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Application For Leave For Judicial Review Allowed

XYZ v KPHDN (HC)

Recently, we successfully obtained leave for judicial review to quash the Inland Revenue Board's (**IRB**) decision to disallow an insurance company, XYZ, to deduct its Provision of Risk Margin for Adverse Deviation (**PRAD**) expenses under Section 60(5)(b)(i) of the Income Tax Act 1967 (**ITA**). The IRB objected to the judicial review application on the ground that there is an alternative remedy of appeal under the ITA.

Upon hearing both parties, the High Court allowed our leave application and dismissed the IRB's objection. The court also granted a stay order against the payment of the disputed taxes until the matter was heard and determined by the court. Our lawyers from the firm's Tax, SST & Customs Practice successfully represented XYZ.

Facts

Under Section 60(5)(b)(i) of the ITA, claims incurred by an insurer under its general policies in the basis period are allowed as a deduction. In the present case, the IRB had disallowed XYZ to deduct its PRAD expenses, as the it is of the view that PRAD is a provision which contains an element of uncertainty, and which therefore has not been incurred. As the taxpayer was aggrieved by the IRB's decision and the amount of disputed taxes was substantial, the taxpayer applied for judicial review.

The legal position where there is an alternative remedy is that leave for judicial review will only be granted in exceptional circumstances. These exist in the form of:

-) A clear lack of jurisdiction; or
-) A blatant failure to perform some statutory duty; or
-) A serious breach of the principles of natural justice.

Therefore, the sole issue which arose for determination is whether a special circumstance exist in the present case.

High Court's Ruling

The High Court allowed our application for leave for judicial review and accepted the arguments advanced on behalf of XYZ that:

-) The decisions of our courts have settled the law in respect of the meaning of the word “incurred”, whereby expenses incurred by a taxpayer are deductible in that basis period so long as there is an obligation to pay. In other words, actual disbursement of the expenses is not required;
-) By its impugned decision, the IRB had failed to adhere to the clear wordings of the ITA and had further failed to comply with the decisions of our courts which decided that an expense incurred is not confined to a disbursement and must include an obligation to pay, i.e. an accrued liability which is undischarged;
-) The failure of the IRB to apply the legal principles established by our courts amounts to and/or constitutes an error of law, which renders its decision in excess of jurisdiction thereby warranting the grant of leave; and
-) Where the amount of the expenses or income is not in dispute and the only issue at hand pertains to whether or not the PRAD expenses have been incurred and are therefore deductible under Section 60(5) (b)(i) of the ITA, the matter involves a question of law which is more suitable to be resolved by way of judicial review.

Conclusion

This case affirms the legal position that even in tax cases where there is an alternative remedy of appeal, judicial review remains available so long as special circumstances exist. More importantly, the IRB has no jurisdiction to commit an error of law, and such an error would give rise to a clear lack of jurisdiction such that the decision would be susceptible to judicial review.

XYZ was successfully represented by partner, **S Saravana Kumar**, and pupil, Ng Kar Ngai, from the firm's Tax, SST & Customs Practice.

If you require any representation or legal strategy to challenge the IRB's decision, please contact S Saravana Kumar at tax@lh-ag.com

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