DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM NEGERI WILAYAH PERSEKUTUAN KUALA LUMPUR, MALAYSIA
(BAHAGIAN KUASA-KUASA KHAS)
RAYUAN SIVIL NO: WA-14-4-03/2020

ANTARA

KEYSIGHT TECHNOLOGIES MALAYSIA SDN BHD
(No. Syarikat 199801007405 (463532-M)) **...PERAYU**

DAN

KETUA PENGARAH HASIL DALAM NEGERI **...RESPONDEN**

(Dalam Perkara Pesuruhjaya Khas Cukai Pendapatan di Putrajaya No. Rayuan Pkcp(R) 408/2018

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JUDGMENT

Introduction

1. The Appellant on 25.3.2020 filed a Notice of Appeal **(Enclosure 1)** to appeal against the Deciding Order of the Special Commissioners of Income Tax **(SCIT)** dated 12.3.2020.

2. The SCIT had unanimously disallowed the Appellant's claim and/or appeal against the Respondent's decision to raise the notice of additional assessment dated 13.6.2017 on the Appellant for the Year of Assessment **(YA)** 2008 for the amount of RM311,057,602.46 as income under section 4(f) of the Income Tax Act 1967 **(ITA)** together with the imposition of penalty at the rate of 45%.

3. After the hearing, I dismissed the Appellant's appeal in Enclosure 1. I will now set out the grounds of my judgment.

Background Facts

4. The agreed facts before the SCIT which have been marked as "Exhibit B" are as follows:-

   4.1 The Appellant was incorporated on 5.6.1998 under the name Hewlett-Packard Microwave Products (M) Sdn Bhd.

   4.2 In 1999, the Appellant changed its name to Agilent Technologies Microwave Products (M) Sdn Bhd., following a spin-off where Hewlett-Packard Company undertook a global spin-off of its test and measurement and related division to form Agilent Technologies **(Agilent).**

   4.3 The Appellant went through another name change on 1.8.2014, as part of the spin-off of the Agilent's Electronic Measurement Group into a new company called Keysight Technologies, and is known as Keysight Technologies Malaysia Sdn. Bhd. since then.

   4.4 The Respondent issued a notice of additional assessment dated 13.6.2017 for RM311,057,602.46 **(Impugned Assessment).**

   4.5 The Appellant being aggrieved by the Impugned Assessment appealed to the SCIT by filing a notice of appeal (Form Q) dated 10.7.2017 against the Impugned Assessment.

5. Based on the testimony of witnesses and documentary evidence before the SCIT during the SCIT Appeal, the following facts have been established: -

5.1 Since 1.11.2000 the Appellant has enjoyed, amongst others, Pioneer Incentive for its manufacturing activities granted by the Malaysian Investment Development Authorities **(Pioneer Incentive).** The Pioneer Incentive status granted the Appellant a 10-year tax exemption for manufacturing various microwave devices and test instruments.

5.2 Since its inception, and incidental to its manufacturing and marketing activities as a full-fledged manufacturer, the Appellant had developed technical knowhow.

5.3 On 1.3.2008, the Appellant ceased to operate as a full-fledged manufacturer and converted into a contract manufacturer for Agilent Technologies International s.a.r.l **(ATIS) (Manufacturing Model Conversion).** Among others, the following agreements were signed:

I. Manufacturing Services Agreement dated 1.3.2008 between the Appellant and ATIS **(Manufacturing Services Agreement)**;

II. Intellectual Property Transfer Agreement dated 1.3.2008 between the Appellant on the one part and ATIS and Agilent Technologies Inc on the other **(Intellectual Property Transfer Agreement)**.

5.4 Following the Manufacturing Model Conversion on 1.3.2008:

I. In exchange for service fees on a cost-plus basis, the Appellant performed contract manufacturing services **(CM Services)** for ATIS in accordance with specification framework provided by ATIS, with ATIS supplying raw materials on a consignment basis; and

II. the Appellant sold, transferred and assigned all beneficial rights in and to "Technology" (as defined) to ATIS, and warranted that it would register any legal title (as defined) in and to the "Technology" to Agilent Inc.

