DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: WA-25-165-06/2017

Dalam perkara mengenai keputusan-keputusan Ketua Pengarah Hasil Dalam Negeri tentang keputusan untuk taksiran cukai dan penalti untuk tahun-tahun taksiran 2006 hingga 2008 melalui surat bertarikh 9.6.2017

Dan

Dalam perkara Seksyen 4(f), seksyen 109B dan lain-lain peruntukan Akta Cukai Pendapatan 1967 yang berkenaan

Dan

Dalam perkara perenggan 1 Jadual Akta Mahkamah Kehakiman 1964

Dan

Dalam Perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

ANTARA

KEYSIGHT TECHNOLOGIES MALAYSIA SDN. BHD.

... PEMOHON

DAN

KETUA PENGARAH HASIL DALAM NEGERI MALAYSIA

... RESPONDEN

Grounds of Decision

Azizah Nawawi, J:

Application

[1] This is an application for leave to commence judicial review seeking the following prayers:

(i) An Order of Certiorari to remove into the High Court for the purpose of it being quashed, the decision of the respondent dated 9.6.2017 that the sale of the marketing and manufacturing intangibles by the applicant to Agilent Technologies International S.a.r.L is revenue in nature, and therefore characterized as income under section 4(f) of the Income Tax Act 1967 (the "First Decision");

(ii) An Order of Certiorari to remove into the High Court for the purpose of it being quashed, the decision of the respondent dated 9.6.2017 that the sale of the marketing and manufacturing intangibles ("Intellectual Property Rights") by the applicant to Agilent Technologies International S.a.r.L is revenue in nature, and not capital in nature (the "Second Decision");

(iii) An Order of Certiorari to remove into the High Court for the purpose of it being quashed, the decision of the respondent dated 9.6.2017 that no or no sufficient withholding taxes

have been paid by the applicant for the years of assessment 2006, 2007 and 2008 for penalties to be imposed under the Income Tax Act 1967 (the "Third Decision");

(iv) An Order of Certiorari to remove into the High Court for the purpose of it being quashed, the decision of the respondent dated 9.6.2017 that various payments made to Agilent Technologies International S.a.r.L is exempted from withholding taxes by the Ministry of Finance Malaysia (the "Fourth Decision"); and

(v) An Order of Prohibition to remove into the High Court for the purpose of preventing the respondent from issuing any assessment as it is out of time pursuant to section 90(1) of the Income Tax Act 1967, more so when the respondent have not proved that it has lifted the time bar period by proving that the applicant was in any negligent as stated in its letter dated 9.6.2017 required under section 91(3) of the Income Tax Act 1967 (the "Fifth Decision");

[2] The grounds of the application are:

(i) That the respondent has committed manifest errors of law and fact when the respondent had recognized the payment received by the applicant from the Intellectual Property Rights as revenue;

(ii) That the respondent has committed manifest errors of law and fact when the respondent had subjected withholding tax to transactions between the applicant and Agilent Technologies International S.a.r.L when the applicant had provided a copy of the Exemption Letter issued by the Ministry of Finance;

(iii) That the respondent was motivated by collateral purpose and/or had abused his powers by taking a position against the applicant and did not consider the applicant's explanation;

(iv) That the respondent is out of time to issue any assessment on the applicant; and

(v) That the imposition of penalties is bad in law.

[3] The putative respondent, Director General of Inland Revenue (the **"DGIR"**) was invited by this court to submit on the legal issue of whether leave should be granted. Both the learned Federal Counsel from the Attorney General Chambers and the legal counsel for DGIR objected to this application for leave. The grounds of objection are:

(i) That this application is premature as the letter dated 9.6.2017 issued by the DGIR is not a decision amenable to judicial review; and

(ii) That there is an alternative remedy of appeal under section 99 of the Income Tax Act 1967.

[4] Having considered the application and the submission of the parties, this court has dismissed the applicant's application for leave with costs.

The Salient Facts

[5] The applicant was incorporated on 5.6.1998 under the name of Hewlett-Packard Microwave Products (M) Sdn. Bhd. Following its spin off by Hewlett-Packard, the applicant became known as Agilent Technologies Microwave Products (M) Sdn Bhd ("**Agilent**") in 1999. It changed its name to Keysight Technologies Malaysia Sdn Bhd since 2014.

