**IN THE FEDERAL COURT OF MALAYSIA**

**(APPELLATE JURISDICTION)**

**CIVIL APPEAL NO.01(i)-18-05/2022(W)**

**BETWEEN**

**MOHD NAJIB BIN HJ ABD RAZAK**
**(NRIC NO.530723-06-5165) ... APPELLANT**

**AND**

**GOVERNMENT OF MALAYSIA ... RESPONDENT**

**In the Court of Appeal of Malaysia**

**(Appellate Juridiction)**

**Civil Appeal No.W-01(IM)(NCVC)-337-07/2020**

**Between**

**Mohd Najib bin Hj Abd Razak**
**(NRIC No.530723-06-5165) ... Appellant**

**And**

**Government of Malaysia ... Respondent**

In the High Court of Malaya at Kuala Lumpur
In the State of Federal Territory Kuala Lumpur
(Civil Division)
Civil Suit No.WA-21NCVC-35-06/2019

Between

Government of Malaysia ... Applicant

And

Mohd Najib Bin Hj Abd Razak
(NRIC No.530723-06-5165) ... Respondent

**(heard together with)**

**IN THE FEDERAL COURT OF MALAYSIA**
**(APPELLATE JURISDICTION)**
**CIVIL APPEAL NO.01(i)-17-05/2022(W)**

**BETWEEN**

**MOHD NAZIFUDDIN BIN MOHD NAJIB**
**(NRIC NO.831213-06-5009) ... APPELLANT**

**AND**

**GOVERNMENT OF MALAYSIA ... RESPONDENT**

**In the Court of Appeal of Malaysia**

**(Appellate Juridiction)**

**Civil Appeal No.W-01(IM)(NCVC)-328-07/2020**

**Between**

**Mohd Nazifuddin Bin Mohd Najib**
**(NRIC No.831213-06-5009) ... Appellant**

**And**

**Government of Malaysia ... Respondent**

In the High Court of Malaya at Kuala Lumpur
In the State of Federal Territory Kuala Lumpur
(Civil Division)
Civil Suit No.WA-21NCVC-42-07/2019

Between

Government of Malaysia ... Applicant

And

Mohd Nazifuddin Bin Mohd Najib
(NRIC No.831213-06-5009) ... 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**

## GROUNDS OF JUDGMENT

## INTRODUCTION

1. The primary issue that falls for adjudication and decision in these two appeals brought by the Appellants, Dato' Seri Mohd Najib bin Haji Abd Razak ('Najib Razak') and Mohd Nazifuddin bin Mohd Najib ('Nazifuddin'), is the **constitutionality of section 106(3) of the Income Tax Act 1967 ('ITA')**. The primary ground put forward by the Appellants is that **section 106(3)** usurps judicial power in **Art**. **121 of the Federal Constitution ('FC')**. It is also contended that the impugned section contravenes **Art**. **5(1) FC** in that it does not accord the Appellants a fair trial and impedes their right of access to justice.

2. It is submitted that this contravention arises because **section 106(3)** expressly limits the defences available to a taxpayer seeking to challenge a summary claim brought by the Respondent, the Government of Malaysia,

represented by the Inland Revenue Board ('Inland Revenue') as a debt due, based on monies assessed to be due from the taxpayer. The statutory provision in issue, namely **section 106(3) ITA**, stipulates that *"the Court shall not entertain"* any plea that the tax claimed is *'excessive, incorrectly assessed, under appeal or incorrectly increased…'*. This limitation on defences that may be considered by the Court, it is maintained, amounts to a usurpation of judicial power as stated above, and therefore warrants being struck down under **Art 4(1) FC**.

3. In further support of this primary assertion, it is contended that **section 106(3)** thereby precludes the right to a fair trial by the taxpayer, flouting **Art**. **5(1) FC** which recognizes this right as part of the right to life. Additionally, the Appellants argue that **Art**. **8(1) FC** is also contravened in that the Inland Revenue is accorded unlimited powers, creating a disparity between the rights of the Inland Revenue and the taxpayer. This, it is argued, amounts to a contravention of **Art**. **8 of the FC**. The *amicus curiae* concurs with the Appellants in that it is submitted that there is a contravention of **Art**. **8 FC** as **section 106(3) ITA** ousts judicial power and has no rational nexus with the objective of the **ITA**.

