IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: 01(f)-18-08/2012(W)

BETWEEN

KETUA PENGARAH HASIL DALAM NEGERI
...APPELLANT

AND

1. ALCATEL-LUCENT MALAYSIA SDN BHD
2. ALCANET INTERNATIONAL ASIA PACIFIC PTE LTD
...RESPONDENTS

In the Court of Appeal of Malaysia
(Appellate Jurisdiction)
Civil Appeal No: W-01-482-2010

Between

Ketua Pengarah Hasil Dalam Negeri
...Appellant

And

1. Alcatel-Lucent Malaysia Sdn Bhd
2. Alcanet International Asia Pacific Pte Ltd
...Respondents

CORAM:

ZULKEFLI AHMAD MAKINUDIN, CJM
SURIYADI HALIM OMAR, FCJ
ZAINUN ALI, FCJ
RAMLY ALI, FCJ
BALIA YUSOF WAHI, JCA

JUDGMENT OF THE COURT

[1] The respondents filed a judicial review application under Order 53 of the Rules of the High Court 1980 on 23.5.2008, inter alia for an order of certiorari to quash the appellant's decision allegedly made in a letter of 14.4.2008 addressed to the respondents' tax agent, a declaration that the appellant's decision in that letter was erroneous in law, and also prayed for a refund of the withholding tax already paid.

[2] The application for judicial review was allowed by the High Court and affirmed by the Court of Appeal. The appellant on 9.8.2015 successfully obtained leave from this court to determine two questions.

Facts of the Case

[3] The first respondent is a Malaysian company whilst the second respondent a non-resident.

[4] A Service Agreement dated 1.1.2003 ("the Service Agreement") was executed between the first respondent and the second respondent, whereupon the second respondent was to provide services to the first respondent from overseas relating to the provision of a global network for voice, data, and video communication (the services). The rates to be paid were fixed.

[5] The appellant, in the course of conducting a withholding tax audit over the first respondent's business, discovered that no withholding tax was paid by the first respondent to the appellant in respect of payments made to the second respondent.

[6] Pursuant to that discovery, the appellant issued a letter dated 31.10.2007 informing the first respondent of its omission to pay the withholding tax for the years of assessment 2001-2005 totalling RM4,489,747.00, and demanded payment. The appellant held the view that the payments made by the first respondent to the second respondent, in consideration of the services rendered by the

latter, as royalty payments, and hence subject to withholding tax.

[7] Apart from the demand of that withholding tax, the appellant wrote that if no payments were made, it would disallow any deduction under section 39 (1) (f) and (j) of the Income Tax Act 1967 (ITA), to be followed by a commencement of action under section 106 (1) of the ITA to recover tax from the first respondent. Hereinafter, any provision referred to refers to a provision in the ITA, unless stated otherwise.

[8] After negotiations were carried out, the amount required to be paid by the first respondent was reduced from RM4,489,747.00 to RM1,781,274.00, and after further representation to the appellant, the sum was finally reduced to RM1,507,674.80 vide a letter dated 28.3.2008, which was addressed to the first respondent.

[9] Another letter by the appellant to the first respondent's tax agent i.e. Price Water Cooper House

Taxation Services Sdn Bhd. dated 14.4.2008 reconfirmed the RM1,507,674.80 sum.

[10] The appellant in the abovementioned letter of 14.4.2008, referred to sections 109 and 109B. Before us the appellant submitted that the RM1,507,674.80 was withholding tax for royalty payments made to the second respondent by the first respondent.

[11] The first respondent vide letter dated 28.4.2008 then registered its dissatisfaction to the appellant.

[12] Despite a lengthy negotiation, exchanges and correspondences, culminating in the reduction of the withholding tax, it was still alleged that the appellant did not supply the reasons why the payments were subject to withholding tax.

[13] The first respondent eventually paid the negotiated sum under protest on 28.4.2008 but continued holding the

view that the services were not royalty as they were performed outside Malaysia.

[14] Despite having paid the withholding tax under protest, the respondents never filed any appeal to the Special Commissioners, as provided for under the ITA. Why the respondents did not file any appeal is of no concern of ours, though highly relevant when answering the second question of the leave question.

[15] To register its dissatisfaction, the first respondent filed the abovementioned judicial review under Order 53 of the Rules of the High Court 1980.

[16] On 15.6.2010, the High Court allowed the respondents' application for judicial review with costs of RM4,000.00.

[17] Being dissatisfied the appellant appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court.

[18] On 9.8.2015 the appellant successfully obtained leave from this court on the following questions of law:

a. whether the letter of the Director General of Inland Revenue dated 14.4.2008 referring to both sections 109 and/or 109B of Income Tax 1967 is bad in law; and

b. if the answer is in the negative, are the payments for the services as referred in the Agreement exhibited as "PC-3" royalties under section 109 of the Income Tax Act 1967.

