DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO.: W-01(A)-342-10/2015

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI … PERAYU

DAN

MUDAH.MY SDN BHD … RESPONDEN

[Dalam Perkara Mahkamah Tinggi Malaya Di Kuala Lumpur
Bahagian Rayuan Dan Kuasa-Kuasa Khas
Permohonan Bagi Semakan Kehakiman No.: R2-25-172-10/2014

Antara

Mudah.My Sdn Bhd … Pemohon

Dan

Ketua Pengarah Hasil Dalam Negeri … Responden]

CORAM

MOHD ZAWAWI BIN SALLEH, JCA

IDRUS BIN HARUN, JCA

ABDUL RAHMAN BIN SEBLI, JCA

JUDGMENT OF THE COURT

[1] The appeal in the present instance emanated from the decision of the learned Judge given on 15.9.2015, granting the respondent's application for judicial review pursuant to Order 53 rule 3(1) of the Rules of Court 2012 (the ROC 2012). The respondent in their application sought to be granted an Order of *Certiorari* to remove into the High Court for the purpose of it being quashed, the decisions allegedly made by the appellant in a letter dated 10.7.2014 (the letter of findings) that—

(a) no or no sufficient withholding taxes have been paid by the respondent for the years of assessment 2010, 2011 and 2012 and for penalties to be imposed under the Income Tax Act 1967; and

(b) various payments such as "Management fee, Legal fee and Consultancy fee" paid to non-residents are subject to withholding tax under section 109B of, and for penalties to be imposed under, the Income Tax Act 1967 on the premise that it is *ultra vires,* null and void.

Pending the determination of the application for judicial review, the respondent had also prayed for an order that the decision of the respondent that the sum of RM5,215,252.00 for the year of assessment 2010, RM3,485,600.00 for the year of assessment 2011 and RM3,296,848.00 for the year of assessment 2012 in withholding taxes and penalties thereon be paid by the applicant to the respondent as stated in the above-mentioned decisions be stayed.

[2] The respondent's application was supported by two affidavits of Lee Chin Chong affirmed on 3.10.2014 and 29.1.2015. The appellant opposed the application by filing two affidavits affirmed by Badrol Hisyam Haron respectively on 14.1.2015 and 12.2.2015. The material parts of the decision dated 15.9.2015 are in the following terms:

> "An Order of Certiorari is granted to quash the decision of the Respondent dated 10.7.2014 that no or no sufficient withholding taxes have been paid by the Applicant for the years of assessment 2010, 2011 and 2012 and the penalties to be imposed under the Income Tax Act 1967; and
>
> An Order of Certiorari is granted to quash the decision of the Respondent dated 10.7.2014 that various payments such as "Management fee, Legal fee and Consultancy fee" paid to non-residents are subject to withholding tax under Section 109B of Act 53 and penalties to be imposed under the Income Tax Act 1967 on the premise that it is ultra vires, null and void."

[3] The Grounds of Judgment of the learned Judge can be adequately summarized as follows:

(a) the appellant's letter of findings dated 10.7.2014 could be termed as a decision and that it had adversely affected the respondent within the context of Order 53 rule 2(4) of the ROC 2012;

(b) the judicial review application was not prematurely filed in Court;

(c) as the said letter of findings is deemed as a decision, the said decision of the appellant in imposing taxes for payments for

technical and management services paid to Malaysian residents (Exhibits “AD-5” to “AD-26”) is flawed on the ground of illegality and/or ultra vires section 109B of the Income Tax Act 1967 (Act 53);

(d) as the letter of findings is deemed as a decision, the said decision of the appellant in imposing taxes for payments for technical and management services performed outside Malaysia paid to non-residents (Exhibits “AD-27” to “AD-46”) is flawed on the ground of illegality and/or ultra vires section 109B of Act 53;

(e) as the letter of findings is deemed as a decision, the transactions discovered during the audit in relation to payments for software (Exhibits “AD-47” to “AD-50”) were payments to non-resident for software products, access code for online platforms or applications and the purchase of an entire intellectual property rights thus not subject to withholding tax;

(f) the decision of the appellant suffered from infirmities of illegality, irrationality and/or procedural impropriety which merit curial intervention;

(g) the appellant had committed errors of law and fact by considering irrelevant matters and/or had ignored crucial matters in arriving at his decision; and

(h) there were manifest errors of law and facts which merit curial intervention thus the court allowed the respondent’s judicial

review application even if Act 53 had provided for an alternative remedy in the form of an appeal process.

[4] The relevant facts emerging out of the events culminating in this appeal began with a letter dated 15.5.2014 (Exhibit "AD-2") issued by the appellant in which the respondent was informed that a field audit would be conducted at the respondent's premises on 10.6.2014. The said letter had also requested that the necessary documents and particulars listed therein be provided to the appellant's officers from the Unit Cukai Pegangan, Cawangan Tidak Bermastautin (Withholding Tax Unit, Non-Resident Division). Based on the respondent's letter dated 26.5.2014 (Exhibit "AD-3"), only 3 documents were submitted to the appellant and these were the audited accounts, management financial statements and tax computation. No further documents were submitted by the respondent pursuant to the appellant's request in their letter of 15.5.2014. The field audit which was conducted at the respondent's premises on 10.6.2014 was based on the documentation available and provided for by the respondent at that material time. The respondent, it was alleged, had failed to provide all the relevant documents requested by the appellant as stated in the said letter of 15.5.2014.

[5] The respondent, on the contrary, asserted in their affidavit in support deposed on 3.10.2014 that they had submitted various documentation and information to the appellant by a letter dated 1.4.2014 (Exhibit "AD-57") following the appellant's letter dated 13.3.2014 (Exhibit "AD-2"). However, the appellant refuted the respondent's assertion stressing that the documents the respondent had allegedly furnished on 1.4.2014 (Exhibit "AD-57") pursuant to the notice dated 13.3.2014 (Exhibit "AD-2") was issued by another department, namely the Corporate Tax

Department with regard to the assessment of the respondent's corporate taxes. The said notice was wholly unconnected to the letter dated 15.5.2014 (Exhibit "AD-2") which was in connection with the issue of the withholding taxes issued by the Withholding Tax Unit of the appellant's Non-Resident Division. Nevertheless, based on documentation furnished by the respondent during the field audit, the appellant had issued the letter of findings to the respondent with regard to the appellant's initial audit findings made and issues raised following the said audit (Exhibit "AD-1") upon which the application for judicial view was premised.

