DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO: WA-25-78-03/2017

Dalam perkara suatu keputusan Responden seperti yang dinyatakan melalui surat bertarikh 23.3.2017 yang telah disampaikan kepada Pemohon pada 23.3.2017

Dan

Dalam perkara suatu notis-notis taksiran tambahan tahun taksiran 2012, 2013 dan 2014 bertarikh 23.3.2017;

Dan

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

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012;

Dan

Dalam perkara Protokol Kepada Perjanjian Pengelakan Cukai Dua Kali Malaysia-Denmark (P.U.(A) 154/2004).

ANTARA

WIRA SWIRE SDN BHD **...PEMOHON**

DAN

KETUA PENGARAH HASIL DALAM NEGERI **...RESPONDEN**

JUDGMENT

Introduction

[1] This is the applicant's judicial review application seeking inter alia the following reliefs :

(a) an order for certiorari to quash the respondent's decision in raising the notices of additional assessment for the years of assessment 2012, 2013 and 2014 with penalty all dated 23.3.2017 and communicated to the applicant on the same date on the grounds that the said decision of the respondent was illegal, unlawful and/or in excess of authority and had been irrational and/or unreasonable;

(b) a declaration that :

(i) The payment paid by the applicant to Orange Rederiet Aps ("ORAPS") are not subject to withholding tax under

section 4A (iii) read with section 109B(1)(c) of the Income Tax Act 1967 ("ITA 1967") as such payments are only taxable in Denmark by virtue of Article IX of the Malaysia-Denmark Double Taxation Agreement (which is gazette *vide* P.U.(A) 154/2004) ("Malaysia-Denmark DTA"); and

(ii) as such, there is no basis for the respondent to disallow the deduction claimed by the applicant for the payments made to the ORAPS pursuant to Section 39(1)(j) of the ITA 1967.

(c) a declaration that the respondent is bound by and shall give effect to the Malaysian-Denmark DTA which states that profits derived by an enterprise of a Contracting States i.e. from the operation of ships in international traffic shall be taxable only in Denmark;

(d) a declaration that the respondent is bound and shall give effect to the decisions of the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Damco Logistics Malaysia Sdn Bhd* (Rayuan Sivil: W-01-424-11) which affirmed the decision of this Honourable Court that the provisions of the Malaysia-Denmark DTA shall prevail over provisions of ITA 1967 in the event of a conflict, and the subsequent decision of the Special Commissioners of Income Tax and this Honourable Court *Maersk Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2013) MSTC 10-046* and *Thompson Reuters Global Resources v Ketua Pengarah Hasil Dalam Negeri (2015) MSTC*

10-048 which applied the decision of the Court of Appeal in *Demco Logistic Malaysia* (supra);

(e) a declaration that the respondent is bound by and shall give effect to the decisions of the Special Commissioners of Income Tax, this Honourable Court and the Court of Appeal in *Damco Logistics (supra), Maersk Malaysia (supra)* and *Thompson Reuters (supra)* above which held that the business profits of the taxapayers were only taxable in their home countries and not in Malaysia pursuant to the applicable double taxation agreements.

The Salient Facts

[2] The relevant facts in this application are the following :

(i) the applicant is a company with its business among others are the operation and chartering of service vessels in offshore oil and gas industries and also act as agent of the Swire Pacific Offshore Group of companies within Malaysia and its adjacent waters.

(ii) the applicant also had dealings with Orange Rederiet Aps ('ORAPS'), a company within the Swire Group, by providing services within Malaysia and international waters.

(iii) On 6.4.2016, Lembaga Hasil dalam Negeri conducted a tax audit exercise on the applicant.

(iv) On 14.10.2016, the respondent informed the applicant that payment collected and remitted to ORAPS should have been subjected to withholding tax under subsection 4A(iii) of the Income Tax Act 1967 (ITA 1967). The respondent then informed the applicant that the deduction for payment made to ORAPS is disallowed pursuant to subsection 39(1)(j) of ITA 1967.

(v) The respondent thereafter issued the impugned notices of additional assessment for Year Assessments 2012, 2013 and 2014.

(vi) On 29.12.2016, on a without prejudice basis, ORAPS through the applicant has paid to the respondent the withholding tax amounting to RM6,160,482.87 with the late remittance penalty in the sum of RM616,048.29.

The Issue

[3] The main issue in this case is whether Article IX of the Malaysia-Denmark Double Taxation Agreement ('Malaysia-Denmark DTA') is applicable with regard to the payments made by the applicant to ORAPS.

