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Judicial Review: Leave To Set Aside The Minister's Decision In A Tax Matter

CIL v Menteri Kewangan Malaysia

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Recently, a Labuan company taxpayer successfully obtained leave to apply for an order for the Minister of Finance (MOF) to exercise his power under Section 135 and/or Section 127(3A) of the Income Tax Act 1967 (ITA) to set aside or exempt the disputed notices of additional assessment raised by the Director General of Inland Revenue (DGIR). The High Court also granted a stay order which means the payment of the disputed taxes is stayed until the matter was determined by the High Court.

The taxpayer was successfully represented by our Tax, SST & Customs Partner, S. Saravana Kumar together with our tax associate, Kar Ngai Ng.

Brief Facts

The taxpayer has held units in a Malaysian real estate investment trust (REIT) since the year 2010 and has been obtaining loans from a non-resident company in order to acquire units in the REIT since the year 2010.

The taxpayer, being a Labuan company, enjoyed tax incentive under the Income Tax (Exemption) (No. 22) Order 2007 (Exemption Order). Consequently, the taxpayer did not subject the interest in relation to the loans paid to the non-resident company to withholding tax since the year 2010. The taxpayer also did not elect to be taxed under the ITA for the relevant years of assessment.

The DGIR took the position that the deduction for interest expense incurred by the taxpayer on the loans obtained from the non-resident company should be disallowed on the basis that the relevant loan interest payments to the non-resident company were not subjected to withholding tax. Subsequently,

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the DGIR raised the impugned assessments for more than RM120 million against the taxpayer.

Being aggrieved by the assessments, the taxpayer submitted an application to the MOF to exercise its power to set aside or exempt the assessments raised against the taxpayer. The MOF did not respond to the taxpayer's letter and in doing so, decided not to issue the direction and/or exempt the arbitrarily raised assessments. As the MOF had failed to respond to the taxpayer's request, the taxpayer applied for judicial to preserve its legal rights.

The High Court's Ruling

The High Court allowed the taxpayer's application for leave to commence judicial review based on the following arguments which establishes that the taxpayer's application was not frivolous or vexatious:

- (a) The ordinary threshold for leave is extremely low with the sole question being whether or not the application is frivolous. The threshold that has to be satisfied by the taxpayer is merely that there is an arguable case for the relief claimed.
- (b) The MOF in exercising a quasi-judicial function or purely an administrative function as a public decision-maker has no jurisdiction to commit an error of law. If the MOF does make such an error, then he exceeds his jurisdiction and his decisions will not be immune from judicial review.
- (c) The MOF had failed to consider that the DGIR had committed an error of law by failing to apply the following legal principles:
 - (i) Since the taxpayer is a company situated in Labuan, the applicable statute would be the Labuan Business Activity Tax Act 1990 (LBATA), amongst others:
 - a. Section 3 of the LBATA states that a Labuan entity carrying on a Labuan business activity shall be charged to tax in accordance with

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the LBATA for each year of assessment in respect of that Labuan business activity;

- b. Section 3A of the LBATA provides that a Labuan entity carrying on a Labuan business activity may make an irrevocable election in the prescribed form that any profit of the Labuan entity for any basis period for a year of assessment and subsequent basis period to be charged to tax in accordance with the ITA in respect of that Labuan business activity;
- c. Section 2(3) of the LBATA provides that the provisions of the ITA shall apply only to a Labuan business activity carried on by a Labuan entity which makes an election under Section 3A of the LBATA; and
- d. Section 3B of the ITA stipulates that tax shall not be charged under the ITA on income in respect of a Labuan business activity carried on by a Labuan company, other than a Labuan company which has made an election under section 3A of the LBATA.

It is not disputed that the taxpayer was a Labuan company carrying on a Labuan business activity at the material time. Further, the taxpayer had not made an irrevocable election to be charged to tax in accordance with the ITA for the relevant years of assessment. As such, the tax treatment of the taxpayer would be subjected to the LBATA and there is no basis for subjecting the taxpayer to the provisions of the ITA.

- (ii) In *Syarikat Pendidikan Staffield Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 CLJ 916, the High Court held that once the taxpayer has satisfied all the conditions under an exemption order, an effect must be given to the exemption order and a taxing authority is not allowed to disregard such exemption arbitrarily.

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In the present matter, the taxpayer had satisfied all the conditions under the Exemption Order. Therefore, pursuant to paragraph 5 of the Exemption Order, the taxpayer should be exempted from paying any withholding tax on the interest payments received by the non-resident person.

- (iii) The MOF's silence can amount to a decision amenable to judicial review under Order 53 of the Rules of Court 2012 which provides for a wider ambit of reviewable decisions as opposed to the previous position under the Rules of the High Court 1980.

Commentary

This ruling is the first tax case in Malaysia where the High Court has exercised its jurisdiction to allow a taxpayer to seek recourse by way of judicial review for the MOF to exercise his power under Section 135 and/or Section 127(3A) of the ITA.

Authored by Kar Ngai, an Associate with the firm's Tax, SST & Customs practice.

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- Construction & Arbitration
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