<u>The appellant's submission</u>

[19] Learned counsel for the appellant submitted that the judicial review application was an application to challenge the decision making process of the Director General of Inland Revenue, with the decision being the imposition of the withholding tax under the ITA over the payment of Leased Communication Facilities, made by the first respondent to the second respondent. It boils down to

whether the appellant's decision in the 14.4.2008 letter is invalid.

[20] The appellant added that the High Court had wrongly agreed with the respondents that they became aware that the payments were royalties, and were subject to withholding tax, only through the appellant's affidavit in reply as affirmed on 15.6.2009 (enclosure 14).

[21] It was ventilated by the appellant that the High Court was in error in law and in fact for failing to take into account the material facts of the case, as the respondents were aware of the withholding tax after due scrutiny of the available affidavits at the High Court. The only complaint worthy of consideration as raised by the respondents in their affidavits was that no reason was given by the appellant of its treatment that the Leased Equipment Facilities payments were royalty.

[22] Expanding on this argument, the appellant submitted that under the ITA, the Director General of Inland

Revenue is statutorily not bound to give reasons for its decision to impose withholding tax. Further, this is not a case under section 140(5) where the appellant is under a statutory duty to give particulars when raising an additional assessment as a result of adjustments having been made under section 140.

[23] According to the appellant, the facts show that the appellant's conduct was in compliance with the principles of natural justice. By having several meetings between the representative of the first respondent, the respondent's tax agent, and the assessors involved in the audit, the respondents had been accorded their fundamental rights to be heard.

[24] Learned counsel for the appellant further submitted that based on the correspondences and meetings between the first respondent and the appellant, it could be gleaned that the first respondent and its tax agent were aware of the issues at hand. In other words, they knew about the issue of the non-compliance of the withholding tax provisions

under the ITA right from the beginning of the auditing exercise.

[25] The appellant argued that only two withholding tax provisions were involved. The respondents were not in the dark when they received the appellant's letter of 14.4.2008. It was submitted that the reference to both sections 109 and 109B in the said letter thus was not unreasonable.

[26] The appellant also emphasized that it has always been a presumption that the administration exercises its power in good faith and for public benefit and that there is no flaw in the decision making process of the appellant. In the premises, it was submitted that question (a) posed before this Court ought to be answered in the negative.

[27] It was submitted by the appellant that the respondents were represented by a reputable tax agent who was aware of the issues and the application of the provisions of the ITA. The outcome of the several meetings between both parties was the reduction of the withholding

tax. The respondents thus were given fair and reasonable opportunities to put their case before the appellant before the matter was finalized.

[28] In respect of question (b), posed before this Court the appellant submitted that the payments made by the first respondent to the second respondent in respect of services were royalty payments within the definition of "royalty" under section 2.

[29] Evidentially, based on the facts of the case, the appellant submitted that the first respondent and the second respondent are subsidiaries of Alcatel-Lucent, which is incorporated in France, and the ultimate holding company of both the respondents.

[30] Supplying further facts, the appellant submitted that during the years 2001 and 2005 and pursuant to a Service Agreement, it was agreed by the second respondent that it designs, implements and operates a global network for voice, data and video communication. The Service

Agreement thus is a crucial document that must be analyzed to determine whether the payments made for the services from 2000-2006 for the Leased Communication Facilities were in fact and in law royalty.

[31] On the argument regarding the draft agreement which was alleged not to have been implemented, the appellant submitted that the onus is on the respondents to prove that it was never implemented. The payments, on the other hand made by the first respondent to the second respondent, are the solid proof that the first respondent had in fact benefited from the terms of the draft agreement arising from the leasing of the facilities. That being so, by action and conduct of the respondents, the draft agreement was indeed executed by the respondents.

[32] A perusal of the Service Agreement shows that the first respondent has to make payments to the second respondent as consideration for the use of the software, with the consideration having been paid by the first

respondent to the second respondent for the services rendered from 2000 till 2005, being RM7,869,698.00.

[33] It was submitted that it could not be an outright sale as the first respondent was only given a non-exclusive, non-transferable right to use the software and the copyright remained with the second respondent. The right to use the software was given to the first respondent, as without such consent granted by the second respondent, the former would have infringed a copyright under section 36 of the Copyright Act 1987.

[34] These payments therefore were "royalty" as defined under section 2 of the ITA, being payment to the second respondent for the use of the intellectual property.

[35] The appellant further submitted that it is immaterial whether the expenses incurred is to gain or produce the income of the payer, as a payment is royalty if it falls within section 2 and not otherwise, unless clearly provided for.

