IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
JUDICIAL REVIEW APPLICATION NO: BA-25-68-08/2019

RE EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY SHELL PEOPLE SERVICES ASIA SDN. BHD.

JUDGMENT

(Enclosure no. 1 - *Ex parte* application for leave to apply for judicial review)

A. Four novel issues

1. This application for leave to apply for judicial review of a decision of the Director General of Inland Revenue (**DGIR**) under s 140A of the Income Tax Act 1967 (**ITA**) raises the following four novel questions:

   (1) do ss 140 and 140A ITA -

      (a) confer "*jurisdiction*",

      (b) provide a discretionary "*power*" or

      (c) impose a mandatory "*duty*"

      on DGIR?;

   (2) whether the court can grant leave pursuant to O 53 r 3(1) of the Rules of Court 2012 (**RC**) for a judicial review of DGIR's decision under s 140A ITA [**Decision (Section 140A)**] when -

      (a) the Decision (Section 140A) does not come within the three categories for the court to issue a *certiorari* to quash the

Decision (Section 140A) as laid down by the Supreme Court in **Government of Malaysia & Anor v Jagdis Singh** [1987] CLJ (Rep) 110 (**Jagdis' Case**); and

(b) the taxpayer has a right to appeal to the Special Commissioners of Income Tax (**SCIT**) against the Decision (Section 140A) under s 99(1) ITA and thereafter -

(i) there is a further right to appeal (by way of case stated by SCIT) to the High Court against SCIT's "*deciding order*" on a question of law by virtue of paragraph 34 of Schedule 5 to ITA (**Paragraph 34**); and

(ii) by reason of paragraph 41 of Schedule 5 to ITA (**Paragraph 41**), an appeal to the Court of Appeal may lie against a decision of the High Court (made pursuant to Paragraph 34) on questions of law;

(3) pending the disposal of an *ex parte* application for leave to apply for judicial review of DGIR's decision (**Leave Application**), can the court grant an *ad interim* stay of DGIR's decision pending the disposal of the Leave Application; and

(4) if the court grants leave for a judicial review of the Decision (Section 140A), whether the court can grant a stay of the Decision (Section 140A) pursuant to O 53 r 3(5) RC pending the disposal of the *inter partes* judicial review application (**Substantive Application**).

B. <u>This application</u>

2. The applicant company (**Applicant**) filed a Leave Application in court enclosure no. 1 (**Enc. 1**) for leave of this court to apply for, among others -

   (1) an order of *certiorari* to quash the following decision of the DGIR (**DGIR's Decision**) -

      (a) DGIR's notices of assessment for the year of assessment (**YA**) 2014 [**Form J (2014)**] and YA 2015 [**Form J (2015)**]; and

      (b) DGIR's notices of additional assessment for YA 2012 [**Form JA (2012)**] and YA 2016 [**Form JA (2016)**]; and

   (2) all further proceedings, including the enforcement of DGIR's Decision, be stayed until the final determination of the Substantive Application to quash DGIR's Decision (**Stay Application**).

C. <u>Background</u>

3. One of the Applicant's principal activities is to provide shared central function services to affiliated companies (**Related Companies**) within the Shell Group of companies (**Shell Group**).

4. As a company within the Shell Group, the Applicant is part of a contractual arrangement for the sharing of services and resources within the Shell Group as provided in a "*Cost Contribution Arrangement*" (**CCA**).

5. By a letter dated 21.6.2018, the DGIR conducted a "*transfer pricing*" audit on the Applicant (**Transfer Pricing Audit**) and requested for the Applicant to furnish certain information and documents for the purpose of the Transfer Pricing Audit [**DGIR's Letter (21.6.2018)**].

6. In response to DGIR's Letter (21.6.2018), the Applicant provided information and documents to DGIR for the purpose of the Transfer Pricing Audit by way of the Applicant's letters dated 3.8.2018, 15.8.2018 and 21.8.2018 (**Applicant's 3 Letters and Documents**).

7. In a letter dated 19.9.2018 [**DGIR's Letter (19.9.2018)**] -

   (1) the DGIR applied s 140A ITA to ensure that the transactions between the Applicant and the Related Companies were conducted based on "*at arm's length*" principle;

   (2) the DGIR provided the findings of the Transfer Pricing Audit (**DGIR's Audit Findings**) to the Applicant;

   (3) based on DGIR's Audit Findings, DGIR proposed to impose a markup on the services provided by the Applicant to Related Companies under CCA for YA 2011 to YA 2016; and

   (4) the DGIR requested the Applicant's feedback on DGIR's Audit Findings.

8. By a letter dated 15.10.2018 to DGIR [**Applicant's Letter (15.10.2018)**], the Applicant did not agree with DGIR's Audit Findings and gave various reasons for such a disagreement.

9. DGIR sent a reply dated 23.10.2018 [**DGIR's Letter (23.10.2018)**] to the Applicant's Letter (15.10.2018) and requested for a detailed feedback from the Applicant regarding DGIR's Audit Findings.

10. There was an exchange of correspondence by letters and emails between the Applicant and DGIR in respect of DGIR's Audit Findings beginning with the Applicant's letter dated 8.11.2018 until the Applicant's letter dated 18.1.2019 (**Correspondence**). Based on the Correspondence, the Applicant had provided information and documents as requested by DGIR.

