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Judicial Review In Tax Disputes

Recently, a Federal Court panel chaired by the Chief Justice of Malaysia unanimously granted leave to a Sarawakian taxpayer to pose questions relating to the availability of judicial review in tax disputes.

Our Tax, SST & Customs partners, Datuk D P Naban and S Saravana Kumar, together with associate, Chris Toh, were engaged by the taxpayer and their Sarawak counsel to assist in the preparation of the hearing before the Federal Court.

Background Facts

The taxpayer owned a large oil palm estate in which various capital expenditures were incurred to cultivate the plantation. The taxpayer had claimed for reinvestment allowance (**RA**) on the capital expenditure incurred pursuant to Schedule 7A of the Income Tax Act 1967 (**ITA**). Schedule 7A allows RA to be claimed on capital expenditure incurred for the planting of crops (paragraph 9(b)) and the cultivation of fruits (paragraph 9(cc)).

In 2008, the Director General of Inland Revenue (**DGIR**) disallowed the RA claim on the basis that the oil palm fruits cultivated by the taxpayer were not “fruits” within the meaning of paragraph 9(cc) (**2008 decision**). The taxpayer’s appeal against the 2008 decision was allowed by the Special Commissioners of Income Tax (**SCIT**), who held that the word “fruits” should be given its ordinary and literal meaning to include oil palm fruits. However, the High Court reversed the SCIT’s decision and the taxpayer’s appeal to the Court of Appeal was dismissed. The taxpayer’s application for leave to appeal to the Federal Court was also dismissed.

In 2016, the taxpayer made another RA claim on the same expenditure, which was disallowed by the DGIR on the same basis (**2016 decision**) and a penalty was also imposed on the taxpayer. The taxpayer applied for leave to commence judicial review proceedings to challenge the 2016 decision at the High Court. However, the High Court refused leave and the taxpayer’s subsequent appeal to the Court of Appeal was dismissed.

Federal Court’s Decision To Grant Leave

The Federal Court agreed with the taxpayer’s counsel that this matter

posed novel points of law and granted leave to the taxpayer to appeal on the following questions of law:

- **Question 1**

Whether the interpretation of Schedule 7A, paragraphs 9(b) and 9(cc) of the ITA, being a question of law going to the legality of the respondent's conduct in raising the notices of additional assessment, gives rise to exceptional circumstances justifying the granting of leave for judicial review under Order 53, Rule 3 of the Rules of Court 2012 (**ROC**)?

If the DGIR's interpretation of paragraphs 9(b) and 9(cc) of Schedule 7A is erroneous, then the DGIR's decision would be illegal, giving rise to a clear lack of jurisdiction — one of the three exceptional circumstances warranting judicial review in tax matters.

- **Question 2**

Whether the issue of law being a matter of public importance affecting an important industry of the country's economy, gives rise to exceptional circumstances justifying the granting of leave for judicial review under Order 53, Rule 3 of the ROC?

As the issue is a matter of public importance affecting an important industry of the country's economy, judicial review as opposed to an SCIT appeal would enable the apex court to hear and make a determination.

- **Question 3**

Whether it is justifiable for the applicant to challenge the respondent's decision by way of judicial review, instead of the alternative remedy of a SCIT appeal where the issue in question goes to the very legality of the respondent's conduct?

This is a question which will examine the importance of judicial review as the bulwark against unconstitutional action including arbitrary assessments issued by the DGIR.

- **Question 4**

Whether the respondent's unilateral decision to impose a penalty under Section 113(2) of the ITA:

- (a) Was in excess of jurisdiction or power conferred by Section 113(2); and
- (b) Without affording the taxpayer the opportunity to be heard and/or providing reasons for its decision gives rise to exceptional circumstances justifying the granting of leave for judicial review under Order 53, Rule 3 of the ROC?

The discretion to impose a penalty under Section 113(2) is not an unfettered discretion and cannot be exercised at the whims and fancies of the DGIR. Neither should the DGIR impose a penalty without having given due consideration to the facts and circumstances of the case. In the present matter, the DGIR did not even grant the

taxpayer the right to be heard on the issue of penalty.

Conclusion

This case will be a landmark decision by the Federal Court in determining whether taxpayers are entitled to pursue judicial review in challenging tax assessments issued by the DGIR.

If you wish to challenge any tax assessments or decisions by the DGIR, please contact our Tax, SST & Customs partners, **Datuk D P Naban** and **S Saravana Kumar**, at tax@lh-ag.com

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