[6] In response to the letter of findings, the respondent had attended 3 meetings with the appellant with the intention of discussing and revising the findings of the audit. The fourth meeting fixed for 13.11.2014 was however cancelled at the behest of the respondent (Exhibit BHH-1). The appellant in the meanwhile, had also requested from the respondent the relevant documents yet to be furnished by the respondent to the appellant. The respondent finally furnished further documentation to the appellant during the third meeting on 20.8.2014. It was after the cancellation of the fourth meeting that the appellant discovered that the respondent had filed the application for judicial review on 9.10.2014 which was directed against the appellant's letter of findings claiming that the appellant had assessed their tax and imposed penalty for the years of assessment 2010, 2011 and 2012. To date, the truth is, the appellant has yet to demand payment of the withholding tax in question from the respondent.

[7] The argument that lay at the core of the appeal before this Court was directed on the issue whether the learned Judge had erred in deciding that the letter of findings was tantamount to a decision and if the answer was in the negative, whether the application for judicial review was prematurely

filed. However, if the letter of findings was tantamount to a decision, the crucial issue on which the appeal turned was whether the learned Judge in the court below had erred in deciding that the application for judicial review was an appropriate route of appeal as there was available a specific appeal procedure under section 109H of Act 53.

[8] The appellant's case on the first issue turned on their contention that the letter of findings was neither conclusive nor finalised and that the judicial review application had been prematurely filed by the respondent. The respondent's case conversely was that the application was not premature as the appellant had already come to a decision being the decision which came within the ambit of Order 53 of the ROC 2012. In substance, the appellant's reasoning, as we understood it, sought to drive home the point that the letter of findings did not constitute a decision. It is of course necessary to mention in this regard that Order 53 rule 2(4) of the ROC 2012 stipulates that any person who is adversely affected by the **decision** etc. in relation to the exercise of the public authority or function shall be entitled to make the application for certiorari. In addition, Order 53 rule 3(6) of the ROC 2012 requires an "application for judicial review shall be made promptly and in any event within three months from the date……. when the **decision** is first communicated to the applicant". It should be remembered that the respondent sought an order of certiorari to quash the decision allegedly made by the appellant on 10.7.2014. The respondent undisputedly treated the letter of findings as a decision by the appellant.

[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 Edition at page 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 …. **[2011] 6 MLJ 490**; **Council of Civil Service Union v Minister for the Civil Service [1984] 3 All ER 935**]. [Clearly, the law we apprehend, is that, apart from requiring the respondent to make the application for judicial review with sufficient promptitude and to show that they were adversely affected by the decision of the public authority communicated to them, 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 Order 53 of the ROC 2012. It is therefore open for 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 a public authority. This was the decisive or important point at issue that was canvassed before this Court.

[10] At this stage, it would be desirable to reproduce the relevant extract of the letter of findings in order to determine whether the appellant had made any decision in respect of the audit findings in particular on the withholding taxes.

PENGARAH
MUDAH.MY SDN BHD
Suite 20.03, The Gardens,
South Tower, Mid Valley City,
Lingkaran Syed Putra,
59200 K. Lumpur.

Ruj. Tuan :
Ruj. Kami : C2017258000 (A30/14)/(BHH)
Tarikh : 10 JUL 2014

Tuan,

AUDIT CUKAI PEGANGAN DI BAWAH AKTA CUKAI PENDAPATAN, 1967

Saya dengan hormatnya merujuk kepada perkara di atas.

2. Adalah dimaklumkan bahawa, hasil audit cukai pegangan ke atas akaun dan dokumen syarikat tuan bagi tahun taksiran 2010 hingga 2012, pihak Lembaga Hasil Dalam Negeri Malaysia telah mengenal pasti beberapa isu ketidakpatuhan peruntukan cukai pegangan bagi Tahun Taksiran tersebut seperti di **Lampiran A, B & C**

TAHUN	**RM**
Tahun Taksiran 2010	589,434.18
Tahun Taksiran 2011	393,169.92
Tahun Taksiran 2012	366,536.12
Jumlah Penemuan	**1,349.140.22**

3. Untuk maklumat tuan, bayaran seperti Management fee, Legal fee dan Consultancy fee yang dibayar kepada syarikat atau individu tidak bermastautin adalah tertakluk kepada Cukai Pegangan di bawah Seksyen 109B Akta Cukai Pendapatan 1967.

4. Oleh yang demikian, pihak tuan diminta hadir ke pejabat kami pada atau sebelum, 17 JUL 2014 untuk berbincang tentang isu-isu penemuan audit, menandatangani surat persetujuan audit dan seterusnya mengatur bayaran.

5. Sekiranya pihak tuan gagal berbuat demikian, kes ini akan dirujuk kepada Jabatan Cukai Korporat, Lembaga Hasil Dalam Negeri untuk menguatkuasakan **perenggan 39(1)(j), Akta Cukai Pendapatan 1967** dan / atau tindakan Mahkamah di bawah **subseksyen 106(1)** Akta yang sama akan diambil terhadap pihak tuan.

6. Sebarang pertanyaan berkenaan perkara di atas, sila hubungi kami di pejabat ini.

Kerjasama tuan berhubung perkara ini amat kami hargai.

Sekian, terima kasih.

“BERKHIDMAT UNTUK NEGARA”
“BERSAMA MEMBANGUN NEGARA”

Saya yang menurut perintah,

t.t.

(KAMARUDDIN BIN YUSOF RAWTHER)
Ketua Penolong Pengarah (Pengurus Audit)
Cawangan Tidak Bermastautin,
b.p. Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri
Lembaga Hasil Dalam Negeri
MALAYSIA.