11. The DGIR sent a letter dated 28.2.2019 to the Applicant [**DGIR's Letter (28.2.2019)**] which stated as follows, among others:

    (1) the DGIR applied s 140A ITA to propose a settlement with the Applicant (**Settlement Proposal**); and

    (2) according to the Settlement Proposal, DGIR recharacterised CCA as an "*intra-group services arrangement*" and imposed a markup on the services provided by the Applicant to Related Companies under CCA for YA 2011 to YA 2016.

12. By a letter dated 4.4.2019, the Applicant disagreed with the Settlement Proposal and gave various reasons for such a disagreement [**Applicant's Letter (4.4.2019)**].

13. DGIR responded to the Applicant's Letter (4.4.2019) by a letter dated 11.7.2019 which maintained DGIR's stand to apply s 140A ITA [**DGIR's Letter (11.7.2019)**].

14. The Applicant disagreed with DGIR's Letter (11.7.2019) in a reply dated 17.7.2019 [**Applicant's Letter (17.7.2019)**]

15. On 31.7.2019, DGIR's Decision was made wherein DGIR adjusted the Applicant's chargeable income by imposing a markup on the adjusted total costs of the Applicant for YA's 2012, 2014, 2015 and 2016. Consequently, the Applicant has to pay the following amounts by reason of DGIR's Decision:

Form JA (2012)	RM3,474,978.44
Form J (2014)	RM2,559,754.38
Form J (2015)	RM7,096,984.69
Form JA (2016)	RM2,537,458.50
Total amount	RM15,669,176.01

D. Conditions to be fulfilled by Applicant in Leave Application

16. The following four conditions must be satisfied by the Applicant before the court can allow Enc. 1:

    (1) DGIR's Decision must have a sufficient element of public law which is amenable to judicial review under O 53 r 2(4) RC (**1st Condition**) - please see the judgment of James Foong FCJ in the Federal Court case of **Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors** [2010] 3 MLJ 145, at [21];

    (2) the Applicant has fulfilled the threshold *locus standi* to file Enc. 1 because the Applicant is "*adversely affected*" by DGIR's Decision within the meaning of O 53 r 2(4) RC (**2nd Condition**) - please see the judgment of the Federal Court delivered by Hasan Lah FCJ in **Malaysian Trade Union Congress & Ors v Menteri Tenaga Air dan Komunikasi & Anor** [2014] 3 MLJ 145, at [1], [44] and [57] to [59];

    (3) as required by O 53 r 3(6) RC, Enc. 1 had been made within three months from the date DGIR's Decision was first communicated to the Applicant (**3rd Condition**); and

    (4) on a *prima facie* basis -

        (a) Enc. 1 is neither frivolous nor vexatious - please see the Supreme Court's judgment delivered by Ajaib Singh SCJ in **Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association** [1990] 3 MLJ 228, at 229; and

(b) there is some substance in the grounds in support of Enc. 1 - **Association of Bank Officers, Peninsular Malaysia**, at 229 (**4th Condition**).

E. Applicant has fulfilled 1st to 3rd Conditions

17. I am of the view that the Applicant has fulfilled the 1st Condition as DGIR's Decision is made pursuant to s 140A ITA and has a sufficient element of public law which renders DGIR's Decision to be amenable to judicial review under O 53 r 2(4) RC.

18. The Applicant is "*adversely affected*" by DGIR's Decision as understood in O 53 r 2(4) RC. Hence, the 2nd Condition is satisfied by the Applicant in this case.

19. Enc. 1 had been filed within the time period stipulated in O 53 r 3(6) RC. As such, the 3rd Condition has been fulfilled by the Applicant.

F. DGIR was allowed to be heard in Enc. 1

20. In view of the importance of Enc. 1 and the Stay Application, this court -

(1) directed the Applicant to serve all the cause papers regarding Enc. 1 on DGIR; and

(2) allowed the DGIR's learned Senior Revenue Counsel (**SRC**) to be heard in respect of Enc. 1 pursuant to O 53 r 8(1) RC (notwithstanding the fact that Enc. 1 is an *ex parte* application). O 53 r 8(1) RC provides as follows -

"*Other persons who may be heard*

O 53 r 8(1) ***Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the Judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers in the matter.***"

(emphasis added).

In the Federal Court case of **Majlis Agama Islam Selangor v Bong Boon Chuen & Ors** [2009] 6 CLJ 405, at [16], Zulkefli Makinuddin FCJ (as he then was) applied O 53 r 8(1) of the then Rules of the High Court 1980 [which is *in pari materia* with O 53 r 8(1) RC] as follows -

"[16] ***Based on the above well laid-out provisions in the RHC it is evident that the Rules Committee had intended to establish a specific framework for the determination of applications for judicial review. In my view O 53 of the RHC was specifically drafted for that purpose. It has been revised over time, the last amendment to O 53 of the RHC having taken place in the year 2000 by which it was substantially revised and amended vide PU(A) 342/2000. It is my judgment that O 53 r 8(1) of the RHC specifically caters to persons claiming an interest in the proceedings and who wish to be heard in opposition. This is discernible from the language of the rule in particular the phrase "... appears to the judge to be a proper person ...". As a specific rule was put in place for judicial review proceedings, the more general basis for intervention under O 15 r 6(2)(b) of the RHC cannot be invoked. The maxim "generalia specialibus non derogant" would apply. The decision of the majority of the Court***

of Appeal in the present case that the appellant's application must be brought under O 53 r 8(1) of the RHC in my view was therefore correct. ..."

