DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: BA-25-81-12/2018

Dalam perkara berkenaan dengan keputusan Ketua Pengarah Hasil Dalam Negeri dalam surat bertarikh 14 Disember 2018;

Dan

Dalam perkara Seksyen-seksyen 91(1) dan 91(3) Akta Cukai Pendapatan 1967;

Dan

Dalam perkara Perenggan 1 Jadual Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara berkenaan Aturan 53 Kaedah-Kaedah Mahkamah 2012.

ANTARA

SHELL TIMUR SDN BHD ... PEMOHON

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

JUDGMENT

The Application

[1] The Applicant, vide enclosure 1, sought leave under O. 53 r 3 of the Rules of Court 2012 for judicial review to primarily quash a decision of the

Respondent, the Director General of Inland Revenue, to raise a Notice of Additional Assessment (Form JA) dated 14.12.2018 ("Assessment") for the Year of Assessment ("YA") 2005 against the Applicant, by invoking the provisions in section 91(3) of the Income Tax Act, 1967 ("ITA").

[2] I had dismissed the leave application for the following reasons.

Salient facts

[3] The Applicant sold its economic rights in certain intellectual property ("Trademarks") in YA 2005 for a sum of RM257,200,000.00 to a group company, Shell Brands International AG ("SBI"). The Applicant states that it did not bring this sum to tax in YA 2005 as it treated it as capital receipt, which is not taxable under the ITA. Nevertheless, this sum of RM257,200,000.00, its tax treatment, as well as the basis for the tax treatment, was disclosed to the Respondent vide the Applicant's cover letter dated 9.8.2006 enclosing the Applicant's tax return for YA 2005.

[4] The Applicant was audited by the Respondent beginning sometime in June 2015, which audit was finalised in 2018. Following the audit, the Respondent disagreed with the Applicant and took the stand that the gain of RM257,200,000.00 is not capital receipt but revenue and thus taxable. The Respondent's position is that the Applicant was negligent in not reporting the

sum of RM257,200,000.00 in its tax returns for YA 2005 under cell L10 ("Keuntungan tidak dikenakan cukai") and as such is entitled to invoke section 91(3) of the ITA.

[5] The Respondent, vide the Assessment is now seeking to tax this sum of RM257,200,000.00, and in this respect has raised the Assessment and imposed additional tax and penalties in the sum of RM90,020,000.00. The Respondent had raised the Assessment based on the provisions of section 91(3) of the ITA. In essence, section 91(3) of the ITA allows the Respondent to raise additional assessments after the statutory 5-year time-bar period stipulated in section 91(1) of the ITA to make good loss of tax attributable to fraud, wilful default or negligence of a taxpayer.

Putative Respondent invited to address the court

[6] Though leave application under O. 53 r 3 is ordinarily heard on an ex-parte basis, the Respondent sought leave of court to appear and be heard on the application on the basis that the Applicant's application involved specific questions of law relating to statutory time bar and to highlight the underlying facts which are disputed. Hence, the putative respondent wished to address the court on these issues and made an oral application for an invitation from the court to do so. The court may in appropriate cases allow the putative

respondent to be heard on the ex-parte leave application. See *Kanawagi a/l Seprumaniam v Dato' Abdul hamid bin Mohamad* [2004] 5 MLJ 495; *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224; *Saujana Triangle Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 171. Having considered the basis for the ex-parte application for leave and the issues involved, I invited the putative respondent to address the court, as I was of the opinion that the presence of counsel for the putative respondent would be helpful to the court in coming to its decision.

The Applicant's Contention

[7] The Applicant contends that in invoking section 91(3) of the ITA, the Respondent had ignored a fundamental fact, which is that the Applicant made a specific and upfront disclosure of the gain of RM257,200,000.00 in the cover letter accompanying its submissions of the tax returns for YA 2005. In that letter the Applicant had informed the Respondent of the receipt, the tax treatment adopted by the Applicant, and the basis thereof. Hence, the Applicant argues that there cannot be any wilful neglect or negligence on the part of the Applicant in not reporting this gain in the tax returns for YA 2005, as the disclosure in the cover letter is more than what is required in cell L10 of the tax returns form.