[11] Having examined the contents of the letter of findings in its entirety, it could clearly be discerned that, the appellant in the letter of findings merely informed the respondent of the initial audit findings and issues of the field audit conducted based on documentation furnished by the respondent at the material time including amongst others the finding that the audit conducted had identified several issues of non-compliance with the provisions of Act 53 in relation to the payments which were subject to withholding tax for years of assessment 2010, 2011 and 2012. The letter of findings moreover had informed the respondent that they were requested to attend a meeting at the appellant's office by or before 17.7.2014, for a discussion on the audit findings and thereafter should both parties agree on the findings of the audit, the execution of the letter of acceptance of the audit in order to finalise the findings of the audit. In other words, the letter of findings had afforded the opportunity to the respondent to discuss with the appellant the findings and issues of the audit apart from informing the respondent the consequences of a failure to attend the said discussion.

[12] It could also be reasonably inferred from the uncontroverted evidence of the respondent's attendance at the subsequent meetings held by the appellant to discuss and revise the audit findings and issues of the field audit that such conduct of the respondent clearly evinced the

knowledge on their part that the initial findings stated in the letter of findings had yet to be finalised and thus was not a decision. There were in truth audit issues which needed to be thrashed out and resolved subsequently by both parties. The respondent should thus be estopped from denying the same [**Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283**]. In any event, the respondent, in paragraph 58 of their Affidavit in Support deposed on 3.10.2014, had admitted that to date, the appellant had yet to demand payment of the withholding taxes in question, a fact which strongly supported our finding that the letter of findings was not a decision, neither was it conclusive nor finalised.

[13] The appellant, it is to be noted, had given the respondent ample opportunities to furnish documents and participate in the finding process. There were, as earlier mentioned, 3 meetings held after the letter of findings was sent to the appellant in which the respondent had irrefutably participated and there were requests made by the appellant to the respondent to furnish relevant documents and information. Despite furnishing further documentation to the appellant during the third meeting, the respondent requested for the cancellation of the fourth meeting and subsequently filed this judicial review application. This they did before the appellant could finally make a decision based on their discussion with the respondent and the further documentation and information they had received from the respondent. The above facts plainly showed that at all material times, information and assistance were given to the respondent so that they could rightfully discharge the burden of disproving the contents of the letter of findings and to enable them to prepare their appeal in the event a decision was made by the appellant. The point of importance that had emerged was that based on these facts, there had

been no breach of natural justice as it had been strictly observed by the appellant when he adopted this approach which was procedurally correct. In the case of **Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor [2007] 5 CLJ 51**, on the issue whether the rules of natural justice had been complied with by the respective authorities, the Court of Appeal held—

> "…… it was abundantly clear that the **appellant had been given the fullest opportunity to participate and state its case** on the respective issue then in question. The record showed that **repeated requests and opportunities were given to the appellant to furnish all relevant documents and information for the consideration** of the relevant authorities." [our emphasis]

[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 Order 53 of the Rules of the 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 Order 53 rule 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 Order 53 rule 2(4) of the Rules of the 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 Order 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.

[16] There was absolutely nothing in its contents from which it could be concluded that the letter of findings constituted or formed any decision of the appellant, impliedly or expressly. The heading of the letter of findings clearly indicated "Audit Cukai Pegangan di bawah Akta Cukai Pendapatan, 1967" and paragraph 2 of the same stated that "adalah dimaklumkan bahawa hasil audit cukai pegangan ke atas akaun dan dokumen syarikat tuan ……". The heading and the words "hasil audit" explicitly and unmistakably showed that it was not tantamount to a decision as decided by the High Court. As the appellant would not decide or penalize the respondent without any negotiations or meetings it was necessary that the meeting should be held as was reasonably expected of the appellant as part of its duty, to conduct the subsequent follow-ups with the respondent for any clarifications should they have any doubts regarding the findings of the audit.

[17] Our attention had been drawn to paragraph 5 of the letter of findings in which the respondent was informed of the legal action to be taken in the

event the respondent failed to attend the meeting with the appellant. Such threat of legal action, we found, had not taken any effect in view of the presence of the respondent at the said meetings. The argument by the respondent that legal action would be taken if they did not attend the meeting had therefore lost its bite. Additionally, it is of some significance to emphasize that we did not think anything material turned upon this argument as the letter merely informed the respondent of what would entail should the respondent fail to attend such meeting to discuss the audit findings.

[18] Thus, the salient point which could be made after considering the tenor of the letter of findings and after taking into consideration the actual facts as discussed above, we found that the said letter was issued to the respondent for the purpose of informing the respondent of the initial findings and issues of the field audit, including the discovery of non-compliance with the provisions with regard to the withholding taxes for the years of assessment 2010 until 2012 by the respondent which findings were based only on the documents furnished by the respondent during the field audit. The said letter of findings had also informed the respondent that they were required to attend a meeting at the appellant's office by or before 17.7.2014. The purpose of the meeting was to discuss the findings of the said audit and was, we would surmise, inclusive of furnishing additional documents which were not made available to the appellant during the field audit. Only upon the finalization of the findings would the execution of the letter of acceptance of the audit be carried out in order to finalise the findings of the said audit. The numbers of the subsequent meetings held between the appellant and the respondent with the intention to discuss and revise the findings of the audit conducted based on the production of new documents clearly supported the appellant's contention

that at all material times, it was within the respondent's knowledge and as manifestly demonstrated by way of the respondent's conduct, that the initial findings stated in the letter of findings had yet to be finalised. The respondent could not deny this established fact.

[19] We found, with deference to the learned Judge, that Her Ladyship had apparently misdirected herself in this fundamental aspect of the case by failing to give proper weight to and make proper evaluation of the evidence and contents of the letter of findings. We need further say on this aspect that it would be wrong and in fact we could not otherwise apprehend that, the court below could make a finding that the contents of the same were tantamount to a decision whilst the evidence discussed above proved otherwise. The essence of the meeting, as it was clear to us, was to discuss the findings of the field audit. We could hardly discern from the letter of findings any hint that would suggest any decision being made or finality that could be safely said to amount to a decision. Before leaving this issue, we should say that since there had been no decision made in this case which was amenable to judicial review, and neither had an arguable case been made out for such review, we were consequently led to one glaring conclusion that the instant case was eminently one which did not come within the ambit of Order 53 of the ROC 2012 and therefore was an appropriate case that an order for judicial review ought not to be allowed. It was manifestly impossible and indeed legally incorrect to allow judicial review of the audit findings when it was neither a decision, conclusive nor finalised and thus the respondent's application was prematurely filed.

