DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN: WA-25-9-01/2019

Dalam perkara permohonan oleh BROWNWOOD SDN BHD untuk satu perintah Certiorari;

Dan

Dalam perkara permohonan untuk satu Perintah Mandamus

Dan

Dalam perkara Penolakan Permohonan Bayaran Balik Duti Setem Yang Telah Dibayar melalui Surat Responden bertarikh 31.10.2018;

Dan

Dalam perkara S. 27(1), 57(f)(i) & (vi), 58 dan 80(3) Akta Setem 1949;

Dan

Dalam perkara Aturan 53 Kaedah-kaedah Mahkamah 2012

ANTARA

BROWNWOOD SDN BHD
(No. Syarikat: 253398-H) ... PEMOHON

DAN

1. LEMBAGA HASIL DALAM NEGERI
2. KERAJAAN MALAYSIA

... RESPONDEN-RESPONDEN

Grounds of Decision

Azizah Nawawi, J

Application

[1] This is the Applicant's application for judicial review seeking an order of Certiorari to quash the 1st Respondent's decision dated 31.10.2018 ("**Decision**") rejecting the Applicant's application for a refund of the stamp duty duly paid and a mandamus directing the 1st Respondent to refund the sum of RM540,000.00 of stamp duty.

[2] Having considered the application and the submission of the parties, this Court had dismissed the Applicant's application with costs.

The Salient Facts

[3] The Applicant had entered into a Sale and Purchase Agreement dated 23.8.2012 with Menang Kuasa Sdn Bhd ("**Vendor**") in respect of a piece of land, Lot No. 18059, Rawang, Selangor (the "**Land**") for the sum of RM15 million. The Applicant was represented by a legal firm, Tetuan V. Manickam And Partners ("**Solicitors**").

[4] Vide a letter dated 15.10.2012, the Pejabat Daerah dan Tanah, Gombak had informed the parties that the State Authority had approved the transfer of the said Land to the Applicant. On 8.11.2012, the Solicitors had sent the executed Memorandum of Transfer ("**Form 14A**"), duly executed by the Vendor to the Applicant. On 16.11.2012, the Applicant had issued a bankers cheque in the name of Pemungut Duti Setem amounting to RM540,000.00 to the solicitors.

[5] Form 14A was submitted to the Deputy Collector of Stamp Duties on 18.10.2012 and the stamp duties Ad Valorem was assessed at RM540,000.00 and the same amount was paid vide the Stamp Duty Certificate on 20.11.2012.

[6] On 6.12.2012, another company Rasa Anggun Development Sdn Bhd ("**Rasa Anggun**") had entered a caveat on the said Land on the ground

that Rasa Anggun had paid a deposit of RM3,267,000.00 for the said Land.

[7] However, when Rasa Anggun withdrew its caveat on 16.1.2013, the said Land was transferred to the Applicant on 16.1.2013. A search with the Land Office made by the Applicant on 30.1.2013 also confirmed that the Applicant is the registered owner of the said Land.

[8] By 14.5.2013, the Applicant had paid RM2,650,000.00 to the Solicitor, Tetuan V. Manickam And Partners towards the purchase price of the said Land. When the Applicant made three (3) title searches with the Land Office on 28.10.2013, 20.8.2014 and 18.2.2015, the Applicant found that the said Land had been transferred to Rasa Anggun by the Vendor.

[9] The Applicant then sued Menang Kuasa Sdn Bhd, the legal firm Tetuan V. Manickam & Partners and all its partners for fraud in the sale of the said Land in Suit 22NCVC-380-07/2018. The Form 14A was filed as a document in the "*Ikatan Dokumen Bersama*" to be used during the trial.

[10] Subsequently a Consent Judgment was entered between the parties on 12.2.2018 where the terms are as follows:

(i) That the SPA between the Applicant and Menang Kuasa Sdn Bhd dated 23.8.2012 is void and of no legal effect;

(ii) That the legal firm Tetuan V. Manickam & Partners and its partners, Vickneswary a/p S. Manickam and M. Chelvanesan a/l S. Manickam, are to refund the Applicant the sum of RM2,650,000.00 with interest at 8%; and

(iii) If Tetuan V. Manickam & Partners and its partners, Vickneswary a/p S. Manickam and M. Chelvanesan a/l S. Manickam, failed to refund the sum before 12.2.2018, they must pay an additional damage of RM1,500,000.00.