[8] The Applicant states that it has shown extreme prudence in dealing with the tax authority by being upfront and make full disclosure in its treatment of the gain of RM257,200,000.00. Hence, the Applicant argues that the Respondent's invocation of section 91(3) of the ITA is repugnant to the time-bar provisions contained in section 91(1) of the ITA, and submits that it defeats the very purpose and object of statutory time bar.

[9] The Applicant submits that it had given the Respondent more than the necessary information as regard this gain of RM257,200,000.00 in its cover letter and the Respondent knew very well the Applicant's tax treatment of it. Thus, the Applicant contends that if the Respondent had wanted to disagree with the Applicant's tax treatment of this sum of RM257,200,000.00 then it had 5 years to do so. However, there was no action taken until 13 years later and the Applicant submits that this is a blatant abuse of power by the Respondent and that the Respondent's invocation of section 91(3) of the ITA is repugnant to the time bar provisions contained in section 91 of the ITA. The Applicant further contends that the Assessment raised by the Respondent is ultra vires the ITA and is an unreasonable exercise of power.

[10] The sole issue in this the Applicant's application for judicial review is whether or not the Respondent can invoke section 91(3) of the ITA on the ground that the gain of RM257,200,000.00 on grounds of negligence, as it was

not reported in cell L10 of the tax return, despite the fact that specific upfront and detailed disclosure was made by the Applicant in its cover letter.

[11] The Applicant submits that it has met the threshold requirements for leave as provided in O. 53 r 2(4) of the Rules of Court and has fulfilled all requirements for leave as laid down by high authority.

The Requirements for leave

[12] Order 53 r. 2(4) of the Rules of Court 2012 provides that:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

The law relating to locus standi in applications for judicial review under O. 53 was restated by the court in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164 as follows:

> There is a single test of threshold of 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.

And subsequently, the "adversely affected" test was affirmed by the Federal Court in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145, where the court held that the applicant only has to show that he has a "real and genuine interest in the subject matter".

[13] In the case of *Chan Tsu Chong & Others v. Suruhanjaya Pilihan Raya Malaysia & Ors* [2017] 1 LNS 780 these established principles were summarized as follows:

> The threshold for leave in a judicial review application as stated in decided case is "very low" and leave should only be denied if the application is proven to be frivolous or vexatious....
>
> ... A similar observation of a "very low" threshold for leave was made by the Court of Appeal in *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi* [2013] 1 LNS 1465; [2015] 3 AMR 35 at 27 where the court emphasised that at the leave stage "a flexible approach" should be taken and the court should not "shut out summarily" any applicant....

[14] Further, there is no need for the court to go into the merits of the case at the leave stage. The test is to see whether the applicant had an arguable case and that the application is not frivolous. See *Association of Bank Officers, Peninsula Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Berhad* [2006] 5 MLJ 60 CA; *Jerry Wa Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675 CA.

[15] On the facts presented, it would seem that the Applicant has a prima facie arguable case and that this is not a frivolous application as the Applicant is undoubtedly aggrieved and adversely affected by the decision of the

Respondent to impose additional tax and penalties amounting to RM90,020,000.00. However, the putative respondent argues otherwise.

The Putative Respondent's Objection – Alternative remedy available

[20] The sole ground of objection by the putative respondent is that leave for judicial review should not be granted where there is in law provision for domestic remedy to address the complaints raised by an applicant. The learned Senior Revenue Counsel ("SCR") appearing for the putative respondent submits that the applicant being dissatisfied and aggrieved by the Assessment should file an appeal to the Special Commissioners for Income Tax Income Tax ("SCIT") as provided in s. 99 of the ITA. The learned SCR further contends that since the applicant has filed an appeal to the SCIT and the appeal is pending, it has not exhausted the statutory appeal mechanism, and thus the filing of this leave for judicial review is an abuse of process.