[20] We now turn to the second fundamental issue that had been pressed on us by the appellant on which it was contended that the

respondent's application for judicial review was inappropriate and an abuse of the process of court as the respondent had blatantly refused or failed to resort to the appeal procedure provided for under Act 53. Before proceeding further, it is appropriate to emphasize at this point that our deliberation on this issue was made on the assumption that the letter of findings contained a decision by the appellant on the audit findings. Our law reports are replete with judicial opinions and pronouncements on the exercise of discretion by the court to grant an order of certiorari. We had been referred to the Supreme Court's case of **Government of Malaysia & Anor v Jagdis Singh [1987] CLJ (Rep) 110,** wherein the application for an order of certiorari to quash a notice of assessment raised under section 91 of Act 53 was dismissed by the said apex court. It was held that although certiorari was always at the discretion of the court, it should not be issued unless there was shown a clear lack of jurisdiction or blatant failure to perform some statutory duty or a serious breach of principles of natural justice. The relevant excerpts of the judgment of the Supreme Court are as follows:

> "Finally, this approach is, I think, consistent with **Preston v IRC [1985] 2 All ER 327** at 337-338, **[1985] AC 835** at 862, where Lord Templeman said:
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> > **Judicial review process should not be allowed to supplant the normal statutory appeal procedure** [but] present circumstances are exceptional in that the appeal procedure provided by s. 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under s. 460 [which relates to the cancellation of tax advantages] was unlawful.
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> In the same appeal Lord Scarman said (**[1985] 2 All ER 327** at 330, **[1985] AC 835** at 852);

> But cases for judicial review can arise even where appeal procedures are provided by Parliament. The present case illustrates the circumstances in which it would be appropriate to subject a decision of the commissioners to judicial review. I accept that the Court cannot in the absence of special circumstances decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the tax payer, even to initiate action under Pt XVIII of the 1970 Act. (Lord Scarman's emphasis).

A clear principle is reiterated here i.e. it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. **Judicial review is always at the discretion of the Court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances**.

In Re Preston was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. **But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases**.

In answer to the first question we would therefore hold that the discretion is still with the Courts but where there is an appeal provision available to the applicant certiorari should not normally issue **unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice**."
[our emphasis]

[21] The aforesaid decision was reiterated by this Court in **Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Another [2009] 1 MLJ 555** in which the application for leave to obtain judicial review by certiorari to quash a notice of assessment under Act 53 was dismissed. The principle in **Jagdis's case** was stated by this Court in the above case in the following terms:

> "[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 in **Jagdis Singh**, the exceptional circumstances in the circumstances of this appeal required to be established by the appellant were that:
>
> (i) the first respondent had a clear lack of jurisdiction; or
>
> (ii) there was a blatant failure by the first respondent to perform some statutory duty; or
>
> (iii) there was a serious breach of the principles of natural justice."

[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 section 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.

[23] To appreciate the contentions that had been raised on this issue before this Court, it would be desirable to reproduce section 109H(1) of Act 53. The section reads as follows:

> "Section 109H. Appeal by the payer.
>
> (1) A payer referred to in sections 109, 109B or 109F may, within thirty days (or any period extended by the Director General) from the date an amount is due to be made to the Director General under that section, appeal to the Special Commissioners by reason that such amount is not liable to be paid under this Act and the provision of this Act relating to appeals shall apply accordingly with any necessary modification."

We pause here to observe that for the purpose of this case, section 109H(1) of Act 53 contains specific provisions with respect to any appeal relating to an amount of withholding tax liable to be paid by a taxpayer pursuant to sections 109 and 109B thereof to the Special

Commissioners of Income Tax. Section 109H of Act 53 also provides that the provisions of Act 53 relating to appeals shall apply accordingly with any necessary modification. The provisions in question are found in Chapter 2 and Schedule 5 to Act 53. It is plain that the respondent may appeal to the Special Commissioners of Income Tax within 30 days from the date the amount is due to be made to the Director General pursuant to the letter of finding. What was evident in this case was that the respondent had failed to comply with the provisions of section 109H(1) of Act 53 with regard to the appropriate route of appeal as well as the period for the filing of the appeal which was the proper forum open to the respondent.

[24] It is indeed an irrefragable fact that the respondent had failed or refused to avail themselves of the remedy of appeal process. The court should not be influenced by the fact that the process by way of judicial review could be resorted to when Act 53 had provided for a specific remedy in the form of an appeal process under section 109H, Chapter 2 of Part VI and Schedule 5 thereof. The Act has specifically provided comprehensive provisions on the right and procedure of appeal for the taxpayers to avail themselves to in the event they were aggrieved by the act of the appellant. Parliament would not have enacted in vain without any real significance such comprehensive provisions on appeal. It is indeed an alternative remedy within the legislative scheme of income tax legislation that allows any person aggrieved by an assessment to appeal before a body which is dedicated specifically to hear such appeal. It would indeed be an exercise in futility to create such mechanism of appeal if it is not to be complied with.

[25] We would in this respect emphasize that the language employed in Act 53 is clear and unambiguous as such it is not for the court to interpret and import new intention of Parliament into the same. In the case of **United Overseas Bank (Malaysia) Sdn Bhd v UJA Sdn Bhd & Another Appeal [2010] 6 CLJ 204**, the Court of Appeal, in stressing that the duty of the court was to expound the language of Act in accordance with the settled rules of construction said—

> "[6] With respect I am unable to agree. It is true that courts have sometimes to read words into provisions in an Act of Parliament to prevent an absurdity from resulting. **But where the language employed is clear and unambiguous, it is not the function of the court to re-write the statute in a way in which it considers reasonable**. As Seah SCJ said in **NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1986] 1 LNS 79**:
>
> > It must always be borne in mind that we are judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature (see **Lord Chelmsford in R v Hughes [1866] LR 1 PC 81, 91** and **Lord Macnaghten in Vacher & Sons v London Society of Compositors [1913] AC 107**).

