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JUDGMENT Express

KETUA PENGARAH HASIL DALAM NEGERI
v.
DATUK OH CHONG PENG

Court of Appeal, Putrajaya
Collin Lawrence Sequerah, Mohd Firuz Jaffril, Nadzarin Wok Nordin JJCA
[Civil Appeal No: W-01(A)-685-12-2023]
3 June 2026

***Company Law:** Secretary — Letters issued by company secretary on matters of corporate status such as whether person was employee or independent director — Whether to be treated as issued with authority of board of directors*

***Revenue Law:** Income tax — Additional assessments and penalty — Directors' fees, allowances and consultancy fees received by respondent remitted in full to management companies set up by respondent, from which respondent received monthly salary and directors' fees annually — Whether taxable as 'gains or profits from an employment' under s 4(b) Income Tax Act 1967 (ITA) or 'gains or profits from a business' under s 4(a) ITA — Whether respondent an 'employee' under the Income Tax Act 1967 (ITA) — Whether respondent 'negligent' within meaning of s 91(3) ITA — Whether Special Commissioners of Income Tax erred in failing to distinguish independent director from director within a company — Whether Bursa Malaysia's Listing Requirements and Practice Note 13 binding on listed companies — Whether underlying assessments invalid and penalty imposed, wrong in law and unjustified*

***Revenue Law:** Income tax — Dispute over correct legal interpretation of s 4(a) and (b) Income Tax Act 1967 (ITA) — Directors' fees, allowances and consultancy fees received by respondent remitted in full to management companies set up by respondent, from which respondent received monthly salary and directors' fees annually — Whether taxable as 'gains or profits from an employment' under s 4(b) Income Tax Act 1967 (ITA) or 'gains or profits from a business' under s 4(a) ITA*

***Revenue Law:** Income tax — EA Form — Whether EA Form merely a standard administrative document for reporting payments and not determinative of person's employment status for tax purposes*

The respondent had after his retirement as a chartered accountant in November 1997, served as an independent non-executive director of several public listed companies and provided occasional consultancy services to several companies. The respondent also incorporated 2 management companies (the management companies) and from December 1997 until December 2016, was exclusively employed by the management companies. The directors' fees, allowances, and consultancy fees which the respondent received from public listed companies and other clients were remitted in full to the management companies, which declared the same as their business income under s 4(a) of the Income Tax Act

1967 (ITA). The respondent was paid a monthly salary by the management companies, which he declared as his employment income, and also received directors' fees annually. For a period of 17 years from 1997 until 2015, the appellant accepted that tax treatment without question. Following a tax audit in 2015, the appellant took the position that the directors' fees, allowances and consultancy fees received by the respondent should have been declared as his personal employment income under s 4(b) of the ITA instead of business income of the management companies. Consequently, notices of additional assessments for the years of assessment (YAs) 2002 to 2012 were raised by the appellant, and a penalty was imposed under s 113(2) of the ITA. The Special Commissioners of Income Tax (SCIT) dismissed the respondent's appeal against the same on the grounds *inter alia* that the respondent was an 'employee' under the ITA and that the directors' fees, allowances and consultancy fees received by the respondent as an independent director were his personal income and taxable under s 4(b) of the ITA as employment income. The High Court Judge (Judge), upon appeal by the respondent, set aside the SCIT's decision. The Judge held that an independent non-executive director was not an employee, that the SCIT had failed to distinguish an independent director from a director within a company, and that the directors' fees, allowances and consultancy fees received by the respondent should not be taxed as employment income under s 4(b) of the ITA but as business income under s 4(a) of the ITA. The Judge also held that Bursa Malaysia's Practice Note 13 (Practice Note 13) which set out the requirements for an independent director clearly established that an independent director could not be considered an employee, that the SCIT had erred in concluding that the Practice Note was a mere guideline, that the SCIT and the appellant had erred in disregarding letters from company secretaries confirming the respondent's status as an independent non-employee director, that EA Forms were not determinative of a person's employment status for tax purposes and therefore the SCIT had erred in treating the same as *prima facie* evidence of an employment relationship. The Judge further held that the appellant had failed to discharge the burden of proving negligence under s 91(3) of the ITA and that the penalty that was imposed was wrong in law and unjustified. Hence the instant appeal. The respondent in turn, made an oral application for refund of all taxes and penalties paid.

