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Revisiting 'Exceptional Circumstances' and 'Legitimate Expectation' in Tax Judicial Review

It is trite law that a taxpayer who is aggrieved by an assessment issued by the Inland Revenue Board (**IRB**) may challenge it by filing a judicial review application, notwithstanding the existence of the Special Commissioners of Income Tax (**SCIT**). However, he or she would need to show "*exceptional circumstances*", specifically the following:

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

In the recent case of *Melody Park*,¹ the High Court seemed to favour the position that the mere issuance of a disputed assessment by the IRB alone does not fall within the parameters of "*exceptional circumstances*". Such issue may involve a dispute of facts which, according to the High Court, renders it better suited to be heard before the SCIT.

Background

In *Melody Park*, the taxpayer disposed of some pieces of land, the sale proceeds of which were subject to real property gains tax (RPGT). The IRB, however, took the position that the sale proceeds should have been subject to income tax, and issued notices of assessment. The taxpayer disputed the IRB's position and claimed that the sale proceeds should be subject to RPGT, as the disposal was not carried out in the nature of trade. On this basis, the taxpayer filed several judicial review applications and contended that the notices of assessments were tainted with

¹ *Melody Park Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2020] 1 LNS 1048 (HC)

illegality and that the IRB had committed an error of law for lack of jurisdiction.

The taxpayer also raised the issue of legitimate expectation in one of the applications for judicial review. Over the course of the audit by the IRB, the taxpayer submitted a settlement proposal of the additional RPGT payable. In response, the IRB requested that the taxpayer execute a letter of undertaking to make payment after the conclusion of the audit. However, upon executing the letter of undertaking, the IRB rejected the settlement proposal and issued the notices of assessment instead. The taxpayer contended that the IRB's act in making it sign the letter of undertaking had given rise to a legitimate expectation that was enforceable under the law.

High Court's decision

The High Court, while affirming the position that an aggrieved taxpayer may resort to judicial review notwithstanding the existence of the SCIT, confirmed that the application will only be heard on its merits when the taxpayer is able to demonstrate that there exists one of the three "*exceptional circumstances*" (as set out above). Thereafter, the court held that the impugned notices of assessment were issued pursuant to s 4(a) of the Income Tax Act 1967 (ITA) and thus, did not demonstrate any error of law or lack of jurisdiction by the IRB. The High Court also held that the issue of whether there was an adventure in the nature of trade is an issue of fact that should be decided by the SCIT.

In respect of the issue of legitimate expectation, the High Court found that the taxpayer had inserted the words "*without prejudice*" in the letter of undertaking. The inclusion of such words, according to the High Court, signified the taxpayer's intention that nothing was to be concluded as yet. Given this, the IRB was entitled to take a different stand and the taxpayer's contention on legitimate expectation was without any basis. The taxpayer's judicial review applications were therefore dismissed with costs.

Our views

There are a few key takeaways from *Melody Park*:

- (a) Judicial review is still available to aggrieved taxpayers in one of the three circumstances stated above;
- (b) The issuance of a disputed notice of assessment does not *ipso facto* amount to a lack of jurisdiction by the IRB, unless it is unsupported by any provision in the ITA;
- (c) The accuracy or merits of an assessment which require an analysis of the factual circumstances should be heard before the SCIT; and

- (d) The use of the words “*without prejudice*” in settlement proposals with the IRB may vitiate the conclusiveness of the settlement proposal.

As matters stand, the courts do not preclude aggrieved taxpayers from seeking relief by way of a judicial review application. Despite the recent judicial trend in dismissing judicial review applications, the cases where taxpayers have succeeded in a judicial review application are still good law. The key (apart from proving an error of law by the tax authority) is in establishing “*exceptional circumstances*”.

Further, our view is that all disputed facts ought to be resolved and agreed upon during the audit stage, so that when the matter comes before the High Court, it merely concerns a dispute on questions of law.

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