MALAYSIA

IN THE HIGH COURT OF SABAH AND SARAWAK AT KUCHING

APPLICATION FOR JUDICIAL REVIEW NO. 5-2008-II

In the matter of an application for Judicial Review to apply for leave for Certiorari and other relief on and relating to a notice of assessment for the year of assessment of 1999 issued by the Director General of Inland Revenue dated 22.07.2008 under the provisions of the Income Tax Act, 1967 in respect of Zecon Toll Concessionaire Sdn Bhd

And

In the matter of an application for Judicial Review to apply for leave for Certiorari and other relief on and relating to notice of assessment for the year of assessment of 1999 issued by the Director-General of Inland Revenue dated 22.07.2008 under the provisions of the Real Property Gains Tax Act 1976 in respect of Zalpoint Corporation Sdn Bhd (now known as Zecon Toll Concessionaire Sdn Bhd)

And

In the matter of section 91 of the Income Tax Act, 1967 and section 15(1) of the Real Property Gains Tax Act 1976

And

In the matter of Orders 53 and 92 of the Rules of the High Court 1980

And

In the matter of paragraph 1 of the Schedule to the Courts of Judicature Act 1964

BETWEEN

ZECON TOLL CONCESSIONAIRE SDN BHD
8th Floor Menara Zecon
Lot 393 Section KTLD
Jalan Satok
93400 Kuching ... Applicant

AND

KETUA PENGARAH HASIL DALAM NEGERI
Lembaga Hasil Dalam Negeri
Cawangan Kuching
Tingkat 4, Wisma Bukit Mata
Jalan Bukit Mata
93100 Kuching ... Respondent

BEFORE THE HONOURABLE JUSTICE
Y.A. DATO' ABDUL AZIZ BIN ABDUL RAHIM

IN CHAMBERS

GROUNDS OF DECISON

This is the applicant's application for leave to apply for an Order of Certiorari to remove to this Court to quash two notices of assessments issued by the respondent to the applicant. The first notice of assessment is dated 22.7.2008 issued under the provisions of the Income Tax Act 1967

["the ITA 1967"] for the year of assessment for 1999. The second notice of assessment, also dated 22.7.2008, was issued to the applicant under the provisions of Real Property Gain Tax Act 1976 ["the RPGTA 1976"], for the year of assessment of 1999, also by the respondent. In the same application the applicant also applied for the stay of the operation of the two notices of assessments pending the conclusion of this judicial review.

The legal principles applicable in considering leave application for judicial review is stated in the Supreme Court's case of *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228,* as that the applicant must show prima facie that the application is not frivolous or vexatious and that on the grounds and evidence produced to support the application, the applicant has shown a prima facie arguable case for the grant of the relief sought.

To show prima facie an arguable case, the applicant should be able to demonstrate in the application that the decision to be quashed is tainted with illegality that is to say that "it is unlawful treatment" and therefore "it would be wrong to insist that the [applicant] exhausts his statutory right of appeal where one is available" : *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serba Guna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ* FC.

The Court in *Majlis Perbandaran Pulau Pinang* (supra) also recognized the principle that where a statute has provided an extensive appeal structure such as the Town and Country Planning Act 1976 and the ITA 1967, the Court is not precluded in appropriate cases from entertaining an application

for judicial review if the applicant can show that firstly, it is a faster and more convenient remedy. Secondly the decision maker, be it a public body or a public officer, had acted unfairly, abuse its powers or breach of natural justice or that the issues of public law raised are of general public importance going beyond the significance of the case itself.

It is no doubt a basic law that the granting of leave for judicial review is an exercise of Court's discretion. The approach to be taken in exercising this discretion, in the circumstances of the above stated case is explained by the Supreme Court in *Government of Malaysia & Anor v Jadgis Singh [1987] 2 MLJ 185* as follows:

> "A clear principle is reiterated here ie 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.".

Following the above principles, the Court of Appeal in *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri Malaysia [2008] 5 AMR 458* dismissed the appeal by the appellant for an application for certiorari holding that certiorari is a discretionary remedy and from which has

emerged the proposition that an application for such remedy will fail where there is an alternative remedy.

An executive decision may also be subject to judicial review if the decision is unreasonable and amounts to an irrationality as described by Lord Diplock in *Associated Provincial Picture Houses Limited v Wednesbury Corporation (1948) 1 KB 223*. That is to say that the decision made "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." : *Rama Chandran R v The Industrial Court of Ma;aysia & Anor [1997] 1 CLJ 147*, 172.

