

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)  
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO: WA-25-304-07/2019**

Dalam perkara suatu keputusan Responden seperti yang dinyatakan melalui e-mel bertarikh 26.6.2019 yang telah disampaikan pada 26.6.2019;

Dan

Dalam perkara notis taksiran bagi tahun taksiran 2007 bertarikh 26.6.2019;

Dan

Dalam perkara suatu permohonan untuk antara lain, suatu Perintah Certiorari;

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012.

**ANTARA**

**SUMUR HEIGHTS SDN BHD**

**...PEMOHON**

**DAN**

**KETUA PENGARAH HASIL DALAM NEGERI**

**...RESPONDEN**

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)  
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO: WA-25-306-07/2019**

Dalam perkara suatu keputusan Responden seperti yang dinyatakan melalui e-mel bertarikh 26.6.2019 yang telah disampaikan pada 26.6.2019;

Dan

Dalam perkara notis taksiran bagi tahun taksiran 2007 bertarikh 26.6.2019;

Dan

Dalam perkara suatu permohonan untuk antara lain, suatu Perintah Certiorari;

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012.

**ANTARA**

**SUMURWANG DEVELOPMENT SDN BHD**

**...PEMOHON**

**DAN**

**KETUA PENGARAH HASIL DALAM NEGERI**

**...RESPONDEN**

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR  
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)  
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO: WA-25-308-07/2019**

Dalam perkara suatu keputusan Responden seperti yang dinyatakan melalui e-mel bertarikh 26.6.2019 yang telah disampaikan pada 26.6.2019;

Dan

Dalam perkara notis taksiran bagi tahun taksiran 2007 bertarikh 26.6.2019;

Dan

Dalam perkara suatu permohonan untuk antara lain, suatu Perintah Certiorari;

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012.

**ANTARA**

**TOP CAPITAL SDN BHD**

**...PEMOHON**

**DAN**

**KETUA PENGARAH HASIL DALAM NEGERI**

**...RESPONDEN**

## **JUDGMENT**

### **Introduction**

- [1] There are three applications for leave to commence judicial review before this Court, among others, to quash the decision of the respondent in the form of notice of assessment for the Year of Assessment 2007 dated 26.6.2019. The applications are No. WA-25-304-07/2019, No. WA-25-306-07/2019 and No. WA-25-308-07/2019.
- [2] The applicants also pray for the said respondent's decision be stayed until the full and final determination of the applicants' judicial review application.
- [3] As the applications involves the same facts, the applications for leave is heard together by this court.

### **The Salient Facts**

- [4] The relevant facts in this application are the following :
- (i) On 16,12,2019 the applicants entered into a Sale and Purchase Agreement ('the SPA') with Syarikat Pembangunan Highlands & Lowlands Sdn Bhd to acquire a property known as Lot 4598; Geran No. 27449, which is approximately 81.2411 acres ('the property').

- (ii) Sumurwang Sdn Bhd, the holding company was then authorised by the applicants to act as the landowner to enter into a joint venture agreement with I-Bhd on 28.2.2016 for I-Bhd to develop the property.
- (iii) On 4.6.2007, the applicants entered into a SPA with I-Group Sdn Bhd for the sale of the property.
- (iv) On 4.6.2019, the respondent issued its tax investigation finding letter to the applicants informing, among others, that the gains received from the disposal of the said property is subject to income tax under section 4(a) of the Income Tax Act 1967 ('ITA 1967') and not real property gains tax.
- (v) On 26.6.2019, the respondent issued the notice of assessment for the Year Assessment 2007 which is the subject matter of the judicial review application filed by the applicants.
- (vi) The applicants' grounds for the judicial review application, inter alia is that the respondent had erroneously and arbitrarily subjecting the gains from the disposal of the property to income tax under section 4(a) of ITA 1967 instead of under the Real Property Gains Tax Act 1976 ('RPGTA 1976')
- (vii) The respondent objected the leave applications on the ground that the applicants has failed to exhaust the remedy of an appeal before the Special Commissioner of the Income Tax ('SCIT') under section 99 of the ITA 1967.

## The Applicants' Submission

- [5] The applicants submitted that leave should be granted as there exist an exceptional circumstances which is an error of law that give rise to a clear lack of jurisdiction by the respondent in imposing the tax under section 4(a) of the ITA 1967 instead of the RGPTA 1976.
- [6] It was also contended that the respondent has failed to apply the legal principles established by the superior courts in the case of *Alf Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 3 CLJ 936* and *Lower Perak Cooperative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541* on the issue that a tax payer cannot be said to have been trading when dealing with its investment properties.
- [7] The applicant further submitted that there is no factual dispute in this case and there is purely a question of law which is whether the disposal of the investment property is subject to income tax.
- [8] In regard to the stay application, the applicants submitted that there exist a special circumstances to grant the stay application which are as follows :
- (i) the amount of tax imposed are large which are the following :
- (a) case No. WA-25-304-07/2019, the amount is RM18,710,899.73.

