

2. The Appellant filed a notice of appeal against the deciding order. This is a case stated under paragraph 34 of Schedule 5 of the Act. The agreed issues for determination are as follows:

5 (i) Whether the specific provision for doubtful debts for the outstanding amount of RM3,285,971.19 (doubtful debts) pursuant to Year of Assessment 2001 by the Appellant ought to be allowed pursuant to section 34(2) of the Income Tax Act 1967.

10 (ii) Whether the Respondent is entitled to impose any penalty under Income Tax Act 1967 for the Year of Assessment 2001, Year of Assessment 2001 (additional) and Year of Assessment 2002 (additional).

15 3. The Statement of Agreed Facts are as follows:

20 (i) The Appellant's principal activity was in timber trading and rental equipment but has been a dormant company as of 31.3.2002. In 1997, the Appellant had rented equipment to Sarawak Pulp Industries Sdn Bhd (SPI) of which SPI was not able to repay its debts causing the Appellant to incur doubtful debts in the sum of RM3,285,971.19 (outstanding sum).

25 (ii) The Respondent conducted a field audit on the Appellant on 22.12.2008 and 13.2.2009 (field audit) at the Appellant.

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- (iii) Following the field audit, the Respondent issued a letter dated 6.3.2009 to the Appellant's Tax Consultant, Ernst & Young Tax Consultant Sdn Bhd (Tax Consultant).
- (iv) The Appellant through its Tax Consultant issued a letter dated 31.3.2009 to the Respondent to appeal against the decision of the Respondent to disallow the provision of doubtful debt for the outstanding sums for the Year of Assessment 2001 and 2002.
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- (v) The Respondent issued a letter dated 13.4.2009 in reply to the Appellant.
- (vi) The Appellant through its Tax Consultant issued a letter to the Respondent dated 17.4.2009 to further appeal against the disallowance for provision of doubtful debt for the outstanding sum.
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- (vii) The Respondent in its letter dated 15.6.2009 replied to the issues raised by the Appellant.
- (viii) Subsequently, the Respondent issued two (2) Form JA dated 29.7.2009 to the Appellant.
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- (ix) Being dissatisfied with the decision of the Respondent, the Appellant filed its Form Q against the two additional assessments to appeal to the Special Commissioner of Income Tax.

25 4. The SCIT dismissed the appeal on the following grounds:-

- (i) that there was no prudent action taken by the Appellant to recover the outstanding sum from the debtor ;

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- (ii) that the Appellant's action in writing off the outstanding amount was not in the interest of the Appellant which was not based on prudent commercial consideration because the Appellant and the debtor shared a common director, namely Tan Sri Ting Pek Khiing;
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- (iii) it was satisfied that the Respondents had considered all facts and circumstances of the case on the imposition of the penalty for the year of assessment 2001, year of assessment 2001 (additional) and year of assessment 2002 (additional); and
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- (iv) it dismissed the 3rd and 4th issues brought by the Appellant on the grounds that the Respondent by duty was allowed to assess the tax chargeability of the Appellant and that the 4th issue had been dealt before the trial had begun.

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5. The Appellant submitted that the SCIT had erred. The Appellant submitted that in 1997 the Appellant leased some equipment to SPI. It submitted that SPI did not pay the lease rentals which amounted to RM3,285,971.19 because there was a serious economic crisis worldwide in 1997 and 1998, including in Malaysia. The Appellant submitted that it had taken all reasonable means to attempt to recover the outstanding debt owed by SPI but was unable to recover

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the debt from SPI.

6. The Appellant submitted that the provision of doubtful debt pursuant to Year of Assessment for 2001 and 2002 ought to be allowed under s.34(2) as the Appellant had utilized all means to recover the outstanding sum which was deemed to be wholly irrecoverable. It submitted that the penalties imposed under s.113(2) ought to be waived as the Appellant had acted in good faith and had duly disclosed to the Respondent all information pertaining to the said doubtful debt.

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7. The Appellant submitted that the SCIT had made an error of fact that Tan Sri Ting was a director of the Appellant because there was no evidence that he was holding the position of a director of the Appellant. It was submitted that he was only acting as an officer of the Appellant in signing the documents related to the Appellant and he was not a director.

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8. In reply, the Respondent submitted that the Appellant's decision to write-off the sum of RM3,285, 871.19 was not for the purpose of the business. It submitted that the Appellant was able to recover the debt but did not do so because both companies share the same director. The Respondent submitted that it agreed with the decision of the SCIT that by having a common director, the Appellant's action in writing off the outstanding amount was not in the interest of the Appellant and not based on prudent commercial consideration.