5.5 "Technology" is defined in the Intellectual Property Transfer Agreement dated 1.3.2008 to encompass any protected and unprotected knowhow including manufacturing processes and intangible property rights. RW1 also agreed during cross examination that the transaction referred to in the Intellectual Property Transfer Agreement dated 1.3.2008 is the very transaction recorded in the Appellant's YA 2008 accounts.

5.6 Consistent with the above, there is a Valuation Report dated 11.3.2008 prepared by Horst Frisch **(IP Valuation Report)** which valued the Intellectual Property Rights in question at RM821,615,000.

5.7 On 20.03.2015, the Respondent requested the Appellant to furnish the following documents for the years of assessment 2010 until 2013:

(a) Audited accounts;

(b) Tax computations;

(c) Audit adjustment;

(d) Tax return forms (Form C) and Forms R;

(e) Trial balance and charts of account;

(f) Computations schedule of section 108;

(g) Incentive application and approval forms;

(h) Organisation chart and structure chart of multinational group; and

(i) Ledger in an edited softcopy and excel form.

5.8 The Appellant furnished all the documents on 30.04.2015 and also informed that the company had changed its name from Agilent Technologies Microwave Product (M) Sdn Bhd to Keysight Technologies Malaysia Sdn Bhd.

5.9 On 9.03.2017, the Respondent issued the audit findings to the Appellant which includes issue on gain from the transfer of technical knowhow to a related company in Switzerland totaling RM821,615,000. The Respondent informed the Appellant that the gain of RM821,615,000 was revenue in nature and would be subjected to tax. This was on the basis that the Appellant was still using the same technical knowhow to manufacture the same product despite the transfer of technical knowhow. Hence, it was not an outright sale and the gain was not capital in nature.

5.10 On 28.03.2017, the Appellant informed the Respondent that it carried the activity as a full-fledge manufacturer prior to 1.03.2008. The Appellant carried out manufacturing intangible and marketing intangible since 1998. The Appellant further informed that on 1.03.2008, it had entered into Manufacturing Services Agreement with its related company in Switzerland and had become a contract manufacturer.

5.11 Based on the Manufacturing Services Agreement, the legal right and beneficial right on the manufacturing intangible and marketing intangible had been sold and transferred out to its related companies in Switzerland and United States.

5.12 The Appellant also stated that the gain from the transfer of the manufacturing intangible and marketing intangible was capital in nature as it was an outright sale and the sale was not for profit purposes.

5.13 On 6.4.2017, the Respondent requested the following explanation and documents relating to intangible property: -

a) Particulars on the sale of intangible property;

b) Sale and purchase agreement on the intangible property which was manufacturing intangible and marketing intangible to the related company in Switzerland and United States.

c) Confirmation on whether the R&D activity was in relation to intangible property and if not, state the difference of the R&D activity carried out before and after the restructuring of the Appellant.

5.14 On 26.04.2017, the Appellant gave its reply as requested by the Respondent:

5.15 On 9.06.2017, the Respondent replied to the Appellant's letter dated 26.04.2017 and concluded that the gain on the transfer of the technical knowhow totaling RM821,615,000 was revenue in nature which would be subjected to tax under section 4(f) of the ITA on the following reasons:

a) The transfer of technical knowhow was not an outright sale as the evidence showed that the Appellant was still using the technical knowhow in the manufacturing of its product after 1.03.2008;

b) The gain on the transfer of technical knowhow was for the payment on the loss of income since it was related to the change of the Appellant's function from a full-fledged manufacturer to a contract manufacturer which resulted in a reduction of profit margin of the Appellant after the change of the function.

5.16 The Respondent also informed the Appellant that an assessment on the additional tax will be raised on the negligence of the Appellant for not reporting the income together with the penalty at the rate of 45% on the additional tax.

6. On 13.6.2017, the Respondent issued its Notice of Additional Assessment for YA 2008, imposing an additional tax and penalty on the Appellant amounting to RM311,057,602.46 **(Form JA).** The assessment was issued beyond the 5 year time bar period provided for under Section 91(1) of the ITA.

7. Subsequently, on 19.06.2018, the Appellant furnished a letter to the Respondent together with the documentation explaining the basis of valuation for the marketing and manufacturing intangible totaling RM821,615,000 after the issuance of the notice of additional assessment dated 13.06.2017.

