KETUA PENGARAH HASIL DALAM NEGERI

v.

KIND ACTION (M) SDN BHD

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Rhodzariah Bujang, Abu Bakar Jais FCJJ
[Civil Appeal No: 01(f)-18-05-2024(J)]
13 March 2025

Administrative Law: *Judicial review — Certiorari — Order of certiorari to quash Notices of Additional Assessment ("Notices") issued by appellant under Income Tax Act 1967 ("ITA") for disposal of lands by respondent — Respondent paid real property gains tax under Real Property Gains Tax Act 1976 ("RPGTA") for sale of lands — Whether Notices invalid in law — Whether appellant could not impose tax on respondent under ITA since it did not discharge or revoke earlier RPGTA certificate of clearance and RPGTA assessments in respect of same transactions — Whether existence of domestic remedy barred application for judicial review — Whether excess or abuse of power enabled judicial review despite alternative remedies*

Revenue Law: *Income tax — Assessment — Judicial review — Order of certiorari to quash Notices of Additional Assessment ("Notices") issued by appellant under Income Tax Act 1967 ("ITA") for disposal of lands by respondent — Respondent paid real property gains tax under Real Property Gains Tax Act 1976 ("RPGTA") for sale of lands — Whether Notices invalid in law — Whether appellant could not impose tax on respondent under ITA since it did not discharge or revoke earlier RPGTA certificate of clearance and RPGTA assessments in respect of same transactions*

This was an appeal by the Ketua Pengarah Hasil Dalam Negeri ("the appellant") against the Court of Appeal's decision in reversing the High Court's judgment, which had decided in favour of the appellant when it dismissed the respondent's application for judicial review. The respondent was involved in the plantation business and had sold its plantation lands to various parties between 2007 and 2017. In respect of these disposals, the respondent paid the Real Property Gains Tax ("RPGT") under the Real Property Gains Tax Act 1976 ("RPGTA"). The RPGTA assessments and certificate of clearance were issued by the appellant's Cawangan Pembayar Cukai Besar and Cawangan Kluang. In October 2019, the appellant took the position that the proceeds from the respondent's realisation of its investments in the plantation lands were subject to income tax under s 4(a) of the Income Tax Act 1967 ("ITA"). The appellant argued that the respondent's land disposals bore characteristics of trade, making the proceeds taxable under the ITA rather than the RPGTA. The appellant raised Notices of Additional Assessment dated 3 December 2020 for Years of Assessment of 2010, 2015, and 2018 ("the Notices") upon the respondent, imposing income tax and a 60% penalty totalling more than RM81 million. However, the appellant did not discharge or revoke the earlier

RPGTA certificate of clearance and RPGTA assessments regarding the same transactions. The respondent contended that the appellant's failure to do so had resulted in unlawful double taxation, as the transactions had already been taxed under the RPGTA. Therefore, the respondent filed an appeal to the Special Commissioners of Income Tax ("SCIT") and also initiated judicial review proceedings in the High Court. Vide the judicial review, the respondent sought the following reliefs: (a) an order of *certiorari* to quash the Notices issued by the appellant under the ITA; (b) a declaration that the Notices were invalid in law; and (c) a declaration that the appellant was bound by its actions in recognising, accepting and acknowledging that the profit (if any) from the realisation of investments of the plantation lands were subjected to RPGTA and, thus, it could not impose a tax on the respondent under the ITA. The High Court dismissed the respondent's judicial review application, but the Court of Appeal reversed the High Court's decision. Hence, the present appeal.

Held (dismissing the appellant's appeal):

Per Tengku Maimun Tuan Mat CJ:

(1) The appellant accepted the RPGT returns filed by the respondent and issued the RPGTA certificate of clearance and assessments under s 14(1)(a) of the RPGTA. Since there were no appeals filed by the respondent, the assessments became final and conclusive under s 20 of the RPGTA. In fact, the appellant conceded that an assessment would become final and conclusive under s 20 when no appeal was filed by a taxpayer after the appellant issued an assessment under s 14(1) of the RPGTA. However, the appellant contended that assessments under s 14(3) would not attain finality until they were formally adopted as the assessment for the relevant year. The Court found no merit in this argument and sought clarification on whether any of the exceptions under s 20(2) of the RPGTA applied to the respondent in the instant case but there were none. Hence, the Court concluded that, under s 20(1), the assessments were final and conclusive. (paras 38-39)

(2) The appellant argued that it could still tax the respondent for income under the ITA after an audit was done even if tax or assessment for capital under the RPGTA was final and conclusive. However, accepting this argument would cause a gross violation of the principle of double taxation and directly contradict the finality provision in s 20(1) of the RPGTA. The words in s 20(1) were clear – if there was no appeal by a taxpayer, and the circumstances stipulated under s 20(2) did not arise, the assessment under the RPGTA would be final and conclusive. It was a trite principle of statutory construction that the Courts would not read words into a statute. The Court's role was strictly to interpret and apply the legislature's express wording. Further, any ambiguity in the tax law ought to be resolved in favour of the taxpayer. (paras 40-44)

(3) The appellant also contended that it was at liberty to take the return "on the surface" and to "keep open the various alternatives". However, the RPGTA did not permit the appellant to accept the RPGT returns 'on the surface'

without proper scrutiny before later reconsidering them. As a matter of good governance, the appellant should undertake an investigation or audit before issuing the assessment. This would be consistent with scheme of s 14(1) of the RPGTA which gave the discretion to the appellant to either accept the return and make an assessment accordingly or make the necessary adjustments before doing so. The appellant's position to "keep open the various alternatives" was also untenable, as it would result in taxation under both the RPGTA and ITA, which was an approach explicitly prohibited by the law. It would also result in perpetual uncertainty in tax positions, which could not be Parliament's intent in regard to the final and conclusive provision in the law. (paras 47-48)

(4) The appellant argued that the Court of Appeal erred in failing to consider its authority under s 91 of the ITA to raise assessments and in holding that it was estopped from doing so. However, this submission was misplaced. The Court of Appeal did not dispute the appellant's power under s 91 but found that the appellant acted unlawfully by taxing the respondent under both the RPGTA and the ITA. This occurred when the appellant failed to discharge the RPGTA certificate of clearance and assessments before reclassifying the tax under the ITA. (para 55)

(5) The appellant had taxed the respondent under both the RPGTA and the ITA, arguing that it should not be estopped from performing its statutory functions and that both assessments under said Acts should remain until judicial determination. Upholding this position would have subjected the respondent to dual taxation, which was unlawful, as Malaysian law only permitted taxation under either the RPGTA or ITA, not both. Further, to accept the appellant's submission that the RPGTA certificate of clearance and assessments be held in abeyance, would render s 20 of the RPGTA redundant as there was no such position stated in the RPGTA. (paras 64-66)

(6) There was no appealable error by the Court of Appeal that warranted appellate intervention. The effect of the appellant's decision in issuing the Notices and in charging the respondent under both the RPGTA and the ITA amounted to an illegal act and was contrary to the principle against double taxation. Thus, the principle of estoppel applied against the appellant. Furthermore, the High Court erred in both concluding that the SCIT was the proper forum and then contradicting itself by addressing the merits. Having determined that the SCIT should assess the merits, the High Court should not have proceeded to decide on the issues of negligence, limitation and sinister or bad faith. (paras 81-82)

