



Deploying judicial review arguments in tax disputes: Key lessons from the ADPL case

Asia Development Pte Ltd v Attorney General [2020] SGCA 22 (“ADPL”)

1 ADPL was a tax-related judicial review (“JR”) application that was doomed to fail from the outset.

2 In a terse 6-page judgment, Chief Justice Sundaresh Menon (on behalf of the Court of Appeal) rejected the entirety of the taxpayer’s submissions on appeal and observed, at one point of the judgment, that the taxpayer’s case was “hopeless”.

3 The CA’s decision is unsurprising. The grounds on which the taxpayer had relied on were simply not proper JR grounds to begin with. As such, the CA did not even have to consider the merits of the case before dismissing the taxpayer’s appeal outright.

4 It is therefore important that taxpayers and tax advisors have a proper understanding of what JR entails, as it is possible to deploy JR arguments in tax disputes with IRAS **in addition to** the substantive tax arguments raised. This article will set out how JR arguments can be properly deployed.

The ADPL case

5 The taxpayer in ADPL was a housing developer that had purchased a property for redevelopment.

6 In 2012, it applied for remission of additional buyer’s stamp duty (“ABSD”) on the purchase. The Chief Tax Policy Officer (“CPTO”) of the Ministry of Finance granted the taxpayer ABSD remission subject to the completion and sale of the redeveloped property within 3 years. However, the taxpayer was unable to meet this deadline and only managed to sell the redeveloped property after more than 15 months from the deadline.

7 The taxpayer made various applications for an extension of time. However, all its appeals were rejected.

8 Dissatisfied, the taxpayer filed a JR application against the Minister of Finance’s decision to reject its appeals (“**Decision**”) on the grounds that:

- the Decision should have been made by the Minister of Finance *personally* and not by the CPTO;
- the Decision was made in breach of natural justice as the CPTO did not adequately consider the taxpayer’s reasons for the delay; and
- the Decision was unreasonable in the *Wednesbury* sense, in that it was so outrageous in its defiance of logic or of acceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

9 After considering the taxpayer’s submissions, the CA held that there was nothing in the relevant statutes that required the Minister to exercise his discretion *personally*. He was entitled under the *Carltona* principle to delegate the decision-making for the remission of ABSD to the CPTO.

10 The CA also there was nothing to suggest that the taxpayer was not able to put its case across. The taxpayer did not raise any new reasons that would have led the CPTO to reach a different result, since the taxpayer only relied on the typical excuses for construction delay i.e. wet weather, problems with employees and delays in dealing with regulatory bodies.

11 In any event, the taxpayer was clearly out of time and it was purely a matter of discretion, not obligation, under the CPTO’s

part to grant an extension under the relevant statutes. Thus, it was not unreasonable for the CPTO to arrive at her Decision.

12 As a sign of its disapproval of the taxpayer's conduct in bringing the unmeritorious JR application, the CA ordered that the taxpayer pay a hefty \$50,000 in costs and disbursements to the Attorney-General.

Key lessons

13 Although the taxpayer in *ADPL* may have failed in its JR application, there are a number of key lessons which can be gleaned for all taxpayers who are engaged in disputes with IRAS. That is because JR arguments can be raised not only in the context of "pure" JR applications but also in tax appeals heard by the Board of Review. Before elaborating on this, we will first touch on the fundamental principles of JR.

A. What is JR?

14 JR is a process by which the High Court exercises supervisory jurisdiction over public bodies that perform public functions and duties¹ (e.g. IRAS). In JR proceedings, an applicant can apply for the following orders:

- Quashing Order. An order quashing or setting aside illegal decisions or acts.
- Mandatory Order. An order obliging a public body to exercise its duties or to perform specific acts or to consider exercising a discretionary power as required by law.
- Prohibiting Order. An injunctive order directed at a prospective act or decision which would be in breach of natural justice, unlawful or irrational at law.

15 In general, applicants can rely on the following 3 JR grounds:

- Illegality. A decision can be overturned for illegality if the public body did not have the legal power to make the decision. For example, if the statute did not provide the public body with the discretion that they thought they had.
- Irrationality (or *Wednesbury* unreasonableness). A decision can be overturned for irrationality if it is so unreasonable that no reasonable person, acting reasonably, could have made it. This is a very high bar to get over, and it is rare for the courts to grant judicial review on this basis.
- Breach of natural justice (or procedural unfairness). A decision can be overturned for breach of natural justice if a decision-maker who was supposed to be impartial was biased, or if the decision-maker did not give the applicant the chance to make representations before making a decision.

16 As can be seen, JR arguments are typically objections about the decision-making *process* of the public body rather than the decision of the public body itself. That is how JR is distinguished from an appeal.

B. Can JR arguments be raised in tax appeals before the Board?

17 Yes. While taxpayers typically rely on Order 53 of the Rules of Court to file a "pure" JR application to the High Court, it is actually possible for the taxpayer to raise JR arguments in the tax appeal itself.

18 In the seminal anti-avoidance decision of *Comptroller of Income Tax v AQQ* [2014] 2 SLR 847 ("**AQQ**"), the CA made it clear at [117] that "the statutory right of appeal against assessments – both to the Board and subsequently to the High Court – also applies where the taxpayer wishes to

¹ AGC Media Fact Sheet, "Judicial Review Proceedings" (31 May 2012)

question the exercise of any discretion of the Comptroller under s33" [emphasis added]

19 At [122], the CA went further to state that "Section 34 puts it beyond doubt that ss 79 and 81, which are expressly stated to apply to the Comptroller's assessments, also apply to the exercise of the Comptroller's discretion such that there is no need to have recourse to judicial review to challenge the Comptroller's discretion: see *Tang Siau Yan*, *LexisNexis Annotated Statutes of Singapore – Income Tax Act (LexisNexis, 2012) at para ITA 34.1*. This is consistent with the dicta in *Ranaweera* that a statutorily constituted taxation board of review was empowered to review matters which were the subject of a discretion exercised by executive officers" [emphasis added]

20 While the CA's observations above were specifically dealing with the anti-avoidance provision in Section 33 of the Income Tax Act, there is no principled reason as to why the same principles should not apply to other provisions in the relevant tax statutes where IRAS exercises a discretion to impose a certain tax on the taxpayer.

21 In fact, the CA's observations were similarly applied in the Board of Review decisions of *AVD v The Comptroller of Income Tax* [2011] SGITBR 3 and *JD v Comptroller of Income Tax* [2004] SGDC 245.

22 As such, this author is of the view that the CA's observations in *AQQ* are of general effect i.e. that JR arguments can also be raised in the context of tax appeals so that the courts can deal with all types of procedural and substantive disputes at once.

C. What kind of JR arguments can taxpayers raise in tax disputes?

23 Taxpayers can raise JR arguments when they are seeking to challenge legality of the Comptroller's decision-making process rather than the merits of the Comptroller's decision.

24 This includes situations where the Comptroller has exceeded its authority by

imposing unreasonable restrictions or conditions, where it fetters its own discretion by a self-imposed rule of policy or practice, or where it acts *ultra vires* beyond the powers conferred by the enabling statute.

25 That said, taxpayers should note that JR arguments are by their nature harder to succeed on as compared to challenges on the merits. That is because the Board / Court will not, as a matter of law, substitute its views for that of the Comptroller.

26 Nevertheless, taxpayers should be aware that there are potential JR arguments that can be raised in disputing tax in the appropriate case. But one must be careful not to make the rudimentary mistakes that the taxpayer in *ADPL* made; lest the case gets thrown out by the Board / Courts before it can even get off the ground.

If you would like information on this area of the law, please contact:



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