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4 AUGUST 2021

## Section 91(4)(a) Income Tax Act 1967: A Subtle Nod to Judicial Review?

In the past year, tax disputes have continued to be heavily litigated notwithstanding the COVID-19 pandemic, including through the forum of judicial review. While the courts are now more circumspect in granting leave, they have not shied away from doing so in suitable cases.<sup>1</sup> In such proceedings, it has become common practice for the Inland Revenue Board (**IRB**) to:

- (a) Appear at the leave stage and strenuously oppose the leave application, often turning what is meant to be an “expeditious and cheap”<sup>2</sup> process into a protracted, expensive affair.
- (b) IRB’s key (and often, sole) objection is that the taxpayer’s application is an “abuse of process”, as it should have resorted instead to the alternative remedy of a Form Q appeal.<sup>3</sup>

The sanctimonious nature of such objections becomes apparent when one considers that the Rules of Court 2012 (**ROC**) have clearly prescribed that the leave application is *ex parte*,<sup>4</sup> which means that the IRB does not have a right of appearance.<sup>5</sup> By contrast, the ITA itself, the very law from which the IRB derives its considerable powers and under which it discharges its duties, has arguably recognised explicitly, the availability of judicial review to challenge tax assessments.

### IRB disregards *ex parte* nature of leave applications

Order 53 r 3(2) of the ROC clearly prescribes that a leave application is made “*ex parte*”. On judicial review procedure at the leave stage, the High Court in *Kanawagi* had this to say:

<sup>1</sup> See e.g. *Tropical Land Property Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (KPHDN)* (JA-25-29-10/2020); *Almurisi Holding Sdn Bhd v KPHDN* [2020] 1 LNS 1439; *Repsol Oil & Gas Malaysia Limited & Ors v KPHDN* [2020] 1 LNS 1634; and *Setia Indah Sdn Bhd v KPHDN* [2021] 1 LNS 527

<sup>2</sup> *Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad (Kanawagi)* [2004] 5 MLJ 495

<sup>3</sup> Appeal to the Special Commissioners of Income Tax (**SCIT**) pursuant to s 99 of the Income Tax Act 1967 (**ITA**)

<sup>4</sup> Rules of Court 2012, O 53 r 3(2)

<sup>5</sup> *Kanawagi*, *supra* n 2

*“It is very clear from the wordings that this application is only ex parte which means that the respondent does not have a right of appearance.*

*“Life will be simpler for all of us if the parties just follow the rules instead of making things difficult by adopting rules which are not there.*

*“The rules have expressly made the initial stage of judicial review to be ex parte and if the court is left alone to decide on the threshold jurisdictional point whether the applicant has an arguable case much time, labour and costs would be saved for all parties and the court. If legislature had intended that the respondents be given an opportunity at this stage then the Rules would have so stated but nevertheless, the Rules expressly states this application to be ex parte with a definite intention to save time and costs which normally follows contested inter party application. This rule is not a dead letter and is there for compliance by parties.”*

In particular, the High Court also urged counsel to have confidence in their competence to decide *ex parte* applications:

*“**Counsel should have confidence that when a judge hears an ex parte application, the judge is competent to decide whether that application should proceed to the inter parte stage or that application be brought to an end at the ex parte stage. For the respondents’ counsel to appear at the ex parte stage is to unnecessarily burden this judicial proceedings which otherwise would be decided very swiftly.**”*

Against this backdrop, however, the IRB has been publicly reported declaring in the past that “all judicial review applications now will be objected to by IRB” and that “IRB will work together with the Attorney-General’s Chambers to object to the leave application”.<sup>6</sup>

Granted, not all judicial review applications brought by taxpayers may be equal in their merits. However, the purpose of the “leave” (i.e. permission) stage is intended exactly to sieve out the spurious or frivolous challenges,<sup>7</sup> and to this end, the High Court judges are more than capable of doing so on their own.

An interesting observation to note is that not all tax assessments issued by the IRB are challenged by way of judicial review. By contrast, the IRB’s publicly declared stance is that it would object to “**all** applications for judicial review”. It appears that this is a promise that taxpayers can expect the IRB to keep.

For instance, in *T v KPHDN* (see our [LHAG Insights of 4 March 2021](#)), the IRB disallowed certain expenditure incurred by the taxpayer which had been expressly held by the High Court to be deductible in an earlier case. The High Court granted leave despite the IRB’s strenuous objection that the dispute should be

<sup>6</sup> “Inland Revenue Board: We’ll object to all applications for judicial review” *theSun daily* (18 April 2018) <https://www.thesundaily.my/archive/inland-revenue-board-well-object-all-applications-judicial-review-AUARCH541171>

<sup>7</sup> Kanawagi, *supra* n 2

heard by the SCIT. Nevertheless, the IRB filed an appeal to the Court of Appeal, while at the same time, maintained the same objections at the substantive judicial review proceedings.