[21] In this regard, the learned FC has referred to the Supreme Court's decision in *Government of Malaysia & Another v Jagdis Singh* [1987] 2 MLJ 185 where it was held:

> A clear principle is reiterated here i.e. it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

In Re Preston was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice. (Emphasis added)

[22] Similar pronouncements have been in *Zakaria bin Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors* [2013] 5 MLJ 206 CA; *Majlis Perbadanan Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugur dengan Tanggungan* [1999] 3 MLJ 1 FC; *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563 FC.

[23] Therefore, it is clear from this string of high authority that when there is in existence a mechanism for statutory appeal, leave for judicial review would be granted only in exceptional circumstances, such as when the applicant is able to show, lack of jurisdiction, illegality, abuse of power or breach of rules of natural justice. Therefore, in light of the existence of the right of statutory appeal under section 99 of the ITA, and which right the Applicant has exercised, it would lie on this court to ascertain whether there are exceptional

circumstances warranting leave for judicial review by the High Court. And in this regard, it is for the Applicant to demonstrate that such special circumstance exists for leave to be granted.

Are there exceptional circumstances?

[24] Section 91(1) and (3) of the ITA provides:

> (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five* years after its expiration make an assessment or additional assessment, as the case may be in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.
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> (3) The Director General where it appears to him that -
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> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
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> (b) any person has been negligent,
>
> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

Now, even though there is a 5 year time in section 91(1) for the Respondent to raise an assessment for any one year, section 91(3) removes that time bar in cases where it appears to the Respondent that any form of fraud, wilful default or negligence in connection with the tax returns is present.

[25] The presence or otherwise of fraud, wilful default, or negligence is a question of fact. Here, there was an audit conducted by the Revenue sometime in June 2015 and thereafter there was an exchange of correspondence between the Applicant and/or its tax agent and the Respondent. The Applicant was given the right to be heard on the audit and its findings as well as make representations before the decision to raise the Assessment was made by the Respondent. Hence, it cannot be gainsaid that the Respondent had breached the rules of natural justice. Further, the time taken from the audit to the raising of the Assessment was about 3 years, thus, it cannot also be said that the decision was made hastily or capriciously. There is clearly a divergence of opinion between the Applicant and the Respondent on whether the non-reporting of the gain of RM257,200,00.00, amounted to negligence. The question of whether it does amount to negligence, and thus enabling the Respondent to use the provisions of section 91(3), is a question of fact that needs to be ascertained after consideration of the evidence, both oral and documentary. In this regard, I agree with the SRC that the Special Commissioners of Income Tax ("SCIT") are best placed, as judges of fact, to determine that issue as the parties would be at liberty to tender documents and call for oral evidence of witnesses. See *Director of Inland Revenue v Lahad*

Datu Timber Sdn Bhd [1978] 1 MLJ 203; *Saujana Triangle Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 171.

[26] In fact, it is well settled that a plea of time-bar, such as that which has been raised by the Applicant, is best left to be determined by the SCIT. This was confirmed by the Federal Court in *Kerajaan Malaysia v Dato' Haji Ghani Gilong* [1995] 3 CLJ 161, where the court held:

> In our view, the High Court has no power to entertain a plea of limitation under sub-sections 1 and 3 of s. 91 of the Act advanced by a taxpayer. However, the Special Commissioners have such power. Our reasons for these conclusions now follow.
>
> If Counsel for the taxpayer were correct in his contention that the plea of limitation based on sub-sections 1 and 3 of s. 91 of the Act is available to him in proceedings for recovery of tax brought in Court as well as in proceedings before the Special Commissioners, then a decision by the High Court on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court thereby abdicating their fact finding function of determining whether there has been fraud or wilful default within the meaning of sub-section 3(a) of s. 91 of the Act. Alternatively, even if the Special Commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the identical question of limitation. These would not be reasonable results and, what is unreasonable, cannot be the law.