Per Abu Bakar Jais FCJ:

(7) Estoppel *in pais* (estoppel by words or conduct) applied against the appellant, preventing it from imposing the tax under the ITA. Once the RGPT was imposed and the certificate of clearance was issued, the appellant was estopped from further taxation under the ITA. The respondent also had a legitimate expectation that no additional tax would be imposed, as the RPGT had already been paid and the clearance certificate was issued by the appellant. (para 89)

(8) The Court of Appeal did not err in finding that the existence of a domestic remedy did not bar an application for judicial review, nor did O 53 of the Rules of Court 2012 impose such a restriction. Hence, there was no obligation for the respondent to appear before the SCIT prior to seeking the appropriate remedy by way of judicial review before the High Court. The Courts had long acknowledged that the availability of an alternative internal remedy in the form of an appeal process would not serve as an absolute bar to an application for judicial review. Further, judicial review would still be applicable when there was excess or abuse of power. In the present case, there was indeed an excess or abuse of power as the appellant should not have further imposed tax on the respondent under the ITA after having done so under the RPGTA. Therefore, the respondent should not be barred from applying for judicial review. (paras 96-99)

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 1 MLRA 683 (refd)

Bye (HM Inspector Of Taxes) v. Gershon And Muriel Coren [1986] 60 TC 116 (distd)

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 1 MLRA 411 (folld)

Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2021] MLRHU 890 (refd)

Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 2 MLRA 335 (refd)

Faekah Haji Husin & Ors v. Menteri Besar Selangor (Pemerbadanan) [2021] 4 MLRA 29 (refd)

Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] MLRHU 1605 (refd)

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 MLRA 635 (refd)

Government Of Malaysia & Anor v. Jagdis Singh [1986] 1 MLRA 207 (refd)

Government Of Malaysia v. Sarawak Properties Sdn Bhd [1993] 3 MLRH 760 (refd)

Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor Malaysia & Ors [2016] MLRAU 487 (refd)

Jakinta Trading Sdn Bhd v. Director General Of Customs & Anor (Encl 8) [2021] MLRHU 551 (refd)

Government Of Malaysia v. Jasanusa Sdn Bhd [1995] 1 MLRA 213 (refd)

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLRA 251 (refd)

Lai Cheng Cheong v. Sowaratnam Arumugan [1983] 1 MLRA 85 (refd)

Lam Eng Rubber Factory (M) Sdn Bhd v. Pengarah Alam Sekitar Negeri Kedah Dan Perlis & Anor [2005] 1 MLRA 110 (refd)

Landmark Property Sdn Bhd v. Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri & Anor [2021] MLRHU 1599 (refd)

Law Pang Ching & Ors v. Tawau Municipal Council [2009] 3 MLRA 475 (refd)

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 1 MLRA 336 (refd)

Maritime Electric Co Ltd v. General Dairies Ltd [1937] AC 610 (refd)

Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri [2011] 10 MLRH 854 (refd)

MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2004] 2 MLRH 639 (refd)

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

North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 1 MLRA 207 (refd)

Preston v. Inland Revenue Commissioners [1985] 2 All ER 327 (refd)

R v. Inland Revenue Commissioners, Ex Parte MFK Underwriting Agencies Ltd [1990] 1 WLR 1545 (refd)

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 2 MLRA 187 (refd)

Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 4 MLRA 394 (refd)

Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 1 MLRA 658 (refd)

Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal [2021] 1 MLRA 712 (refd)

Legislation referred to:

Real Property Gains Tax Act 1976, ss 13(1), 14(1)(a),(b), (3), 20(1), (2)

Income Tax Act 1967, ss 4(a), 91, 99

Rules of Court 2012, O 53

Counsel:

For the appellant: Ashrina Ramzan Ali (Muhammad Farid Jaafar & Surani Che Ismail with her); Inland Revenue Board

For the respondents: Anand Raj (Foong Pui Chi & Cheong Wen Yie with him); M/s Shearn Delamore & Co

For Amicus Curiae: Nitin Nadkarni (Soon Jia Yin & Abhilaash Subramaniam with him); M/s Abilaash Subramaniam & Co

[For the Court of Appeal judgment, please refer to *Kind Action (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2024] 6 MLRA 328]

JUDGMENT

Tengku Maimun Tuan Mat CJ (Majority):

Introduction

[1] This is the Ketua Pengarah Hasil Dalam Negeri/Revenue's appeal against the decision of the Court of Appeal in reversing the judgment of the High Court. The High Court had decided in favour of the Revenue when it dismissed the respondent's application for judicial review.

[2] Having considered the written and oral submissions of the parties, we unanimously dismissed the Revenue's appeal. We now provide our reasons.

Background facts

[3] The respondent is in the plantation business. Its parent company is Revertex Malaysia Sdn Bhd ("RMSB"). The ultimate holding company of the respondent is the Synthomer Group, a company incorporated in the United Kingdom.

[4] Synthomer Group decided that RMSB was to focus on Synthomer Group's core business activity, namely manufacture, trade and sale in chemicals (i.e. Synthetic resin and alkyd resin), and the respondent to carry out plantation business previously carried out by RMSB. For this purpose, the respondent entered into a Sale and Purchase Agreement dated 24 May 2004 with RMSB where plantation lands used by RMSB in Kluang, Johor were transferred to the respondent.

[5] The particulars of the lands are as follows:

(i) HS(D) 47663 Lot PTD 57386

(ii) HS(D) 47664 Lot PTD 57387

(iii) HS(D) 47665 Lot PTD 57387

(collectively referred to as "Mengkibol Estate")

[6] At all material times, the respondent derived its income from its plantation business which was conducted on the Mengkibol Estate. Mengkibol Estate has always been recognized in the respondent's audited account as a fixed asset for the relevant years of assessment. The respondent has duly paid income tax upon the same.

[7] There was a change in the top management of the Synthomer plc, the ultimate holding company in the United Kingdom, and following the change, in 2007 the Synthomer Group made a strategic decision to streamline the business activity of the Group. Synthomer Group decided to withdraw from the plantation business altogether and focus on its chemical manufacturing

business. Towards that end, the respondent was to realise its investments in Lots PTD 57386 and PTD 57387. Lot PTD 57386 and Lot PTD 57387 measuring 427 acres and 1471 acres respectively, were subsequently subdivided into smaller lots ("the plantation lands").

[8] In accordance with the decision of the holding company, ten (10) transactions took place between 2007 and 2017 where the respondent, vide several sale and purchase agreements, sold its plantation lands to various parties. In respect of these disposals of the lands, the respondent paid the real property gains tax under the Real Property Gains Tax Act 1976 ("the RPGTA"). The RPGTA assessments and the real property gains tax certificates were issued by the appellant's Cawangan Pembayar Cukai Besar and Cawangan Kluang.