This approach (i.e. of indiscriminately objecting to all leave applications) can also be glimpsed in other cases, e.g. in *Magnum Holdings*,<sup>8</sup> where the taxpayer alleged that the IRB had failed to follow the High Court's decision in *Multi-Purpose Holdings*.<sup>9</sup> This also appears inconsistent with the IRB's own declared stance that "cases where IRB fails to follow a High Court decision or fails to follow its own public ruling would be appropriate cases for a judicial review".<sup>10</sup>

### Section 91(4)(a) ITA: A recognition of judicial review?

In contrast to the explicit "*ex parte*" nature of leave proceedings, the ITA appears to recognise the availability of judicial review to challenge tax assessments raised by the IRB. Section 91(4)(a) of the ITA provides that:

*"(4) Where in a year of assessment—*

*(a) any assessment made under this Act or the Real Property Gains Tax Act 1976 [Act 169] in respect of a person for any year of assessment has been determined by the court on appeal or review;*

*the Director General may in the first-mentioned year of assessment or within five years after its expiration **make an assessment** in respect of that person for any year of assessment **for the purpose of giving effect to the determination, revocation, withdrawal or cancellation, as the case may be.**"*

Our observations:

- (a) At the risk of stating the obvious, the "review" in s 91(4)(a) of the ITA refers to a "review" "by the court". This differs from a review by the Director General of Inland Revenue, which has been separately provided for under s 101 of the ITA. Note 15 of the Explanatory Statements in the Finance Bill 2005 further confirms this.
- (b) Section 91(4)(a) of the ITA appears to specifically recognise that an assessment can be determined by the court on appeal (i.e. via a Form Q appeal under s 99 of the ITA), or via judicial review. It should be noted that s 102, and Schedule 5 of the ITA which regulates the hearings of "appeals" by the SCIT, make no mention whatsoever of a "review" process.
- (c) Comparisons can be made with e.g. s 143 of the Customs Act 1967, and s 47 of the Excise Act 1976, which appears

to similarly recognise the possibility of a challenge being mounted directly at the High Court against decisions by the Director General of Customs.

- (d) Contrasts can be drawn with other statutory provisions in Malaysia that expressly exclude judicial review. For instance, s 59A of the Immigration Act 1959 is unambiguously titled “Exclusion of Judicial Review” and begins unequivocally with “there shall be no judicial review...”.

Other similar provisions include s 15B of the Prevention of Crime Act 1959; s 120 of the Water Services Industry Act 2006; s 23 of the Witness Protection Act 2009; ss 17 and 19 of the Strategic Trade Act 2010; s 65 of the Occupational Safety and Health Act 1994; and s 23 of the Fisheries Act 317.

- (e) If Parliament had intended to exclude judicial review, it would arguably have done so using the express wording that it had adopted in provisions such as s 59A of the Immigration Act 1959. Instead, it had chosen to explicitly recognise the possibility of a “review” of a tax assessment “by the court”.
- (f) Even if, which is not the case, the ITA did indeed contain an express ouster clause, the Federal Court has held that “it is settled law that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause”.<sup>11</sup>
- (g) However, at this juncture, the interpretation of s 91(4)(a) remains to be tested, on a suitable occasion, in our courts.

## Conclusion

The current trend of the IRB appearing at the leave stage to object to “**all** applications for judicial review” has arguably affected the “expeditiousness” and cost-effectiveness<sup>12</sup> of the leave stage. This is despite:

- (a) The clearly *ex parte* nature of leave proceedings;
- (b) The “very low” threshold for leave even in tax cases;<sup>13</sup>
- (c) The High Court judges being more than capable of deciding leave applications on an *ex parte* basis; and
- (d) The ITA itself arguably recognising specifically the possibility of “review” “by the courts”.

<sup>11</sup> *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545

<sup>12</sup> *Kanawagi, supra n 2*

<sup>13</sup> *Inspirasi Elit Sdn Bhd v KPHDN* (2021) MSTC 30-456

Armed with the “massive and bottomless purse of the State”<sup>14</sup> (except it seems, where tax refunds are concerned<sup>15</sup>), the IRB can also have multiple bites of the proverbial apple, i.e. the leave question, at the leave stage (and subsequent appeals), and again at the substantive stage (and subsequent appeals).

With the greatest respect, if public authorities are truly confident in the correctness of their decisions, allowing the courts to decide the issue directly at the substantive stage would surely increase the expeditiousness of tax dispute resolution, while at the same time, enhancing the progressive development of tax law.

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Published by the Tax, Customs & Trade Practice

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<sup>14</sup>

*Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155

<sup>15</sup>

Nuradzimmah Daim, “IRB yet to pay out RM3.807 billion tax refunds” *New Straits Times* (24 August 2020) <https://www.nst.com.my/news/nation/2020/08/618949/irb-yet-pay-out-rm3807-billion-tax-refunds>