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Judicial Review in Tax Cases — Analysing the Federal Court's decision in *Bintulu Lumber*

Recently on 26.8.2020, the Federal Court dismissed a taxpayer's appeal to be allowed leave to commence judicial review against the Inland Revenue Board (**Revenue**) in respect of the tax assessments raised.¹ This alert analyses the decision and its impact on the availability of judicial review in tax cases generally.

*Bintulu Lumber v KPHDN*²

In *Bintulu Lumber*, the taxpayer was in the business of cultivating palm oil in Sarawak and had claimed Reinvestment Allowance (**RA**) under Schedule 7A of the Income Tax Act 1967 (**ITA**) for, among others, the years of assessment (**YAs**) 2008 and 2011. The taxpayer relied on paragraph 9(cc) of Schedule 7A and took the position that it had incurred capital expenditure in respect of the "cultivation of fruits". The Revenue disagreed and raised assessments for YAs 2008 and 2011. The issue is thus whether palm oil fruits amounted to "fruits" within the meaning of Schedule 7A of the ITA.

- *The first claim – YA 2008*

The taxpayer filed an appeal to the Special Commissioners of Income Tax (**SCIT**) for YA 2008, which was allowed. However, the SCIT's decision was reversed by the High Court. The High Court's decision was upheld by the Court of Appeal (**CA**). The taxpayer's application for leave to appeal to the Federal Court was also dismissed. The High Court and CA both held that the cultivation of palm oil fruits did not come within the meaning of paragraph 9(cc) of Schedule 7A of the ITA.

- *The second claim – YA 2011*

The taxpayer then filed an application for leave to commence judicial review at the High Court in respect of its claim for YA 2011, which was dismissed. The taxpayer's appeal to the CA was also dismissed. However, the Federal Court granted leave for the taxpayer's further appeal to be heard. On 26.8.2020, the Federal Court dismissed the



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taxpayer's appeal and accepted the Revenue's submissions that there were no exceptional circumstances that warranted the granting of leave for judicial review.

Our analysis and views

Careful evaluation needed on whether judicial review is appropriate

The Federal Court's decision is a strong reminder that barring the existence of exceptional circumstances, our courts' approach is that the filing of an appeal to the SCIT is the usual route to challenge tax assessments by the Revenue. This is also reflected in the recent judicial trend where the Kuala Lumpur High Court recently dismissed a successive string of leave applications filed by taxpayers against tax assessments. Taxpayers should thus be reminded to carefully evaluate their case before deciding whether judicial review is appropriate in order to avoid incurring unnecessary costs.

Bintulu Lumber does not spell the end for judicial review

Having said that, *Bintulu Lumber* should not be regarded as the death knell for judicial review. Judicial review remains a viable forum for cases that fall within the parameters of the tests laid down by our courts. As at the date of this alert, the Federal Court has not issued grounds for its decision. However, the principles applied appear to remain the same as that laid down by the (then) Supreme Court in *Jagdis Singh*,³ i.e. whether the taxpayer can demonstrate exceptional circumstances in the form of:

- a) **A clear lack of jurisdiction**
- b) Blatant failure to perform some statutory duty
- c) Serious breach of the principles of natural justice

Suitable cases for judicial review would thus be cases in which the Revenue had committed an error of law by acting contrary to a principle of law which has already been decided by the courts or when it violates clear statutory provisions. Such a decision can be said to have arisen from "a clear lack of jurisdiction" and is thus "illegal" in the plainest sense of the word. Thus, in *Mudah.My*,⁴ the CA accepted that: "Generally, if the taxpayer can demonstrate illegality or unlawful treatment, then it would be wrong to insist on exhaustion of local remedy." This was later applied by the High Court in *Magnum Holdings*,⁵ where the court observed:

[26] As such, bearing in mind that it is the submission of the applicant that the facts and the law in this case fall squarely within the case of **Multi-Purpose**, I am of the considered opinion that **Multi-Purpose** case will be binding on both the SCIT and the DGIR.

[27] Therefore, since the **Multi-Purpose** case is binding on the DGIR, the failure to apply the principles in **Multi-Purpose** case amounts to an

³ *Government of Malaysia & Anor v Jagdis Singh* [1987] CLJ (Rep) 110

⁴ *Ketua Pengarah Hasil Dalam Negeri v Mudah.My Sdn Bhd* [2017] 5 CLJ 283

⁵ *Magnum Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Other Cases* [2018] 1 LNS 2278

excess of jurisdiction. In [Ketua Pengarah Hasil Dalam Negeri v. Mudah.My Sdn Bhd \[2017\] 5 CLJ 283](#), the Court of Appeal held that if the taxpayer can demonstrate illegality, then it would be wrong to insist on the exhaustion of an alternative remedy, that is an appeal to the SCIT.

[28] Added to that, if the DGIR is seeking to revisit the legal position in **Multi-Purpose** case, then the proper forum is this court, as both the SCIT and the DGIR are equally bound to apply the High Court decision in **Multi-Purpose**.”

In *Bintulu Lumber*, the Revenue arguably cannot be said to have acted illegally in respect of the claim for YA 2011 (the second claim) as it had merely applied the decision of the courts in the first claim for YA 2008. This is presumably the basis for the Federal Court’s finding that “the Director General of Inland Revenue (DGIR) had acted lawfully in following the interpretation of Schedule 7A of the Income Tax Act 1967 by the courts”.

Conclusion

Based on the above, the recent judicial trend in dismissing leave applications could perhaps be a better reflection of the type of cases which have been filed on behalf of taxpayers in courts rather than an indictment of the availability of judicial review generally. Taxpayers should thus carefully evaluate and assess the suitability of their facts before deciding whether judicial review is warranted for their cases.

However, if the Revenue had acted illegally in raising assessments by disregarding or ignoring the decisions of the courts on a specific issue of law, such assessments could be challenged by way of judicial review, as the Revenue in doing so would have acted in excess of its jurisdiction.

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If you have any queries pertaining to tax assessments which have been raised by the Revenue, please contact associate Chris Toh Pei Roo or Tax, SST & Customs partners, **Dato’ Nitin Nadkarni** and **Jason Tan Jia Xin**, at tax@lh-ag.com

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