

1. This is a brief and broad grounds for my decision for the three (3) Lead cases, namely LBN-25JR-75/5-2021, LBN-25JR-18/4-2021 and LBN-25-17/6-2021. Full grounds will be provided in the event of appeal by the parties concerned and if necessary.

The legality of the 2018 Regulations made by Deputy Prime Minister and amended by the 2020 Regulations made by the Minister of Finance

2. The 2018 Regulations which first prescribed the Substance Requirements was made by the Deputy Prime Minister.

3. By section 2 of the LBATA, the Minister authorised to prescribe the Substance Requirements by regulations under section 2B(1)(b) of LBATA is the Minister for the time being charged with the responsibility for finance, meaning the Minister having control and responsibility with the matter, who is the Minister of Finance.

See: Public Prosecutor v. Kit Chee Wan [1999] 1 MLJ 16

4. The power conferred upon the Minister of Finance (MOF) to make regulations to prescribe the Substance Requirements under section 2B(1)(b) and section 21 of LBATA in this case cannot be further sub-delegated to any other persons.

See: Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 (FC)

5. Strictly construed, the 2018 Regulations is therefore ultra vires and invalid. That being the case, the 2020 Regulations made by the Minister of Finance to amend the 2018 Regulations which was not validly made, has no effect too.

6. In the hearing of their application for Judicial Review, the Applicants are not precluded from calling into question, the legality of these regulations

See: Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated [2004] 2 MLJ 49.

No Substance Requirements prescribed for the business activity of Applicants and no specific provision to disqualify Applicants to be taxed under LBATA

5 7. As the 2018 Regulations and 2020 Regulations were not validly made, as at the time the Deputy Director of Inland Revenue Board (DGIR) issued the impugned letter dated 5-2-2021 (Exhibit TKS-66, at page 6197 - 6214 of Encl. 4 in JUDICIAL REVIEW NO: LBN-25JR-75/5-2021) and the MOF issued the letter impugned letter dated 1-4-2021, the Applicants were Labuan entities as specified in the Schedule referred to under section 2B(1)(a) of LABATA carried on Labuan business activities without any Substance Requirements under section 2B(1)(b) lawfully prescribed by any valid regulations made and in force at the material times.

10 8. Tax statutes have to be construed strictly. There must be clear and expressed provisions in the statutes to render a taxpayer liable to be charged to tax. Any ambiguity in the provisions in the tax statutes in that respect has to be construed in favour of a taxpayer.

15 See: Exxon Chemical (M) Sdn Bhd v. Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428 (CA), Director-General of Inland Revenue v Highlands Malaya Plantations Ltd [1988] 2 MLJ 99 at 104 (SC) and National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1994] 1 MLJ 99 at 106 (SC).

20 9. That being the case, at the material times the Applicants therefore, were only subject to be charged to tax under section 4 of LBATA and not under ITA by section 3B thereunder.

25 10. That being the case, the letter dated 5-2-2021 issued by the DGIR relying on the invalid 2018 Regulations and requiring the Applicants to submit the Tax Return Form under ITA to be charged to tax thereunder and the letter dated 1-4-2021 of the MOF which decided to the effect that the Applicants were subject to the imposition of income tax under the ITA were made without expressly authorised by the law and therefore in excess of authority.

30 11. The Senior Federal Counsels for the Respondents have not submitted otherwise.

35 **The 2021 Regulations cannot have retrospective effect to take away the vested right of the Applicants**

12. The Senior Federal Counsels for the Respondents submitted that the Applicants' applications for Judicial Review have become academic because of the making of the 2021 Regulations by the MOF on 19-11-2021 gazetted as P.U. (A) 423/2021.

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13. The 2021 Regulations seems to provide a comprehensive list of the applicable Labuan business activities of Labuan entity under LBATA and prescribed with the Substance Requirements which covered the Business activities of all the Applicants to take effect retrospectively on 1-1-2019, some two years back in time, which the Applicants have to comply so as not to be subject to the higher tax under ITA.

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14. The Senior Federal Counsels submitted that the Applicants' issues were resolved, the applications for Judicial Review have been overtaken by the 2021 Regulations. They submitted that "the factual substratum underlying the question of the case has ceased" and relying on the Federal Court decision in Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim Malaysia, pencelah) and another case [2018] MLJU 1288, they submitted that the Applicants' applications for Judicial Review should be withdrawn by the Applicants if not, dismissed.

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15. I do not agree that the matters have become academic, particularly in view of the findings that the 2018 Regulations and the 2020 Regulations were invalid.

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16. Firstly, the Respondents seemed to maintain the validity of their decisions made in their letters dated 5-2-2021 and 1-4-2021 respectively.

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17. Secondly, the 2021 Regulations were made to apply retrospectively with effect on 1-1-2019.

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18. The Applicants have the vested rights as Labuan entities with business activities not required to satisfy any Substance Requirement and entitled to the benefit of being subjected to be charged to tax at a lower rate under LBATA before the making of the 2021 Regulations.