8. On 10.07.2017, the Appellant filed a notice of appeal to the SCIT against the Form JA. On 12.3.2020, the SCIT dismissed the Appellant's appeal on the following grounds:

a. The time-bar under Section 91(1) of the ITA does not apply to the Respondent's assessment although it was made 5 years after the expiration of YA 2008 as the Respondent had correctly and sufficiently established negligence on the part of the Appellant pursuant to Section 91(3) of the ITA.

b. The proceeds from the sale of the Intellectual Property Rights by the Appellant is revenue in nature and subject to tax under the ITA. There is no outright sale of the Intellectual Property Rights by the Appellant to ATIS as (i) there is no evidence of transfer of legal title of the Intellectual Property Rights and (ii) the Appellant was still using the Intellectual Property Rights after its transfer to ATIS.

c. The Respondent had correctly imposed the penalty under section 113(2) of the ITA to the Appellant.

The Issues

9. The main issues in this appeal are as follows:-

i. whether the Respondent is time-barred under Section 91(1) of the ITA from issuing the Notice of Additional Assessment for the year of assessment 2008?;

ii. whether the proceeds from the sale of marketing and manufacturing intangibles by the Appellant to Agilent Technologies International s.a.r.l is capital in nature, and therefore not subjected to tax under the ITA or are the proceeds revenue in nature and subject to tax under the ITA;

iii. whether the penalty imposed under section 113 of the ITA is correct?.

The decision of the Court

Whether the Respondent is time-barred under Section 91(1) of the ITA from issuing the Notice of Additional Assessment for the year of assessment 2008?;

10. The Appellant argued that the Respondent is time barred under section 91(1) of the ITA from issuing the Notice of Assessment for the YA 2008.

11. It is not in dispute that the time bar provision under section 91(1) of the ITA clearly provides that the Respondent may only issue an assessment within 5 years of the specific YA.

12. It is also not in dispute that the statutory limitation period for the Respondent to re-visit the Appellant's YA 2008 income tax return expired on 31.10.2013. The Form JA was issued on 13.6.2017 and had remained time-barred for almost 4 years.

13. However, section 91(3) of the ITA provides that the Respondent may issue an assessment after the expiration of the time period of 5 years on grounds of fraud or wilful default or negligence.

14. Section 91(3) of the ITA provides as follows :-

> **Assessments and additional assessments in certain cases**
>
> (3) **The Director General where it appears to him that –**
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) **any person has been negligent,**
>
> in connection with or in relation to tax, **may at any time make an assessment in respect of that person for any year of assessment** for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.
>
> (emphasis added)

15. Based on the audit conducted by the Respondent on the Appellant by way of letters dated 3.1.2013 and 20.3.2015 requesting detailed documents for the financial years ended 31.10.2007 until 31.10.2009 and the years of assessment 2010 until 2013, the Respondent finds that the Appellant was negligence for:-

    a. Failure to support the claim that the gain from the transfer of technical knowhow (i.e. the marketing and manufacturing intangibles) by the Appellant to Agilent Technologies International s.a.r.l totaling RM821,615,000 is an outright sale.

    b. Failure to furnish the document and information as requested by the Respondent in the letter dated 6.04.2017 on the valuation of the marketing and manufacturing intangibles.

16. This was reflected from the testimony of the Respondent's witness, Hairaneey Mhd (RW1) during examination-in-chief as stated at pages 2913-2914 of the Kenyataan Saksi (RWS1) Records of Appeal Part C Q5 and Q6.

17. I find that based on the review of the documents, the Respondent has given the initial finding vide a letter dated 9.03.2017 on the issue of the gain on the transfer of technical knowhow (i.e. the marketing and manufacturing intangibles) to a related company in Switzerland for the amount of RM821,615,000.

18. The letter explains that the transfer of technical knowhow (i.e. the marketing and manufacturing intangibles) is not an outright sale since the Appellant is still using the technical knowhow in the manufacturing of the same product of the Appellant even after the sale of the technical knowhow.

19. Therefore, the gain from the transfer of technical knowhow is a revenue receipt which is subject to tax. [See page 2919 of the Kenyataan Saksi Responden (RWS1) Records of Appeal, Part C in answer to question 8].