The Applicant's Submission

[4] At the outset, the applicant submitted that the respondent is estopped from resisting the applicant's application as the same issue had been

adjudicated between parties by the High Court which is in favour of the applicant. It was contended that the principle of res judicata is applicable in the present case.

[5] In any event, the applicant further submit that Article IX of the Malaysia-Denmark DTA is applicable in this case and prevails over section 4A(iii) of ITA 1967 based on decided cases by the superior courts.

The Respondent's Submission

[6] The respondent has raised an issue that the applicant has failed to exhaust its remedy to appeal to the Special Commissioner of the Income Tax (SCIT) before filing this judicial review application. Further it was submitted that there is no special circumstances which enable the applicant not to exhaust the statutory remedy. In the circumstances the respondent submitted that it is an abuse of court's process.

[7] The respondent further submitted that Article IX is not applicable in the present case as the applicant has failed to prove the vessels operates in international waters and not only within the Malaysian water as required under Malaysia-Denmark DTA.

Findings Of This Court

[8] The law on judicial review is well settled that the court may review a decision in the exercise of public duty or function on the grounds of illegality, irrationality or procedure impropriety.

[9] In the recent Federal Court case of ***Peguam Negara Malaysia v Chin Chee Kow (sebagai Setiausaha Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan and another appeal [2019] MLJU 202***, the grounds for judicial review is reiterated in the following words:

> "***[60]*** *This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at p.401D of the GCHQ case enunciated three classic grounds for judicial review:*
>
> > *'**Judicial review has I think developed to a stage today when.... one can conveniently classify under heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality'. The second 'irrationality' and the third 'procedural impropriety'**...*
> >
> > ***By 'illegality'** as a ground for Judicial Review, I mean that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
> >
> > ***By 'irrationality'**, I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

The Preliminary Issue

Failure to exhaust the statutory remedy

[10] The respondent is seeking to set aside the Court Order dated 26.5.2017 in granting leave to commence the present judicial review

application on the ground that the applicant has failed to exhaust the statutory remedy to appeal to the SCIT against the respondent's decision to issue the additional assessment for Year Assessments 2012, 2013 and 2014 pursuant to section 99 of the ITA 1967.

[11] On this issue, an *ex-parte* order for leave to commence judicial review application dated 26.5.2017 may be set aside in light or Order 32 rule 6 which provides :

"The Court may set aside order made ex-parte."

[12] The rationale of this provision is the party applying to set aside the *ex-parte* order has no opportunity to present their arguement or given the right to be heard in the *ex-parte* application.

[13] However, in exercising this discretionary power, the court must consider the background facts of each application before arriving to its decision.

[14] In the present case, after the court has allowed the leave application on 26.5.2017, the respondent has filed an appeal to the Court of Appeal on 22.6.2017. There is no evidence to show that this appeal has been withdrawn.

[15] Further, the application to set aside the leave order dated 26.5.2017 vide enclosure 27 has already been dismissed by this court on 7.5.2018.

[16] I have dismissed the respondent's application to set aside the leave order on the following grounds:

(i) (a) the filing of notice of appeal to the Court of Appeal and the application to set aside the leave order creates a duplicity of proceedings which should not be entertained by the Court.

(b) this principle has been explained by the Court of Appeal in the case the ***Royal Selangor Golf Club v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2012] 3 CLJ 293*** in the following manner :

> "*[12] In the ordinary case, if a court erred, the proper course is an appeal.* ***Since a notice of appeal to the Court of Appeal had been filed earlier, the application in encl. 9 is in duplicity of the appeal process. Until an appeal is withdrawn, dismissed or otherwise disposed of by the court to which it is filed, it remains in existence as an appeal. No evidence was put before the court that the appeal was withdrawn****. The alternative of making an application to clarify the order appealed from having been forgone, remained foregone.* ***The filing of the application at encl. 9 before the High Court created a duplicity. The document that created the duplicity must fail****. There cannot be a question of the party committing a duplicity being at liberty to choose which is to be proceeded with, without having first withdrawn the order.*
>
> *[13] The inherent powers reserved under O. 92 r. 4 pertain to those instances where no provision is provided in the rules, and there arises a need to consider that inherent power the court may have, to prevent an injustice. In that context, O.92 r.4 offers the clarification that nothing in the rules is to be interpreted to limit the power of the court to prevent injustice or to prevent an abuse of the process of the*

court. Since the relevant legislation has provided a specific in respect of appeals from the Land Reference Court, the question of resort to any inherent power to prevent injustice under the Rules of the High Court 1980 does not arise."

