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THE HIGH COURT DISMISSED THREE LEAVE APPLICATIONS FOR JUDICIAL REVIEW UNDER ORDER 53 RULE 3 OF THE RULES OF THE COURT 2012

**CASES: (1) SDSB V KETUA PENGARAH HASIL DALAM NEGERI
(2) SHSB V KETUA PENGARAH HASIL DALAM NEGERI
(3) TCSB V KETUA PENGARAH HASIL DALAM NEGERI**

On 25.7.2019, YA Dato' Nordin Bin Hassan dismissed the Applicants' application for leave to file Judicial Review to quash the Notices of Additional Assessment raised by the Respondent under section 4 (a) of the Income Tax Act 1967 ("ITA") on the disposal of a property. The applications for leave were dismissed on the grounds that the issues raised by the Applicants involves dispute on questions of fact and thus, the merits of the assessments are to be tried by the Special Commissioners of Income Tax ("SCIT").

FACTS OF THE CASE:

1. The principal activity of the Applicants as stated in their Annual Report and Financial Statements ("audited accounts") is property / general investment.
2. On 4.6.2007, the Applicants entered into a Sale and Purchase Agreement with another related company for the sale of the said Property.
3. Subsequent to the said sale, on 4.6.2007, the Applicants wrote to the Director General of Inland Revenue ("DGIR") to enquire on whether the disposal of the said property would be subjected to ITA or Real Property Gains Tax ("RPGT").
4. The DGIR in replying to the Applicants' letter confirmed that the Applicants are not required to file CKHT Form in regards to the disposal of the said property and the gains of the said disposal is not subject to RPGT.

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5. Nevertheless, on 12.3.2019, the DGIR conducted an audit investigation on the Applicants. There were various meetings and exchange of correspondences took place between parties.
6. On 26.6.2019, the DGIR upon concluding that the disposal of the said property fall under section 4(a) of the ITA, issued Notices of Assessment for Year of Assessment (“YA”) 2007 to each Applicants as landowners in respect of the gains arising from the disposal of the said property.
7. Being dissatisfied, the Applicants filed leave applications for judicial review at the Kuala Lumpur High Court on 8.7.2019.

ISSUE OF THE CASE

Whether the DGIR’s decision in subjecting the gains arising from the disposal of the said Property in YA 2007 under section 4(a) of the ITA is erroneous due to the failure to give effect to the decisions of the superior courts in ***Alf Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 3 CLJ 936*** and ***Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541***.

APPLICANTS’ SUBMISSION

1. There was an error of law committed by the DGIR by failing to give effect to the decisions of the superior courts which amounts to a clear lack of jurisdiction as decided by the superior courts in the case of ***Metacorp Development Sdn Bhd*** and ***Society of La Salle Brothers***. As such, this case falls within one of the exceptional circumstances warranting judicial review by the High Court. It will be wrong to insist the Applicants to appeal before the SCIT.
2. In applying ***Alf Properties*** (*supra*) and ***Lower Perak*** (*supra*), the Applicants cannot be said to have been trading when dealing with its investment property.

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3. There was no intention to trade. The said Property was an investment asset which has been consistently recognised as a non-current asset of the Applicants in their audited accounts for financial years ended 2002 to 2006. In addition, the Applicants had also held the said property for more than 10 years.
4. The Applicants relied on the excerpts cited by Gunn Chit Tuan SCJ in the case of ***Director General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 CLJ 160*** which was referred by the Court of Appeal in ***Alf Properties (supra)*** that said “*The broader question as to the meaning of adventure in the nature of trade would be however be one of law*” to support their contention in determining an intention to trade is a question of law.

DGIR’S SUBMISSION

1. The DGIR objected to the leave applications on the premise that judicial review is not an appropriate forum to decide on the issues raised by the Applicants as the present cases involved substantial dispute of facts.
2. There are abundance of authorities indicating that the question as to whether a disposal is subject to ITA or RPGT is a question of facts. It is settled law that determination of an intention to trade involved question of facts.
3. The decisions in ***Alf Properties (supra)*** and ***Lower Perak (supra)*** relied by the Applicants were arrived after full examination of documents and the hearing of witnesses by the SCIT. The Applicants had neglected the earlier statement by Gunn Chit Tuan SCJ in ***Khoo Ewe Aik Realty Sdn Bhd (supra)*** “*In this case the question was whether or not an adventure in the nature of trade was being carried on and the Special Commissioners had to consider all the circumstances of the case and their finding would be one of fact.*” which clearly negates the Applicants’ contention that intention to trade is a question of law.

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4. There are decided authorities which held that audited reports are not conclusive in determining the tax payer's actual activities. One must look at what business it actually carries on and not what business it professes to carry on.

THE HIGH COURT DECISION

The High Court dismissed the Applicants' applications for leave with costs of RM2,000.00 each. The High Court also dismissed the Applicants' applications for stay of proceeding pending appeal to the Court of Appeal.

REVENUE COUNSELS FOR THE DGIR

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26.7.2019