Held (dismissing the appeal and allowing the respondent's application for refund of taxes and penalties paid):

(1) The Judge had not erred in concluding that the SCIT had erred in law and fact by failing to distinguish an independent director from a director within a company. As was established in *Chong Kim Sang v. Metatrade Sdn Bhd,* a director's appointment did not by itself create an employer-employee relationship and that a director's remuneration was governed by the company's articles and approved by the shareholders and not derived from a contract of service. Furthermore, as was held in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor*, 'degree of control' remained a significant criterion in distinguishing a contract of service from a contract for services. (paras 17-19)

(2) The absence of a master-servant relationship in this instance was clear and unequivocal. The respondent, thus, was not an employee. It followed, therefore, that the directors' fees, allowances and consultancy fees received by the respondent were not taxable as 'gains or profits from an employment' under s 4(b) of the ITA. On the facts, the proper income head for the respondent's receipts was 'gains or profits from a business' under s 4(a) of the ITA and not employment income under s 4(b) of the ITA. (paras 20-25)

(3) The Bursa Malaysia's Listing Requirements, including the Practice Note 13, were issued pursuant to the Capital Markets and Services Act 2007 and were binding on all listed companies. The SCIT should have had regard to the said Listing Requirements, which provided valuable context for interpreting the provisions of the ITA in a commercial setting. To disregard the regulatory framework governing listed companies would be to ignore the commercial and legal reality within which a taxpayer operated. (paras 26-29)

(4) The Judge was correct in holding that the EA Form was a standard administrative document prescribed by the appellant for reporting purposes. Although it was a mandatory statutory form under s 83(1A) of the ITA, it was not determinative of a person's employment status for tax purposes. The inclusion of the directors' fees in the EA Form was a matter of administrative compliance and not a conclusive legal classification. The SCIT had therefore erred in treating the EA Form as *prima facie* evidence of an employment relationship. (paras 30-32)

(5) The SCIT and the appellant had erred in disregarding the letters from the company secretaries confirming the respondent's status as an independent non-employee director. The refusal to accept the said letters solely because the same were signed by the company secretary and rather than by a director was wrong in law. A company secretary is an officer of the company, and letters issued by the company secretary on a matter of corporate status are to be treated as issued with the authority of the board of directors. (paras 33-36)

(6) On the authorities, an independent director was not an employee and ought not to be subjected to income tax under the category of an employee. (paras 37-38)

(7) The burden was on the appellant to prove that the respondent had been 'negligent' within the meaning of s 91(3) of the ITA. On the facts and in the absence of evidence of any fraudulent intent or wilful default on the part of the respondent, the SCIT's finding of negligence was erroneous. Consequently, the time-barred assessments for the YAs 2002 to 2009 were invalid. (paras 39-43)

(8) Given that negligence under s 91(3) of the ITA was not proven and the underlying assessments for the time-barred years were invalid, there was no basis for the imposition of the penalty under s 113(2) of the ITA for those years, nor was there any proper justification for the penalty that was imposed for the years that were not time-barred. Given that the respondent was not an employee and the dispute was one of interpretation, the penalty that was imposed was unreasonable and ought to be set aside. (paras 44-46)

Case(s) referred to:

A & Anor v. C & Anor [2015] SASC 35 (refd)

Ace Insurance Ltd v. Trifunovski [2014] 2 ILJ 399 (refd)

Chong Kim Sang v. Metatrade Sdn Bhd [2004] 1 MLRA 241 (folld)

Etiqa Family Takaful Berhad v. Ketua Pengarah Hasil Dalam Negeri & Another Appeal [2025] 2 MLRA 463 (folld)

Ever-Yield Sdn Bhd v. Yap Keat Choon And Other Appeals [2022] MLRAU 189 (folld)

Government of Malaysia v. Sarawak Properties Sdn Bhd [1993] 3 MLRH 760 (not folld)

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1995] 1 MELR 1 (folld)

Kalyani Forge Ltd Pune v. Assessee (India ITAT, 27 May 2015) ITA No.1133/PN/2013 (refd)

Ketua Pengarah Hasil Dalam Negeri v. Kind Action (M) Sdn Bhd [2025] 3 MLRA 403 (folld)