[6] On 1.3.2008, Agilent entered into a manufacturing services management with Agilent Technologies International Sarl, Switzerland ("**ATIS**"), where the applicant ceased to operate as a full-fledge manufacturer and converted into a contract manufacturer. Following this, the applicant states that it no longer own any marketing and manufacturing intangibles as those rights have been sold and transferred to ATIS.

[7] On 30.8.2013, DGIR commenced an audit on the applicant for Year of Assessment ("YA") 2010 to 2012. Between 2013 to 2017, the applicant has provided the required documents to the DGIR.

[8] On 9.3.2017, the DGIR issued a letter to the applicant seeking clarification on the sale of Intellectual Property Rights by the applicant to ATIS. The applicant replied vide a letter dated 28.3.2017.

[9] Vide a letter dated 9.6.2017, the DGIR states as follows:

"KEYSIGHT TECHNOLOGIES MALAYSIA SDN BHD (C 6897629-09)
AUDIT PINDAHAN HARGA BAGI TAHUN TAKSIRAN (TT) 2008
TAKSIRAN SEKSYEN 140 AKTA CUKAI PENDAPATAN 1967

Adalah saya dengan hormatnya merujuk kepada perkara di atas dan surat kami bertarikh 9 Mac 2017.

2. Setelah meneliti kesemua fakta dan maklumat yang diberikan oleh pihak tuan melalui surat bertarikh 28 Mac 2017 dan 26 April 2017, pihak Lembaga memutuskan bahawa keuntungan dari pindahmilik "technical know-how" berjumlah RM821,615,000 yang dilaporkan dalam Tahun Taksiran 2008 adalah merupakan penerimaan hasil di bawah seksyen 4(f), Akta Cukai Pendapatan 1967 dan boleh dikenakan cukai.

3. Pihak Lembaga menolak hujah pihak tuan yang menyebut bahawa syarikat tidak mempunyai niat untuk membangunkan "technical know-how" tersebut untuk menjual bagi mendapatkan keuntungan dan jualan "technical know-how" tersebut merupakan "outright sale" dimana keuntungan yang diperolehi atas jualannya adalah merupakan penerimaan modal.

4. Pihak Lembaga berpendapat bahawa pemindahan "technical knowhow" tersebut bukanlah merupakan "outright sale" dan

keuntungannya bukanlah penerimaan modal kerana syarikat masih lagi menggunakan "technical know-how" dalam aktiviti pengilangan produk walaupun telah dilesenkan secara kontrak tanpa pembayaran sebarang royalty selepas pengstrukturan syarikat dilakukan.

5. Keuntungan daripada pindahmilik tersebut merupakan bayaran atas kehilangan pendapatan berkaitan dengan proses pengstrukturan syarikat dengan penukaran fungsi dari "full fledge manufacturer" kepada "contract manufacturer" yang menyebabkan penurunan mendadaknya margin keuntungan syarikat selepas pengstrukturan tersebut. Walaupun dakwaan pihak tuan bahawa karektor/ciri syarikat telah berubah selepas pengstrukturan, syarikat masih mengilang produk dan menjual kesemua produknya kepada syarikat berkaitan dan ianya tidak mengubah fungsi dan tujuan syarikat untuk mengilang produknya dan menjual keseluruhan produk tersebut kepada syarikat berkaitan.

6. Pemindahan "technical know-how" tersebut tidak mengubah karektor/ciri syarikat kepada "contract manufacturer" kerana "technical know-how" tersebut masih digunapakai oleh syarikat dan penurunan margin yang mendadak tidak sepatutnya berlaku. Pihak tuan telah memaklumkan bahawa "technical know-how" tersebut adalah aktiviti iringan yang berkait secara langsung dengan aktiviti pengilangan dan ianya terhasil secara sampingan sejak syarikat berfungsi sebagai "full fledge manufacturer" sebelum pengstrukturan berlaku.

7. Di dalam keadaan bebas, sekiranya pemindahan "technical know-how" berlaku dan syarikat tidak dilesenkan untuk menggunakan "technical know-how" tersebut di dalam aktiviti pengilangan, syarikat tidak boleh lagi mengilang produk dan menjualnya. Oleh kerana pemindahan tersebut berlaku antara syarikat berkaitan, aktiviti

pengilangan menggunakan "technical know-how" tersebut masih berjalan seperti biasa walaupun pengstrukturan berlaku.

