DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
RAYUAN SIVIL NO: WA-14-1-03/2018

ANTARA

DATO' NG KAI CHOON ... **PERAYU**

DAN

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

[KES DINYATAKAN OLEH PESURUHJAYA KHAS CUKAI PENDAPATAN BAGI PENDAPAT MAHKAMAH TINGGI MENURUT PERENGGAN 34 JADUAL 5 AKTA CUKAI PENDAPATAN 1967

DALAM PERKARA

PESURUHJAYA KHAS CUKAI PENDAPATAN DI PUTRAJAYA
RAYUAN NO. PKCP(R) 26/2015
RAYUAN NO. PKCP(R) 27/2015

ANTARA

DATO' NG KAI CHOON ... **PERAYU**

DAN

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

Grounds of Decision

Azizah Nawawi, J

Applications

[1] This is an appeal before this Court filed by the Appellant, Dato' Ng Kai Choon, by way of a Case Stated pursuant to paragraph 34 of Schedule 5 of the Income Tax Act ("**ITA 1967**") against the Deciding Order made by the Special Commissioner of Income Tax (**"SCIT"**), in dismissing the Appellant's appeal against a notice of assessment for the Year of Assessment ("**YA**") 2009 and 2010 issued by the Director General of Income Tax ("**DGIR**").

[2] The Deciding Order dated 13.2.2018, *inter alia*, reads as follows:

> ***"ADALAH DIPUTUSKAN SECARA SEBULAT SUARA*** *bahawa Perayu telah gagal membuktikan rayuan Perayu selaras dengan Perenggan 13 Jdual 5 Akta Cukai Pendapatan 1967;*
>
> ***DAN*** *pendapatan yang diterima oleh Perayu melalui syarikat Supreme Management Solution merupakan kontrak maka penemuan yang dibuat oleh Responden bahawa Perayu telah terkurang lapor pendapatan yang diterima bagi tahun taksiran 2009 dan 2010 adalah betul;*
>
> ***DAN*** *rayuan terhadap terhadap Notis-Notis Taksiran Tambahan bagi tahun 2009 dan 2010 bertarikh 21 Julai 2014 untuk amaun RM24,764.72 dan RM353,379.88*

yang dibangkitkan oleh Responden adalah tidak dibenarkan;

***DAN** Responden telah mengenakan penalti dengan betul sebagaimana dibenarkan oleh Akta Cukai Pendapatan 1967;*

***DAN DENGAN ITU** rayuan Perayu ditolak dan Notis Taksiran Tambahan bertarikh 21 Julai 2014 bagi tahun taksiran 2009 dan 2010 yang berkaitan dengan rayuan ini adalah dikekalkan.*

The Salient Facts

[3] The Appellant is the owner of a sole proprietorship business known as Supreme Management Solutions ("**SMS**"). Apart from that, the Appellant had also operated a petrol station under the name and style of Hup Kee Service Station since 1970.

[4] SMS had entered into a sub contract with Usaha Damai Gas Sdn Bhd ("**Usaha Damai**") for electrical works for the sum of RM7,807,251.00. Usaha Damai had secured a contract with Infra Segi Sdn Bhd. The sub contractual works was awarded to SMS and SMS had accepted the same on 8.8.2008.

[5] The DGIR conducted an audit on the Appellant. Arising from this audit and after several correspondences between the Appellant

solicitor, the DGIR issued a letter dated 21.7.2104 demanding the settlement of undercharged tax for YA 2009 and 2010, together with two (2) Notices of Additional Assessment for YA 2009 and 2010, for the sum of RM24,764.72 and RM353,379.88 respectively.

[6] The Appellant then filed an appeal by submitting Form Q dated 21.8.2014.

[7] Having considered the Appellant's appeal, the SCIT had dismissed the Appellant's appeal and affirmed the Notices of Additional Assessments issued by the DGIR.

Issues

[8] The issues for determination here are as follows:

(i) Whether the SCIT was correct in its finding that the income from the sub-contract received from Usaha Damai Gas Sdn Bhd is a contract income and not a return of investment from the project under taken; and

(ii) whether the SCIT was correct in its finding that the Appellant's business, Supreme Management Solution ("**SMS**") is a sole proprietor business and not a partnership and thus all income received by SMS is to be taxed onto the Appellant alone as a sole proprietor.