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9. The Respondent submitted that the Appellant admitted that the only action to recover the said debt was by sending a series of notices of demand to the debtor and there were prolonged periods between the demands. It submitted that the legal action was only commenced against the debtor in 2013 knowing that the debt was already time barred and it was only filed for the purpose of the tax appeal.
10. The Respondent submitted that from the statement of claim, there were no important particulars of the debt claimed, such as the date of rental agreement, types of equipment rented and any reference to invoices or documents. It submitted that by sending notices of demand did not establish that the debt was irrecoverable.
11. The Respondent submitted that based on the facts and circumstance of the case, it was right to impose the penalty of 45% under s.113(2) of the Act on the Appellant because the Appellant had made an incorrect return to the Respondent and this was only discovered during the field audit conducted. It submitted that the penalty imposed was correct in law.
12. Section 34(1) of the Act states that in ascertaining the adjusted income of a person from a business for the basis period for a year of assessment, deductions shall be made from the gross income from

the business for that period in accordance with the following subsections. Subsection (2)(a) states that there shall be deducted in the case of any debt if at the end of the relevant period the debt is reasonably estimated in all the circumstances of the case to be wholly irrecoverable, an amount equal to the amount of the debt, the deduction being reduced by the amount. The word “debt” in subsection (2) is defined in subsection (3).

10 13. The question is whether the debt written off by the Appellant was wholly irrecoverable so that it qualified as a deduction under s.34 of the Act. Subsection (3) defines the word “debt” whereas the term “wholly irrecoverable” is not defined in the Act. Whether a debt is wholly or partly and to what extent bad or irrecoverable is in every case a question of fact: Dinshaw v Bombay CIT [1933-34] 50 LTR. A taxpayer is required to show that the outgoings and expenses were incurred wholly and exclusively during the period in the production of the gross income from that source: Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248.

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14. At the hearings before the SCIT the Appellant had filed two bundles of documents namely Encl.4 and Encl.5 whereas the Respondent filed one bundle of documents Encl.6 which were referred to during the hearings. The parties did not submit that these documents were disputed or not admissible. In Encl.5, the Appellant exhibited its audited account as at 31.3.2001. This was also exhibited by the

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Respondent in Encl.6. The Respondent also exhibited the audited account of the Appellant as at 31.3.2002 and the audited account of SPI as at 31.3.2001 in Encl.6.

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15. Based on the audited accounts of the Appellant for the financial years ended 31.3.2001 and 31.3.2002, the principal activity of the Appellant was in timber trading and there was no significant change in this principal activity during the two years. However, pursuant to the statement of agreed facts, the Appellant's principal activity was also in timber trading and rental equipment.

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16. Notwithstanding that, based on the documents and case stated, the Appellant did not exhibit any documents to establish that there was or there were such transactions between the Appellant and SPI and that these were genuine. A transaction carried out without the object of making a profit cannot be one done in the course of carrying on its business: see Fairway Estates Pty Ltd v FCT 70 ATC 4061. The Appellant did not disclose or exhibited any lease or rental equipment agreement entered into between the Appellant and SPI, the equipment rented, the total lease rentals, the monthly or yearly payments towards the lease rentals, the length of the lease and its expiry date, whether the equipment to be returned, either at the end or earlier termination of the lease, whether any option to purchase and whether SPI had exercised the option and the payments made.

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17. Based on the documents, the Appellant did not set out when SPI defaulted in the lease rental payments, how long since the default, any action taken to recover the arrears and or the outstanding sum, any action taken to repossess or take back the lease equipment and how long did it take for the unpaid lease rentals to accumulate until they amounted to the sum of RM3,285,971.19.
18. Based on the documents exhibited in Encl.4, the first letter of demand for this sum was dated 17.2.2000. The next letter of demand as exhibited was dated 26.5.2000. There were several letters of demand before the Appellant filed a suit dated 15.5.2013 against SPI, after 13 years of sending letters of demand, bearing in mind the Appellant leased the equipment to SPI in 1997. The Appellant did not state whether and when the writ was served on SPI, whether any defence filed or judgment entered against SPI. Pursuant to the 'proved facts', the Appellant did not pursue the action as it was already time-barred. The Appellant did not take any legal action against SPI prior to 2013. Clearly the Appellant delayed in taking the necessary action to recover the debt for obvious reasons.
19. The record showed that the Appellant made provision for doubtful debts for the outstanding sums in its account for the year of assessment 2001. In note 3 to the financial statements for trade debtors, included in trade debtors of the Appellant, was an amount

of RM9,606,596 due from companies in which a director of the holding company has substantial financial interest.