[36] Based on the above premises, the appellant submitted that this appeal ought to be allowed with costs.

The respondents' submission

[37] The respondents submitted that the courts below were correct in law and in fact in holding that the appellant was unreasonable in applying both sections 109 and 109B for the payments and exacerbated by failing to give reasons for the impugned decision.

[38] Learned counsel for the respondents conceded that even though there are only two withholding tax sections in the ITA, namely section 109 and section 109B, and by so listing both sections it showed that the appellant was unsure which section applied to the payments made by the first respondent to the second respondent. In short the appellant had not come to a determination as to which section applied to the said payments.

[39] The respondents submitted that when asked by the respondents' tax agent, as to which withholding tax provision applied to the said payments, the appellant was unable to provide any answer. Instead the appellant merely listed down sections 109 and 109B.

[40] The respondents further canvassed that a perusal of the two sections will show that they cover different types of payments and that they relate to different things; otherwise there would be no necessity for two separate withholding tax provisions in the ITA. It was submitted that if the appellant was uncertain and unclear as to which legal provision should have been alluded to, in order to withhold the tax, it would fundamentally be unreasonable to require taxpayers to withhold the taxable portion.

[41] It was submitted by the respondent that by the appellant so listing both sections 109 and 109B as the legal provisions for subjecting the payments to withholding tax, the appellant had committed an error of law in numerous ways, including, acting mechanically, omitting to give

reasons for the impugned decision, taking into account irrelevant considerations, misconstruing the terms of the ITA and arriving at a decision which is evidently unreasonable.

[42] The respondents also submitted that the failure by the appellant, as a decision maker, to give reasons for its decision was a violation of the principles of procedural fairness and natural justice. By that failure, the respondents were deprived of the opportunity to explain, or make a case based on the facts of the cases as to why the payments were not subject to withholding tax, and thenceforth to effectively dispute the impugned decision.

[43] The respondents ventilated that there were no intellectual property rights provided for by the second respondent to the first respondent. In fact there was no acquisition of any rights under the Service Agreement to constitute royalty. What was provided for by the second respondent were services that a third party telecommunication provider like Telekom Malaysia Berhad

would provide to facilitate the first respondent's access or connection to the global network for voice, data and video communication. The payments were merely charges for the services.

[44] The respondents submitted that the impugned decision of the appellant therefore should be quashed as it was ultra vires the law.

Our analysis

[45] Under section 3 a person is liable to income tax on income accrued in or derived from Malaysia or received in Malaysia from outside Malaysia. The amount charged on individuals and companies varies in accordance with the appropriate tax rates to chargeable income after having taken into account all the necessary allowable adjustments.

[46] For purposes of this appeal the contested income to be taxed was alleged to have been derived from royalties, as legislated in section 4 (d) of the ITA and this section reads:

Classes of income on which tax is chargeable

4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of-

(a)…

(b)…

(c)…

(d)…royalties..;

[47] Section 2 states that 'royalty' includes-

(a) any sums paid as consideration for the use of, or the right to use-

(i) copyrights, artistic or scientific rights, patents, designs or models, plans secret processes or formulae , trademarks or tapes from radio or television broadcasting, motion picture films, films or video tapes or other means or reproduction where such films or

tapes have been or are to be used or reproduced in Malaysia or other like property or rights;

(ii) know-how or information concerning technical industrial, commercial or scientific knowledge, experience or skill;

(b) income derived from the alienation of any property, know-how or information mentioned in paragraph (a) of the definition;.

[48] The promulgation of section 4 (d) of the ITA and the definition of royalty supplied in section 2 cleared the air and subjected the importation of know-how and intellectual property from overseas to income tax; in line with globalized business dealings of which Malaysia cannot escape from. Under section 4A (i), (ii) or (iii) of the ITA (a provision that deals with another source of taxable income i.e. a special class of income), notwithstanding section 4 but subject to the ITA, the income of a person not resident in Malaysia but derived from Malaysia is chargeable to tax.

[49] How to collect the income tax from elusive foreign companies whether from income under section 4 (d) or 4A of the ITA was statutorily resolved by the promulgation of section 109 and section 109B of the ITA respectively.

[50] Sections 4A of the ITA surfaced in this appeal as the judicial review application filed by the respondents made mention of them. Section 109 and section 109B of the ITA were already mentioned much earlier in appendix 1, a document that was attached to the letter of 14.4.2008. A perusal of appendix 1 shows that section 109 of the ITA was referred to for expenses for licences, maintenance fees, payments for training of foreign workers and the like, and sections 109 and 109B of the ITA referred to for payments of leased communication and facilities.