4. The Inland Revenue meets these arguments by responding that **section 106(3**) **ITA** does not usurp judicial power nor contravene **Art**. **121 FC** because:

(a) The section, when construed in the context of the **ITA** holistically, 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, who are qualified to deal with such tax disputes. On such determination by the SCIT, the taxpayer has recourse to the Court. The Court exercises its power to hear an appeal premised on points of law. There is a right of appeal up to the Federal Court. As such, it cannot be said that judicial power is ousted under **section 106(3) ITA**. The **ITA** provides for a specific mode of adjudication under **section 99(1)** and **Schedule 5 ITA**.

(b) The Inland Revenue maintains that it cannot be said that a fair trial or access to justice is denied to the taxpayer because the Court exercises its judicial power by way of appeal from the decision of the SCIT under **section 99(1) ITA**, even after the summary mode of enforcement is disposed of under **section 106 ITA**. All the defences of the taxpayer are available for review by the Court after having initially been considered by the SCIT.

(c) This means that the judgment obtained summarily under **section 106 ITA** is <u>not</u> the final disposition of the taxpayer's rights. The taxpayer, if unsuccessful in

opposing the summary application for judgment under **section 106 ITA**, in view of **section 106(3) ITA**, may have recourse to the SCIT and then the Court again by way of appeal on points of law.

(d) If the SCIT, in the course of its determination on the merits of the tax dispute, or the Court by way of appeal on points of law, determines the dispute in favour of the taxpayer, his tax liability is then reduced or reversed, as the case may be. Access to justice, it is asserted, is not therefore precluded or negated under **section 106(3) ITA**.

## THE UNDERLYING ISSUE

5. It appears to this Court that underlying these competing positions in relation to the **constitutionality of section 106(3) ITA,** the core issue that emerges for consideration 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. In other words, collection of tax by the Inland Revenue is accorded immediacy while the disputes raised by the taxpayer are deferred for adjudication to a later time.

8. And this is because once judgment is obtained summarily by the Inland Revenue, based on **section 106(1) ITA,** as a debt recoverable by it against the taxpayer, it becomes incumbent upon the taxpayer, such as the Appellants, to make the payment due to the Revenue **first**, while the dispute relating to any of the defences relating to quantum etc., proceed to resolution, first through the SCIT, and then the Court, by way of appeal on points of law. If the taxpayer is successful, the monies paid out by him, are then reimbursed to the taxpayer by the Inland Revenue under **section 111 ITA**. The effective challenge by the Appellants is the constitutionality of such a system or mechanism.

9. Although collection might precede the full adjudication of the dispute, it is relevant to note that the **Director-General of Inland Revenue ('DGIR')** possesses the power and discretion to allow for suspension, payment in instalments,

partial payment and a variety of other means as an alternative to payment in full immediately (See **section 107B ITA** for inistance). Similarly, the Courts have the power to stay full enforcement on failure to pay by the taxpayer pending appeals, if sufficient grounds are made out.

10. Put another way, the challenge on the constitutionality of **section 106(3) ITA** effectively contests and seeks the removal of the operation of the tax legislation enacted by Parliament, which provides for a 'Pay first, dispute later' structure.

11. The striking down of **section 106(3)** 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.

12. Having set out in a nutshell the scope of the dispute, we turn to the background facts and issues that arise in these

appeals, as indicated in part at least, by the questions of law before us.

## BACKGROUND FACTS

13. The Respondent filed separate applications for summary judgment to be entered against the Appellants under **section 106 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.

14. The summary judgment applications against Najib Razak and Nazifuddin were heard before Ahmad bin Bache J and Ahmad Zaidi bin Ibrahim J respectively. Both High Court Judges allowed summary judgment to be entered against the two Appellants.

15. Dissatisfied with the decisions of the High Court, both Appellants separately appealed to the Court of Appeal. Both appeals were heard together. The Court of Appeal dismissed the appeals and upheld the decisions of the High Court. Dissatisfied with the decision of the Court of Appeal, both Appellants appealed to the Federal Court.

**PROCEEDINGS IN THE LOWER COURTS**

**HIGH COURT**

16. Ahmad bin Bache J allowed summary judgment to be entered against Najib Razak on the following grounds:

(a) The Notice of Assessment (Additional) for the years 2011 to 2017 had been duly served on Najib Razak on 20.03.2019. The Court was satisfied that the additional assessment and the increases were in accordance with **ITA**.

