TAHIR, ROSLAN AND TASARIFF SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI & OTHER CASES

High Court Malaya, Kuala Lumpur
Amarjeet Singh Serjit Singh J
[Civil Appeal Nos: WA-14-16-06-2022, WA-14-17-06-2022 & WA-14-18-06-2022]
5 July 2023

Revenue Law: *Real property gains tax — Appeal against deciding order of Special Commissioners of Income Tax — Whether imposition of rate of tax at 10% pursuant to the amendment to Part II of Schedule 5 of the Real Property Gains Tax Act 1976 in 2019 had impaired existing right of the appellants in respect of conditional sale and purchase agreements entered into in 2018*

The respective appellants in the three appeals in this instance namely, Appeal No. WA-14-16-06-2022 by Tahir, Roslan and Tasariff Sdn Bhd, Appeal No. WA-14-17-06-2022 by Syarikat Kaum Melayu Hilir Perak Sdn Bhd and Appeal No. WA-14-18-06-2022 by Pinehill Plantations (Malaysia) Sdn Bhd (collectively, the appeals) had appealed to the Special Commissioners of Income Tax (SCIT) against the assessments raised for the year of assessment 2019 (YA 2019) following the sale of certain lands owned by the appellants. The issue before the SCIT was whether the gains from the disposal of the lands were subject to real property gains tax of 10% or 5% under Part II of Schedule 5 of the Real Property Gains Tax Act 1976 (RPGTA). The SCIT held *inter alia* that the applicable rate of tax provided in Part II Schedule 5 of the RPGTA with effect from 1 January 2019 was applicable, and that the chargeable gains from the disposal of the said lands were subject to tax at the rate of 10%. The SCIT accordingly dismissed the appeals and upheld the impugned assessments. Hence the instant appeals which were premised on the question of law of whether the imposition of the rate of tax at 10% pursuant to the amendment to Part II of Schedule 5 of the RPGTA vide paragraph 70(b) of the Finance Act 2018 which came into effect on 1 January 2019 had impaired the existing right of the appellants in respect of conditional sale and purchase agreements entered into prior to the amendment. The appellants argued that the correct rate of tax was 5% which was the stipulated rate prior to the aforesaid amendment since the sale and purchase agreements were signed on 21 September 2018.

Held (dismissing the appeals):

(1) In view of paragraph 16 of Schedule 2 of the RPGTA and given the fact that the sale and purchase agreements in this instance were conditional contracts, the date of disposal was the date when the last of the conditions

was satisfied. On the facts, the last of the conditions was for each sale and purchase agreement, was fulfilled on 29 May 2019. Thus, 29 May 2019 was the date of disposal for the purpose of determining the chargeable gain from the sale of the said lands. In this regard, the chargeable gain arose after the date the amendment had become operative, and the rate in force then was 10%. The SCIT had therefore applied the correct rate of tax. There was no issue of retrospective operation of the applicable rate. (paras 22 & 27)

(2) The appellants' argument that the correct rate applicable was 5% since the sale and purchase agreements were signed on 21 September 2018, could not succeed in view of the clear and plain wordings of paragraph 16 of Schedule 2 of the RPGTA read with ss 69 and 70(b) of the Finance Act 2018. The chargeable gains arising for conditional contracts depended on the date of disposal as provided in paragraph 16 Schedule 2 of the RPGTA which provided three different dates for disposal, the exception being, firstly, where the conditional contract required the approval of the Government or a State Government in which case, the date of disposal was the date such approval was given; and secondly, where the approval of the Government or a State Government was conditional, the date of disposal was the date when the last of all such conditions was satisfied. (paras 23-24)

(3) Given that the rate of tax in this instance was governed by the aforesaid exceptions and that s 69 of the Finance Act 2018 clearly provided that the amendment to Part II of Schedule 5 of the RPGTA took effect from 1 January 2019, hence, for the purposes of the second exception in paragraph 16 of Schedule 2 of the RPGTA, the date of disposal of the chargeable asset was 29 May 2019 and not the date the sale and purchase agreements were signed. Accordingly, the disposal of the chargeable assets under the sale and purchase agreements was subject to the rate of tax at 10% and not 5%. (para 25)