8. Oleh itu, pihak Lembaga memutuskan bahawa berlakunya perancangan cukai di mana margin keuntungan syarikat telah dipindahkan ke syarikat berkaitan di luar negara melalui pemindahan "technical know-how" yang dilakukan semasa pengstrukturan syarikat berlaku dalam Tahun Taksiran 2008.

9. Taksiran cukai tambahan akan dibangkitkan mengikut peruntukan seksyen 91(3) Akta Cukai Pendapatan 1967 atas kecuaian pihak tuan tidak melaporkan pendapatan ini dengan pengenaan penalti sebanyak 45% atas cukai tambahan mengikut peruntukan seksyen 113(2) Akta yang sama. Dilampirkan pindaan pengiraan cukai untuk Tahun Taksiran 2008 (Lampiran 1) dan pemberitahuan taksiran bagi tahun taksiran tersebut dikeluarkan tidak lama lagi.

10. Bersama-sama surat ini dilampirkan juga penemuan isu cukai pegangan bagi perbelanjaan produk royalti untuk Tahun-Tahun Taksiran 2006-2008 (Lampiran 2). Sila kemukakan bukti resit pembayaran cukai pegangan dalam masa terdekat. Sebarang kemusykilan boleh berhubung dengan pihak Lembaga."

[10] Being unhappy with the above letter, the applicant then filed this application for judicial review on 20.6.2017.

[11] However, on 20.6.2016 the applicant had received the Notice of Additional Assessment dated 13.6.2017 issued by the DGIR, seeking an additional tax of about RM311 million.

[12] On 10.7.2017, the applicant has filed an appeal under section 99 of the Income Tax Act 1967 (the "**ITA 1967**") against the notice of additional assessment dated 13.6.2017.

The Findings of the Court

[13] It is common ground that the test for leave to commence with judicial review was held by the Federal Court in **WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd** [2012] 4 CLJ; [2012] 4 MLJ 296, to be as follows:

> *"Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though, ie, unless the matter for judicial review is amenable to judicial review no success may be envisaged."*

[14] The decision in **WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd** (supra) was followed by a recent decision of the Court of Appeal in **Peguam Negara Malaysia v. Nurul Izzah bt Anwar & Ors** [2017] 5 CLJ 595, where Idris Harun JCA states as follows at pages 615-616:

> *"[23] The law on the subject is well-settled and the authority on which the appellant principally relies in*

considering the test for granting leave is the pronouncement of the Federal Court in the case of WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad [2012] 4 CLJ 478; [2012] 4 MLJ 296 in which the applicable test was stated in para. 12 at p. 488 in the following terms:

> *"... At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted... Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome.".*

We would also refer to the case of Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442 wherein the Supreme Court approved the following guidelines stated in R v Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] COD 107 –

(a) The judge should grant leave if it is clear that there is a point for further

investigation on a full inter parte basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.".

[15] In the case of **Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals** [2011] 6 MLJ 490, the Federal Court has laid down the test applicable for granting of leave for application for judicial review as follows:

"[20] It is clear from the above that a person who is adversely affected by the decision of a public authority can make an application for a judicial review of that decision. But the person must first obtain leave before his substantive motion can be heard. At the leave stage without the need to go into depth of the abundance of authorities, suffice for us to state that the threshold for the granting of such leave is very low. Leave is normally

granted if the application is neither frivolous nor vexatious and it justifies further argument on a substantive motion."

[16] Therefore, in an application for leave for judicial review, the applicant must show that such application is not frivolous or vexatious and if the leave was granted, an arguable case in favour of granting the reliefs sought at the substantive hearing might be the result.

Whether the application is premature

[17] Order 53 r 2(4) of the Rules of Court 2012 ("**ROC 2012**") reads:

"Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application."

[18] Therefore, in order to invoke the judicial review powers of the court under Order 53 r 2(4), there must first be a decision by a decision maker (DGIR) or a refusal by him to make a decision, and, that decision must affect the aggrieved party (the applicant) by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy (see ***Council of Civil Service Union & Ors v. Minister for Civil Service*** [1984] 3 All ER 935).

