DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO: WA-25-20-01/2019

Dalam perkara suatu keputusan Responden seperti yang dinyatakan melalui notis-notis taksiran tambahan tahun-tahun taksiran 2013 2014 dan 2015 yang disampaikan melalui surat Responden bertarikh 20.12.2018;

Dan

Dalam perkara suatu permohonan untuk antara lain, suatu Perintah Certiorari;

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012.

ANTARA

TUNE INSURANCE MALAYSIA BERHAD **...PEMOHON**

DAN

KETUA PENGARAH HASIL DALAM NEGERI **...RESPONDEN**

JUDGMENT

Introduction

[1] The applicant filed a judicial review application seeking among others an order of certiorari to quash the respondent's decision which is the notices of additional assessment dated 20.12.2018 for the years of assessment 2013, 2014 and 2015.

[2] The additional assessment among others, was as the result of the respondent's action in disallowing the deduction of the Provision of Risk Margin for Adverse Deviation (PRAD) expenses as deduction under subsection 60(5)(b)(i) of the Income Tax Act 1967 ('ITA 1967').

The Background Facts

[3] The salient facts in this application are the following :

(i) The respondent has conducted an audit at the applicant's premises from 14.5.2018 until 16.5.2018 for years ended 31.12.2013, 31.12.2014 and 31.12.2015.

(ii) The audit tax revealed that the applicant had made claim on expenses under '***net benefits and claims***' for years assessment 2013, 2014 and 2015 as follows :

Year Assessment	Net benefits and claims Amount RM
2013	91,250.419
2014	104,495.950
2015	117,835,524

(iii) The respondent also found the expenses for Incurred But Not Reported ('IBNR') and Provision of Risk Margin For Adverse Deviation ('PRAD') based on the report for Estimation of General Insurance Liabilities are the following :

Year Assessment	IBNR RM'000	PRAD RM'000	Amount RM'000
2013	23,500	14,850	38.350
2014	36,191	15,999	52,190
2015	46,553	20,086	66,639

(iv) The respondent then informed the applicant that the claim for PRAD expenses were not allowable for deduction as they were estimated expenditure which were uncertain.

(v) As a result, the respondent issued the notices of additional assessment dated 20.12.2018 for years of assessment 2013, 2014 and 2015 with penalty which are as follows :

Year Assessment	Amount
2013	RM7,475,472.83
2014	RM866,174.18
2015	RM2,757,664.01
TOTAL	RM11,099,311.02

The Grounds For The Judicial Review

[4] The applicant's ground for the judicial review applications are the following :

(i) The respondent has failed to consider the provisions of sections 33(1) and 60(5)(b)(i) of Income Tax Act 1967 ('ITA 1967') in disallowing the deduction for PRAD expenses incurred by the applicant.

(ii) The respondent has failed to apply the legal principles established by the superior courts that disbursement is not a requirement for an expenses to be deductive under section 33(1).

The Respondent's Preliminary Objection

[5] At the outset, the respondent raised the issue that the notice of additional assessment for years assessment 2013, 2014 and 2015 dated 20.12.2018 consists of several adjustments for other expenses which also not been allowed for deduction and not only for PRAD expenses. These other expenses has been appeal against by the applicant to the Special Commissioner of Income Tax ('SCIT'). As such, the respondent submitted that the applicant has failed to fulfil the requirement under Order 53 rule 2(4) of the Rules of Court 2012 that the applicant is adversely affected by the respondent's decision in issuing the additional assessment as the result of the disallowance of PRAD expenses.

[6] The respondent also contends that the applicant has failed to exhaust the remedy to appeal to the SCIT under section 99 of ITA 1967 and as such the applicant judicial review application should not be allowed.

Findings Of This Court

[7] The respondent has raised an issue that the applicant is not adversely affected by the issuance of the additional assessment

which includes the assessment by disallowing the deduction of PRAD expenses. This also relates to the fact that no appeal has been lodged by the applicant to the SCIT for the disallowance of deduction of PRAD expenses.