5 20. The Appellant submitted that based on its audited account exhibited, the two directors of the Appellant were Sunny Kho and Mohamad Idris Ibrahim and that Tan Sri Ting Pek Khiing was not a director. It was submitted that Tan Sri merely signed the statutory declaration as an officer primarily responsible for the financial management of
10 the Appellant. It was submitted that the SCIT had erred when it ruled that the Appellant and SPI shared a common director, namely Tan Sri Ting Pek Khiing.

15 21. Based on the audited account of the Appellant as at 31.3.2001 and the audited account of SPI as at 31.3.2001, Tan Sri Ting Pek Khiing was not a common director of both companies. He was a director of SPI only. The SCIT had erred on this finding of fact. The question is whether this finding of fact went to the root of the appeal at the
20 SCIT. Based on the facts and circumstances of the case as stated, there was no real prejudice and no miscarriage of justice against the Appellant.

25 22. Note number 12 to the financial statements of the audited account of the Appellant stated “significant related party disclosures”, which referred to transactions with companies in which a director of the

holding company, Tan Sri Ting Pek Khiing has substantial financial interest. The record showed that he signed the statutory declaration in both audited accounts of the Appellant and SPI as the officer primarily responsible for the financial management of both companies.

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23. Based on the two sets of accounts, although Tan Sri Ting Pek Khiing was not a director of the Appellant but a director of SPI, he had substantial financial interests in both companies and in the holding company. Clearly Tan Sri Ting Phek Khiing had substantial financial interest in both the Appellant and SPI and in the holding company. Their dealings and financial transactions carried out were as related parties which were noted in the accounts as such.

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24. Their dealings and financial transactions being as related parties, there were conflicts of interest in the financial management of both companies by him. In 2001 the Appellant made provision for bad debt and then wrote off the debt. The Appellant only filed the suit in 2013 after it was time-barred. Clearly the Appellant had delayed in taking actions to recover the debt owed by SPI and in writing off the debt. These decisions were not made bona fide. The SCIT had ruled that the decisions were not based on prudent commercial business considerations. There was ample material for the SCIT to come to that finding.

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25. In respect of the penalty imposed on the Appellant, a penalty imposed under s.113(2) of the Act is appealable. The discretion to impose cannot be exercised at whim or fancy but after due
5 consideration of all relevant facts and circumstances: Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co [1992] 2 MLJ 708.

26. The facts showed that the Respondent conducted an audit on the
10 Appellant. From the audit it discovered that the Appellant had submitted an incorrect return because it had wrongfully deducted the debt as a deduction under s.34(2) of the Act and imposed the penalty under s.113(2) of the Act.

15 27. The Appellant submitted that it had acted in good faith and had disclosed all information pertaining to the doubtful debt. As stated above, the Appellant failed to disclose the particulars of lease equipment transactions with SPI and was not up-front with these
20 particulars and the steps taken to recover the debt owing. As stated, the decisions to write off the debt and in taking actions to recover the debt were not based on prudent commercial business considerations and not bona fide.

25 28. The SCIT had ruled that they were satisfied that the Respondent had considered all the facts and circumstances of the case in

5 imposing the penalty and that the penalty imposed was justified, reasonable and valid. The SCIT ruled that based on the record, there was no reason to disturb the discretionary power of the Respondent. Again, there was ample material for the SCIT to come to that ruling.

10 29. On facts and circumstances of the case, there were no merits in the submissions of the Appellant and there was no reason to interfere with the deciding order made by the SCIT. The deciding order is hereby confirmed and the Appellant shall pay costs of RM3,000.00 and the allocatur.

15 Dated: **31st MAY 2017**

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STEPHEN CHUNG HIAN GUAN
High Court Judge
Kuching

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For Appellant: Thian Ling Ying
Messrs Suhaili & Bong Advocates

25 For Respondent: Ezza Mohd Esa
Lembaga Hasil Dalam Negeri Malaysia (LHDN)

30 *Notice: This Judgment is subject to amendments, corrections and editorial revision.*