Keysight Technologies Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2024] 6 MLRA 287 (folld)

Merimen Online Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2025] 2 MLRA 608 (folld)

Tan Ban Uu & Anor v. Ong Ghin Leong [2017] MLRHU 115 (refd)

The Queen On The Prosecution Of J. B. Saunders v. The Postmaster General (1876) 1 Q.B.D. 658 (distd)

Legislation referred to:

Companies Act 2016, s 216

Income Tax Act 1967, ss 4(a), (b), 83(1A), 91(1), (3), 113(1), (2), 120

Counsel:

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[For the High Court judgment, please refer to *Datuk Oh Chong Peng v. Ketua Pengarah Hasil Dalam Negeri* [2024] 3 MLRH 741]

JUDGMENT

Mohd Firuz Jaffril JCA:

A. Introduction

[1] The present appeal before us is by the Director General of Inland Revenue ("the Revenue") against the decision of the learned High Court Judge dated 14 December 2023. At the court below, the High Court Judge ("HCJ") had allowed the respondent taxpayer's ("the Taxpayer") appeal and set aside the decision of the Special Commissioners of Income Tax ("SCIT") dated 31 March 2022.

[2] This appeal raises fundamental questions about the proper interpretation of "employee" and "employment" under the Income Tax Act 1967 ("ITA"), and whether an independent non-executive director can be treated as an employee for tax purposes.

[3] We heard the appeal on 9 October 2025. Upon deliberation, this panel reached a unanimous decision to dismiss the appeal with costs, affirming the decision of the High Court.

B. Factual Matrix of the Appeal

[4] The salient facts are as follows:

(a) The Taxpayer is a Fellow of the Institute of Chartered Accountants in England and Wales (ICAEW) and a member of both the Malaysian Institute of Certified Public Accountants (MICPA) and the Malaysian Institute of Accountants (MIA). He was formerly a partner in the accounting firm Coopers & Lybrand (now PricewaterhouseCoopers), from which he retired in November 1997.

(b) Following his retirement, the Taxpayer was invited to serve as an independent non-executive director on the boards of numerous public listed companies. He also provided occasional consultancy services to companies on whose boards he did not sit.

(c) From 1996 to 2018, the Taxpayer sat as a member of the Labuan Financial Services Authority (LFSA), and from 2018 to 2020, he was appointed by the Minister of Finance as Chairman of the LFSA. Over a span of 24 years, successive Ministers of Finance vetted his background, including his tax compliance, and never found any deficiency.

(d) After retiring, the Taxpayer incorporated two management companies: OCP Holdings Sdn Bhd and Garzania Sdn Bhd ("the Management Companies").

(e) From December 1997 until December 2016 (a period of 19 years), the Taxpayer was exclusively employed by the Management Companies. He received a monthly salary from them, which he declared as his personal employment income and paid income tax on accordingly. He also made Employees Provident Fund (EPF) contributions through this arrangement.

(f) All directors' fees, allowances, and consultancy fees received by the Taxpayer from the public listed companies and other clients were remitted in full to the Management Companies. The Management Companies declared these receipts as their business income under s 4(a) of the ITA and paid income tax on them. This treatment was consistently applied and reflected in the Management Companies' audited accounts and tax computations. The directors' fees were paid annually after approval by shareholders at the annual general meeting, typically 4 to 6 months after the end of the financial year, and were not paid on a monthly basis.

(g) From 1997 until 2015 — a period of approximately 17 years — the Revenue accepted this tax treatment without question.

(h) During the official assessment system (pre-2001), the Revenue itself examined the Taxpayer's returns, tax computations, and audited accounts before issuing assessments. No objection was ever raised.

(i) When the self-assessment system was introduced in 2001, the Taxpayer continued the same practice, relying on the Revenue's previous acceptance and on professional tax advice from Total Taxation Services.

(j) In 2015, the Revenue conducted a tax audit of the Taxpayer's affairs.

(k) Consequent to that audit, the Revenue took the position that the directors' fees, allowances, and consultancy fees received by the Taxpayer should have been declared as his personal employment income under s 4(b) of the ITA, rather than as business income of the Management Companies.