(ii) (a) There is no exceptional circumstances that warrant the setting aside of the ex-parte order. There is also no evidence that shows the applicant has failed to disclose any material facts in the ex-parte application.

(b) In this regard, reliance is placed in the Supreme Court case of ***Tuan Haji Sarip Hamid & Anor v Patco Malaysia Sdn Bhd [1995] 2 MLJ 442***, where it states :

"*Before leaving this case, we hasten to add a word of caution, and it is this : applications to set aside leave granted in judicial review proceedings should only be made in exceptional circumstances. (See Popplewell J in R v Bromsgrove District Council, ex p Kennedy (The Times, 28 November 1991).*"

The court further states the following :

"***Moreover, as the application for leave is made ex-parte, there is a clear duty disclosure, imposed by law on the applicant, the breach of which may – depending upon the importance of the non-disclosure – result in the order for leave being set aside.*** *(See, eg R v Governor of Pentonville 1995 2 MLJ 442 at 448 Prison, ex p Herbage (No. 2) [1987] QB 1077; [1987] 1 All ER 324; [1987] 2 WLR 226.)"*

'In determining the extent of the affidavit evidence at the leave stage, it is necessary to bear in mind two matters :

(i) applications for leave are ex parte, and like all ex-parte applications must be made uberrimae fidei. ***A failure to disclose material relevant to the grant of leave would provide an opponent with cogent material on which to apply to set aside the leave*** *and would entitle the court (if so minded) to refuse to grant relief of its own motion'."*

(iii) Further in the Supreme Court case of ***Government of Malaysia & Another v Jagdis Singh [1987] 2 MLJ 185***, it was held that judicial review application may be allowed although the remedy of appeal has not been exhausted if it is shown there exist a clear lack of jurisdiction, blantant to perform any statutory duty or there is a serious breach in the principle of natural justice. In the present case, I find, there exist a exceptional circumstances as explained in Jagdis's case for this court to allow the commencement of the judicial review application which will be revealed in this judgment.

[17] In the case of ***Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447***, where the decision of the Federal Court case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65* was cited and the High Court Judge had this to say :

*"**[8] It is clearly established by the Federal Court in the Majlis Perbandaran Pulau Pinang that an application for a judicial review is not barred by the non-exercise of its internal appeal procedure**. As stated by Edgar Joseph Jr FCJ in that case, whilst in theory the court often been recited with incantation that alternative remedy must be exhausted, in practice the court are often much kinder to an applicant with good case. Having analysed the various conflicting decision of the English cases in that case the Federal Court states that generally, **if an applicant can***

***demonstrate illegality or unlawful treatment then it would be wrong to insist on exhaustion of local remedy**. The Federal Court acknowledged that in certain cases such as tax cases, appeal procedure is provided under the statute but if the applicant can demonstrate excess or abuse of power or a breach of natural justice, judicial review would still be granted. Indeed in the present case case where there exist special circumstances, the respondent is not immune from the process of judicial review. Similar principle was applied by the high court in Kim Thye Co v Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur [1991] 3 CLJ 20 (Rep). Wich was subsequently unheld by the Supreme Court on appeal.*

***[9]** Thus relying on the principle laid down in Majlis Perbandaran Pulau Pinang I hold that the availability of an alternative inernal remedy in the form of an appeal process will not bar an application for judicial review. This is so expecially where the complaint made to the court is one on error of law or abuse of power that goes to the legality of the conduct of the conduct of the decision-making authority as in this case."*

[18] This decision of the High Court has been affirmed by the superior courts.

[19] Having considered the facts and the position of law on this issue, I find, the preliminary issue raised by the respondent is without merit and untenable.

Issue of Estoppels and Res Judicata

[20] As regards this issue, on 4.9.2018, in another judicial review application by the same parties, Justice Datuk Azizah Nawawi has decided on the same issue and has made the following orders :

"***IT IS HEREBY ORDERED** as follows :*

(1) ***An order for** Certiorari to quash the respondent's decision which is deemed to have been made on **29.1.2017** and communicated to*

the applicant ***on the same date on the grounds that the said decision of the respondent was illegal, void, unlawful and/or in excess of authority, and had been irrational and/or unreasonable****;*

(2) ***A Declaration*** *that the respondent is bound by and shall give effect to* ***Article IX of the Malaysia-Denmark Double Taxation Agreement*** *(which is gazetted vide P.U.(A) 154/2004) ('Malaysia-Denmark DTA') which states that profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State (i.e. Denmark);*

