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Tax e-Alert

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Judicial Review: Enhancing Access To Court

On 23.7.2018, the Attorney General's Chambers (**AGC**) announced that it would engage with the Malaysian Bar and the Rules Committee to repeal the requirement that all cause papers in judicial review be served on the AGC. This announcement sets an encouraging tone in the development of judicial review and public law, of which tax law is a branch. As our High Court recently affirmed in *Hii Yii Ann*,[1] the public nature of taxation matters is "unquestionable". Our tax team successfully represented the Commonwealth of Australia and the Australian Taxation Office in the *Hii Yii Ann* case.

Notwithstanding the disappointing decision of the Federal Court in the *Alcatel*[2] case, our tax team has been successful in the recent months in obtaining leave in the following landmark tax cases:

- *WSSB v KPHDN*
(Issue: Whether withholding tax applicable to payments made for the use of moveable property if the double taxation agreement provides that shipping income is taxable in the home county of the non-resident)

- *ORA v KPHDN*
(Whether withholding tax applies to payments made to a non-resident permanent establishment)[3]

- *MH Sdn Bhd v KPHDN* and *SPS v KPHDN*
(Whether the Inland Revenue Board [**IRB**] may disregard the *Multi-Purpose* principle and segregation between income- and non-income-producing share counters)

- *SR v KPHDN*
(Whether losses from retakaful business source can be set off against income from reinsurance business source)

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[1] *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors* [2017] 10 CLJ 743

[2] *KPHDN v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1

[3] LHAG Tax, Customs & GST Practice e-Alert Availability Of Judicial Review In Withholding Tax Disputes

- *NR v KPHDN*
  (Whether gains from disposal of land belonging to a company in liquidation are subject to income tax)

- *CS v KPHDN*
  (Whether withholding tax applies to payment for advertising services rendered outside Malaysia)

- *IBM v KPHDN*
  (Whether an erroneous advance ruling by the IRB can be challenged by way of judicial review)

Background

Since the Supreme Court's decision in the *Jagdis Singh*[4] case, it is trite law that judicial review is available in tax cases, notwithstanding the availability of Special Commissioners of Income Tax (**SCIT**), provided the taxpayer is able to establish exceptional circumstances.

Under Order 53 rule 3(3) of the Rules of Court 2012, all cause papers in any judicial review application must be served on the AGC. As clarified in the recent announcement by the AGC, judicial review is a two-stage process in which the first stage of application for leave is to be conducted on an *ex-parte* basis, i.e. in the absence of the putative respondent and, in many cases, even the AGC. The role of the AGC is a limited one, and its interference is only warranted if the applicant's judicial review application is frivolous and vexatious.

In the months preceding the recently-concluded 14th General Election, there had been a disturbing shift in the AGC's stance in tax matters. Objections had been raised to seemingly all judicial review applications filed by taxpayers and the AGC had also taken the liberty of inviting counsel for the IRB to appear at the leave stage of their own volition. This cordial relationship had even led the IRB to publicly declare that it would "work together with the AGC" to "object to all applications for judicial review" (http://www.thesundaily.my/news/2018/04/18/inland-revenue-board-well-object-all-applications-judicial-review).

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

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At the very least, this has led to escalating costs for taxpayers in increasingly contested leave applications. In some cases, money, manpower and time were also incurred through appeals brought by the AGC against the granting of leave. At most, this previously unwelcoming stance on judicial review might even be said to have hindered access to the courts and justice and stunted the development of tax law.

AGC's proposed amendment

The AGC's announcement is a definitive step away from its previous negative stance against judicial review. In particular, the proposal to dispense with service of cause papers marks a long-overdue return to the earlier days of judicial review, when all that was needed was for the litigant to satisfy the court, on an *ex-parte* basis, that the application was not frivolous. This would save considerable resources in costs and time for both the court and litigants alike, while setting a positive and progressive tone for public law litigation by eliminating deterrence to access to justice.

Observation

Judicial review is alive and well, and in the words of the Federal Court in *Indira Gandhi*,[5] remains available as the "ultimate bulwark against unconstitutional legislation or excesses in administrative action".

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[5] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (FC)

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In instances of the IRB acting illegally in raising arbitrary assessments, judicial review is a more appropriate avenue to seek judicial recourse rather than appealing to the SCIT. As the Federal Court observed in *Sungai Gelugor*[6] case, an act of illegality by a public authority should be nipped in the bud. The IRB is no exception to this jurisprudence. The right to raise an assessment is not a licence for the IRB to misinterpret or disregard the law to raise incorrect and arbitrary assessments.

If you have queries on matters pertaining to judicial review and tax litigation, please contact our tax partners Datuk D P Naban or Mr S Saravana Kumar at tax@lh-ag.com

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6 *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65] (FC)

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