

**IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPLICATION NO.01(i)-18-05/2022(W)**

BETWEEN

MOHD NAJIB BIN HJ ABD RAZAK ... APPELLANT

AND

GOVERNMENT OF MALAYSIA ... RESPONDENT

(heard together with)

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(APPELLATE JURISDICTION)
CIVIL APPEAL NO.01(i)-17-05/2022(W)**

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MOHD NAZIFUDDIN BIN MOHD NAJIB ... APPELLANT

AND

GOVERNMENT OF MALAYSIA ... RESPONDENT

CORAM:

ABANG ISKANDAR BIN ABANG HASHIM, PCA
MOHAMAD ZABIDIN BIN MOHD DIAH, CJM
NALLINI PATHMANATHAN, FCJ
MARY LIM THIAM SUAN, FCJ
ABU BAKAR BIN JAIS, FCJ

SUMMARY OF JUDGMENT**Brief Facts**

1. The Inland Revenue, the Respondent in these appeals, filed an application for summary judgment to be entered against the Appellants under **section 106(3) of the Income Tax Act 1967 ('ITA')**, for the respective sums of RM1,692,872,924.83 and RM37,644,810.73 being additional income tax together with penalties which the Appellants allegedly failed to pay for the years of assessment 2011 to 2017.
2. The Appellants deny such liability and defend these claims on several grounds. The primary ground put forward by the Appellants is that **section 106(3)** usurps judicial power in **Art. 121 of the Federal Constitution** as it expressly limits the defences available to a taxpayer seeking to challenge a summary claim brought by the Respondent in the instant appeals, against it in court.

3. The Appellants further contend that **section 106(3) ITA** precludes the right to a fair trial by the taxpayer, flouting **Art. 5(1) of the Federal Constitution**. They argue that **Art. 8(1) of the Federal Constitution** is also contravened in that there is a disparity between the rights of the Respondent and the taxpayer.
4. The Respondent's position is that **section 106(3) ITA** does not usurp judicial power as the provision does not preclude or obviate the taxpayer from putting forward these defences, but provides instead for such disputes to be first heard by the Special Commissioners of Income Tax ('SCIT'), a specialist panel of tax commissioners. All the defences of the taxpayer are available for review by the Court after having initially been considered by the SCIT.

The Underlying Issue

5. The core issue that emerges for consideration by this Court is whether the system promulgated by Parliament under the **ITA** whereby the taxpayer is bound to make payment of the quantum assessed to be due by the Inland Revenue **first**, and only subsequently dispute the sum so assessed, passes the constitutionality test.
6. The fact that the Act provides for a 'Pay first, dispute later' system is borne out *inter alia*, by **section 103(1) ITA** which provides that tax payable under an assessment for a year of assessment shall be due and payable on the due date

whether or not that person appeals against the assessment, read together with **section 103B ITA** which provides that for the purposes of collection and recovery of taxes only, in **Part VII of the ITA**, the institution of any proceedings under any other written law against the Inland Revenue, does not absolve or exempt the taxpayer from making payment for the purposes of collection of tax pending the adjudication of the taxpayer's dispute.

7. The striking down of **section 106(3) ITA** would mean that defences stipulated under the section as not available to the taxpayer, could in fact be heard by way of defence under a claim to judgment under **section 106 ITA**. This in turn would result in a full adjudication of the Inland Revenue's claim by the Courts at first instance, rather than being heard by the **SCIT** at first instance, and subsequently by the Courts on appeal. It would also mean that the procuring of payment of tax upon assessment would be delayed until the completion of the entirety of court proceedings at all levels of the hierarchy of the Courts.

Our Decision

On whether section 106(3) of the ITA is ultra vires the Federal Constitution and should be struck down

8. In order to answer the question, it is necessary to determine whether **section 106(3) ITA** is *ultra vires* the

Federal Constitution. This in turn involves an exercise of construction of the **ITA**.

9. The test to determine whether a statutory provision is *ultra vires* the **Federal Constitution** involves a consideration of the following matters:
 - (a) What is the true scope and implication of the relevant provision of the **Federal Constitution** which is alleged to be transgressed?
 - (b) What is the substance and effect of the impugned statute or statutory provision on its true construction?
 - (c) Then the Court has to consider whether the impugned statute or statutory provision is capable of a construction which is consistent with the constitutional provision;
 - (d) If the impugned statute or provision can be so construed no contravention arises. Alternatively, if it appears to confer untrammelled powers when construed, it should be read down first, in order to uphold the provision. It is only where the construction of the impugned statute or provision lends itself to only one meaning that the power to strike down under **Article 4(1) of the Federal Constitution** should be utilised;