(emphasis added).

G. Effect of ss 140 and 140A ITA

21. The Applicant's learned counsel has contended as follows:

(1) DGIR lacks the "*jurisdiction*" to make DGIR's Decision; and

(2) DGIR has failed to comply with the "*statutory duty*" under s 140(1) and (5) ITA.

22. The Applicant's aforesaid contention concerns the construction of ss 140 and 140A ITA which read as follows:

"*140 **Power to disregard certain transactions***

*(1) **The [DGIR], where he has reason to believe that any transaction has the direct or indirect effect of -***

*(a) **altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;***

*(b) **relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;***

*(c) **evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by [ITA]; or***

*(d) **hindering or preventing the operation of [ITA] in any respect,***

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

(2) In exercising his powers under this section, the [DGIR] may -

(a) treat any gross income from any source of any person either as the gross income and source of any other person or, where the gross income is that of a controlled company, as having been distributed to any member (within the meaning of subsection 139(7)) of that company;

(b) make such computation or recomputation of any gross income, adjusted income or adjusted loss, statutory income, aggregate income, total income or chargeable income of any person or persons as may be necessary to revise any person's liability to tax or impose any liability to tax on any person in accordance with his exercise of those powers; and

(c) make such assessment or additional assessment in respect of any person as may be necessary in consequence of his exercise of those powers, nullify a right to repayment of tax or require the return of a repayment of tax already made.

(2A) In exercising his powers under this section, the [DGIR] may require by notice any person to pay to him within the time specified in the notice the amount of tax that would be deducted by that person under in consequence of his exercise of those powers.

(3) Without prejudice to the generality of the foregoing subsections, the powers of the [DGIR] conferred by this section shall extend -

(a) to the charging with tax of any person or persons who but for any adjustment made by virtue of this section would not be chargeable with tax or would not be chargeable with tax to the same extent; and

(b) to the charging of a greater amount of tax than would be chargeable but for any such adjustment.

(4) Where in accordance with this section the [DGIR] requires from a person the return of the amount of a repayment of tax already made -

(a) the [DGIR] shall give to that person a notice of that requirement and the notice shall be treated as a notice of assessment for the purposes of any appeal therefrom, Chapter 2 of Part VI applying with any necessary modifications; and

(b) that amount shall be deemed to be tax payable under an assessment and section 103 and the other provisions of Part VII shall apply accordingly.

(5) Where in consequence of any adjustment made under this section an assessment is made, a right to repayment is refused or a return of a repayment of tax is required, particulars of the adjustment shall be given with the notice of assessment, with the notice refusing the repayment or with the notice requiring the return of a repayment, as the case may be.

*(6) **Transactions** -*

(a) between persons one of whom has control over the other;

(b) between individuals who are relatives of each other; or

(c) between persons both of whom are controlled by some other person,

shall be deemed to be transactions of the kind to which subsection (1) applies if in the opinion of the [DGIR] those transactions have not been made on terms which might fairly be expected to have been

made by independent persons engaged in the same or similar activities dealing with one another at arm's length.

(7) Notwithstanding any other provision of this section, where a transaction to which this section relates consists of a settlement on a relative or on a relative and other persons, nothing in this section and no powers exercised thereunder shall affect the interests of the relative under the settlement.

(8) In this section -

"relative" means a parent, a child (including a stepchild and a child adopted in accordance with any law), a brother, a sister, an uncle, an aunt, a nephew, a niece, a cousin, an ancestor or a lineal descendant;

"transaction" means any trust, grant, covenant, agreement, arrangement or other disposition or transaction made or entered into orally or in writing (whether before or after the commencement of [ITA]), and includes a transaction entered into by two or more persons with another person or persons.

Power to substitute the price and disallowance of interest on certain transactions

140A(1) ***This section shall apply notwithstanding section 140*** *and subject to any rules prescribed under this Act.*

(2) ***Subject to subsections (3) and (4), where a person in the basis period for a year of assessment enters into a transaction with an associated person for that year for the acquisition or supply of property or services, then, for all purposes of [ITA] Act, that person shall determine and apply the arm's length price for such acquisition or supply.***

(3) ***Where the [DGIR] has reason to believe that any property or services referred to in subsection (2) is acquired or supplied at a price***

which is either less than or greater than the price which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length, he may in determination of the gross income, adjusted income or adjusted loss, statutory income, total income or chargeable income of the person, substitute the price in respect of the transaction to reflect an arm's length price for the transaction.

(4) ***Where the [DGIR], having regard to the circumstances of the case, is of the opinion that in the basis period for a year of assessment the value or aggregate of all financial assistance granted by a person to an associated person who is a resident, is excessive in relation to the fixed capital of such person, any interest, finance charge, other consideration payable for or losses suffered in respect of the financial assistance shall, to the extent to which it relates to the amount which is excessive, be disallowed as a deduction for the purposes of [ITA].***

(5) The transactions or the financial assistance referred to in subsection (2) or (4) respectively, shall be construed as a transaction or financial assistance between -

(a) persons one of whom has control over the other;

(b) individuals who are relatives of each other; or

(c) persons both of whom are controlled by some other person.