[51] Let us now peruse section 109 and section 109B of the ITA for better understanding of the matter before us. They respectively read as follows:

“Deduction of tax from interest or royalty in certain cases

109. (1) Where any person (in this section referred to as the payer) is liable to pay interest or royalty derived from Malaysia to any other person not known to him to be resident in Malaysia, other than interest or royalty attributable to a business carried on by such other person in Malaysia, he shall upon paying or crediting the interest (other than interest on an approved loan or interest of the kind referred to in paragraph 33 or 35 of Part I, Schedule 6) or royalty deduct therefrom tax at the rate applicable to such interest or royalty, and (whether or not that tax is so deducted) shall within one month after paying or crediting the interest or royalty render an account and pay the amount of that tax to the Director General:

[Am. Act 328: s.11; Am.Act 497: s.7]

Provided that the Director General may-

(a) give notice in writing to the payer requiring him to deduct and pay tax at some other rates or to pay or credit the interest or royalty without deduction of tax;

or

(b) under special circumstances allow extension of time for tax deducted to be paid over.

(2) Where the payer fails to pay any amount due from him under subsection (1), that amount which he fails to pay shall be increased by an amount equal to ten per cent of the interest or royalty liable to deduction of tax under subsection (1) and the total sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

[Subs. Act 557: s.18]

Deduction of tax from special classes of income in certain cases derived from Malaysia

109B. (1) Where any person (in this section referred to as "the payer") is liable to make payments to a non-resident-

(a) for services rendered by the non-resident person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such non-resident;

(b) for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or

(c) for rent or other payments made under any agreement or arrangement for the use of any moveable property,

[Am. Act 309: s.14; Am. Act 328: s.12; Am. Act 557:s.19]

which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General:

Provided that the Director General may-

(i) give notice in writing to the payer requiring him to deduct and pay tax at some other rates or to pay or credit the payments without deduction to tax; or

(ii) under special circumstances, allow extension of time for tax deducted to be paid over.

(2) Where the payer fails to pay any amount due from him under subsection (1), the amount which he fails to pay shall be increased by an amount equal to ten per cent of the payments liable to deduction of tax under paragraph (1)*(a)*, *(b)* or *(c)* and the total sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General.

[Subs. Act 557: s.19]"

[52] These are colloquially called the withholding tax provisions and there is nothing intimidating about their meaning. It merely means that the payer (in this case the first respondent) withholds the tax portion of an income of a non-resident recipient (the second respondent) and transmits it directly to the Ketua Pengarah Hasil Dalam Negeri (the appellant). Section 109 or section 109B have been crafted in such a way that each respective provision

addresses a different category of income. The duty to withhold tax on royalty income would invariably fall under section 109 whilst the special class of income that falls under section 4A will be catered to by the withholding provision of section 109B. What is undeniable is that, be it section 109 or 109B, both are withholding provisions, and as the respondents have been informed that the income comes from royalty payment, by no figment of the imagination could the respondents' tax agent have been misled by something so obvious.

[53] Any non-adherence of the statutory duty will attract certain repercussions, and for purposes of this appeal, unless payment is made to the appellant within 30 days, a 10% penalty will be added to the amount of the unpaid tax. And the failed withheld payment will be disallowed as deductible expense (sections 39 (1) (f) and (j)). And all these grave consequences were mentioned at paragraph 4 of the letter of 14.4.2008.

[54] To wind up this issue of withholding tax, Chin Yoong Kheong at page 283 of *Malaysian Taxation 2nd Edition* had occasion to author:

> "As stated earlier, withholding tax is basically a tax collection mechanism which places the duty on the payer to withhold tax at source on behalf of the IRD, and is enacted primarily to ensure collection of the tax due on specified categories of income derived from a source in Malaysia."

[55] The respondents' argument to the above is that not only did they not know that the payment was 'royalty' payment, but that even the appellant was uncertain as to the exact applicable provision. And of course it was submitted that the withholding instruction pursuant to the decision was flawed.

[56] What comes out strikingly clear is that, despite being aware and aggrieved of the impugned decision, the

respondents never filed any appeal to the Special Commissioners under section 99 against the determination by the appellant. And this despite protesting vide letter dated 28.4.2008 that the first respondent was aware of its rights to appeal against the appellant's decision.

[57] Section 99(1) reads:

> "A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director general within thirty days after the service of the notice of assessment or … a written notice of appeal in the prescribed form (i.e. Form Q) stating the grounds of appeal and containing such other particulars as may be required by that form."

[58] To dispel any fear of a taxpayer, merely because he has to face such an awesome body in the form of the government, Gill F.J in *Sun Man Tobacco Co. v. Government of Malaysia [1973] 2 MLJ 163* had occasion to state:

> "The doors of justice are not shut to him merely because its claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. *It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts* (emphasis supplied)."

