MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

APPLICATION FOR JUDICIAL REVIEW NO:

KCH-13NCvC-17/8-2016

In the matter of the application for leave for an Order of Certiorari under Order 53 Rule 3 of the Rules of Court, 2012.

AND

In the matter of Paragraph 1 of the Schedule to the Courts of Judicature Act.

AND

In the matter of Paragraph 1A, 4 & 9 (cc) of Schedule 7A of the Income Tax Act, 1967.

BETWEEN

BUDI NASIB SDN. BHD
(Co. No. 628064-W)
8th Floor, Crown Towers
88 Jalan Pending
93450 Kuching, Sarawak. … … … … … … Applicant

AND

KETUA PENGARAH HASIL DALAM NEGERI
Ibu Pejabat Lembaga Hasil Dalam Negeri Malaysia
Jalan Resolusi Pertikaian
Jabatan Pejabat Ketua Pegawai Eksekutif
Menara Hasil, Aras 11
Persiaran Rimba Permai, Cyber 8
63000 Cyberjaya, Selangor. … … … … … …Respondent

BEFORE THE HONOURABLE JUSTICE

DATO RHODZARIAH BT. BUJANG

IN CHAMBER

JUDGMENT

The applicant is a Bintulu-based company in the business of oil palm cultivation and has filed this action against the respondent following its dissatisfaction with his decision not to allow their claim for reinvestment allowance ('the allowance') made under paragraph 1A of Schedule 7A of the Income Tax Act 1967 ("the Act"). The said provision allows the respondent to give a company resident in Malaysia and which has been in operation for a minimum of three years such an allowance at the rate of 60% of its capital expenditure in relation to an agricultural project. The rejected claim of the applicant was for the years of assessment 2006 to 2008 totaling **RM975,364.00** and **RM10,370,042.00** for the subsequent years of assessment until 2013. The respondent's decision in respect of the former was conveyed to the applicant on 4th November 2013 and on 23rd September 2015 for the latter but only in respect of the years of assessment 2010 to 2013; not 2009 where no decision was made or conveyed to the applicant. In respect of both decisions, the applicant has filed two separate appeals to the Special Commissioners of Income Tax ("SCIT") i.e on the 25th November 2013 and on the 2nd October 2015, respectively. However, until the date when I reserved this judgment, the appeals have yet to be heard. Despite those pending appeals, the applicant has filed this action for extension of time and if granted, for leave to review the rejection of their claim for the allowance.

The application for extension of time and for leave (Enclosure 1)

It is being objected to by the respondent on the principal ground of delay and absence of merits. Mr. George Lo, appearing with Mr. Jonathan Tay for the applicant was honest enough to admit the delay and that this is the first hurdle

which his client would have to cross for Order 53r3 (6) of the Rules of Court 2012 very clearly stipulates the time frame for making a judicial review application – it must be done within three months from the date when the grounds of application first arose or when the decision is communicated to the applicant although as provided in sub rule (7), the court has the discretion to extend the time.

I have earlier stated the dates the impugned decisions were made and conveyed to the applicant i.e **4th November 2013** and **23rd September 2015,** respectively. This action was filed on **30th August 2016**, way out of the prescribed timeline. But there are very good reasons for the delay, contended the applicant thereby justifying the grant of their notice of application dated **30th August 2016** to extend time (enclosure 1) and consequently, if that is granted then for leave to issue the judicial review. It is trite law that in exercising its discretion to grant an extension of time both the length of the delay and the reason(s) for it must be considered. Of course the delay here is, even if looked at with the most lenient of eyes, is not favourable to the applicant because it is not just days or a few months but even years (in respect of the first impugned decision).

Given that rather extreme delay in instituiting this action, the reason(s) for it must be exceptionally good for me to allow the application for the extension and abridgement of the time. And it is so, said the applicant.

Bintulu Lumber's case.

As stated earlier, the applicant's business is one of oil palm cultivation and their claim for the allowance is based on "…capital expenditure in relation to an agricultural project…" Paragraph 9 of Schedule 7A defines what that "capital expenditure" is. It is:

(a) the clearing and preparation of land.

(b) the planting of crops.

(c) the provision of irrigation or drainage systems.

(d) the provision of plant and machinery.

(e) the construction of access roads including bridges.

(f) the construction or purchase of buildings (including those provide for the welfare of persons or as living accommodation for persons) and structural improvements on land or other structures;

(g) [Deleted Act 755 of the year 2013]

For the purposes of any of the following activities:

(aa) cultivation of rice and maize.

(bb) cultivation of vegetables, tuber and roots.

(cc) **cultivation of fruits**.

(dd) livestock farming.

(ee) spawning, breeding or culturing or aquatic products.

(ff) any other activities approved by the Minister, and

(gg) [Deleted Act 755 of the year 2013]. (emphasis added)

The company **Bintulu Lumber Development Sdn. Bhd** was also in the business of oil palm cultivation and faced the exact predicament of the applicant in that its application for the allowance in respect of capital expenditure made in relation to its principal activity was disallowed by the respondent. Their appeal to the SCIT was allowed on 22nd May 2012 who held that the cultivation of oil palm falls within the meaning of "cultivation of fruits" under the said paragraph 9 (cc). The respondent (the appellant in **Bintulu Lumber**'s case) appealed to the High Court (case number KCH-14-1/9-2013). That appeal was allowed by Yew Jen Kie J on 20th June 2014 and which decision was affirmed by the Court of Appeal on 20th April 2016. Its application for leave to appeal to the Federal Court against that decision was dismissed recently i.e on 8th February 2017.

