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TECHNICAL

Direct Taxation

TAX CASE UPDATE

Judicial Review application – tax on proceeds from sale of land alienated to a toll concessionaire under a Toll Concession Agreement

[ZECON TOLL CONCESSIONAIRE SDN BHD v KPHDN](#)

High Court in Sabah & Sarawak at Kuching
Application for Judicial Review No: 5-2008-II
Date of Judgment: 6 Nov. 2008

Facts and Issues:

This is an application for leave to apply for an Order of Certiorari to quash 2 Notices of Assessment (NA) issued by the respondent (“Revenue”), both dated 22.7.2008. The first was issued under the Income Tax Act 1967 (ITA) for the year of assessment (YA) 1999, and the second under the Real Property Gains Tax Act 1975 (RPGTA) for YA 1999.

The company (“the Applicant”) was incorporated on 28.8.1997 and commenced business on 25.2.1998. Its principle activities were turnkey construction, trading in real property and toll concession. Under a toll concession agreement (CA) with the government in which the Applicant agreed to construct, operate and maintain a bridge and associated works for the government, the Applicant was granted a concession to collect and retain toll from vehicles using the bridge and associated works. In addition, within 6 months of the date of the CA, the government would alienate several parcels of land (concession lands) to the Applicant under a 99-year lease, and the Applicant would be given unfettered and absolute rights to develop the concession lands.

Pending alienation of the concession lands (which took place from February till November 1999) the Applicant entered into 3 sale and purchase (S&P) agreements on 15.1.1999, to sell the concession lands to third parties named in the CA. The letter from the relevant authority granting approval for alienation of the lands to the nominated companies was dated 30.1.1999, hence the Applicant claimed that the sale of the lands was a conditional sale because on the date of the S&P agreements, the Applicant had no right or interest over the concession lands. 4 land titles submitted by the Applicant as exhibits showed that the dates of issue were 2 Feb, 3 March and 17 Nov. (2 titles), in the year 1999. Based on these dates, the Applicant contended that the lands were alienated only from 2.2.1999 and therefore prior to that date, it had no rights or interest over the land.

As for its business, the Applicant submitted the Profit and Loss Account and Balance Sheet as at 31.12.1998 to show that the Applicant had suffered a net loss of RM188,058 for the year 1998 and therefore should not be liable for income tax for YA 1999 (basis year 1998). Hence the Applicant claimed that the issuance of the NA mentioned above were unreasonable and illegal.

Decision:

Leave application for judicial review not granted. The grounds of the decision are summarized below:

1. The Court examined the legal principles applicable in considering leave application for judicial review and pointed out the following:
 - The applicant must show prima facie that the application is not frivolous or vexatious, and that there is an arguable case for the grant of relief based on evidence produced;
 - To show prima facie an arguable case, the applicant should be able to demonstrate that the decision to be quashed is tainted with illegality and therefore *“it would be wrong to insist that the (applicant) exhausts his statutory right of appeal where one is available.”*
 - *“Where a statute has provided an extensive appeal structure such asthe ITA, the Court is not precluded in appropriate cases from entertaining an application for judicial review if the applicant can show that firstly, it is a faster and more convenient remedy. Secondly the decision maker.....had acted unfairly, abuse(d) its powers or breach of natural justice or that the issues of public law raised are of general public importance going beyond the significance of the case itself.”*
2. The Applicant submitted that Revenue had acted unreasonably and without, or in excess of jurisdiction in raising the NA – Form J and Form K, both dated 22.7.2008 under the ITA and RPGTA respectively.
 - The Applicant contended that Revenue acted without jurisdiction in raising the assessments as they were raised more than 6 years after the YA 1999 in contravention of S91(1) and (3) of the ITA and S15(1) and (2) of the RPGTA.
 - In issuing the assessments Revenue had failed to consider several relevant factors, among which were the following facts – that the applicant:
 - derived no income from the concession lands in 1998;
 - suffered a net loss in 1998;
 - was principally engaged in turnkey construction and trading in real property, and as such, even if there was a disposal of concession lands (which was denied), such disposal was not subject to the RPGTA.
 - Revenue also took into account irrelevant considerations. Revenue was wrong in the following considerations:
 - the date the CA was concluded was the date the Applicant derived income from the concession lands;
 - profit derived from the sale of concession lands to nominated companies were subject to RPGT;
 - the date the CA was concluded was the date the concession land was alienated to the Applicant.
 - Revenue failed to provide any reason, tax computation, calculations or supporting information to the Applicant in the NA dated 22.07.2008 thus failing to fulfill its obligation to provide a reasoned decision in issuing the said notices.
3. The Court was of the view that the issues of unreasonableness and illegality raised by the Applicant are issues of mixed fact and law which are within the purview of the Special

Commissioners of Income Tax (SCIT) to decide. Where the SCIT have the jurisdiction to deal with such issues, the Court should be slow to take away that jurisdiction from the tribunal which was specially established by statute to deal with such kind of cases.

4. Based on the case of Govt. of Malaysia and Anor. v Jagdis Singh [1987] 2 MLJ 185, the Judge opined *"that the Court's discretion in such cases must be exercise(d) sparingly and only in cases where it is shown 'a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice'....On the facts and circumstances of this case I cannot find any exceptional circumstances to justify the exercise of the discretion in favour of the applicant."*
5. The SCIT is vested with the necessary authority and power to deal with matters raised in the present case and it constitutes a wholly adequate machinery for the just disposal of the complaint in question.
6. On the issue of unreasonableness relating to the issuance of the NA after 6 years, the Court noted that the DGIR is empowered under S91 of the ITA and S15 of the RPGTA to issue notices for additional taxes. The SCIT are the Judges of facts with the function of determining whether there has been fraud or wilful default. Furthermore, the Court, in the case of Kerajaan Malaysia v Dato' Hj. Ghani Gilong [1995] 2 MLJ 119, has pronounced that *"in our view, the High Court has no power to entertain a plea of limitation under S91(1) and (3) of the Act advances by the taxpayer. However, the Special Commissioners have such power."*
7. There is no provision in either the ITA or the RPGTA that requires the DGIR to give reasons or to state the basis for an assessment raised. Presumably, the taxpayer is acquainted with his own tax affairs and should be able to discharge the burden of proving that an assessment is wrong. Although the onus of proof of wilful default or fraud is on the DGIR, once that onus is discharged, the burden of proving that the assessment was excessive or erroneous shifts to the taxpayer.
8. A perusal of the notice of appeal by the taxpayer to the SCIT showed that the Applicant was aware of the issues raised in the assessment, and had in fact summarized the reasons why the assessment was excessive. Therefore it would be incorrect to conclude that the Applicant was not given the basis for the assessment.
9. In a certiorari application, the Court sits in a supervisory jurisdiction and is concerned only with the manner the decision is arrived at and not with the decision itself (unless it can be shown that the decision itself is illegal and not allowed in law.)(Ta Wu Realty Sdn Bhd v KPHDN [2008] 5 AMR 458)

For the above reasons, the application was refused.

Members may read the full Grounds of Judgment at the [Institute's website](#) and the [LHDNM website](#).

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