

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: WA-25-237-12/2016

Dalam perkara Keputusan Ketua Pengarah Hasil Dalam Negeri/Lembaga Hasil Dalam Negeri Malaysia melalui surat bertarikh 09.09.2016 yang dialamatkan kepada Dr. Koh Kar Chai, Setiausaha Kehormat Persatuan Perubatan Malaysia;

Dan

Dalam perkara Perkara-Perkara 7 dan 8 Perlembagaan Persekutuan;

Dan

Dalam perkara seksyen-seksyen 2, 4, 65, 66, 91 dan 140 Akta Cukai Pendapatan 1967;

Dan

Dalam perkara Jadual Pertama (Perenggan 1) Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Antara

- 1. DATO' DR. SINGARAVELOO A/L MUTHUSAMY**

2. SINGA & HOE SDN BHD (NO. 587356-U)

... Pemohon - Pemohon

Dan

1. KETUA PEGAWAI EKSEKUTIF/
KETUA PENGARAH HASIL DALAM NEGERI
2. LEMBAGA HASIL DALAM NEGERI

... Responden - Responden

Grounds of Decision

Azizah Nawawi, J:

Application

[1] This is an application for judicial review seeking the following prayers:

- (i) an order of certiorari to quash the decision of the Respondents by way of a letter dated 9.9.2016 ("**Decision**") addressed to Dr. Koh Kar Chai, the General Secretary of the Malaysian Medical Association, ruling amongst others, that the income received by the 2nd Applicant should be taxed under section 4(a) of the Income Tax Act 1967 as individual income and not company income;

- (ii) a declaration that the Decision is invalid and ultra vires Article 7 of the Federal Constitution and accordingly null and void, as it punishes the Applicants for the incorporation of a company to carry on business as medical practitioners and to provide medical services ("**Arrangement**") which was not illegal and invalid when the arrangement was made back in 2002;
- (iii) a declaration that the Decision is inherently unreasonable and arbitrary, as it does not apply equally across the board and is therefore ultra vires Article 8 of the Federal Constitution and is accordingly null and void;
- (iv) a declaration that the Decision is unlawful, invalid and ultra vires the Income Tax Act 1967 ("**ITA 1967**"), as the Respondents have exceeded their powers or committed an error of law, in treating the Arrangement as a tax avoidance arrangement;
- (v) a declaration that the Decision is unlawful and invalid, as the Respondents have acted unfairly towards the Applicants, as to amount to an abuse of power, by retrospectively departing from their previous course of conduct which had led the Applicants to reasonably believe at all material times, that the Arrangement was lawful and valid;

- (vi) a declaration that the Decision is unlawful and invalid, as the Respondents have breached their duty to treat similarly placed taxpayer alike, by taking an inconsistent approach in their tax treatment of the Applicants, as compared to other similarly placed taxpayers; and
 - (vii) an order of prohibition to restrain and/or to prevent the Respondents from implementing the Decision to the detriment or prejudice of the Applicants.
- [2] The grounds of the application are an error of law, that the decision was arbitrary and a breach of legitimate expectation.
- [3] Having considered the application and the submission of the parties, this Court had dismissed the application with costs.

The Salient Facts

- [4] The 1st Applicant, Dato' Dr. Singaraveloo a/l Muthusamy (the "**Doctor**") is a registered specialist medical practitioner who has retired from the Government Medical Services in 2002.
- [5] On 24.7.2002, the Doctor incorporated the 2nd Applicant (the "**Company**"), to carry on the business as medical practitioners and to provide medical services to in-patients and out-patients in and/or

outside hospitals (see Clause 3(1) of the Company's Memorandum of Articles).