Coincidentally, Mr. George Lo was also the counsel for **Bintulu Lumber** in the Federal Court as shown in the draft order of the court (Tab P in the respondent's Bundle of Authorities) although at both the High Court and Court of Appeal levels their legal representative was different. Granted, as submitted by the applicant before me that the dismissal of the leave application by the Federal Court was on the point of jurisdiction i.e that it (ie the Federal Court) has no jurisdiction to grant leave because the High Court was exercising its appellate jurisdiction and the appeal was not resolved on the merits of the issue regarding the definition of "cultivation of fruits", however, the unavoidable fact is that the said merit has been decided by an appellate court i.e the Court of Appeal. It is a decision I am bound by the doctrine of stare decisis to follow since the central issue in the disputes in these two cases is exactly the same and I say this with confidence because if it were not so the applicant would not have used the legal process in **Bintulu Lumber**'s case as the reason for delaying its approach to the court.

Although I am fully aware that in an application for extension of time, I should not be overly concerned with the merits of the applicant's legal grievance, nevertheless in the face of such a clear and express outcome of the leave application-even if the extension is granted-it would be terribly foolhardy for me to waste everybody's time and resources to pursue and/or defend an outcome which is a foregone conclusion or exert ourselves in an exercise of futility.

There is yet another reason, no less compelling, if not more so why I should not grant the extension of time and the leave sought by the applicant. It is the clear dicta from the superior courts in the two cases as cited by the respondent's counsel, Mr. Ahmad Ishak and Ms. Nuk Nur Halina i.e **Government of Malaysia and Anor v. Jagdis Singh** [1987] CLJ (Rep) 110 (Supreme Court) and **Ta Wu Realty Sdn. Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor** [2008] 6

CLJ 235 (Court of Appeal) which held that an aggrieved tax payer has to exhaust the appeal procedure in the Income Tax Act 1967 and not resort to judicial review to quash the impugned decision of the tax authority. The respondent's counsel also referred to me to another case which was decided by the Federal Court on 18th October 2016 i.e **Ketua Pengarah Hasil Dalam Negeri v. Bandar Nusajaya Development Sdn. Bhd** [Civil Appeal No. 01(f)-5-02/2015(w)] and which they submitted also made the same decision but given that only that court order was exhibited in their Bundle of Authority, not the full grounds it would not be fair for me to agree with them that it is so. There is however another Federal Court decision which it is a fairer option to consider and it is **Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn. Bhd & Anor** [2017] 1 AMR 209; [2017] 1 MLJ 563. The facts in that appeal is of course far removed from this case before me and that of **Bintulu Lumber**'s but what was held by the Federal Court in respect of the procedure for an aggrieved tax payer is akin to the earlier two cited cases.

The respondents in **Alcatel**'s case (supra) also filed an application for leave to issue a judicial review against the decision of the same respondent herein to challenge his decision to impose withholding tax in respect of services rendered by the second respondent to the first respondent (as they were in the said case). Admittedly, the Federal Court did not expressly held that the judicial review filed was incompetent but Suryadi Halim Omar FCJ held that the respondents therein have circumvented the appeal process to the SCIT as provided by section 99 (1) of the Act and further held that because there was no such appeal filed to SCIT, "the court must accept certain facts and conclusion as not reversible (fait accompli)". Zainun Ali FCJ echoed this view in Her Ladyship's concluding remark of her supporting judgment.

Reverting now to the applicant's case before me, since the merits of the decision of the respondent on the allowance could not be challenged as stated in **Alcatel**'s case (supra) and is not open to challenge by virtue of **Bintulu Lumber**'s case (supra), this fact adds to the hopelessness of allowing the application and it is even more so when the undisputed fact in this case is that the applicant have indeed filed an appeal to the SCIT as I have mentioned at the beginning of my ruling. With respect, the applicant should have proceeded with that appeal and allow it to go through its own natural process without any hindrance from this court, all the way to the Court of Appeal, if need be rather than, to paraphrase the words of the Federal Court Judges in **Alcatel**'s case (supra), circumvent that appeal by filing this judicial review application. In fact it is the best and surest way to challenge the decision in **Bintulu Lumber**'s case in that a different panel of the Court of Appeal may be persuaded to arrive at a contrary decision than that of **Bintulu Lumber**'s. Awaiting the outcome of **Bintulu Lumber**'s decision, all the way up to the Federal Court may be a good reason to apply for a stay of the hearing of the appeal before the SCIT but regrettably, it is not good justification for circumventing that appeal process by filing this application way out of the timeline prescribed by the said Order 53 r 3 (6).

For the foregoing reasons, I would dismiss the notice of application with cost of RM3,000.00 since the parties failed to agree to it.

Sgd.

(RHODZARIAH BT. BUJANG)
Judge
High Court II Kuching

Date of Grounds of Judgment : 11th day of April, 2017

Date of Delivery of Decision : 6th day of April, 2017

For the Applicant	:	Mr. George Lo with Mr. Jonathan Tay Messrs. George Lo & Partners No. 49, 1st Floor Block F, King's Centre Jalan Simpang Tiga 93350 Kuching, Sarawak.
For the Respondent	:	Mr. Ahmad Ishak with Ms. Nik Nur Halina Lembaga Hasil Dalam Negeri Malaysia (LHDNM) Unit Undang-Undang Tingkat 11, Wisma Hasil, No. 1 Jalan Padungan 93100 Kuching Sarawak.