(b) Najib Razak's failure to pay the total amount of arrears of additional income tax was further confirmed by the issuance of a certificate of indebtedness dated 5.8.2019 pursuant to **section 142(1) ITA**. The total amount of additional income tax became recoverable as tax that was due and payable under **ITA**.

(c) Following the line of authorities including **Chong Woo Yit v Government of Malaysia [1989] 1 CLJ (Rep) 9 ('Chong Woo Yit')**, **Sun Man Tobacco Co. Ltd. v Government of Malaysia [1973] 2 MLJ 163**, **(Sun Man Tobacco) Arumugam Pillai v Government of Malaysia [1980] 2 MLJ 283**, **(Arumugam Pillai) Government of Malaysia v Abdul Rahman [1975] 1 MLJ 276**, **(Abdul Rahman) Kerajaan Malaysia v Abdul Rahim bin Mohd Aki 1994] 4 BLJ 376**, **(Abdul Rahman)** learned judge held that on a plain reading,

once Najib Razak had been served with a Notice of Assessment, the Court in a civil proceeding brought by the Inland Revenue will not entertain any plea that the amount is excessive, incorrectly assessed, under appeal or whatsoever, unlike the SCIT who remain the judges of fact.

(d) Najib Razak's pleas that the assessments are grossly incorrect and without basis, as a substantial amount of the income came from donations received from an Arab donor and political donations and are therefore not taxable, are all questions of fact. The learned judge held that the merit of assessments which involve questions of fact should be heard by the SCIT. The SCIT are the judges of fact.

(e) Further, **section 106(3) ITA** is triggered where the Court cannot entertain any plea regarding the amount of tax sought to be recovered on the ground that the assessment is excessive or incorrectly assessed. The learned judge also held Najib Razak could dispute the assessment under **section 99 ITA** to the SCIT.

(f) **Section 106 (3) ITA** does not contravene **Article 13 of the FC** as **section 106 ITA** is merely a method of recovery which is clearly provided under the law.

(g) **Section 106 (3) ITA** does not usurp judicial power as the right of the taxpayer is protected and guaranteed

under **section 99 ITA** by way of an appeal to the SCIT. Subsequently, the taxpayer if dissatisfied with the decision, he may appeal to the High Court against the decision of the SCIT. Therefore, judicial powers remain vested in the Court to determine the correctness of the assessments.

(h) **Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat [2017] 5 CLJ 526 (Semenyih Jaya)** was distinguished from the present case as in that in the present case, the correctness of the assessment is appealable to the SCIT and a further appeal may lie to the High Court.

(i) Additionally, if the court is to decide on the issue of whether or not the amount received by Najib Razak is subject to tax, or is wrongly calculated, this will preclude the SCIT, who are the judges of facts, from deciding the same questions, as the SCIT would regard themselves as bound by the decision of the High Court, as decided by the Supreme Court in **Kerajaan Malaysia v Dato' Haji Ghani Gilong [1995] 2 MLJ II** (**Dato' Haji Ghani Gilong**).

(j) Ahmad Zaidi bin Ibrahim J, too, allowed summary judgment to be entered against Nazifuddin on the following grounds:

i. The Notice of Assessment (Additional) for the years 2011 to 2017 had been duly served on Nazifuddin in compliance with **section 145(2)(c) ITA** on 18.03.2019. The fact that Nazifuddin had then filed an appeal to the SCIT via Form Q on 10.04.2019 further supported the Inland Revenue's submission that the notices had been served on 18.03.2019. Nazifuddin had also admitted the service of the notices on him.

ii. Although Nazifuddin had filed an appeal to the SCIT in respect of the notice, the Inland Revenue could recover the tax payable via a civil proceeding following the settled position of the law in **Chong Woo Yit** where the Supreme Court held:

> *"[2] On service of a notice of assessment… the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the Government by civil proceedings as a debt due to the Government".*

iii. Nazifuddin's submission that the Additional Tax for the years 2011 to 2017 is time-barred pursuant to **section 91(1) ITA** is not a triable issue. The law is settled that the issue of limitation is to be raised before and decided by the SCIT. This principle was laid down by the

Federal Court in **Dato' Haji Ghani Gilong**. The court also highlighted that pursuant to **section 91(3) ITA**, the Inland Revenue has the power to make an additional assessment beyond the limitation period i.e., in cases where it appears there has been fraud, wilful default or negligence.