[11] Vide a letter dated 31.5.2018, the Applicant requested the refund of the RM540,000.00 stamp duty paid to the 1st Respondent on 20.11.2012.

[12] In response, the said application for a refund was rejected by the 1st Respondent vide an email dated 31.10.2018 on the basis that the application does not fall within sections 21(7), 57, 58 and 80(3) of the Stamp Act 1949.

[13] Hence, the Applicant filed this application to review and to quash the Decision of the 1st Respondent and a mandamus directing the 1st Respondent to refund the said stamp duty in the sum of RM540,000.00.

The Findings of the Court

[14] Before I deal with the merits of the application, I will now deal with the preliminary objection raised by the Respondents, that is, whether the application is brought against the proper party whose Decision is being challenged.

[15] On this issue, reference is made to Order 53 r 2(4) of the Rules of Court 2012, which reads:

*"Any person who is **adversely affected** by the **decision**, action or omission in relation to the exercise of the **public duty or function** shall be entitled to make the application"*

[16] In the case of **Council of Civil Service Unions V. Minister for the Civil Service** [1985] AC 374 the House of Lords held as follows:

*"The subject matter of every judicial review is a **decision** made by some person or (body of person) whom I shall call the **decision maker** or else a refusal by him to make a decision"*

[17] In **T. Ganeswaran lwn. Suruhanjaya Polis DiRaja Malaysia & Satu lagi** [2005] 3 CLJ 302, the Federal Court held the principle in judicial review to be as follows:

"Pendapat Mahkamah

Sebelum mahkamah ini mempertimbangkan alasan-alasan rayuan yang dikemukakan peguam perayu, kami berpendapat adalah lebih sesuai jika dinyatakan di sini mengenai perinsip-perinsip yang digunapakai oleh mahkamah-mahkamah dalam pengedalian kes-kes 'judicial review'.

Mengenai perkara ini kami ingin merujuk kepada House of Lords di dalam kes Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141 yang menyatakan:

> *Judicial review is not an appeal from a decision* ***but a review of the manner in which the decision was made****, and, therefore, the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable"* (emphasis added)

[18] Judicial review is the review of the decision making process in which a decision has been made, and in this case the Applicant is seeking to review the Decision dated 31.10.2018, which was made by the Deputy Collector of Stamp Duties under the Stamp Act 1949 (**"Act 378"**). The 1st Respondent herein is not the decision maker.

[19] Therefore, I am of the considered opinion that there is merit in the preliminary objection and the substantive application should be dismissed.

[20] On the merits of the application, I refer to the case of **Booi Kim Lee v YB Menteri Sumber Manusia & Golden Plus Geaniait SB** [1999] 3 MLJ 515, where Justice KC Vohrah had adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions V. Minister for the Civil Service* [1985] AC 374. The three (3) grounds described by Lord Diplock are:

(i) illegality;

(ii) irrationality; and

(iii) procedural impropriety.

[21] By illegality as a ground for judicial review, it means *"that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it'* and that *"... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess."*

[22] By irrationality it means *'Wednesbury unreasonableness'* and "*applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it*"

[23] By procedural impropriety, it includes *'failure by an administrative tribunal to observe procedural rules that are expressly laid out.."* and *"duty to act fairly"*.

[24] In the present case, the Applicant is relying on the ground of illegality and irrationality, premised on section 57(f)(i) of Act 378.

Whether the Decision is illegal and/or irrational

[25] The Applicant takes the position that its application for the refund is premised on section 57(f)(i) of Act 378, which reads as follows:

"57. Allowance for spoiled stamps

Subject to any rules which may be made under this Act and to the production of such evidence by statutory declaration or otherwise as the Collector may require, allowance shall be made by the Collector for stamps spoiled in the following cases-

...

(f) the stamp used for any of the following instruments-

(i) an instrument executed by any party thereto, but afterwards found to be absolutely void from the beginning;

.....

Provided as follows:

(a) that the application for relief is made within twelve months after the stamp has been spoiled or become useless or in the case of an executed instrument after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed or within such further time as the Collector may prescribe in the case of any instrument sent abroad for execution or when from unavoidable circumstances any instrument for which another has been substituted cannot be produced within the said period;

(aa) that the application for relief is made within two months from the date the instrument of transfer is rejected by the Registrar of Titles; or

(b) that in the case of an executed instrument no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence, and that the instrument is given up to be cancelled."