(6) In this section, "relative" and "transaction" have the same meanings assigned to them under subsection 140(8)."

(emphasis added).

23. Section 140A ITA has been inserted into ITA by the Finance Act 2009 (**Act 693**) with effect from 1.1.2009 - please see s 3(4) of Act 693.

24. Firstly, the term "*jurisdiction*" is not used in ss 140 and 140A ITA. On the contrary, Parliament employs the word "*power*" in -

    (1) s 140 ITA - please refer to the shoulder note of s 140 ITA as well as subsections (2), (2A) and (3) of s 140 ITA; and

    (2) s 140A ITA - please refer to the shoulder note of s 140A ITA.

25. It is permissible for the court to refer to the shoulder note, marginal note or sidenote of a statutory provision - please see the judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court in **Lim Phin Khian v** [1996] 1 MLJ 1, at 28-29.

26. Secondly, as the legislature has expressly used the term "*power*" in ss 140 and 140A ITA, the term "*jurisdiction*" should not be used regarding those provisions. Furthermore, there is a distinction between "*jurisdiction*" and "*power*" as explained by Thomson CJ in the Court of Appeal of the Federation of Malaya in **Lee Lee Cheng v Seow Peng Kwang** [1960] 1 MLJ 1, at 3, as follows:

> "***It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word "jurisdiction" is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand,***

in dealing with matters over which it has jurisdiction, it cannot exceed its powers."

(emphasis added).

27. Thirdly, I opine that ss 140 and 140A ITA only confer discretionary powers and do not impose any statutory duty on DGIR. This view is premised on the following reasons:

(1) ss 140(1) ITA confers powers on DGIR which may be exercised as DGIR "*thinks fit*". The phrase "*in the opinion*" is used in ss 140(6) and 140A(4) ITA. These phrases provide a discretion which may or may not be invoked by DGIR;

(2) the permissive term "*may*" is employed in ss 140(1), (2), (2A) and 140A(3) ITA; and

(3) ss 140 and 140A ITA are placed by the legislature in Part X (*Supplemental*), Chapter 2 (*Controlled companies and* ***powers to protect the revenue in case of certain transactions***) of ITA. ITA has been revised under the Revision of Laws Act 1968. Hence, Part 1 of the Interpretation Acts 1948 and 1967 (**IA**) applies in the interpretation of ITA - please refer to s 2(1)(b) IA.

According to s 16 IA (in Part 1 IA), the court shall take notice of the "*fact and particulars of the division*" of ITA into chapters. The title to Part X, Chapter 2 ITA clearly shows Parliament's intention to confer a "*power*" and not a "*duty*" on DGIR by way of ss 140 and 140A ITA.

28. Fourthly, if DGIR exercises a discretionary power under ss 140 and 140A ITA, there may be certain conditions to be fulfilled in respect of such a discretionary power as provided in those statutory provisions (**Statutory Conditions**). These Statutory Conditions concern the validity of the exercise of DGIR's discretionary power under ss 140 and 140A ITA and are not mandatory statutory duties *per se* which have been imposed on DGIR.

29. Lastly, I am not able to accede to the Applicant's submission that the exercise of DGIR's discretionary power under s 140A ITA is subject to s 140(1) and (5) ITA. My reasons are as follows:

    (1) the opening words in s 140A(1) ITA (*This section shall apply notwithstanding section 140 and subject to any rules prescribed under this Act*) clearly shows the intention of the legislature that s 140A ITA shall prevail over s 140 ITA and not the converse;

    (2) when Parliament introduced s 140A ITA *vide* Act 693, Parliament did not provide for s 140A ITA to be subject to s 140 ITA; and

    (3) there is a rebuttable statutory presumption that the legislature is deemed to know existing law - please see Gopal Sri Ram JCA's judgment in the Court of Appeal case of **Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor** [1995] 1 MLJ 719, at 754. When Act 693 inserted s 140A into ITA, Parliament was aware of s 140 ITA. If Parliament had intended for s 140A ITA to be subject to s 140 ITA, Parliament could have easily provided as such. This was however not the case and instead, Parliament expressly provided for s 140A ITA to prevail over s 140 ITA.

H. Whether Enc. 1 should be allowed

30. I reproduce below s 99(1) ITA, Paragraphs 34 and 41:

> "***Right of appeal***
>
> *99(1)* ***A person aggrieved by an assessment made in respect of him may appeal to the [SCIT] against the assessment*** *by giving to the [DGIR] within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the [YA] following the [YA] for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.*
>
> *Paragraph 34* ***Either party to proceedings before the [SCIT] may appeal on a question of law against a deciding order made in those proceedings*** *(including a deciding order made pursuant to subparagraph 26(b) or (c))* ***by requiring the [SCIT] to state a case for the opinion of the High Court*** *and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.*
>
> *Paragraph 41* ***There shall be such rights of appeal from decisions of the High Court on cases stated under paragraph 34 as exist in respect of decisions of the High Court on questions of law in its appellate civil jurisdiction.***"
>
> (emphasis added).

31. When ITA has expressly provided for a taxpayer's right to appeal to SCIT against the Decision (Section 140A) in s 99(1) ITA, the court can only

grant leave for a judicial review of the Decision (Section 140A) in the following three categories of cases (**3 Categories**) as laid down by the Supreme Court in **Jagdis' Case**, at p. 189:

> "***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 is another 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.***"
>
> (emphasis added).

