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SPECIAL ALERT !

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Too Early to the Party: Revenue's Appeals Struck Out for Want of Locus

Taxpayers to Proceed with Legal Challenge to Seek Refund for Taxes Paid Pursuant to Unlawful Legislation

On 16.5.2024, the Court of Appeal (**COA**) struck out two appeals brought by the Inland Revenue Board (**Revenue**) against the Kuala Lumpur High Court's (**HC**) decisions to grant leave for judicial review[1]. The COA's decisions were unanimous, agreeing with the respondent (**Taxpayers**) that the Revenue has no right of appeal against the granting of leave to the taxpayers for judicial review.

Background at the HC

The Taxpayers are two companies which had previously paid taxes on gains from the compulsory acquisition of their land pursuant to Section 4C of the Income Tax Act 1967 (**ITA**). On 9.12.2022, the Federal Court (**FC**) in ***Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2023] 8 CLJ***

[1] *Ketua Pengarah Hasil Dalam Negeri v Tanda Bestari Development Sdn Bhd* (W-01(IM)-531-10/2023); *Ketua Pengarah Hasil Dalam Negeri v Lush Development Sdn Bhd* (W-01(IM)-534-10/2023).

21 had struck down Section 4C of the ITA as being unconstitutional ("**the Wiramuda Decision**").

Upon learning of the Wiramuda Decision, the Taxpayers wrote to the Revenue, requesting it to give effect to the FC's decision by discharging and refunding the taxes they had paid pursuant to Section 4C of the ITA. As the Revenue did not reply positively to the Taxpayers' request, the Taxpayers proceeded to file leave to commence judicial review on 8.3.2023 at the HC. The Taxpayers took the position that taxes paid pursuant to an unlawful legislation is *prima facie* recoverable as of right.

At the *ex-parte* leave stage, Revenue counsels sought and obtained permission to appear as the putative respondents to make submissions. The Revenue objected strenuously to the leave applications, arguing that:

(a) It had not made any decision that could be subject to judicial review;

(b) The applications were out of time as they should have been filed against the assessments for the relevant years; and

(c) There was an alternative remedy of appeal to the Special Commissioners of Income Tax (**SCIT**).

On 13.9.2023, the HC granted leave, holding that:

(a) The ambit of reviewable decisions under the current Order 53, Rule 2(4) of the Rules of Court 2012 (**ROC**) is wider and can encompass deemed decisions or omissions by public authorities. The HC agreed that the older decisions cited by the Revenue, which were predicated upon the previous Rules of

the High Court 1980 (**RHC**), should be distinguished.

(b) The grounds of the applications arose on 9.12.2022, when the Wiramuda Decision was made. Accordingly, the applications, which were filed to compel the Revenue to comply with the Wiramuda Decision, had been made within three months of 9.12.2022 and were thus within time.

(c) The Revenue's failure to follow the FC's Wiramuda Decision "renders its decision flawed". The Revenue "has no right to retain the taxes" and has also been "unjustly enriched from both collecting and retaining of such taxes".

The HC has made available its grounds of judgment, which can be viewed here and here.

Revenue's Ill-Fated Appeals to the COA and the Taxpayers' Motions to Strike Out

Aggrieved, the Revenue filed appeals to the COA. In response, the Taxpayers filed motions to strike out the Revenue's purported appeals on the basis that the Revenue lacked *locus standi* (standing) to file them.

The Taxpayer's Submissions

Order 53, Rule 9 of the ROC allows an "aggrieved party" to appeal to the COA against any order made by the HC Judge under Order 53. The Revenue was neither a "party" nor "aggrieved" because:

(a) The leave proceedings were *ex parte* in nature (heard in the presence of one party

only, i.e., the applicant)[2]. The COA has held that while the Attorney General (**AG**) is a party as his presence is required by law even at the leave stage, the putative respondent is not a party at that particular point.

(b) The superior courts have consistently held for over two decades that the putative respondent is not a party and does not have the right to file an appeal even if it had been allowed to submit at the leave stage.

