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Judicial Review: Taxpayer Successfully Challenged Minister's Refusal To Grant Tax Incentives

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Recently, the High Court allowed the application for judicial review by BHP (a company) to quash the Minister of Finance's (Minister) decision to reject BHP's application for pre-package tax incentives scheme. BHP had applied for pre-package tax incentives scheme under the Income Tax (Exemption) (No. 12) Order 2006 (Exemption Order).

BHP was successfully represented by our Tax, SST & Customs Partner, S. Saravana Kumar.

Brief Facts

BHP owns, operates and maintains a 1,285 MW Hydroelectric Power Plant located at Kapit (Project). In 2017, BHP applied to the Minister for pre-package tax incentives scheme to be granted to the Project under the Exemption Order. Subsequent to several correspondence between the parties, the Minister arbitrarily rejected BHP's application for pre-package tax incentives scheme to be granted under the Exemption Order. The Minister in the rejection letter merely stated that BHP's application for the pre-package tax incentives scheme was not approved. The Minister did not provide any reasons or justifications for his decision.

Being aggrieved by the Minister's decision, BHP applied for judicial review to set aside the said decision.

High Court Ruling

The High Court allowed BHP's application for judicial review and accepted the arguments advanced on behalf of BHP that:

- (a) The Exemption Order is a subsidiary legislation made under the Income Tax Act 1967 (ITA) and, as such, would be equally applicable as the ITA. Therefore, the Minister must give effect to the Exemption Order where relevant and applicable as the Minister would with any provisions of the ITA.

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- (b) The Exemption Order would be relevant and applicable if the conditions for such exemption are satisfied. The Minister must give effect to the Exemption Order as held in *Syarikat Pendidikan Staffield Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 CLJ 916.
- (c) A subsidiary legislation such as the Exemption Order is to be read as a whole to ascertain the intention of the Parliament in enacting such law. This principle was applied in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and Another Case* [2017] 3 MLJ 561 and *Asia Pacific Higher Learning Sdn Bhd (registered owner and license of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1.
- (d) The requirements for the exemption under the Exemption Order have been satisfied as follows:
 - (i) BHP is a company resident in Malaysia.
 - (ii) BHP had incurred capital expenditure on plants used for the provision of services, i.e. qualifying capital expenditure.
 - (iii) BHP is not granted any other incentives listed under the Exemption Order.
- (e) Due regard must be given to the Indian cases on the enforcement of policies, i.e. exemptions, incentives and/or concessions implemented by the authorities that the executive is bound by the legislation enacted by the legislature.
- (f) The Minister must take into account all factors and circumstances of the case and should not act mechanically as held in *Awang Tengah Ag Amin v Sabah Public Service Commission & Anor* [1998] 2 CLJ Supp 409. Had the Minister applied his mind to the facts and circumstances of the matter, it would have approved BHP's application for the pre-package tax incentives scheme and given effect to the Exemption Order.
- (g) Further, the Minister does not have unfettered discretion when it comes to decision-making. The Minister as a public decision maker is required to exercise his

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discretion fairly and reasonably at all material times following the decision in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

- (h) It was decided in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265 and *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495 that a public decision-making body has a duty to provide reasons.
- (i) The failure of the Minister to give reasons has deprived BHP of basic fairness. This is on the basis that without any reasons given, BHP would not be able to be informed of the reasons for the decision of the Minister.
- (j) Further, as the Minister failed to give any reasons for its decision, it would be open for the court to conclude that the Minister had no good reasons. The root of such inference is drawn from the House of Lords' decision in *Padfield and Others v Minister of Agriculture, Fisheries and Food and Others* [1968] AC 997, which has subsequently been applied by our courts in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Another Appeal* [1996] 1 MLJ 481 and *MUI Finance Berhad v Menteri Kewangan, Malaysia* [1994] 2 CLJ 630.
- (k) Additionally, it is trite administrative law that a decision would be liable to be quashed for unreasonableness if it so unreasonable that no reasonable decision maker could have arrived at it. If the Minister had applied his mind to the facts and circumstances of the case in the manner of a reasonable decision maker, it would have arrived at the proper conclusion that there is no basis to reject BHP's application for the pre-package tax incentives scheme.

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Commentary

This ruling is believed to be the first tax case in Malaysia where the taxpayer has successfully challenged the Minister's refusal to grant a tax incentive. The High Court agreed with the taxpayer that since all the requirements under the Exemption Order have been met, the Minister's refusal to give effect to the Exemption Order is erroneous in law.

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This decision highlights that public authorities such as the Minister do not have a discretion as to whether the exemption should be granted if all the requirements under an exemption order are satisfied. Further, it affirms the principle that a public decision-making body is under a duty to provide reasons. The failure of a public decision maker to provide reasons for its decision leads to the inference that its decision is made without any premise under the law.

Authored by Kar Ngai Ng, an Associate with the firm's Tax, SST and Custom department.

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