20. It is also to be noted that RW1 further stated the Appellant given its reply by explaining in the letter dated 28.03.2017 that the legal right and beneficial right of the manufacturing intangible and marketing

intangible has been transferred through the Manufacturing Services Agreement dated 1.03.2008 and the gain from transfer of the manufacturing intangible and marketing intangible is capital as it is an outright sale.

21. However, according to RW1 the document shows that only the beneficial right of the manufacturing intangible and marketing intangible has been transferred and there is no evidence that indicates the transfer of the legal right. [See pages 2921, 2922, and 2923 of the Kenyataan Saksi Responden (RWS1), Records of Appeal, Part C in answer to questions 10, 11, 12 and 13. Page 2921 of the Kenyataan Saksi Responden (RWS1) Records of Appeal, Part C in answer to question 10:]

22. Based on the Intellectual Property Transfer Agreement dated 1.3.2008, I am of the view that there is no evidence on the transfer of the legal right on the technical knowhow or the intellectual property rights from the Appellant to the related company. This has been clearly stated in Kenyataan Saksi Responden (RWS1) at page 2927 Records of Appeal Part C QA:17.

23. I find that the Appellant has failed to furnish the document and information on the valuation of the marketing and manufacturing intangibles as requested by the Respondent in the letter dated 6.4.2017.

24. The Respondent merely informs that a valuation has been made on the intellectual property rights for purposes of the transfer without furnishing any documents to support information despite the request by the Respondent to show how the valuation has been made. [See pages 2923 and 2924 of the Kenyataan Saksi Responden (RWS1) Records of Appeal, Part C in answers to questions 14 and 15:]

25. Therefore, I view that the Respondent has issued the audit finding letter dated 9.6.2017 stating that the transfer on technical knowhow is not an outright sale as the technical knowhow is still being used in the manufacturing activity of the company's product and the gain on the transfer relates to payment for loss of future income due to the failure of the Appellant to provide evidence that the gain from the transfer of technical knowhow totaling RM821,615,000.00 is an outright sale.

26. Further, I also find that the Respondent failed to furnish the document and information as requested by the Respondent in the letter dated 6.04.2017 on the valuation of the marketing and manufacturing intangibles. [See pages 2928-2929 of the Kenyataan Saksi Responden (RWS1) Records of Appeal, Part C in answers to question 18:]

27. The reasons from the findings of the audit including the explanation on the negligence of the Appellant can be gleaned from the Respondents letter dated 9.6.2017.

28. Further, I find that the negligence of the Appellant has been further elaborated by the Appellant's witness, Mr Tay Eng Su (AW1) and Vivien Han (AW2).

29. AW1 during the cross-examination has referred to clause 3.4 of the Intellectual Property Transfer Agreement dated 1.03.2008 to state that the legal and beneficial ownership of the Intellectual Property Rights has been transferred from the Appellant to its related company. [See page 27 of the Notes of Proceeding (Cross examination of AW1), Records of Appeal, Part A:].

30. Having perused clause 3.4 of the Intellectual Property Transfer Agreement dated 1.03.2008 I find that it does not state that the legal ownership of the Intellectual Property Rights has been transferred from the Appellant to its related company:

> "3.4 Except as expressly provided otherwise in this agreement and to the fullest extent permitted by law, assignor hereby disclaims any and all warranties, express or implied, with respect to the technology, including but not limited to, any implied warranties or merchantability, fitness for a particular purpose, or non-infringement, and the parties agree that the technology is being transferred "as is".".

31. Further, I find that even clause 7 of the Manufacturing Services Agreement dated 1.03.2008 does not show proof that the legal ownership of the Intellectual Property Rights has been transferred from the Appellant to its related company. [See statement of AW1 during the cross examination at page 29 of the Notes of Proceeding (Cross examination of AW1) Records of Appeal, Part B:].

32. Clause 7.1 of the Manufacturing Service Agreement states as follows:-

> "7.1 **Intellectual Property Rights** Contractor hereby acknowledges that Company or its licensor is the owner, or authorized licensee, of all rights in and to all of the Intellectual Property Rights, and Contractor shall acquire no rights whatsoever in or to any of such Intellectual Property Rights, except as specifically provided in this Agreement. Contractor shall not take any action that might impair in any way right or interest of Company in or to any of the Intellectual Property Rights".