- [6] The Doctor had signed a Resident Consultant Agreement With The Use of Suite dated 1.7.2002 ("**Resident Consultant Agreement**") with Johore Specialist Hospital Sdn Bhd ("**JSHSD**"), the owner and operator of Johore Specialist Hospital ("**Hospital**"), to provide medical consultancy services, as a Resident Consultant Physician at the Hospital.
- [7] The Respondents have initiated tax audits on several specialist medical practitioners focusing on their tax treatment on the income received by the specialist medical practitioner who has set up a Sdn Bhd business and operate their own medical services business in a private specialist hospital.
- [8] Because of the said tax audits, the Malaysia Medical Association ("**MMA**") had made inquiries and meetings with the Respondent. In response to MMA inquiries, the 1st Respondent ("**DGIR**") had issued the letter dated 9.9.2016 to MMA, which *inter alia*, reads:

"2. *Harap maklum bahawa pertemuan yang diadakan telah membincangkan perkara-perkara berikut –*

2.1 ISU PERCUKAIAN YANG BERBANGKIT

Isu yang terlibat adalah sama ada pendapatan yang diterima doktor pakar daripada kontrak perkhidmatan dengan hospital pakar swasta adalah dikenakan cukai dibawah perenggan 4(a) Akta Cukai Pendapatan 1967 [Akta 53] atas pendapatan individu atau pendapatan syarikat (dimiliki oleh doktor pakar). Diagram yang jelas menunjukkan situasi persoalan ini adalah seperti di Lampiran 1.

2.2 KEPUTUSAN KETUA PENGARAH

2.2.1 Berdasarkan semakan terhadap perjanjian yang telah ditandatangani oleh doktor pakar dan hospital pakar swasta serta dokumen-dokumen yang terlibat, adalah diputuskan bahawa pendapatan yang diterima daripada hospital pakar swasta adalah dikenakan cukai dibawah perenggan 4(a) Akta 53 atas pendapatan individu dan bukanlah pendapatan syarikat.

2.2.2 Keputusan ini dibuat berlandaskan kepada layanan cukai yang di amalkan oleh Ketua Pengarah berasaskan kepada peruntukan Statutori Akta 53, yang

memperuntukkan dengan jelas kuasa-kuasa Ketua Pengarah seperti yang terkandung di bawah peruntukan Seksyen 140, Seksyen 91 atau Seksyen 65 Akta 53 tersebut. Fakta dan merit kes telah menunjukkan bahawa perjanjian yang ditandatangani adalah antara hospital pakar swasta dan doktor pakar adalah merupakan perjanjian untuk perkhidmatan (contract for service).

2.2.3 Sehubungan dengan itu, dengan mengguna pakai peruntukan Akta 53, Ketua Pengarah mempunyai kuasa statutory untuk mengabaikan pendapatan yang diterima oleh doktor pakar melalui Syarikat Sdn Bhd dan seterusnya membangkitkan taksiran atas pendapatan individu doktor pakar berkenaan.”

- [9] Even though the Decision of the DGIR was conveyed to MMA, the Applicants commenced this review proceeding as they would also be affected by the Decision of the DGIR as their case falls squarely within the ambit of the Decision.
- [10] However on 14.11.2016, the Doctor had entered into a Service Agreement with the Company, whereby it was agreed that the Company, as the Employer had engaged the Doctor, as the

Employee, to provide Medical Consultancy Services as a physician to the **Hospital**.

The Findings of the Court

[11] In **Booi Kim Lee v. YB Menteri Sumber Manusia & Golden Plus Geaniait SB** [1999] 3 MLJ 515, Justice KC Vohrah 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.

[12] 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*".

[13] 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”.

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

[15] Bearing in mind the above principles, the issues raised by the Applicants are as follows:

- (i) that the Decision amounts to an error of law, as it is premised upon erroneous and invalid grounds;
- (ii) arbitrary and unfair treatment of the Applicants;
- (iii) breach of the Applicants’ legitimate expectation; and
- (iv) retrospective punishment of the Applicants is in breach of Article 7(1) of the Federal Constitution.

Issue (i) - error of law

[16] The Applicants take the position that the DGIR has committed an error of law, as the Decision is flawed and defective based on the following reasons:

- (i) that the Respondent had failed to appreciate that medical practitioners are authorized or permitted by law, to incorporate a company or body corporate to carry on business as medical practitioners and to provide medical services. In any event, the Arrangement is/was in accordance with generally accepted business practices and was, at all material times, approved by the Respondents;
- (ii) that in the present case, the Respondent had failed to appreciate that whilst the Resident Consultant Agreement was entered into between the JSHSD and the Doctor, the Doctor was in fact acting at all material times for and on behalf of the Company, as confirmed by the fact that the monies received from patients seen by the Doctor were paid over by the JSHSD to the Company;
- (iii) that consequently, pursuant to section 3 and 66 read together with section 2 of the ITA 1967, it is the Company and not the Doctor who is chargeable and assessable to income tax in respect of the aforesaid monies received from the patients; and
- (iv) that in the circumstances, the Respondents have acted unlawfully and ultra vires the ITA 1967 in treating the Arrangement as a tax avoidance arrangement and in ruling that the income tax received by the Company should be taxed

under section 4(a) of the ITA 1967, as individual income and not company income.

