DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO.: WA-25-17-01/2021

Dalam perkara suatu Keputusan Responden seperti yang dinyatakan melalui notis-notis taksiran bagi tahun-tahun taksiran 2013, 2014, 2015, 2016 dan 2017 semuanya bertarikh 30.12.2020 yang dianggap diterima pada 31.12.2020;
Dan
Dalam perkara suatu permohonan untuk antara lain, suatu Perintah Certiorari;
Dan
Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

ANTARA

PETRONAS TRADING CORPORATION SDN BHD ...PEMOHON

DAN

KETUA PENGARAH HASIL DALAM NEGERI ...RESPONDEN

JUDGMENT

[1] This is an application for leave to commence judicial review against the Respondent for inter alia an order for certiorari to quash the notice of assessment for the year of assessment ("**YA**") 2013-2017 dated 30.12.2020 (the "**Decision**").

Background Facts

[2] The Applicant was principally engaged in the business of marketing of crude oil and trading in crude oil and petroleum until 31.12.2012.

[3] The Applicant was appointed by its subsidiary, PETCO Trading Labuan Company Ltd ("**PTLCL**") as agent in relation to the trading and marketing activities of crude oil and petroleum products via an Undisclosed Agency Agreement ("**UAA**") dated 5.5.2010.

[4] On 24.8.2011, PTLCL was invited by the Malaysian Petroleum Resources Corporation ("**MPRC**") to be one of the pioneer company for the Global Incentive for Trading ("**GIFT**") Programme.

[5] On 14.12.2012, a commercial decision was made whereby the Board of Directors of PETCO approved the reassignment of business activities and manpower to PTLCL. The Applicant has been progressively transferring its business activities to PTLCL starting from 1.1.2013.

[6] On 30.11.2020 the Respondent issued its case review findings letter for YA 2013 to 2018 to the Applicant.

[7] On 24.12.2020 the Respondent issued its audit finalisation letter for YA 2013 to 2018 and notified that notices of assessments will be raised against the Applicant.

[8] On 27.12.2020 the Applicant responded with detailed explanations to the Respondent.

[9] On 30.12.2020, the Respondent issued notice of assessment for YA 2013-2017 totalling to RM33,983,885.07 against the Applicant.

Issues

[10] The main issue at this stage is whether the Applicant's grievance ought to be ventilated before the Special Commissioners of Income Tax ("**SCIT**") and not by way of judicial review.

Findings

[11] It is the contended by the Putative Respondent herein that the Applicant cannot bypass the SCIT. It is submitted that the correct avenue for the Applicant to appeal is to file a notice of appeal to the Director General of Income Tax (the "**DGIR**") under section 99 of the Income Tax Act 1967 ("**ITA**").

[12] The ordinary threshold for leave to commence judicial review is extremely low with the sole question being whether the application is frivolous or otherwise. Even in tax cases, where an alternative remedy to appeal under of section 99 (1) of the ITA is provided, judicial review remain available so long as the Applicant shows that it has an arguable case and that the application is not frivolous (see: **WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad [2012] 2 MLJ 296**). At this preliminary stage, it is trite that the court should not go into the merits of the case (see **Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228**) and the court must abstain from embarking upon substantive submissions of the parties (**Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] 3 AMR 35**).

[13] The decision of the Supreme Court in **Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185** is a clear authority that the taxpayer is entitled to resort to the remedy of judicial review in exceptional circumstances. In **Metacorp Development v Ketua Pengarah Hasil**

Dalam Negeri [2011] 5 MLJ 447, the High Court had cited and applied the Federal Court's decision in **Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1993] 3 CLJ 65** where the Court had stated that the availability of an alternative internal remedy in tax cases is not a bar to a judicial review application and that if an applicant can demonstrate illegality or unlawful treatment then it would be wrong to insist on exhaustion of local remedy. In addition, excess or abuse of power or a breach of natural justice will be a ground to justify for judicial review to be granted.

[14] In **Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] 7 CLJ 487,** the High Court had stated that nowhere in Order 53 of the Rules of Court 2012 it is stated that the existence of a domestic remedy will bar an application for judicial review neither it is a requirement established in case law.

[15] Further, in **QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164** and **Chin Mee Keong & Ors v Pesuruhjaya Sukan [2007] 5 CLJ 363,** the Federal Court had stated that the availability of domestic remedy is a matter that should be raised at the substantive stage.