(4) The amendment to Part II of Schedule 5 of the RPGTA was prospective and did not operate retrospectively to impair a vested right or impose a new liability. The common law principle that *prima facie*, a vested right could not be taken away or impaired by the retrospective operation of the amendment and that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result was unavoidable on the language used, was therefore not relevant to the facts of the instant case. (para 30)

(5) In the circumstances, the submission of ambiguity arising from the manner in which the amendment was done and came into force, was misconceived and devoid of merit, and hence appellate interference with the deciding order of the SCIT was not warranted. (para 32)

Case(s) referred to:

Commissioner of Income Tax, UP v. Shah Sadiq And Sons [1987] AIR 1217 (distd)

Geetanjali Trading & Investment Ltd v. Income Tax Officer (ITA No 5428/MUM/2007 & 1737/Mum/2009) (distd)

National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue [1993] 1 MLRA 512 (distd)

Yew Bon Tew & Anor v. Kenderaan Bas Mara [1982] 1 MLRA 425 (refd)

Legislation referred to:

Finance Act 2018, ss 69, 70(b)

Interpretation Acts 1948 and 1967, ss 30(1)(b)

National Land Code, s 433B

Real Property Gains Tax Act 1976, ss 2, 3(2), 4, 7(1)(3), 18, paras 15(1)(a), 16 sch 2, part II sch 5

Counsel

Civil Appeal No: 14-16-06-2022

For the appellant: Vijey Krishnan (William Wong with him); M/s Raja, Darryl & Loh

For the respondent: Noor Faezah Zainodin (Munirah Abd Wahid with her); Inland Revenue Board

Civil Appeal No: 14-17-06-2022

For the appellant: Vijey Krishnan (William Wong with him); M/s Raja, Darryl & Loh

For the respondent: Noor Faezah Zainodin (Munirah Abd Wahid with her); Inland Revenue Board

Civil Appeal No: 14-18-06-2022

For the appellant: Vijey Krishnan (William Wong with him); M/s Raja, Darryl & Loh

For the respondent: Noor Faezah Zainodin (Munirah Abd Wahid with her); Inland Revenue Board

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] This judgment concerns three appeals that emanated from a decision of the Special Commissioners of Income Tax ("the SCIT") delivered on 20 April 2022. The appeals are as follows:

(i) Appeal No WA-14-16-06-2022 by Tahir, Roslan and Tasariff Sdn Bhd ("Tahir")

(ii) Appeal No WA-14-17-06-2022 by Syarikat Kaum Melayu Hilir Perak Sdn Bhd ("Syarikat Kaum Melayu")

(iii) Appeal No WA-14-18-06-2022 by Pinehill Plantations (Malaysia) Sdn Bhd ("Pinehill")

[2] In this judgment, the three appeals are referred to as "the appeals" unless otherwise stated. There was only one identical issue in the appeals. The issue concerned the appropriate rate of tax to be imposed on the appellants for the disposal of land under Part II of Schedule 5 of the Real Property Gains Tax Act 1976 ("RPGTA"). For this reason, parties agreed to have the appeals heard together.

[3] The appellants had appealed to the SCIT against the assessments made against each appellant ("the assessments") which was for the year of assessment 2019 ("YA 2019") as a result of the sale of certain lands owned by the appellants. The SCIT upheld the DGIR's assessment agreeing with the rate of tax imposed. The appellants appealed to this Court against the decision of the SCIT. On 5 April 2023, I dismissed the appeals. The reasons for my decision are as follows.

Background

[4] The following facts were agreed by the parties. The appellants had on 21 September 2018 entered into sale and purchase agreements with United Plantations Berhad ("the purchaser") for agriculture lands cultivated with palm oil trees held by them respectively. There were 7 lots of land: (i) PN 286020 Lot 7362, Mukim Changkat Jong; (ii) PN 290568 Lot 7258, Mukim Changkat Jong; (iii) PN 290563 Lot 7280, Mukim Changkat Jong; (iv) PN 290566 Lot 7281, Mukim Changkat Jong; (v) PN 309287 Lot 11501, Mukim Durian Sebatang; (vi) PN 349423 Lot 5936, Mukim Durian Sebatang; and (vii) PN 308136 Lot 5936, Mukim Changkat Jong. All these lands were in Daerah Hilir Perak, in the State of Perak.

