KETUA PENGARAH HASIL DALAM NEGERI v SAP MALAYSIA SDN BHD

CaseAnalysis
[2023] MLJU 2184

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Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AMARJEET SINGH SERJIT SINGH J

RAYUAN SIVIL NO WA-14-14-06/2022

11 September 2023

Norsalwani bt Muhd Nur (with Norhamizah bt Ab Han and Nur Aina bt Mohd Jaffar) (Revenue Counsel, Inland Revenue Board) for the appellant.
Nitin Nadkarni (with Chris Toh Pei Roo) (Lee Hishamuddin Allen & Gledhill) for the respondent.

Amarjeet Singh Serjit Singh J:

JUDGMENT

Introduction

[1] This is an appeal by the Director General of Inland Revenue ("DGIR") against the decision of the Special Commissioners of Income Tax ("SCIT") dated 19th May 2022, which allowed SAP Malaysia Sdn Bhd's appeal ("the respondent") against the assessments raised for the Year of Assessment 2010 and 2011 respectively ("YA 2010" and "YA 2011" or collectively as the "impugned assessments").

[2] The deciding order of the SCIT stated that:

(i) the time limit imposed by Subsection 91(1) of the *Income Tax Act 1967* ("ITA") applies to bar the impugned assessments from being issued by the DGIR;

(ii) the DGIR failed to prove on a balance of probabilities that the respondent was negligent as the basis of issuing the impugned assessments for the purpose of making good any loss of tax attributable to the negligence in question;

(iii) the income tax returns for the YA 2010 and 2011 filed on 4th August 2011 and 15th August 2012 respectively were premises on the draft financial statements of the respondent in accordance with Section 77A of the *ITA*

(iv) the respondent succeeded in showing that the impugned assessments were excessive or erroneous as required under paragraph 13, Schedule 5 of the ITA; and

(v) the DGIR did not have any basis in law or fact to impose the penalties under Subsection 112(3) of the *ITA*.

[3] The effect of the deciding order of the SCIT was the setting aside of the assessments raised for the YA 2010 and YA 2011 and the penalties imposed thereon. On 3rd April 2023, I dismissed the DGIR's appeal and affirmed the decision of the SCIT after being satisfied that there were no merits in the appeal. I now state the reasons for my decision.

Background

[4] The following facts were agreed:

(i) The respondent filed its income tax returns for the YA 2010 and YA 2011 on 4th August 2011 and 15th August 2012 respectively premised on the draft financial statements of the respondent.

(ii) Subsequently, by way of a letter dated 15th May 2014 the respondent revised its tax returns for the YA 2010 and YA 2011 based on the final audited accounts for the financial years ended 31st December 2010 and 31st December 2011 on the grounds that the earlier tax returns were based on its draft financial statements.

(iii) According to the final audited accounts, the respondent had overpaid RM9,684.00 for the YA 2010 and RM1,483,055.00 for the YA 2011.

(iv) Notwithstanding receiving more tax than due, the DGIR on 11th April 2017, raised the impugned assessments and imposed penalty as follows: for the YA 2010-RM1,074,791.93 at the rate of 30% and for the YA 2011 - RM491,060.56 at the rate of 25%.

(v) The penalties were imposed under Section 112(3) of the *ITA* as the DGIR was of the view that the earlier income tax returns did not qualify as returns within the meaning of Section 77A of the *ITA*.

(vi) The respondent appealed against the impugned assessments under Section 99 of the *ITA* furnishing all the relevant documents to no avail and the matter was referred vide letter dated 25th April 2018 to the SCIT.

[5] On the admitted facts, the DGIR had treated the earlier returns as never having been filed in breach of Subsection 77A(1) of the *ITA* on the basis that the earlier returns were filed based on a draft financial statements and not final audited accounts.

[6] It is not disputed, that the DGIR issued the impugned assessments more than *5* years after the assessment years in question. The respondent, argues that the impugned assessments are time barred for breaching Subsection 91(1) of the *ITA* and are therefore bad in law. The DGIR, on the other hand, argues that the impugned assessments are not caught by the time limit under Subsection 91(3) of the *ITA* given that the respondent was negligent in connection with the submission of the earlier income tax returns.

Decision of the SCIT

[7] The SCIT held that:

(a) the time limit imposed by Subsection 91(1) of the *ITA* applies to bar the impugned assessments from being issued by the DGIR;

(b) there was no loss of tax attributable to the negligence of the taxpayer by the earlier tax returns and therefore Subsection 91(3) of the *ITA* relied by the DGIR has no application to extend time; and

(c) the earlier tax returns were in accordance with Subsection 77A of the *ITA*.

Decision of the court

[8] I begin with the governing principles relating to an appeal against the decision of the SCIT which are trite law. It authoritatively established that a decision of SCIT can be set aside if the decision is: (i) plainly wrong in law; (ii) made on a misdirected of the law; (iii) so unreasonable that no reasonable SCIT could have reached if similarly circumstanced; (iv) where the SCIT misdirected itself by reaching conclusions inconsistent with primary facts found by it and drew inferences from matters which were of no probative value in supporting their conclusions (*Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541 *Chua Lip Kong v. Director-General of Inland Revenue* [1982] 1 MLJ 235).