33. Further, I am of the view that AW2 has also failed to support her contention that the intellectual property rights has been legally transferred from the Appellant to its related company. This can be shown in the statement by AW2 during the cross-examination at page 33 of Notes of Proceeding (Cross examination of AW2) Records of Appeal Part B:

34. Therefore, based on the testimonies of witnesses and all the relevant documents tendered during the trial before the SCIT, I am of the view that the evidence of negligence on the part of the Appellant has been established by the Respondent based on the following facts:-

    34.1 Failure to provide evidence that the gain from the transfer of technical knowhow (i.e. the marketing and manufacturing intangibles) by the Appellant to Agilent Technologies International s.a.r.l totaling RM821,615,000 is an outright sale;

    34.2 Failure to furnish the document and information as requested by the Respondent in the letter dated 6.04.2017 (Refer to pages 172-176, Records of Appeal, Part B) on the valuation of the marketing and manufacturing intangibles.

35. The Appellant had argued that the Respondent has not particularized the negligence. However, I find that this argument is devoid of merit.

36. Upon perusal of the Respondent's letter dated 9.6.2017, I find that it clearly states that the negligence of the Appellant arises from the findings that the Respondent has failed to report the gain on the transfer of technical knowhow as income and the transfer of technical knowhow is not an outright sale on the following reasons:

a. The Appellant is still using the technical knowhow for the product manufacturing activity.

b. The gain received from the transfer of technical knowhow relates to payment received for loss of income.

37. Added to that, I find that the provisions of the ITA do not require the Respondent to particularize the negligence of the Appellant.

38. In **Chong Woo Yit v. Government of Malaysia [1989] 1 MLRA 189; [1989] 1 CLJ (Rep) 9; [1989] 1 MLJ 473**, the then Supreme Court has held that the Respondent would only require to show fraud, or wilful default or negligence relating to tax for the particular year of assessment when it held as follows:-

"...for the purposes of an assessment or additional assessment of tax under s91 of the Income Tax Act 1967 not made in any year of assessment or within 12 years of assessment after its expiration, **the Revenue would still have to show fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.**"

(emphasis added)

39. On this issue, I find that the SCIT in its ground of decision at page 122 of the Records of Appeal Part A had made the following findings:

b. We agree with the Respondent's Submission that the findings of negligence on the part of the Appellant are as follows:-

i. Failure to support the claim that the gain from the transfer of technical knowhow (i.e. the marketing and manufacturing intangibles) by the Appellant to Agilent Technologies International totaling of RM821,615,000.00 is an outright sale;

ii. Failure to furnish the document and information as requested by the Respondent in the letter dated 6.4.2017 on the valuation of the marketing and manufacturing intangibles;

iii. RW1 (Respondent's Witness) said that-

"...berdasarkan fakta ditemui, Responden berpendapat bahawa keuntungan pindahmilik technical knohow kepada syarikat berkaitan di Switzerland berjumlah RM821,615,000.00 adalah merupakan penerimaan hasil di bawah seksyen 4(6) ACP dan

boleh dikenakan cukai. Ini adalah kerana Perayu masih menggunapakai technical knowhow dalam pengilangan produk yang sama walaupun kini dibuat secara kontrak (contractual manufacturing) selepas pemindahan technical knowhow tersebut. Oleh itu, ia merupakan outright sale dan keuntungannya adalah bukan penerimaan modal."

40. Based on the above, I view there is no error in the SCIT decision and there is no reason to disturb the findings of the SCIT.

Whether the proceeds from the sale of marketing and manufacturing intangibles by the Appellant to Agilent Technologies International s.a.r.l is capital in nature and therefore not subjected to tax under ITA or are the proceeds revenue in nature and subject to tax under ITA.

41. It is to be noted that there are various cases which have been decided by the court on the issue of capital or revenue based on facts and circumstances of each case.

42. In **Harry Ferguson Motors (Ltd) v. IRC (1951) 33 TC 15 at 42** it was held as follows:-

"During the debate many cases were cited in which a decision was reached as to **whether particular payments were capital or income... There is so far as we are aware no single infallible test for settling the vexed question whether a receipt is of an income or a capital nature. Each case must depend upon its particular facts** and what may have weight in one set of circumstances may have little weight in another. Thus the use of **the words 'income' and 'capital' is not necessarily conclusive; what is paid out of profits may not always be income**; and what is paid as consideration for a capital asset may on occasion be received as income. One has to look to all the relevant circumstances and reach a conclusion according to their general tenor and combined effect".

