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CHARTERED TAX INSTITUTE OF MALAYSIA (225750-T)

e-CTIM TECH-DT 47/2019 **19 June 2019**

TO ALL MEMBERS

TECHNICAL

Direct Taxation

TAX CASE UPDATE

Application For Judicial Review

Between

STORMAC SDN BHD (Applicant)

And

1**. SPECIAL COMMISSIONERS OF INCOME TAX** (SCIT)
2. **INLAND REVENUE BOARD OF MALAYSIA** (LHDN)

…..(Respondents)

High Court of Malaya in Kuala Lumpur
Semakan Kehakiman: No. WA-25-230-08/2017
Date of Judgment: 22 March 2018

Facts and Issues:

This is an application to commence a judicial review (JR) against the Respondents pursuant to Order 53 Rule 3 of the Rules of Court 2012 vide the Notice of Application dated 30/8/2017 seeking for the following reliefs –

(a) A Certiorari to quash the decision of the SCIT dated 1/6/2017;
(b) An order for Certiorari to quash the decision of the SCIT to be allowed by this Honorable Court;
(c) An order that all proceedings and / or steps pertaining to the enforcement or execution of the Decisions be stayed until the final determination of this application;
(d) The cost of and/ or incidental (sic) to this application be paid by the Respondents; and / or
(e) All other and further relief which the Honorable Court deems fits (sic) and proper (hereinafter referred to as "this Application")

The following are the salient facts of the case –

(All sections cited hereinafter refer to sections in the ITA unless otherwise stated.)

In a letter to the Applicant dated 26/9/2013, LHDN raised several issues arising from its audit findings for the years of assessment (YA) 2009 to 2011. The Applicant was then issued with Notices of Additional Assessment for YA 2009, 2010 and 2011 dated 10/11/2014 accompanied by a letter dated 12/11/2014.

Being dissatisfied with the assessments, the Applicant filed an appeal to the SCIT by way of Form Q which was forwarded to the SCIT on 7/5/2015. After the hearing before the Court, the SCIT dismissed the appeal and decided that –

"(a) The purchase for (sic) furniture is not allowable under S33(1) Act 53;
(b) The application of S140(1)(c) by the 2nd Respondent is correct; and
(c) The imposition of penalty….under the Act 53 is correct."

The Applicant did not file any appeal against the decision of the SCIT under Paras. 34 and 35 of

Sched. 5, neither was there any application for extension of time (Para. 36 of Sched. 5) at the expiry of the timeline for filing an appeal. Instead, the Applicant filed for a JR against the said decision.

Decision:

The application was dismissed by the High Court ("the Court").

The following is a brief summary of the grounds of decision:

1. **The Principle of Law in the Leave Application for Judicial Review**
   Among the cases referred to are the following:
   i. *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association (1990) 3 MLJ 228* provided the following principle –

      "*the guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application".*

   ii. *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya & Anor (1998) 1 MLJ 224*

      "…Additionally, an application must fail if it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial remedies is inappropriate."

2. The Senior Federal Counsel had opposed the application on the sole ground that it is frivolous and vexatious, and contravenes Order 53 of the Rules of Court 2012 since there are available provisions for further appeals in Paras. 34 – 42 of Sched. 5. The Applicant has not exhausted its local remedy and thus abused the process of court by filing this JR.

3. The Judge drew attention to the "*trite principle….whereby the Court (is) inclined to dismiss the judicial review for the available local remedy on the subject matter*." He referred to the following cases in support of that statement –
   i. *Khoo Ah Imm v Datuk Bandar Kuala Lumpur & Anor (1997) 3 CLJ 519*

      "One of the grounds on which the remedy of certiorari may be withheld is where the supplicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an alternative forum…"

   ii. *Ta Wu Realty Sdn Bhd v KPHDN & Anor (2008) 6 CLJ 235*

      "The normal rule is that certiorari will not lie where there is an alternative remedy…."

4. He then referred to the following cases wherein it was emphasized that compliance with the above principle is not an option given to the courts –
   i. *KPHDN v Mudah.my Sdn Bhd (2017) 2 MLJ 197*

      "…where there was an alternative remedy of appeal, leave to bring judicial review proceedings would only be granted in exceptional circumstances…

      Therefore the principle remains a good law….(and) should apply….especially….where an alternative and specific remedy is expressly provided under s 109H of Act 53. ***It is beyond question that this position is not an option but the law that ought to be complied with and applied to the instant application***."

ii. *Robin Tan Pang Heng v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor (2010) 9 CLJ 505*

"……courts are not authorized to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words, the statutory right has to be exhausted."

iii. *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia (2005) 8 CLJ 613*

"Thus the Applicant's application for injunction would be in effect pre-empt or hinder the Respondent's right to exercise its statutory duties and power under section 15(1) and (2) of the Act."

5. The next point for consideration was the contention by the 2nd Respondent that the application for JR is wrong in procedure, and tainted with illegality, irrationality and procedural impropriety. In connection with this, the Court referred to S99 which contains provisions for appeals before the SCIT, and reiterated that "*the ITA has specifically provided the avenue for an aggrieved Taxpayer to appeal against the Revenue's decision except in a very exceptional case*". The Judge cited the case of *KPHDN v Bandar Nusajaya Development Sdn Bhd (2016) MSTC 30 – 117* in which it was held that where there is available domestic remedy prescribed by the regulating Act, the domestic remedy must first be exhausted.

   The case of *KPHDN v Alcatel-Lucent (M) Sdn Bhd & Anor (2017) 1 MLJ 563* was also cited as one where the decision of the court on the issue of domestic remedy was in agreement with the first mentioned case.

   The Judge then observed that the doctrine of *stare decisis* has made the Federal Court's decision (in the 2 cases cited above) to reject the Taxpayer's application, (since the domestic remedy available has not been exhausted by the Taxpayer) binding on the Court in the present case as well.

6. The Court also declared that there "*is nothing in the affidavit* (in support of leave) or the *submission* (of the Applicant) *that explain (sic) the exceptional circumstances of the Applicant's case that warrant the Court to exercise its discretion to allow this leave and divert from the trite principle….laid down in the previous discussion*."

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