

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM  
DALAM NEGERI SELANGOR DARUL EHSAN  
PERMOHONAN SEMAKAN KEHAKIMAN NO : 25-8-04/2015**

Dalam perkara suatu keputusan Responden yang terkandung dalam notis-notis taksiran bertarikh 16.03.2015 dan telah disampaikan kepada Pemohon pada 27.03.2015

Dan

Dalam perkara suatu permohonan untuk antara lain, suatu Perintah Certiorari

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

**ANTARA**

**SOCIETY OF LA SALLE BROTHERS ... PEMOHON**

**DAN**

**KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN**

**ALASAN PENGHAKIMAN**

**BRIEF FACTS.**

1. The Applicant is a charitable institution with its sole objective to ensure that education is accessible to Malaysians of all races, religion and

creed. Pursuant to the said objective the Applicant had establish a number of La Salle Schools in Malaysia, of which 39 schools are still in operation.

2. Through of a letter dated 26.1.1970, the Applicant had obtained a tax exemption status from the Controller General of Inland Revenue Malaysia. Paragraphs 2 and 3 of the aforesaid letter read as follows;

*2. The documents and information furnished have been examined and it is now confirmed;*

*a) That the Society of the La Salle brothers in Malaysia is a charitable institutions and therefore not liable to income tax*

*b) That the allowances paid by the Ministry of Education for the education services rendered by the Brothers are regarded as subsidies to the Society of which the Brothers are beneficiaries; and*

*c) That the Brothers themselves are not liable to income tax in respect of the allowances paid by the Ministry*

*3. The following papers are returned herewith-*

*a) Rules of the Brothers of the Christian Schools 1925 Edition;*

*b) The Rule of the Constitutions, 1967-1968; and*

*c) Book of Government, 1967-1968*

3. The Respondent by a letter dated 25.7.1995 notified the Applicant for the requirement to re-apply the tax exemption status pursuant to the amendments of Section 13 of the Finance Act 1988. Paragraphs 1, 2 and 3 of the aforesaid letter read as follows;

*(1) saya diarah merujuk kepada borang-borang nyata tahun tafsiran 1988 hingga 1993 serta akaun.*

*(2) berikutan dengan pindaan kepada perenggan 13 Jadual 6, tuan dikehendaki memohon kepada Bahagian Teknikal Ibu Pejabat Jabatan*

*Hasil Dalam Negeri untuk mendapat kelulusan bagi melanjutkan taraf pengkecualian dibawah Jadual 6 para 13 bagi tahun taksiran 1989 dan seterusnya. Tuan dikehendaki menghantar salinan dokumen berikut bersama dengan surat permohonan;*

2.1 *Salinan yang terbaharu undang-undang dan peraturan perlembagaan*

2.2 *Lain-lain maklumat yang berkaitan dengan institusi tuan seperti laporan tahunan*

2.3 *salinan penyata kira-kira yang terbaharu*

*(3) Sila maklum surat kuasa lantikan Anthony Skelchy Tax Services Sdn Bhd sebagai wakil cukai tuan belum diterima oleh pihak kami. Sila kemukakan dengan segera.*

4. To-date the Applicant had not done so.
5. The income reported by the Applicant which are chargeable to tax are as follows:

Year of Assessment (YA)	Income	Amount (RM)
2003	Rental	661,980.92
	Interest from Fixed Deposit	74,801.65
2002	Dividend	7.20
	Gains from Disposal of Vehicle	6,299.00
	Gain from Disposal of Land	1,923,773.58
	Interest from Fixed Deposit	38,692.41
	Rental	684,050.41
2001	Dividend	1,108.27
	Interest from Fixed Deposit	47,043.67
	Rental	500,410.48

2000 CY	Commission	89,203.71
	Dividend	18,657.30
	Interest from Fixed Deposit	42,201.28
	Gains from Investments	268,948.46
	Rental	511,607.81
2000 PY	Commission	98,080.40
	Dividend	16,600.51
	Interest from Fixed Deposit	82,519.39
	Other income	10,705.11
	Rental	544,358.58