(3) *A Declaration that the respondent is bound by and shall give effect to the decisions of the Court of Appeal in Ketua Pengarah Hasil Dalam negeri v Damco Logistics Malaysia Sdn Bhd (Rayuan Sivil: W-01-424-11) which affirmed the decision of this Honourable Court that the provisions of the Malaysia-Denmark DTA shall prevail over provisions of the Income Tax Act 1967 ('ITA 1967') in the event of a conflict, and the subsequent decisions of the Special Commissioners of Income Tax and this Honourable Court in Maersk Malaysia Sdn v Ketua Pengarah Hasil Dalam Negeri (20130 MSTC 10-046 and Thomson Reuters Global Resources v Ketua Pengarah Hasil Dalam Negeri (2015) MSTC 10-048 which applied the decision of the Court of Appeal in Damco Logistic Malaysia (supra);*

(4) *A Declaration that the Respondent is bound by and shall give effect to the decisions of the Special Commissioners of Income Tax, this Honourable Court and the Court of Appeal in Damco Logistic (supra), Maersk Malaysia (supra) and Thomson Reuters (supra) above which held that business profits of the taxpayers were only taxable in their home countries and not in Malaysia pursuant to the applicable double taxation agreements;*

(5) *A Declaration that the payments collected and remitted to the Applicant through its agent, Wira Swire Sdn Bhd,* ***are not subject to withholding tax under Section 4A(iii) of the ITA as such payments are only taxable in Denmark by virtue of Article IX*** *of the Malaysia-Denmark DTA and as such, there is no basis for the respondent to disallow the deduction claimed by Wira Swire Sdn Bhd for the payments made to the applicant pursuant to Section 39(1)(j) of the ITA."*

[21] I find, the orders in the said judicial review application are the same orders sought in the present application. The issues has been adjudicated and decided accordingly.

[22] In the circumstances, I find, the issues in the present application are res judicata and are not subject to further challenge by the respondent. The respondent is estopped from doing so. This certainly will avoid any contradiction of decision from the previous one. The respondent's avenue is to appeal to the Court of Appeal.

[23] On this issue, in the often quoted case of ***Asia Commercial Finance (M) Bhd v Kok Sdn Bhd [1995] 3 CLJ 783***, the Supreme Court explained as follows :

> "*On the other hand, the issue estoppels literally means simply an issue which a party is stopped from raising in a subsequent proceeding. However, the issue estoppels, in a nutshell, from a consideration of case law, means in law a lot more i.e. that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduced evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in Lawdor v Gray [1984] 3 All ER 345, 350 who said: "**Issue estoppels....prevents contradiction of a previous determination** whereas cause of action estoppels prevents reassertion of the cause of action.*"

[24] Likewise in the present case, the respondent is estopped from challenging the correctness of the earlier decision of this court on the

same issue irrespective that this judicial review application was filed by the applicant.

[25] Be that as it may and for the sake of completeness, I will deal with the main issue in this application which is in regard to the application of Article IX, Malaysia-Denmark DTA.

[26] Firstly, it is settled law that Article IX of the DTA prevails over ITA 1967. Sub-section 132(1) of the ITA 1967 provides the following :

> *"132. (1) If the Minister by statutory order declares that :*
>
> *(a) arrangements specified in the order have been made by the Government with the government of any territory outside Malaysia with a view of affording relief from double taxation in relation to tax under this Act any foreign tax of the territory; and*
>
> *(b) it is expedient that those arrangements should have effect, then, so long as the order remains to tax under this Act* ***notwithstanding anything in any written law.***"

[27] In this regard, the Federal Court in the case of ***Director General of Inland Revenue v Euromedical Industries LTD [1983] CLJ (Rep) 128***, states the following :

> *"It appears to us that the learned Judge never intended it to be understood that he had found the management fees to be royalty under s. 2 of the Act. What he obviously means is that whilst the parties agree that the fee does appear to come under the definition of 'royalty' under that section, it does not come within the definition of that term in the Relief Order, and that* ***because under s.132(1) of the Act in the event of conflict the provisions of the Relief Order should prevail****, the fees should be treated as income or profit and not as royalty.*