In this instant case the applicant had said in paragraph 36 of its affidavit in support of the application affirmed by Zainurin bin Ahmad affirmed on 29.8.2008 that the respondent had acted unreasonably and without or in excess of jurisdiction in raising the notices of assessments Form J and Form K both dated 22.7.2008 under the ITA 1967 and the RPGTA 1976 respectively. Both notices of assessments are collectively exhibited as Exhibit ZBA12 in the affidavit. The applicant also alleged that the respondent has committed a jurisdictional error or has exceeded its jurisdiction or has acted without jurisdiction when it raised the notices of assessments in Exhibit ZBA12. The applicant contended that the assessments were raised more than six years after the year of assessment 1999 in contravention of sections 91(1) and (3) of the ITA 1967 and sections 15(1) and (2) RPGTA 1976.

As to the grounds of irrationality and unreasonableness of the decision in raising the tax assessment as in the notices of assessments in Exhibit ZBA12 the applicant deposed in paragraph 40 of Zainurin bin Ahamd's affidavit in support as follows:

"I am advised by the Applicant's Advocates and I verily believe that the Applicant has a legal right to insist that the Respondent should not raise the notices of assessment (Form J and Form K) for the reasons set out below:

a) The Respondent committed a jurisdictional error and/or exceeded its jurisdiction and/or acted without jurisdiction when it raised the notices of assessment dated 22.07.2008 under the Act and the RPGT Act (referred to collectively as the "notices of assessment") more than 6 years after the Year of Assessment 1999 in contravention of Sections 91(1) and 91(3) of the Act and Sections 15(1) and 15(2) of the RPGT Act;

b) The Respondent failed to consider or adequately consider one or more of the following relevant factors, when deciding to issue the notices of assessment on the Applicant:

   i) The fact that at the time the CA was concluded on 17.07.1998, the Concession Land was not alienated to the Applicant;
   ii) The fact that the Concession Land was alienated by the Government to the Applicant's nominated companies and only in 1999;
   iii) The fact that the Applicant derived no income from the Concession Land in 1998;
   iv) The fact that the Applicant suffered a nett loss in 1998;
   v) The fact that the Applicant did nothing wrong to justify the Respondent invoking its powers to issue retrospective notices of assessment against the Applicant for the 1999 Year of Assessment after the expiry of more than 6 years after the said year of assessment.
   vi) The fact that the Applicant did nothing wrong to justify the Respondent imposing penalties on it; and/or
   vii) The fact that the Applicant was principally involved in turnkey construction and trading in real property and, as such, if there was disposal of the Concession Land (which is denied), such disposal was not subject to the RPGT Act.

c) The Respondent took into account one or more of the following irrelevant considerations, when it decided to issue the notices of assessment on the Applicant:

   i) The Respondent wrongly considered that the date the CA was concluded (i.e. 17.07.1998) was the date the Applicant derived income from the Concession Land;
   ii) The Respondent wrongly considered that the profit derived from the sale of the Concession Land by the Applicant to its nominated companies pursuant to the Sale and Purchase Agreements dated 15.01.1999 were subject to the RPGT Act; and/or
   iii) The Respondent wrongly considered that the date the CA was concluded (i.e. 17.07.1998) was the date the Concession Land was alienated to the Applicant or,

alternatively, was the date the Applicant derived a benefit from the Concession Land.

d) The Respondent issued notices of assessment with penalties that are wholly disproportionate to any alleged wrong which the Respondent claims the Applicant has committed (which is denied);

e) The Respondent acted unreasonably and/or irrationally in imposing the penalties on the Applicant in its notices of assessment without providing any reasons for each penalty;

f) The Respondent acted unreasonably and/or irrationally in imposing penalties in its notices of assessment when the Applicant did nothing wrong to justify the imposition of such a penalties;

g) The Respondent failed to provide any reasons, tax computation, calculations or supporting information to the Applicant in the notice of assessment dated 22.07.2008 issued under the Act to explain how the computation in the said notice was derived. As such, the Respondent has failed to fulfil its obligation to provide the Applicant with a reasoned decision for issuing the said notice of assessment under the Act.

h) The Respondent's failings as set out in paragraphs 40(a), (b), (c), (d), (e), (f) and/or (g) show that its action in issuing the notices of assessment were so unreasonable and/or irrational that no other competent taxing authority would have issued the said notices."