[17] This case calls for an interpretation of the Resident Consultant Agreement, that was entered into by the Doctor and JSHSD. The guiding principle on the construction of a contract can be found in the decision of the Federal Court in **Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd** [2010] 1 MLJ 597, where the Court held that the most recent statement of the guideline to interpretation of contract is to be found in *Attorney General of Belize & Ors v Belize Telecom Ltd* [2009] UKPC and quoted Lord Hoffman at page 621:

*“The court has no power to improve upon the instrument which is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed... It is this objective meaning which is conventionally called **the intention of the parties**, or the intention of Parliament, or the intention of whatever*

person or body was or is deemed to have been the author of the instrument.” (emphasis added)

[18] Bearing in mind the abovementioned principle, in order to ascertain the intention of the parties, we need to look at the salient terms of the Resident Consultant Agreement.

[19] Under the terms of the Resident Consultant Agreement, the Hospital had offered the Doctor to conduct his professional practice at the Hospital in consideration for fees and chargeable, payable by the Doctor to the Hospital, under clause 5, which inter alia, reads:

“Clause 5: GRANT OF HOSPITAL PRIVILEGES

5.1 *The Company hereby grants the following licenses and privileges to the Consultant at the Hospital pursuant to and subject to the terms of this Agreement: -*

5.1.1 *The right to carry on his profession as a consulting medical specialist in the discipline he is specialized in*

5.1.2 *The right of exclusive occupation of all areas forming the Suite ...*

5.1.3 *Rights in common with the Company’s employees, ... use of the utilities provided ...*

5.1.4

5.1.5

5.2 *Payment by the Consultant*

The following payment shall be payable by the Consultant:-

5.2.1 *Rental Charges*

....

5.2.2 *Payment for Hospital Privileges ...*”

[20] As for the medical services rendered by the Doctor at the Hospital, JSHSD will pay all the money so received by the Doctor from his patients. This is clearly provided for under clause 8.4 of the Resident Consultant Agreement, which reads:

“Clause 8: OBLIGATIONS OF THE COMPANY

The Company binds and obligates itself to the following in respect of the Hospital:-

8.1 *Reasonable Standard and Quality*

8.2 *Maintenance of the Hospital*

8.3 *Keep Proper Records*

8.4 *Payment of Monies*

The Company shall pay over all monies so received, in respect of the first half of every month by the 22nd of the relevant month and in respect of the second half of the month by the seventh day of the subsequent month or by the end of the period of stay of the inpatient concerned, whichever is later, and such money shall be paid without any deduction except for the payment of such amount as had been agreed herein to be paid by the Consultant pursuant to Clause 5.2 above or under any other agreement."

- [21] The Resident Consultant Agreement was signed by the Doctor and JSHSD. Having considered the relevant clauses in the Resident Consultant Agreement, I agree with the DGIR's stand that the Doctor had signed the said agreement in his personal capacity. The Resident Consultant Agreement allows the Doctor to practice his profession as a registered specialist medical practitioner at the Hospital, subject to payment of rental fees and payment for hospital privileges.
- [22] For the medical services that the Doctor had rendered to his patients, he is entitled to such payments and clause 8.4 provides that JSHSD will pay all the monies received for the medical services rendered. Therefore, when the agreement for services was clearly made between the Doctor and JSHSD, then all monies and payments from the patients under the Resident Consultant

Agreement rightly belonged to the Doctor. Since all the monies and payments that arises from the Resident Consultant Agreement belonged to the Doctor, consequentially all taxes derived from the income of the practice at the Hospital is taxable under the Doctor as individual income, not the Company's income.

[23] However, the Applicants take the position that whilst the Resident Consultant Agreement was entered into between the Doctor and JSHSD, the Doctor was in fact acting for the Company at all material times. This can be seen from the Service Agreement dated 14.11.2016 and from the fact that the monies received from the patients seen by the Doctor at the Hospital, were paid by JSHSD to the Company.

