

## Kerajaan Malaysia v Kon Chee Leong [2010] MLJU 854

Malayan Law Journal Unreported

HIGH COURT (MUAR)

Umi Kalthum Binti Abd. Majid, JC

GUAMAN SIVIL NO 21-01-2007

30 August 2010

En. D. Paralingam (Tetuan *Krish Maniam & Co.*),

Lembaga Hasil Dalam Negeri Malaysia (Unit Undang-undang)

**Umi Kalthum Binti Abd. Majid, JC**

### **GROUND OF JUDGMENT. THE APPLICATION :**

1. The Plaintiff had applied in enclosure 8 to enter summary judgment against the Defendant under Order 14 of the Rules of the High Court 1980 ( " RHC ") for the sum of RM2,698,136.38 being the income tax for the assessment years 1998, (additional), 1999 (additional), 2000 (additional) and 2001 (additional) including the increased tax imposed under section 103(4), section 103(5) and Section 103(5A) of the Income Tax Act 1967 ( " the Act ") by the Director General of Inland Revenue ( " the D.G. "), interest at 8% per annum from the date of judgment to realisation and costs.

### **B. FACTS:**

2. The Defendant had been assessed additional income tax for the years of assessment 1998, 1999, 2000 and 2001 for the total sum of RM2,698,136.38, including the increased tax imposed under section 10(4), (5), and (5A) of the Act and after less the payments of RM13,504.15 and RM 18,675.93 made by the Defendant.

3. The Defendant had appealed to the Special Commissioners of Income Tax ( " the Commissioners ") against the said assessment. The Commissioners had on 29.5.2007 affirmed the D.G's additional assessment of the Defendant's income tax by using an average gross profit margin of 22% for all the relevant years. Dissatisfied with the Commissioners' deciding order the Defendant filed an appeal against the Commissioners' deciding order to the High Court at Johor Bahru under paragraph 34 of the Fifth Schedule

to the Act. The learned Judicial Commissioner had on 5.3.2010 found for the Defendant, and allowed the Defendant's appeal whereby -

3.1 the decision of the Commissioners dated 29.5.2007 was set aside;

3.2 the Notice of Assessment for the years of assesment 1998, 1999, 2000 and 2001 were set aside;

3.3 the Inland Revenue Board was directed to issue fresh Notices of Assessment for the years of assessment 1998, 1999, 2000 and 2001 based on a Gross Profit Ration of 8%.

As learned counsel for the Defendant was not able to exhibit a copy of the learned Judicial Commissioner's judgment in his Additional Affidavit affirmed on 9.3.2010, he instead exhibited a letter in Exhibit "PL-2", enclosure 32 which set out the terms of the said judgment. As the Plaintiff had not objected to this letter, I accept it as stating the truth of the said judgment.

4. In the mean time the Plaintiff had filed on 5.6.2007 a Writ action against the Defendant claiming judgment on the said sum as being due and owing to it. The Defendant had filed his Memorandum of Appearance on 3.9.2007 and his Statement of Defence on 28.9.2007. The Plaintiff then proceeded to file this application on 30.11.2007.

### **C. THE DECISION :**

5. I dismiss the Plaintiffs application with costs at RM2,000.00 for the following reasons:

5.1 this application is based on the Plaintiffs pleadings as found in the Statement of Claim as well as the Plaintiffs Affidavit in Support affirmed on 26.11.2007 (enclosure 8A) wherein the Plaintiffs claim against the Defendant is based on income tax additionally assessed by it and as claimed in the Notice of Assessment of the years of assessment 1998, 1999, 2000 and 2001 (" Notices of Assessment") as found in Exhibits "MM1", "MM2", "MM3" and ""MM4" of enclosure 8A. However, with the judgment of the learned Judicial Commissioner dated 5.3.2010 (" the Judgment"), that Judgment had effectively not only set aside the Commissioners' decision but also set aside the said Notices of Assessment. This means that the foundation of the Plaintiffs claim, and with that this application, now no longer exists. There is therefore effectively nothing for the Plaintiff to claim against the Defendant so long as the Inland Revenue Board does not adhere to the Judicial Commissioner's Judgment for the Board to issue fresh Notices of Assessment for the years of assessment concerned;

5.2 this Court cannot pretend that the Notices of Assessment still exist when it had already been set aside, notwithstanding the fact that the Plaintiff still has the right of appeal, and has in fact appealed, to the court of Appeal against the learned Judicial

Commissioner's Judgment under paragraph 41 and 42 of the Fifth Schedule of the Act;

5.3 the facts of the case cited by the learned Plaintiff's counsel in the case of *Kerajaan Malaysia v Ekran Bhd* [2006] 2 MLJ 749 is distinguished from this case. That case involved a stay application pending the hearing and disposal of the appeal by the defendant before the Special Commissioners after an Order 14 application was filed and allowed by the Deputy Registrar. In that case the notice of assessment remained intact pending the Defendant's appeal to the Special Commissioners;

5.4 moreover, as the issues raised in this suit had already been canvassed and formed the subject matter of the Defendant's appeal before the Commissioners and also the Johor Bahru High Court, the Plaintiff is estopped from pursuing the same issues in this Court under the principle of res judicata. See *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn. Bhd* [1955]3 CLJ 783.