DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: WA-25-133-05/2017

Dalam perkara suatu Keputusan Responden seperti yang dinyatakan melalui surat bertarikh 4.5.2017;

Dan

Dalam perkara notis-notis taksiran tahun taksiran 2009 dan 2010bertarikh 4.5.2017 dan notis-notis taksiran tambahan tahun taksiran 2011 dan 2013 bertarikh 4.5.2017;

Dan

Dalam perkara suatu permohonan untuk antara lain, suatu Perintah Certiorari;

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Antara

Saujana Triangle Sdn Bhd ... Pemohon

Dan

Ketua Pengarah Hasil Dalam Negeri ... Responden

Grounds of Decision

Azizah Nawawi, J:

Application

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

(i) An Order of Certiorari to quash the decision of the respondent dated 4.5.2017 in the form of notices of assessment for the years of assessment ("**YAs**") 2009 and 2010 and notices of additional assessment for YAs 2011 and 2013;

(ii) A declaration that the building costs incurred by the applicant are deductible under section 33 (1) of the Income Tax Act 1967;

(iii) A declaration that the gains received by the applicant from the disposal of its lots of land are not subject to income tax;

(iv) A declaration that notices of assessment dated 4.5.2017 for the YAs 2009 and 2010 and notices of additional assessment for YAs 2011 are time barred and thus null and void; and

(v) A declaration that the penalty imposed on the applicant under section 113(2) of the Income Tax Act 1967 for the YAs

2009, 2010, 2011 and 2013 is without any legal and factual basis and must be set aside;

[2] The grounds of the application are:

(i) That the respondent's decision was illegal, void, unlawful and/or in excess of authority;

(ii) That the respondent's decision is unreasonable; and

(iii) That the decision of the respondent has been made without regard to the decision of the superior courts.

[3] The 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 only ground of objection is that there is an alternative remedy of appeal under section 99 of the Income Tax Act 1967 (the "**ITA 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 in Malaysia with its principle activities are property development and land investment holding.

[6] On 8.12.2016, the DGIR issued its tax audit finding letter stating that:

(i) That the applicant had under-reported its income for the construction projects; and

(ii) That the gains arising from the disposal of the applicant's parcels of land should be subjected to income tax.

[7] Between 10.1.2017 to 17.4.2017, there was an exchange of communications between the applicant and the DGIR.

[8] On 4.5.2017, the DGIR issued the notices of assessment with penalty for the YAs 2009 and 2010 and the notice of additional assessment with penalty for YAs 2011 and 2013, which are as follows:

(i)	YA 2009:	RM50,191,012.31
(ii)	YA 2010:	RM7,217,558.43
(iii)	YA 2011:	RM8,747,722.76
(iv)	YA 2013:	RM14,611,931.16

[9] Being aggrieved by the decision of the DGIR, the applicant has filed this application.

The Findings of the Court

[10] The core issue is whether this application for leave should be dismissed as the applicant should have proceeded with the appeal process statutorily provided by the ITA 1967.

[11] 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.

[12] The next issue is at what stage can the Attorney General and/or the DGIR raise the preliminary objection premised on the alternative remedy of an appeal to SCIT pursuant to section 99 of the ITA 1967.

[13] In **Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Glugor dengan Tanggungan** [1999] 3 MLJ 1; [1999] 3 CLJ 65, the Federal Court held as follows:

"(2) The Alternative Remedy Point

Did the existence of the statutory remedy of appeal and its non-exercise, in this case, exclude Judicial Review?

Before considering this question, we should like to make a preliminary observation regarding the stage at which the question of alternative remedies should be dealt with. There is no hard and fast rule about this. As we have said, the case of R. v. Secretary of State for the Home Department ex p., Swati (ibid) shows that the ***existence of alternative remedies would be a ground for refusing leave to apply for judicial review****. It is also* ***a ground for setting aside a grant of leave given earlier.*** *(R. v. Secretary of State for the Home Department ex p. Davendranath Doorga [1990] COD 109). Again, the* ***alternative remedies argument may be considered at inter partes stage,*** *even if leave had been granted and not challenged (R. v. Brentford General Commissioners, ex p. Chan [1986] STC 65. At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point...*" (emphasis added)

[14] In **Chin Mee Keong & Ors v. Pesuruhjaya Sukan** [2007] 5 CLJ 363, the Court of Appeal held that the issue of alternative remedy may be raised during the application for leave. Justice James Foong (JCA) held as follows:

