

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S6-21-195-2008

BETWEEN

KERAJAAN MALAYSIA PLAINTIFF

AND

MAXISEGAR CONSTRUCTION SDN BHD DEFENDANT

GROUND OF JUDGMENT

This is the Plaintiff's application under 0 14 Rules of the High Court 1980, for Summary Judgment against the Defendant for tax due and payable for the year of assessment of 2006. Both parties submitted written submissions. I find that there are no triable issues and order in terms was granted to the Plaintiff with costs. The Defendant appealed.

Facts

The claim of the Plaintiff against the Defendant is for Income Tax for the year of assessment 2006 for the amount of RM 2,687,425.75.

The Plaintiff avers that the tax amount owed has become due and payable on the service of the notice of assessment on the Defendant.

Since the notice of assessments have been completely served on the Defendant at its last known address based on the return form (Form C) submitted by the defendant, the amount taxed therefore becomes due and payable by the Defendant under section 103A (2) of the same. (Refer to ***Chong Woo Yit v Government of Malaysia*** [1989] 2 CLJ 87 where the Supreme Court ruled that:

"On service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the Government by civil proceedings as a debt due to the Government."

The Defendant's contention is that the amount claimed is untrue and inaccurate and does in no way give the picture of the actual amount admitted by the Defendant.

1. Defendant is not responsible to pay the total outstanding tax stated due to the reasoning that the tax claims for the said financial year is inaccurate and excessive.
2. P.U. (A) 277 Income Tax Act 1967 Income Tax Rules (Property Development) Regulations 2007 is applicable to the facts of this case.
3. The Defendant should be allowed for an annual assessment of the rough estimation of the profits using a building

formulae for the said basic duration or immediately after there have been changes in the building costs of the said contract and/or if there are any changes in the price or contract amount.

4. This application should not be allowed because the developers' project has yet to be classified as completed. Hence, the amount in question can only be finalised once the Defendant's building project has been completed.
5. If within a basic duration for an annual assessment if a developers' project is classified as completed, the said developers' project has to determine the rough estimation of profits or actual losses from the project as whether :
 - (a) rough estimation of actual profits from the said project is more than total estimation of profits taken to be the rough income of a developer in accordance to rule 5, that difference must be classified as a portion of rough income of the developer for that basic duration; or
 - (b) estimation of actual profits is less than the total rough estimation of income that was taken as estimated income of the said developer according to rule 5 or if there was actual loss.

The Defendant submits that the calculations stated in the Rule above can only be taken into account when the developer's project is classified as completed only.

Therefore, the Defendant contends that it is premature for the Plaintiff to commence his suit due to the fact that the Defendant can only determine the actual losses after completion of the entire project and the Defendant has the right to standardize the annual assessments before this Court wishes to not give effect to the actual meaning of this new rule, the actual assessments cannot be made and this new ruling appears to be futile.

The Defendant submits that these Rules shows that Parliament takes cognizance that the amount acquired by the developer will not be accepted until the project is completed and this may take time for up to over a year.

Therefore, the losses and profits based on the Sales and Purchase Agreement is not true.

The Defendant further submits that the amount due to tax claims for the said annual assessments involved taking into account the actual losses after the completion of the project as a whole. This is a triable fact that must be heard in court.

The new regulation mentioned above, are questions of law that must be tried.

The questions of facts raised here are whether the fact of profits and losses of the Defendant's housing project must be taken into consideration and these issues can only be determined with the calling of witnesses to testify on the issues.

The Defendant has in no way given the impression of not settling the fair and just amount to the Plaintiff and is exercising his duties as a tax payer. Further this Court has no expertise in calculating

precisely this complex tax payment and only by calling of witnesses can this Court settle the said issues.

The Courts Findings

The scheme of Income Tax laws in the country envisaged that tax shall be paid although the person assessed disputes the assessment in the notice of assessment. This is provided for in section 21 (1) and fortified by 23 (3) of the Income Tax Act. The court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 21 (4) of the same.

The whole of the Defendant's contention merely raised on allegations of inaccuracy of the assessment.

This Court is not the right forum for the Defendant to litigate the Defendant's plea or allegation with regards to assessment. This is stipulated under Section 106 (3) of the Act which clearly provides:

“(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103(3), (4) ,(SA) ,103A (4), (5), (6),(7), (B) or 103A (9)”.

There is a dearth of authorities that supports the effect of the abovesaid provisions. Gill F.J in delivering the judgment in a Federal Court case of ***Sun Man Tobacco Co. Ltd v Government of Malaysia*** [1973] 2 MLJ 163 held that:

“.....the effect of the relevant provisions of the Income Tax 1967 is that on the service of a notice of 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. On such civil proceedings being brought by the Government, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.”

The correct approach that should be taken by the Defendant is to bring this matter before the Special Commissioners of Income Tax who is the right forum to hear the allegation or plea raised in accordance with section 99 (1) of the Act. This was explained in the same case of ***Sun Man Tobacco Co. Ltd*** where the Supreme Court ruled that:

“In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a taxpayer to go before them and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the claimant is the Government, but he has to enter the doors of the Special Commissioners first to raise the plea of non observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts”.

Further support on this point can be found in the case of ***Government of Malaysia v Dato' Mahindar Singh*** (1996) 5 MLJ 626 where it was held that:

".... the short answer to them is that these issues similarly could be raised before the special commissioners and not before the court in an application for summary judgment under 0 14 of the RHC 1980. The law is clear that once an assessment is made, the Inland Revenue Department can invoke as 130 and 106 of the Act which make the tax payable under the assessment due and payable at the place specified in the notice of assessment upon service on the taxpayer of the notice whether or not the taxpayer appeals against the assessment."

Thus, from the above authority the Defendant cannot raise the defence of the amount being excessive or inaccurate, as triable issues. Moreover in an application under 0 14 RHC it is trite law that in income tax cases, the order should be in favour of granting summary judgment. The case of ***Chong Woo Yit v Government of Malaysia*** [1989] 1 CLJ (Rep) 9 where the Supreme Court cited the case of ***Government of Malaysia v Abdul Rahman*** [1975] 1 MLJ 276, and states that:

"When proceedings are commenced under 0.14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend

should be given but under section 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the Government under section 106 (1) of the Act for the recovery of tax by civil proceedings as a debt due to the Government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal, or incorrectly increased under section 103(4) or (5)."

The Federal Court in the case of ***Arumugam Pillai v Government of Malaysia*** [1975] 2 MLJ 29 had put in bluntly that due to the operation of section 106 (3) of the Income Tax Act 1967, the court had only one function i.e. to give judgment in favour of the Government. The reason why this is so is that the Income Tax Act is a piece of legislation introduced to provide for the speedy collection, recovery and repayment of tax, besides to counter the delay tactics employed by the indolent tax payers by lodging unnecessary appeals and objections. (Refer to ***Government of Malaysia v Lee Tain Tsung*** [1992] 1 MLJ 269)

Therefore, based on the above stated reasons there is no triable issues and the application by the Plaintiff is allowed with costs.

t.t. Datin Zabariah Mohd Yusof

Tarikh : 23.6.2009