(l) The Taxpayer was surprised by this change of position but accepted that the fees should be taxed in his name. However, he could not agree with:

    (i) the Revenue's classification of these payments as employment income (as opposed to business income); and

(ii) the Revenue's refusal to grant tax credits for the income tax already paid by the Management Companies on the same receipts.

He further produced letters from the company secretaries of the public listed companies confirming that he was appointed as an independent non-executive director and that he was not an employee of those companies.

(m) The Revenue disregarded these letters and instead relied on the EA Forms issued by the public listed companies. Unlike the company secretary letters (which stated that the Taxpayer was not an employee), the EA Forms recorded the directors' fees as remuneration, which the Revenue treated as evidence of an employment relationship.

(n) Consequently, the Revenue raised Notices of Additional Assessment for the YAs 2002 to 2012 on various dates in 2015 and 2016. For YAs 2002 to 2009, the assessments were issued in 2016. The Revenue also imposed a penalty under s 113(2) of the ITA.

C. The Decision of the SCIT

[5] On 31 March 2022, the SCIT dismissed the Taxpayer's appeal, holding that:

(a) the Taxpayer was an "employee" under the ITA;

(b) the directors' fees, allowances, and consultancy fees received by the Taxpayer as an independent director were his personal income and taxable under s 4(b) of the ITA as employment income;

(c) the letters from the company secretaries were disregarded on the basis that they were signed by the company secretary and not by a director;

(d) the EA Forms issued by the public listed companies were treated as *prima facie* evidence of an employment relationship;

(e) the Taxpayer had been negligent in failing to report the directors' fees, allowances, and consultancy fees as his personal employment income, instead routing them through the Management Companies;

(f) the Revenue had successfully discharged the burden of proof under s 91(3) of the ITA in relation to the time-barred assessments for YAs 2002 to 2009; and

(g) the penalty under s 113(2) of the ITA was correctly imposed.

[6] The Taxpayer, being aggrieved by the SCIT's decision, appealed to the High Court.

D. The Decision of the High Court

[7] The learned High Court Judge heard the appeal and, on 14 December 2023, allowed the Taxpayer's appeal, setting aside the SCIT's decision.

[8] The High Court held that an independent non-executive director is not an employee. The SCIT had failed to distinguish an independent director from a director within a company. The absence of a master-servant relationship was palpable. The Taxpayer was never an employee and was never subject to the control of the companies. The directors' fees, allowances, and consultancy fees received by the Taxpayer should be taxed as business income under s 4(a) of the ITA, not employment income under s 4(b).

[9] The High Court further held that Bursa Malaysia's Practice Note 13 sets out the requirements for an independent director and clearly establishes that an independent director cannot be considered an employee. The SCIT had erred in concluding that the Practice Note was a mere guideline. The High Court also found that the SCIT and the Revenue had erred in disregarding letters from company secretaries confirming the Taxpayer's status as an independent non-employee director. A company secretary is an officer of the company under the Companies Act 2016, and letters issued by a company secretary on corporate matters should be treated as issued by the board of directors.

[10] On the EA Forms, the High Court held that the EA Form is a standard administrative document prescribed by the Revenue for reporting payments. It is not determinative of a person's employment status for tax purposes. The SCIT had erred in treating the EA Form as *prima facie* evidence of an employment relationship.

[11] On the time-barred assessments, the High Court held that the Revenue had failed to discharge the burden of proving negligence under s 91(3) of the ITA. The dispute was at its heart a disagreement over the correct legal interpretation of the ITA (s 4(a) versus s 4(b)). The Taxpayer had acted diligently and in good faith, seeking professional advice, making full disclosure, filing returns on time, and having his treatment accepted by the Revenue for 17 years.

[12] On the penalty, the High Court held that the penalty imposed under s 113(2) of the ITA was wrong in law and unjustified. The Taxpayer had acted in good faith at all times. The Revenue had failed to exercise its discretion properly or provide reasons for the penalty.

[13] The Revenue, being aggrieved by the High Court's decision, appealed to the Court of Appeal.

E. The Parties' Submission to the Court of Appeal

E1. The Revenue's Submissions

[14] The Revenue appealed the High Court's decision on several grounds.