[24] With regards to the Service Agreement entered into between the Doctor and the Company, this is not a relevant consideration as it was only executed on 14.11.2016, whereas the DGIR's letter was dated 9.9.2016.

[25] In any event, with regards to the payments of professional fees made by JSHSD to the Company instead to the Doctor, I am of the considered opinion that the said payments made was only an arrangement that was agreed to by the parties, but it cannot detract away from the fact that it was the Doctor (in his personal capacity), who has entered into the Resident Consultant Agreement with JSHSD. The payments were for the services rendered by the Doctor at the Hospital, pursuant to the Resident Consultant

Agreement. As to how the payments were transmitted by JSHSD is up to the parties' arrangements, but it does not change the character of the payments made, that is, for the medical services rendered by the Doctor to his patients at the Hospital pursuant to Resident Consultant Agreement.

[26] In **Controller of Inland Revenue v. Lim Foo Yong Sdn Bhd** [1982] CLJ (Rep) 76, the Federal Court had applied the principle laid down in the English case of *Commissioners of Inland Revenue v. Wesleyan & General Assurance Society* 30 TC 11, where the court is to look at the real character of the payment, and not the label that the parties have given it. Justice Salleh Abas FCJ held as follows:

*“As the supposed doctrine of substance is only a matter of construction, the following passage in the judgment of Lord Greene MR in *Commissioners of Inland Revenue v. Wesleyan and General Assurance Society* 30 TC 11, 16 is very relevant:*

*It is perhaps convenient to call to mind some of the elementary principles which govern cases of this kind. **The function of the Court in dealing with contractual documents is to construe those documents according to the ordinary principles of construction, giving to the language used its normal ordinary meaning save in so far as the***

context requires some different meaning to be attributed to it. Effect must be given to every word in the contract save in so far as the context otherwise requires.

Another principle which must be remembered is this. In considering tax matters a document is not to have placed upon it a strained or forced construction in order to attract tax, nor is a strained or forced construction to be placed upon it in order to avoid tax. The document must be construed in the ordinary way and the tax legislation then applied to it. If on its true construction it falls within a certain taxing category, then it is taxed. If on its true construction it falls outside the taxing category, then it escapes tax.

The Special Commissions applied the above principle and came to the conclusion that these three documents constitute a sale, a lease and an agreement to repurchase the properties. The construction of these documents does not only involve a matter of the words or form used in the agreements but above all the method employed by the parties in the transaction. The modus operandi adopted was clearly based upon the assumption that it was a sale. Thus there is no way in which the Special Commissioners could find the transaction to be otherwise, short of tearing off these documents or ignoring them altogether.

As to the respondent's explanation that the transaction was documented in the form of sale rather than of loan because of certain legal technicalities and benefits we do not think that they only amount to a motive which had no effect on the legal consequence. It may well be that sale was entered into instead of a loan, because the EPF Board had also no power to run and invest in a hotel business. Thus technicalities cut both ways, and in any case motive is completely irrelevant.

We therefore think that the Special Commissioners' finding that the transaction with the EPF Board was a sale was correct.” (emphasis added)

[27] In this case, I am of the considered opinion that the DGIR had complied with the above principle of construction, giving the Resident Consultant Agreement its ordinary meaning, in that the said agreement is a contract for service between the Doctor and JSHSD, where the Doctor will pay for the rental of his clinic at the hospital and will receive payments from his patients in consideration of his professional service. There is no forced construction to the said agreement in order to attract tax. But if we are to read the Service Agreement into it, or to read into it the manner in which payments were made to the Company instead to the Doctor, then we will be giving it a strained or forced construction, in order to avoid tax.

[28] In any event, section 140 of the ITA 1967 empowers the DGIR to disregard certain transactions, (in this case the monies being paid to the Company and not to the Doctor by JSHSD). Section 140 reads:

“Power to disregard certain transactions

140. (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of:

- (a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;*
- (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;*
- (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or*
- (d) hindering or preventing the operation of this Act in any respect.*

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he

thinks fit with a view to counter acting the whole or any part of any such direct or indirect effect of the transaction.”