The Findings of the Court

[9] Parties are on common ground with regards to the legal principles when dealing with an appeal from the decisions of the SCIT. The relevant cases are as follows:

(i) The Privy Council in the case of **Chua Lip Kong v. Director General of Inland Revenue** [1981] 1 LNS 157; [1982] 1 MLJ 235 held as follows:

> *Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded.* ***Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself;*** *occasionally they may be* ***insufficient to enable the High Court to decide the question of law*** *sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be* ***remitted to the Commissioners themselves for further findings.*** *It is the primary facts so found*

by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".

From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law. *It is therefore desirable that in a Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: viz - whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or*

consequences of fact; and, in the latter event, what those assumptions were.
(emphasis added)

(ii) The Court of Appeal in the case of **Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2013] 3 CLJ 813 also made reference to *Chua Kip Long* 's case and further held as follows:

> ***"As a general rule finding of facts of trier of facts is rarely disturbed by appellate court more so when it relates to physical facts.*** *As long as the trier of facts has directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness, the finding of facts relating to physical facts will not be ordinarily disturbed notwithstanding the judgment is brief and direct to the point. However, when it relates to psychological facts the trier of facts is expected to give more cogent reasons to ensure every aspect of the relevant evidence has been considered in the right perspective to pass the test of reasonableness, [see Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor [2004] 4 CLJ 309; [2003] 2 MLJ 97]. Failure to give sufficient reasons in the grounds of judgment may result in appellate interference. This*

is evident from decided criminal cases and very seldom in civil cases as psychological facts may not be relevant unless it is a probate matter, consisting of issues such as animus testandi, undue influence or fraud etc. or in civil cases relating to conspiracy or motive etc. ***When it relates to statutory appeals concerning SCIT the test for appellate interference is much stricter*** *[see Edwards v. Bairstow & Harrison 36 TC 207]."* (emphasis added)

(iii) In Kenny Heights Development **Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri** [2015] 5 CLJ 923, the Court of Appeal held as follows:

"[24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialized bodies such as SCIT. ***The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance.*** *It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.*

[25] Courts must also bear in mind the SCIT's specialization. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. ***Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT...*** "(emphasis added)

[10] Guided by the aforesaid cases, I will now deal with the two (2) issues raised before the SCIT.

Issue (i) ***Whether the SCIT was correct in its finding that the income from the sub-contract received from Usaha Damai Gas Sdn Bhd is a contract income and not a return of investment from the project under taken***

[11] With regards to this issue, the SCIT has made a finding that the income received from Usaha Damai is premised on the contract executed by SMS and Usaha Damai, and is a contractual income and

not a return of capital as contended by the Appellant. The SCIT's finding is based on the following facts:

(i) that Infra Segi Sdn Bhd had awarded a contract to Usaha Damai for RM9,339,690.00. Usaha Damai then sub contracted it to SMS for RM7,807,251.00 for the '*supply, delivery, installation and testing and commissioning of Electrical HT, Electrical LV, Telephone, Public Address, SMTV and Lighting*';

(ii) that SMS had accepted the sub-contract vide a letter of Acceptance dated 8.8.2008; and

(iii) that all the payments vouchers and cheques were issued by Usaha Damai to SMS; and

(iv) that SMS had issued Trade Debtors Claim to Usaha Damai via Progress Claim Item in its Ledger for accounting period 1.1.2009 to 31.12.2010;

[12] In paragraph 10.12 and 10.13 of the Case Stated, the SCIT made the following conclusion:

"10.12 .. Panel KCP mendapati wujudnya bukti melalui perjanjian sub-kontrak dan disokong dengan dokumen seperti penyata pendapatan dan dokumen lain yang dikemukakan oleh Perayu seperti lejar dan progress claim bahawa SMS telah menerima pendapatan hasil dari aktiviti sebagai kontraktor.

10.13 Oleh kerana SMS telah terbukti menjalankan aktiviti kontraktor dan mendapat pendapatan dari aktiviti kontraktor, oleh itu pihak Panel PKCP memutuskan bahawa pendapatan yang diperoleh melalui SMS merupakan pendapatan kontrak."