[9] In October 2019, in the course of a tax investigation conducted by the appellant's branch in Melaka, the appellant took the position that the proceeds from the respondent's realization of its investments in the plantation lands are subject to income tax under s 4(a) of the Income Tax Act 1967 ("ITA"). This is based on, among others, that the respondent's activities of realizing its investments were in the nature of trade.

[10] The appellant raised Notices of Additional Assessment dated 3 December 2020 for Year Assessments of 2010, 2015 and 2018 upon the respondent, imposing income tax and 60% penalties totaling more than RM81 million ("Disputed Notices"). The appellant did not discharge or revoke the earlier RPGTA certificate of clearance and RPGTA assessments in respect of the same transactions.

[11] The respondent contended that by not discharging or revoking the earlier RPGT certificate of clearance and assessments, the appellant's conduct is illegal and contrary to the principle against double taxation.

[12] The respondent filed an appeal under Form Q to the Special Commissioners of Income Tax (SCIT) and also judicial review proceedings in the High Court. Via the judicial review, the respondent sought for the following reliefs:

(a) An order for *certiorari* to quash the Notices of Additional Assessment for Year Assessment 2010, 2015 and 2018 issued by the Revenue under the ITA;

(b) A declaration that the Notices are invalid in law; and

(c) A declaration that the Revenue is bound by its action in recognizing, accepting and acknowledging that the profit (if any) from the realization of investments of the plantation lands are subjected to RPGTA and thus the Revenue cannot impose tax on the respondent under the ITA.

Proceedings In The Courts Below

[13] The following were the issues for determination by the High Court:

(a) Whether the Disputed Notices for Year Assessment prior to 2015 were time-barred;

(b) Whether the Revenue was bound by the RPGTA certificate of clearance;

(c) Whether the Revenue had failed to give reasons for its decision;

(d) Whether it was improper for the applicant to bypass the alternative remedy of appeal to the SCIT; and

(e) Whether imposition of the penalty by the Revenue was correct.

[14] The High Court dismissed the respondent's judicial review application on the following grounds:

(i) The Revenue's additional assessments were not statutorily barred and as the respondent has negligently failed to furnish the proper information and to make the proper declaration to the Revenue, the respondent's plea of limitation should be taken up before the Special Commissioners of the Income Tax ("SCIT");

(ii) The respondent's plea of double taxation is not tenable as pursuant to s 91 of the ITA, the Revenue is given the power to make additional assessment; and because the Revenue had adjusted the RPGT payments made by the respondent;

(iii) The Revenue had not acted in bad faith or had breached any rules of natural justice;

(iv) That this was not a proper case to bypass the appeal to SCIT. Since the respondent had disputed the additional assessments, the issue of whether the gains from the disposal of the plantation lands should be subjected to the ITA would require a fact finding exercise by SCIT;

(v) The imposition of penalty is linked to the facts of the case and the SCIT being judges of fact would be the appropriate forum to decide on the correctness of the penalty imposed.

[15] On appeal, the Court of Appeal found that the High Court had arrived at a wrong conclusion in dismissing the respondent's judicial review application. The respondent's appeal was therefore allowed. The findings of the Court of Appeal may be summarized as follows:

(i) No acid test is applicable in judicial review cases (be it exceptional circumstances/error of law/abuse of power) but if a good case is brought before the Court for review then in the interests of justice, the application ought to be allowed.

(ii) The Revenue has failed to act in accordance with the law. In failing or omitting to discharge or revoke the RPGTA certificate of clearance and assessments, it resulted in double taxation for the same land transactions under two different legislation, i.e., the ITA and the RPGTA. The correct procedure in law was for the Revenue to discharge the assessments under the RPGTA and then raise the taxes under the ITA.

(iii) Based on established principles, the Revenue's discretion to impose taxes is not absolute and unfettered. The power of the Courts is not ousted where the discretion is not exercised in accordance with the relevant law.

(iv) As the Revenue had already issued the RPGTA certificate of clearance and RPGTA assessments in respect of the same land transactions which are final and conclusive, the Revenue is bound by the certificate and the assessments, and the principle of estoppel should apply against the Revenue.

[16] The Court of Appeal also found that the High Court erred in holding that the SCIT is the proper forum under the provisions of the ITA to deal with the merits of the case but yet, in the same breadth, took a completely contradictory approach in her judgment by determining the merits of the appellant's claim.

[17] Dissatisfied with the decision of the Court of Appeal, the Revenue applied for leave to appeal to the Federal Court.

Questions of Law

[18] Leave to appeal was granted to the Revenue/appellant on the following questions of law:

(i) Whether the Court of Appeal can extend the reading of s 20 of the Real Property Gains Tax 1976 ("RPGTA") relating to appeal under the RGPTA on the assessment raised under the Income Tax Act 1967 ("ITA");

(ii) Whether finality of assessment under s 20 of the RGPTA makes this appeal limited to RPGTA only or otherwise;

(iii) Whether the Court of Appeal has jurisdiction to make findings of facts in a judicial review when the jurisdiction to find facts is vested in the Special Commissioners of Income Tax ("SCIT");

(iv) Whether disputes relating to the merits of assessment raised under a taxing legislation involving question of law or mixed questions of law and facts may be determined by way of judicial review:

(v) Whether the appellant as a statutory body can be estopped from exercising its statutory duty under the tax laws;

(vi) Whether the appellant can raise tax assessment under the ITA in exercising its statutory duty despite the self-declaration by the respondent under the RGPTA; and

(vii) Whether there exists double taxation under the ITA and RPGTA.

[19] Questions 1, 2, 5, 6 and 7 generally concerned the finality of assessment under s 20 of the RPGTA; whether there was double taxation in view of s 20 of the RPGTA, and the construction of s 91 of the ITA. Questions 3 and 4 dealt with the issue of the availability of a domestic remedy.

Submissions of Parties

[20] Essentially, it was the submission of learned counsel for the appellant that the appellant is allowed to take the RPGT return forms submitted by the respondent under s 13(1) of the RPGTA "on the surface" and issued the RPGTA certificate of clearance and RPGTA assessments on that basis.

[21] Learned counsel further submitted that no audit was carried out under the RPGTA and that the clearance was issued based on the respondent's forms. However, subsequently, when an audit investigation was carried out on the respondent, the true nature of the transaction came to light and the appellant found that the disposal of the plantation lands should be reported under the ITA instead of the RPGTA. This is because the facts on the whole show that the respondent's land transactions comply with badges of trade and are, thus, gains under the ITA.

[22] It was further submitted by learned counsel for the appellant that what was final and conclusive under s 20 of the RPGTA was the amount of real property gains tax assessed under the RPGTA. Since the issue of whether the gain is chargeable to income tax or real property gains tax has not been determined yet, there is no finality of the assessment under the RPGTA in this case. Learned counsel relied on the case of *Bye (HM Inspector Of Taxes) v. Gershon And Muriel Coren* [1986] 60 TC 116 ("*Bye*") to argue that the appellant is not precluded from raising an assessment under the ITA after the finalization of the capital gains tax.