[5] The completion of the sale and purchase agreements were subject to condition precedents which were to be fulfilled within a period of 6 months from the date of the said agreements with an automatic extension of a further two months. All the sale and purchase agreements were conditional contracts. The condition precedents and their dates of fulfillment are as follows:

(a) approval of the Economic Planning Unit ("EPU") which approval was obtained on 19 December 2018;

(b) approval of the Perak State Authority pursuant to s 433B of the National Land Code ("NLC") upon terms and conditions acceptable to the purchaser, which approval was obtained on 7 May 2019 and which approval had several conditions which required the purchaser's agreement;

(c) written consent of the Perak State Authority pursuant to the restriction-in-interest contained in the title deeds, which consent was obtained on 9 May 2019; and

(d) the written consent of the Estate Land Board, which was consent was obtained on 29 May 2019.

[6] The appellants and the purchaser then on 10 June 2019 signed supplemental agreements to modify and vary certain provision of the sale and purchase agreements. On the same day, the purchaser accepted the conditions set out in the approval of the Perak State Authority pursuant to s 433B of the NLC. Thereafter, on 12 June 2019 the memorandums of transfer ie Form 14A were executed by the appellants in favour of the purchaser.

[7] The sale was subject to real property gains tax under the RPGTA. As at 31 December 2018, Part II of Schedule 5 of the RPGTA provided that in a case where the disposer of land is a company, the rate for disposal in the sixth year after the date of acquisition was 5%. With effect from 1 January 2019, the Finance Act 2018 amended Part II of Schedule 5 of the RPGTA by increasing the rate of tax for disposal in the sixth year after the date of acquisition to 10%.

[8] On 26 July 2019, the appellants' tax agent filed the real property gains tax returns of chargeable asset *vide* Forms CKHT 1A. The DGIR made the assessments for real property gains tax at the rate of 10% pursuant to the amendment and raised the notices of assessment in Form K ("the impugned assessments"). This was followed by the appellants filing their respective notices of appeal in Form Q against the impugned assessments pursuant to s 18 of the RPGTA.

The Decision Of The SCIT

[9] The facts before the SCIT were agreed as shown above. The only issue before the SCIT was whether the gains from the disposal of the lands is subject to real property gains tax at the rate of 10% or 5% under Part II Schedule 5 of the RPGTA.

[10] It was not in dispute before the SCIT that the last approval as required under cl 3.1 of the sale and purchase agreements was obtained on 29 May 2019. This was agreed by the only witness for the appellants, K Selveswaran Kanagaratnam ("SP-1") who is the Executive Director of Pinehill Pacific Berhad in his testimony. This date was also stated in their Form CKHT 1A by the respective appellants.

[11] The SCIT, after considering ss 3, 4, 7, paras 15 and 16 Second Schedule and Part II Schedule 5 of the RPGTA the SCIT held that the applicable rate of tax provided in Part II Schedule 5 of the RPGTA with effect from 1 January 2019 was applicable in the case before them. The SCIT disagreed with the submission that the deeming provision as to the date of disposal of an asset under para 15 of Schedule 2 was applicable and stated that the specific provision concerning conditional contracts provided in para 16 of Schedule 2 of the RPGTA prevailed and was applicable. The SCIT found no ambiguity in the provisions or that the provisions gave rise to more than one interpretation and said that the ordinary meaning was clear and must be taken and given effect.

[12] The SCIT also found the common law rule of construction set out in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1982] 1 MLRA 425 that *prima facie* a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used relied by the appellants was irrelevant to the facts of the instant case. The SCIT was also of the view that ss 7(1) and 7(3), and Schedule 2 of the RPGTA must be read together with ss 3(2) and Part II Schedule 5 of the RPGTA as the provisions are interlinked with each other. This view rejected the appellants' proposition to the effect that the provisions of the Schedule 2 cannot override ss 2 and 3 of the RPGTA.