[59] The respondents when asked about the failure to appeal, replied that the issue of withholding tax is not an assessment, hence the irrelevancy of section 99 in this appeal. We will discuss the issue of 'assessment' later (see paragraphs 72-75).

[60] Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong. The respondents may request for the

attendance of witnesses to give evidence on oath and request any witness to produce any books, papers or documents which is in his custody or his control necessary for purposes of the appeal. Therefore, before the Special Commissioners the respondents will have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined (see *Director-general of Inland Revenue v Lahad Datu Timber Sdn Bhd [1978] 1 MLJ 203*).

[61] At the completion of the hearing of the appeal, the Special Commissioners shall give their decision in the form of an order known as a deciding order, and which in certain circumstances may be final. Either party to the proceedings before the Special Commissioners may appeal on a question of law against a deciding order, or may request the Special Commissioners to state a case (generally known as case stated) for the opinion of the High Court. Any dissatisfied party may appeal only up to the Court of Appeal (*Tio Chee Hing v United Overseas Bank (Malaysia) Bhd (2013) 2 CLJ 910; Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v*

Kumar Gurusamy (2011) 3 CLJ 241; Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No.8-31-99 (S) (Unreported)).

[62] By filing an appeal before the Special Commissioners the respondents would have had that opportunity to challenge the decision of the appellant as to whether the payments were indeed royalty. Likewise the respondents would have had the chance to rebut section 15A of the ITA. Section 15A provides that certain income, including the likes of services rendered by the second respondent to the first respondent, shall be deemed to be derived from Malaysia.

[63] By circumventing the Special Commissioners from resolving these issues, and unwittingly leaving the deeming provision unrebutted, the first respondent's payments to the second respondent are thus income derived from Malaysia. That being so, the requirements of section 4 (d) read together with section 109, and section 4A read together with section 109B of the ITA have been satisfied. In short, as the

first respondent is liable to pay (and did pay), and the second respondent is taxable even though a non-resident, section 109 and section 109B respectively will be triggered and the first respondent is statutorily bound to withhold a portion of the payments as tax. By analogy, we refer to the case of *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd (2014) 3 CLJ 421*), a case falling under section 4A (iii) ITA, where we said:

> "In the circumstances of the case as the non-resident companies in this appeal are taxable, s.109B of the Act is triggered, and the respondent is forthwith statutorily bound to withhold a portion of the payments as tax. To reiterate, this provision is a tax collection mechanism primarily to ensure collection of the tax due from any person liable to make payments to a non-resident person (or non-resident companies in the circumstances of the case…"

[64] At the risk of repeating, as there was no appeal to the Special Commissioners, this Court has no option but to accept certain facts and conclusions as not reversible (*fait accompli*). We cannot alter the view that the payments made by the first respondent are royalty payments and now be heard to complain, bearing in mind that they have failed to avail themselves, to echo Gill F.J, "*of that remedy as laid down by the law"* before coming to the courts.

[65] The respondents instead filed a judicial review under Order 53 of the Rules of the High Court 1980 to vent their disgruntlement. On scrutinizing the judicial review application what struck us was that the appellant's decision to subject the respondents to withholding tax or increased withholding tax was the central issue to the appeal.

[66] The grounds for the judicial review are that, the appellant had erred in law and or acted in excess of powers conferred by the ITA, and or without jurisdiction and or had acted unreasonably. An argument put forth strongly by the respondents was that the appellant acted unreasonably by

not supplying the reasons to them (and in consonant with the central issue stated immediately above), disagreed that withholding tax should have been imposed on the first respondent.

[67] Under Order 53 of the RHC 1980, an applicant may procedurally seek out the reliefs specified at paragraph 1 of the Schedule to the Courts of Judicature Act 1964, and for the purposes specified therein. Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 are the additional powers of the High Court, powers in addition to those already seised by it, to issue prerogative writs, wherein a High Court judge may issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Federal Constitution, or any of them, or for any purpose.

[68] Section 25 of the Court of Judicature Act 1964, when read together with paragraph 1 of the Schedule,

provides the High Court of that augmented power. For purposes of the current appeal the Director-General of the Inland Revenue will fall under the reference of "any person or authority". Under this source of power, the High Court may grant relief in a judicial review whilst Order 53 of the RHC 1980 prescribes the procedure and practice when filing for that judicial review.

[69] A judicial review is a court proceeding where a challenge is made on the decision of the relevant authority or entity (in this case the appellant) i.e. by challenging the lawfulness of the decision making process. This is trite law. Generally, the court dealing with the judicial review application in a supervisory capacity is not to delve into the merits of the case. In other words the evidence is not reassessed. The court is merely to quash the decision of the relevant authority, if need be, and not to substitute with what it thinks is the correct decision. We are not here to usurp the powers of the designated authority.