[7] In **Vickers, Sons and Maxim, Limited v Evans [1910] AC 444**, Lord Loreburn, LC, said (at p. 445):

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; … The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself." [our emphasis]

[26] The learned Judge on this issue appeared to be swayed by the fact that the process by way of judicial review could be resorted despite the availability of the appeal process in Act 53 as she was satisfied that the appellant's decision suffered from infirmities of illegality. We accept of course that notwithstanding the existence of an alternative remedy in an Act of Parliament, remedy by way of judicial review is available in exceptional circumstances. Generally, if the taxpayer can demonstrate illegality or unlawful treatment, then it would be wrong to insist on exhaustion of local remedy. The court in the case of **Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447**, at page 454, acknowledged that in certain cases, appeal procedure was provided under the statute but if the applicant can demonstrate excess or abuse of power or a breach of natural justice, judicial review would be granted. As in our current case, the respondent, for the reasons that we would deal in due course, had failed to do so.

[27] It was open to the respondent to go before the Special Commissioners of Income Tax and prove that it was not liable to assessment. The respondent had to enter the doors of the Special Commissioners of Income Tax first to raise the plea of non-observance of the principle of natural justice or to establish that the Director General had acted arbitrarily and in a non-judicial manner. It was only after they had availed themselves of that remedy as provided for by Act 53 that they had a right to come to court [**Sun Man Tobacco Co. Ltd. v Government of Malaysia [1973] 2 MLJ 163**]. We must also stress that the onus of proof lies with the respondent. This was clearly given due recognition by the court in **Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713** in which it was held that the onus was on the taxpayer to demonstrate that the assessment should not have been made and the assessment should stand unless and until the taxpayer satisfied the Special Commissioners that it was wrong and the taxpayer undertook the same onus when he brought a further appeal to the court.

[28] Obviously, the respondent, in the circumstance of this appeal had failed to fulfil the principles so lucidly stated by the Supreme Court in **Jagdis Singh**. In our judgment, there was no clear lack of jurisdiction for the field audit conducted by the appellant was within its statutory powers under sections 80 and 81 of Act 53, neither was there any proof of a blatant failure by the appellant to perform its statutory duty nor any serious breach of natural justice [**Paramount Malaysia (1963) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri, Malaysia [1998] MLJU 450**].

[29] Further, it is trite law as entrenched in paragraph 13, Schedule 5 of Act 53 that the burden of proving an assessment is excessive or erroneous

is upon the respondent. The Supreme Court in **Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri**, supra, in the words of Edgar Joseph Jr. SCR had expressed its view on this issue as follows:

> "We recognize that in an appeal by a taxpayer to the Special Commissioners against an assessment made under the Act, the assessment stands unless the taxpayer is able to satisfy the Special Commissioners that the assessment is overcharged. It follows, that in such an **appeal the onus is on the taxpayer to demonstrate that the assessment should not have been made**, (see **Norman v Golder 26 TC 239**, per Macnaghten J at p. 295) and so, the assessment stands unless and until the taxpayer satisfies the Commissioners that it is wrong (per Lord Greene MR at p. 295). The taxpayer, therefore, undertakes the same onus when he brings a further appeal to the High Court and yet another appeal to this Court." [our emphasis]

It had also been decided in **A.B.C v The Comptroller of Income Tax, Singapore [1959] 25 MLJ 162** that—

> "The **onus of the appellant** here is not only to show that the assessment is wrong but **what must be done to put it right**." [our emphasis]

[30] It is thus clear that this burden to positively show what must be done to justify correcting the findings is to be discharged on the balance of probabilities and this burden is carried by the respondent. However, in the absence of special or exceptional circumstances, the application for judicial review is not an appropriate route of appeal and in fact an abuse of the process of court. The High Court's decision in allowing the respondent's application whilst there were no special circumstances

established could place the court to be in danger of being flooded with applications for judicial review instead of the appropriate venue as provided for under Act 53 [**M & W Zander (M) Sdn Bhd**, supra].

[31] It is to be emphasised 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 involve 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 on 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 the 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 assessed or 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."

[32] To decide by way of judicial review that the appellant was right or not in its findings is in truth questioning the merits of the matter. The proposition that a question pertaining to the merits of the assessment is a matter better reserved for the Special Commissioners was deliberated in the case of **Ta Wu Realty Sdn Bhd**, supra, wherein this Court held that the Special Commissioners of Income Tax were the proper forum to decide on the merits of an assessment. Suriyadi JCA in delivering the

judgment of the Court explained the reasons in language that merits our reference in the following terms:

> "[25] This course of action was taken up, as somehow the appellant had been distracted, eventually to be deviated by the guidelines of Jagdis Singh, resulting in the unwittingly failure to discuss this ground. It must be understood that a court listening to a certiorari application sits in a supervisory jurisdiction, and merely to scrutinize the manner the assessment was arrived at by the Director General. Put another way, the court is only concerned with the legality of the decision making process and not eventual decision i.e., that 1998 assessment, in relation to the current case. **To state that the impugned Form J is invalid, and that it contains an error of law on the face of that Form J, is a question pertaining to the merits of the assessment, a matter better reserved for the Special Commissioners or a matter to be transmitted as case stated to the High Court."** [our emphasis]

[33] It is evident that the Special Commissioners of Income Tax have the power to hear a question of mixed facts and law. By virtue of sections 14, 19 and 20 of the Schedule 5 to Act 53 the respondent could by represented by an advocate or tax agent and witnesses may be called to be examined on oath and produced documents. The respondent is thus is under the law afforded every opportunity to ventilate their complaint against the appellant. Therefore, the issue of whether the appellant was correct in their letter of findings ought to be dealt with by the Special Commissioners of Income Tax. In any event, the door for the respondent to bring the matter to the High Court on any question of law is not entirely closed. The decision of the Special Commissioners of Income Tax is appealable to the High Court by way of a case stated pursuant to

paragraph 34 of Schedule 5 to Act 53. This safeguard is well explained in the case of **Ta Wu Realty Sdn Bhd**, supra—

> "[6] Before the Special Commissioners a taxpayer, in this case the appellant, will have all the opportunity to ventilate his disgruntlement, with every opportunity to tender exhibits, and give oral evidence if necessary (**Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd [1978] 1 MLJ 203**). If the taxpayer is successful the tax so paid will be refunded in full. A taxpayer has an additional safeguard in that in the event a dispute on questions of law is identified it may be transmitted to the High Court by way of case stated. To dispel any fear of the taxpayer, merely because he has to face such an awesome body in the form of the government, Gill FJ in **Sun Man Tobacco Co. v Government of Malaysia [1973] 2 MLJ 163** had occasion to state:
>
> > "The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts."