[8] In this regard, Order 53, rule 2(4) provides as follows :

> "*(4) 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.*"

[9] The words "adversely affected" has been explained in detail by the Court of Appeal in the case of ***QSR Brands Bhd v Suruhanjaya Securiti & Anor [2006] 3 MLJ 164*** in the following manner :

> "***[16]*** *There is a single test of threshold locus standi for all the remedies that are available under the order.* ***It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach****. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'.* ***At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned*** *(see Finlay v Canada [1986] 33 DLR 421). This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, ex debito justitiae, grant the applicant threshold standing. See, for example Thorson v Attorney General of Canada [1975] 1 SCR 138.*
>
> ***[17]*** *At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in*

Malik Brothers v Narendra Dadhich AIR 1999 SC 3211, where, when granting leave, it was said :

> *'Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected. It would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated'.*

[18] *In an ordinary case, if on a reading of the application for leave to issue judicial review the court is satisfied that the applicant has neither a sufficient personal interest in the legality of the impugned action in the sense already discussed, nor is the application a public interest litigation, then leave may safely be refused on the ground that the applicant is not a person 'adversely affected'. In this context, the court must bear in mind what Lord Diplock said in Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd [1982] AC 617 :*

> *'The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated it the court were to go into the matter in any depth at the stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application'."*

[10] Reverting to the present case, I find, the applicant has an obvious sufficient interest in the legality of the respondent's action in disallowing the deduction of PRAD expenses. This also relates to the applicant's rights to property which has been infringed. As such, the applicant is adversely affected as envisaged under Order 53 rule 2(4) irrespective that there was no appeal made to the SCIT under section 99 of ITA 1967.

[11] The other related issue is the applicant's failure to appeal to the SCIT. On this issue, there is an exception to the principle that applicant must exhaust the remedy provides by statute as was held by the Supreme Court in the case of ***Government of Malaysia & Anor v Jagdis Singh [1987] CLJ (Rep) 110***, as follows :

> "*[1] Certiorari is always at the discretion of the Court. But where there is an appeal provision available to the applicant, certiorari should not issue* ***unless there is a clear lack of jurisdiction or blantant failure to perform some statutory duty*** *or* ***serious breach of principles of natural justice.***"

[12] In the present case, the respondent has failed to apply the provisions of section 33(1) and section 60(5)(b)(i) of the ITA 1967 to the detriment of the applicant. The detail of this will be elaborated in this judgment.

[13] In the circumstances, there is failure to perform statutory duty by the respondent and also lack of jurisdiction. As such the respondent's preliminary objection is devoid of any merit.

[14] As regards the merits of the judicial review application, the core issue here is whether PRAD expenses is deductable pursuant to sections 33(1) and 60(5)(b)(i) of ITA 1967.

[15] In this regard, reference to sections 33(1) and 60(5)(b)(i) are pertinent which are as follows :

Section 33(1) states :

"(1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deduction from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including – ..."

[16] Pursuant to this section 33(1), it is clear that taxpayer can claim for deduction for outgoings and expenses incurred during the period in the production of gross income.

[17] This has been explained by the Court of Appeal in the case of ***Aspac Lubricants (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2007] 5 CLJ 353***, where section 33(1) was referred as 'the basket provision' and states as follows :

"***[2]*** *The appellant relies on what is commonly referred to as 'the basket provision' to support its deduction of the expenses in question. This is in fact the opening paragraph of s. 33(1) of the Income Tax Act 1967 ('the Act') which reads as follows :*

> *'Subject to this Act, the adjusted income of a person from a source for the period for a year of assessment shall be an amount ascertained by deduction from the gross income of that person from that source for that period* ***all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income*** *from that source...'*

I have lent emphasis to that part of the subsection on which the appellant relies."