At this point a brief accounts of the background facts will be helpful. The applicant was incorporated on 28.8.1997 and commenced business on 25.2.1998. Its principal activities are turnkey construction, trading in real property and Toll concession. On 17.7.1998 the applicant entered into a concession agreement with the Government of Sarawak to design, build, operate and maintain a bridge and associated works for the Government. Under the concession agreement, the applicant was granted a concession inter alia to demand, collect and retain Toll for its own benefit from Toll paying vehicles using the Bridge and the associated works. In addition the Government promised within six months of the date of signing the agreement to alienate or cause to be alienated several parcels of land [concession lands] identified in Appendix B of the agreement under a ninety

nine year lease. The applicant was given unfettered and absolute rights to develop the concession lands.

On 15.1.1999 and pending the alienation of the concession lands the applicant entered into three sale and purchase agreements [Exhibit ZBA 3] to sell the concession lands to third parties named in the agreement.

The concession lands was alienated to the applicant only from the month of February 1999 till November 1999. The letter from the Ibu Pejabat, Lands and Surveys Department Kuching granting the approval for the alienation lands to the nominated companies was dated 30.1.1999. The letter is exhibited as Exhibit ZBA4. Therefore the applicant claimed that the sale of the concession lands was a conditional because on the date of the sale and purchase agreements the applicant has no rights or interest over the concession lands. The applicant also exhibited Exhibit ZBA6 which are 4 land titles for the concession lands sold by the applicant to the nominated companies and these titles were dated 2.2.1999, 3.3.1999 and 17.11.1999 (two titles). Based on the dates on the issue of title the applicant contended that the concession lands was alienated only from 2.2.1999. Prior to that date the applicant had no right or interest or otherwise own the concession lands.

As for the applicant's business, the applicant exhibited Exhibit ZBA5 which is a copy of the applicant's Profit and Loss Account and balance sheet as at 31.12.1998. The account showed that the applicant suffered a net loss of RM188,058.00 for the year 1998 after commencing business on

25.2.1998. Therefore the applicant contended that no tax is payable for the year of 1999 the basis year of which was 1998.

On the foregoing background as to the applicant's business and transactions, the applicant was issued with notices of assessment as in Exhibit ZBA12, which the applicant claimed to be unreasonable and illegal.

The reasons given by the applicant for saying so are stated in Zainurin's affidavit in support as follows:

"19 The Notice of Assessment dated 22.07.2008 (Form J) issued pursuant to the Act specifies that for the Year of Assessment 1999 (basis year 1998) the taxable income of the Applicant was RM136,461,927. No tax computation accompanied the said Notice of Assessment, and there was also no other information showing how the alleged taxable income was arrived at.

20 Based on the alleged income a tax of RM38,209,339.56 was imposed on the Applicant. Additionally the Respondent also imposed on the Applicant a penalty of an equivalent amount pursuant to Section 113(2) of the Act. I verily believe that in the absence of any tax computation or supporting information, the assessment of tax was without basis and was a mere conjecture. Furthermore I also verily believe that the imposition of the penalty under Section 113(2) of the Act was also unjustified. Section 113(2) of the Act reads as follows:

"S.113 Incorrect returns

(2) Where a person -
(a) makes an incorrect return by omitting or understanding any income of which he is required by this Act to make a return on behalf of himself or another person; or
(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under section (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged it the return or information have been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under section 124(3), so much, if any, of the penalty as has not been

abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1)."

21 The Applicant also did not make any incorrect return by omitting or understanding income or give any incorrect information in the Year of assessment 1999.

22 Hence based on the above grounds, I am advised and verily believe that the Notice of Assessment for the year of assessment 1999 (Form J) is without basis, unjustified and totally unfair. In issuing the said Notice of Assessment the Respondent is guilty of misuse of power.

Under Real Property Gains Tax Act 1976 ("the RPGT Act")

23 In relation to the Notice of Assessment dated 22.07.2008 (form K) issued pursuant to Section 15(1) of the RPGT Act, the Respondent assessed the Applicant to tax in the amount of RM8,898,000.00. Additionally the Respondent also imposed on the Applicant a penalty of an equivalent amount pursuant to Section 29(3) / Section 30(2) of the RPGT Act. The total tax for Form K is therefore RM17,796,000.00. My Advocates advised me and I verily believe that strictly speaking, there is no disposal of any real property or chargeable asset, and thus, there is no chargeable gain to trigger the RPGT Act. Alternatively, if there was disposal of real property or chargeable asset (which is denied), the disposal was made in the course of business of the Applicant and any surplus should be subjected to tax pursuant to section 4(a) of the Act.

24 The Applicant is principally involved in turnkey construction and trading in real property as stated in the statutory accounts for the financial year ended 31.12.1999 as well as in Memorandum of Association. A copy of the statutory accounts for the financial year ended 31.12.1999 is now produced, shown to me and exhibited hereto marked as "ZBAT".

