



LEAVE TO APPEAL GRANTED: 2 QUESTIONS POSED TO THE APEX COURT

— IMSB v KETUA PENGARAH HASIL DALAM NEGERI

 Federal Court, Putrajaya

 October 29, 2019

 Special Appeal Division,
Legal Department, IRBM

PANEL OF JUDGES

1. YAA Tan Sri Tengku
Maimun Tuan Mat
2. YA Dato' Rohana Binti
Yusud
3. YA Dato' Setia Haji
Mohd Zawawi Bin Salleh

REVENUE COUNSELS

Muhammad Farid Jaafar
Ridzuan Othman
Nurul Amalina Mantaza

BACKGROUND

IMSB ("the Applicant") filed a notice of motion for leave to appeal to Federal Court against the whole decision of the Court of Appeal dated 19.2.2019 ("the impugned Decision").

The leave application was made based on the complaint that the Court of Appeal was wrong to allow the appeal by the Respondent against the decision of the Court of Appeal which reversed the High Court's decision dated 27.3.2019. The Applicant proposed six (6) questions of law to be brought before the Federal Court. The questions are **(1)** Whether an Advance Ruling issued under Section 138B of the Income Tax Act 1967 ("ITA") is a decision which could adversely affect the Applicant within the meaning of Order 53 Rule 2(4) of the Rules of Court 2012 ("ROC")?;

(2) Whether the Applicant who is aggrieved by a decision made by way of an advance ruling may seek an order for certiorari pursuant to Order 53 Rule 2(1) of the ROC to quash the said decision?; **(3)** Whether an Advance Ruling is immune to judicial scrutiny by way of judicial review under Order 53 Rule 2(1) of the ROC?; **(4)** Whether it is premature for the applicant who is aggrieved by advance ruling to file a judicial review application immediately after receiving the advance ruling?; and **(5)** Whether the distribution fee payable by a Malaysian tax resident to a non-resident under the distribution agreement is royalty under the Malaysia-Netherlands Double Taxation Agreement ("DTA")?; and **(6)** In the event of a conflict, whether the definition of "royalty" under a DTA shall prevail over the definition of "royalty" under Section 2(1) of the ITA?.

APPLICANT'S CONTENTION

The Applicant contended that the questions of law in this application have fulfilled the threshold under Section 96(a) of Court Judicature Act 1964 in which the questions had not been decided by the Federal Court and it is also a matter of public interest. The Applicant also highlighted that the Respondent in arriving to the decision in Advance Ruling had made an error of law and the said Advance Ruling adversely affects the Applicant.

KPHDN'S CONTENTION

The issues under appeal had been decided by the Federal Court and do not require further argument before the Federal Court for public advantage. The Applicant is not adversely affected by the Advance Ruling due to the fact that the Advance Ruling is a decision towards the 'proposed transaction' of the Applicant to which the advance ruling bears no tax implication until an assessment has been made by the Applicant. Any objection to the tax treatment stated in the advance ruling has to be ventilated to the Special Commissioners of Income Tax as provided under tax law. Thus, the application for judicial review in this stage would be premature and lead to abuse of the process of court.

COURT'S DECISION

A three-member bench led by the Chief Justice allowed two (2) out of six (6) questions to the apex court which are:-

1. Whether an Advance Ruling issued under Section 138B of ITA is a decision which could adversely affect the applicant within the meaning of Order 53 Rule 2(4) of the ROC?; and
2. Whether the definition of 'royalty' under Double Taxation Agreement Malaysia-Netherlands DTA shall prevail over Section 2(1) of the ITA.