# DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
## (BAHAGIAN RAYUAN KUASA-KUASA KHAS)
## PERMOHONAN SEMAKAN KEHAKIMAN NO.: 25-336-12/2015

Dalam Perkara menurut Artikel 96 Perlembagaan Persekutuan

Dan

Dalam Perkara menurut Seksyen-Seksyen 4A, 15(2), 109B dan 132 Akta Cukai Pendapatan 1967

Dan

Dalam Perkara menurut Artikel 7, 8, 12 dan 22 dalam Perjanjian Pengelakan Cukai Dua Kali antara Malaysia-Singapura berkuatkuasa mulai 01.01.2007

Dan

Dalam Perkara mengenai Surat-Surat bertarikh 10.08.2015 dan 18.12.2015 (No. Rujukan: C 1853247-00 (A03/14)) dari Lembaga Hasil Dalam Negeri Malaysia

Dan

Dalam Perkara mengenai satu permohonan untuk semakan kehakiman untuk relif di bawah perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 selaras dengan Aturan 53 dan Aturan 92 Kaedah-Kaedah Mahkamah 2012

**ANTARA**

**ALWAN ENTERPRISE SDN BHD**
**(NO. SYARIKAT: 388564-K)** ... **PEMOHON**

**DAN**

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

## Grounds of Decision

**Azizah Nawawi, J:**

## Application

[1] The applicant's application for judicial review is seeking the following orders:

(i) An order of Certiorari be issued to quash the respondent's decision via the respondent's letters dated 8.10.2015 and 18.12.2015 with reference number C 1853247-00 (A03/14) which stated that the applicant's payments to Nordic Offshore Pte Ltd and MV Nor Spring, a company in Singapore is subject to withholding tax under Section 109B (1) (c) of the Income Tax Act 1967;

(ii) In the alternative, an order that the respondent ("**DGIR**") review the decision of the respondent as in the letters dated 8.10.2015 and 18.12.2015 under the reference number C 1853247-00 (A03/14);

(iii) A declaration that the respondent's refusal to apply Article 8 of the Double Taxation Avoidance Agreement between Malaysia – Singapore is flawed and/or inappropriate and/or odd, absurd, and/or in breach of Article 96 of the Federal Constitution;

(iv) A declaration that the applicant does not have to pay any withholding tax under Section 109B (1) (c) of the Income Tax Act 1967 to the respondent pursuant to Article 8 of the Double Taxation Avoidance Agreement between Malaysia and Singapore; and

(v) An order that the respondent shall postpone all further proceeding to enforce the decision in the letters dated 10.8.2015 and 18.12.2015 under the reference number C 1853247-00 (A03/14) until the disposal of this proceeding.

**The Salient Facts**

[2] The applicant is a Private Limited Company, registered in Malaysia. The applicant's main activities are as follows:

(i) operating, maintaining and chartering of marine vessels;
(ii) supplying, installing, commissioning and maintaining of transformers;
(iii) scientific laboratory equipment;
(iv) trading of fertilizers; and
(vi) oil and gas.

[3] The applicant, in the cause of its business paid commission to an international shipping company known as Nordic Offshore Ptd Ltd ("**Nordic**") in Singapore and had paid another International Shipping Company in Singapore known as Solstad Offshore Asia Pacific Ltd ("**Solstad**") the following payments:

| **Year of Assessment** | **Payments to** | **Ringgit Malaysia** |
|---|---|---|
| 2009 | Commission payment to **Nordic** | 380,709.00 |
| 2011 | Time chartering payment to **Solstad** | 3,811,746.91 |
| **(Total)** | | **4,191,455.91** |

[4] On 12.2.2014, the DGIR had conducted an audit on the applicant. After the audit, the DGIR had demanded for the payment of withholding tax together with a penalty of 10% by way of their letter dated 10.8.2015.

[5] The applicant, through their solicitors wrote to the DGIR, explaining their legal stand on the matter but it was rejected by the DGIR vide a letter dated 18.12.2015.

[6] Hence, the applicant filed an application for judicial review to challenge the said decision on 22.12.2015.

## The Findings of the Court

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

(i) illegality;
(ii) irrationality; and
(iii) procedural impropriety.