- (e) In determining in **(a)** and **(b)**, the meaning of a statutory provision and the intention of the Legislature in enacting the same can only be properly construed by considering the whole of the statute and every part of it.
- (f) The position in this jurisdiction is provided for by statute in **section 17A of the Interpretation Acts 1948 and 1967**. The section requires any construction to take into account the words of the statute in the context and purpose of the statute. This means that the intention of the Legislature behind a particular provision can only be properly understood by a consideration of the whole instrument and every part of it. The meaning is to be drawn from the context of the Act using the words in the impugned section, other sections in the Act or the scheme of the Act in general.
- (g) Where the invalidity or encroachment or unconstitutionality is clear, the Court is bound to carry out its duty under the **Federal Constitution** to strike down or sever the impugned statutory provision or statute.
- (h) In economic and fiscal matters such as tax measures the Court should proceed warily or with restraint as the Judiciary is not expert in these matters. It is when such measures are shockingly arbitrary, clearly illegal

or unconstitutional, that the Court should act under **Article 4(1) of the Federal Constitution.**

10. The facet of judicial power being referred to by the Appellants in the instant appeal as having been usurped is the power of the Judiciary to hear and determine the subject matter of actual controversies between parties to a suit, to deliberate upon and entertain that suit and finally determine or adjudicate on that dispute by handing down a binding decision on the same, through the hierarchy of our courts.

Should **section 106(3) of the ITA** be construed in vacuo or in the context of **section 106** and the **ITA** as a whole?

11. An approach which focuses wholly on **section 106(3) ITA** alone is likely to result in a construction which is different from an approach where the sub-section is read in the context of the section it is housed in, and the operation of the **ITA** as a whole.
12. A construction of **section 106(3) ITA** in the context of the entirety of the Act gives a more accurate picture of whether judicial power or function is removed or suspended for the purposes of constitutional review (see: **BNCB v Babubhai (1987) 1 SCC 606 (para. 4)**, **Canada Sugar Refining Co. v R (1898) AC 735**, **Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal [2023] 2 MLJ 621**).

13. The present incarnation of our **ITA** was enacted by the legislature to facilitate the expeditious collection of government revenue and to deter tactical attempts from would-be tax evaders to delay the payment of outstanding taxes as borne out by a reading of the Hansard relating to the predecessors of the present **ITA**. The then Finance Minister explained that:

“ ... it is the duty of the Government to ensure that the income tax laws of the country are fully enforced in the interests of the general body of taxpayers who would otherwise have to bear a disproportionately heavier tax burden through no fault of their own...”

In the face of persistent and widespread evasion or attempts at evasion of tax, and in view of the inadequacy and shortcomings of existing legislation to prevent avoidance of tax, it is considered necessary to give wider powers to the Department of Inland Revenue ...

14. **Section 106(3) of the ITA** must be read together with the other provisions of the Act, for example **section 106 in its entirety**, as well as the provisions of **section 103 to 107**.
15. It is apparent from the design and operation of the **ITA** that Parliament has fashioned a specific mode of determination of disputes relating to assessment of liability for tax. And that mode of doing so, is by the DGIR, followed by the

specialist SCIT. There is express provision for an appeal to the superior Courts.

16. The Court under **section 106 ITA** is fulfilling the purpose of recovery or collection only. It is not undertaking a full judicial adjudicatory role. Its full adjudicatory judicial power is deferred to the appeal arising from the decision of the SCIT by way of questions of law, or administrative or constitutional judicial review at a subsequent stage.
17. This is consonant with the 'Pay first dispute later' mode of tax imposition by the Government. In our full grounds of judgment, we have examined cases from South Africa, Australia, Hong Kong and Ghana. It is evident that the pay first, dispute later mechanism inherent in the **ITA** is utilised the world over.
18. There is no abrogation or suspension of the Court's adjudicatory powers because those powers remain to be exercised in the course of the appeal proceedings brought in relation to the assessment itself. The judicial powers of judicial review as well as powers of judicial intervention in the form of a stay are also available and not ousted.
19. This statutory certification of the sum assessed as a debt means that the sum so certified is statutorily due and payable. However, it is equally clear from a perusal of the **ITA** as a whole, that **it is not a final determination of the sum due and owing by the taxpayer because section**

99(1) ITA remains untouched and enables the taxpayer to proceed with his grievances through the SCIT and the entire hierarchy of the Courts.