[13] I am of the considered opinion that the SCIT has arrived at a decision after considering the evidence before it and that the decision of the SCIT is supported by the evidence before it. Therefore, this court is bound by the findings of facts by the SCIT. In **Chua Lip Kong v. DGIR** [1982] 1 MLJ 235, the Privy Council held as follows:

> *"...Finding of primary facts by the Special Commissioners are unassailable. This can neither be overruled nor supplemented by the High Court..."*

[14] With regards to the Appellant's contention that the payments from Usaha Damai is a return of capital, the SCIT has applied paragraph 13, Schedule 5 of the ITA 1967, which provides that the onus of proving that an assessment is excessive or erroneous shall be on the appellant. After considering the evidence before it, the SCIT has made the following finding:

"Berdasarkan keterangan saksi dan dokumentar yang ada, pihak Panel PKCP mendapati atas imbangan kebarangkalian bahawa Perayu gagal membuktikan bahawa pendapatan yang diterima oleh

SMS adalah pendapatan pelaburan bagi projek yang dijalankan oleh Usaha damai gas Sdn Bhd."

[15] I am of the considered opinion that where the SCIT has made a finding that the Appellant's contention is not supported by any evidence, it is not for this court to disturb such findings.

Issue (ii) ***whether the SCIT was correct in its finding that the Appellant's business, Supreme Management Solution ("SMS") is a sole proprietor business and not a partnership and thus all income received by SMS is to be taxed onto the Appellant alone as a sole proprietor.***

[16] The Appellant takes the position that SMS is not a sole proprietorship, but a partnership with one Datuk Phang. However, Datuk Phang did not give any evidence before the SCIT. On this issue, the SCIT made a finding that SMS is a sole proprietorship, not a partnership based on the following evidences:

(i) that based on the official search result with the Suruhanjaya Syarikat Malaysia, the Appellant's business SMS, is a sole proprietorship with the Appellant, Ng Kai Choon named as the sole proprietor;

(ii) that the Appellant had admitted in his evidence under cross examination that the undated agreement between him and

Datuk Phang was for the purpose of appointing Datuk Phang as a consultant. Under the term of the consultancy agreement, Datuk Phang was to be paid 13.9% from every progressive payment as the 'Consultant Fee.' Therefore, the purported consultancy agreement does not fall within the definition of partnership as envisaged by section 2 of the ITA 1967, which reads:

"*partnership means an association of any kind (including joint ventures, syndicate and cases where a party to the association is itself a partnership) between parties who have agreed to combine and of their rights, power, property, labour or skill for the purpose of carrying on a business and sharing profits thereon...*"

(iii) that the Appellant has failed to show any involvement of a third party or Datuk Phang in the sub contract agreement which may amount to a partnership. Only SMS and Usaha Damai are privy to the sub contract agreement;

(iv) that the Appellant had treated the amount due from Usaha Damai as a trade debt, and not a return of investment. This can be seen from the notice of demand issued by the Appellant's Solicitor, Messrs Puspalingam, Kasmani & Partners dated 4.8.2011, which, inter alia, reads:

"(iv) Our client has executed the said sub-contract works including works related to the variation orders and has submitted his final claim to you on 14-06-2011 as per the attachment;

(v) As per the final claim, you still owe our client the sum of RM2,254,651.69 … which is still due and owing."

[17] I am of the considered opinion that the findings of the SCIT is based on the analysis of the evidence before it. It cannot be said that the SCIT's finding is irrational and not supported by evidence. Therefore, there is no basis for this court to interfere in the said findings.

Conclusion

[18] Premised on the reasons enumerated above, I am of the considered opinion that there are no merits in this appeal and the same is dismissed with costs.

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

Dated: 2 July 2019

For the Applicant :	Encik Zailan bin Muhamed Tetuan Zailan & Associates, Kuala Lumpur
For the 1st Respondent:	SRC, Tuan Ahmad Isyak bin Mohd Hassan Ketua Pengarah Hasil Dalam Negeri, Cyberjaya

REFERENCES:

1) Chua Lip Kong v. Director General of Inland Revenue [1981] 1 LNS 157; [1982] 1 MLJ 235

2) Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813

3) International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813

4) Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923

5) Chua Lip Kong v. DGIR [1982] 1 MLJ 235

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