

Tax e-Alert

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Notes Of Proceedings In Tax Appeals

Taxpayers intending to appeal against the decisions of the Special Commissioners of Income Tax (**SCIT**) may do so by appealing to the High Court by way of case stated. It is trite law that the SCIT are the finders of fact in tax appeals and the appellate courts, including the High Court, have no jurisdiction to disturb the findings of facts. In practice, the SCIT is expected to prepare a full and fair case stated where it shall “set forth the facts as found by the SCIT, the deciding order and the grounds of their (the SCIT) decision”.

The perimeters of the findings of fact and law are not always clear. The Malaysian courts have recognised that a certain degree of intervention in respect of the SCIT’s findings of fact or inferences drawn by the SCIT from its findings of fact is “necessary to enable the High Court to ascertain the real question of law sought to be raised”. Between the High Court’s lack of jurisdiction in the finding of facts and the crucial reliance on the SCIT to include all relevant facts in its case stated, an issue then arises on a taxpayer’s recourse should the case stated omit relevant facts on appeal to the High Court.

The law

The law currently provides some recourse in the form of paragraph 40, Schedule 5 of the ITA, which reads:

“At any time before it determines the questions of law arising on a case stated under paragraph 34, the High Court may –

- (a) cause the case to be sent back to the Special Commissioners for amendment; or
- (b) require the Special Commissioners to find further facts and state a supplementary case,

and may postpone or adjourn the proceedings before it until the amendment has been made or the requisition complied with.”

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When exercising the discretionary power under paragraph 40 above, the High Court has adopted the following guidelines:

“If a request is made for a case stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are,

- (a) material to some tenable argument;
- (b) at least reasonably open on the evidence that has been adduced; and
- (c) not inconsistent with the finding or finds that have already been made.”

There is also judicial concern that the SCIT “must be protected from nit-picking” and should the case stated be full and fair, “in that its findings broadly cover the territory desired to be dealt with by the proposed additional findings, the court... should be slow to send the case back, particularly so if it appears that the Special Commissioners have had the proposed findings in mind when settling the final form of the case stated”.

While paragraph 40 does provide the High Court with the discretionary power to require further facts from the SCIT, it is to be exercised cautiously while bearing in mind the role of the SCIT as the statutorily empowered body for the finding of facts in tax appeals.

Federal Court’s decision

In *Idaman Pelita Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*, while the High Court did not allow the taxpayer’s application under paragraph 40, the High Court nevertheless ordered the production of Notes of Evidence (**NOE**) from the SCIT for the hearing of the taxpayer’s appeal (**Order**). Instead of relying on paragraph 40, the High Court relied on another discretionary power in the form of paragraph 39(c), Schedule 5 of the ITA, which reads:

“The High Court shall hear and determine any question of law arising on a case stated under paragraph 34 and may in accordance with its determination thereof:

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...

(c) make such order as it thinks just and appropriate”.

The High Court relied on case law in justifying the Order, despite it not being included in the case stated. The circumstances where the court’s intervention is justified were held as follows:

- When the SCIT have made a finding of fact which is perverse or which is not supported by evidence
- When the SCIT took into account irrelevant factors
- When the SCIT draw an inference or reach a conclusion which is not supported or which is contrary to evidence

The judge held that because of the existence of undisputed evidence/NOE before the SCIT, which the case stated omitted, there was a possibility that all three of the above justifications were satisfied. The High Court emphasised that the case before it was *sui generis* (exceptional) simply because of the existence of the NOE at the SCIT.

The Inland Revenue Board (**IRB**)’s subsequent appeal to the Court of Appeal was dismissed, whereby the Court of Appeal upheld the taxpayer’s preliminary objection that the Order does not amount to a “decision” or a “question of law” that is appealable under paragraph 41 of Schedule 5 of the ITA.

Recently, the Federal Court too dismissed the IRB’s leave application to set aside the decision of the Court of Appeal on the basis that the conditions of appeal under Section 96 of the Courts of Judicature Act 1964 were not satisfied. In particular, the Order was not made “in the exercise of its original jurisdiction involving a question of general principle decided for the first time”. As the High Court was merely making an interlocutory order in the determination of an appeal originating from the SCIT and not its original jurisdiction, the Order was not appealable at the Federal Court.

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Observation

On appeal from the SCIT, taxpayers may find some relief that the appellate courts do possess, albeit limited, discretionary powers under Schedule 5 of the ITA to intervene in the finding of facts from the SCIT. The exercise of these discretionary powers would depend on the unique facts and circumstances of each case.

This landmark decision also highlights that tax appeals made from the High Court to appellate courts are ultimately governed by the specific statutory provisions regulating appeals within Schedule 5 of the ITA. The appeal matter must be a question on law and one that amounts to a “decision”, rather than interlocutory orders made by the High Court in the conduct of their own determination of the substantive appeal.

If you have queries on matters pertaining to tax litigation, we are available to assist you. Please contact our tax partners Datuk D P Naban or Mr S Saravana Kumar at tax@lh-ag.com.

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