6. The said income which are not exempted from tax are:
- 7.1 Dividends, interests and discounts.
  - 7.2 Rentals, royalties, and premiums; and
  - 7.3 Other income (Annual/membership fees, donations and dale of assets)
7. On 16.3.2015, notice of assessment for the years of assessment 2004, 2006, 2007, 2011, 2012, and 2013, were issued to the Applicant.
8. The said assessments are as follows:

Year of Assesment	Assessment (RM)	Penalty	Total (RM)
2004	25,812,404.88	5,162,480.98	30,964,881.46
2006	2,111,752.52	422,350.50	2,534,103.02
2007	3,278,486.48	655,697.30	3,934,183.78
2010	688,845.34	137,769.07	826,614.41
2011	1,213,329.82	242,665.96	1,455,995.78
2012	24,187.32	4,837.46	29,024.78

2013	1,371,327.68	274,265.54	1,645,593.22
Total	34,500,334.04	6,900,066.81	41,390,396.45

9. Penalties at the rate of 20% were imposed by the respondent when the Applicant failed to furnish the returns for the respective years by or before 30<sup>th</sup> April of the said year.
10. The dates of which the Applicant's return were filed are as follows:

Year of Assessment	Date of Receipt by the Respondent
2004	19.10.2005
2006	20.6.2007
2007	24.6.2008
2010	20.6.2011
2011	29.6.2012
2012	28.6.2013
2013	30.6.2014

11. Upon receipt of the said assessment, the Applicant's representative, Puan Azdiana A Kadir from Messrs. PKF Tax Services Sdn. Bhd. attended a meeting with the Respondent's representative at the Respondent's premise on 14.4.2015. Puan Azdiana had requested that the payments of the said assessment be made by way of 28 monthly instalments of RM1.5 million each with the last payment being the sum of RM 890,396.41. The said request was further supported by a letter dated 13.4.2015.
12. Subsequently, the Applicant filed the application for judicial review dated 9.4.2015 and among others to quash the notice of assessment

2004, 2006, 2007, 2011, 2012 and 2013 on the premise that the decision is null and void and unconstitutional.

13. The Applicant had approximately a week filed her appeal on 17.4.2015, with regards to the assessment dated 16.3.2015 for the year of assessment 2004 by way of Form Q dated 14.4.2015.

### **Submission of the Applicant.**

14. In submission, The Applicant alleged that she is a charitable institution and therefore not subjected and liable to pay the income tax. By virtue of this tax exemption, the Applicant rightfully is not subjected to any investment returns to pay income tax including the years in dispute. The Applicant had enjoyed the tax exemption as a charitable body /organization and the letter by the Director General was never withdrawn.
15. The Applicant also alleged that the notices of assessment dated 16.3.2015 with penalties for the years of assessment 2004, 2006, and 2007 are time barred.
16. The Applicant also alleged that the amendments of the Finance Act in 1986, 1988, 2000, 2007, do not in law have any effect on the vested right that the Applicant had acquired before the said amendments. Notwithstanding the law had been amended but cannot have retrospective effect.
17. The tax law has to be strictly interpreted, any ambiguity to be ruled in favour of the tax payer.

18. No reason was given by the DG to withdraw the acquired right enjoyed by the Applicant, so the order is contrary the Wenesday's principle.
19. Based on the above facts/reasons, the Respondent decision to require the respondent to pay the income for the said assessment years is ultra vires, illegal, void, unlawful and/or in excess of authority.
20. The Applicant further submitted that one should avoid a construction that inflicts a detriment whereby any of the amendments listed above inflict a detriment as it takes away or impairs the vested right acquired under the existing law. Therefore, the amendments listed above must be construed as having regard to the Interpretation Acts 1948 and 1967 denying of the legitimate expectations of the Applicant.
21. The decision of the Respondent is so unreasonable when the Respondent had failed to give any valid justification, reason or basis for his decision including for the issuance of the time barred assessment.