Relevant provisions

[9] Next are the relevant provisions that govern the instant case. Subsection 77A(1) of the *ITA* in force for the YA 2010 and YA 2011 state as follows: *every company, ... shall for each year of assessment furnish to the Director General a return in the prescribed form within seven months from the date following the close of the accounting period which constitutes the basis period for the year of assessment* while Subsection 77A(3) of the *ITA* provide that: (i) the return for a year of assessment shall specify the chargeable income and the amount of tax payable (if any) on that chargeable income for that year; and (ii) contain such particulars as may be required by the DGIR. It was only subsequently, with effect from the YA 2014, a new subsection i.e Subsection 77A(4) was added by the Finance Act 2014 which, for the first time, imposed a statutory requirement to submit tax returns on audited accounts in the following words:

The return furnished by a company under this section shall be based on accounts audited by a professional accountant, together with a report made by that accountant which shall contain, in so far as they are relevant, the matters set out in *Subsections 174(1) and (2)* of the *Companies Act 1956*.

[10] The next provisions, of importance are *Sections 112* and *113* of the *ITA* which provided the effect of failing to furnish returns as required. *Subsection 112(3)(a)* of the *ITA* state:

Where in relation to a year of assessment a person makes default in furnishing a return in accordance with *Subsection 77(1)* or *77A(1)* or in giving a notice in accordance with *Subsection 77(3)* and no prosecution under Subsection (1) has been instituted in relation to that default —

(a) the Director General may require that person to pay a penalty equal to treble the amount of the tax which, before any set-off, repayment or relief under this Act, is payable for that year, and

(b) ...

and *Subsection 113(2)* of the *ITA* which provide as follows:

Where a person —

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own changeability to tax or the changeability to tax of any other person, then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General **may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information** or which would have been undercharged if the return or information had been accepted as correct; and, if that person says that penalty (or, where the penalty is abated or remitted under *Subsection 124(3)*, so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under Subsection (1).

Whether limitation is extended due to respondent's negligence?

[11] In the instant case, it is clear that the impugned assessments including penalties were raised after 5 years from the YA 2010 and YA 2011. Thus, by virtue of *Subsection 91(1)* of the *ITA* which read as follows:

the Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five years after its expiration make an assessment or additional assessment, as the case may be in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year the impugned assessments were clearly time barred.

[12] However, the DGIR to avoid the pitfall of limitation provided in *Subsection 91(1)* relied on *Subsection 91(3)* of the *ITA* which provided that time could be extended in the case of negligence of the taxpayer in the following words:

The Director General where it appears to him that —

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

[13] It is plain and clear, that the DGIR can only rely on *subsection 91(3)* of the *ITA* for one purpose, that is, to make good any loss of tax attributable to the fraud, wilful default or negligence in question (in the instant case it is

negligence of the respondent). In the instant case, the SCIT found that the element was not satisfied and in fact found that **there was overpayment of tax.** This fact is clearly established from the undisputed documentary evidence in the form of the final audited accounts. The DGIR did not show otherwise. Overpayment of tax means, that the government has suffered no loss of tax but a windfall not legally due to it. The reliance on *Subsection 91(3)* of the *ITA* is clearly misconceived and the SCIT was absolutely correct in its decision holding that the impugned assessments were therefore statute barred.

[14] There is therefore, no need to decide whether there was negligence. In any event, I considered the issue of negligence and found that on the balance of probabilities, negligence was not proven.

[15] The law is trite. The burden is on the DGIR, under *Section 91(3)* to show that the appellant had been 'negligent' in connection with or in relation to tax for a certain year of assessment. The meaning of the word 'negligent' is not provided in the ITA. In such a case, the principle stated in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* *[2005] 3 MLJ 97* would apply, namely, that a word in the taxing statute must be given its ordinary meaning. The ordinary meaning of 'negligent' which is an adjective while 'negligence' being the noun is given in the Oxford Advanced Learner's Dictionary as "failing to give somebody/something care or attention especially when this has serious results".

[16] The common law principle of 'negligence' would have no application in the taxing statute as the principle there was the creation of the common law to determine liability of a tortfeasor who had caused damage to another party. The word 'negligence' in the common law is judge-made law after years and years of shaping the common law of 'negligence'. However, the word 'negligence' in the ITA is statutorily enacted. It must be given its ordinary meaning in absence of a definition. A widely referred ordinary meaning of 'negligence' in our case-law is that from *Whiteman on Income Tax* which states:

> …means negligence or a failure to give any notice, make any return, statement or declaration or to produce or furnish any list, document or other information required by the Income Tax Act, but a person is not deemed to have failed to do anything required in a limited time if he does it within such extended time as the Commissioners or officer concerned may allow, where a person has a reasonable excuse or not doing anything required he is deemed not to have failed to do it if he does it without unreasonably delay. It should be noted that even though an incorrect return was not made fraudulently or negligently originally, a subsequent failure to remedy it without unreasonable delay may result in the return being treated as having been made negligently *ab initio.*

[17] The issue for this Court to determine is whether the respondent was negligent in filing its tax returns. The facts are not in dispute. The respondent filed its returns as required and under the law at the material time did so based on the draft financial statements of the company as there was no requirement of the final audited accounts. Later, the respondent filed revised rates based on final audited accounts which show that it had not underpaid but overpaid tax to the revenue. The act of the respondent is therefore, not an act of negligence which had caused a loss of tax. Hence, I hold that *Subsection 91(3)* of the *ITA* has no application on the facts of the instant case on this separate ground of review.

The impugned assessment and penalties

[18] For the above reasons, the impugned assessments including penalties are null and void. For completeness, the DGIR submitted that the penalties were imposed under *subsection 112(3)* of the *ITA*. This provision does not apply because there must be a default in furnishing a return in accordance of, inter alia, *Subsection 77A(1)* of the *ITA*. Here the respondent had filed returns as required and overpaid tax. Hence the submission is devoid of merit.

Conclusion

[19] For the above reasons, the circumstances of the case do not warrant appellate interference based on established grounds. The decision of the SCIT is upheld and the appeal is dismissed.