On Order 14 of the Rules of Court 2012

20. In the cases cited before us, summary judgment under **Order 14 of the Rules of Court 2012** is a commonly adopted method of collection of the statutory 'debt' under **section 106(3) ITA**.
21. There is a presumption made, both by the Inland Revenue and the Appellants that the only means of enforcement available is under **Order 14 of the Rules of Court 2012**. However **Order 14** envisages the Court undertaking a final determination as to whether an amount is payable or due.
22. The **ITA** does not envisage a full-blown ventilation of all possible challenges to be determined at this stage of the tax process. It serves to ensure timely recovery and collection of tax due, while deferring the challenge to a later date. And this is where the utilisation of **Order 14 of the Rules of Court 2012** gives rise to confusion.
23. By contrast where summary judgment is granted or judgment is granted after a full trial, the full merits and rights of the parties are litigated and the judgment handed down, final in nature.

24. If a tax recovery 'debt' as statutorily provided for under **section 106 ITA is subjected to the procedure under Order 14 of the Rules of Court 2012**, then the entire purpose and object of the **ITA**, which provides for a deferral of the full dispute to a later date under the adjudicatory process prescribed under the Act, is not met.
25. Bearing in mind that **section 106 ITA** provides for this statutory debt to be due and owing for the purposes of recovery only, and not with finality, the use of a summary process which seeks to allow for a full determination of whether the sum is due and payable, is not ideal given the purpose and object of the **ITA**.
26. The **section 106 ITA** recovery mechanism under the **ITA** provides a comprehensive mode of recovery for initial enforcement purposes only.

On Article 5 of the Federal Constitution

27. **Section 106(3) ITA** is constitutional and cannot be said to encroach upon judicial power nor contravene **Article 5(1) of the Federal Constitution** in terms of the right to a fair trial or access to justice. As we have explained earlier the right of full adjudication is preserved under **s. 99(1) ITA**.

On Art. 8 of the Federal Constitution

28. The Appellants complain that **section 106(3) ITA** puts them on an unequal footing with the Respondent as it confers wide powers on the latter in respect of tax matters and is consequently violative of the Appellant's right to equal treatment under **Art. 8 of the Federal Constitution** . This view is shared by *amicus curiae*.
29. **Art. 8(1) of the Federal Constitution** means that a law may not discriminate for or against a person or class unless there is a rational basis for such discrimination. **Art. 8(1) of the Federal Constitution** permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question. This is the test of constitutionality under **Art. 8**.
30. We find that **Art. 8 of the Federal Constitution** is not infringed for the following reasons:
- (i) For a tax statute to pass the test of permissible classification, two conditions must still be fulfilled:
 - (a) the classification must be founded on intelligible differentia which distinguish persons or things that are grouped together from others left out of the group;

- (b) the differentia must have a rational relation to the object sought to be achieved by the statute. The classification must not be arbitrary, artificial or evasive, but must be based on some real and substantial distinction bearing a just and reasonable relation to the object to be achieved by the legislature.
- (ii) Where the Government acts in its public capacity and in the exercise of its ordinary governmental functions, a subject, such as the Appellants, cannot claim equality with the Government. The function of levying tax is a sovereign function of the Government and cannot therefore be treated as a private function of the Government so as to make it a 'person' within the meaning of **Art. 8 of the Federal Constitution**.
- (iii) The Inland Revenue is levying tax on the Appellants in the same manner that it does for all citizens of the nation. The Appellants have not been singled out for discriminatory treatment nor treated in a manner not provided for in the **ITA**. There is no evidential basis on record to support such a contention. Accordingly there is no basis for the contention that there has been a contravention of **Art. 8 of the Federal Constitution**.
- (iv) Since the economic wisdom of a tax statute is within the exclusive province of the legislature and

questioning the legislative policy is beyond the domain of the judiciary, tax legislation is subject to a less rigorous anti-discrimination test.

- (v) Here the **ITA** has the object of ensuring that taxes are collected efficiently and expeditiously in the interests of the citizens of the nation as a whole. **Section 106(3) ITA** has a rational relation to the collection of taxes efficiently and expeditiously in that it serves to ensure that for the purposes of enforcement **section 106(3) ITA** precludes matters which are deferred to the dispute resolution mode specified in the statute. Therefore, it satisfies that aspect of the test for **Art. 8 of the Federal Constitution** too. It passes the constitutional validity test.

Conclusion

31. The power of constitutional review contained in **Art. 4(1) of the Federal Constitution** is a formidable instrument and should be wielded by the Judiciary with great care. If it were to be used indiscriminately or where there is no substantive basis for its invocation, the results could cause considerable damage. In the instant appeals, it could stultify the tax collection system of the nation as validly provided for, and adversely affect the functioning of the Government and the peoples.

32. The appeals are therefore dismissed with no order as to costs.

Note: The full judgment of the Court is the only authoritative document. This summary is provided to assist in understanding the Court's decision.