[26] The Applicant submits that section 57 allows the Collector of Stamp Duties to allow refunds to a person in possession of a spoiled stamp. The word '***spoiled***' is not defined in Act 378.

[27] With regard to statutory interpretation, in the case of **Krishnadas Achutan Nair & Ors v. Manivam Samykano** [1997] 1 CLJ 636; [1997] 1 MLJ 94, the Federal Court has held that:

> ***"The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment.*** *Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:*
>
> > *As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains. Per Gibbs J in Beckwith v. R. [1976] 12 ALR 333, at p. 337."*

[28] In **Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor** [1994] 1 MLJ 156, Justice Edgar Joseph JR SCJ stated that although dictionaries are not to be taken as authoritative exponents of the meaning of the words used in the Acts of Parliament, it is a well-known rule that words should be taken to be used in their ordinary sense.

[29] In 'Oxford Advanced Learner's Dictionary of Current English' (3rd Edition), the word "*spoiled*" is defined to include, inter alia, "*make useless* or unsatisfactory".

[30] This interpretation finds support in the case of **DKLR Holdings Co (No. 2) Pty Ltd v Commissioner of Stamp Duties (NSW)** (1982) 40 ALR 1, where the High Court of Australia (per Mason J) said as follows at page 21:

"*Section 15(1) enables the Commissioner to allow a refund to a 'person possessed of any spoiled or unused stamps'. Section 15(2) enables the Governor in Council to prescribe, inter alia, the classes of cases in which the allowance may be made and the time within which the application for it is to be made.* ***In the absence of any statutory definition of 'spoiled', I think it should be understood as signifying not only stamps which are defaced, but also those that have become useless*** *as, for example, when the instrument to which they relate itself 'has failed in its intended operation and' has become useless within the meaning of reg 30(7). These words then appropriately apply to a case in which the declarant fails to acquire the property on which the declaration of trust was intended to operate. Of it one can accurately say that it has failed in its intended operation and has become useless. The question arising under proviso (b) to reg 30 – what was the date when the stamp was spoiled? – may in some cases be difficult to determine, but that is not a matter that presently concerns us.*" (emphasis added)

[31] It is therefore the submission of the Applicant that it is entitled for the refund of the stamp duty in the sum of RM540,000.00, as the stamp duty was executed in respect of Form 14A, the duly executed Memorandum of Transfer, but was subsequently found to be useless when the Consent Judgment was entered which rendered the SPA to be void. As such, the Applicant submits that this case falls within section 57(f) (i) of Act 378, and the Applicant is therefore entitled for a refund.

[32] However, Section 57(f)(i) of Act 378 envisage a situation where the instrument is found to be "*absolutely void from the beginning*", that is the instrument is "*void ab initio*". But in the present case, there is no issue of the Form 14A being '*void an initio*' as the Applicant and the Vendor had executed a valid transfer for the said Land. In fact, the title search conducted by the Applicant clearly shows that as at 30.1.2013, the Applicant was the registered owner of the said Land (see exhibit "**MSI-9**"). This fact is affirmed by the Applicant in paragraph 17 of the Affidavit in Support, which reads:

"17. Oleh kerana ketiadaan dokumen asal dalam simpanan Pemohon, saya berikrar bahawa saya telah membuat satu carian persendirian ke atas hartanah tersebut ***pada 30.01.2013 yang mengesahkan bahawa Pemohon adalah pemilik berdaftar hartanah tersebut.***"

[33] It is just that the Solicitor and/or the Vendor had defrauded the Applicant, and the Applicant had sued them. From this suit, the

Consent Judgment dated 12.2.2018 (exhibit "**MSI-14**") was entered, and the term on the SPA of the said Land reads:

> *"a) Perjanjian Jual Beli di antara Plaintif dengan Menang Kuasa Sdn Bhd bertraikh 23.8.2012 yang telah disediakan oleh Defendan Kedua, Defendan Ketiga dan Defendan Keempat* ***adalah batal dan tidak berkuatkuasa****."* (emphasis added)

[34] The above consented term simply means that the SPA dated 23.8.2012 is void and of no legal effect. It does not mean that the SPA is void from the beginning (*void ab initio*), but void from the date of the Consent Judgment, that is effective 23.8.2012.

[35] Therefore, I am of the considered opinion that the Applicant's application for the refund does not fall within section 57(f)(i) of Act 378 as the instruments concerned, Form 14A is not found to be "*absolutely void from the beginning*".

