

**TECHNICAL**

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**Direct Taxation****TAX CASE UPDATE****Application for Judicial Review – Subjecting compensation from compulsory acquisition of land to tax****ISKANDAR COAST SDN BHD v KPHDN**

High Court of Malaya at Kuala Lumpur

Application For Judicial Review

No. WA-25-144-08/2016

Date of Judgment: 26 October 2017

**Facts and Issues:**

The Applicant had filed an application for Judicial Review to grant (amongst others) –

- a Declaration that the gains from compensation received for the compulsory acquisition of a parcel of land belonging to the Applicant (identified in the Judgment as “the land”) is not subject to income tax as the element of compulsion vitiates the intention to trade;
- an order for Certiorari to quash the decision of the DGIR (the Respondent) in issuing the notices of additional assessments dated 8.8.2016 for the years of assessment 2008, 2009 and 2013 to subject the gains arising from the compulsory acquisition of the land to income tax on the premise that the Respondent had acted ultra vires, illegally and without jurisdiction.

In the course of an investigation relating to the Applicant’s business activities for YA 2008 to 2013, the Respondent requested for and obtained documents and tax computations for the relevant years from the Applicant. From the review and inspection of these documents, the Respondent found that the Applicant had omitted/ failed to report the gain from compensation for compulsory acquisition of the land by the Johor State Government. The Applicant responded to this finding in a letter dated 26.5.2015 in which it submitted that the gain from the compulsory acquisition of the land was not subject to income tax and referred to the case of Lower Perak, Penang Realty and Metacorp Development because the element of “compulsion vitiates the intention to trade.”

The Respondent informed the Applicant in a letter dated 4.2.2016 that it maintained its previous decision and made reference to S24(1)(a) of the Income Tax Act 1967 (ITA) in which the income has to be reported in the year it is receivable. (All provisions cited hereinafter are from the ITA unless otherwise stated.) The Respondent was of the opinion that the case of F. Housing Sdn Bhd (1976) 2 MLJ 18 and S24(1) were applicable because the Applicant had prior knowledge of the intention of the government to acquire the said land.

The issues raised before the Court is whether the compensation for compulsory acquisition of the land belonging to the Applicant was taxable (as submitted by the Respondent) or not taxable (Applicant’s submission). The Respondent also raised a preliminary issue based on S99 of the ITA which provides that a person aggrieved by an assessment made under the ITA may appeal to

the Special Commissioners of Income Tax (SCIT) within 30 days after service of the notice of assessment (NA). *"In other words, (it was submitted) this Court has no jurisdiction to entertain the Applicant's application when there is an available remedy provided for the Applicant under S99 of the Act."*

**Decision:**

The application was dismissed. The grounds of the decision are summarized below:

1. In the present case, the Applicant did not file any appeal to the SCIT under S99 and thus had *"failed to adhere to the appeal process provided for under the (ITA) therefore a remedy of appeal process is available for the Applicant under the (ITA)."* Thus, the Court agreed with the Respondent's submission that the Applicant had failed to exhaust the remedy provided under the Act.
2. The Court referred to the case of Government of Malaysia & Anor. V Jagdis Singh [1987] 2 MLJ 185 and cited the principle stated therein - *"Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances."*
3. *"In the present case, the crux of the matter is whether there exist exceptional circumstances of clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of principles of natural justice for the Applicant to circumvent the express provision of appeal procedure under section 99 of the ITA..."*
4. The Court agreed with the Respondent that the leave application (which was made ex-parte before a judge in chambers) was granted in the absence of the Respondent, therefore leave should not have been granted to the Applicant since the Respondent was not able to present his objection. It was also noted that the record of proceedings showed that leave application was granted because there was no objection from the Attorney General (AG) Chambers, although in revenue cases, the AG is not acting for the Respondent.
5. While the Court agreed with the Applicant's submission that the existence of an alternative remedy is not a bar to judicial review and *"cannot operate to oust the jurisdiction of the High Court"*, the Court was of the view that *"the 'no objection' from the AG Chambers cannot be an exceptional circumstances meriting the granting of leave for judicial review"* and went on to state that –  
*"In my considered opinion there must be grounds such as the 'error of law' or 'abuse of power' going to the legality of the conduct of the decision-making authority that would be considered as exceptional circumstances to grant leave for judicial review."*
6. The Applicant relied on the case of KPHDN v Metacorp Development Sdn Bhd [2011] MSTC 30-024 for its stand that gains from the compulsory acquisition of land are not subject to income tax, and distinguished this case from F Housing Sdn Bhd v DGIR [1975] 2 MLJ 183 as one which is peculiar to its own facts, as the taxpayer in F Housing knew full well that the land in question was to be acquired by the Government even before they bought it and had intended to profit from the difference in the acquisition award and the purchase price.
7. The Respondent submitted that the case of F Housing Sdn Bhd and S24(1) of the ITA were applicable to this case because the Applicant had prior knowledge of the intention of the Government to acquire the said land. By referring to Metacorp Development, the Court of Appeal had agreed that compulsory acquisition of land did not fall under S24(1) UNLESS the taxpayer, when obtaining the said land, had knowledge that it would be acquired by the government.

8. The finding by the Respondent that the Applicant had prior knowledge of the intention of the Government to acquire the said land was based on factual relationship between the Applicant, Iskandar Investment Bhd (IIB) and Khazanah Nasional Bhd (parent company of IIB, which in turn holds 80% of the Applicant's shares) through the related shareholdings and supported by documents submitted to the Court as Exhibits (listed under paragraph 52 of the Judgment.) Exhibits presented also showed that the Applicant had applied to the Pejabat Pengarah Tanah Dan Galian Johor, to change the status of the land from agricultural land under 99-year lease to freehold land. Most of the land had their status changed to freehold land. It was submitted that this was done to increase the value of the properties and consequently obtain higher value of compensation.
9. Applying the principle from the case of *KPHDN v Alcatel-Lucent (M) Sdn Bhd (Civil Appeal No. 01(f)-18-08/2012(W))* the Court declared that, had the Appellant filed an appeal to the SCIT, they would be accorded every opportunity to show where the Respondent went wrong. Decisions derived by the SCIT are much dependant on the facts of the case, i.e. points of submission by both the Respondent and the Applicant have to be proved by way of evidence from records or documents and the testimony of witnesses. After the case, either party may appeal on a question of law against a Deciding Order of the SCIT, or request for a Case Stated for the opinion of the High Court. It is much easier to determine the issue of law based on the proven facts found by the SCIT in the Case Stated.
10. In the Court's opinion, the SCIT do have powers to hear the matter in dispute in this case since they are the "judges of facts" who have the jurisdiction to hear the matter. To submit that the Respondent is right or wrong in raising the additional assessments is in substance, questioning the merit of the assessments raised. In Ta Wu's<sup>1</sup> case, it was held that the SCIT were the proper forum to decide on the merits of an assessment. Furthermore, the Applicant will also have the opportunity to bring the matter to the High Court on any question of law as the decision of the SCIT is appealable to the High Court by way of a case stated.
11. Based on the doctrine of "*stare decisis*", the decision by the Federal Court in rejecting the Taxpayer's claim as the domestic remedy available has not been exhausted by the Taxpayer in the case of Alcatel-Lucent is binding on all courts and it is also binding upon this Court.
12. In conclusion, in the Court's opinion, there were no exceptional circumstances for the Court to allow the application. The dispute raised by the Applicant must be dealt with by the SCIT like any other appeal against an assessment.

1 Ta Wu Realty Sdn Bhd v KPHDN & Another [2008] 6 CLJ 235

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

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