[34] Reference in this connection may also be made to the latest Federal Court's decision in the case of **Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1** wherein Suriyadi FCJ said—

> "[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 are in his custody or his control necessary for 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 determined (see Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd [1977] 1 LNS 26; [1978] 1 MLJ 203).

[61] At the completion of the hearing of the appeal, the Special Commissioners shall give their decision in the form of an order known as a deciding order, and which in certain circumstances may be final. Either party to the proceedings before the Special Commissioners may appeal on a question of law against a deciding order, or may request the Special Commissioners to state a case (generally known as case stated) for the opinion of the High Court. Any dissatisfied party may appeal only up to the Court of Appeal (**Tio Chee Hing v United Overseas Bank (Malaysia) Bhd [2013] 2 CLJ 910**; **Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd v Kumar Gurusamy [2011] 3 CLJ 241**; **Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No. 8-31-99 (S) (Unreported)**)."

[35] We accepted the well-established legal position that rightfully the appellant had the right to collect taxes which were due and payable whether or not a taxpayer objected or appealed against the assessment. This principle had been enunciated by Choor Singh J in the case of **Comptroller of Income Tax v A Co. Ltd [1966] 2 MLJ 282—**

"In my opinion, once the Comptroller of Income Tax has made an assessment and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned in the notice, **the taxpayer is bound by law to pay such tax within one month even though he may be dissatisfied with the assessment. Whether the assessment is right or wrong, the tax must be paid**

> **notwithstanding any objection or appeal**. The scheme of the Income Tax Ordinance is that if any person disputes the assessment, he may apply to the comptroller to review and revise the assessment made upon him…" [our emphasis]

[36] The argument before this Court was directed on the issue that the High Court had erred in failing to consider that the respondent had failed to adduce sufficient evidence to support their contention of the inherent unlawfulness of conduct of the appellant and of the breach of natural justice. The respondent had in fact failed to show in clear term how or which part of the letter of findings that was tantamount to a serious breach of the principle of natural justice, an illegality or manifest error of law. This argument in essence clearly boiled down to the question whether the respondent had successfully shown that there were exceptional circumstances that would justify their action in applying for judicial review as an appropriate route to ventilate their grievances.

[37] Now what were the special circumstances by which the respondent sought to convince us that it would be appropriate for this Court to subject this case to judicial review. We begin by stating the respondent's contention that the transactions discovered during the audit in relation to payments for software, were neither royalties nor subject to withholding tax. Under section 4(d) of Act 53, it is expressly stated that the income upon which tax is chargeable under the Act is income in respect of, *inter alia*, royalties. The learned Judge found that these payments were not royalties thus not subject to withholding tax. It was apparent from the field audit conducted on 10.6.2014 that the initial findings made by the appellant were derived from the documentation provided by the respondent at the relevant time. It was contended for the respondent that

the payments made to the non-residents were for the payments for software, technical services and management fee for services carried out outside Malaysia. We may mention in this respect that the fact that payments were made to the non-residents were not disputed. Having perused the relevant documentation and agreements in Exhibits AD-27 to 46 which were exhibited to the respondent's affidavit in support dated 3.10.2014, we found that there was a good deal of substance in the argument put forward by the appellant that the payments made by the respondent to the non-resident companies were for the 'right to use' within Malaysia, as such these payments were payments of royalty. We agreed with this contention and in our view it was correct in law as the payments fell within the definition of 'royalty' under section 2 of Act 53, hence such payments to the non-resident companies were subject to the withholding taxes.

[38] The definition of royalty as provided in section 2 of Act 53 reads as follows:

> "royalty" includes—
>
> (a) any sums paid as consideration **for the use of, or the right to use—**
>
> (i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks, or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;
>
> (ii) know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(b) income derived from the alienation of any property, know-how of information mentioned in paragraph (a) of this definition." [our emphasis]

[39] This definition undoubtedly gives wide and non-exhaustive interpretation of the word "royalty" as indicated by the use of the word "includes". The word "include" is defined in the **Black's Law Dictionary, Ninth Edition, Bryan A. Garner** at page 777 as follows:

> "To contain as a part of something…… But some drafters use phrases such as including without limitation and including but not limited to …"

In the **Stroud's Judicial Dictionary of Words and Phrases**, **Sixth Edition, Volume 2** at page 1253 the word "include" is described as—

> "…… a phase of extension, and not of restrictive definition, it is not equivalent to 'shall mean ……"
>
> 'Include' is very generally used in interpretations clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such thing as they signify according to their natural import but also those things which the interpretation clause declares that they shall include."

The House of Lords in **Patrick Alfred Reynolds v The Commissioner of Income Tax [1967] 1 AC 1** construed the word 'ínclude' as a word of extension when it held at page 2B of the case—

> "That section 10(1), on its true construction, and having regard to the word "including" which was a word of extension, …."

[40] It is our considered opinion that based on the above authorities, the definition of the word “royalty” ought to be taken in its widest sense and shall not be limited only to any sums or income included in section 2 of Act 53 with regard to the definition of the word “royalty”. It was therefore our finding that based on the facts, it was evident that the payments made by the respondent to the non-resident companies were for the “right to use”, thus falling very well within the scope of the definition of “royalty” under section 2 of Act 53 and accordingly, were subject to withholding taxes.