(b) case No. WA-25-306-07/2019, the amount is RM16,223,325.83.

(c) case No. WA-25-306-07/2019, the amount is RM22,724,327.14.

**[9]** It was also submitted that the stay is necessary to preserve the status quo and to prevent nugatory effect in the event the applicant is successful in the substantive application.

### **The Respondent's Submission**

**[10]** On the other hand, the respondent submitted that whether a disposal of a property is subject to Income Tax Act 1967 or Real Property Gains Tax Act 1976 is a question of fact. It was argued that as the applicants contended that they have no intention to trade in regards to the said property, it then involves determination of question of fact.

**[11]** Further, it was submitted that there is no exceptional circumstances in this case for the applicants not to exhaust the remedy of an appeal to the SCIT under section 99 of ITA 1967.

**[12]** As to the stay application by the applicants, the respondent contends that there is no special circumstances for the court to grant the stay application as it involves payment of tax and is refundable if the notice of assessment by the respondent is set aside by the Court.

## Findings Of This Court

[13] It is trite law that the threshold in granting leave to commence judicial review application is low and leave may be granted if there exists an arguable case and the application is not frivolous and vexatious.

[14] The Federal Court in the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 at page 303 states as follows :

*"Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged."*

[15] The core issue before this Court in the present leave applications is the failure of the applicants to exhaust the remedy of an appeal to the SCIT under section 99 of ITA 1967 before proceeding with these applications for judicial review.

[16] There is plethora of authorities which decides that leave application for judicial review will not be granted if there is an alternative remedy except if there exist an exceptional circumstances which are :

- (i) a clear lack of jurisdiction;
- (ii) a blantant failure to perform some statutory duty;
- (iii) a serious breach of principle of natural justice;



(iv) 'illegality' or 'unlawful treatment'.

*(see Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185 SC, Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal For Ulu Kinta & Ors [1972] 1 MLJ 70 FC).*

**[17]** In the instant case, it is not disputed that the applicants have not exhaust the statutory remedy to appeal against the decision of the respondent to the SCIT under section 99 of the ITA 1967 in issuing the notice of assessment.

**[18]** Here, the applicants' main contention is that there is clear lack of jurisdiction as there is an error of law by the respondent in imposing the income tax for the disposal of the said property instead of the real property gains tax.

**[19]** In this regard, subsection 4(a) of the ITA 1967 provides that an income which tax is chargeable is income in respect of gains or profits from business.

**[20]** "Business" is defined under section 2 of the same Act to include "adventure or concern in nature of trade".

**[21]** Reverting to the present case, the basis of the respondent's impugned notice of assessment is that the transaction with regard to the said land concern in nature of trade based on its assessment of facts to which the applicants denied and contend that the transaction concerned a disposal of an investment of property which is not subject to income tax.

[22] In the circumstances, I find, the issue whether the disposal of the said land concern in nature of trade or disposal of an investment property involves determination of facts which can be resolved by adducing evidence through witnesses and documents. This task has to be carried out by the SCIT as judges of facts.

[23] In the case of Director ***General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 CLJ 160***, the court held that the issue whether an adventure in nature of trade was carried out involves a finding of fact and only the broader question involves the question of law. It states as follows :

*"In this case the question was whether or not an adventure in the nature of trade was being carried on and the Special Commissioners had to consider all the circumstances of the case and their finding would be one of the fact. The broader question as to the meaning of adventure in the nature of trade would however be one of law."*

[24] Further, in the Court of Appeal case of ***Saujana Triangle Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [Civil Appeal No. W-01(A)-283-08/2017]*** the decision of the High Court to dismiss the leave application was affirmed and the High Court Judge which states, among others, as follows :

*"...the facts and the documents must be adduced to determine whether or not such expenses are deductive and whether the gains from the disposal of the plots of land subject to the ITA 1967 or not. Accounts and documents need to be examined and witnesses need to be called to verify the accounts and documents and to prove the facts therein."*

[25] In addition, in the present case, it involves the issue of merit of tax assessment by the respondent and question pertaining to the merit of the assessment of tax is matter to be determined by the SCIT as judges of facts.