[13] The SCIT concluded by setting out its deciding order which can be summarized as follows: (i) the appellants failed to discharge the onus of proving that the impugned assessments were erroneously made; (ii) the sale and purchase agreements are conditional contracts by virtue of its terms and conditions, in particular, cl 3.1 in the said agreements; (iii) pursuant to para 16 Schedule 2 of the RPGTA the date of disposal of the said lands was on 29 May 2019 ie the date the last condition in the said sale and purchase agreements was satisfied; (iv) the chargeable gains from the disposal of the said lands is subject to tax at the rate of 10%; (v) the issue of retrospective implementation does not arise on the facts of the instant case; and (vi) the appeal is dismissed and the notices regarding the impugned assessments are upheld.

The Question Of Law

[14] The appellants have satisfied the entitlement to appeal against the decision order of the SCIT on a question of law.

[15] The question of law is whether the imposition of the rate of tax at 10% pursuant to the amendment to Part II of Schedule 5 of the RPGTA which came into effect on 1 January 2019 has impaired the existing right of the appellants on sale and purchase agreements entered into prior to the amendment.

Decision Of The Court

[16] First, the relevant provisions of the RPGTA. Subsection 3(1) provides that real property gains tax shall be charged as provided in in its provisions in respect of chargeable gain accruing on the disposal of any real property, which is given the term "chargeable asset", under the RPGTA. Subsection 3(2) state that "subject to" the RPGTA the tax shall be charged on chargeable gains in respect of each category of disposal of chargeable assets specified in Schedule 5.

[17] Section 4 of the RPGTA empowers the charging of tax at a specified rate for the categories of disposal specified in Schedule 5 as follows:

> (1) The **tax shall be charged at the appropriate rate specified in Schedule 5 in respect of each category of disposal stated therein**.

(2) The Minister, where he is satisfied that it is the intention of the Government to promote the introduction of a Bill to vary in any particular way the rate of tax, may by statutory order declare the rate to be varied in that way, and, where he does so, then, subject to subsections (3) and (4), **this Act shall have effect as if the rate as so varied had come into force at the beginning of the first year of assessment for which the Bill seeks to vary that rate**.

[Emphasis Added]

[18] The relevant part of Schedule 5 is Part II which is at the centre of this appeal. The part provides that where a chargeable asset is disposed in the fifth year after the date of acquisition or thereafter, the tax rate is 10%. Prior to this date, the rate of tax was 5%. The amendment from 5% to 10% was made *vide* paragraph (b) s 70 of the Finance Act 2018. Section 69 of the said Act provided that the amendment comes into operation on 1 January 2019.

[19] In this regard "chargeable gains" and "allowable losses" are set out in s 7 as follows:

(1) **Where a chargeable asset is disposed of, then**-

(a) **if the disposal price exceeds the acquisition price, there is a chargeable gain**;

(b) if the disposal price is less than the acquisition price, there is an allowable loss; and

(c) if the disposal price is equal to the acquisition price, there is neither a chargeable gain nor an allowable loss.

(2) In this section, an allowable loss means a loss suffered on the disposal of a chargeable asset which, if it had been a gain, would have been chargeable with the tax.

(3) **Subsection (1) shall be subject in its operation to Schedule 2, which shall have effect for computing acquisition and disposal prices and otherwise as provided therein**.

[Emphasis Added]

[20] The relevant provision in Schedule 2 is para 15(1)(a) which provides:

(1) Except where this Schedule provides otherwise, a disposal of an asset shall be deemed to take place-

(a) where there is a written agreement for the disposal of the asset, on the date of such agreement;

[21] In Schedule 2 there is a provision that provides otherwise. It is para 16 which specifically provides for conditional contracts. This provision is an exception to the general provision provided in para 15(1)(a). Paragraph 16 is in the following words:

> Where a contract for the disposal of an asset is conditional and the condition is satisfied (by the exercise of a right under an option or otherwise), the acquisition and disposal of the asset shall be regarded as taking place at the time the contract was made, unless-
>
> (a) the acquisition or disposal requires the approval by the Government or a State Government, the date of disposal shall be the date of such approval; or
>
> (b) **the approval referred to in subparagraph (a) is conditional, the date of disposal shall be the date when the last of all such conditions is satisfied**.
>
> [Emphasis Added]

[22] Thus, in view of para 16 Schedule 2 and given the fact that the sale and purchase agreements are conditional contracts, the date of disposal is the date when the last of the conditions was satisfied. The last of the conditions was, for each sale and purchase agreement, fulfilled on 29 May 2019. Therefore, 29 May 2019 is the date of disposal for the purpose of determining the chargeable gain from the sale of the said lands. The chargeable gain arose after the date the amendment had become operative. The rate in force then was 10%. The SCIT had therefore applied the correct rate. In this circumstance there is no issue of retrospective operation of the applicable rate.