Similar pronouncement was made by the Federal Court in *NTS Arumugam Pillai v Government of Malaysia* [1976] 2 MLJ 72. This principle was applied and

explained by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197, where it was held:

> [30] ... However, in the absence of special or exceptional circumstances, the application for judicial review is not an appropriate route of appeal and in fact an abuse of the process of court. The High Court's decision in allowing the respondent's application whilst there were no special circumstances established could place the court to be in danger of being flooded with applications for judicial review instead of the appropriate venue as provided for under Act 53 (*M & W Zander (M) Sdn Bhd*).
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> [31] It is to be emphasised that the dispute raised by the respondent could be dealt with by the Special Commissioners of Income Tax like any other appeals on assessment. The merits of this application significantly involve disputes of facts and being as such, it is our opinion that the Special Commissioners of Income Tax being judges of fact are the best for hearing and deciding on tax grievances. The position of the Special Commissioners of Income Tax as judges of fact has been confirmed by the Federal Court in *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161 when it authoritatively said:
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> > We say so because the Special Commissioners are the judges of fact, and have the jurisdiction to consider not only the plea of limitation based on sub-ss 1 and 3 of s 91 of the Act but also other issues such as whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, all of which are issues which the court in proceedings for recovery of tax by suit is prohibited by s 106(3) of the Act from entertaining.
>
> [32] To decide by way of judicial review that the appellant was right or not in its findings is in truth questioning the merits of the matter. The proposition that a question pertaining to the merits of the assessment is a matter better reserved for the Special Commissioners was deliberated in the case of *Ta Wu Realty Sdn Bhd*, wherein this court held that the Special Commissioners of Income Tax were the proper forum to decide on the merits of an assessment. Suriyadi JCA in delivering

the judgment of the court explained the reasons in language that merits our reference in the following terms:

> [25] This course of action was taken up, as somehow the appellant had been distracted, eventually to be deviated by the guidelines of Jagdis Singh, resulting in the unwittingly failure to discuss this ground. It must be understood that a court listening to a certiorari application sits in a supervisory jurisdiction, and merely to scrutinise the manner the assessment was arrived at by the Director General. Put another way, the court is only concerned with the legality of the decision making process and not eventual decision ie, that 1998 assessment, in relation to the current case. To state that the impugned Form J is invalid, and that it contains an error of law on the face of that Form J, is a question pertaining to the merits of the assessment, a matter better reserved for the Special Commissioners or a matter to be transmitted as case stated to the High Court. (Emphasis added.)

> [33] It is evident that the Special Commissioners of Income Tax have the power to hear a question of mixed facts and law. By virtue of ss 14, 19 and 20 of the Schedule 5 to Act 53 the respondent could by represented by an advocate or tax agent and witnesses may be called to be examined on oath and produced documents. The respondent is thus is under the law afforded every opportunity to ventilate their complaint against the appellant. Therefore, the issue of whether the appellant was correct in their letter of findings ought to be dealt with by the Special Commissioners of Income Tax. In any event, the door for the respondent to bring the matter to the High Court on any question of law is not entirely closed. The decision of the Special Commissioners of Income Tax is appealable to the High Court by way of a case stated pursuant to para 34 of Schedule 5 to Act 53.

I am, by the doctrine of stare decisis, bound by these pronouncements of the Court of Appeal and Federal Court. Hence, it is crystal clear that in matters concerning the raising of assessments of tax under section 91(1) or 91(3) of the

ITA, challenges by the tax payer are best left to be dealt by the SCIT, unless of course if there are any exceptional circumstances.

[27] In this case, I do not find exceptional circumstance that would warrant leave to be granted for judicial review. Which would then make this application an abuse of process. Wherefore, the I dismissed the application for leave.

Dated this 28th day of June 2019.

Vazeer Alam Mydin Meera
Judge
High Court in Malaya
Shah Alam

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