TAXPAYER TO EXHAUST INTERNAL REMEDY PROVIDED UNDER SECTION 99 OF INCOME TAX ACT 1967 ("ITA")

Case: **KETUA PENGARAH HASIL DALAM NEGERI V GSMSB**

Brief Facts

The Appellant issued its audit finding letter to the Respondent where amongst others informed the Respondent that payments made to Symantec in the Year of Assessment ("**YA**") 2010 amounting to RM17,730,190.06 should have been subjected to withholding tax. In the same year, the Notice of Additional Assessment for YA 2010 was issued. The Respondent then filed an application for Judicial Review to quash the Notice of Additional Assessment for YA 2010 dated 3.12.2012 raised by the Appellant on the premise that the Appellant's decision to raise the assessment is erroneous and ultra vires and thus, null and void.

On 01.11.2017, High Court had allowed the Respondent's application with costs. Being dissatisfied with the learned High Court Judge decision, the Appellant then filed a Notice of Appeal before the Court of Appeal.

Issue

Whether the Notice of Additional Assessment for Year of Assessment 2010 issued by the Appellant was made with a clear lack of jurisdiction, irrationality / unreasonableness and tainted with illegality.

Appellant's Contention

1. In a certiorari application, a court sits in a supervisory jurisdiction, merely scrutinize the manner the assessment was arrived at by the Director General. The court only concerned with the legality of the decision making process and not the eventual decision. The learned High Court Judge had constitutionally interfered with the jurisdiction of the SCIT by making a finding of facts as stated in the grounds of decision.

2. Whether or not the Respondent is subject to withholding tax under Section 109 of the ITA goes to the merit of the assessment. The SCIT is the appropriate corum to deal with such issue. They have the jurisdiction to hear such matters.

3. Definition of 'royalty' under Section 2 should be read in a wider sense as the definition of 'royalty' is very wide and non-exhaustive interpretation.

4. It is not for the Respondent to argue that it was a business income of the recipient or whether it was not a royalty payment therefore not subject to withholding tax. Section 132 of ITA has made it clear that DTA's relief shall only applicable to a non-resident. Thus, the party which could claim for a relief through DTA is Symantec but not the Respondent in this case.

The Respondent's Contention

1. The Respondent in this case sought reliefs on the premise that Appellant's decision to issue the said notice of assessment is erroneous and ultra vires, made without any legal basis and has no force of law, the penalty imposed made without any legal basis and has no force of law, acted without any legal authority and without jurisdiction, failing to state any reasons for its decision, had improperly exercised its statutory authority and acted arbitrarily in arriving its decision.

2. The existence of domestic remedy does not preclude a taxpayer to apply for judicial review.

3. The Revenue committed gross error of law by disregarding Section 132(1) of the ITA and contending that the definition of 'royalty' under Section 2 of the ITA prevail over Article 12 of the DTA.

4. The payments are business income of Symantec in Singapore and should not be taxed in Malaysia as they have no permanent establishment in Malaysia.

5. With regard to the definition of 'royalty' within Article 12 of the DTA, the learned High Court Judge has rightfully referred to paragraph 12 of the OECD Commentaries.

Decision

The Court of Appeal is of the view that the merits of the case involve finding of facts that should be heard before the SCIT and the Respondent has to exhaust the internal remedy as provided under Section 99 of the Act.

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