32. As a matter of *stare decisis*, the Supreme Court's judgment delivered by Hashim A. Sani SCJ (as he then was) in **Jagdis' Case**, is binding on me until the Federal Court overrules **Jagdis' Case**.

33. I am of the view the 3 Categories cannot be extended unless the Federal Court allows for such an extension. My opinion is based on the following reasons:

(1) according to Paragraphs 34 and 41, the SCIT's (not the High Court) are the sole judges of fact in appeals by taxpayers against DGIR's assessments of income tax.

By reason of Paragraph 34, there can only be an appeal (by way of case stated by SCIT) to the High Court against a deciding order made by SCIT on a question of law and not against a factual finding or an inference of fact made by SCIT. Similarly, Paragraph 41 provides for an appeal to the Court of Appeal against any decision by the High Court (made pursuant to Paragraph 34) on questions of law only (not in respect of findings of fact and inferences made by SCIT) - please see **Idaman Pelita Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri** [2016] 4 AMR 25, [2016] 8 CLJ 503, at [27] to [32];

(2) the SCIT's have wide powers under sub-paragraphs 19(a) to (c), (e) and (f) of Schedule 5 to ITA (**Paragraph 19**) to, among others, admit or reject any evidence, oral and documentary. According to paragraph 20 of Schedule 5 to ITA (**Paragraph 20**), among others, every person examined as a witness before the SCIT, shall be legally bound to state the truth. I reproduce below the relevant parts of Paragraphs 19 and 20 -

"*Powers of [SCIT]*

19 The [SCIT] shall have -

(a) power to summon to attend at the hearing of an appeal any person who in their opinion is or might be able to give evidence respecting the appeal;

(b) power, where a person is so summoned, to examine him as a witness on oath or otherwise;

(c) power, where a person is so summoned, to require him to produce any books, papers or documents which are in his custody or under his control and which the [SCIT] may consider necessary for the purposes of the appeal;

...

(e) all the powers of a subordinate court with regard to the enforcement of attendance of witnesses, hearing evidence on oath and punishment for contempt;

(f) subject to subsection 142(5), power to admit or reject any evidence adduced, whether oral or documentary and whether admissible or inadmissible under the provisions of any written law for the time being in force relating to the admissibility of evidence; ...

Witnesses bound to tell truth, etc.

20 Every person examined as a witness by or before the [SCIT], whether on oath or otherwise, shall be legally bound to state the truth and if summoned under subparagraph 19(a) to produce such books, papers or documents in his custody or under his control as the [SCIT] may require under subparagraph 19(c)."

(emphasis added).

When the High Court hears a judicial review application regarding the Decision (Section 140A), the High Court has no power as provided in Paragraphs 19(a) to (c), (e), (f) and 20 - please see the judgments of Suriyadi Halim Omar FCJ and Zainun Ali FCJ in the Federal Court case of **Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor** [2017] 2 CLJ 1, at [60] and [127] (**Alcatel-Lucent's Case**); and

(3) Parliament has provided for a specialized appeal procedure before SCIT in s 99(1) ITA - please see the Federal Court's judgment delivered by Edgar Joseph Jr FCJ in **Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan** [1999] 3 MLJ 1, at 40.

34. I decline Enc. 1 with costs because the Applicant has failed to satisfy me that Enc. 1 falls within any of the 3 Categories as laid down in **Jagdis' Case**. This decision is based on the following reasons:

(1) DGIR has the discretionary power under s 140A ITA to make the Decision (Section 140A). There is no "*clear lack of jurisdiction*" in this case;

(2) s 140A ITA confers a discretionary power on DGIR and does not impose any mandatory statutory duty on DGIR - please see the above paragraphs 27 and 28. If DGIR has not complied with Statutory Conditions regarding DGIR's Decision (**Breach of Statutory Conditions**), the Applicant has a right to appeal under s 99(1) ITA to SCIT against DGIR's Decision and rely on the Breach of Statutory Conditions as a ground of appeal. Breach of Statutory

Conditions does not amount to a "*blatant failure to perform some statutory duty*" on the part of DGIR within the meaning of the second category for judicial review as expounded in **Jagdis' Case**; and

(3) there are two rules of natural justice, namely the rule against biasness (**1st Rule of Natural Justice**) and the right to be heard before a decision is made (**2nd Rule of Natural Justice**).

In this case, the Applicant did not allege that DGIR had contravened the 1st Rule of Natural Justice. Nor was there any evidence that DGIR was partial in making DGIR's Decision.