[23] Learned counsel for the appellant contended that the issue of subjecting the respondent to both taxes and the issue of double taxation did not arise because the respondent has not been charged for both the real property gains tax and the income tax. In her own words as captured in the written submission:

> "The income tax assessments are alternative to the capital gains tax assessment. No one has ever supposed for a moment that the Appellant were intending to levy double taxation or doing anything other than keep open the various alternatives until the uncertainties ... had been determined."

[24] Learned counsel also highlighted that the appellant had made the necessary adjustments after considering the RPGT payments made by the respondent and that there is no rule of law that precluded the appellant from proceeding to raise assessments under the ITA after the capital gains tax assessments had become final. According to learned counsel, there is 'no rule that the same sum cannot be subject to two separate taxes.'.

[25] Learned counsel argued that the appellant has the right and power to review and revise any assessment raised under RPGT. *Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 MLRA 658 ("*Teruntum Theatre*") and *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2004] 2 MLRH 639 ("*MR Properties*") were cited to support her arguments.

[26] As regards legitimate expectation and estoppel, it was argued for the appellant that it cannot be estopped from discharging its statutory duty. Learned counsel highlighted the decision of the Court of Appeal in *Teruntum Theatre* that estoppel cannot be invoked against the DGIR when he is put to notice that an incorrect assessment has been made under the RPGTA. Various cases including *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu lagi* [2011] 1 MLRA 207 and *Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor Malaysia & Ors* [2016] MLRAU 487 were cited in support of her submissions on legitimate expectation. Learned counsel had also submitted that complaints on legitimate expectation are matters that should be raised and determined by the SCIT.

[27] On the issue of availability of a domestic remedy, learned counsel for the appellant submitted that as s 99 of the ITA provides for a right to appeal to the SCIT against an assessment, the respondent must avail itself of this remedy and thus it is not competent for the respondent to pursue judicial review. Reliance was placed on among others, *Government Of Malaysia & Anor v. Jagdis Singh* [1986] 1 MLRA 207 ("*Jagdis Singh*"). Learned counsel argued that whether tax under the RPGTA or the ITA should be imposed on the respondent involves a finding of fact by the SCIT.

[28] As regards the decision of the Court of Appeal that the High Court erred in finding that the proper forum is SCIT but at the same time the High Court determined the merits of the appellant's case, learned counsel cited the decision of this Court in *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLRA 251 ("*Alcatel-Lucent*"). She argued that *Alcatel-Lucent* is the authority to support the proposition that although the courts have decided on the merits, the matter or the merits could still be ventilated before the SCIT.

[29] In response to the appellant's submissions on Questions 1, 2, 6 and 7, learned counsel for the respondent argued that the "on the surface" approach is not supported by law, and in taking that "on the surface" approach, the appellant is ignoring their statutory duty under s 14 of the RPGTA which requires the appellant to consider the contents of the taxpayer's return first in order to decide whether to accept it or make adjustments to it and thereafter raised the assessment. Having raised the assessment and there being no appeal by the respondent, the appellant's assessment under the RPGTA was final and conclusive.

[30] Further, having raised the Disputed Notices under the ITA and not having discharged or revoked the earlier RPGTA certificate of clearance and the RPGTA assessments, the appellant has sought to impose liability under both the RPGTA and the ITA which is contrary to law. This, contended learned counsel, is an illegal act on the part of the appellant which amounts to exceptional circumstances enabling the respondent to pursue judicial review. Learned counsel similarly relied on *Teruntum Theatre* and *Jagdis Singh*. It was submitted that the conduct and/or decision of the appellant is tainted with illegality and on this ground alone, the appellant's appeal should be dismissed.

[31] On Question 5, learned counsel for the respondent submitted among others that the RPGTA certificate of clearance and RPGTA assessments were issued by the Revenue over a period of seven (7) years from 2011 to 2018. This, contended learned counsel, shows that the respondent has been given the assurance and confirmation multiple times by the appellant that all the transactions were indeed capital in nature and any reasonable taxpayer would rely upon such repeated and consistent assurances of the appellant. Learned counsel argued that this has created a legitimate expectation on the part of the respondent that the certificate of clearance and the assessments under the RPGTA are correct and that the DGIR will not resile from his position. Numerous cases were cited in support thereof including *R v. Inland Revenue Commissioners, Ex Parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 ("*MFK Underwriting*") and *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 1 MLRA 411 ("*Darahman*").

[32] Learned counsel for the respondent also highlighted that the case of *Darahman* has been recently applied by the High Court against Malaysian taxing authorities. The High Court decisions are *Landmark Property Sdn Bhd v. Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri & Anor* [2021] MLRHU 1599 and *Jakinta Trading Sdn Bhd v. Director General Of Customs & Anor (Encl 8)* [2021] MLRHU 551. Applying these cases, learned counsel submitted that the fact that the appellant had issued the RPGTA certificate of clearance and assessments over a period of 7 years clearly created a legitimate expectation that the disposals of the respondent's plantation lands are subject to real property gains tax under the RPGTA and as such, it would be unfair for the appellant to now shift their position and unlawfully tax the respondent again under the ITA.

[33] On the principle that there can be 'no estoppel', learned counsel accordingly submitted that the Court of Appeal was correct in law in holding that estoppel should apply against the appellant. It was also highlighted by learned counsel that the law on estoppel has evolved.

[34] The respondent also argued that the Court of Appeal was correct in finding that the High Court erred in law in holding that the SCIT is the proper forum under the provisions of the ITA to deal with the merits of the case, yet, proceeded to determine the merits of the appellant's claim.

[35] On the existence of a domestic remedy under the ITA, learned counsel for the respondent submitted that nowhere in O 53 is it stated that the existence of a domestic remedy will bar an application for judicial review, and that it would be wrong to insist on the exhaustion of a domestic remedy where there are errors of law or abuses of power that goes to the legality of the conduct of the decision-making authority. Learned counsel relied on *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 1 MLRA 336, *Lai Cheng Cheong v. Sowaratnam Arumugan* [1983] 1 MLRA 85, *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] 10 MLRH 854, *Flextronics Shah Alam Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2018] MLRHU 1605, *Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2021] MLRHU 890.

[36] Learned counsel for the Malaysian Bar who appeared as *Amicus Curiae* addressed the following points in his written submission − whether and when different legislations can be construed together; whether and when the doctrine of estoppel can be applied against public authorities/statutory bodies, in this case, the Director General of Inland Revenue; whether and when double taxation arises under the ITA and the RPGTA; whether the superior courts' jurisdiction in judicial review proceedings is confined only to dealing with issues of law, or whether it can also address issues of facts or mixed issues of law and facts.

Decision/Analysis

Finality of the Assessment and Double Taxation

[37] The relevant provisions of the RPGTA are ss 13(1), 14(1) and 20 as follows:

> "**13. Returns**
>
> (1) Every chargeable person who disposes of a chargeable asset and every person who acquires the asset so disposed of shall, within sixty days (or such further period as the Director General may allow on a written request being made to him) of the date of disposal of that asset, make a return-
>
> (a) specifying in respect of the asset disposed of the acquisition price, the disposal price and the gain or loss on the disposal;

(b) furnishing all information necessary to determine the acquisition price and disposal price of the asset disposed of; and

(c) where the market value of the asset is to be taken for the purposes of this Act, submit a written valuation of the asset by a valuer.