[26] As regard the meaning of exceptional circumstances, it is instructive to make reference to the Court of Appeal case of *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2017] MLJU 179*, where it states the following :

*"Exceptional means 'unusual: not typical': see Consise Oxford English Dictionary 11<sup>th</sup> Edition . Very exceptional circumstances therefore means very unusual circumstances. What amounts to very unusual circumstances must depend on the factual matrix of each case.*

*[22] There is nothing exceptional about the appellant's case to entitle it to by-pass the domestic appeal process prescribed by section 99 of the ITA. Nor could we find 'very exceptional circumstances', in the sense that there was a clear lack of jurisdiction, or a blatant failure to perform some statutory duty, or a serious breach of the principles of natural justice that the respondent can be said to be guilty of when he issued the Notices of Assessment.*

*[23] The dispute was over the decision of the respondent to issue the Notices of the Assessment for years of assessment 2008, 2009 and 2013, for which the appellant's remedy lies in appealing to the Special Commissioners in accordance with section 99 of the ITA. That would be the proper avenue for the appellant to challenge the decision of the respondent: Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd & Anor [2017] 2 CLJ 1; [2017] 1 MLJ 563."*

[27] The cases of Alf Properties (supra) and Lower Perak (supra) referred to by the applicants in fact has gone through the appeal process before the SCIT pursuant to section 99 of the ITA 1967 and as such

are distinguishable from the present case. Both cases only laid down the legal principle with regard to issue of disposal of an investment property. However before applying this legal principle, the determination of facts is required as was done in both cases.

**[28]** Furthermore, the assessment of tax by the respondent in the present case was conducted pursuant to the statutory powers under the ITA 1967.

**[29]** Having considered the law, the facts and submissions by parties in this case, I find, there is no lack of jurisdiction or any exceptional circumstances which enable the applicants to proceed with the judicial review application without having exhaust the remedy of an appeal to SCIT under section 99 of the ITA 1967.

### **Conclusion**

**[30]** As such, the applicants' applications for leave to commence judicial review for the three cases are dismissed with costs of RM2,000.00 for each application.

### **The Application For Stay**

**[31]** As regard to the stay application, it is not disputed that this cases involves payment of tax. The amount involved is immaterial as the payment made is refundable in the event that the applicant succeed in quashing the said notice of assessment. Hence, there is no issue of nugatoriness in the present case.

[32] On this issue too, it is relevant to make reference to the Federal Court case of *Sun Man Tobacco Co. Ltd v Government of Malaysia [1973] 2 MLJ 163*, which emphasized the statutory requirement to make prompt payment of tax upon being served with the notice of assessment. It states inter alia as follows :

*"... There is a string of decided cases (A.B.C. v The Comptroller of Income Tax, Singapore; Comptroller of Income Tax v R.S.T.; Comptroller of Income Tax v. A. Co. Ltd.; Comptroller of Income Tax v. A.b. and Comptroller of Income Tax v. C.D. Ltd; Comptroller-General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd; Government of Malaysia v. C.D.; and Comptroller-General of Inland Revenue v. N.P; in which it has been held that the effect of the relevant provision of the Income Tax Act 1967 is that on the service of a notice assessment on the person assessed the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not the person appeals against the assessment, and can then be recovered by the Government by civil proceedings as a debt due to the Government."*

[33] Likewise in another Federal Court decision in *Kerajaan Malaysia v Mudek Sdn Bhd [2017] 10 CLJ 158*, where it was held as follows :

*"We hold that pursuant to s. 21(1) of the said Act, once a notice of assessment has been served, the tax payable will be due and payable. If the Respondent felt aggrieved by the issue of no chargeable gain arising, the Respondent should have lodged an appeal to the Special Commissioners of Income Tax pursuant to s. 18 of the said Act."*


[34] Further, the Court of Appeal in the case of *Mass Rapid Transit Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Rayuan Sivil No. W-01(A)-684-12/2018)* has affirmed the decision

of the High Court in dismissing the application for stay where the states as follows :

*"[36] I am of the considered opinion that since the subject matter of the case involves the payment of tax, there is no issue of the appeal being rendered nugatory. Any collection of tax from the Applicant can be refunded by the DGIR added to that, there cannot be any special circumstance in this case where the DGIR is empowered to collect taxes under the ITA 1967."*

**[35]** Likewise in the present case, there is no special circumstances that warrants the stay application to be granted. As such, the applications for stay for the three cases are also dismissed.

**DATED THIS 25<sup>th</sup> JULY 2019**

A handwritten signature in black ink, appearing to read 'Nordin Bin Hassan', is written over a horizontal line.

**[ NORDIN BIN HASSAN ]  
JUDGE**

**HIGH COURT SPECIAL AND APPELLATE POWERS  
KUALA LUMPUR HIGH COURT.**

**Parties :**

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& Ng Kar Ngai (PDK)  
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