- [29] The application of section 140 was considered by the Court of Appeal in the case of **Syarikat Ibraco – Paremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2017] 2 MLJ 120; [2015] 10 CLJ 114, where the Court held as follows:

*“[28] The distinction between what is accepted and what is not in the way of reducing the amount of tax to be paid used to be conveniently described by the terms tax avoidance and tax evasion respectively. Section 140(1)(c) of the Act in particular, has the effect of demolishing that convenient description. **The Act now empowers the Director General, without prejudice to such validity as it may have in any other respect or for any other purpose, where he has reason to believe that any transaction has the direct or indirect effect of evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by the Act, to disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.** Thus the oft quoted words of Lord Tomlin in *IRC v. Duke of Westminster* [1936] AC 1 and quoted by Lord*

Templeman in Commissioner of Inland Revenue v. Challenge Corporation Ltd (supra) that every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be is now only partially true, for whether he succeeds or not, according to s. 140(1)(c), depends upon the determination of the Director General. We make the observation that it is for the taxpayer to demonstrate that the transaction or the arrangement by which the income was produced was so preordained by compliance with the requirements of law or accepted business practices to limit risk exposure, and that the tax savings were purely incidental.” (emphasis added)

[30] In this case, the issue is on the construction of the Resident Consultant Agreement, whether it is the Doctor or the Company who is taxable for the income derived under the said Agreement. Therefore, there is no issue with regards to whether the medical practitioners are authorized or permitted by law to incorporate a company or body corporate to carry on business as medical practitioners and to provide medical services.

[31] Therefore, premised on the reasons enumerated above, on the construction of the Resident Consultant Agreement, I find that the DGIR has applied the correct principles in the construction of the same, when he finds that based on the said agreement and pursuant to the ITA 1967, it is the Doctor and not the Company, who is

chargeable and assessable to income tax in respect of the aforesaid monies received from the Doctor's patients.

Issue (ii) arbitrary and unfair treatment of the Applicants

[32] It is the submission of the Applicants that the DGIR's decision is unfair and discriminatory as the said Decision does not apply to other categories of specialist doctors, general practitioners in private medical clinics, architects and engineers.

[33] The Decision cannot be said to have been made arbitrarily as from the DGIR's letter itself, there were discussions with the MMA. Added to that, the Decision was made based on the Applicant's own documents and the DGIR's construction of the same.

[34] With regards to the other categories of professionals given a different treatment, there are no documentation before this court as to whether their contracts are the same as the Applicants herein. It must be emphasized that the DGIR will only look at each taxpayer's own documents on the issue of taxes and each case will be assessed on its own merits.

Issue (iii) breach of the Applicants' legitimate expectation

[35] The Applicants submit that premised on the principle of legitimate expectation, the Respondents are bound by the Respondents' own Tax Audit Frameworks and its audit on the 2nd Applicant in 2013.

- [36] The Tax Audit Framework provided that the objective of tax audit is to ensure the correct amount of tax has been reported and the right amount of tax has been paid, and that once an audit case is settled, the audit should not be repeated on the same issues for the same year of assessment.
- [37] However, the 2013 audit on the 2nd Applicant is not on the tax treatment practiced by the Applicants, but rather on the issue of expenses claimed by the Applicant, that is the expenses for petrol, parking and toll, filing fees, telephone bills, travelling expenses and printing stationary.
- [38] In any event, section 91(1) of the ITA 1967 allows the DGIR to raise any assessment or additional assessment if the DGIR is of the opinion that no tax or sufficient tax has been made, and this will include departing from the existing practice and adopting a different form of assessment. In **Government of Malaysia v. Sarawak Properties Sdn Bhd** [1984] 1 MLJ 14, Justice Chong Siew Fai held as follows:

*“... It cannot be doubted that the Director of Inland Revenue and his subordinate officers down to those charged with the due administration of the Act are holding public offices (s. 134 of the Act) and, in carrying out their tasks of assessing taxes under the Act, are performing public duties. **As such, the doctrine of estoppel by record does not apply to them in that they cannot, by***

issuing a letter such as Exh. CSC- 2, be estopped from subsequently exercising a power or discretion which it is their duty to exercise...

...