### **Submission of the Respondent**

22. Likewise, the Respondent submitted that this application for a judicial review is inappropriate and an abuse of the process of Court as the Applicant refused/failed to resort to the appeal procedure provided under Section 99 of the ITA 1967, that a person aggrieved by an assessment raised under the Act, may file an appeal to the special commissioners of the Income Tax within 30 days. The avenue for judicial review only open to the Applicant only in the exceptional

circumstances. The Applicant had failed to justify the existence of exceptional circumstances which warrant a judicial review in this case.

23. The respondent further submitted, as a result of the amendments to the Finance Act, the Applicant does not anymore enjoy the exemption status. The tax exemption status cannot be deemed as being granted in perpetuity.
24. There is no application by the Applicant after the amendments to re-apply for the exemption status.
25. The aforesaid provision of amendments is evidently clear and unambiguous.
26. The assessments raised by the Respondent are in accordance with the aforementioned statutory provisions and in accordance with the operation of law.
27. Notwithstanding that the notice of assessment dated 16.3.2015 for the years of assessment 2004, 2006 and 2007 were issued outside of the limitation period, it is the Respondent's belief that there are element of fraud and/or negligence in existence with regards to the Applicants tax exemption.
28. The burden is on the Applicant to prove that the assessment is excessive or erroneous.
29. Lastly, the penalties was rightly imposed by the Respondent on the Applicant.



## The Relevant Statutory Amendments

30. The law of the income tax as it stood on 26.01.1970 reads as follows;

*The income of any charitable institution, of the trust body of any trust or of body persons, if the institutions, trust or body of persons in question is established for charitable purposes only;*

*Provided that, where a business is carried on by any such institution, trust body or body of persons, the income from the business shall be exempt from tax only if it is applied solely for charitable purposes and either-*

- a) The business is carried on in the course of the actual carrying out of a primary purpose of the institution, trust or body of persons; or*
- b) The work in connection with the business is mainly carried on by persons for whose benefit the institution, trust or body of persons was established.*

31. In 1986, the proviso to paragraph 13 of Schedule 9 of the ITA was amended to read as follows;

***Amendment by Section 19(b) of the Finance Act 1986;***

*Provided that-*

- a) Where a business is carried on by any such institution, trust body or body of persons, the income from the business shall be exempt from tax only if it is applied solely for charitable purposes and either-*
  - i. The business is carried on in the course of the actual carrying out of a primary purpose of the institution, trust or body of persons; or*

- ii. *The work in connection with the business is mainly carried on by persons for whose benefit the institution, trust or body of persons was established;*
- b) *The exemption under this paragraph shall not apply to income consisting of a dividend.*

***Amendment by Section 13 of the Finance Act 1988;***

*Paragraph 13 of Schedule 6 of the ITA was then substituted to read as follows;*

- 1) *Subject to this paragraph, the income, other than dividend income, of-*
  - a) *A charitable institution, trust body of any trust or body of persons, if the institution, trust body or body of persons in question is established in Malaysia for charitable purposes only and approved by the Director General for the purposes of this paragraph;*
  - b) *A building fund approved under subsection 44(6) or a religious institution or organization which is not operated or conducted primarily for profit and which is established in Malaysia exclusively for the purposes of religious worship or the advancement of religion.*
- 2) *An institution, a trust body or body of persons referred to in subparagraph (1)(a)-*
  - a) *Shall apply for approval from the Director General; and*
  - b) *Shall apply its income, whether exempt or otherwise, solely for its charitable purposes or charitable objects within Malaysia and the amount so applied in a year of assessment shall not be less than seventy per cent ( or such percentage as may be permitted by the Director basis period for that year of assessment*

(3) *Where a business is carried on by an institution, a trust body, body of persons or an organization referred to in subparagraph (1) the income from the business shall be exempt from tax if—*

- a) *the business is carried on in the course of the actual carrying out of a primary purpose of the institution, trust body, body of persons or organization; or*
- b) *the work in connection with the business is mainly carried on by persons for whose benefit the institution, trust body, body of persons or organization was established."* Amendment of Schedule 7A

32. Later there was amendment of Section 26 of the Finance Act 2000 and amendment of Section 36 (b) of the Finance Act 2007.