.....

14. Assessments

(1) Where a person makes a return under subsection 13(1), the Director General may-

(a) accept the return and make an assessment accordingly;

(b) make an assessment after making such adjustments as he considers necessary; or

(c) reduce an assessment made for the year of assessment for which the return was made, in giving effect to paragraph 7(4)(a).

.....

20. Finality of assessment

(1) Subject to this section, an assessment shall become final and conclusive for all the purposes of this Act as regards the amount of the tax assessed under it or the tax relief for allowable losses indicated in it, as the case may be-

(a) on the expiry of the time of appeal against the assessment; or

(b) where an appeal is made, on the appeal being finally disposed of.

(2) Subsection (1)-

(a) shall not apply to an assessment made under subsection 14(3) until it is adopted as the assessment for the year of assessment to which it relates;

(b) shall not prevent the Director General from making in respect of any year of assessment-

(i) an assessment under subsection 15(1) or (2); or

(ii) a revision under subsection 19(1).''

[38] The appellant in this case had accepted the RPGT returns filed by the respondent and issued the RPGTA certificate of clearance and RPGTA assessments under s 14(1)(a) of the RPGTA. Since there were no appeals filed by the respondent, the assessments became final and conclusive under s 20. In fact, learned counsel for the appellant conceded that the assessment will become final and conclusive under s 20 of the RPGTA when no appeal is filed by a taxpayer after the DGIR issued an assessment under s 14(1) of the

RPGTA. She argued however that the finality provision does not apply to an assessment made under s 14(3) until it is adopted as the assessment for the year of the assessment to which it relates.

[39] With respect, we found no merit in the submission of learned counsel for the appellant on s 14(3) of the RPGTA. In the course of the hearing, we sought clarification from her whether any of the scenarios under s 20(2) of the RPGTA apply to the respondent in the instant case. Her response was in the negative. Thus, pursuant to s 20(1), the assessments issued by the appellant are final and conclusive.

[40] Learned counsel for the appellant had also submitted that the appellant can still tax the respondent for income under ITA after an audit is done even if tax or assessment for capital under the RPGTA is final and conclusive.

[41] With respect, to accept the submission of learned counsel for the appellant would cause gross violation of the principle of double taxation and would run counter to the finality provision in s 20(1). The words in s 20(1) are clear. If there is no appeal by a taxpayer, and the circumstances stipulated under s 20(2) do not arise, the assessment under RPGTA is final and conclusive.

[42] It is a trite principle of statutory construction that the courts will not read words into a statute. The duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. See *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 4 MLRA 394 and *Faekah Haji Husin & Ors v. Menteri Besar Selangor (Pemerbadanan)* [2021] 4 MLRA 29.

[43] In *Tebin Mostapa*, this Court stated thus:

> "... the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute."

(See also *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 2 MLRA 187 and *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 MLRA 712).

[44] Further, as submitted by learned counsel for the respondent, even if there is an ambiguity in the law, such ambiguity must be construed in favour of the taxpayer as decided in *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 2 MLRA 335 ("*Exxon Chemical*"). In *Exxon Chemical*, Gopal Sri Ram JCA (as he then was) said:

> "[10] ... the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision: no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 1 MLRA 512).

> The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read literally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head."

[45] In *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 1 MLRA 512, this Court stated thus:

> "... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used....".

[46] The words in s 20(1) are clear. As stated by the Supreme Court in *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 MLRA 635, the court is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavor to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. We therefore found no reason not to give effect to the clear words of 'final and conclusive' in s 20(1) of the RPGTA which means what it says. The definiteness and certainty of the legal position must be maintained (see *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 1 MLRA 683).

[47] Learned counsel for the appellant also contended that the appellant is at liberty to take the return "on the surface" and to "keep open the various alternatives". We agreed with the respondent that nowhere in the RPGTA is it provided that the appellant can take the RPGT return "on the surface" first and think about it later. In our view, it would be consistent with good governance that the appellant undertakes an investigation or audit first, before issuing the assessment. This would be consistent with the overall scheme of s 14(1) of the RPGTA which gives the discretion to the Director General to either accept the return and make an assessment accordingly or make an assessment after making such adjustments as he considers necessary.

[48] The appellant's position to "keep open the various alternatives" cannot be accepted as that position amounted, in effect, to taxing the respondent under both the RPGTA and the ITA. The law clearly prohibits the appellant from taking that course of action. As observed by Raus Sharif J (as His Lordship then was) in MR Properties: "The act of the respondent to switch from one Act to another would result in no finality to tax liability and there is a presumption in tax law against double taxation in respect of the same transaction.". To "keep open the various alternatives" would also result in a perpetual uncertainty in tax position. To our mind, this cannot be the intention of Parliament having regard to the final and conclusive provision in the law.

[49] At this juncture, it is perhaps pertinent to cite Edgar Joseph Jr FCJ in *Government Of Malaysia v. Jasanusa Sdn Bhd* [1995] 1 MLRA 213, where he referred to the judgment of the High Court in the same case:

> "... The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfill the collection of certain publicly declared targeted amount of taxes and whose assessments, as a result may be influenced by the target to be achieved rather than the correctness of the assessment."

[50] In the instant case, the appellant, under s 14(1)(b) could have made the necessary adjustments before issuing the assessments under the RPGTA. They did not deem it necessary to do so. Instead, they issued the RPGTA certificate of clearance and assessments. Seven (7) years later, the appellant issued notices/assessments under the ITA for the same transactions of the respondent's plantation lands. The earlier RPGTA certificate of clearance and the RPGTA assessments were not revoked. As found by the Court of Appeal, this in effect resulted in double taxation for the same land transactions but under two different legislations, i.e., once under the RPGTA and later under the ITA. This is clearly an illegality.

[51] In *MR Properties,* Raus Sharif J (as His Lordship then was) held:

> "8. In short, the argument by the learned counsel for the appellant is that there is no statutory power for the respondent to 'vacate' an assessment under RPGT and then having done so, to switch to another assessment under the ITA. According to the learned counsel, that the act of the respondent to switch from one Act to another would result in no finality to tax liability and there is a presumption in tax law against double taxation in respect of the same transaction.
>
> 9. To support his argument, the learned counsel for the appellant referred to a number of English cases in particular two Houses of Lords cases of *Garvin v. Inland Revenue Commissioners and Related Appeals* [1981] STC 344 and *Bird and Others v. Inland Revenue Commissions and Related Appeals* [1988] STC 312.
>
> 10. The Special Commissioners, as can be seen in the case stated, dealt with the two cases as follows:
>
> What clearly emerged from *Bird* and *Garvin* is strong judicial misappropriation of double taxation. We wholeheartedly agree with the sagacious view of the House of Lord. As Lord Keith said in *Garvin*, it is not open to the Revenue to subject a taxpayer to two different charges of tax in respect of the same receipts. ....
>
> In Malaysia, the relevant laws are specific in their application. The ITA applies only to income and RPGTA applies only to capital gains on real property. The question of subjecting a taxpayer to both the taxes in respect of the same receipt cannot arise. The corollary is that any attempt by the respondent to impose both taxes will be legally untenable. If the appellant has been subjected to both taxes, the objection by the appellant is perfectly valid.