25 The lands were also classified as stocks in the Applicant's books. A copy of an extract of the Applicant's Books is now produced, shown to me and exhibited hereto marked as "ZBA8".

26 The Applicant sold the lands to make a profit, but the lands were never held in its name.

27 The Applicant also assisted its nominated company, Zalpoint Tanah Putih Sdn Bhd, to obtain the planning approval from the State Planning Authority / Lands & Surveys Department to develop Lot 742 and Lot 7398 for commercial purposes. A copy of the letter dated 28.10.2000 from Akiklient Team Sdn Bhd is now produced, shown to me and exhibited hereto marked as "ZBA9" and a copy of the approval letter f[ro]m the Land & Survey Department dated 17.10.2000 is now produced, shown to me and exhibited hereto marked as "ZBA10".

28 The above facts displayed the existence of badges of trade, and it is contended that if there were "disposal" of land (which is denied) such disposals of lands should be subjected to the Act and not the RPGT Act. Hence the profit on the sales of the land should be subjected to the Act and not the RPGT Act.

29 Sections 29(3) and 30(2) of the RPGT Act provide as follows:

"29 Failure to notify or make return of disposal

(3) Where in relation to a year of assessment a person fails to make a return required by section 13(1) or fails to make a declaration under section 13(5) and no prosecution under subsection (1) has been instituted in relation to that failure -

a. the Director General may require that person to pay a penalty equal to treble the amount of the tax which is payable for that year; and

b. if that person pays that penalty (or, where the penalty is abated or remitted under section 40(3) so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under section (1).

30. Incorrect returns. Etc.

(2) Where a person makes an incorrect return or gives other incorrect information in the matter described in section (1)(a) or (b), the Director General may, if no prosecution under subsection (1) has been instituted in relation to the incorrect return or incorrect information, require that person to pay a penalty equal to the amount of the tax which has been undercharged in consequence of the incorrect return or information or which would have been undercharged if the return or information had been accepted as correct, and if that person pays that penalty (or, where the penalty is abated or remitted under section 4)(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1)."

30. The Respondent did not commit any of the above mentioned acts, hence the imposition of the penalty under the Notice of Assessment dated 22.07.2008 (Form K) is unjustified, baseless and totally unfair.

<u>Under Income Tax Act 1967 & Real Property Gains Tax Act 1976</u>

31 Both notices of assessment (Form J and Form K) were raised at a time which is more than 6 years from the year of assessment which the income or chargeable gain of the Applicant was alleged to have arisen i.e. basis year 1998 or Year of Assessment 1999 in respect of Form J and Form K.

32 Section 91(3) of the Act reads:

"S.91 Assessments and additional assessments in certain cases.

(4) The Director General where it appears to him that -
(a) any form of fraud or wilful default has been committed by or on behalf of any person; or
(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question."

33 Section 15(2) of the RPGT Act provides as follows:

"S. 15 Additional assessments

The Director General, where it appears to him that a person chargeable with the tax has been guilty of any form of fraud or willful default in connection with or in relation to the tax, may at any time make an assessment in respect of that person for the purpose of making good any loss of the tax attributable to the fraud or wilful default."

34 Under both sections 91(3) of the Act and 15(2) of the RPGT Act an assessment can only be made beyond a period of 6 years from a year of assessment if a taxpayer has been guilty of any form of fraud, wilful default or is negligent. The Applicant has not been guilty of any of the aforesaid misconduct because since the date of commencement of business the Applicant had regularly submitted its tax returns and paid whatever tax, which was due.

35 I wish to disclose that in the Year of Assessment 2000, the Applicant had understated its income due to difference in approach for certain tax treatment of its income. However the tax on the understatement of income together with penalty were paid to the Respondent pursuant to an agreement entered into by the Applicant and the Respondent pursuant to section 96A(1) of the Act. A file copy of the Agreement pursuant to Section 96A(1) of the Income Tax Act 1967 between the Respondent and the Applicant is now produced, shown to me and exhibited hereto marked as "ZBA11".