(emphasis added)

43. I find that the Appellant has raised the issue of badges of trade in its submission. The Appellant relied on the following case laws to strengthen its case:-

a. NYF Realty Sdn Bhd v. Comptroller of Inland Revenue [1950-1985] MSTC 63;

b. Alf Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] MSTC 4, 423;

c. Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd [2006] MSTC 4,256

44. Upon perusal of the above case laws, I am of the view that it can be distinguished from the Appellant's case due to different facts of the case.

45. Added to that, I find that the facts of the Appellant's case are different from the above authorities as they do not involve acquisition of a property. Instead, the facts deal with the intellectual property rights which have been developed by the Appellant and subsequently sold or transferred to another related party. Thus, the authorities referred to by the Appellant are not relevant.

46. Based on the evidence produced before the SCIT, I am of the opinion that there is no outright sale of the Intellectual Property Rights of RM821,615,000.00 based on the followings:-

a. There is no evidence of transfer of ownership of the Intellectual Property Rights from the Appellant to its related companies, Agilent Technologies International s.a.r.l ("ATIS"); and

b. The Appellant is still using the Intellectual Property Rights for the manufacturing activity of its product prior to the transfer (i.e before 1.1.2008) and after the transfer of the Intellectual Property Rights.

47. It is not disputed that in Note 17(b) to the Statutory Financial Statements for the financial year ended 31.10.2008, the amount of RM821,615,000 is disclosed as "Transfer out of technical knowhow to a related corporation". However, I am of the opinion that the disclosure in the Statutory Financial Statements does not represent or give any connotation that there is an outright sale of technical knowhow or the Intellectual Property Rights.

48. I find support in my view by relying in the case of **Director-General Of Inland Revenue v Highlands Malaya Plantations Ltd [1988] 2 MLJ 99** the Supreme Court refers to the House of Lords' decision in **Commissioners of Inland Revenue v. Wesleyan & General**

Assurance Society [1948] 30 TC 11 which makes the following observation:

> "It may be well to repeat two propositions which are well established in the application of the law relating to Income Tax. First, **the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction.** To call a payment a loan, if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. **The question always is what is the real character of the payment, not what the parties call it."**

(emphasis added)

49. The Appellant contended that the entire legal and beneficial ownership of the Intellectual Property Rights has been transferred to ATI and ATIS is based on the Manufacturing Services Agreement and Intellectual Property Rights Transfer Agreement both dated 1.3.2008.

50. However, having perused the 2 agreements, I find that the documents do not show any evidence that the entire legal beneficial ownership of the Intellectual Property Rights has been transferred to ATI and ATIS.

51. I find that section 2.1 of the Intellectual Property Rights Transfer Agreement dated 1.3.2008 clearly states that the legal title shall not be transferred to ATS.

52. At the most, I find that the agreement indicates only the beneficial rights to the technology has been transferred to ATIS. However, there is no evidence in the agreement to prove of the registration of the legal title has been made under ATI. Thus, I view that the agreement does not support the Appellant's contention that the entire legal and beneficial ownership of the Intellectual Property Rights has been transferred to ATI and ATIS.

53. The Appellant further contended that it has been licensed to use the Intellectual Property Rights under the Manufacturing Services Agreement dated 1.3.2008 following the Manufacturing Model Conversion from being a full-fledge manufacturer to a contract manufacturer.

54. However, I find that the Manufacturing Services Agreement dated 1.3.2008 shows no evidence that the Intellectual Property Rights of the product which has been licensed to the Appellant is the same product as mentioned in the Manufacturing Services Agreement.

55. Section 2.2 of the Agreement merely states that ATIS grants a license to the Appellant for the use of the Intellectual Property Rights on certain products. There is no explanation of the type of product relating to the Intellectual Property Rights.

56. Further, I find that while there is a specific provision on the Intellectual Property Rights under section 7.1 of the Agreement but the provision does not make any reference to the type of product to be licensed to the Appellant and whether the licensed product is similar to the product as stated in the Intellectual Property Transfer Agreement dated 1.3.2008.

