LHAG Insights

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24 JUNE 2021

Form Q and Judicial Review: Can They Co-Exist?

We highlighted previously (see LHAG Update on 29 September 2020, "Judicial Review in Tax Cases – Analysing the Federal Court's Decision in *Bintulu Lumber*") that judicial review remains available to taxpayers aggrieved by tax assessments despite the decision of the Federal Court in *Bintulu Lumber*. However, judicial review can only be filed in cases involving questions of law. Hence, it is not uncommon for taxpayers to also file a Form Q to the Special Commissioners of Income Tax (**SCIT**) as a safeguard and to appeal against issues involving questions of fact.

Recently in *BTS*,[1] the Court of Appeal deliberated on the issue of whether it is an abuse of court process to pursue judicial review after filing a Form Q to the SCIT.

Background facts

The taxpayer, which was in the business of property development and investment, had divided several lots in Berjaya Times Square Mall into stock-in-trade and investment units. The taxpayer disposed of two investment lots to the Kuala Lumpur City Hall with the agreement that the lots would be repurchased by the taxpayer in 10 years. The gains from the disposal were subject to real property gains tax. The Director General of Inland Revenue (**DGIR**) took the view that the gains should be subject to income tax and raised assessments accordingly. The taxpayer filed judicial review to challenge the assessments. Subsequently, the taxpayer also filed an appeal via Form Q to challenge the penalty portion of the assessments.

Court of Appeal's Decision

The Court of Appeal held that the question of whether the transaction amounts to trading, and therefore chargeable to income tax, is one of fact and should be decided by the SCIT.

[1] *BTS Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2021) MSTC 30-454

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The Court of Appeal also held that it is an abuse of court process to maintain the judicial review application as the taxpayer had filed an appeal to the SCIT. Although the taxpayer argued that Form Q was only confined to the issue of penalty, the Court of Appeal held that there is no separate appeal provision for tax assessments and penalties, and agreed with the DGIR that the taxpayer was challenging the assessments raised by the DGIR in Form Q.

Our thoughts

Judicial review still available

Nevertheless, the Court of Appeal recognised the trite position that judicial review is still available in tax cases if there is a lack of jurisdiction, blatant failure to perform statutory duty or a serious breach of natural justice. The taxpayer's appeal was dismissed by the Court of Appeal on the basis that there were no exceptional circumstances and the matter involved questions of fact.

Abuse of court process

What amounts to an abuse of court process has been judicially defined as follows:

> "*Abuse of process of court refers to a situation where the court's process is used for* ***unlawful*** *and* ***not for the actual purpose intended*** *to achieve justice.*"[2]

> *"Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When, however, the process of the court is invoked****, not for the genuine purpose of obtaining the relief*** *claimed, but for a collateral purpose, for example,* ***to oppress the defendant****, it becomes an abuse of process.*"[3]

It would be an abuse of court process if a case was not filed for the genuine purpose of obtaining relief but for a collateral purpose, such as to oppress the other party. We respectfully view that the filing of Form Q after the filing of judicial review would not be tantamount to an abuse of court process as both are filed with the genuine intention of obtaining relief. It can hardly be said that the DGIR would be oppressed by the filing of a judicial review and Form Q.

Form Q and judicial review CAN co-exist

Further, an assessment can be raised on a myriad of issues and taxpayers can accept the DGIR's position on one issue and appeal against the other. Although s 99 of the Income Tax Act 1967 provides for an appeal against assessments generally, an

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2 *Hock Peng Realty Sdn Bhd v Ting Sie Chung @ Ting Sieh Chung and Another Appeal* [2018] 2 MLJ 51 (CA)
3 *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340 (CA)

assessment can be confirmed, reduced, increased or discharged after being reviewed by the DGIR or after being decided by the SCIT. Naturally, this allows an assessment to be appealed based on certain issues only, such as penalty.

In any event, the ITA does not prohibit the filing of a Form Q after the filing of judicial review and vice versa. Hence, it is not unlawful for a taxpayer to file a judicial review to challenge an error of law committed by the DGIR and a notice of appeal to challenge issues involving questions of fact. It is trite that in construing taxing statutes, nothing is to be implied and a strict interpretation is to be adopted. Hence, whether there is an abuse of court process must still be viewed holistically with other surrounding circumstances of the case. The mere filing of a Form Q on its own should not be viewed as an abuse of court process.

Conclusion

This case indicates the courts' increasing wariness in allowing leave for judicial review in tax cases, especially those involving dispute of facts. Hence, it is important for taxpayers to obtain professional advice even during the audit phase to ensure that all factual disputes are resolved before assessments are raised. Based on this decision, taxpayers should also seek advice on the suitability of their case for judicial review and the strategy to protect their legal rights.

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Published by the Tax, SST & Customs Practice