DGIR had not contravened the 2nd Rule of Natural Justice in making DGIR's Decision because the Applicant had been given a right to explain and provide information as well as documents before DGIR's Decision was made. This is clear from the following undisputed documentary evidence -

(a) DGIR's Letter (21.6.2018) informed the Applicant regarding the Transfer Pricing Audit and requested for the Applicant to furnish certain information and documents. The Applicant's 3 Letters and Documents clearly showed that the Applicant had been given a right to respond to the Transfer Pricing Audit;

(b) DGIR's Audit Findings were forwarded to the Applicant by way of DGIR's Letter (19.9.2018) and DGIR's Letter (19.9.2018) requested a feedback by the Applicant on DGIR's Audit Findings;

(c) the Applicant's Letter (15.10.2018) gave various reasons why the Applicant did not agree with DGIR's Audit Findings;

(d) DGIR's Letter (23.10.2018) requested for a detailed feedback from the Applicant with respect to DGIR's Audit Findings;

(e) by way of the Correspondence, the Applicant had provided detailed information and documents on why the Applicant disagreed with DGIR's Audit Findings;

(f) DGIR's Letter (28.2.2019) sent the Settlement Proposal to the Applicant but the Applicant did not agree with the Settlement Proposal in the Applicant's Letter (4.4.2019); and

(g) DGIR's Letter (11.7.2019) maintained the Decision (Section 140A) which was disagreed by the Applicant's Letter (17.7.2019).

The above contemporaneous documents clearly showed no "*serious breach of the principles of natural justice*" as explained in **Jagdis' Case**.

35. Regarding a host of cases cited by the Applicant's learned counsel (**Applicant's Cases**), I am of the following view:

(1) the Applicant's Cases, including the Supreme Court's judgment in **Director-General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd** [1985] CLJ (Rep) 107 and the Federal Court's decision in **Director-General of Inland Revenue v Rakyat Berjaya**

Sdn Bhd [1984] 1 CLJ (Rep) 108, do not concern DGIR's discretionary power under s 140A ITA; and

(2) the Applicant's learned counsel has relied on sealed orders regarding leave of the High Court for judicial review of DGIR's decisions under ITA (**Sealed Orders**). I cannot accept the Sealed Orders without the benefit of written judgments. It is decided in **Syahin Hafiy *et al* v Mansur bin Yunus & Anor** [2019] 1 LNS 1237, at [13] and [14] as follows -

> *"[13] In support of This Appeal, the Defendant's learned counsel has referred to the following:*
>
> *(1) sealed judgments and orders as well as draft judgments and orders of the Court of Appeal, High Court and Sessions Court of other cases (**Other Cases**);*
>
> *(2) written submission filed in the Other Cases; and*
>
> *(3) memorandum of appeal and notice of appeal filed in the Other Cases.*
>
> ***[14] I am not able to accept the reference by the Defendant's learned counsel to Other Cases except if written judgments have been delivered in the Other Cases. This is because from the view point of the stare decisis doctrine, only the ratio decidendi ascertained from a written judgment of a superior court, has binding or persuasive effect. I refer to the judgment of Raja Azlan Shah FJ (as his Majesty then was) in the Federal Court case of Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29, at 32 as follows -***

> ***"However, I would once again emphasize what has so often been said before, that precedents are not to be slavishly followed; a case may be followed only for its strict ratio decidendi."***
>
> *(emphasis added).*
>
> ***Without a written judgment of a previous case, the court cannot ascertain the ratio decidendi of the previous case by considering the following three matters (3 Matters) -***
>
> *(1)* ***the material facts of the case which give rise to the issue to be decided by the court;***
>
> *(2)* ***the rule of law which has been applied by the court to resolve the issue; and***
>
> *(3)* ***the reasoning of the court in applying the rule of law to decide the issue in question."***
>
> (emphasis added).

36. In view of the reasons explained in the above paragraphs 34 and 35, I find that the Applicant has failed to fulfill the 4th Condition and on a *prima facie* basis -

    (1) Enc. 1 is frivolous and/or vexatious; and

    (2) there is no substance to support Enc. 1.

I. Can court grant *ad interim* stay of Decision (Section 140A) pending disposal of Leave Application?

37. When the learned SRC first appeared for Enc. 1, the learned SRC applied to postpone the hearing of Enc. 1 so as to enable the learned SRC to file a written submission to oppose Enc. 1 (**SRC's Postponement Application**).

38. The Applicant's learned counsel did not object to SRC's Postponement Application provided that the court would grant an *ad interim* stay of Decision (Section 140A) pending the disposal of Leave Application (***Ad Interim* Stay**). The learned SRC did not object to the *Ad Interim* Stay.

39. O 53 r 3(5) RC provides as follows:

> "***The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.***"
>
> (emphasis added).

40. I am of the following view:

(1) O 53 r 3(5) RC only applies when the court allows the Leave Application. In other words, O 53 r 3(5) RC is silent on *Ad Interim* Stay; and

(2) the court has the inherent jurisdiction, inherent power and/or power under O 92 r 4 RC to grant an *Ad Interim* Stay so as to prevent an injustice and/or to prevent the Leave Application from being rendered redundant. O 92 r 4 RC reads as follows -

"***Inherent powers of the Court***

O 92 r 4 ***For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.***"

(emphasis added).

If the court has no jurisdiction or power to grant an *Ad Interim* Stay, the delay in the disposal of the Leave Application may -

(a) cause irreparable harm to an applicant; or

(b) render the Leave Application to be academic.

41. I grant an *Ad Interim* Stay on the following grounds:

(1) the *Ad Interim* Stay will ensure that the Leave Application is not rendered redundant; and

(2) no prejudice is caused to DGIR by the *Ad Interim* Stay.