57. Hence, upon reading the Manufacturing Services Agreement dated 1.3.2008 and the Intellectual Property Transfer Agreement dated 1.3.2008, I am of the opinion that the product stated in the Manufacturing Services Agreement is different from the product as stated in the Intellectual Property Transfer Agreement. I find that there is no evidence to relate the product mentioned in the two agreements refer to the same product.

58. Thus, it is my view that the Manufacturing Services Agreement dated 1.3.2008 and the Intellectual Property Transfer Agreement dated 1.3.2008 when read as a whole do not show proof that there is an outright sale Intellectual Property Rights by the Appellant to ATI and ATIS and is concluded as follows:-

    a. There is only beneficial right to the Intellectual Property Rights that has been transferred by the Appellant to ATIS;

    b. There is no evidence of registration of title of the Intellectual Property Rights under the name of ATI; and

    c. There is evidence that the Intellectual Property Rights to the product in the Manufacturing Services Agreement and the Intellectual Property Transfer Agreement are the same.

59. The SCIT in its grounds of the decision at page 122 of the Records of Appeal, Part A had made the following findings:-

5 issue 2:

Whether the proceeds from the sale of marketing and manufacturing intangibles by the Appellant to Agilent Technologies International s.a.r.l is capital in nature, and therefore not subjected to tax under ITA 1967, or are the proceeds revenue in nature and subject to tax under ITA 1967:

a) We also agreed that there are various cases which have been decided by the court on the issue of capital or revenue, each and every case is to be decided based on the surroundings facts and circumstances of the case. The badges of trade test as relied by the appellant is not inclusive. The cases of NYF Realty Sdn Bhd, ALF Property Sdn Bhd, can be distinguished from the Appellant's case due to the different facts of the case. The Appellant's case is different from those authorities as they do not involve acquisition of a property. Instead the facts deal with the Intellectual property rights which have been developed by the Appellant and subsequently sold or transferred to another related party.

b) We also agreed with the Respondent's Submission that there is no outright sale of the IP Rights of RM821,615,000.00 because there is no evidence of transfer of ownership of the IP Rights from the Appellant to its related companies. Agilent Technologies and Appellant still using the IP Rights from the manufacturing activity of its product prior to the transfer and after the transfer of the IP Rights.

c) The Manufacturing Services Agreement dated 1.3.2008 and the Intellectual Property Transfer Agreement dated 1.3.2008 when read as whole do not show proof that there is an outright sale IP Right by the Appellant to ATI and ATIS and is concluded as follows:

   i. There is only beneficial rights to the IP Rights that has been transferred by the Appellant to ATIS;

   ii. There is no evidence of registration of title of the IP Rights under the name of ATI; and

   iii. There is evidence that the IP Rights to the product in the Manufacturing Service Agreement and the Intellectual Property Transfer Agreement are the same.

d) The amount of RM821,615,000.00 is proven to represent the projection of future income of the Appellant for the years 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015 arising from the change of the Appellant's function from full fledge manufacturer to a contract manufacturer. We agreed that the amount of RM821,615,000.00 which has been received by the Appellant is revenue in nature.

60. Based on the above, I view there is no error in the SCIT decision and there is no reason to disturb the finding of the SCIT.

Whether the penalty imposed under section 113 of the ITA is correct

61. It is not disputed that the respondent has discretionary power to impose penalty against tax payer under subsection 113(2) of the ITA 1967 which reads as follows:-

Incorrect returns

(1) Any person who –

(a) Makes an incorrect return by omitting or understanding any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax of any other person,

shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

(2) Where a person,

(a) Makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

Then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, **the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information has been accepted as correct;** and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3),

so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

(emphasis added)

62. Based on the above, it is clear that it is the discretion of the Director General of the Respondent to impose penalties under subsection 113(2) of the ITA after taking into consideration all relevant facts and circumstances of the case.

63. In the case of **Insaf Tegas Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri MTKL Civil Appeal No.: RI-14-14-10/2013; Mahkamah Rayuan Sivil No.: W-01(A)-295-08-2016**, the Court of Appeal had affirmed the decision of the High Court on the Respondent's discretion to impose the penalty when the High Court held as follows:-

On the issue as to **whether the Respondent have correctly exercised it's discretion in the Respondent's imposition of penalty on the Appellant, pursuant to section 113(2) of the Act, it is clear from the stated provision that the Director General is given the discretionary power to impose a penalty on an incorrect return filed by a taxpayer. The Director General has a right to impose the penalty irrespective that the taxpayer's return was made negligently, or in good faith or with intent to deceive or evade tax.** The Director General however, is not duty bound to require penalty payment but, to exercise the discretion after due consideration of all relevant facts and circumstances.