[41] The High Court in this regard had obviously failed to consider some evidence in relation to the payments made by the respondent to the non-residents which were for the “right to use” and these were—

(a) Exhibit AD-27 which was the Standard Consultancy And License Agreement which was also exhibited as AD-51, between Schibsted Iberica SRL and the respondent at recital (C) granted the respondent the right to use the software. Clause 5 confirmed that the intellectual property rights which included the software developed by Schibsted remained with Schibsted. Schibsted granted license to the respondent to use the software within Malaysia where its exclusive ownership belonged to the former. However, no supporting invoices or evidence for payments to the non-resident company were furnished to the appellant; and

(b) Exhibit AD-28, the additional terms at paragraph III of the Service Order and clause 3 of the Service Agreement between Comscore Inc. and the respondent stated that the license for

software was given to the respondent however the same was not transferable. No supporting invoices or evidence for payments to the non-resident company were furnished to the appellant.

[42] We were referred to the case of **Commissioner of Income-Tax v Davy Ashmore India Ltd [1991] 190 ITR 626** in which the term "payment for the use of or the right to use" was discussed. At pages 632 to 633 of the case it was stated that—

> "Royalty" has been defined in the Agreement for Avoidance of Double Taxation between India and the UK, as follows (see [1982] 133 ITR (St) 34, 44):
>
> "XIII(3) The term "royalties" as used in this article mean payments of any kind including rentals received as consideration for the use of, or the right to use:
>
> (a) Any patent, trademark, design or model, plan, secret formula or process;
>
> (b) Industrial, commercial or scientific equipment, or information concerning industrial, commercial or scientific experience; and
>
> (c) Any copyright of literary, artistic or scientific work, cinematographic films, and films or types for radio or television broadcasting;
>
> but does not include royalty or other amounts paid in respect of the operation of mines or quarries or of the extraction or removal of natural resources."

> It appears, therefore, that the term "royalty" has been defined in the agreement to mean, inter alia, the payment of any kind including rentals received as consideration for the use of or the right to use any patent, trademark, design or model, plan, secret formula or process. Therefore, what is important to consider is that, in order that a payment may be treated as royalty for the purposes of article XIII of the Agreement for Avoidance of Double Taxation between India and the UK., **the person who is the owner** of such patents, designs or models, plans, secret formula or process, etc., **retains the property in them** and permits the use or allows the right to use such patents, designs or models, plans, secret formula, etc. In other words, where the transferor retains the property right in the designs, secret formula etc, and allows the use of such right, the consideration received for such user is in the nature of royalty." [our emphasis]

It was held at page 629 of the case that where the owner retained the property in the product and permitted the use or allowed the right to use the property, payment received for that was royalty. With respect, we were entirely in agreement with the court's pronouncement in the above case and applied the interpretation to the instant application. Accordingly, it could be concluded that if the owner of a design, know-how or intellectual property right allows the use of any right and retains the right, the payment for the right to use of the said design, know-how or intellectual property right is to be treated as royalty.

[43] Following the granting of the right to use the software, the respondent had to pay to the non-resident companies the amount which had been mentioned in paragraph 26 of the respondent's affidavit in support. As the right to use the software was granted to the respondent and the respondent had to pay a certain price to the non-resident

companies, such payments in our judgment, should rightfully be treated as “royalty”. This treatment was consistent with the definition of royalty under section 2 of Act 53 and the cited authorities. In the case of **Director-General of Inland Revenue v Phaltan Sugar Works Ltd [1983] CLJ (Rep) 131**, the Federal Court held as follows:

> “[2] Payments under the technical services agreement are royalty income and not exempted from taxation in Malaysia.”

[44] The payments made to the non-residents were for the use of software. Thus reference should also be made to the Copyright Act 1987 of which sections 7 and 3 are relevant. Section 7(1) of the Copyright Act 1987 provides—

> “Subject to this section, the following works shall be eligible for copyright:
>
> (a) **literary works**;
> (b) musical works;
> (c) artistic works;
> (d) films;
> (e) sound recordings; and
> (f) broadcasts.”
> [our emphasis]

Section 3 of the Copyright Act defines ‘literary works’ and we set out the full definition thereof below—

> “Literary work” includes—
>
> (a) novels, stories, books, pamphlets, manuscripts, poetical works and other writings;
> (b) plays, dramas, stage directions, film scenarios, broadcasting scripts, choreographic works and pantomimes;

(c) treatises, histories, biographies, essays and articles;
(d) encyclopedias, dictionaries and other works of reference;
(e) letters, reports and memoranda;
(f) lectures, addresses, sermons and other works of the same nature;
(g) tables or compilations, whether or not expressed in words, figures or symbols and whether or not in a visible form; and
(h) **computer programs**,…" [our emphasis]

[45] Accordingly, based on the above definition, it could safely be concluded that payment for the use of the literary works were subject to royalty as the literary works were eligible for copyright. And in this case, literary works include 'computer program'. Following the granting of the right to use the software owned by the non-resident companies, the respondent had to make payments to such non-residents companies for certain sums which payments were subject to withholding tax. This is in line with section 109(1) of Act 53 under which the respondent is statutorily bound to deduct from the royalty withholding tax at the rate applicable to such royalty. What it merely means, as explained by the Federal Court in **Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor**, supra, is that the payer (in our case the respondent) withholds the tax portion of an income of a non-resident recipient and transmits it to the Director General of Income Tax. For clarity we reproduce section 109(1) of Act 53 below—

"109. (1) Where any person (in this section referred to as the payer) is liable to pay interest or royalty derived from Malaysia to any other person not known to him to be resident in Malaysia, other than interest or royalty attributable to a business carried on by such other person in Malaysia, he shall upon paying or crediting the interest (other than interest on an approved loan or interest of the kind referred to in paragraph 33, 33A, 33B, or 35 or 35A of Part 1, Schedule 6) or royalty

deduct therefrom tax at the rate applicable to such interest or royalty, and (whether or not that tax is so deducted) shall within one month after paying or crediting the interest or royalty render an account and pay the amount of that tax to the Director General:

> Provided that the Director General may under special circumstances allow extension of time for tax deducted to be paid over."