[36] Added to that, I am also of the considered opinion and I agree with the Respondents that the application for refund should be rejected premised on Proviso (a) and (b) to Section 57 of Act 367.

[37] Proviso (a) to section 57 is on time frame to make the application for refund. This proviso (a) allows for relief if application for the same is made:-

(i) within 12 months after the stamp becomes spoilt or become useless or in the case of an executed instrument after the date of the instrument; or

(ii) if it is not dated within twelve months after the execution thereof by the person whom it was first or alone executed or within such further time as the Collector may prescribe in the case of any instrument sent abroad for execution or when from unavoidable circumstances any instrument for which another has been substituted cannot be produced within the said period;

[38] In section 2 of Act 378, the word "*executed*" and "*execution*" used with reference to instruments not under seal, mean "*signed and signature*". Therefore, in the context of proviso (a) to section 57, the word *'executed'* simply means that the instrument have been signed by both parties.

[39] In the present case, the application for refund was made on 31.5.2018 (exhibit "**MSI-15**"), whereas the instrument, Form 14A was executed by both the Applicant and the Vendor on 17.10.2012. Since the instrument was executed on 17.10.2012, the application should have been made within twelve (12) months from 17.10.2012. Therefore, this application is clearly out of time and this court has no jurisdiction to extend time. In **Central Electricity Board v. Commissioner of The Federal Capital & Anor; Insurance Company of North America - Third Party** [1967] 2 MLJ 161, the Court held that:

"The Court has no inherent jurisdiction to extend time except where such power is expressly given to it under the provision of the law."

[40] In **V. Sinnathamboo v. Minister for Labour and Manpower** [1981] 1 MLJ 251, the court held as follows:

"In the event, I was of the view that the one month time-limit prescribed under section 20(1) of the revised Act was a mandatory provision; and failure to comply was fatal to a workman who was not a member of a trade union. *In my view, that was the most natural interpretation of section 20(1) having regard to the clear words used by Parliament. I further agreed with Mr. Das that Part VI of the Act was an extraordinary relief to a non-unionised workman. If it was the intention of Parliament to make the time-limit as a mere directory provision, then it would say so clearly. In the instant case, there was no justification for the court to import words into section 20."* (emphasis added)

[41] In **Koperasi Serbaguna Kebangsaan Berhad v Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur** [2003] CLJ 227, the court held that the time frame for refund under Act 378 is mandatory and if the application for refund was made outside the specified time frame, the same must be dismissed. The Court held that:

"Furthermore, I am of the view that the plaintiff is not entitled for the refund because of the provisions on time limit for a repayment of the

stamp duty as specified by s. 58 of the Act. Section 58 provides as follows:

58. Allowance for misused stamps.

> *When any person has inadvertently used for an instrument liable to duty a stamp of greater value than was necessary, or has inadvertently used a stamp for an instrument not liable to any duty, the Collector may, on application made within twelve months after the date of the instrument, or, if it is not dated, within twelve months after the execution thereof by the person whom it was first or alone executed, and upon the instrument, if liable to duty, being stamped with the proper duty cancel and allow as spoiled the stamp so misused.*

The said provision does allow an application for repayment of stamp duty where a person has "... inadvertently used a stamp for an instrument not liable to any duty...". ***But it must be made within 12 months after the date of the instrument. In our present case, the plaintiff paid the stamp duty of RM30,000 on 10 October, 1995 and the application for repayment was made on 6 August, 1997. Clearly, it surpassed the time limit as specified by s. 58 of the Act."*** (emphasis added)

[42] The English case of **Terrance Byrne v The Revenue Commissioners** [1935] I.R 664 is also instructive. In this case, the question turns upon the meaning of the words *"application must be*

made within 2 years after ***the date of the instrument***" in section 10 of the Stamp Duties Management Act, 1891 (*pari materia* with section 58 of Act 378) regarding refund of stamp duty paid inadvertently. The facts in this case is that the instrument was dated 30.1.1932, but was retained as an escrow pending payment of the purchase price, which was paid on 19.5.1932. The instrument was then stamped on 31.5.1932. In fact, the plaintiffs were exempted from payment of stamp duties, and upon discovering this, made an application for refund of the stamp duty on 25.4.1934. The claim was refused by the Revenue on the ground that it was not made within the specified 2 years period from the date of the instrument. The plaintiffs argued that the correct construction of the words "date of the instrument" is the "date the instrument becomes operative", that is 19.5.1932. However Johnson J held at page 670:

"*The date of the instrument was January 30th, 1932 and I have no power to extend a statutory date of that kind by giving the section a forced and fanciful construction.*"

[43] The last issue raised by the Respondents is that the application should be dismissed as the application is caught by proviso (b) to Section 57 of Act 378. Proviso (b) is applicable in the following circumstances:

(i) there was an executed instrument; and

(ii) there was no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence; and

(iii) the instrument is given up to be cancelled.