***Amendment by Section 26 of the Finance (No.2) Act 2000;***

*Paragraph 13 of the Schedule 6 of the ITA was again substituted to read as follows;*

*The income, other than dividend income, of-*

- a) *An institution or organization approved for the purposes of subsection 44(6) so long as the approval remains in force; or*
- b) *A religious institution or organization which is not operated or conducted primarily for profit and which is established in Malaysia exclusively for the purposes of religious worship or the advancement of religion.*

*The said amendment took effect from the year of assessment 2001.*

*Section 27 of the Finance (No 2) Act 2000 adds that;*

*Notwithstanding any other provision of the principal Act, where a person is exempt by virtue of paragraph 13 of Schedule 6 before the coming into operation of the amendment to that paragraph in section 26 of this Act, that exemption shall cease from the year of assessment 2003 for the basis period ending in that year:*

*Provided that such exemption shall continue, under paragraph 13 of Schedule 6 as amended in this Act, where an approval is granted to such person upon an application made under subsection 44(6) of the principal Act*

***Amendment by Section 36(b) of the Finance Act 2007;***

*Paragraph 13 of the Schedule 6 of the ITA was amended as follows;*

*By deleting the words “, other than dividend income.”*

*The said amendment took effect from 01.01.2014*

**FINDINGS.**

33. I find the words in the ITA 1967 and Finance Act are clear and unambiguous and therefore effect should be given to it. In this connection, reference should be made to the following passage in the Federal Court’s decision in **Foo Loke Ying & Anor v Television Broadcast Ltd & Ors [1958] 2 MLJ 35** (at pp 43-44).

*The court however 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 endeavour 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 should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question that is its proper and most known signification....*

*We are of the view that the provisions of the Act under consideration before us call for a purposive and literal construction which is one which follows the literal meaning of the enactment where that*

*meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment....*

The provisions of the Acts are abundantly clear to refute any resort to a purposive and strained construction which requires a strained meaning where the literal meaning is not in accordance with the legislative purpose.

34. Based on the above decision, firstly I have studied the letter dated 26.01.1970. I find it is clearly stated in para 1 of the said letter that the Applicant is a charitable organisation and not liable to income tax.
35. Subsequently, there was an amendments to the Finance Act 1998, where section 13 is relevant. From the above amendments, the following can be observed.. Firstly, income from business of charitable institution or trust, other than dividend income is exempted from tax provided the income is applied solely for charitable purpose. Secondly, buildings approved under s.44(6) or religious institution or organization established exclusively for the purpose of religious worship or the advancement of religion whose operation is not primarily for profit is also exempted. Thirdly, to qualify for the exemption, the institution, a trust body or body of person seeking exemption must apply for approval from the DG and the profit.
36. Based on the above section, I find it is mandatory that the Applicant must apply to the Director General to enjoy the tax exemption. It is further mandatory for the Applicant to apply its income solely for its charitable purposes or charitable objects within Malaysia and the amount so applied in a year an assessment shall not be less than 70%.