[23] The appellants' argued that the correct rate was 5% since the sale and purchase agreements were signed on 21 September 2018. This argument cannot succeed in view of the clear and plain wordings of para 16 Schedule 2 read with ss 69 and 70(b) of the Finance Act 2018. The chargeable gains arise for conditional contracts depending on the date of disposal as provided in para 16 Schedule 2. Paragraph 16 Schedule 2 provide three different dates for disposal. The first is the general provision where there is a condition and that condition (by the exercise of a right under an option or otherwise) has been satisfied. In this situation, the date of disposal is regarded as taking place at the time the contract is made.

[24] Then are the two exceptions to the general rule. The first exception is where the conditional contract requires the approval of the Government or a State Government. In this situation, the date of disposal is the date of the said approval being given. The second exception is where the approval of the Government or a State Government is conditional, the date of disposal is the date when the last of all such conditions is satisfied.

[25] In the instant case, the rate of tax is governed by the exceptions. The date the last condition was satisfied was 29 May 2019. At that time the amendment was already in force and the prevailing rate was 10%. Further, s 69 of the Financial Act 2018 is clear and unambiguous. It states that the amendment would become operational on 1 January 2019. So, for the purposes of the second exception in para 16 Schedule 2, the date of disposal of the chargeable

asset is 29 May 2019 and not the date of signing of the sale and purchase agreements. It is only on 29 May 2019 that the tax implications in respect of the RPGTA arose. Therefore, the disposal of chargeable assets under the sale and purchase agreements are subject to the rate of tax at 10% and not 5%. On the undisputed facts, the SCIT did not misdirect itself or commit any error of law. The decision was made according to law.

[26] The appellants next argued that the imposition of tax at the rate of 10% impaired the vested right of the appellants and is in breach of s 30(1)(b) of the Interpretation Acts 1948 and 1967 which state:

> (1) The repeal of a written law in whole or in part shall not:
>
> (a) ...;
>
> (b) **affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law**; or
>
> (c) ...
>
> **and any such** investigation, **legal proceeding** or remedy **may be instituted**, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, **as if the repealing law had not been made**.
>
> [Emphasis Added]

[27] Section 69 of the Finance Act 2018 mandated that the liability to real property gains tax commences from 1 January 2019 at the rate provided in the amended Part II Schedule 5 of the RPGTA. The provision is not enacted to be retrospective application but is prospective in nature. The right to pay or more appropriately the liability to pay tax had not even arisen at the time the sale and purchase agreements were executed. The liability to pay real property gains tax only arose when the last of the conditions was satisfied as provided under the second exception to para 16 Schedule 2. There is therefore no retrospective application of s 70 of the Finance Act 2018.

[28] The appellants then relied on the common law rule of construction set out by the Privy Council in *Yew Bon Tew* which is in the following words:

> Apart from the provisions of the Interpretation Statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

[29] The principle provides that *prima facie* a vested right cannot be taken away or be impaired by the retrospective operation of the amendment and that a statute should not be interpreted retrospectively so as to impair an existing right

or obligation unless that result is unavoidable on the language used. According to this principle, if there is a retrospective amendment it must not impair an existing right unless by clear and unambiguous words.

[30] It was submitted that the appellants' vested right to pay tax at 5% was impaired. I am unable to agree with this submission. The amendment to Part II of Schedule 5 is not retrospective. It is prospective. It does not operate retrospectively to impair a vested right or imposes a new liability. The liability to pay tax only arose on 29 May 2019, the date of disposal according to para 16 Schedule 2. The common law principle is therefore not relevant to the facts of the instant case as held by the SCIT given that the tax liability of 5% had not arisen when the amendment to Part II Schedule 5 came into force the appellants had not acquired any right and there was no retrospective operation of the amendment.