(a) On the definition of "employee" and "employment," the Revenue submitted that the High Court had erred by focusing solely on the master-servant relationship. Under s 2 of the ITA, "employment" is defined in two limbs. The second limb includes "any appointment or office, whether public or not and whether or not that relationship subsists, for which remuneration is payable." The Revenue argued that an independent director holds such an office, and therefore falls within the definition of "employee."

(b) The Revenue further submitted that directors' fees constitute "remuneration" for holding an office, and are therefore taxable as employment income under s 4(b) read together with para 13(1)(a) of the ITA.

(c) The Revenue argued that the case of *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 1 MLRA 241 was not a tax case and should not apply, as the ITA has its own specific definitions which must prevail.

(d) On the EA Forms, the Revenue submitted that the EA Forms issued to the Taxpayer by the public listed companies were *prima facie* evidence of an employment relationship, and that the Taxpayer had accepted these forms without objection for many years.

(e) On Bursa Malaysia's Practice Note, the Revenue argued that the ITA prevails over the Practice Note, which is merely a guideline and cannot override the statutory definition of "employee" under the ITA.

(f) On negligence, the Revenue submitted that the Taxpayer had been negligent in failing to declare the directors' fees, allowances, and consultancy fees as his personal employment income, and that the fact that the Revenue had accepted his treatment in the past did not prevent the Revenue from correcting the position upon audit.

(g) On the penalty, the Revenue submitted that it had properly exercised its discretion under s 113(2) of the ITA to impose a 45% penalty, and that the defence of "good faith" is not available under s 113(2), unlike under s 113(1).

E2. The Taxpayer's Submissions

[15] The Taxpayer contended that the High Court's decision was correct and submitted as follows:

(a) On the status of an independent director, the Taxpayer submitted that an independent non-executive director is not an employee. There was no master-servant relationship. The Taxpayer was not subject to the control of the companies. No offer of employment, employment contract, employee handbook, EPF contributions, or PERKESO contributions existed. The Taxpayer paid GST to the companies, which an employee would not do.

(b) The Taxpayer relied on the Court of Appeal case of *Chong Kim Sang (supra)*, which directly held that a director's appointment does not, by itself, create an employer-employee relationship, and submitted that this principle applies with even greater force to an independent non-executive director.

(c) On directors' fees, the Taxpayer relied on *Ever-Yield Sdn Bhd v. Yap Keat Choon And Other Appeals* [2022] MLRAU 189, which held that a director is not an employee and that directors' fees are not akin to an employee's salary. Directors' fees are only payable upon approval by shareholders at an annual general meeting, unlike an employee's salary which is paid monthly as of right.

(d) On Bursa Malaysia's Practice Note, the Taxpayer submitted that Practice Note 13 is binding on listed companies and clearly provides that an independent director is not an employee; the SCIT had erred in dismissing it as a mere guideline.

(e) On company secretaries' letters, the Taxpayer submitted that a company secretary is an officer of the company under the Companies Act 2016, and that s 216 allows the board to delegate powers to officers; letters issued by a company secretary on matters of corporate status should be treated as issued by the board, and the Revenue's refusal to accept these letters was arbitrary.

(f) On the EA Forms, the Taxpayer submitted that the EA Form is a standard administrative format prescribed by the Revenue, that it includes directors' fees by design, that it cannot be determinative of employment status, and that the companies were required by law to issue EA Forms, over which the Taxpayer had no control.

(g) On negligence, the Taxpayer submitted that he had acted diligently and in good faith, seeking professional tax advice, making full disclosure, filing returns on time, and having his treatment accepted by the Revenue for 17 years. The Taxpayer argued that the dispute is one of legal interpretation, not negligence, and relied on *Keysight Technologies Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2024] 6 MLRA 287 and *Etiqa Family Takaful Berhad v. Ketua Pengarah Hasil Dalam Negeri & Another Appeal* [2025] 2 MLRA 463.

(h) On the penalty, the Taxpayer submitted that since the Revenue failed to prove negligence, the penalty cannot stand; in any event, the penalty was imposed without proper consideration of the facts, and the Taxpayer had acted in good faith at all times.

F. Our Analysis

[16] After careful consideration of the appeal record, the written and oral submissions, and the authorities cited, we find no merit in the Revenue's appeal and unanimously dismiss the appeal. Simultaneously, we affirm the High Court's decision. The following are our rationales for concluding so.