[16] This Court finds that there are exceptional circumstances in the present application that merits judicial review. Foremost it must be reminded that the Respondent in exercising a quasi-judicial or purely administrative function as a public decision maker has no jurisdiction to commit error of law. An error of law amounts to a lack of jurisdiction and certiorari will lie to correct it. (see: **Majlis Perbandaran Pulau Pinang** (supra)). Here is where the Applicant is contending that via the Decision,

the Respondent had clearly committed an error of law amounting to a clear lack of jurisdiction by raising the assessment for the YA 2013-2017 in disallowing the reassignment of income and expenses to the rightful legal owner- PTLCL.

[17] The Respondent's Decision is averred to have been a consequent to its position to invoke section 140A of the ITA to disregard the reassignments of income and expenses between the Applicant and PTLCL and to reclassify income and expenses from PTLCL back to the Applicant on the basis that the income derived and/or expenses were incurred by the Applicant. In arriving at the Decision, the Respondent is said to have disregarded the following material and undisputed facts that:

(a) pursuant to the UAA, PTLCL appointed the Applicant as its agent in relation to the trading and marketing activities of crude oil and petroleum products;

(b) via letter dated 24.8.2011, PTLCL was invited by the Malaysian Petroleum Resources Corporation ("**MPRC**") to be one of the pioneer company for the Global Incentive for Trading ("**GIFT**") Programme which was managed by the Labuan Financial Services Authority ("**LFSA**"). Subsequent to the invite by MPRC for the GIFT programme, PTLCL had registered as a Labuan International Commodity Trading Company ("**LITC**") under GIFT on 31.10.2011;

(c) as a result of this, there are now two active trading entities within the PETCO Group that is operating within the Asia Pacific region. A commercial decision

was made whereby the business activities (trading, sourcing, marketing and other services) as well as the manpower currently under the Applicant would be reassigned to PTLCL effective from 1.1.2013. This was clearly stated in the Audit Financial Statement for Financial Year ending 31.12.2013 and Board Resolution on the reassignment of business activities and manpower PTLCL;

(d) this leaves the Applicant as an investment holding company. Since all the manpower has been transferred from the Applicant to PTLCL as stated in the Organization Chart of PTLCL for the year 2013, the "control and management/supervision" of these said business transactions can only be managed by PTLCL and its staff;

(e) during this transitional period, some sales and cost of sales may have been inadvertently captured under the Applicant's Accounts following the UAA and reassignments and/or reclassification had to be done to PTLCL's Accounts to reflect the correct position in line with the legal rights to these income and/or expenses; and

(f) there are absolutely no related party transactions entered into by the Applicant with PTLCL.

[18] It is further averred that in arriving at the Decision, the Respondent had:

i. disregarded the assignment of business and UAA and disallowed the reclassification of income and expenses of the Applicant without taking into account the commercial structure and activities of the companies involved namely the Applicant and PTLCL;

ii. failed to consider PTLCL is governed by the Labuan Business Activity Tax Act 1990 ("**LBATA**") in which case the arm's length principle does not apply prior to the coming into effect of section 17D of the LBATA on 1.1.2020;

iii. failed to consider that the transactions entered into by the PTLCL are outside the ambit of the ITA; and

iv. erroneously invoked section 140A of the ITA which does not empower the Respondent to disregard and re-characterize the Applicant's transaction, especially since there was no related party transaction entered into by the Applicant and PTLCL.

[19] At this juncture, this Court agrees that there are no facts in dispute. The only issues arising herein are questions of law.

[20] The first question is whether the Respondent is empowered to disregard and re-characterise the UAA and reassign the subsequent transactions from PTLCL to PETCO.

Section 140A states:

"*140A. Power to substitute the price on certain transactions*

(1) This section shall apply notwithstanding section 140 and subject to any rules prescribed under this Act.

(2) Subject to subsection (3), where a person in the basis period for a year of assessment enters into a transaction with an associated person for that year for the acquisition or supply of property or services, then, for all purposes of this Act, that person shall determine and apply the arm's length price for such acquisition or supply.