11. I am in agreement with the above reasoning of the Special Commissioners. I am of the view, under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT as the latter is only levied in a situation where ITA is not applicable. There is also no possibility for a taxpayer being liable to both taxes in respect of the same gain because under the definition of gain under RPGT, it refers to 'gain other than gain or profit chargeable with or executed from income tax'. Thus, if the gain is from the sale of an asset is found to be of an income nature, then the assessment cannot be under RPGT because such gain should be taxed under the ITA. Thus, there is no possibility of a tax payer being liable to both taxes on the same gain.".

[52] The appellant argued that they have the power to review the assessments and that the Court of Appeal erred in law in deciding that the ITA assessments resulted in double taxation. It was further argued that the Court of Appeal had failed to consider that the appellant had made the necessary adjustments to the payment made by the respondent under the RPGTA.

[53] We disagreed with the appellant that the Court of Appeal erred in this respect. We found that the Court of Appeal has considered the appellant's submission on the necessary adjustments as apparent in its grounds of judgment reproduced below:

"[35] Turning to the facts of the present case, the Respondent before us did not dispute that the initial assessment under the RPGTA 1976 was not discharged but went on to submit that the Respondent had made the necessary adjustments in consideration of the payment made by the Appellant under the RPGTA 1976 and decided to raise the respective assessments under the provisions of the ITA 1967. According to the Respondent, they are allowed to do so under the law.

[36] We disagree with the Respondent. In our view, as the law stands, the correct procedure in this instance was for the Respondent to have revised and discharged the assessment under the RPGTA 1976 and then raise the taxes under the ITA 1967.".

[54] The finding of the Court of Appeal in the instant case is consistent with the decision of the Court of Appeal in *Teruntum Theatre* where the Court of Appeal stated thus:

"[19] ... there is no rule of law precluding Revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA. That Revenue is, if the facts and circumstances warrant it, free to revise and discharge the assessment under the RPGT and then raise an assessment under the ITA.

[20] On the issue of double taxation, we agree that the position is Malaysia is different from that in England. The ITA applies only to income, whilst the RPGT applies only to capital gains on real property. It has to be one or the other, it cannot be both. Unlike in England, the question of subjecting a taxpayer to both taxes in respect of the same receipt cannot arise here. The authorities cited by the appellant on this issue are clearly distinguishable.".

[55] It was also contended for the appellant that the Court of Appeal erred in failing to consider that the appellant is empowered to raise the assessments under s 91 of the ITA and in that regard further erred in holding that the appellant is estopped from raising the tax under the ITA. We found the submission of learned counsel misplaced. This is not a case where the Court of Appeal found that the appellant is not empowered under s 91 of the ITA to raise assessments against the respondent. This is a case where the Court of Appeal found that the appellant had acted contrary to law by imposing tax on the respondent both under the RPGTA and the ITA which resulted when the appellant failed to discharge the RPGTA certificate of clearance and the RPGTA assessments before revising and imposing tax on the respondent under the ITA.

[56] In *Teruntum Theatre*, one of the issues that arose for determination of the Court of Appeal was whether, after having assessed the taxpayer for real property gains tax under the RPGTA, and upon payment of the sum assessed and a certificate of clearance issued, the Revenue could vacate the assessment and re-assess the appellant for income tax on the same receipt as a trading gain under the ITA.

[57] The crux of the argument in *Teruntum Theatre* which was taken by way of a preliminary issue was that once an assessment for capital gains had become final by reason of the capital gains tax having been paid and a certificate of clearance issued, from then onwards, the matter became final and conclusive. It was the taxpayer/appellant's case that the Revenue/respondent was precluded from raising an assessment to income tax.

[58] Referring to the case of *Maritime Electric Co Ltd v. General Dairies Ltd* [1937] AC 610, the Court of Appeal in *Teruntum Theatre* held that estoppel cannot be invoked against the Revenue/DGIR when he is put to notice that an incorrect assessment has been made under the RPGTA and that the DG cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law. The Court of Appeal further held that there is no rule of law precluding the Revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA, that if the facts and circumstances warrant it, the Revenue is free to revise and discharge the assessment under the RPGT and to then raise an assessment under the ITA.

[59] Learned counsel for the respondent submitted that *Teruntum Theatre* should be treated as *per incuriam* as the Court of Appeal did not consider the crucial provisions of 'final and conclusive' of the RPGTA and had misunderstood the Privy Council case of *Maritime Electric*. *Maritime Electric*, according to learned counsel, was completely irrelevant as it was not a tax case nor a public law case.

[60] We were not with the respondent on the *per incuriam* point. We noted that the issue on final and conclusive assessment was submitted by the taxpayer there, and while we disagreed with the Court of Appeal in *Teruntum Theatre* on the point of estoppel (for the reasons set out below), the decision in *Teruntum*

Theatre that Revenue may issue assessment under the ITA if the facts and circumstances warrant it, but after discharging the assessment under RPGTA, is consistent with numerous other cases. To that extent, *Teruntum Theatre* is still good law.

Legitimate Expectation/Estoppel

[61] As adverted to earlier, the Court of Appeal in *Teruntum Theatre* referred to an old case of *Maritime Electric*. The same principle that there can be no estoppel against the Crown on tax/revenue matters was also decided in *Government Of Malaysia v. Sarawak Properties Sdn Bhd* [1993] 3 MLRH 760 ("*Sarawak Properties*").

[62] Learned counsel for the respondent submitted that the old case of *Sarawak Properties* is no longer good law, particularly in matters where the Revenue by their conduct has exceeded or abused their powers and/or had given rise to legitimate expectations and that the other jurisdictions have moved on in terms of the law on estoppel.

[63] We agreed with the respondent that the law on the principles of estoppel and legitimate expectation in Malaysia, as in other jurisdictions such as India and Hong Kong has evolved (see for example, *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 1 MLRA 336, *Lam Eng Rubber Factory (M) Sdn Bhd v. Pengarah Alam Sekitar Negeri Kedah Dan Perlis & Anor* [2005] 1 MLRA 110, *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 1 MLRA 411, *Law Pang Ching & Ors v. Tawau Municipal Council* [2009] 3 MLRA 475, *Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor Malaysia & Ors* [2016] MLRAU 487).

[64] In the instant case, the appellant had taxed the respondent under both the legislations of RPGTA and the ITA. The position taken by the appellant is that they should not be estopped from performing their statutory functions and that the Court of Appeal should have preserved the *status quo* of both assessments under the RPGTA and the ITA until the determination by the Courts, which is the principle and spirit of the decision in *Teruntum Theatre*.

[65] The effect of upholding the appellant's position is that the respondent will be subjected to tax under both the RPGTA and the ITA. This is contrary to law as it is trite that in Malaysia, a taxpayer can only be taxed either under the RPGTA or the ITA and that there can be no overlap between the RPGTA and the ITA.