[31] The appellants relied on *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 1 MLRA 512 to support their position. I find the case of no assistance to the appellants and not relevant to the instant case before me. There the taxpayer was a society registered under the Co-operative Societies Ordinance 1948, and was *vide* s 13(i)(f)(ii) of the Income Tax Ordinance 1947 exempted from payment of income tax. The Income Tax Act 1967 ("the ITA") repealed the Ordinance but the exemption conferred by the Ordinance was continued by para 33 Schedule 9 of the ITA. In 1980, the Income Tax (Amendment) Act 1980 ("the Amendment Act") removed the exemption and further by s 1(5), the amendment to para 33 of the ITA was made retrospective to the year of assessment 1968. In view of this amendment, the DGIR raised assessments afresh on the taxpayer for the years of assessment 1977-1981. The SCIT in that case discharged the assessments and held that the amendment to para 33 Schedule 9 of the ITA did not have the effect of removing the exemption from tax. On appeal by the DGIR, the High Court reversed the decision and held that the taxpayer no longer enjoyed the exemption by virtue of the amendment. The taxpayer appealed. The Supreme Court reversed the High Court holding as follows:

> (i) the taxpayer had an acquired right to exemption under the Ordinance when the Act came into force. That acquired right could only be overruled prospectively and not retrospectively; and
>
> (ii) although the legislature had made its intention clear in s 1(5) of the Amendment Act that s 16 therein which amended Schedule 9 of the ITA shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment, the amending Act did not expressly provide that Part I of the Interpretation Acts 1948 and 1967 shall not apply. This raised a doubt whether the legislature had intended to impair the existing right of the appellant and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there was a doubt, the ambiguity must be construed in favour of the appellant as the exemption from tax had not been removed by sufficiently clear words to achieve that purpose.

[32] In the instant case, the amendment to Part II of Schedule 5 was not made retrospective. It was prospective in its application. In the National Land Finance Co-operative Society Ltd case, not only was the amendment made to operate retrospectively, the Amendment Act further did not expressly provide that the equivalent to s 30(1) of the Interpretation Acts 1948 and 1967 shall not apply. Similarly, the cases of *Geetanjali Trading & Investment Ltd v. Income Tax Officer (ITA No 5428/MUM/2007 & 1737/Mum/2009)* and *Commissioner of Income Tax, UP v. Shah Sadiq And Sons* [1987] AIR 1217 (SC) are also distinguished on the facts and the application of the said principle. Further, since the amendment made in the instant case is not enacted retrospectively there is no issue of enacting any clear words to remove an existing right, Thus, the submission of ambiguity arising from the manner in which the amendment and it coming into force is misconceived and devoid of merit. Only if the amendment is retrospective in its operation does the need arise for clear words to impair an existing right or liability.

Conclusion

[33] For the above reasons there is no reason for this Court to interfere with the deciding order of the SCIT. The appeal is dismissed.