[18] In another case, ***North Borneo Timber Bhd v Ketua Pengarah Hasil Dalam Negeri [1999] MSTC 3,741***, Justice Charles Ho had this to say in regard to the provision of section 31(1) :

"*It appears to me the Special Commissioners did not seem to fully appreciate that the taxpayer company in the present case is entitled to fall back on the general provisions of s. 33(1) if it fails to bring its case within the specific provisions of s.33(1)(c).* ***In order to qualify for deduction under s.33 of the Act, it is not necessary that a taxpayer must show that the expenses and outgoings, for which a claim for deduction is made, fall within one of the expenses and outgoings specifically mentioned in paras 33(1)(a) to 33(1)(d) of the section. The taxpayer can rely on the general provisions of that section to claim for deduction if the taxpayer is able to show that such outgoings and expenses are actually incurred wholly and exclusively during that period in the production of gross income.***"

[19] The next relevant and related provision on this issue is ***section 60(5)(b)(i)*** which provides :

"*(5) The adjusted income for the basis period for a year of assessment from the general business of an insurer resident for the basis year for that year of assessment shall consist of an amount arrived at by –*

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(b) subject to section (7), ***deduction from that aggregate the amount*** *of –*

(i) ***claims incurred in that period in connection with his general policies;***"

[20] Here, there is nothing under this provision that precludes the application of section 33(1) and I agree with the applicant's contention that section 60(5)(b)(i) supplements and applies over and above section 33(1). This too is consistent with section 52 of the ITA 1967 which states :

"***In a case where any provision of this Chapter applies, the foregoing Chapters shall also apply*** *but shall be modified in their application to the*

extent necessary to conform with that provision; and, if in that case there is any inconsistency between that provision and any provision of the foregoing Chapters, that provision of those Chapters shall be void to the extent of the inconsistency."

[21] In the circumstances, section 60(5)(b)(i) and section 33(1) of ITA 1967 are applicable in relation to this issue of deduction of PRAD expenses.

[22] The essential element in both sections 33(1) and 60(5)(b)(i) are with regard to 'expenses incurred' and the word 'incurred' in section 33(1) includes the sum which is under the obligation of the taxpayer to pay and not confined to actual disbursement.

[23] This principle of law has been explained in numbers of decided cases and among others, in the Court of Appeal case of ***Exxon Chemical (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810*** which states as follows :

"*Revenue's argument is simple enough. It says that the important words in s. 33(1) are 'expenses wholly and exclusively incurred'. In other words, it must be money actually spent. The benefit plan is in respect of monies that are never 'incurred'. They are there to meet a mere contingency. So they form part of ther adjusted income and attract tax.*

Learned counsel for revenue submits that Lo & Lo is distinguishable because of the difference in the actual wording of s. 16 of the Hong Kong Ordinance. It is also submitted that s. 33(1), being a taxing statute, should be given a strict construction and hence the words 'expenses wholly and exclusively incurred' should receive a narrow interpretation. The oft quoted judgment of Rowlatt J in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1KB 64 was prayed in aid of this submission. With respect, ***I am unable to agree with these arguments***.

In the first place, ***the word 'expenses wholly and exclusively incurred' appearing in s. 33(1) include a sum which the taxpayer is under an obligation to pay****. That is the proposition established by Lo & Lo. Being a Privy Council decision from another jurisdiction on a provision that is materially similar to our written law, it must be given great weight. Here, I can do no better that to refer to the following passage in the judgment of Chang Min Tat FJ in Director General if Inland Revenue v Kulim Rubber Plantations Ltd [1981] 1 MLJ 214 :*

> *This court has down in Khalid Panjang & Ors v. Public Prosecutor (No. 2) [1964] MLJ 108 the principle that a Privy Council decision on appeal from another country is binding on it and the other courts of this country if the appeal is on a provision of law in pari material with a provision of the local law. The decision is lasala v Lasala [1979] 2 All ER 1146, that the Privy Council would consider itself bound by a decision of the House of Lords must extend this principle to judgments of the House of Lords. Insofar as the decision of other courts in these and other countries are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as per incuriam. Other hand for these reasons, we should as a matter of judicial comity and for the orderly development of law, pay due and proper attention to them (emphasis added.).*

