2 AUGUST 2021

Leave For Judicial Review & Stay Order Granted To Taxpayer By The Court Of Appeal

MEMB v Ketua Pengarah Hasil Dalam Negeri

Contact Persons:

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

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

On 19.7.2021, the Court of Appeal unanimously allowed the taxpayer's appeal against the High Court's dismissal of its application for leave for judicial review (Appeal Against Leave). The Court of Appeal also granted a stay of proceedings and enforcement of the disputed tax assessments raised by the Director General of Inland Revenue (DGIR) until the merits of the taxpayer's judicial review application is determined at the High Court.

The taxpayer was successfully represented by our Tax, SST & Customs Partner, S. Saravana Kumar together with associates, Chew Ying, and Sophia Choy.

This alert summarises the facts of the appeal and the arguments advanced by both parties.

Brief Facts

The taxpayer is a public listed company incorporated in Malaysia, principally engaged in the business of providing oil and gas, marine, infrastructure, civil and structural engineering contract work. In the course of its business, the taxpayer engaged the services from subcontractors to carry out its projects and had incurred expenses (Project Expenses).

In 2019, the DGIR concluded its tax audit and issued its audit findings letter to the taxpayer. The DGIR disallowed the deduction of the Project Expenses under Section 33(1) of the Income Tax Act 1967 (ITA) and adjusted the losses the taxpayer had surrendered to its related company under the group relief provision (i.e. Section 44A of the ITA) in the relevant years of assessment. The DGIR took the position that the Project Expenses are provisional in nature, hence they are not deductible under Section 33(1) of the ITA.

Via various letters, the taxpayer provided supporting documents and explained that:

- The Project Expenses should be deductible under Section 33(1) of the ITA on the basis that the expenses need not be disbursed for it to be regarded as incurred for income tax purposes. As long as the expenses had been accrued, it is eligible for tax deduction.

- The DGIR had no basis to invoke both sub-provisions of Section 44A (9) of the ITA against both the taxpayer as well as its related company that had claimed losses under the group relief. This is because of the word, "or" which meant that the DGIR may only assess the company claiming the losses.

- However, the DGIR raised tax assessments not only against the taxpayer but also against both the taxpayer being the surrendering company and the related company which claimed the group relief.

Aggrieved by the DGIR's decision, the taxpayer filed a judicial review at the High Court. The High Court granted an interim stay pending the hearing of the leave application. Subsequently, the High Court dismissed the taxpayer's application to commence judicial review on the basis that the taxpayer should have raised its grievances before the Special Commissioners of Income Tax (SCIT) as provided under Section 99(1) of the ITA. However, the High Court granted the taxpayer a further stay order pending the disposal of the taxpayer's appeal to the Court of Appeal.

The only issue before the Court of Appeal was whether the High Court had erred in dismissing the taxpayer's application for leave for judicial review. The taxpayer's arguments at the Court of Appeal, among others, are as follows:

- The existence of domestic remedy (i.e. appeal to SCIT) is not a bar to judicial review. It is a well-recognised principle that judicial review remains available even where there is an alternative remedy when exceptional circumstances exist.

- Thus, issue of domestic remedy goes to the merits of the judicial review application and should not be dealt with at the leave stage of the judicial review.

- Leave should be granted as exceptional circumstances exist as the DGIR had committed an error of law in raising the disputed notices of assessment against the taxpayer and the related company which claimed the tax losses.

- In arriving at the decision, the DGIR had failed to give effect to the provisions of the ITA and case law which are binding on the DGIR. As such, the questions to be determined in the judicial review application are of legal nature.

- The taxpayer's judicial review application has met the low threshold for leave to be granted, whereby it is neither frivolous nor vexatious.

- The DGIR's objection to the taxpayer's judicial review application mainly on the issue of the availability of domestic remedy is premature.

The DGIR's Arguments

The counsels for the Attorney General and the DGIR argued that the taxpayer's Appeal against Leave is devoid of merits as the taxpayer should have exhausted the domestic remedy provided under Section 99(1) of the ITA (i.e. appeal to the SCIT) instead. They also argued that judicial review is not the proper forum of appeal against any assessment raised by the DGIR. Both the Attorney General and the DGIR also took the position that there were no exceptional circumstances warranting the leave for judicial review being granted in light of the domestic remedy available to the taxpayer.

The Court Of Appeal's Decision

Upon reading and hearing the parties' submissions, the Court of Appeal took the view that there were merits in the taxpayer's Appeal against Leave. The Court of Appeal unanimously

allowed the taxpayer's appeal and set aside the High Court's decision.

The Court of Appeal also granted a stay of proceedings and enforcement of the disputed tax assessments raised by the DGIR until the taxpayer's judicial review application is heard and disposed of at the High Court.

In arriving at its conclusion, the Court of Appeal agreed with the taxpayer's submissions and adopted the position as per the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 that the arguments pertaining to the availability of alternative remedy go to the merits of the matter. As such, this issue should be ventilated at the substantive stage of the judicial review application and ought never to be dealt with at the leave stage. The Court of Appeal also took the view that the existence of alternative remedy does not automatically oust the court's judicial review jurisdiction. The sole question to be determined at the leave stage is whether the judicial review application is frivolous.

Conclusion

This recent decision by the Court of Appeal reinforces the notion that any exercise of power by the government authorities (including the DGIR) is subject to legal limits. Judicial review application remains a viable route for aggrieved taxpayers to challenge arbitrary assessments made by the DGIR notwithstanding the appeal route to the SCIT. Taxpayers are entitled to choose its route in challenging the DGIR's decisions and neither should the Attorney General nor the DGIR dictate to taxpayers on their appeal rights.

Authored by Chew Ying, an associate with the firm's Tax, SST & Customs practice.

Contact Persons:

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

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