F1. On the Status of an Independent Non-Executive Director

[17] With reference to the respondent's status as an independent non-executive director, it is our view that the learned High Court Judge was correct in concluding that the SCIT had erred in law and fact by failing to distinguish an independent director from a director within a company.

[18] The Court of Appeal decision in *Chong Kim Sang (supra)* is directly on point, where it was held that a director's appointment does not, by itself, create an employer-employee relationship. A director's remuneration is governed by the company's articles and approved by shareholders, not derived from a contract of service.

> "A person who is appointed director of a company does not become an employee of the company. Whether he is entitled to receive remuneration as director would depend on the articles of association and that would normally have to be determined by the company in general meeting.... Directors' fees are not wages or salaries and generally shall be determined by the company in general meeting."

Given that an independent non-executive director is, by definition, not involved in the day-to-day management of the company and is not subject to the control of the executive directors or management, the approach taken by the High Court in dealing with this issue was correctly on point.

[19] Furthermore, the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 2 MLRA 435 held that the "degree of control" remains a significant criterion in distinguishing a contract of service from a contract for services.

> "The 'degree of control' even though may not be a sole criterion still plays an important role when deciding if a contract is one of service or for services."

[20] In the present case, the Revenue's own witness admitted that:

(a) no offer of employment, increment letter, or employee handbook was provided to the Taxpayer;

(b) no EPF or PERKESO contributions were made for the Taxpayer by the public listed companies;

(c) the Taxpayer was not subject to the control of the companies regarding working hours or leave;

(d) no employee ID card or name card was issued to the Taxpayer; and

(e) the Taxpayer paid GST to the public listed companies, which an employee would not be required to do.

[21] We therefore find that the absence of a master-servant relationship was clear and unequivocal, and the Taxpayer was not an employee.

F2. On the Taxability of Directors' Fees under Section 4(b) of the ITA

[22] In light of our earlier finding that the Taxpayer was not an employee, it follows that the directors' fees, allowances, and consultancy fees received by him could not be taxed as "gains or profits from an employment" under s 4(b) of the ITA.

[23] We agree with the High Court that the case of *Ever-Yield Sdn Bhd v. Yap Keat Choon & Other Appeals* [2022] MLRAU 189 was the correct authority on this issue. In that case, the Court of Appeal held as follows:

> "A director of a company therefore does not have a right to be remunerated as of right by virtue of his office except as provided by its constitution or approved by its shareholders.... Neither is the fact that a person is a director of a company in itself makes that person an employee, which would otherwise entitle him to remuneration as an employee."

[24] Based on our observation, the Taxpayer's directors' fees were only payable upon approval by the shareholders at an annual general meeting, as clearly demonstrated by the AGM reports and minutes exhibited in the Record of Appeal. In contrast, an employee's salary is paid monthly as of right, and the employee can seek redress through the Industrial Court if unpaid.

[25] We disagree with the Revenue's reliance on the case of The Queen on the Prosecution of *JB Saunders v. The Postmaster General* (1876) 1 Q.B.D. 658, as that case pertained to the word "emolument" and did not address the specific nature of directors' fees. Insofar as the facts of this case are concerned, we are of the view that the proper income head for the Taxpayer's receipts is "gains or profits from a business" under s 4(a) of the ITA, not employment income under s 4(b).

F3. On the Legal Status of Bursa Malaysia's Practice Note

[26] With reference to this issue, the SCIT concluded that the definition of an independent director set by Bursa Malaysia was a mere guideline. The High Court disagreed with the SCIT. We agree with the HCJ as Bursa Malaysia's Listing Requirements, including Practice Note 13, are issued pursuant to the Capital Markets and Services Act 2007 and are binding on all listed companies.

[27] Under para 1.01 of the Listing Requirements, an "independent director" is defined as "a director who is independent of management and free from any business or other relationship which could interfere with the exercise of independent judgment or the ability to act in the best interests of an applicant or a listed issuer".

[28] We are of the view that the very concept of an independent director presupposes that such a director is not an employee. An independent director is appointed to provide independent oversight and advice, not to be subject to the control of management.