[19] In **Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd** [2017] 2 MLJ 197; [2017] 5 CLJ 283, the Court of Appeal held as follows:

> *"[9] It is a principle which remains a good and trite law that certiorari will lie to quash a decision which has already been made by a public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of the decision of the public authority (see Malaysian Court Practice (2007) Desk Ed) at p 670).* ***For a decision to be quashed on judicial review or susceptible to the court's reviewing powers, there must first be a decision by a decision maker, and that decision must affect the aggrieved party by either altering the rights or obligations or depriving him of the benefits which he has been permitted to enjoy*** *(Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2011] 6 MLJ 490; Council of Civil Service Union & Ors v. Minister for Civil Service [1984] 3 All ER 935). Clearly, the law we apprehend ....* ***there must first be shown that a requisite decision by the appellant as a public authority had been made before the application could***

come within the bounds of O 53 of the ROC 2012. *It is therefore open to the appellant to argue and for this court to hold, based on this principle, that certiorari will not lie to quash a decision if no such decision has been made by the public authority. This was the decisive point at issue that was canvassed before this court).*" (emphasis added)

[20] Therefore, the first issue here is whether the DGIR has made a decision which must affect the rights of the applicant. In this case involving tax matters, the applicant is seeking to impugn the letter of the DGIR dated 9.6.2017. Having examined the contents of the said letter, I am of the considered opinion and I agree with the DGIR's submission that the said letter merely states the opinion of the DGIR of the tax treatment under the ITA 1967 for transfer of technical knowhow arising from the transfer pricing audit conducted by the DGIR for the YA 2008.

[21] The crucial part of the letter is as enumerated in paragraph 9 which reads as follows:

"9. ***Taksiran cukai tambahan akan dibangkitkan mengikut peruntukan seksyen 91(3) Akta Cukai Pendapatan 1967*** *atas kecuaian pihak tuan tidak melaporkan pendapatan ini dengan pengenaan penalti sebanyak 45% atas cukai tambahan mengikut peruntukan seksyen 113(2) Akta yang sama. Dilampirkan pindaan pengiraan cukai untuk Tahun Taksiran 2008 (Lampiran 1) dan*

pemberitahuan taksiran bagi tahun taksiran tersebut dikeluarkan tidak lama lagi." (emphasis added)

[22] Paragraph 9 merely informs the applicant that the assessment on the additional tax will be raised with the penalty in accordance with the provision under the Income Tax Act 1967. Also, the paragraph states that a revised tax computation is enclosed and a notification of assessment will be issued in due course. Paragraph 10 informs on the finding of withholding tax issue for payment of royalty for the years of assessment 2006, 2007 and 2008 and requests that the applicant to furnish evidence of the payment receipts.

[23] Upon perusal of the whole letter and particularly paragraphs 9 and 10, I agree with the DGIR that contents of the letter dated 9.6.2017 is merely to state the findings by the DGIR and cannot be regarded as imposing any liability on the applicant. The letter cannot be enforced against the applicant as it is subject to the issuance of an assessment on additional tax by way of notice of additional assessment under the ITA 1967. As such, the applicant should have waited for the notice of additional assessment before it files this application for judicial review. In fact, the applicant is only aggrieved when the DGIR raised the additional taxes vide the Notice of Additional Assessment dated 13.6.2017.

[24] The same position was taken in **M.W. Zander (M) Sdn Bhd v Director General of Inland Revenue** [2005] 6 CLJ 336. In this case, no notice of assessment of income tax has been issued by

the DGIR. As such, the DGIR has not made a decision which affects the taxpayer under the Income Tax Act 1967. At page 348/f-g, Justice Skinner said as follows:

> *"Reverting to the issue at hand, in my judgment it must follow that unless the applicant can show that the Director General has made a **'decision'** within the meaning of that word in sub-rule (4) of O. 53 r. 2, the applicant does not pass the threshold test because the applicant cannot then be said to have an arguable case which needs further investigation on a full inter-parte basis, nor does it have a sufficient interest since it is not **'adversely affected'** by the **decision** of a **public authority.**"*

[25] The above case of **M.W. Zander (M) Sdn Bhd v Director General of Inland Revenue** (supra) was cited with approval by the Court of Appeal in **Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd** (supra) where the court held as follows:

> *"[14] The next essential point which we would like to make is that there was no assessment made by the appellant in the letter of findings. We had been referred to the case of M.W. Zander (M) Sdn Bhd v Director General of Inland Revenue [2005] 6 CLJ 336. in which it was argued by the respondent that:*

(a) *the Director General had not made nor issued any notice of assessment of income tax against the applicant and neither had any assertion been made by the applicant in its application that the Director General had made any decision in that regard;*

(b) *to invoke the judicial review powers of the court under O. 53 of the Rules of High Court 1980, there must first be a decision by a decision maker or a refusal by him to make a decision;*

(c) *there being no decision of the Director General before the court in the sense that no assessment had been made by him, the applicant had not been adversely affected by any decision of the Director General which was amenable to review by the court. Accordingly, the applicant was not an 'aggrieved person', within the meaning of O. 53 r. 2(4) and therefore had no locus standi to make this application;*

(d) *the applicant's application for leave was premature as the Director General had not made any assessment on the applicant's chargeable income; and*

(e) *it would be premature for the court to intervene at this stage and pre-empt the Special Commissioners from performing their statutory function of adjudicating any dispute that may arise between a taxpayer and the Director General.*

[15] *The learned judge in the above case accepted the above contentions and decided that the action of the respondent in computing the applicant's chargeable income on certain principles and its refusal to budge from those principles did not resemble a decision within the meaning of O. 53 r 2.(4) of the Rules of High Court 1980 . The applicant had not acquired any status or right against the respondent which required to be protected by declaratory orders. In the absence of a decision by the respondent, the applicant not only lacked a sufficient interest or locus standi to make the application, but that its application was premature. We accept that for there to be a judicial review of executive action under O. 53 of the ROC 2012, there must first be a decision by the public authority. That, we discern, is the statutory requirement and well-established legal principle repeated and applied by our courts.* ***Applying the above decision, of which we were entirely in agreement, we would hold that in the absence of a decision by the appellant, the respondent not only lacked a sufficient interest or locus standi to make the application, but that its application was patently premature.*** *More significantly, we would say that, as the audit findings and issues stated in the letter of findings did not resemble a decision, there was consequently no decision from which this court could justifiably say that the respondent was adversely affected and thus order it to be quashed. The learned judge had*

erroneously found that the letter of findings was a decision and hence the application was not filed prematurely. We could not therefore accede to the argument urged for the respondent that as the language of the letter of findings was very clear the application was not premature." (emphasis added)

[26] A similar position was taken by Justice Asmabi in **Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [Permohonan Bagi Semakan Kehakiman No. 25-2-01/2015]** which had been recently affirmed by the Court of Appeal **[Rayuan Sivil No. W-01(A)-187-05/2016]**. In that case, the High Court has decided that the letter issued by the DGIR to the taxpayer is a letter informing of the status of the audit conducted by the DGIR. The reasons by the High Court are clearly explained as below at pages 18-20:

"20. A perusal of the Impugned letter at paragraph 2 showed that the Respondent had not issued the notice of assessment for years of assessment 2004 to 2006. Note the words used "Adalah dimaklumkan yang notis taksiran bagi Tahun-Tahun Taksiran 2004 hingga 2006 ***yang akan dibangkitkan terhadap tuan*** *adalah selaras dengan kuasa Ketua Pengarah Hasil Dalam Negeri (KPHDN) di bawah seksyen 140(2) Akta Cukai Pendapatan 1967 (ACP)".*

21. ...

22. ...

23. ...

24. It is obvious that in the case of the Applicant, the said Impugned Letter had not affected their rights as it was merely a letter informing the applicant of the status of the audit conducted by the officers of the Respondent. In the event the Applicant chose not to respond to the Impugned Letter, the Respondent will not be able to enforce against the Applicant.

25. The liability of the Applicant will be triggered only upon the service of the notice of assessment pursuant to section 103(1) and (2) of ITA. Only upon service of the notice of assessment on the Applicant will the Applicant be liable to pay the sum due and payable under section 103 of the ITA to the Respondent. *In the event the applicant failed to pay the sum due, then the same shall be deemed to be a debt due and payable to the Government of Malaysia. The notice pursuant to section 103(1) and (2) would specify the period within which the recipient of the notice has to make payment and the said section too will provide an appeal mechanism to the Special Commissioners for Income Tax (see Sun Man Tobacco Co. Ltd. v. Government of Malaysia [1973] 2 MLJ 163).*

26. ...