[66] Further, to accept the appellant's submission that the RPGTA certificate of clearance and the RPGTA assessments be held in abeyance, would render s 20 of the RPGTA Act completely redundant. The position taken by the appellant is not supported by law as there is nothing in the RPGTA that speaks of holding the RPGTA certificate of clearance and assessments in abeyance.

[67] Our reading of *Teruntum Theatre* also did not support the appellant's contention that having applied both tax legislations of the RPGTA and the ITA, the assessments must be held in abeyance until the dispute is determined. What was decided in *Teruntum Theatre* was that the Revenue is, if the facts and circumstances warrant it, free to revise and discharge the assessment under the RPGTA and to then raise an assessment under the ITA.

[68] The issue that the appellant could not be estopped from performing its statutory functions did not arise here as the appellant is only expected to perform its function as required by law and not otherwise. On the facts, the appellant had clearly taxed the respondent under both the RPGTA and the ITA. As alluded to earlier, it is illegal for the appellant to do so, as in effect, it amounts to double taxation.

[69] Further, it was not disputed that the respondent has been given assurances multiple times over a period of seven years from 2011 to 2018 that all the transactions were indeed capital in nature. In *Preston v. Inland Revenue Commissioners* [1985] 2 All ER 327, the House of Lords held:

> "... judicial review should in principle be available where the conduct of he commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of representation giving rise to an estoppel. Such a decision could be an abuse of power; whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide...
>
> In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and appropriate remedy."

[70] In *MFK Underwriting Agencies*, the House of Lords stated thus:

> "It was not inconsistent with the Revenue's statutory duty for the Revenue to advise a taxpayer as to his rights and duties where an approach was made by the latter for such advice. However, if a public authority so conducted itself as to create a legitimate expectation that a certain course would be followed, it would be unfair if the authority were permitted to follow a different course to the detriment of the person who entertained the expectation, particularly if he acted on it. Accordingly, if the Revenue agreed to, or represented that it would, forgo tax which might arguably be payable on a proper construction of the relevant legislation, and the taxpayer relied on such agreement or representation, the Revenue would be bound by that agreement or representation and a decision to resile therefrom would be unfair and subject to judicial review on the ground of abuse of power..
>
> ... The doctrine of legitimate expectation is rooted in fairness. ...".

[71] In *Darahman*, the Court of Appeal referred to among others, *MFK Underwriting Agencies* on the issue of legitimate expectation. The Court of Appeal held thus:

> "... A taxpayer, for instance, must rely upon a representation from the Revenue before his expectation will be protected ...
>
> ...
>
> ... I now revert back to the doctrine of legitimate expectation. This doctrine is often used in the field of public law. If used wisely, this doctrine serves as an effective weapon in challenging decisions of public bodies. If a decision is adverse to the person affected, it must follow a procedure that is fair. ...
>
> The following principles of law must be advanced:
>
> (a) There should be such unfairness as to amount to an abuse of power. If a statement has created a legitimate expectation that a certain decision will be taken or that decision will be taken on the assumption that a certain fact is true, it will often be unfair and an abuse of power to resile from it. The court will act and will impose the requirement of fairness on the public body concerned.
>
> (b) The requirements giving rise to a legitimate expectation must be present. These requirements are similar to the requirements of estoppel in private law... The requirements are − that the body concerned made a representation which was clear, unambiguous and devoid of qualification; that the Applicants was within the category of people to whom it was made and that it was reasonable for him or her to rely on the representation and that the representee relied on such representation to his or her detriment.
>
> (c) ...
>
> (d) It is for the court to decide whether there is overriding reason for frustrating the legitimate expectation. In doing so, the court must always put to the forefront the question of fairness.".

[72] Learned counsel for the appellant sought to rely on *Bye* to argue that the appellant was not precluded from raising an assessment under the ITA after the finalization of capital gains tax. With respect, *Bye* is distinguishable. In *Bye*, the capital gains tax assessments were issued as an alternative to the income tax assessments and the taxpayers were fully aware of this at the outset. Here, at the risk of repetition, the appellant shifted their position after seven (7) years against the legitimate expectation of the respondent.

[73] Applying *Darahman* and the other cases cited above, the appellant's certificate of clearance and assessments under the RPGTA which were never discharged or revoked, has created a legitimate expectation on the part of the respondent that they are correct and the appellant is now estopped from shifting its position. To the extent to which *Teruntum Theatre* and *Sarawak Properties* decided that estoppel cannot be invoked against the Revenue, we found that they are no longer good law.

Domestic/Alternative Remedy

[74] On alternative remedy, the Court of Appeal held that there is no acid test applicable in judicial review applications and that if a good case is brought before the court for review, for instance, if there is clear illegality on the part of the decision-making authority, then it is in the interest of justice that such application be allowed. The Court of Appeal found that on the facts of the present case, the decision of the appellant in issuing the Disputed Notices was tainted with illegality.

[75] There was no error committed by the Court of Appeal in dismissing the appellant's contention that this was not a proper case for the respondent to bypass the avenue to appeal to SCIT. The finding of the Court of Appeal is supported by the authorities (see *Jagdis Singh*; and *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 1 MLRA 336 ("*Sungai Gelugor*").

[76] In *Jagdis Singh*, Hashim Yeop A Sani SCJ (as he then was) said:

> "A clear principle is reiterated here, i.e., it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.".

[77] In *Sungai Gelugor*, this Court stated thus:

> "The reason for this is that whilst in theory the courts there frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to Judicial Review, in practice, the courts are often much kinder to the applicant with a good case on the merits, who is faced with this hurdle to clear and will most probably entertain this application as an exception ...
>
> ... Speaking generally, it is right to say, that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available. Why should illegal action not be nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather than appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest.
>
> ... Having said that we recognize that there are certain classes of cases such as planning, employment cases and tax cases ... where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess of power, or breach of the rules of natural justice.".

[78] Citing *Alcatel-Lucent*, the appellant argued that the High Court did not err in deciding on the merits of the case. We found that the reliance by the appellant on *Alcatel-Lucent* was misconceived. The case of *Alcatel-Lucent* does

not support the appellant. In *Alcatel-Lucent*, the taxpayer succeeded in their judicial review application before the High Court where they sought an order of Certiorari to quash the decision of the Revenue to levy withholding tax. The decision of the High Court was affirmed by the Court of Appeal. On Revenue's appeal to this Court, it was found among others, on the merits, that there was no flaw detectable in the decision making process and there was also no illegality or irrationality in the decision of the Revenue. The existence of a domestic remedy did not form part of the ratio of this Court's decision.

[79] Hence, *Alcatel-Lucent* is not the authority for the proposition suggested by the appellant that the Courts could decide on the merits and the same can still be determined by SCIT. In any event, the appellant's decision in the present case, as found by the Court of Appeal, was tainted with illegality. Thus, the matter was rightfully brought by the respondent by judicial review to quash the illegal decision.

[80] Learned counsel for the appellant's submission that complaints on legitimate expectation are matters that should be raised and determined by the SCIT is also devoid of any merit.

Conclusion

[81] We found no appealable error by the Court of Appeal that warrants our appellate intervention. The effect of the appellant's decision in issuing the Disputed Notices and in charging the respondent under both the RPGTA and the ITA amounted to an illegal act and contrary to the principle against double taxation. We agreed with the Court of Appeal that the principle of estoppel should apply against the appellant.