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

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

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

[11] In the present application, the applicant is relying only on the issue of illegality, in that the DGIR had wrongly interpreted the provisions of the Malaysia-Singapore Double Taxation Agreement (the **"Malaysia-Singapore DTA**") in arriving at his decision.

[12] The applicant takes the position that the payments of commission to Nordic and the payments pursuant to the Time Chartering Contract with Solstad falls under article 7(1) and 8 (1) & (2) of Malaysia-Singapore DTA, whilst DGIR maintains that it falls under article 22.

[13] The relevant provisions read as follows:

> "***Article 7 – BUSINESS PROFITS***
>
> *1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. if the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only on so much thereof as is attributable to that permanent establishment.*"

*"**Article 8 – SHIPPING, AIR AND ROAD TRANSPORT***

1. *Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.*

2. *For the purposes of this Article, profits from operation of ships or aircraft in international traffic shall include profits derived from:*

   *(a) the rental on a bareboat basis of ships or aircraft used in international traffic;*

   *(b) the use or rental of containers, if such profits are incidental to the profits to which the provisions of paragraph 1 apply"*

***"Article 22 – INCOME NOT EXPRESSLY MENTIONED***

*Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that Contracting State except that if such income is derived from sources in other Contracting State, it may also be taxed in that other State."*

[14] On the construction of the provisions of the Malaysia-Singapore DTA, Justice Rohana Yusuf (as she then was) in **Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri** [2011] MSTC 30 - 033 held as follows:

> "*The **DTA modelled after the OECD Model Convention containing Commentary that determines the construction of Article XII of DTA. In OA Pte Ltd v. Ketua Pengarah Hasil Dalam Negeri [1996] MTSC 2, 752 it was observed that the Commentary of the OECD model has been used to determine the construction of the treaty.** This seems to be also the position in other countries using the same model as seen in the decisions of the Australian High Court in Thiel v. Commissioner of Taxation of the Commonwealth of Australia [1990] 171 CLR 338, the Supreme Court of Canada in Crown Forest Industries Ltd v. Canada [1995] 2 SCR 802 as well as the United Kingdom in the case of Sun Life Assurance Co of Canada v. Pearson (Inspector of Taxes) [1986] STC 335, 59 TC 250.*" (emphasis added)

[15] Therefore, the Commentary of the OECD will be used to determine the constructions of the relevant articles in the Malaysia-Singapore DTA.

[16] With regards to Article 7 of the Malaysia-Singapore DTA, the OECD Commentary states as follows:

> *"11. The first principle underlying paragraph 1, i.e that the profits of an enterprise of one Contracting State shall not be taxed in the other State unless the enterprise carries on business in that other State through a permanent establishment situated therein, has a long history and reflects the international consensus that, as a general rule,* ***until an enterprise of the State has a permanent establishment in another State, it should not properly be regarded as participating in the economic life of that State to such an extent that the other State should have taxing rights on its profits***." (emphasis added)

[17] Therefore, to fall within Article 7, the enterprise must not have a permanent establishment in Malaysia and that the profits are business profits. In the present application, the applicant submits that since the commissions paid by the applicant to Nordic falls under Article 7, in that it is business profits and that Nordic does not have a permanent establishment in Malaysia, then the said profits should only be taxable in that Contracting State, i.e Singapore.

[18] With regards to Article 8, the OECD Commentary states as follows:

> "*1. The object of paragraph 1 concerning profits from the operation of ships or aircraft in international traffic is to secure that such profits will be taxed in one State alone. The provision is based on the principle that the taxing right shall be left to the Contracting State in which the place of effective management of the enterprise is situated. The term "international traffic" is defined in subparagraph e) of paragraph 1 of Article 3,*
>
> ....
>
> *4. The profits covered consists in the first place of the profits directly obtained by the enterprise from the transportation of passengers or cargo by ships or aircraft (whether owned, leased or otherwise at the disposal of the enterprise) that it operates in international traffic..."*

[19] Therefore, to fall under Article 8 of the Malaysia-Singapore DTA, the effective management of the enterprise must be situated in Singapore and that the profits must directly be obtained from the transportation of passengers or cargo by ships or aircraft in international waters. In the present case, the applicant submits that the profits derived by Solstad from the Time Chartering Contract between the applicant and

Solstad would fall under Article 8 and taxable in Singapore, and is therefore exempted from taxation in Malaysia.