J. <u>Whether court can stay Decision (Section 140A) pending disposal of Substantive Application</u>

42. Despite the fact that I have dismissed Enc. 1 with costs, I should give my view regarding the Stay Application. This is because firstly, there is only one High Court decision which has stayed a decision of DGIR under ITA pending the disposal of the Substantive Application, namely the judgment of Vazeer Alam Mydin J (as he then was) in **Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri** [2018] 7 CLJ

487. Secondly, the learned SRC has raised a far-reaching submission based on the definition of "*proceeding*" in O 1 r 4(1) RC. Lastly, there are provisions in ITA which are pertinent to the Stay Application. I refer to ss 103(1), (1A), (2), (5), (7) and 106 ITA as follows:

> "***Payment of tax***
>
> *103(1)* ***Except as provided in subsection (2), tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment.***
>
> *(1A)* ***Where an assessment or additional assessment has been made under section 91A, the tax or additional tax payable under the assessment shall be due and payable on the day the amended return is furnished whether or not that person appeals against the assessment or additional assessment:***
>
> *Provided that where the amended return is furnished within a period of sixty days after the due date and the amount of tax due and payable has not been paid within the period of sixty days from the due date, so much of the tax as is unpaid upon the expiration of that period shall without any further notice being served be further increased by a sum equal to five per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.*
>
> *(2)* ***Where an assessment is made under section 90(3), 91, 92 or 96A, or where an assessment is increased under section 101(2), the tax payable under the assessment or increased assessment shall, on the service of the notice of assessment or composite assessment or increased assessment, as the case may be, be due and payable on the person assessed at the place specified in that notice whether or not that person appeals against the assessment or increased assessment.***

...

(5) ***Subject to subsection (7), where any tax due and payable under subsection (2) has not been paid within thirty days after the service of the notice, so much of the tax as is unpaid upon the expiration of that period shall without any further notice being served be increased by a sum equal to ten per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under [ITA].***

...

(7) ***Where any tax is payable in accordance with subsection (2), the [DGIR] may allow the tax to be paid by instalments in such amounts and on such dates as he may determine and in the event of default in payment of any one instalment on the date specified for payment the balance of the tax then outstanding shall be due and payable on that date and shall without any further notice being served be increased by a sum equal to ten per cent of that balance, and that sum shall be recoverable as if it were tax due and payable under [ITA].***"

(emphasis added).

43. Premised on the definition of "*proceeding*" in O 1 r 4(1) RC, the learned SRC has contended that the court can only stay proceedings in open court and chambers (**Court Proceedings**) pursuant to O 53 r 3(5) RC (but the court cannot stay DGIR's Decision itself). The term "*proceeding*" is defined in O 1 r 4(1) RC as follows:

" ***"proceeding" means any proceeding whether in open Court or in Chambers and includes an application at any stage of a proceeding which is deemed to have started when an action is filed;***"

(emphasis added).

44. I am not able to accept the above submission by the learned SRC. This is due to the following reasons:

(1) O 53 r 3(5) RC concerns a stay of the "*proceedings in question*", namely the decision which has a sufficient element of public law that is amenable to judicial review - please see the 1st Condition in the above sub-paragraph 16(1). In other words, applications for judicial review generally do not concern Court Proceedings. The definition of "*proceeding*" in O 1 r 4(1) RC however concerns Court Proceedings only. Accordingly, the definition of "*proceeding*" in O 1 r 4(1) RC cannot be resorted to in the interpretation of O 53 r 3(5) RC;

(2) all the definitions in O 1 r 4(1) RC apply to RC "*unless the context otherwise requires*". As explained in the above sub-paragraph (1), the context of O 53 r 3(5) RC (which does not apply to Court Proceedings) does not require the application of the definition of "*proceeding*" in O 1 r 4(1) RC;

(3) if I have accepted the above contention by the learned SRC -

(a) this will cause an injustice wherein the Substantive Application will be rendered academic if the court does not stay the decision in question; and

(b) this will render O 53 r 3(5) RC redundant; and

(4) as explained in the above paragraphs 40(2) and 41, the court has the power to grant an *Ad Interim* Stay. It will be incongruous if the court can give an *Ad Interim* Stay pending the disposal of the Leave

Application but the court is incapable of granting a stay of DGIR's decision pending the disposal of the Substantive Application.

45. If the court allows the Leave Application regarding DGIR's assessment or additional assessment of income tax, I am of the following view regarding the Stay Application:

(1) as a general rule, the court should not grant a stay of DGIR's decision under O 53 r 3(5) RC pending the disposal of the Substantive Application (**General Rule**). Exceptionally, the court can only grant a stay of DGIR's decision pending the disposal of the Substantive Application when there are special circumstances which can justify the stay (**Exception**). This opinion is based on the following reasons:

(a) a literal interpretation of O 53 r 3(5) RC supports the General Rule and Exception;

(b) s 103(1) ITA has expressly stated that except as provided in s 103(2) ITA, tax payable under an assessment "*shall be due and payable on the due date whether or not that person appeals against the assessment*". The mandatory term "*shall*" has been used by Parliament in s 103(1) ITA. The exception in s 103(2) ITA does not support a stay of DGIR's decision;

(c) with regard to an additional assessment of income tax, s 103(1A) ITA provides that "*tax or additional tax payable under the assessment shall be due and payable on the day the amended return is furnished whether or not that person appeals against the assessment or additional assessment*". The only

exception to s 103(1A) ITA is stated in the proviso to s 103(1A) ITA which does not justify a stay of DGIR's decision. Once again, s 103(1A) ITA employs a mandatory term "*shall*";