> ***This provision is not peculiar to our tax law. Counsel for the respondent drew our attention to a similar provision in the United Kingdom Income Tax Act, 1918 where in the event of any inconsistency between the provision of the Act on one hand and a Double Taxation Relief Agreement on the other, the Agreement must prevail over the Act*** *– see Ostime (H.M. Inspector of Taxes). v. Australian Mutual Provident Society 38 Tax Cases 492."*

[28] Likewise in another Federal Court case of ***Lembaga Hasil Dalam Negeri v Alam Maritim Sdn Bhd [2014] 3 CLJ 435***, which states as follows :

> ***[26]*** *Without the need to restate the positive effect of any DTA, the above provision has prioritised any DTS, and by order of the relevant Minister, this bilateral treaty takes a pre-eminent position vis-a-vis domestic tax laws (Director-General of Ireland Revenue v Euromedical Industries Ltd [1983] 1 CLJ 281; [1983 CLJ (Rep) 128, FC).* ***The legislated words in s. 132(1)(b) which read, '....notwithstanding anything in my written law" clearly gives the effect of giving precedence over domestic law*** *(In re Geoffrey Roberton [2001] 4 CLJ 317."*

(*see also Damco Logistic Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] MSTC 30-033, Director General of Inland Revenue v Euromedical Industries Ltd [1983] CLJ (Rep) 128*).

[29] Reverting to the present case, the Malaysia-Denmark DTA was signed on 3.12.2003 with its effective date on 1.1.2006. The said Agreement clearly is subsequent to the enactment of subsection 4A(iii) of the ITA 1967.

[30] In the circumstances, Article IX of the Malaysia-Denmark DTA prevails over subsection 4A(iii) of the ITA 1967.

[31] Further, based on the affidavits and documentary evidence presented before this court, I also find that the applicants has fulfilled all the requirements under Article IX of the Malaysia-Denmark DTA which provides as follows :

> "***Article IX***
>
> *1. Income of an enterprise of one of the Contracting States derived from the other Contracting State from the operation of ships or aircraft in international traffic may be taxed in that other Contracting State, but the tax chargeable in that other Contracting State on such income shall be reduced by an amount equal to 50 per cent of such tax.*
>
> *2.* ***Where income from the operation of ships or aircraft in international traffic*** *is derived by an enterprise of one of the Contracting States from a State other than the Contracting States, such income shall be taxable only in the Contracting State of which the enterprise is a resident.*
>
> *3. The provisions of paragraphs 1 and 2 of this article shall likewise apply to income arising from participation in shippling or aircraft pools of any kind by such enterprise engaged in shippling or aircraft transport operations."*

[32] It has been shown that the operation of vessels in the present case is also in the international waters. In the Agency Agreement dated 30.12.2014, in particular paragraph 3.8, it indicates that the operation is in the international waters as it states :

> "*3.8 From time to time as may be required by the Principal, to provide adequate and properly qualified crew for the vessels, including, but not limited to the following functions :*
>
> - *Employment of officers and crew (collectively referred to as 'the Crew') for the Vessels;*

- *arrangement of transportation of Crew, including joining, repatriation and land transfers to and from airports to Vessels;*

- *arrangement of hotel accommodation or lodging for Crew as and when required during crew change;*

- *arrangement of medical attendance, treatment or hospitalization for Crew if and when necessary, and provision of all necessary assistance in an emergency situation;*

- ***arrangement of immigration clearance for Crew and obtain such permits, approvals, and visas to ensure that the Crew can enter into and work in the Location and any other relevant region(s);***

- *supervision and arranging of training of Crew (in respect of technical and STCW requirements of operations concerned);*

- *supervision of the efficiency of the Crew and administration of other crew matters as advance planning for Vessels' manning requirements;*

- *payment of on-board advances and allowances;*

- *on-board discipline, grievance procedures and dispute resolution;*

- *enforcement of appropriate standing orders;*

- ***the appointment of sub-agents and sub-contractors (where necessary) at ports of call within the Location.***"

Conclusion

[31] Based on the aforesaid reasons, the decision of the respondent with regard to the additional assessment for the year of assessment 2012, 2013 and 2014 is tainted with error of law and irrationality which warrants the intervention of this court.

[32] As such the applicant's application for judicial review is allowed with costs of RM5,000.00. The court allowed the relifs sought at paragraph 1(a), (b) (i) & (ii), (c), (d) & (e).

DATED THIS 29TH APRIL 2019

[NORDIN BIN HASSAN]
JUDGE
HIGH COURT SPECIAL AND APPELLATE POWERS
KUALA LUMPUR HIGH COURT.

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...for the Applicant

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...for the Respondent