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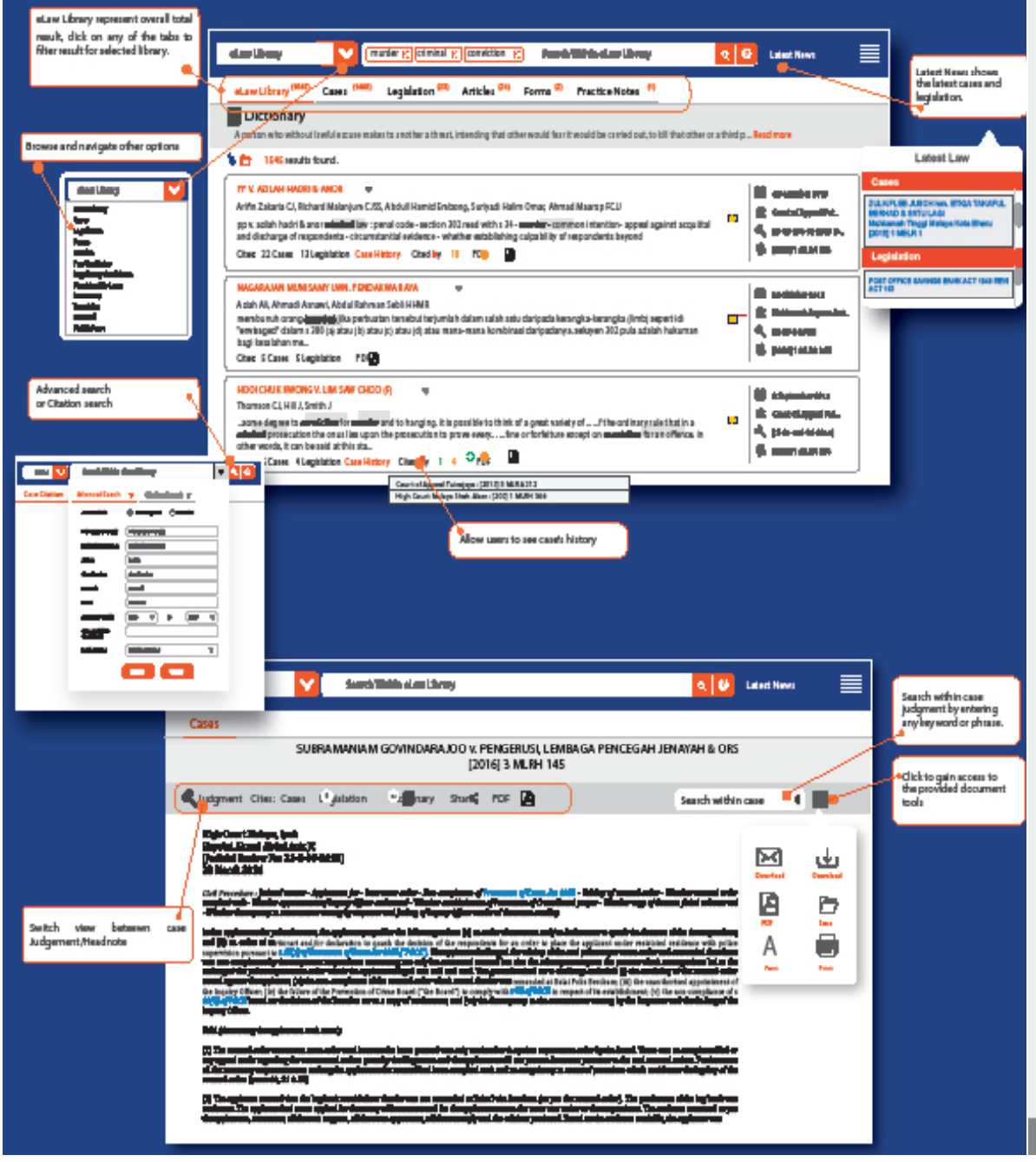

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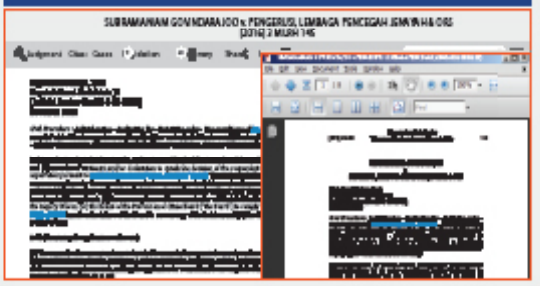

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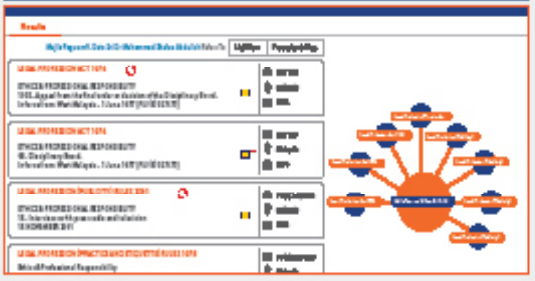

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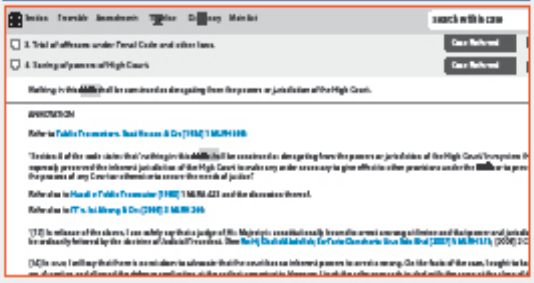

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