[82] We further agreed with the Court of Appeal that the High Courterred in concluding that the proper forum is SCIT and in taking a contradictory stand by dealing with the merits itself. Having found that the merits are appropriate for the SCIT to determine, the High Court should not have proceeded to decide on the issues of negligence, limitation, and sinister or bad faith.

[83] We therefore unanimously dismissed the appeal with costs. We declined to answer the Leave Questions.

Abu Bakar Jais FCJ (Supporting):

Introduction

[84] The main written judgment for this case has been prepared and drafted by our learned sister, Tengku Maimun Tuan Mat, CJ and my learned sister, Rhodzariah Bujang FCJ and I agree to the same. In turn, this written judgment supporting that main written judgment deals with only two issues in support of our unanimous decision to dismiss the appeal. The first is on the issue of estoppel/legitimate expectation. The second is on the issue of whether in the

first place, the substantive matter must be heard by the Special Commissioners of Income Tax ("SCIT") before it is litigated at the High Court ('HC"). The material facts of this case are already alluded to in the main written judgment. There is no reason to repeat the same.

Estoppel And Legitimate Expectation

[85] Essentially the argument by the respondent on this point is that the appellant could not further act in imposing additional income tax on the former pursuant to the Income Tax Act 1967 ("ITA"). This is because the appellant had earlier imposed real property gain tax ("RPGT") under the Real Property Gains Tax Act 1976 ("RPGTA") on the sale of the relevant lands by the respondent and this tax had been paid. The appellant also issued a certificate of clearance pursuant to the RPGTA for this payment made by the respondent. This certificate was never revoked by the appellant. Under such circumstances, the respondent argued that estoppel would apply against the appellant preventing them from imposing further or additional tax pursuant to the ITA and there is a legitimate expectation for the respondent that additional tax could not be imposed by the appellant pursuant to the ITA.

[86] The appellant, on the other hand, submitted that additional income tax could be imposed under the Income Tax Act 1967 ("ITA") as the proceeds from the sale of the lands constituted business income and the respondent's activities of realizing its investment were in the nature of trade. Essentially the appellant contended that the sale of the lands was not the disposal of capital assets subject to RPGT but the disposal of stock in trade subject to income tax.

[87] In our view, since the appellant had accepted the RPGT returns filed by the respondent and also issued RPGTA certificate of clearance, this would reflect that the appellant had acted on the basis of s 14(1)(a) of the RPGTA that states as follows:

> (1) Where a person makes a return under s 13(1), the Director General may:
>
> (a) accept the return and make an assessment accordingly;

[88] Further, since there were no appeals filed by the respondent, the assessment became final and conclusive pursuant to s 20(1) of the RPGTA which states as follows:

> (1) Subject to this section, an assessment shall become final and conclusive for all the purposes of this act as regards the amount of the tax assessed under it or the allowable losses indicated in it, as the case may be:
>
> (a) on the expiry of the time for appeal against the assessment; or
>
> (b) where an appeal is made, on the appeal being finally disposed of.

[89] We are of the opinion estoppel would set in against the appellant. In the circumstances of the present case, estoppel *in pais* (estoppel by words or conduct) would apply here, preventing the appellant from imposing the tax under the ITA. Once the RGPT is imposed and the certificate of clearance is issued, the appellant will be estopped from imposing further tax under the ITA. There would also be a legitimate expectation that the respondent would not be required to pay further tax under the ITA as the RPGT had been paid and the certificate of clearance had been issued for this payment, none other than by the appellant.

[90] In this regard, it is also relevant to note that Raus Sharif J (later CJ) in *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2004] 2 MLRH 639, said:

> I am of the view, under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT as the latter is only levied in a situation where ITA is not applicable.

[91] There is another relevant point to consider regarding further notices for tax under the ITA raised by the appellant and after not discharging or revoking the earlier RPGTA certificate of clearance and assessments. This is related to the fact it has resulted in the same land transactions being subjected to tax under the said two different legislations.

[92] That action and conduct of the appellant is clearly illegal and must amount to double taxation.

[93] We also could not agree with the appellant that the Court of Appeal case of *Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 MLRA 658 supports the contention that the RPGTA certificate of clearance and RPGTA assessments can be held in abeyance pending the Court's final determination on whether the land transactions should be taxed under the RPGTA or the ITA. One would not be able to discern this if one reads the whole of this case. There is nothing in the same to suggest that the certificate and the assessment can be held in abeyance as submitted by the appellant based on this case.

[94] On a more serious note, this contention of the appellant if accepted, would mean the finality provision in s 20(1) of the RPGTA on the assessment for RPGT as narrated earlier is of no effect.

[95] In any event, there is no provision in the RPGTA that stipulates RPGTA certificate of clearance and RPGTA assessments can be held in abeyance.

SCIT Or HC

[96] The Court of Appeal ("COA") was also not in error in finding that the existence of a domestic remedy will not bar an application for judicial review. Therefore, there is no obligation for the Respondent to go before the SCIT prior to seeking the appropriate remedy by way of judicial review before the HC. The COA is also not erroneous in finding there is no requirement in O 53 of the Rules of Court 2012 (the ROC 2012) that the availability of a domestic remedy will bar an application for judicial review.

[97] The courts have long acknowledged, based on landmark Supreme Court and Federal Court decisions, that the availability of an alternative internal remedy in the form of an appeal process will not be a complete bar of an application for judicial review. In this regard, the COA had correctly referred to the Supreme Court decision in *Government Of Malaysia & Anor v. Jagdis Singh* [1986] 1 MLRA 207 where Hashim Yeop A Sani SCJ said as follows:

> A clear principle is reiterated here i.e. it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

[98] The COA also correctly referred to what was said by Edgar Joseph Jr FCJ in delivering judgment in the Federal Court case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 1 MLRA 336 as follows:

> Having said that we recognize that there are certain classes of cases such as planning, employment cases and tax cases (see, e.g., *R v. Commissioner for the Special Purposes of the Income Tax Acts; ex p Napier* [1988] 3 All ER 166; *R v. Epping Forest DC; ex p 'Green* [1993] 1 COD 81) where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review **but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice** (see *Accountant in bankruptcy v. Alls of Gillock* [1991] SLT 765, *Macksville & District Hospital v. Mayze* (1987) 10 NSWLR 708).
>
> [Emphasis Added]

[99] Thus, judicial review would still be applicable following the above decision when there is excess or abuse of power. In the present case before us, there is indeed an excess or abuse of power as the appellant should not have further imposed tax on the respondent under the ITA, having done so under the RPGTA. Therefore, the respondent should not be prohibited from applying for judicial review.

Conclusion

[100] The determination on these two issues as explained above would mean the appeal must be dismissed.

[101] The appellant's action in imposing tax under the ITA should be estopped and the appellant's action in imposing the tax under the RGPTA had provided the respondent a legitimate expectation that tax under the ITA would not be further imposed.

[102] The respondent's action in filing the judicial review application at the HC is also permissible without the need to go before the SCIT.