In the second place, ***the fact that the appellant's employees did not actually receive the money in a given year does not matter. For, had any of those who were eligible to receive the benefit claimed it, then it would have been impossible for the appellant to have lawfully resisted the claim****. The fact that the employees thought it fit not to make a claim but to defer it does not make the obligation to pay the expense that is incurred by the appellant non-existent. Accordingly it comes within what revenue lawyers commonly call 'the basket' in s. 33.*

In the third place, ***the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision: no tax. If there is any doubt then it must be resolved in the taxpayer's favour****. See, National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1993] 4 CLJ 339. The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head."*

[24] The principle in Exxon Chemical was followed in ***Mercedez Benz Malaysia Sdn Bhd v Ketua Pegarah Hasil Dalam Negeri [2012] MSTC 30-052*** where it was held as follows :

> *"[36] Gross income is always recognised for the purpose of tax on accrual basis. Thus soon as a taxpayer has a legal right to payment it must be recognised as income.* ***Correspondingly, expenditure should also be recognised one the legal obligation sets in****; otherwise the profit will not be correctly stated. Relying on Exxon Chemical (M) Sdn Bhd v KPHDN [2005] 4 CLJ 810 the Taxpayer contended that the word 'expenses wholly and esclusively incurred' includes a sum which the Taxpayer is under legal obligation to pay. The same position accordingly was taken in other Commonwealth jurisdiction.*
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> *[39] The above authorities illustrate that the word 'incurred' for the purposes of s.33(1) of the ITA is not confined to actual disbursement. The word 'incurred' also includes expenses as a sum of which there is an obligation to pay, or outgoings to which the Taxpayer is definitively committed in the year of income.* ***The pertinent question to be asked therefore is whether the Taxpayer is under a legal obligation to incur the expenditure in respect of the Margins****."*

[25] Aside from the above local authorities, on the same issue, the Federal Court of Australia in the case of ***Federal Commissioner of Taxation v Mercantile Mutual Insurance (Workers Compensation) Ltd [1999] 162 ALR 130*** explained as follows :

> *"**[44]** There is no doubt that once an event insured against has happened (and I put to one side matters of notice and the like which may affect the generality of what is here said) the insurer comes under a legal liability to pay money to the policy holder. That legal liability is encountered the moment the event insured against happens. It is in all respects a presently existing liability, and for this purpose it matters not that the liability falls to be discharged in the future. There is no difference for this purpose*

between the liability of an insurer to pay money in the future in settlement of a claim and the obligation of any other taxpayer who falls under a legal liability to pay money in the future. Contrary to the Commissioner's submission, there is no gap in time between the event insured against and the liability to pay. There is a presetly existing liability to pay moneys in the future, which liability, like the event which gives rise to it, occurs in the year of income."

[26] In the instant case, the applicant has the legal obligation to pay the policy holder pursuant to the contractual obligation from the insurance policy and as the result the applicant incurred the PRAD expenses. This, irrespective of the fact that the applicant had disbursed the PRAD expenses.

[27] Further, the fact whether PRAD is part of IBNR is immaterial as the issue here is whether PRAD expenses is deductable under the relevant provision as alluded to earlier and which this court has find in the affirmative.

Conclusion

[28] Based on the aforesaid reasons, I find, the respondent has committed an error of law in disallowing the deduction of PRAD expenses in the issuance of the additional assessment for years of assessment 2013, 2014 and 2015.

[29] In the circumstances, the application for the judicial review application is allowed in which the additional assessment for years assessment 2013, 2014 and 2015 to be made after the deduction of PRAD expenses incurred by the applicant.

[30] The respondent is to pay costs of RM5,000.00 to the applicant.

DATED THIS 23RD MAY 2019

[NORDIN BIN HASSAN]
JUDGE
HIGH COURT SPECIAL AND APPELLATE POWERS
KUALA LUMPUR HIGH COURT.

Parties :

[1] S. Saravana Kumar & Nur Amira bt Ahmad Azhar
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[2] MuhamMad Farid Jaafar &
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Peguam Kanan Hasil Respondent
Ibu Pejabat Lembaga Hasil Dalam Negeri
Malaysia, Jabatan Undang-Undang
Bahagian Litigasi Cukai
Cyberjaya.