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Taxpayer Succeeds In Striking Out The Revenue's Appeal

Ketua Pengarah Hasil Dalam Negeri v KMBH

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdsllawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
☎ +603 6209 5404
✉ sara@rdsllawpartners.com

Last week, the High Court allowed an application by a taxpayer to strike out an appeal commenced by the Director General of Inland Revenue (DGIR). This matter highlights the consequence of non-compliance with the mandatory provisions of the Income Tax Act 1967 (ITA) and the Rules of Court 2012 (ROC) during the course of pursuing an appeal against the decision of the Special Commissioners of Income Tax (SCIT).

This taxpayer was successfully represented by the firm's Tax, SST & Customs Partner, S. Saravana Kumar, together with associate, Brandon Chee Ken Wei.

Background Facts

The taxpayer company is engaged in the plantation business and was previously listed on the main board of the Kuala Lumpur Stock Exchange. The taxpayer appealed against the additional tax assessments raised by the DGIR amounting to more than RM 19 million, where the issue was whether the taxpayer may deduct under Section 33(1) of the Income Tax Act 1967 (ITA), the interest and other related financial expenses incurred in relation to various financial arrangements undertaken by the taxpayer.

In 2014, the SCIT had in majority decided in favour of the taxpayer and found that the interest and other related financial expenses such as the procurement of loans for investment and refinancing incurred by the taxpayer were deductible under Section 33(1). The Deciding Order was issued by the SCIT on 5.9.2014 and subsequently served on the DGIR on 11.3.2015. Aggrieved by the decision of the SCIT, on 23.3.2015, the DGIR filed a Notice of Appeal by way of a case to be stated for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 of the ITA.

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Upon filing the Notice of Appeal to the High Court, the DGIR did not serve the said Notice of Appeal on the taxpayer or the taxpayer's solicitors within the prescribed time period stipulated under the ITA and the ROC. Due to the failure of the DGIR to serve the Notice of Appeal within the stipulated time period, the taxpayer filed an application to strike out of the appeal before the High Court.

The Taxpayer's Submission

During the hearing of the taxpayer's application for striking out before the High Court, the taxpayer's arguments can be summarised as follows:

- Pursuant to paragraphs 42 and 42A Schedule 5 of the ITA and Order 55 Rule 3(4) of the ROC, the time period for the DGIR to serve the said Notice of Appeal upon the taxpayer is 21 days after the receipt of the Deciding Order by the DGIR. The DGIR had failed to comply with the provisions of the ITA and the ROC in effecting service of the Notice of Appeal within the stipulated period, which lapsed on 1.4.2015.
- It is a mandatory requirement for the Notice of Appeal to be served to the taxpayer and a non-compliance on the part of the DGIR may render the appeal to be fatal and/or struck out because an appeal is only brought into existence when the said Notice of Appeal is served on all the affected parties. This is illustrated in the case of ***Ketua Pengarah Hasil Dalam Negeri v Continental Automotive Instruments (M) Sdn Bhd [2015] 9 MLJ 857***, whereby the High Court held

"Although no time limit is provided for under para 35, within which the appellant has to serve a copy of the notice of appeal, by paras 42 and 42A of Schedule 5, it can be implied that the appellant has to serve it on the respondent within the same period for the filing of such notice to the SCIT, that is within 21

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days after the service of the Order of the SCIT on the appellant.

The time limit to serve the notice of appeal is 21 days from the date the order of the SCIT was served on the appellant (as provided for by para 35 of Schedule 5) Since this notice of appeal was not served on the respondent within the said period, the appeal filed was not properly brought before this court. As such the application by the respondent is allowed and the appeal is struck out...”.

- In such circumstances, the DGIR had failed to make an application for an extension of time to serve the notice of appeal out of the prescribed time. Even at the time of the hearing before the High Court, the DGIR had not served the Notice of Appeal upon the taxpayer.
- The DGIR's failure to comply with the mandatory provisions under the ITA and the ROC has inadvertently caused prejudice to the taxpayer as the taxpayer was not aware of the appeal brought by the DGIR and conducted its financial affairs as if there was no further appeal by the DGIR.
- Relying upon the express provisions of the ITA and the Federal Court cases like **Director-General of Inland Revenue v R [1976] 1 MLJ 173** and **Merck KGaA v Leno Marketing (M) Sdn Bhd (Registrar of Trade Marks, interested party) [2018] 5 MLJ 1**, the SCIT is a Subordinate Court and therefore, the ROC applies to the present appeal before the High Court.

The DGIR's Submissions

The arguments for the DGIR can be summarised as follows:

- Under Order 55 of the ROC, the title expressly provides for 'Appeals to High Court from the Subordinate Courts'. The SCIT is not a Subordinate Court and therefore, the current appeal is not subject to Order 55 Rule 3(4) of the ROC as the SCIT is in fact an inferior tribunal established under the ITA. In this regard, the

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DGIR relied on the Federal Court case of **JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners) [2019] 3 MLJ 561** where it was held that:

“In Malaysia today, there are several statutory adjudicatory bodies that have decision-making powers in disputes between parties like the Special Commissioner of Income Tax or the Labour Tribunal under the Employment Act 195, the Industrial Court establish under s 21 of the Industrial Relations Act 1967, the Custom Appeal Tribunal (CAT) establish under the Custom Act 1967 or the Competition Appeal Tribunals established under s 44 of the Competition Act 2010. They are adorned with similar trappings as a court but are not strictly ‘courts’ within the meaning of Art 121 of the FC”.

- In order for the High Court to determine the procedures for appeal from the SCIT to the High Court, the High Court is bound to refer to the statutory provisions governing the SCIT which is the ITA.
- There is no mandatory requirement provided under the ITA for the DGIR to serve the Notice of Appeal to the taxpayer and such non-service of the Notice of Appeal will not in any way render the Notice of Appeal to be defective. The construction of paragraph 34 and 35 Schedule 5 of the ITA expressly provides that a Notice of Appeal shall be filed to the SCIT and there is no requirement mentioned that the same must be served to the opposing party.
- The High Court can exercise its discretion to regularise the present proceedings as the failure to serve the Notice of Appeal is only a technical non-compliance and shall not obstruct the process of giving justice by virtue of Order 2 Rule 1 of the ROC.

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S Saravana Kumar
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- The High Court is not bound by the decision of the High Court in *Continental Automotive Instruments* (supra).

Commentary

Upon hearing the submissions by both parties, the High Court allowed the taxpayer's application to strike out the DGIR's appeal. The decision of the High Court affirms the principle enunciated in the case of *Continental Automotive Instruments* (supra) whereby although no time limit is provided for under paragraph 35 of Schedule 5 of the ITA indicating that the party appealing to the High Court must serve a copy of the Notice of Appeal. By virtue of paragraphs 42 and 42A of Schedule 5 of the ITA, the Notice of Appeal must be lodged and served within 21 days after the receipt of the Deciding Order of the SCIT. In the present matter, although the Notice of Appeal was filed within time but not served on the taxpayer, the appeal is not considered to have been properly constituted.

The present case further sheds light upon the standing of the SCIT as a Subordinate Court whereby the procedures in relation to appeals to the High Court from Subordinate Court under Order 55 of the ROC must be adopted.

Authored by Brandon Chee Ken Wei, an Associate with the firm's Tax, SST & Customs practice.

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