[29] To disregard the regulatory framework governing listed companies would be to ignore the commercial and legal reality within which the Taxpayer operated. Hence, while we agree with the submission of the Senior Revenue Counsel that the ITA prevails over any inconsistent administrative guideline, we disagree that the Bursa Malaysia Listing Requirements are inconsistent with the ITA. To the contrary, they provide valuable context for interpreting the ITA's provisions in a commercial setting, and the SCIT should have had regard to them.

F4. On the Evidentiary Value of EA Forms

[30] On this issue, we agree with the High Court's finding that an EA Form is a standard administrative document prescribed by the Revenue for reporting payments. While it is a mandatory statutory form under s 83(1A) of the ITA, it is not determinative of a person's employment status for tax purposes.

[31] This issue was, in fact, confirmed by the Revenue's own witness, who, during cross-examination, confirmed that:

(a) the EA Form is a standard format prepared by the Revenue (see p 62 of the Record of Appeal at encl 16);

(b) the format includes directors' fees as a category of income to be reported (see p 63 of the Record of Appeal at encl 16);

(c) all companies are required by law to issue EA Forms to recipients of directors' fees (see pp 62 and 64 of the Record of Appeal at encl 16); and

(d) failure to issue an EA Form is an offence under s 120 of the ITA (see p 62 of the Record of Appeal at encl 16).

[32] The above evidence shows the inclusion of directors' fees in an EA Form is a matter of administrative compliance, not a conclusive legal classification. The SCIT had therefore erred in treating the EA Form as *prima facie* evidence of an employment relationship. We must emphasise that the legal nature of the relationship between the Taxpayer and the public listed companies must be determined by examining the substance of that relationship, not by relying on a standardised reporting form. To hold otherwise would allow administrative convenience to override substantive legal rights and obligations.

F5. On the Evidentiary Value of the Company Secretaries' Letters

[33] On this issue, we agree with the High Court's finding that the SCIT and the Revenue had erred in disregarding the letters from the company secretaries confirming the Taxpayer's status as an independent non-employee director. The SCIT's refusal to accept these letters solely because they were signed by the company secretary rather than by a director was wrong in law, premised on a fundamental misunderstanding of the role and authority of a company secretary under Malaysian law.

[34] In this regard, s 216 of the Companies Act 2016 provides that except as otherwise provided by the Act, the constitution or any resolution of the board or members of the company, the directors may delegate any power of the board to any committee of the board, director, officer, employee, expert or any other person.

[35] In *Tan Ban Uu & Anor v. Ong Ghin Leong* [2017] MLRHU 115, the High Court (Collin Lawrence Sequerah J, as he then was) held as follows:

> "The company secretary has been described as one who ensures compliance with the regulations affecting the company.... His duties are primarily to the board of directors."

[36] It is trite that a company secretary is an officer of the company. A letter issued by a company secretary on a matter of corporate status, such as whether a person is an employee or an independent director, is to be treated as issued with the authority of the board of directors. The Revenue's refusal to accept these letters was clearly unreasonable and unjustified.

F6. Position of Independent Directors in Other Commonwealth Jurisdictions

[37] As a matter of commercial importance, we had the opportunity of reviewing the position of independent directors in other Commonwealth jurisdictions. Our review found that the courts have consistently held that an independent director is not an employee:

(a) In *A & Anor v. C & Anor [2015] SASC 35*, the Supreme Court of South Australia held that a non-executive director is not an employee as their rights and obligations arise under general law, rather than from an employment contract;

(b) In *Ace Insurance Ltd v. Trifunovski* [2014] 2 ILJ 399, the Federal Court of Australia held that the existence of a contract alone does not define an employment relationship; the substance of the engagement must be examined; and

(c) In *Kalyani Forge Ltd Pune v. Assessee* (27 May 2015) ITA No.1133/PN/2013, the Indian Income Tax Appellate Tribunal held that non-executive directors are not employees for tax purposes.

[38] Whilst the above foreign authorities are not binding on our courts, they are indeed persuasive. This fortifies our view that an independent director is not an employee and ought not to be subjected to income tax under the category of an employee.