37. It was not disputed that the Respondent had given notice to the Applicant of their requirement to re-apply for the tax exemption status by the way of the letter dated 29.07.1995.
38. I find an amendment of the Finance (No 2) Act 2000 Act 608 should be read together with Section 44(6) of the ITA 1967.
39. Based on the reading of the law, as amended, the exemption ceased to have effect from 2013 unless the Applicant has obtained the approval for the exemption
40. It is clear from the aforesaid provisions that any tax exemption obtained by the Applicant prior to the aforesaid amendments shall ceased from the years of assessment 2004 onward for that basic period ending in that year unless an application is made and approved by the Director General pursuant to section 44 (6).
41. As a result of the Applicant's failure to apply for the tax exemption status, the Applicant was not included and/ or deemed as an institution or organisation pursuant to section 44 (6) of ITA 1967, hence the Applicant could not obtain the tax number as required to be filled at column A (5) of their returns.
42. Based on the above reasons, I made the finding that the notice of assessment for the years of assessment 2004, 2006, 2007, 2010, 2011, 2012 and 2013 on 13<sup>th</sup> of March 2016 are in accordance with ITA.
43. The argument by the Applicant that the law having been amended cannot have retrospective effect does not apply on the facts of this case. This is to the contrary, in this particular case whereby the DG had notified the Applicant of their need **to re-apply** for the tax exemption. It is not the case wherein no such notification to do so

was issued and the Applicant was in turn taxed for the years in question. This fact must be borne in mind to highlight as to the fact that the argument of retrospective application will not apply. (the emphasize is mine)

44. Based on the above findings, the reliance of the Applicant on the Interpretation Act will likewise not apply in their favour.
45. I am also in agreement with the submission of the respondent's counsel that this application of judicial review is inappropriate and an abuse of the process of Court as the Applicant bluntly refused or failed to resort to the appeal procedure provided for under section 99 of ITA, 1967. The said Section provides that any person aggrieved by an assessment raised under this Act may file an appeal to the Special Commissioner of the Income Tax within 30 (thirty) days of the notice of the assessment. Based on the affidavits filed, I find that the Applicant did not deny that she has failed to resort to the appeal process provided for an available under Section 99 within the exception for the year of assessment 2004.
46. In the case of the **Government of Malaysia vs Jagdiss Singh**, Supreme Court held that although certiorari is always at the discretion of the court, certiorari should not be issued unless is shown a clear lack of jurisdiction or blatant failure to perform some statutory duty or a serious breach of principles of natural justice, furthermore, judicial review is always at the discretion of the Court but where there are other avenues or remedies open to that Applicant, it will only be exercised in a very exceptional circumstances.

47. Back to this case, the Applicant should have filed an appeal to the Special Commissioner of Income Tax within 30 (thirty) days on receiving the assessment notice. The Applicant also failed to show the existence of a very exceptional to justify for an order of certiorari.
48. On the issue of time bar, I find the assessment for the year 2004, 2006 and 2007 are beyond the period provided by section 90 (1) Of ITA. I am of the opinion, in any event, the burden of proof rests on the Applicant to show that there is no existence of wilful fraud, negligence and wilful default, which she fails to show in the affidavit. Therefore the respondent is rightfully entitled to issue the notices of assessment for the year of assessments 2004, 2006, and 2007.
49. On the issue of penalty imposed at the rate of 20%, I find the penalty imposed was in accordance of Section 112 (3) of ITA 1967 in view of the Applicant's failure to furnish their returns for the respective years by or before 30<sup>th</sup> April of the said assessment years.
50. I am satisfied that the respondent had exercised a proper discretion in imposing the said penalty and the Court cannot disturb such decision of the respondent as the relevant matters had been fully considered by the respondent prior to the imposition of the penalty.
51. I have thoroughly considered the submission of the respondent on the issue that the Amendments do not in law have any effect on the vested right that the Applicant had acquired before the said amendments. I totally disagreed with the submission that the exemption enjoyed is in perpetuity. The amendments emphasised that the exemption shall ceased for the year of assessment 2003 unless there is an approval granted to the Applicant upon an application made under submission-section 44 (6) of ITA. I find, it is



undisputed fact that the Applicant had not made the application for the exemption and as a result she cannot seek and enjoy the exemption.