In my opinion, the question of the applicability of estoppel against the Crown does not necessarily depend on the existence of any mistake on the part of revenue officers but rests on the broader basis as to whether the Crown is bound by representations and conduct of the officers of the Inland Revenue irrespective of the presence or otherwise of any mistake.

.....

Lastly it was contended for the defendant that since the plaintiff had, for the years of assessment 1981 - 1985 (both inclusive), agreed to and accepted what was called "the completed contract" method of accounting adopted by the defendant respecting the same project and had assessed taxes on that basis, the plaintiff was estopped from changing to a new method (known as "percentage completion method") to assess the tax respecting the year of assessment 1986 in relation to the same project.

*With respect I am unable to agree to the contention. **The fact that the Revenue Department had accepted or adopted certain method in assessing tax does not preclude it from departing from the existing method or practice and changing its opinion by adopting a***

different form of assessing. *Pethaperumal Chettiar v. C.I.T.* [1943] 1 TR 532, 538.

The doctrine of res judicata does not apply to the decisions of income tax commissioners. *Patuck v. Llyod (Inspector of Taxes)* [1944] 26 TC 284 at 292 CA.”
(emphasis added)

[39] The above principle was applied by the Court of Appeal in **Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2006] 4 MLJ 685, where the Court held as follows:

*“[18] Estoppel is a rule of evidence which can only be invoked in special circumstances. The estoppel relied upon by the taxpayer against revenue in this case is that of estoppel in pais, ie, estoppel by words or conduct. In our view the Special Commissioners were not wrong to reject the suggestion that the assessment by the respondent of a taxpayer under the RPGT was an irrevocable act. **Estoppel cannot be invoked against the Director General of Income Tax when he is put to notice that an incorrect assessment has been made under the RPGT. The Director General cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law if the basis of treating the gain as a capital gain was not within the meaning ascribed to***

it by the RPGT and no real property gains tax is payable. In such a situation the Director General is not absolved from discharging his duty of raising the correct assessment in accordance with the relevant law. No person can raise an estoppel against himself so as to defeat a positive duty imposed upon him by a statute (Maritime Electric Co. Ltd v. General Diaries Ltd. [1937] AC 610 at pp. 620-621). The duty of both parties, the Director General and the taxpayer, is to obey the law.”
(emphasis added)

Issue (iv) breach of Article 7(1) of the Federal Constitution

[40] The Applicants submit that there had been a breach of Article 7 of the Federal Constitution as the DGIR's decision amounts to punishing the Applicants for implementing the Arrangement, which was neither illegal nor invalid when it was made back in 2002.

[41] I do not appreciate this argument and the relevance of Article 7, which is on double jeopardy in criminal cases. However, as the cases are very clear that the DGIR can adopt a different form of assessing tax, this is clearly a non-issue.

Conclusion

[42] Premised on the reasons enumerated above, I am of the considered opinion that the Decision of the DGIR is legal as it is premised on the construction of the Resident Consultant Agreement. The ITA 1967 empowers the DGIR to raise any assessment or additional assessment, and the DGIR is not estopped from adopt a different form of assessing tax. Therefore, I find no merit in the application and the same is dismissed with costs.



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

Dated: 23rd November 2018

For the Applicants : T. Sudhar/Tanya Edward
Messrs Steven Thiru & Sudhar Parnership
Kuala Lumpur.

For the Respondents : Tuan Ahmad Isyak bin Mohd Hassan (PKH)
Lembaga Hasil Dalam Negeri
Cyberjaya, Selangor.

Cases referred:

1. Booi Kim Lee v. YB Menteri Sumber Manusia & Golden Plus Geaniait SB [1999] 3 MLJ 515.
2. Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 MLJ 597.
3. Controller of Inland Revenue v. Lim Foo Yong Sdn Bhd [1982] CLJ (Rep) 76.
4. Syarikat Ibraco – Paremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2017] 2 MLJ 120; [2015] 10 CLJ 114.
5. Government of Malaysia v. Sarawak Properties Sdn Bhd [1984] 1 MLJ 14.
6. Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685.

Salinan Diakui Sah



.....
Setiausaha Kepada
Y.A. Datuk Hajjah Azizah Binti Haji Nawawi
Rayuan dan Kuasa-Kuasa Khas 2
Mahkamah Tinggi Kuala Lumpur