[20] It is therefore the submission of the applicant that since the commissions to Nordic falls under Article 7 of the Malaysia – Singapore DTA, and the payment of profits to Solstad under the Time Chartering Contract falls under Article 8, then Article 22 is not relevant at all.

[21] In **Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Dalam Hasil** [1994] 2 MLJ 713, the court held that the onus is on the taxpayer to demonstrate that the assessment should not have been made, and the said assessment should stand unless and until the taxpayer satisfied the Special Commissioners that it was wrong. The taxpayer undertook the same onus when he brought a further appeal to the court.

[22] As conceded by the applicant, in order to fall within Article 7 and 8, the onus is on the applicant to establish that:

(i) that the enterprise concerned, Nordic and Solstad, do not have a permanent establishment in Malaysia;

(ii) that the profits derived by Nordic are business profits; and

(iii) that the profits derived by Solstad are from the operations of ships in international waters.

[23] However, from the affidavit affirmed by the applicant, the applicant had merely exhibited the company profiles of Nordic and Solstad downloaded from the internet. There is no affidavit from both companies to state the fact that they have no permanent establishments in Malaysia. There are no primary documents to support the mere statements of the applicant. Added to that, with regards to Solstad, there is no evidence to establish that the operations of the ships concerned are limited to international waters only.

[24] Therefore, I am of the considered opinion that in order to decide whether the payments made by the applicant to Nordic and Solstad falls within Article 7 and 8 or Article 22, there must be an ascertainment of the underlying facts. Without a proper ascertainment of the facts, this court cannot come to a definitive conclusion as to whether Article 7, 8 or 22 is applicable in this factual situation.

[25] It is on this basis that the matter should have been referred to the Special Commissioners of Income Tax ("**SCIT**") under section 109H(1) of the Income Tax Act 1967, as the SCIT are the judges of facts in tax matters. In **Ketua Pengarah Hasil Dalam Negeri v. Mudah.My Sdn Bhd** [2017] MLJU 162, in a similar issue on withholding tax, the Court of Appeal held as follows:

*"[31] It is to be emphasized 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 involved 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 ion 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' Haji Ghani Gilong [1995] 3 CLJ 161 when it authoritatively said –*

*"We say so because Special Commissioners are the judges of fact, and have the jurisdiction to consider not only the plea of limitation based on subsections 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 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."* (emphasis added)

[26] The applicant relied on the case of **Ketua Pengarah Hasil Dalam Negeri v. Thomson Reuters Global Resources** [2016] 7 CLJ 210, where the issue before the court is on the interpretation of the word 'royalty' under Article 12(4) of the Malaysia – Swiss Federal Council Double Taxation Agreement 1974. It must be noted that this case was an appeal from the SCIT, where the SCIT has made a finding of fact.

[27] In **Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia** [2017] 1 MLJ 563, the respondent applied to review the decision of the DGIR demanding payment of withholding tax. The application was allowed by the High Court and was affirmed by the Court of Appeal. However, the DGIR's appeal was allowed by the Federal Court where the court held that where a party is not satisfied with the decision of the DGIR, he should have exercised his right to appeal to the SCIT under section 109H of the Income Tax Act 1967. The Federal Court also held as follows:

> *"[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 control necessary for the 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 had determined (see Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd [1978] 1 MLJ 203).*"

[28] On the merits of the application itself, I am bound by the decision of the Court of Appeal in **Ketua Pengarah Hasil Dalam Negeri v. Teraju Sinar Sdn Bhd** [2014] 4 MLJ 218, where the court held that the charging law is the Income Tax Act 1967 and not the DTA, which only determines availability of relief from tax and that the party seeking relief from tax should be the non-resident in Malaysia. The court held as follows:

***"THE DOUBLE TAXATION AGREEMENT ('DTA')"***

*[40]* ***It is trite the relationship between the ITA and the DTA is that the charging law is the ITA and not the DTA which only determines availability of relief from tax:*** *see Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim (M) Sdn Bhd [2014] 2 MLJ 1. In our view, s. 132 of the ITA provides the special status described in United Overseas Bank Ltd v Ketua Pengarah Hasil Dalam Negeri [1997] 3 MLJ 359 as inherent to a DTA that enables the DTA*