(d) if income tax is not paid within the stipulated time period, s 103(5) ITA imposes an increase of 10% of the unpaid income tax. The mandatory term "*shall*" is used in s 103(5) ITA. If the court grants a stay of DGIR's decision under O 53 r 3(5) RC, this will defeat the purpose of s 103(5) ITA; and

(e) the DGIR has a discretion pursuant to s 103(7) ITA to allow a taxpayer to pay income tax which is payable under s 103(2) ITA (**Outstanding Sum**) in instalments and if the taxpayer defaults on the payment of any instalment, there "*shall*" be an increase of 10% on the balance of the unpaid income tax. Section 103(7) ITA will be circumvented if a decision of DGIR is stayed under O 53 r 3(5) RC;

(2) a taxpayer has the evidential burden to persuade the court that the Exception (not the General Rule) applies to justify a stay of DGIR's decision under O 53 r 3(5) RC;

(3) the following scenarios (which are not exhaustive) constitute special circumstances to stay DGIR's decision -

(a) if there is no stay of DGIR's decision, the Substantive Application will be rendered redundant; **or**

(b) if the court does not stay DGIR's decision, the taxpayer will suffer irreparable harm (not exhaustive) as follows -

(i) the taxpayer will face a severe cash flow problem - please see **Flextronics**, at [34];

(ii) the taxpayer will be commercially insolvent in the sense that the taxpayer will be unable to pay the taxpayer's debts when such debts are due and payable; **or**

(iii) the taxpayer will face insolvency proceedings [winding up proceedings (if the taxpayer is a company) and bankruptcy proceedings (if the taxpayer is an individual)]; and

(4) the following scenarios do not amount to special circumstances which can justify a stay of DGIR's decision -

(a) the Substantive Application has merits, even strong merits;

(b) the taxpayer is a law-abiding person who has previously paid all income tax which is due and payable. This fact does not amount to special circumstances which can justify a stay of DGIR's decision because all taxpayers are legally required by ITA to pay their income tax within the stipulated time period. If otherwise, an errant taxpayer will be subject to civil and criminal sanctions under ITA;

(c) the amount of Outstanding Sum is huge, burdensome and onerous. Firstly, income tax is based on the income derived by a taxpayer. If a taxpayer's income is high, the Outstanding Sum is also understandably high and the taxpayer should be financially able to pay the Outstanding Sum (due to the taxpayer's high

income). Furthermore, any taxpayer can apply to DGIR under s 103(7) ITA to pay the Outstanding Sum in instalments so as to alleviate any hardship which may be caused to the taxpayer by reason of the huge Outstanding Sum;

(d) pursuant to s 106(1) ITA, DGIR may file a civil suit against a taxpayer to recover the Outstanding Sum (**DGIR's Statutory Right To Sue**). The exercise of DGIR's Statutory Right To Sue, as expressly provided by the legislature, cannot constitute special circumstances to justify a stay of DGIR's decision; and

(e) according to s 104(1) ITA, DGIR may issue to a Commissioner of Police or Director of Immigration a certificate containing particulars of the Outstanding Sum with a request for a taxpayer to be prevented from leaving Malaysia until the taxpayer pays the Outstanding Sum (**DGIR's Statutory Right To Bar Taxpayer From Leaving Malaysia**). DGIR's Statutory Right To Bar Taxpayer From Leaving Malaysia does not amount to special circumstances to stay DGIR's decision because -

(i) DGIR's Statutory Right To Bar Taxpayer From Leaving Malaysia has been expressly provided by Parliament to prevent errant taxpayers from fleeing our court's jurisdiction; and

(ii) if there is a valid reason for a taxpayer to travel outside Malaysia, eg. to seek urgent medical treatment, the taxpayer can apply to DGIR to allow the travel in question.

46. Even if I have allowed Enc. 1, I will not exercise the discretion under O 53 r 3(5) RC to stay the Decision (Section 140A) because -

(1) there is no evidence to show that if there is no stay of the Decision (Section 140A) -

(a) the Substantive Application will be rendered academic;

(b) the Applicant will face a severe cash flow problem;

(c) the Applicant will face commercial insolvency and is therefore unable to pay its debts when such debts fall due and payable; and

(d) the Applicant will face winding up proceedings; and

(2) the Applicant has not discharged the onus to satisfy this court that there are special circumstances in this case to stay the Decision (Section 140A).

47. I have no hesitation to distinguish all the cases cited by the Applicant's learned counsel (except for **Flextronics**) because those cases do not concern assessments or additional assessments of income tax.

K. Court's decision

48. Premised on the above reasons, Enc. 1 is dismissed with costs. Consequently, the *Ad Interim* Stay lapses upon the disposal of Enc. 1.

49. I will end this judgment with the following remarks:

(1) this judgment concerns solely DGIR's decisions on s 140A ITA which do not fall within the 3 Categories. There may be decisions of DGIR under ITA which fall within any one or more of the 3 Categories and in such cases, leave of court should therefore be granted pursuant to O 53 r 3(1) RC for a judicial review of those decisions; and

(2) no view is expressed in this judgment regarding the merits of the Applicant's application to impugn DGIR's Decision.

WONG KIAN KHEONG
Judge
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

DATE: 12 NOVEMBER 2019

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