(c) The Revenue cannot be said to be "aggrieved". The HC merely granted leave for the Taxpayers to commence judicial review and to seek substantive reliefs. No order has yet been made against the Revenue.

The Revenue's Submissions

The Revenue maintained that it was an "aggrieved party" and had *locus standi* to file the purported appeals. In particular, the Revenue cited and relied on its successful appeal in ***Ketua Pengarah Hasil Dalam Negeri v Setia Indah Sdn Bhd (Civil Appeal No: W-01(IM)-583-10/2020),*** a tax case where the COA allowed the Revenue's appeal against the HC's decision to grant leave for the taxpayer to commence judicial review.

Specifically in respect of the Revenue's reliance on the ***Setia Indah*** decision, the Taxpayers submitted that the COA did not issue grounds for the decision to set aside leave. Therefore, that decision does not form binding precedent as the *ratio decidendi* (reasons for the decision) cannot be identified. It was unclear whether the issue of *locus standi* was even raised by the taxpayer in ***Setia Indah***. If not, the COA

[2] Order 53, Rule 3(2) ROC

would not have considered the issue, as a court is bound to decide only the issues on the record.

The COA's Decision

The COA unanimously held in favour of the Taxpayers and allowed the motions to strike out with costs. The COA delivered brief oral grounds as follows:

(a) The IRB was not yet a party to the judicial review application at the leave stage of the proceedings, despite its presence at the leave hearing.

(b) Because it was not yet a party to the judicial review proceedings, the IRB was not entitled to mount an appeal against the HC's decision to grant leave to commence judicial review.

(c) The cases cited by the IRB are distinguishable. In particular, the COA agreed that since the COA did not issue any grounds in ***Setia Indah***, the reasons for the COA's decision in that case are unascertainable. It is not apparent from the order alone why the COA reversed the HC's decision to grant leave in that case. Therefore, the ***Setia Indah*** case does not constitute a binding precedent.

Conclusion

The Revenue's refusal to take action immediately upon the pronouncement of the Wiramuda Decision by the FC to refund taxes collected pursuant to Section 4C of the ITA is already troubling. Its continued reluctance to engage in the substantive judicial review proceedings suggests that it may be

fully aware of its obligations and the views that the HC may form in the substantive applications.

The trend of appearing to object at the *ex parte* stage appears particularly prevalent in tax cases, turning the "expeditious and cheap" process for seeking leave[3] into a protracted and costly affair. The Revenue's promise to object to "**all** applications for judicial review" further exacerbates this issue"[4]. Appeals by the Revenue against decisions to grant leave, instead of engaging in the substantive judicial review proceedings, inevitably produce further unnecessary delays in the dispute resolution process.

In this regard, the COA's decision is welcomed for taking the Taxpayers one step closer towards seeking justice. In recent times, it has seemingly become common for putative respondents to appear to submit and object at the leave stage of judicial review applications. While it is the prerogative of the learned HC judges to decide whether to hear putative respondents at this stage, the general principle, in the words of the learned HC judge in ***Kanawagi a/l Seperumaniam*** remains:

> *"Counsels 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 the 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***"

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[3] ***Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad [2004] 5 MLJ 495***

[4] See our LHAG Insights dated 4 August 2021: Section 91(4)(a) Income Tax Act 1967: A Subtle Nod to Judicial Review? https://lh-ag.com/wp-content/uploads/2022/11/Section-914a-Income-Tax-Act-1967_A-Subtle-Nod-to-Judicial-Review_LHAG-Insights-20210804.pdf

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The Taxpayers were successfully represented at the COA by Consultant Dato' Nitin Nadkarni, Partner Chris Toh Pei Roo, and Associate Tan Henry.

If you have any queries pertaining to applications for refunds of income tax erroneously paid, or any disputes with the Revenue arising from audits or investigations, please contact Consultant **Dato' Nitin Nadkarni** (nn@lh-ag.com) or Partner **Chris Toh Pei Roo** (tpr@lh-ag.com).

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