment. This is also a correlative requirement under the rules of natural justice which provides for disclosure of particulars in order to give the applicants reasonable opportunity to set out its case and appeal against the assessments.(3) The existence of an alternative remedy is not a bar to judicial review and cannot operate to oust the jurisdiction of the High Court, much less render the High Court Order null and void. Where there are genuine grounds for judicial review, it is the refusal rather than the grant of the relief which is the exceptional case. Case Law 9HO SOON GUAN V KETUA PENGARAH HASIL DALAM NEGERI (2002) MSTC 3, 887 (HIGH COURT)The FactsThe above case was an appeal by the taxpayer to the High Court from the decision of the SC reported as HSG v. Ketua Pengarah Dalam Negeri, [(2000) MSTC 3, 170]. In the abovementioned case, the taxpayer who worked for a Bank, suffered from a illness which required him to wear a neck collar. In 1997, the Bank introduced a Separation Scheme for Resident Officers. It was open to officers who were, inter alia, suffering from illnesses. However, an employee was not required to furnish any reasons to participate in the Scheme, and similarly the Bank was not obliged to furnish any reason for accepting or rejecting an application. The taxpayer opted for early retire-

CPA Tax & Investment Review 2003 236 ment under the Scheme and his application was accepted. He received an amount of RM390, 437 under the Scheme. The amount was brought to tax after deducting the amount exempted of RM4, 000 per completed year of service pursuant to Paragraph 15(1)(b), Schedule 6 of the ITA. The SC dismissed the taxpayer's appeal and held that the taxpayer's loss of employment was because he participated in the Scheme and not because of any other reasons. The taxpayer's loss of employment was a choice made by the taxpayer under the Scheme which required no reason to be stated in the application nor did the Bank need to specify the reason for approving. As such, the SC held that the compensation qualified for exemption pursuant to only Paragraph 15(1)(b), Schedule 6 of the ITA. The Argument The taxpayer contended that the compensation was for loss of employment due to ill-health and therefore he was entitled to total exemption under Paragraph 15 (1)(a), Schedule 6 of the ITA. Decision Held: The taxpayer's appeal was dismissed. The High Court held that the SC was correct in deciding that the decision to be made was based on a question of fact. In this case, it was to be decided whether the compensation received by the taxpayer was received for loss of employment as a result of ill health or not. The SC's decision was based on the findings of primary facts and was not ex facie bad in law. The SC's findings that ultimately the taxpayer had retired and received the compensation under the Scheme and not on account of his ill health, was not wrong in law. Case Law 10KETUA PENGARAH HASIL DALAM NEGERI V MULTI PURPOSE HOLDINGS BHD (2001) MSTC 3, 880 (HIGH COURT) The Facts The taxpayer was an investment holding company deriving the following income:- dividends from the holding

of shares;- interest from the granting of loans and advances to related companies as well as from the placing of funds on short-term deposits- rental and plantation income For the years of assessment 1982 - 1988, the IRB treated each counter of share investment, each loan/advance and each deposit as a separate source of income, and thereby segregated the income producing sources from the non-income producing sources. The

Arguments(1) The IRB's assessments were incorrect in law in that the dividend income and interest income should have been treated as singular sources however or wherever derived.(2) The scheme by which chargeable income is to be ascertained as set out in the ITA had been ignored by the IRB. The sub-division of each source of income as proposed by the IRB was not authorized by law.(3) There was a failure on the part of the IRB to recognise that income from all sources have to be aggregated pursuant to section 43, ITA. DecisionHeld: The IRB's appeal was dismissed for the following reasons:(1) The manner in which a taxpayer's chargeable income should be ascertained, as set out in section 5(1)(c), ITA is relevant. This section makes reference to " a source consisting of a business", as well as other sources. The other sources must therefore relate the classes of income set out in section 4, which would include a " dividend" source and an " interest" source under section 4(c). Section 4(c) would have been worded differently if Parliament had intended each share counter and each loan to be treated as a separate source.(2) The ITA adopts a comprehensive description of sources in section 4, and imposes tax upon gains and profits of a taxpayer as classified under section 4. There is no sub-division of these

classes, and hence the IRB has no authority to further subdivide or disintegrate the groupings of profits and gains as set out in section 4.