[70] Lord Brightman in *Chief Constable of North Wales Police v Evans* (1982) 1 WLR 1155, at page 1174 had occasion to state that a judicial review "is not an appeal from the decision but a review of the manner in which a decision is made". The book authored by Mr. Michael Supperstone QC and Mr. James Goudie QC in *Judicial Review* at page 72, was also referred to, and reads:

> "It is easy to understand why this is so. The paradigm case of a Judicial Review challenge arises where a body whose functions are conferred by statute are said to have acted in a manner in which the law does not allow. But if the only complaint is that the body has reached a decision unfavourable to the applicant on the facts, and the claim put forward is a plea to the court in effect to substitute a different decision, the proceedings would amount to an invitation to the court to exercise the very function which statute had confided to the body reviewed; to accede to such an invitation would be to usurp the will of Parliament. Since, of course, Parliament includes the elected element of the

legislature, any such stance by the court might reasonably be castigated as undemocratic…"

[71] However, the Federal Court in the landmark decision of *R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145* held that the decision of an inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality", which not only permits the courts to scrutinize the decision making process but also the decision itself. In short, it allows the courts to delve into the merits of the matter.

[72] The approach of illegality and irrationality was recognized and applied by *Malaysian Trade Union Congress & 13 Lagi v Menteri Tenaga, Air dan Komunikasi & 1 Lagi (2014) 3 MLJ 145*. This court in succinct terms said:

"On the facts of this case, we find MTUC had failed to show that the Minister's decision was illegal, irrational and flawed on the grounds of procedural impropriety".

[73] It is now clear, and here to stay, that the decision of an inferior tribunal may also be reviewed on the grounds of illegality and irrationality. The distinction between a review application and an appeal thus appears to no longer exist (see also *Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629*).

[74] Despite the introduction of the grounds of "illegality", "irrationality" and possibly "proportionality", and the liberal approach, *R Rama Chandran* self-checked itself when it stated at page 197 that:

> "Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.

For example, where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underline such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the courts."

[75] *Petroliam National Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625*, in no uncertain terms said that the reviewing court may scrutinize a decision on its merits but only in the most appropriate case. At page 635 we said:

"Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge …"

[76] The respondents have set out the grounds in brief in their application for judicial review founded on error of law or acting in excess of powers conferred by the ITA and/or without jurisdiction. These three grounds would fall squarely on the term of "illegality" as propounded by *R Rama Chandran.*

[77] Let us now peruse the facts and decide whether the respondents did manage to establish those grounds in support of their application.

[78] The evidence shows that the appellant had sent the letter of 28.3.2008 demanding payment of the tax. The first respondent promptly made payment under protest. We enquired why the withholding tax payments should not have been appealed against under section 99. In response, the respondents replied that a withholding tax does not fall under the definition of assessment, and as it falls outside the ambit of section 99, their remaining choice was a judicial review application.

[79] A view held by Wan Hamzah J in *Government of Malaysia v P Corporation (M) Sdn Bhd (1950-1985) MSTC 426,* and of which we approve, had occasion to opine that section 99 refers to 'assessment' generally and not specifically to 'assessment to tax'. It is established law that papers or notices of assessments sent out by the appellants to taxpayers are not assessments. An assessment is the official administrative act of the appellant who determines the amount of tax to be paid by a taxpayer, after having taken into account all the relevant circumstances. Notices of assessments will be sent out only after the ascertainment is complete. In *The King v The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper (1926) 37 C.L R 368/373* Isaacs J said:

> "An assessment is not a piece of paper; it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a

notification thereof called 'a notice of assessment'..... But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the Commissioner."

[80] The above view was cited with approval by Buttrose J in *A.B.C v The Comptroller of Income Tax, Singapore (1959) 25 MLJ 162/165* when he said:

"The assessment itself is the administrative act of the Comptroller and determines the quantum of the tax..."

[81] The relevant question that must follow is, did the appellant make an assessment i.e. carry out an official administrative act, when he ordered the first respondent to make payments of the withholding tax? Without a doubt the answer is in the affirmative. That being so, with the imposition of the withholding tax being an assessment, it is

thus subject to appeal to the Special Commissioners under section 99.

[82] Let us scrutinize the grounds of judgment of the High Court in order to appreciate the reasoning of the successful judicial review application at the High Court. Perusing the grounds of judgment of the High Court, out of 21 pages of the grounds of judgment, the High Court reserved 18 pages to regurgitate the submissions of the contending parties, and merely left 3 pages to give her reasons why the judicial review application was allowed.