*to determine the availability of relief from tax imposed under the ITA.*

*[41]* ***But the party that is relieved of the liability to tax by the DTA is not Teraju but Union Concept.*** *Section 4A created three special classes of income derived in Malaysia, of a person not resident in Malaysia may be chargeable to tax. Section 15A deems these three classes to be derived from Malaysia if any one of three conditions are met, and the payer in Malaysia is imposed the duty to make deductions of withholding tax to the KPH. That is a responsibility entirely distinct or separate from the liability of Union Concept under para (ii) of s 4A notwithstanding the provisions of s 4. It is then for Union Concept to avail itself of the relief under the DTA.*

*[42] In SGS Singapore (Pte) Ltd v Ketua Pengarah Hasil Dalam Negeri [2000] 7 MLJ 229; [2000] LNS 143,* ***the appellant was SGS Singapore (Pte) Ltd. It claimed relief under Article IV of the DTA as a company that did not 'carry on business' in Malaysia and did not have a 'permanent establishment' in Malaysia. It was held that tax withheld should be paid to the appellant SGS Singapore (Pte) Ltd.*** *In Director-General of Inland*

*Revenue v Euromedical Industries Ltd [1983] 1 CLJ 281 (FC), the Federal Court made clear that the payments by Euromedical Industries Sdn Bhd to the recipient company Euromedical Industries Ltd, a United Kingdom company, with no permanent establishment in Malaysia for management services was taxable only in the United Kingdom. It may be noted that it was the recipient company that took up the claim against the KPH.*

*[43] The question rather neatly put emerged in Erria Shipping Pte Ltd v Cara Timur Transport Sdn Bhd [1989] 1 MLJ 133; [1988] 1 LNS 173 where Chong Siew Fai J (as he then was) said:*

*... The central issue therefore is whether the commission earned by the plaintiff company is subject to Malaysian withholding tax under s 109B(1) of the Act such that the defendant as the payer thereof is legally obliged or entitled to deduct the tax thereon upon paying the commission to the plaintiff. It must be made clear that the issue for determination is whether the defendant is statutorily entitled to deduct the amount under s 109B(1) and not whether the plaintiff company is liable to pay tax in Malaysia on the commission earned ...*

> *[44] There* ***being no claim for relief by Union Concept, the issue whether Union Concept is relieved of liability does not arise.*** *The starting point before relief is sought therefore remains, that is, the application of the charging provisions ss 4A and 15A. We hold that Teraju's liability from the failure, its failure to act under s 109B, attracted the operation of s 39(1)(j) and that it is not a matter involving the operation of the DTA.*" (emphasis added)

[29] Therefore, applying the principle in **Teraju Sinar's** case, the DGIR is correct to demand payment of the withholding tax from the applicant. If Nordic and Solstad take the position that their income can only be taxed in Singapore under the Malaysia-Singapore DTA, they must make the application to the DGIR. The statutory duty of the applicant is merely to withhold the tax portion of Nordic and Solstad and transmit the same to the DGIR.

## Conclusion

[30] Premised on the reasons enumerated above, I find no merit in the application as this court is not in a position to ascertain the underlying facts, simply based on documents downloaded from the internet. The applicant should have referred this matter to the SCIT, which would be the proper forum to make a finding of facts and decide on the

issues between the parties. As such, the application is dismissed with costs.

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

Dated: 2nd October 2018

For the Applicant : Mr. S. Vijayaretnam @ Veizay
Messrs Viezay & Co.
Johor Darul Takzim.

For the Respondent : SRC, Mr. Muhd Farid bin Jaafar
Ketua Pengarah Hasil Dalam Negeri Malaysia
Cyberjaya.

**Cases referred:**

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

2. Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] MSTC 30 – 033

3. Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Dalam Hasil [1994] 2 MLJ 713

4. Ketua Pengarah Hasil Dalam Negeri v. Mudah.My Sdn Bhd [2017] MLJU 162

5. Ketua Pengarah Hasil Dalam Negeri v. Thomson Reuters Global Resources [2016] 7 CLJ 210

6. Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia [2017] 1 MLJ 563

7. Ketua Pengarah Hasil Dalam Negeri v. Teraju Sinar Sdn Bhd [2014] 4 MLJ 218