CHARTERED TAX INSTITUTE OF MALAYSIA

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CHARTERED TAX INSTITUTE OF MALAYSIA (225750-T)

e-CTIM TECH-DT 23/2018 **29 March 2018**

TO ALL MEMBERS

TECHNICAL

Direct Taxation

TAX CASE UPDATE

TAX EXEMPT STATUS GRANTED UNDER INCOME TAX ORDINANCE 1947

SOCIETY OF LA SALLE BROTHERS v KPHDN

Court of Appeal at Putrajaya
Civil Appeal No: B-01(A)-83-03/2016
Date of Judgment: 18 April 2017

Facts and Issues:

This is an appeal against the decision of the High Court in refusing the appellant's application for judicial review. The case before the High Court was reported in our e-CTIM TECH-DT 34/2017 dated 17 May 2017. Please read our report for the facts of the case. The following is a brief recapitulation.

The Society of La Salle Brothers (the appellant) is a charitable institution with the sole objective of ensuring that education is accessible to Malaysians of all races, religions and creeds, and has been in Malaysia for more than 160 years. In a letter dated 26/1/1970, the respondent confirmed that the appellant was a charitable institution and was therefore not liable to income tax. The said letter was never withdrawn.

The appellant was informed in a letter dated 25/7/1995 from the respondent of the requirement to reapply for tax exempt status, but the appellant failed to do so.

The appellant was served with notices of assessment (NAs) dated 16/3/2015, for the years of assessment (YA) 2004, 2006 to 2007, and 2010 to 2013. The assessments included penalties for failure to furnish the returns for the respective years before the deadline of 30 April of each year. The total tax payable including penalties amounted to more than RM40 million.

Subsequently, the appellant filed for judicial review on 19/4/2015 to (among others) quash the notices for the above years of assessments "on the premise that the decision is null and void and unconstitutional." The High Court held that the NAs for the relevant years were valid and enforceable and the Prayer for order of certiorari was denied. Hence, the present appeal. The issues for determination of the Court of Appeal (the Court) were:

i. whether the High Court judge erred in holding that the appellant has lost its right of exemption by merely considering the amending provisions made to the Income Tax Act 1967 (ITA), without considering that the appellant did not acquire the right of exemption under the ITA, but under the Income Tax Ordinance 1947 (the 1947 Ordinance);
ii. whether the High Court judge was correct on the burden of fraud, negligence and willful default as regards the NAs issued out of time; and
iii. whether the appellant was correct in filing the application for judicial review.

Decision:

By a unanimous decision of the Court, the appeal was allowed.

The grounds of decision are summarized below:

1. **Submissions**

1.1 The main contention of the **appellant** was that it is a charitable institution and had enjoyed tax-exempt status under the 1947 Ordinance. These rights remain unaffected even when the Ordinance was repealed and replaced by the ITA as they were acquired before the amendments brought about by the Finance Acts in 1986, 1988, 2000 and 2007, which did not have retrospective effect so as to impair the appellant's rights in relation to the tax exemption.

1.2 The **respondent** submitted that the application for judicial review was an abuse of the process of court as the appellant had failed to file an appeal to the Special Commissioners of Income Tax (SCIT) under S99 of the ITA. The tax-exempt status of the appellant cannot be deemed as being granted in perpetuity. The appellant no longer enjoyed tax exemption as it did not take any action to re-apply for tax-exempt status subsequent to the amendments to the law. Although the NAs for YA 2004, 2006 and 2007 dated 16/3/2015 were issued outside the limitation period, it was the respondent's belief that there were elements of fraud and/or negligence on the part of the appellant. The burden of proof that the assessments were excessive/ erroneous was on the appellant.