[83] On further perusal of pages 8, 10, 12 (para 18 and 19), 13 (para 21), 15 (para 12), 14 and 24 we are painfully aware that the discussions carried out by the High Court centred on the merits of the case.

[84] The learned judge criticized the reliance of the appellant on Article 2 of the unsigned draft agreement (AP-2). Again at page 20 of her grounds of judgment the

learned judge delved into the merits of the matter, matters that ought to be resolved by the Special Commissioners.

[85] Without giving an in-depth reasoning, the High Court again delved into the merits of the case, and concluded that it was unreasonable for the appellant to advert to sections 109 and 109B of the ITA to arrive at the decision that the payments made were royalty payments. In no uncertain terms the learned judge opined:

> "In my opinion there was failure on the part of the respondent (i.e. the appellant) to give due consideration **to relevant matters** at the material time when making the decision that the payment were royalties and subject to withholding tax."

[86] The Court of Appeal fared no better, when it delved into the evidence (and consciously agreed with the factual finding of the High Court judge).

[87] The Court of Appeal criticized the appellant for not providing reasons for its decision to the respondents, and opined that by such failure to be open, the court could conclude that the appellant had no good reasons in making the impugned decision. This strong view came about after the Court of Appeal had referred to the decision of *Pahang Omnibus Co. Bhd V Minister of Labour and Manpower & Anor (1981) 2 MLJ 199* which endorsed Lord Denning MR's remarks in *General Electric Co Ltd v Price Commission (1975) 1 ICR 1*. Lord Denning MR opined:

> "If the decision making body comes to its decision on no evidence or comes to an unreasonable finding-so unreasonable that a reasonable person would not come to it-then again the courts will interfere….If it gives no reasons-in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion and act accordingly."

[88] Having perused the above remarks it is obvious that if the circumstances warrant it, and after having considered all the relevant factors, judicial interference is permissible. Putting aside the obvious that Malaysia suffers different challenges due to its complex populace, enforcing a blanket view that silence by a decision maker implies lack of good reasons may be too strong a stance, and must be treated with considerable reserve.

[89] For purposes of this appeal, the cases of *Stefan v General Medical Council (1999)1 WLR 1293* and *A.B.C v The Comptroller of Income Tax, Singapore (supra)* are of great help. Lord Clude in *Stefan v General Medical Council* had occasion to state:

> "The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and

administration." **But the trend is proceeding on a case by case basis...**and has not lost sight of the established position of the common law that **there is no general duty, universally imposed on all decision-makers** (emphasis supplied)."

[90] In *A.B.C v The Comptroller of Income Tax, Singapore (supra)*, the Comptroller caused to be served on the taxpayer notices of assessment or additional assessments in respect of certain years. The taxpayer returned all the notices of assessment and demanded the Comptroller to furnish him with reasons for or detailed basis on which the Comptroller made the assessments. As in the current appeal, correspondences passed between the Comptroller and the taxpayer and the Comptroller eventually gave notice to the taxpayer that he did not propose to amend the assessments or additional assessments. An appeal was lodged by the taxpayer, and to cut the story short, the matter ended up as a case stated at the High Court. This did not happen here in the current appeal before us. The main issue in

contention, and of relevance to us was that, the notices of assessment did not indicate the source of income that led to the liability of tax. So, must the Comptroller as a decision maker specify or give particulars of the source of the taxpayer's income before a tax liability is disclosed? After all an assessment had been made. After delving into a string of authorities, and applying them to the facts in that case, Buttrose J opined that the taxpayer was not entitled to the particulars of the source or sources from which the Comptroller alleged that the taxpayer derived the amounts in question set out in the assessment notices. The court held that the notices of assessments were valid. Buttrose J remarked:

> "It is no doubt a truism to say that you cannot have income without a source but on the construction of the Ordinance as a whole I am unable to find anything that requires the Comptroller or imposes upon him a duty to specify or give particulars of the sources of

the taxpayer's income before a legal liability to tax is disclosed…"

[91] Guided by those persuasive cases, judicial interference therefore should be on a case by case basis. As regards this appeal, we also find no statutory provision that demands the appellant to supply reasons why the first respondent is duty bound to pay the withholding tax. Apart from the want of a statutory provision demanding the supplying of reasons, in the circumstances of the case, with there being more than ample documents or reasons surfacing in the course of the negotiations which are self-explanatory, the need to give an overt explanation is superfluous.

[92] The Court of Appeal here, enroute to its decision merely reproduced and discussed a plethora of cases on the trite law or issues regarding the law of judicial review, rather than highlighting where the appellant went wrong prior to making its decision.

