

Tax e-Alert

31 MAY 2018

Availability Of Judicial Review In Withholding Tax Disputes

The Supreme Court's decision in *Jagdis Singh* held that judicial review would remain available despite the availability of an alternative appeal remedy, even in tax cases. This is provided that the litigant is able to establish exceptional circumstances. This principle has been followed in subsequent cases such as *Metacorp Development*,¹ where the High Court allowed the taxpayer's judicial review application to challenge the Inland Revenue Board (**IRB**)'s decision to subject compensation for compulsory land acquisition to income tax. It is notable that the decision in *Metacorp Development* was subsequently affirmed by the Court of Appeal and the Federal Court.

Recently, however, prompted in part by the Federal Court's decision in *Alcatel-Lucent*,² the availability of judicial review in tax matters has returned to the forefront for consideration. About a month ago, the IRB had even publicly declared that it will "object to all applications for judicial reviews".³ This characteristically strong statement was made despite the recent decision by the Court of Appeal in *La Salle*,⁴ which had held that taxpayers cannot be precluded from applying for judicial review.

In this regard, recent decisions by the Kuala Lumpur High Court in *WSSB*⁵ and *ORA*⁶ have confirmed the availability of judicial review in tax cases, particularly in withholding tax matters. Our tax lawyers successfully represented the taxpayers in both these matters.

¹ *Ketua Pengarah Hasil Dalam Negeri v Metacorp Development Sdn Bhd* (Civil Application No 08(f)-371-2011(W))

² *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1

³ <http://www.thesundaily.my/news/2018/04/18/inland-revenue-board-well-object-all-applications-judicial-review>

⁴ *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2017] 8 CLJ 298

⁵ *WSSB v Ketua Pengarah Hasil Dalam Negeri*

⁶ *ORA v Ketua Pengarah Hasil Dalam Negeri*

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Background facts

ORA is a non-resident company providing offshore shipping services in Malaysian and international waters. Meanwhile, WSSB is a Malaysian resident company which has dealings with ORA. WSSB pays ORA and does not subject the payments to withholding tax. This is because ORA, which has been present in Malaysia since the 1980s, has a permanent establishment in Malaysia. It subjects its income to tax in Malaysia under Section 54 of the Income Tax Act 1967 (**ITA**). However, since 2009, ORA does not subject its income to income tax in Malaysia by virtue of the Double Taxation Agreement (**DTA**) between Malaysia and ORA's home country.

Notwithstanding this, the IRB audited WSSB and took the stance that the payments made to ORA should have been subjected to withholding tax. As there was no withholding tax withheld and remitted, the IRB invoked Section 39 of the ITA and disallowed the deduction claimed by WSSB for the payments made to ORA. The IRB then proceeded to raise notices of additional assessments with penalty for the years of assessment 2012 to 2014 for the sum of RM101,712,642.13.

Aggrieved by the IRB's decision, ORA and WSSB commenced judicial review proceedings separately against the agency. The challenge was mounted on the basis that the IRB's decision was contrary to the decisions of our courts in *Damco Logistics*,⁷ *Maersk Malaysia*⁸ and *Thomson Reuters*,⁹ which held that provisions of the DTA would prevail over that of the ITA.

Leave And Stay Granted By The High Court

The High Court granted leave and stay in both the judicial review applications commenced by ORA and WSSB. While the Attorney General (**AG**) did not object to the judicial review application made by ORA, the AG initially raised a preliminary objection to that made by WSSB on the basis that there was an alternative remedy of an appeal to the Special Commissioners of Income Tax (**SCIT**). However, this preliminary objection was subsequently withdrawn by the AG after its review of WSSB's written reply submission to the preliminary objection.

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⁷ *Ketua Pengarah Hasil Dalam Negeri v Damco Logistics Malaysia Sdn Bhd* (Rayuan Sivill W-01-424-11)

⁸ *Maersk Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2013) MSTC-046

⁹ *Thomson Reuters Global Resources v Ketua Pengarah Hasil Dalam Negeri* (2015) MSTC 10-048

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IRB's Appeal To The Court Of Appeal

The IRB filed appeals against the granting of leave and stay in both cases to the Court of Appeal. Among others, the IRB argued in its written submission that leave should not have been granted to ORA and WSSB due to the existence of an alternative remedy of a SCIT appeal. In response, WSSB and ORA submitted in their written submissions that:

- (a) There is no right of appeal to the SCIT for ORA as no assessment has been raised against them. Yet, ORA is an aggrieved party by virtue of the tax audit conducted on WSSB as the IRB's decision will result in the payments that WSSB will make to ORS being subjected to withholding tax. Applying the single threshold *locus standi* test laid down by the Federal Court in *Malaysian Trade Union Congress*¹⁰ and *Members of the Commission of Enquiry on the Video Clip Recording*,¹¹ ORA had clearly been adversely affected by the IRB's decision;
- (b) With regard to WSSB, they had no right of appeal to the SCIT as Section 109H of the ITA is a specific provision in withholding tax cases that takes precedence over the general appeal provision in Section 99(1) of the ITA. The trite maxim of *generalia specialibus non derogant* should apply. Section 109H(2) has clearly precluded an appeal to the SCIT in matters such as the present where the payments made to ORA had been disallowed as a deduction under Section 39;
- (c) In any event, even if the court took the view that there was an alternative remedy for ORA and WSSB, this alone could not bar them from seeking judicial review as there were exceptional circumstances in the present matter. There was a clear lack of jurisdiction in the IRB's decision due to its failure to apply the decisions of our courts in *Damco Logistics, Maersk Malaysia* and *Thomson Reuters*.

At the Court of Appeal, subsequent to the filing and exchange of the parties' written submissions, the IRB withdrew both appeals. This resulted in the Court of Appeal striking out both appeals by the IRB.

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¹⁰ *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi* [2014] 3 MLJ 145

¹¹ *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judge v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490

Observation

Subsequent to the above, we are of the view that the Federal Court's decision in *Alcatel-Lucent* should be read in its proper context and not relied upon as a blanket ruling against judicial review applications in tax matters. In fact, the Federal Court has made this clear in *Alcatel-Lucent* itself that:

"... it is obvious that if the circumstances warrant it, and after having considered all the relevant factors, judicial interference is permissible".

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If you have queries on matters pertaining to judicial review and withholding tax, we are available to assist you. We successfully represented the taxpayers in landmark withholding tax cases such as *Damco Logistics*, *Maersk Malaysia* and *Thomson Reuters*.

Please contact our tax partners Datuk D P Naban or Mr S Saravana Kumar at tax@lh-ag.com if you have any further queries on tax matters.

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