*"**[29]** So the question to be asked in our instant case is whether the appellants' application is frivolous and vexatious to justify refusal of leave in limine. The learned Judicial Commissioner answered this in the affirmative based primarily on the fact that there exist an alternative domestic remedy for the appellant to appeal against the decision of the respondent under s. 21(1)(c) of the SD Act. But does the availability of this remedy alone justify the refusal of leave to apply for an order of certiorari?*

***[30]** I am aware that this court in QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532, has gone as far as to declare:*

> *In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A fortiori, it is a matter which does not fall to be considered on a leave application.*

[31]** But I am not inclined to accept such a wide proposition in the light of the authorities disclosed. This is too broad an interpretation given to the cases cited.* ***To summarily assign this issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would, in my view, mean that even cases which are bound to fail in limine on the issue of

availability of an alternative remedy would automatically be permitted at leave stage. It must be reminded that there are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal. And to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles *particularly that of Mohamed Nordin bin Johan v. Attorney General, Malaysia (supra) which is a Federal Court case and the Supreme Court decision in J.P. Berthelsen v. Director General of Immigration, Malaysia & Ors [1986]2 CLJ 409; [1986] CLJ (Rep) 160 which repeatedly states that the test is whether the application for leave is frivolous to merit the refusal of leave in limine.****In my view, if the issue of an alternative remedy is raised at leave stage, it must still be considered in the light of this established test rather than leaving it completely for evaluation at the substantive hearing of the motion of certiorari after leave has been granted.***" (emphasis added)

[15] Since the issue of alternative remedy has been raised at the leave stage, then this court will consider the same in light of the established test. The test has been set in several cases which have held that in tax cases, where there is a provision of appeal to the SCIT against the decision on the assessment of taxes by the DGIR,

the proper mode will be to appeal to the SCIT instead of filing an application for judicial review.

[16] 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.

[17] In **Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Glugor dengan Tanggungan**(supra) 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].

[18] 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)

[19] In **Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd** [2017] 2 MLJ 197 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)

[20] 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."

[21] In the present case, the issues raised are as follows:

(i) whether the building costs incurred by the applicant for MSQ Block D, Rafflesia Phase C4 and Rafflesia Phase C5 is deductible under section 33(1) of the ITA 1967;

(ii) whether the gains received by the applicant from the disposals of plots of land, PT 44016, 40017 and 44018 are subjected to the ITA 1967;

(iii) whether the notices of assessment/additional assessments for YAs 2009, 2010 and 2011 are time barred; and

(iv) whether the penalty under section 113(2) of the ITA 1967 imposed on the applicant is correct.

[22] I agree with the DGIR that in order to resolve the issues in this case, the facts and the documents must be adduced to determine whether

or not such expenses are deductible and whether the gains from the disposal of the plots of land are subject to the ITA 1967 or not. Accounts and documents need to be examined and witnesses need to be called to verify the accounts and documents and to prove the facts therein.

[23] Therefore, in order to ascertain whether the deductibility of building costs as expenses falls under section 33(1) of the ITA 1967 is a question of fact to be determined by the SCIT, which as the *"judges of facts"*. (see **Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd** [1978] 1 MLJ 203).

[24] The applicant had also raised the issue that the DGIR had raised an assessment which are time-barred under s. 91(1) of the ITA 1967. However, in the case of **Kerajaan Malaysia v. Dato' Haji Ghani Gilong** [1995] 3 CLJ 161, the Federal Court held that only the SCIT has the power to hear a question on "limitation period" in raising as assessment and held as follows:

> *"In our view, the High Court has no power to entertain a plea of limitation under subsection 1and 3 of s. 91 of the Act advanced by the taxpayer. However, the Special Commissioner have such power."*

[25] Therefore, I am of the considered opinion that these issues should be ventilated before SCIT. The ITA 1967 has provided for an appeal process to the SCIT where there will be finding of facts and the

application of the relevant law. From the findings of the SCIT, the aggrieved party may appeal to this court.

Conclusion

[26] 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: 19th January 2018

For the Applicant	:	Datuk DP Naban/S.SaravanaKumar Messrs Lee Hishammuddin Allen & Gledhill Kuala Lumpur.
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For Ketua Pengarah
Hasil Dalam Negeri : Ashrina Ramzan Ali, Senior Revenue Counsel/Abu Tariq Bin Jamaluddin, Senior Revenue Counsel/Muhammad Farid Jaafar, Senior Revenue Counsel
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Salinan Diakui Sah

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