

# LHAG Insights

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Tax, Customs & Trade Practices



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### High Court upholds SCIT's Landmark Transfer Pricing Decision on Section 140A Income Tax Act 1967

Ketua Pengarah Hasil Dalam Negeri v Sandakan Edible Oils Sdn Bhd

In our LHAG Insights published on 5 February 2021, we wrote about the landmark decision on transfer pricing by the Special Commissioners of Income Tax (SCIT) in favour of the Taxpayer in S v Ketua Pengarah Hasil Dalam Negeri. This was the first decision to address s 140A of the Income Tax Act 1967 (ITA) and the Income Tax (Transfer Pricing) Rules 2012 (TP Rules), and on long-standing practices by the Inland Revenue Board (IRB) in transfer pricing (TP) audits.

On 26 May 2022, Euromoney's Benchmark Litigation Asia-Pacific Awards 2022 recognised the SCIT's decision as one of the Impact Cases of the Year. This was the only tax case in Asia to receive this recognition. Benchmark Litigation Asia-Pacific Awards recognises the leading litigators, and the most complex and innovative cases across Asia-Pacific annually.

This award also coincides with the decision of the High Court on 17 May 2022 to dismiss the IRB's appeal and affirm the SCIT's decision.

The High Court's decision confirms the following key lessons for taxpayers in TP matters:

- (a) The OECD Guidelines remain the point of reference for TP matters in Malaysia and cannot be ignored in TP audits.



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(b) The IRB does not have unfettered discretion to make TP adjustments under s. 140A ITA and the TP Rules. On matters which are not specifically provided for in the ITA or the TP rules, the OECD Guidelines must be duly considered and applied.

(c) The importance of proper documentation, including legally cogent representations to the IRB during the audit process. The courts are hesitant to accept oral evidence and explanations given for the first time during the hearing, especially when it does not accord with the contemporaneous written evidence. This applies equally to taxpayers and the IRB.

(d) The interquartile range is recognised internationally as a suitable determinant of arm's length pricing. Therefore, where the taxpayer's financial results fall within the arm's length interquartile range, no adjustments should be made.

This landmark case is one of the most significant decisions in recent years, especially for multinational corporations with significant volumes of transactions with associated overseas entities. The full grounds of judgment from the High Court, once issued, will provide valuable guidance on the rights and responsibilities of the taxpayer and the IRB in TP matters.

The taxpayer was successfully represented by Dato' Nitin Nadkarni, Jason Tan Jia Xin and Chris Toh Pei Roo from Lee Hishammuddin Allen & Gledhill's Tax, Customs & Trade Practice.

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