(3) Where the Director General has reason to believe that any property or services referred to in subsection (2) is acquired or supplied at a price which is either less than or greater than the price which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length, he may in determination of the gross income, adjusted income or adjusted loss, statutory income, total income or chargeable income of the person, substitute the price in respect of the transaction to reflect an arm's length price for the transaction."

[21] It is therefore clear that section 140A ITA only permits the Respondent to substitute the price in respect of the transaction to reflect an arm's length price for the transaction. It does not permit the Respondent to disregard and re-characterise the UAA in this matter. It must be noted that in the case of **Shell People Services Asia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Rayuan Sivil No:B-01(A)-474-09/2019)** although the High Court rejected the tax payer's leave application to commence judicial review, the Court of Appeal had granted leave to file judicial review based on this question alone.

[22] On the other hand, section 140 of the ITA (which accords the Respondent the power to vary a taxpayer's transaction if he is of the view that the transaction entered by the taxpayer amounts to a tax avoidance scheme), is worded such that the Respondent is empowered to disregard or vary the transaction and make such adjustments as he thinks fit with a view of counteracting the whole or any direct or indirect effect of the transaction as listed in sections 140 (1) (a) to (d). Section 140 (1) of the ITA is reproduced:

> *"Power to disregard certain transactions*
> *140. (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of—*
> *(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;*
> *(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;*
> *(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or*
> *(d) hindering or preventing the operation of this Act in any respect, may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction."*

[23] The Supreme Court in **Director-General of Inland Revenue v Hup Cheong Timber (Labis) Sdn Bhd [1985] CLJ Rep 107** and the Federal Court in **Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 CLJ Rep 108** had held that where the Respondent is of the view that the transaction had been entered into for the purposes of avoiding taxes, the Respondent should invoke section 140 of the ITA to make adjustments and in doing so must provide particulars of the adjustment made together with the notice of assessment.

[24] Therefore, the second question is whether the Respondent had failed to invoke section 140 of the ITA and had disregarded the purpose of the same provision. It must be noted that the Applicant is contending that the Respondent did not invoke section 140 of the ITA because the Respondent is statutorily time-barred to issue the assessment under section 140 of the ITA that is within 5 years from the end of the year of assessment compared to the 7 years under section 140A ITA. It is further contended that the Respondent had acted in an unreasonable manner to rush the issuance of the assessment without any consideration of the Applicant's legitimate expectation and respect for the Applicant's right to not be deprived of property unless in accordance with the law under the Federal Constitution.

[25] It is pertinent to note further that the Respondent cannot dictate how the taxpayer should conduct its business and a taxpayer is at its own liberty to conduct its business with all available means to make good profit and to mitigate his incidence of tax (see: **Port Dickson Power Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] MSTC 30-045** and **Ketua**

Pengarah Hasil Dalam Negeri v OKA Concrete Industries Sdn Bhd [2015] MSTC 30-091).

[26] Section 140A and section 140 of the ITA must be subject to the principle of strict interpretation as propounded by the Supreme Court in **National Land Finance Co-operative Society Ltd v Director General Inland Revenue [1993] 4 CLJ 339.** The internal guidelines and policy of the Respondent have no force of law and every exercise of statutory power such as the raising of assessment in this instant matter cannot be done arbitrarily. Every exercise of statutory power must be in conformity with the express words of the statute and implied legal requirements. As such, it is of the considered view that leave ought to be granted for questions of law alluded to in the above be determined. Illegality, unlawful treatment, error of law and failure to adhere to legal principles established by courts by the Respondent constitute excess of jurisdiction that warrants the Courts intervention by way of judicial review.

[27] This Court further grants the stay of the Respondent's Decision until the full and final determination of the judicial review to preserve the status quo, prevent nugatory effect and the Applicant's full benefits of success. Unjust enrichment of the Respondent as a tax authorities would occur where taxes which are not payable are nevertheless being paid. There is a strong arguable case herein based on the discussion above. Further, the amount of taxes and penalty imposed by the Respondent upon the Applicant amounting to RM33,983,885.07 is indisputably large which will result in a financial crisis and cash flow problems to the Applicant if a stay order is denied.

Conclusion

[28] Premise on the above reasons, this Court granted order in terms of the Applicant's application.

Dated: 6.7.2022

[NOORIN BINTI BADARUDDIN]

Judge

High Court of Malaya

Kuala Lumpur

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