19. It is certainly impossible for all the Applicants now to go back in time to 2019 to satisfy the Substance Requirements as prescribed by the 2021 Regulations, if they had not satisfied then, in order not to be charged to tax at a higher rate under ITA.

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20. I also noted the submission of the Federal Counsels for the Respondents of that the tax regime under LBATA is based on preceding Year basis and Current Year basis as under ITA.

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21. To require the Applicants to go back in time to comply with the Substance Requirements retrospective is a grave injustice to the Applicants which cannot be intended by the Legislature in enacting the provisions in LBATA empowering the MOF, the 2nd Respondent to make regulations.

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See: *Lim Phin Khian v Kho Su Ming* 1996 1 MLJ 1 (FC)

22. There is no express provisions in LBATA which empowers the MOF to make regulations to apply retrospectively.

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23. Section 20 of the Interpretation Acts 1948 and 1967 has to be narrowly and strictly construed not to take away the vested rights of the Applicants and subject to section 30 of the same Act.

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See: *National Land Finance Co-Operative Society Ltd v Director General Of Inland Revenue* [1994] 1 MLJ 99 (SC); *Kerajaan Malaysia v Wong Pot Heng* [1997] 1 MLJ 437 (FC); *Ketua Pengarah Hasil Dalam Negeri v Malaysian Co-Operative Insurance Society Ltd* [2000] 1 MLJ 561 (CA); *Syed Ibrahim Bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49 (CA); *Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498 (CA); *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376 (CA); and *Engineering Analysis Centre of Excellence Private Ltd v Commissioner of Income Tax and another* 23 ITLR 569

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24. The 2021 Regulations made by MOF cannot take away the vested rights of the Applicants. The 2021 Regulations has to be construed to apply and I hold that they apply only to the Applicants prospectively.

Whether the Letters of DGIR and MOF impugned adversely affected the Applicants?

5 25. The learned Senior Federal Counsels for the Respondents again submitted that the Applicants were not “adversely affected” by the impugned letters of the DGIR and the MOF respectively as they were only opinions or understandings of them respectively, no tax returns or documentations to Inland Revenue Board of Malaysia and no assessment or decision on each individual applicant has yet been made. They have canvassed the issue in opposing the leave application for
10 Judicial Review by the Applicants.

26. The learned Senior Federal Counsels were entitled to do so again in the hearing of the substantive applications for Judicial Review.

15 27. After considering the submissions of the learned Senior Federal Counsels, the learned counsels for the Applicants and re-considering the matters as raised in respect of the issue, for the reasons as given in my grounds of decision dated 2-9-2021 granting the Applicants leave for Judicial Review, I maintain my finding that the decisions if not, the action by two letters of the Respondents respectively adversely affected the Applicants
20 and therefore amendable to judicial review.

The Applicants’ Application filed out of time?

25 28. The learned Senior Federal Counsels for the Respondents submitted that the Applications herein were out of time as the 2018 Regulations was gazetted on 31-12-2018 and that was the time the grounds of the applications first arose and communicated.

30 29. I do not agree with the submission. Firstly, the impugned decisions or actions were the two letters dated 5-2-2021 and 1-4-2021 of the Respondents respectively which letters were issued relying on the 2018 Regulations which I found it to be invalid.

35 30. The Applicants are entitled to apply for Judicial Review of the decisions in or actions by the two impugned letters of the Respondents respectively without first applying to set aside the 2018 Regulations on the ground of its invalidity.

31. As I held earlier, the Applicants are not precluded from contending that the 2018 Regulations were invalid.

Pronouncement and orders.

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32. In the premises, in respect Application For Judicial Review No: LBN-25JR-75/5-2021 (HC); Application For Judicial Review No: LBN-25JR-18/4-2021 (HC) and Application For Judicial Review No. LBN-25-17/6-2021 (HC), I granted the Applicants therein, the following orders:

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(a). an order of certiorari that the decision of the 1st Respondent contained in his letter dated 5-2-2021 be removed into this Court and quashed;

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(b). an order of certiorari that the decision of the 2nd Respondent contained in his letter dated 1-4-2021 be removed into this Court and quashed;

(c). a Declaration that the 2018 Regulations and the 2020 Regulations are invalid in law;

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(d). a Declaration that for the purpose to be charged to tax by the 1st Respondent, the 2021 Regulations only applies, operates and has effect on the Applicants prospectively as from the date of its making (i.e. 19-11-2021) and has no retrospective operation, effect and application upon the Applicants prior to the date of its making.

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33. The Applicants in these three (3) applications for Judicial Review in the 3 lead cases are entitled to costs which I allow in the sum of RM25,000.00 for each of the three (3) applications.

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34. Pursuant to the agreement between the parties, I grant similar orders in favour of the other Applicants in their applications as listed under respective Category A, B and C tabulated (except applicant in LBN-25JR-4/3-2021 Palmsphere (L) Bhd (item no. 3)) and as attached to my grounds of decision granting leave with costs of RM1,000.00 for each of the applications.

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02:55 PM - 13 June 2022.



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(WONG SIONG TUNG)
Judge

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