[46] The respondent contended that the evidence showed that the payments did not pertain to services performed within Malaysia and therefore these payments should not be subject to withholding tax. Section 109(1) of Act 53, in our judgment, does not explicitly stipulate that the services by the non-resident company must be performed in Malaysia. All that it provides is that where any person is liable to pay royalty derived from Malaysia to a non-resident, such person is required to deduct from the royalty tax which he has to account and pay to the Director General within one month after paying the royalty. Nowhere does the section stipulate that the service must be rendered in Malaysia. In any event, the evidence showed that the services were provided within Malaysia. For example recital (c), clauses 1 and 6 of the Standard Consultancy And Licence Agreement between Schibsted and the respondent (Exhibits AD-27 and AD-51) provides for services for the purpose of operating the respondent's business within the "territories" which is defined as "Malaysia". This contention was in our opinion devoid of any merit and therefore must be rejected.

[47] We were pressed with the argument by the respondent that the appellant wrongly imposed withholding taxes on payments for technical and management services paid to Malaysian residents which were not

subject to withholding tax under section 109B of Act 53. This section, like section 109 of Act 53 is yet another provision which subjects payments to withholding tax. However, both sections apply to different types of income or payment [**Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor**, supra]. The payments which are subject to withholding tax pursuant to section 109B are special classes of income of a non-resident derived from Malaysia for services rendered by the said non-resident which is chargeable to tax by virtue of section 4A of Act 53 whereas the duty to withhold tax on royalty is governed specifically by section 109 of Act 53. For convenience, section 109B is reproduced below—

> "109B. (1) Where any person (in this section referred to as "the payer") is liable to make payments to a non-resident:
>
> (a) for services rendered by the non-resident person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such non-resident;
>
> (b) for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or
>
> (c) for rent or other payments made under any agreement or arrangement for the use of any moveable property,
>
> which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall

within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General:

Provided that the Director General may:

(i) give notice in writing to the payer requiring him to deduct and pay tax at some other rates or to pay or credit the payments without deduction to tax; or

(ii) under special circumstances, allow extension of time for tax deducted to be paid over.

(2) Where the payer fails to pay any amount due from him under subsection (1), the amount which he fails to pay shall be increased by an amount equal to ten per cent of the payments liable to deduction of tax under paragraph (1)(a), (b) or (c) and the total sum shall be a debt due from him to the Government and shall be payable forthwith to the Director General."

[48] It is thus clear to us that section 109B of Act 53 deals with payments made by a taxpayer such as the respondent, being a resident, to a non-resident which was deemed to be derived from Malaysia of which the taxpayer was required to deduct therefrom tax and pay the same to the Director General of Income Tax. However the respondent contended that payments in Exhibits AD-5 to 26 were made to the Malaysian residents. The learned Judge on this point held that the decision of the appellant was flawed as it was illegal and therefore contravened section 109B of Act 53. We accept of course that the point was well taken. However, upon perusal of all these exhibits we discerned inherent discrepancies between the respondent's sworn affidavit dated 3.10.2014 and the documents exhibited thereto marked as Exhibit AD-13 which could only be resolved by way of oral evidence during an appeal before the Special Commissioners of Income Tax. An example would be item 9 in paragraph

13 of the respondent's affidavit in question wherein the deponent had stated that payments had been made to Vincomm Trading Sdn. Bhd. whereas supporting documents exhibited in Exhibit AD-13 revealed that there were payments which were made to Clickatell Inc. and 701 Search Pte Ltd which were non-resident companies.

[49] We would additionally say on this aspect that there were in fact other audit findings which clearly indicated that payments were made to the non-residents as we had shown above. Thus, whatever might be the position, the alleged wrongful imposition of the withholding tax would not have rendered the entire findings of the field audit tainted with illegality as other findings clearly supported our conclusion that there were payments made to the non-residents of which tax was deductible under sections 109(1) and 109B of Act 53. We did not find any merit in this argument either.

[50] Hence, as we had said earlier, we were satisfied that there were no special or exceptional circumstances that would bring the instant application to be within the **Jagdis Singh's** exception. The respondent therefore was not justified when it wrongly chose the court as a forum before which it could ventilate its grievances whilst there was in existence the specific remedy of appeal before the Special Commissioners of Income Tax. Had the respondent availed itself to that remedy of appeal laid down by the law, it would have had the opportunity to challenge the decision of the appellant as to whether the payments which it had made were indeed subject to withholding taxes under sections 109(1) and 109B of Act 53. They could have thereafter appealed on a question of law against a deciding order by requiring the Special Commissioners of Income Tax to state a case for the opinion of the High

Court pursuant to section 34 of Schedule 5 to Act 53 [**Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor**, supra]. The finding by the learned Judge that the decision of the appellant suffered from infirmities of illegality, irrationality and procedural impropriety and that the appellant had committed errors of law and fact were clearly unsupported by evidence and demonstrated a misapprehension of the law and evidence placed before Her Ladyship. Such findings ought to be set aside. Accordingly the respondent's judicial review application ought not to be allowed.

[51] Each of the factor to which we had alluded, taken as a whole, was sufficiently convincing to support our conclusion that the respondent in reality did not have justification for a judicial review of the appellant's audit findings and issues. The instant application was an abuse of the court's process and had been prematurely filed. The findings of the appellant that the payments made by the respondent to the non-resident companies were undoubtedly subject to the withholding taxes were correct. We were satisfied that the Special Commissioners of Income Tax was the right forum to decide on the respondent's complaints by way of an appeal as salient issues involved under this application were made up of questions of facts and law which were plainly within their competence and power to deal.

[52] For all these reasons, the respondent's application lacked merits and was without any legal basis therefore could not be sustained. We allowed the appeal and set aside the order of the learned Judge dated 15.9.2015. We set costs at RM10,000.00 to be paid to the appellant.

signed
(IDRUS BIN HARUN)
Judge
Court of Appeal, Malaysia
Putrajaya

Dated: 14.2.2017

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