



Judicial Review Order 53 Rules of Court 2023 – Letter is not a decision – Section 2(4)(b), Section 139 & Paragraph 33A Schedule 6 Income Tax Act 1967

KETUA PENGARAH HASIL DALAM NEGERI
v.
NOTABLE VISION SDN BHD
[W-01(A)-609-11/2023]

 **COURT OF APPEAL, PUTRAJAYA**


YA DATUK AZIMAH BINTI OMAR
YA DATUK WONG KIAN KHEONG
YA DATUK ISMAIL BIN IBRAHIM

 **24 APRIL 2025**

This was an appeal by the Revenue against the High Court's decision on 7.11.2023 in allowing the Taxpayer's application for judicial review against the Revenue's letter dated 29.6.2021 informing the Taxpayer of the existence of the relationship between the Taxpayer and FHTM pursuant to Section 2(4)(b) of the Income Tax Act 1967 ("ITA") to be read together with Section 139 of the ITA based on the audit findings conducted on the Taxpayer.

This case concerned the withholding tax treatment on interest payments by the Taxpayer under a medium-term note ("MTN") programme, which was an asset-backed security ("ABS") that was approved by the Securities Commission ("SC") and incentivised via an income tax exemption in paragraph 33A Schedule 6 of the ITA. Paragraph 33A Schedule 6 of the ITA provided for tax exemption on the interest paid to non-resident companies, other than companies in the same group, from, inter alia, sukuk or debenture issued in Ringgit Malaysia and approved or authorised by or lodged with the SC.

The Taxpayer was incorporated on 16.12.2013 as a special purpose vehicle ("SPV") to issue ABS as approved by SC on 24.3.2014. TMF Trustees Malaysia Berhad ("TMF Trustees") holds 100% of the Taxpayer's shares. TMF Trustees is a subsidiary under TMF Group. The Taxpayer had established the Medium Term Note ("MTN") to fund the acquisition of the real property known as "The Westin Kuala Lumpur" and a piece of land at Section 67, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur.

The Taxpayer as the bond issuer had to pay interests to the bondholders as consideration. The Taxpayer then on 14.2.2018 wrote to the Revenue seeking for the Revenue's position on the withholding tax exemption on the Taxpayer. Subsequently, the Revenue replied on 5.7.2018 informing that the Taxpayer was entitled to the exemption under Paragraph 33A(1) Schedule 6 of the ITA. The Revenue's letter dated 5.7.2018 approving the tax exemption was issued based on the information provided by the Taxpayer through their letters dated 14.2.2018 and 17.5.2018. No audit was being conducted on the Taxpayer at that material time.

However, upon subsequent audit, the Revenue found that the Taxpayer made transactions being payments of interest to related company/same group of companies (FHTM). Hence, the payments of interest paid by the Taxpayer to FHTM under the MTN Programme was subject to withholding tax under Section 2(4)(b) of the ITA to be read together with Section 139 of the ITA by reason that the Taxpayer paid the interest to a related company in the group.

The Taxpayer filed a Judicial Review application for, inter alia, a certiorari order to quash the decision of the Revenue in the form of an audit letter dated 29.6.2021 relating to the audit conducted for the years of assessment (YA) 2014, 2015, 2016, 2017 and 2018. At the material time, no assessment had been made by the Revenue against the Taxpayer.

The Taxpayer contended that the Revenue's action was tainted with illegality, irrationality and unreasonableness, and there was procedural impropriety. The application for Judicial Review was against the Revenue's letter dated 29.6.2021 which had revoked the Revenue's view as expressed in the earlier letter dated 5.7.2018.

The court agreed with Revenue that the letter dated 29.6.2021 was a notification and the Taxpayer had failed to prove that they were aggrieved by it. The Taxpayer still had a right to appeal against an assessment to the SCIT upon issuance of the notice of assessment. There was no decision being made and the decision-making process was still in progress. Therefore, the application for judicial review was premature and the Revenue's letter dated 29.6.2021 was issued in accordance with the ITA and was not infirmed by illegality, irrationality and procedural impropriety. The Revenue found additional information from the audit findings and had duly stated the same in the letter dated 24.6.2020. The letter dated 29.6.2021 that was issued by the Revenue was pursuant to the audit findings in that the Taxpayer's payments of interest to FHTM did not fall under the exemption under Paragraph 33A(1) Schedule 6 of the ITA. Meanwhile, the letter dated 5.7.2018 by the Revenue had been cancelled due to the audit exercise. The issue of estoppel and legitimate expectation did not arise in this case as the Revenue was merely carrying out its duties under the law and had acted pursuant to the additional information found by Revenue during the audit.

The Court of Appeal unanimously allowed the Revenue's appeal. The High Court's decision had been set aside and cost was awarded to the Revenue without any allocatur fee.

Editorial Note: *The Taxpayer has right to file appeal to the Federal Court within 30 days of this decision.*