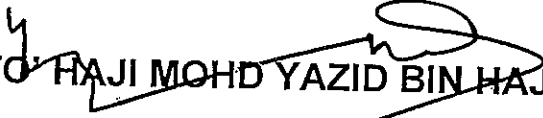
52. The fact shows that the Applicant's representative Puan Adziana A. Kadir from Messrs. PKF Tax Services Sdn Bhd. went to the Income Tax Office, attended a meeting and requested to pay by instalments the aforesaid assessment, implied that the respondent had recognised that she has to pay the assessment as she has not enjoyed the exemption.
53. Furthermore, at that meeting no objection was raised or received from the Applicant in relation to the said assessment. In fact what is abundantly clear is that the Applicant had in fact proposed a mode of payment through instalment evidencing that the Applicant recognised the requirement to pay as per the notice.
54. In **Tang Sung Mooi v. Too Miew Kim [1994] 3 MLJ 117** the Supreme Court held that

*"...the legislative intention...must be construed within the framework and the general purpose of the Act...."*
55. I find the object and intent of legislating the ITA is to facilitate the smooth process of assessment and payment of the income tax payable. As long as the Director General of Income Tax Department exercising his legal power with the provision of ITA, it is not for the court to intervene.
56. Based on the above findings, the answer to the reliefs by the Applicant are as follows:

- (1) I find the notices of assessment for the years of assessment 2004,2006, 2007,2011, 2012 and 2013 dated 16.03.2015 raised by the Respondent ("decision") which subjected the investment returns of the Applicant to income under the Income Tax Act 1967 ("ITA") is valid and enforceable. Therefore, the Prayer for an order of certiorari is refused.
- (2) I find that the declaration that the investment returns of the Applicant any income of the Applicant (if any) is exempted from income tax under the ITA pursuant to the vested rights acquired by the Applicant under Paragraph 13 of the Schedule 6 of the ITA as it first stood; and the enactment of the subsequent amendments to the said provision whether in whole or in part shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law is also rejected as they are not exempted from income tax.
- (3) I further find, based on the above law, a declaration that the various subsequent amendments to paragraph 13 of the Schedule 6 the ITA must be interpreted and construed in tandem with para 1 of the Interpretation Acts 1948 and 1967, and in that regard, any subsequent onerous amendments made to the paragraph 13 of the Schedule 6 of the ITA after 26.1.1970 shall have in so far as the Applicant is concerned no legal effects on the premise that the said subsequent amendments deprived the Applicant some of the rights that it had acquired is also dismissed.
- (4) I also further dismiss the Applicant's prayer for a declaration that in so far as the Applicant is concerned any subsequent onerous amendments made to paragraph 13 Schedule 6 of

the ITA after 26.1.1970 which affect the Applicant vested rights as at that date as are null and void;

- (5) I also further find that the declaration sought that in any event the imposition of the penalty under Section 112(3) of the ITA is without any legal basis and as such, is null and void, also devoid of any merits.
- (6) Lastly, I find that the Prayer sought for an Order that Respondent return to the Applicant any sums of money paid by the Applicant to the Respondent in consequence to the decision and that the Respondent returns the said sum within 14 days from the date of this order is granted by this honourable Court with interest accruing at the rate of 8% on the said sum from the date of payment was made to the Respondent is also devoid of any merits.
57. Based on the above findings, the submission of the Applicant that the respondent's decision is ultra vires, illegal, void, unlawful and/or in excess of authority cannot stand.

  
YA DATO' HAJI MOHD YAZID BIN HAJI MUSTAFA  
HAKIM  
MAHKAMAH TINGGI SHAH ALAM

30 DISEMBER 2016

Pihak-pihak

Peguam Pemohon: Mr D.P Naban bersama Mr S Saravana Kumar dan Mr Jason Tan daripada Tetuan Lee Hishamuddin Allen & Gledhill

Peguam Responden: Puan Duna dan En Muhammad Farid Jaafar  
Peguam Kanan Persekutuan daripada Kamar  
Peguam Negara