[44] There is no issue on (i) and (iii), that there was an executed instrument which is given up to be cancelled under the terms of the Consent Judgment dated 23.8.2012.

[45] The only issue here is whether there was any legal proceeding that has been commenced in which the instrument could or would have been given or offered in evidence. In the present case, there was a legal proceeding that has been commenced, culminating in the Consent Judgment dated 23.8.2012 (Suit No. 22NCVC-380-07/2015). This suit is against the Vendor and the Solicitors handling the SPA of the said Land for the return of the sum of RM2,650,000.00 duly paid under the SPA and damages in the sum of RM1,500,000.00.

[46] On the issue of whether the instrument *could* or *would have been* given or offered in evidence in the said suit, this fact had been admitted by the Applicant in paragraph (5) of the affidavit affirmed by Mohamad Suffian bin Ismail on17.4.2019, which reads:

"Saya juga menegaskan bahawa adalah tidak munasabah untuk menyatakan bahawa tempoh 12 bulan sebagaimana diperuntukkan dalam Proviso Seksyen 57 Akta Setem mesti dikira daripada tarikh

perjanjian dalam kes ini walaupun seksyen ini membenarkan ianya dikira daripada tarikh setem menjadi rosak atau tidak berguna. ***Lebih-lebih lagi dalam kes ini, dokumen yang disetemkan tersebut telah ditawarkan menjadi salah satu bukti untuk dikemukakan dalam prosiding Mahkamah Yang Mulia ini.***

Dilampirkan sesalinan Ikatan Dokumen Bersama yang telah difailkan di Mahkamah Tinggi Shah Alam melalui guaman no: 22NCVC-380-07/2018 yang ditandakan sebagai eksibit 'MSI-1'." (emphasis added)

[47] Therefore, I am of the considered opinion that this application must be rejected as it falls within proviso (b) to section 57, in that there is already a legal proceeding that has been commenced in Suit 22NCVC-380-07/2018, where the instrument, Form 14A was offered in evidence. As to whether the suit culminates in a Consent Judgment is irrelevant, as proviso (b) to section 57 merely requires the filing of a suit and the use of the instrument for the purpose of the suit.

Conclusion

[48] Premised on the reasons enumerated above, I find that the application does not fall within Section 57(f)(i) of Act 378, and that the application is caught by proviso (a) and (b) to Section 57. Therefore, I am of the

considered opinion that the Decision is not illegal nor irrational and the application is hereby dismissed with costs.

(AZIZAH HAJI NAWAWI)
JUDGE
HIGH COURT MALAYA
(Appellate and Special Powers Division 2)
KUALA LUMPUR

Dated: 5 February 2020

For the Applicant : Mohamed Ibrahim Mohamad
Tetuan Ibrahim & Fuaadah
Selangor

For the 1st Respondent: Zul-Hasymi Mohamad
Jabatan Undang-Undang
Lembaga Hasil Dalam Negeri Malaysia

Cases Referred:

1. Council of Civil Service Unions V. Minister for the Civil Service [1985] AC 374

2. T. Ganeswaran lwn. Suruhanjaya Polis DiRaja Malaysia & Satu lagi [2005] 3 CLJ 302

3. Booi Kim Lee v YB Menteri Sumber Manusia & Golden Plus Geaniait SB [1999] 3 MLJ 515

4. Krishnadas Achutan Nair & Ors v. Manivam Samykano [1997] 1 CLJ 636; [1997] 1 MLJ 94

5. Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156

6. DKLR Holdings Co (No. 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1982) 40 ALR 1

7. Central Electricity Board v. Commissioner of The Federal Capital & Anor; Insurance Company of North America - Third Party [1967] 2 MLJ 161

8. V. Sinnathamboo v. Minister for Labour and Manpower [1981] 1 MLJ 251

9. Koperasi Serbaguna Kebangsaan Berhad v Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur [2003] CLJ 227