2. **Decision of the Court**

2.1 The Court traced the transition of the law from the 1947 Ordinance to the ITA, and examined the amendments to paragraph 13 of Schedule 6 of the ITA by way of the Finance Acts of 1986, 1988, 2000 and 2007. Before stating its findings, the Court postulated that "the *first question for determination was whether the appellant had enjoyed tax exemption under the 1947 Ordinance, or under the ITA."*

2.2 Based on the respondent's letter dated 26/1/1970, where reference was made to the appellant's "last letter" and the use of the word "confirmed" in the first-mentioned letter, the Court concluded that there would have been an earlier decision granting the exemption, although counsel for the appellant was unable to present any documentary evidence to show specifically the grant of exemption under the 1947 Ordinance. Be that as it may, the Court found that the respondent did not mount any challenge in respect of the appellant's averment that they had enjoyed tax exemption under the 1947 Ordinance. Therefore the Court accepted the appellant's position that it had been granted tax exemption under the 1947 Ordinance, and "*it follows that the exemption was granted not through the letter dated 26/1/1970 but much earlier than that."*

2.3 The next question to ask was whether the exemption that was enjoyed by the appellant had been impaired by the repeal of the 1947 Ordinance. In this regard, the Court noted that although the 1947 Ordinance was repealed and replaced in whole by the ITA, "*there was no express provisions in the ITA which indicate that the vested rights acquired under the Ordinance shall be revoked*."

2.4 The Court referred to S30(1) of the Interpretation Acts 1948 and 1967 which provides that

"*the repeal of* a *written law in whole or in part shall not –*

(a) …..

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law;…."

Addressing the issue of whether the High Court judge had erred in not considering the above provision and its applicability to the taxing statute, the Court referred to the following cases:

- *National Land Finance Co-operative Society Ltd v DGIR* [1993] 4C;J 339 where the Supreme Court allowed the appeal by the taxpayer. The following was part of the excerpt quoted:

> "*There is therefore a doubt whether the Legislature had intended to impair the existing right of the taxpayer and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there is a doubt the ambiguity must be construed in favour of the taxpayer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose*."

- *Keith Sellar v Lee Kwang* [1980] 2MLJ 191. The Court took note of the Federal Court's statement (in dealing with paragraphs (a) and (b)) that the right approach should be that unless it is so expressed in the new law, a vested right is not taken away.

2.5 The Court agreed that the High Court judge had failed to direct his mind to S30 of the Interpretation Acts, and "*this failure was an error of law*." Based on the above authorities, the Court summed up its position as follows:

> "*Hence, while the tax exemption granted under the ITA 1967 would have ceased automatically pursuant to the ITA 1967, those amendments do not affect the appellant as it had not been granted the exemption under the ITA 1967 but under the 1947 Ordinance, which exemption remains valid and has not been revoked. Pursuant to sections 30(1)(b) of the Interpretation Acts, the appellant, in our judgment continues to be entitled to the tax exemption*."

2.6 The Court highlighted its observation that the amendments to paragraph 13 of Schedule 6 of the ITA have all been expressly stated to have prospective effect. Further, it was noted that while S27 of the Finance Act (No.2) 2000 specifically excludes taxpayers previously exempted under paragraph 13 of Schedule 6 of the ITA, it did not exclude those exempted under S13(1)(g) of the 1947 Ordinance.

2.7 In the premises, the Court found that there was no basis in law for the issue of the said NAs, and the respondent's decision to issue these notices were illegal and without jurisdiction.

2.8 Given that the respondent acted without jurisdiction, the third issue had to be resolved in favour of the appellant. Notwithstanding that it did not resort to the appeal procedure under S99 of the ITA, the appellant cannot be precluded from applying for judicial review. (*Government of Malaysia & Anor. V Jagdis Singh* [1987] CLJ (Rep) 110 cited.) In the light of the Court's (abovementioned) findings the decision of the High Court judge could not be sustained. (Note: The High Court held that the appellant had failed to prove the existence of "exceptional circumstances" to justify the issue of an order of certiorari.)

2.9 On the second issue, the Court held that the High Court judge had erred in his ruling on the burden of proof and cited *N.T.S. Arumugam Pillai v DGIR* [1977] 2 MLJ 63, where the SCIT ruled that the Revenue was to prove fraud and willful default beyond reasonable doubt and the burden on the appellant to rebut the case against him was on a balance of probabilities. This decision was affirmed by the High Court as well as the Federal Court.

Members may read the full Grounds of Judgment at the Institute's website and the LHDNM website.