To my mind the claim of unreasonableness and illegality in Zainurin's affidavit regarding the notices of assessment are issues of mixed facts and

law. Such issues are within the purview of the Special Commissioners to decide. I think on the authorities cited and referred to above as to the jurisdiction of the Courts to allow judicial review of cases where Special Commissioners also have the jurisdiction to deal with on an appeal to it, the Court should be slow to take away that jurisdiction from the body or tribunal specially established by statute to deal with those kind of cases. On the authority of *Govt. of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185* my opinion is that the Court's discretion in such cases must be exercise sparingly and only in cases where it 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'. A similar approach was taken by the Court of Appeal in *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri Malaysia* (supra) where it was held that certiorari is a discretionary remedy and from which has emerged the proposition that an application for such remedy will fail where there is an alternative remedy. It was also said in that case that where there is an appeal procedure available. To the applicant, as in this instant case, certiorari should not normally issue save in exceptional circumstances. On the facts and circumstances of this case I cannot find any exceptional circumstances to justify the exercise of the discretion in favour of the applicant.

It is also my view that the Special Commissioners is seised with the necessary authority and power to deal with the matter as in the instant case that is referred to it and that that special body constitutes a wholly adequate machinery for the just disposal of the complaint in question. That being so the utilization of the alternative domestic remedy intended for such matters as the present should be preferred: *Syarikat Berkerjasama-sama*

Serbaguna Sungai Gelugor Dengan Tanggungan Berhad v Majlis Perbandaran Pulau Pinang [1966] 3 CLJ 336, 373.

As to the issue of illegality and unreasonableness relating to the issuance of the notices of assessment after a period of six years, the Director General of Income Tax has the power under section 91 of the ITA 1967 and section 15 of the RPGT Act 1976 to issue such notices for additional taxes. And in *Kerajaan Malaysia v Dato' Hj. Ghani Gilong [1995] 2 MLJ 119* the Federal Court reaffirmed the proposition that the Special Commissioners are Judges of facts with the function of determining whether there has been fraud or willful default. Further, the Court in that case has pronounced that *'[I]n our view, the High Court has no power to entertain a plea of limitation under section 91(1) and (3) of the Act advances by the taxpayer. However, the Special Commissioners have such power.'*. The Federal Court reasoned that if the High Court were to be allowed to decide on the question of limitation it would prevent the Special Commissioners from deciding the same question as they would regard themselves bound by the decision of the High Court and thereby abdicating their fact finding function of determining whether there has been fraud or wilful default within the meaning of section 91(3) of the ITA 1967. Furthermore, the Federal Court reasoned that even if the Special Commissioners do not regard themselves bound by the High Court's decision, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the identical question of limitation.

It is also not the law that the Director-General of Income Tax is required to give reasons or to state the basis of his raising the assessment. There is no

such provisions in the ITA 1967 and the RPGTA 1976 that requires the Director General of Income Tax to do so. The taxpayer is presumed to be generally acquainted with his own affairs and should be able to discharge the burden of proving that the assessments were wrong as all the facts are within the taxpayer knowledge : *ABC v CIT, Singapore [1959] 2 MLJ 162.*

Learned counsel for the applicant correctly submitted that the onus to prove wilful default or fraud is on the Director-General of Income Tax. However once this onus is discharged the burden of proving that the assessment were excessive or erroneous shifts to the taxpayer : *Arumugan Pillai v. Director General of Inland Revenue [1981] 1 MLJ 171.*

Now, perusal of the notice of appeal by the applicant to the Special Commissioners indicates that the applicant is aware of the issues raised in the assessment. The applicant knew which provisions of the ITA 1967 and RPGTA 1976 that the Director-General of Income Tax was relying on and they have also briefly summarized the reasons why the assessment were excessive. Therefore, I agree with the submissions by the respondent counsel that it is incorrect to conclude that the applicant has not been given the basis of the assessment.

It is trite that in hearing a certiorari application the Court sits in a supervisory jurisdiction; and the Court is only concerned with the manner the decision is arrived at but not the decision itself (unless it can be shown that the decision itself is illegal and not allowed in law) : *Ta Wu Realty* (supra).

For the above reasons, I shall refuse the applicant's leave for judicial review. Costs to the respondent and costs to be taxed unless agreed.

Dated this 3rd day of February 2009.

Sgd.

(Y.A. DATO' ABDUL AZIZ BIN ABDUL RAHIM)
Judge
High Court II Kuching

Date of Judgment	:	6.11.2008
Date of Hearing	:	23.10.2008 and 6.11.2008
For Applicant	:	Mr. Albert Tang, Messrs. Chew Jugah, Wan Ullok & Co., Advocates, Kuching.
For Respondent	:	Mr. Muazmir bin Mohd Yusuf, Revenue Counsel, Lembaga Hasil Dalam Negeri, Kuching.

SALINAN DIAKUI SAH
DIBEKALKAN KEPADA
Messrs Chew Jugah, Wan Ullok & Co., Adv.
.....
4 Feb 2009
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LAU KIAT HIONG
Setiausaha Kepada
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