[93] To avoid falling into the same trap of the subordinate courts, after sifting through the available material regarding the decision making process, we find that the appellant had:

a. negotiated with the respondents;
b. exchanged correspondences with the respondents. The first was the letter of 31.10.2007;
c. there was even a finding of facts (see para 4 of the COA grounds of judgment) that several meetings and exchanges of correspondences took place between the appellant and the respondents;
d. the sum was then reduced to RM 1,781,274.00;
e. a further representation was made by the first respondent and the withholding tax was reduced to RM 1,507,674.80,00 as per the appellant's letter dated 28.3.2008;
f. then came the impugned letter of 14.4.2008 in which Appendix 1 was appended detailing out

the amount to be paid and making reference to the relevant provisions;

g. the respondents protested vide letter dated 28.4.2008; and

h. the appellant warning the respondents of the repercussion of non-payment in both the letters of 28.3.2008 and 14.4.2008.

[94] It cannot be denied that sections 109 and 109B of the ITA were referred to by the appellant in appendix 1 of the letter dated 14.4.2008, and even in its earlier letter, as far back as 31.10.2007. The earliest produced letter of the respondents, dated 14.11.2007 even made mention of the above two provisions. By no account the respondents' accountants, Price Water House Coopers Taxation Services Bhd., a company that is world renowned for its tax expertise could have failed to know what these two sections referred to. These provisions, as briefly discussed above, are self-explanatory.

[95] The matter before us should be focused on whether any defect is detectable in the decision making process i.e. before the appellant arrives at its decision, and whether the decision falls within the *R Rama Chandran* approach. Having perused the evidence adduced before us, we are satisfied that apart from there being no flaw detectable in the decision making process there was also no illegality or irrationality in the decision. That being so the appellant's decision must stand. The respondents therefore are liable to the withholding tax.

[96] We have an additional reason why the appeal must be allowed. A rather disquieting factor which we detect is that, even though the respondents are not prevented from seeking remedy under Order 53 of the RHC 1980, the respondents have failed to satisfy some of the statutory requirements.

[97] Under Order 53 Rule 3(6) RHC 1980, an application shall be made promptly, or within 40 days when grounds for the application first arose, or when the decision was first

communicated. If an applicant is out of time he then must apply for an extension of time. If none is made or no extension of time is granted the judicial review application therefore becomes incompetent.

[98] On the issue of timeliness the first flaw detected is the issue of when the decision was made by the appellant. From the chronology of events we noted that the letter dated 28.3.2008 addressed to the first respondent had already decided as to the amount to be paid by the latter. Paragraph 2 reads:

> "Adalah dimaklumkan bahawa, setelah meneliti secara terperinci rayuan yang dikemukakan oleh pihak tuan, pihak kami mendapati isu-isu ketidakpatuhan cukai pegangan bagi tahun tahun taksiran tersebut seperti berikut:
>
> | Rujukan | Amaun (RM) |
> | --- | --- |
> | Lampiran 1 | 1,507,674.80 |

3. Oleh itu tuan diminta hadirkan diri...dan seterusnya mengatur bayaran. Sila kemukakan salinan resit bayaran jika cukai pegangan telah dibayar.

4...."

[99] The decision was clear. As abovementioned, the final sum directed to be paid was RM 1,507,674.80. In other words, the decision already was in the letter of 28.3.2008, and addressed to the first respondent.

[100] The contents of the letter dated 14.4.2008 therefore was to clarify (and in fact in response to) the respondents' tax agent's query as per letter dated 14.4.2008 (same date). If not for the attachment of appendix 1, this letter, which is addressed to the tax agent rather than the first respondent, would have been a replica of the 28.3.2008 letter.

[101] The judicial review application was filed on 23.5.2008. By alluding to the letter of 14.4.2008, to indicate when the decision was made, the application

indeed was made in the nick of time i.e. by one day. Going by the letter of 28.3.2008 the respondents were way out of time. And no application to extend time was ever filed.

[102] On a finding of fact, as the decision was actually made in the earlier letter of 28.3.2008 rather than the clarification letter of 14.4.2008, then, not only was the premise of the judicial review application flawed but was also out of time. The judicial review application thus should not have been entertained in the first place. In short the judicial review application is incompetent.

CONCLUSION

[103] The additional ground of the incompetency of the judicial review application aside, we find that the respondent had failed to establish the grounds supplied in the judicial review application. We also find that the appellant had not erred in law in its performance of duty when arriving at its impugned decision.

[104] We therefore allow the appellant's appeal with costs.

[105] Question (a) is to be answered in the negative. We refrain from answering question (b).

[106] Costs of RM30,000 subject to allocateur.

Dated 29th day of November 2016

sgd

SURIYADI HALIM OMAR
Judge
Federal Court, Malaysia

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