27. The Applicant's JR Application was prematurely filed as the Impugned Letter was not final and conclusive but merely a finding made by the audit during the audit's visit and based on the information and the documentations furnished to the audit by the Applicant. Therefore, there was no decision, omission or action which had adversely affected the applicant within the context of Order 53 Rule 2(4) of the ROC 2012 at the point the Impugned Letter was sent and received by the Applicant." *(emphasis added)*

[27] Therefore, I am of the considered opinion that until the DGIR issued a notice of additional assessment under the Income Tax Act 1967 (which he did only on 13.6.2017), there is no decision, omission or action which had adversely affected the applicant within the context of Order 53 Rule 2(4) of the ROC 2012 in the letter dated 9.6.2017. The liability of the applicant will only be triggered upon the service of the notice of additional assessment pursuant to the ITA 1967, and only then will the applicant be liable to pay the sum due and payable under the ITA 1967. In the premise, I find that this application to review the letter issued by the DGIR on 9.6.2017 is premature and should be dismissed.

Alternative remedy under the ITA 1967

[28] However, if I am wrong in the above finding, and that the letter dated 9.6.2017 is a decision within the meaning of Order 53 r 2(4) of the ROC 2012, the next issue is whether this application should be dismissed as the applicant should have proceeded with the appeal process statutorily provided by the ITA 1967.

[29] Section 99 of the ITA 1967 provides that a person who is aggrieved by the assessment of the DGIR may appeal to the Special Commissioners for Income Tax ("**SCIT**").If the applicant is not satisfied with the decision of the SCIT, it has a statutory right of appeal to the High Court pursuant to para 34, Schedule 5 of the ITA 1967.

[30] In **Government of Malaysia & Anor v. Jagdis Singh** [1987] 2 MLJ 185, the Supreme Court states the following principles;

(i) 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 exceptional circumstances; and

(ii) the applicant must show exceptional circumstances, such as a clear lack of jurisdiction or a blatant failure to perform some statutory duty or a serious breach of natural justice.

[31] In **Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Glugor dengan Tanggungan** [1999] 3 MLJ 1, the Federal Court made the following findings:

(i) There are certain classes of cases such as planning, employment and tax cases whereby a statute provides for a special appeal procedure, and so the courts understandably may not grant judicial review. However, this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of natural justice [pp 40B-F]; and

(ii) where the main grounds of judicial review are that the public body had acted unfairly, abused its powers, judicial review is more appropriate, as the issues raised are issues of public importance, going beyond the significance of the case itself [pp 40H-41B].

[32] The above principles were followed by Justice Low Hop Bing in **Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor** [2004] 6 MLJ 53. On the facts of the case, His Lordship held that the issues of the validity of the notices and the errors of law may be raised as issues before the Special Commissioners, where the applicant is given every opportunity to present its case in the tribunal of the first instance. The High Court decision was affirmed by the Court of Appeal in **Ta Wu Realty Sdn Bhd v. Ketua**

Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555, where the Court held at page 567:

> *"[21] The Supreme Court thus in Jagdis Singh had held that the discretion is still with the courts to act by way of judicial review,* ***but where there is an appeal procedure available to the applicant, certiorari should not normally issue save in exceptional circumstances*** *(see also R v Chief Constable of Merseyside Police; ex parte Calveley & Ors [1986] QB 424}.*
>
> *[22] To repeat the guidelines of Jagdis Singh,* ***the exceptional circumstances in the circumstances of this appeal required to be established by the appellant were that:***
>
> ***(a) the first respondent had a clear lack of jurisdiction; or***
> ***(b) there was a blatant failure by the first respondent to perform some statutory duty; or***
> **(c) *there was a serious breach of the principles of natural justice.***".
>
> (emphasis added)

[33] In **Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd** (supra) the Court of Appeal held as follows:

"[22] ***The principle that the court retained the power to judicially review the decision of a public authority, but where there was an alternative remedy of appeal, leave to bring judicial review proceedings would only be granted in exceptional circumstances would entail the necessity on the part of the respondent to show to our satisfaction the existence of such exceptional circumstances.*** *The effect of the failure by the respondent to establish special circumstances necessarily followed that the legal precept that an alternative remedy was available and yet to be exhausted would therefore return to the forefront for consideration (Ta Wu Realty Sdn Bhd, supra). The decision in Jagdis Singh thus laid down a lucid and authoritative guiding principles enunciated by none other than the highest court of the land which this court was bound to follow. Therefore, the principle remains a good law here that the way is open for this court to hold that the above case authorities should apply to the appeal before us especially when these authorities deal specifically in revenue matters where an alternative and specific remedy is expressly provided under s. 109H of Act 53. It is beyond question that this position is not an option but the law that ought to be complied with and applied to the instant application."* (emphasis added)

[34] In **Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Another** [2017] 1 MLJ 563 (FC), Zainun Ali FCJ in her Ladyship's supporting judgment reasons at page 594 (Column H-I) held that a party who is dissatisfied with an assessment or notice of assessment issued by the Revenue has the remedy to exercise its right to appeal under section 99 of the Act:

> *"[127]. A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under section 109 or 109B is not left without any remedy. In the circumstance of this case, if it is dissatisfied with assessment or notice of assessment issued by the appellant, the 1st respondent ought to have exercised its right to appeal under section 99 of the Act. Before the Special Commissioners, the 1st respondents would have an opportunity to make known its dissatisfaction. It will have the opportunity to tender exhibits and give evidence if necessary."*

[35] In the present case, I am of the considered opinion that the facts of this case does not come within the exceptions enumerated in **Jagdis Singh's** case and the **Majlis Perbandaran Pulau Pinang's** case. There is no issue of a lack of jurisdiction when the DGIR issued the said letter dated 9.6.2017. Added to that, the applicant has also failed to show an excess or abuse of power or breach of the rules of natural justice in the issuance of the said letter.

[36] It is the submission of the applicant that it has filed this judicial review application for two (2) reasons:

(i) the alleged sum of additional tax payable would cause such irreparable harm to the applicant's business that it would likely be forced to cease business operations should the sum to be demanded have to be paid; and

(ii) that there is no dispute as to the facts between the applicant and the respondent and that the only dispute relates to the law and whether the conduct of the DGIR was lawful in the present case.

[37] The applicant therefore submits that the appeal to the SCIT under section 99 of the ITA 1967 is not a reasonable or legitimate route for the applicant as it would be required to pay the high additional taxes (RM311 million) which would cause irreparable damages to the applicant. This according to the applicant falls within the '*exceptional circumstances*' in **Jagdis Singh's** case. However, in **Jagdis Singh's** case, the Supreme Court held the exceptional circumstances are lack of jurisdiction, or a blatant failure by the DGIR to perform some statutory duty or there was a serious breach of the principles of natural justice. Irreparable damages on account of payment of additional tax does not fall within exceptional circumstances.

[38] Therefore, I am of the considered opinion that there are no special circumstances, namely a lack of jurisdiction, abuse of power or breach of natural justice that would merit this case to be reviewed by this court under Order 53 ROC 2012, when there is already an appeal process under section 99 of the ITA 1967.

[39] Added to that, since the applicant has filed an appeal to the SCIT under section 99 of the ITA 1967, it is an abuse of the court process to maintain this application.

Conclusion

[40] Premised on the reasons enumerated above, I am of the considered opinion that this application is premature and that the applicant should proceed with the appeal under section 99 of the ITA 1967 instead of filing this application. As such, I find no merit in the application and the same is dismissed with costs.

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

Dated: 3rd January 2018

For the Applicant	:	Dato' Mohd Arief Emran bin Arifin/ Jason Liang Dinghui/Kellie Yap Messrs Wong & Partners Kuala Lumpur
Attorney General Chambers	:	Noor Fadzila bte Ishak, Senior Federal Counsel Jabatan Peguam Negara Putrajaya.
Putative Respondent	:	Abu Tariq Bin Jamaluddin, Senior Revenue Counsel/Muhammad Farid Jaafar, Senior Revenue Counsel Lembaga Hasil Dalam Negeri Cyberjaya Selangor.

Salinan Diakui Sah

Nor Laily Binti Hasim
Setiausaha Kepada
Y.A. Datin Azizah Binti Haji Nawawi
Mahkamah Tinggi Kuala Lumpur