(emphasis added)

64. Further in **KT Co v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur (1992) 1 MSTC 3255 at 3258, Richard Talalla J** (as he then was) held:-

As I see it subsec. 1 of sec. 113 is couched in mandatory terms but conditioned whereas subsec. 2 is expressed in terms which are discretionary. The Director General may require payment of the penalty. He is not bound to require such payment. **He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances. It seems to me that the Director General would have to consider whether the incorrect return or incorrect information was respectively made or given dishonestly with intention to evade payment of tax or possibly even negligently** and then, and only then, mete out the punishment which under subsec. 2 is a penalty equal to the amount of tax which

has been undercharged in consequence of the incorrect return or incorrect information and so on. But that is not all.

(emphasis added)

65. Further in the case of **Ketua Pengarah Hasil Dalam Negeri v. Shaklee Products (M) Sdn Bhd MTKL Rayuan Sivil No: RI-14-07-2008**, Aziah Ali J (as she then was) held as follows:-

On the penalty imposed under s. 113(2) of the Act, it is submitted that the Respondent had made incorrect returns by understating its income and had declared in its tax returns that it has no tax payable. Therefore, under the law **the Appellant was empowered to impose a penalty to a maximum of equal of the amount of tax undercharged. In this case the Appellant imposed only the amount of 60% penalty**.

(emphasis added)

66. Based on the audit findings and having considered the documents and information provided by the Appellant, the Respondent has taxed the gain on the transfer of technical knowhow for the amount of RM821,615,000 as income under section 4(f) of ITA together with the imposition of penalty at the rate of 45%. The tax computation relating to the adjustment has been enclosed with the Respondent's letter dated 9.6.2017.

67. The SCIT in its grounds of decision had made the following findings:-

6. Issue 3:

Whether the penalty imposed under section 113 of the ITA 1967 is correct.

a) We also agreed that based on the audit findings and having considered the documents and information provided by the Appellant, the Respondent has taxed the gain on transfer of technical knowhow for the amount of RM821,615,000.00 as income under section 4(f) of ITA together with the imposition of penalty at the rate of 45% even though the Respondent has a discretion to impose a penalty at the rate of 100% of the amount undercharged.

68. Based on the above, I am of the opinion that SCIT had made correct findings and I see no reason why I should disturb the findings of the SCIT.

69. Thus, based on the above cases, the justification to impose the penalty under section 113(2) of the ITA is not due to technical adjustment or difference of interpretation but on the basis of whether the tax treatment adopted by the Appellant is wrong and would result in paying less tax. Hence, the penalty under section 113(2) of the ITA is imposed on the amount of tax undercharged in consequence of the Appellant submitting incorrect returns or giving wrong information affecting its own chargeability.

Conclusion

70. Based on the aforesaid reasons, I am of the view that the notice of assessment for the YA 2008 is correct and in accordance with section 91(3) of the ITA.

71. As such, I dismissed the Appellant's appeal with costs of RM5,000.00.

Dated: 12 May 2022

Ahmad Kamal Bin Md. Shahid

Judge

High Court Kuala Lumpur

Counsels

For the Appellant:	Cik Elaine Yap (Encik Jason Liang, Cik Kellie Yap and Encik Jeff Sum with her) Tetuan Wong & Partners Peguambela dan Peguamcara Level 21, The Gardens South Tower, Mid Valley City, Lingkaran Syed Putra, 59200 Kuala Lumpur. (Ruj. Tuan: AWG/JLG/KAY/JSU/10008234-50327940 (KULDMS-3940234)
For the Respondent:	Puan Normareza Mat Rejab Senior Revenue Counsel (Puan Syazana Safiah Rozman Revenue Counsel with her) Lembaga Hasil Dalam Negeri Malaysia, Menara Hasil, Aras 16 Persiaran Rimba Permai Cyber 8, 63000 Cyberjaya, Selangor Darul Ehsan.