F7. On the Time-Barred Assessments and Negligence under Section 91(3)

[39] In relation to the additional assessments for YAs 2002 to 2009, which were issued outside the 5-year limitation period under s 91(1) of the ITA, the Revenue bore the burden of proving that the Taxpayer had been "negligent" within the meaning of s 91(3) of the ITA as held by the Court of Appeal in *Keysight Technologies Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2024] 6 MLRA 287 and *Etiqa Family Takaful Berhad v. Ketua Pengarah Hasil Dalam Negeri & Another Appeal* [2025] 2 MLRA 463.

[40] In *Keysight (supra)*, Collin Sequerah JCA (now FCJ) in delivering judgment, held that:

> "a taxpayer could not be negligent by relying upon professional advice and had not wilfully classified the sum received without the benefit of relevant advice from specialists."

[41] Similarly, in *Merimen Online Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2025] 2 MLRA 608, the Court of Appeal reaffirmed that simply claiming a tax treatment that the IRB disagrees with does not, by itself, amount to negligence — particularly where the taxpayer has:

i. acted on professional advice;

ii. provided full cooperation; and

iii. made full and frank disclosure.

[42] Applying the above principles to the present appeal, it is our finding that:

(a) the Revenue had accepted the Taxpayer's tax treatment from 1997 until 2015 — a period of approximately 17 years. If the treatment was so obviously wrong that it amounted to negligence, the Revenue would have (or should have) raised the issue much earlier;

(b) the Taxpayer had sought and obtained advice from a professional and independent tax firm. He did not act on his own whim or without proper guidance;

(c) the Taxpayer made full and frank disclosure of his arrangement with the Management Companies in his tax returns. There was no concealment or attempt to hide the true nature of the receipts;

(d) the Taxpayer filed all his tax returns within the prescribed statutory time frame. There was no delay or default;

(e) the Taxpayer provided full cooperation to the Revenue during the 2015 audit; and

(f) there was no evidence of any fraudulent intent or wilful default on the part of the Taxpayer. The dispute was at its heart a disagreement over the correct legal interpretation of the ITA (s 4(a) versus s 4(b)).

[43] We therefore conclude that the SCIT's finding of negligence was erroneous and is set aside. Consequently, the time-barred assessments for YAs 2002 to 2009 were invalid.

F8. On the Imposition of Penalty under Section 113(2)

[44] Since the Revenue had failed to prove negligence under s 91(3) of the ITA and the underlying assessments for the time-barred years were invalid, we are constrained to hold that there is no basis for the penalty under s 113(2) of the ITA for those years. We further find that the penalty imposed for the years that were not time-barred was without proper justification.

[45] Despite the attempt by the Senior Revenue Counsel to salvage the Revenue's case by contending that estoppel does not lie against the Revenue to preclude it from departing from existing method or practice and changing its opinion by adopting a different form of assessing tax, with reliance placed on the case of *Government Of Malaysia v. Sarawak Properties Sdn Bhd* [1993] 3 MLRH 760. We find such submission untenable pursuant to the Federal Court decision in *Ketua Pengarah Hasil Dalam Negeri v. Kind Action (M) Sdn Bhd* [2025] 3 MLRA 403 (see paras 62 and 63) which held that the decision in *Government Of Malaysia v. Sarawak Properties Sdn Bhd* as the principles of estoppel and legitimate expectation in Malaysia, as in other jurisdictions such as India and Hong Kong have evolved.

[46] As far as the facts of the present appeal are concerned, the Taxpayer had at all times acted in good faith. *Ipso facto*, whilst the Revenue's power to impose a penalty under s 113(2) of the ITA is discretionary, it must be exercised judiciously. In light of the findings that the Taxpayer was not an employee and that the dispute was one of interpretation, the imposition of a penalty was unreasonable and ought to be set aside.

G. Conclusion

[47] For all the foregoing reasons, we hereby make the following orders:

a. the Revenue's appeal is dismissed;

b. the decision of the learned High Court Judge dated 14 December 2023 was affirmed;

c. the assessments raised by the Revenue for YAs 2002 to 2012 are set aside;

d. the penalty imposed under s 113(2) of the ITA is set aside; and

e. we allow the Taxpayer's oral application that the Revenue refund all taxes and penalties paid by the Taxpayer in relation to the impugned assessments within 3 months from the date of the order, given the substantial sum involved and the Taxpayer's age.

[48] We make no orders as to the costs of this appeal.