iv. On Nazifuddin's submission that there has been an incorrect calculation of the additional tax assessment, the learned judge found that it is not an issue to be tried following **section 106(3) ITA** and as determined in **Abdul Rahman**, **Chong Woo Yit**, **Comptroller of Income Tax v A. Co Ltd [1966] 2 MLJ 282** (**A. Co. Ltd**).

v. On the constitutionality of **section 106 ITA**, the learned judge held that it is constitutional following several Federal Court cases including **Kerajaan Malaysia v Mudek [2017] 6 MLRA 25**, **Chong Woo Yit** and **Sun Man Tobacco Co. Ltd.** The learned judge further stated that in the case of **Semenyih Jaya**, it was observed by the Federal Court that the SCIT is a body which performs a judicial function.

vi. An appeal to the SCIT would not prevent Nazifuddin from obtaining justice as he could

appeal to the High Court via the case stated process under **section 99 of the ITA**.

## COURT OF APPEAL

17. The Court of Appeal upheld the decisions of the High Court.

## THE QUESTIONS OF LAW

18. On 10.05.2022, the Appellants obtained leave to appeal to this Court on the following questions of law:

(a) **Question 1**

Whether **section 106(3) of the Income Tax Act, 1967** contravenes **Article 121 of the Federal Constitution**.

(b) **Question 2**

Whether **Section 106(3) of the Income Tax Act 1967** is unconstitutional and/or *ultra vires* as it usurps the judicial power of this Honourable Court guaranteed by **Article 121 of the Federal Constitution**.

(c) **Question 3**

Whether, by reason of **Sections 103 and 106(3) of the Income Tax Act 1967**, this Court is wholly prevented from considering whether or not there are triable issues and/or some other reason warranting a trial (within the meaning of **Order 14 Rule 1 and Order 14 Rule 3 of the Rules of Court 2012**), before deciding whether or not to give judgment in favour of the Plaintiff, despite the fundamental liberties, rights and powers enshrined in, *inter alia*, **Articles 5, 8** and **121 of the Federal Constitution**.

(d) **Question 4**

Whether **Article 121 of the Federal Constitution**, which guarantees the judicial power of this Honourable Court, is relevant in the determination of civil recovery proceedings in tax matters (including in summary judgment proceedings therein).

(e) **Question 5**

Whether **Order 14 Rule 3 of the Rules of Court 2012**, which provides that a Summary Judgment application may be dismissed if a Defendant can show "some other reason" for a trial to be held, applies in civil recovery proceedings in tax matters.

(f) **Question 6**

Whether in instances of manifest and obvious errors in calculation of a tax assessment, a court is entitled by virtue of its inherent and judicial powers to consider a Defendant's defence of merit to dismiss or set aside an application for Summary Judgment by a Plaintiff and order full trial on the matter.

(g) **Question 7**

Whether the Judicial Power of the Federation that is vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a tax recovery suit filed under **section 106(1) of the Income Tax Act 1967** on the basis of **section 106(3)** of the same Act.

(h) **Question 8**

Whether the Judicial Power of the Federation vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a tax recovery suit filed under **section 106(1) of the Income Tax Act 1967** on the grounds that an appeal to the Special Commissioner of Income Tax has been filed under **Section 99 of the Income Tax Act 1967**.

(i) **Question 9**

Whether a Defendant's defence as to the Plaintiff's conduct of bad faith, mala fide, oppression, unconscionability, irresponsibility, unreasonableness and/or abuse of process falls within the scope of **section 106(3) of the Income Tax Act 1967**, and whether the Courts are entitled to consider such a defence as a triable issue and/or some other reason warranting a trial in the context of civil recovery proceedings in tax matters (including in summary judgment proceedings therein).

19. We now turn to consider the questions of law in categories germane to the issues they raise. On the basis of the subject matter of the issues raised we consider the questions in the following categories:

(a) Category 1:

**Questions 1, 2 and 4** all relate to judicial power;

(b) Category 2:

**Questions 3, 5 and 6** all of which deal with the workings of summary judgment in the context of **section 106 ITA**.

(c) Category 3:

**Questions 7 and 8** as they deal with the concept of the 'suspension' or 'abrogation' of judicial power by reason of **sections 106(3)** and **99 of the ITA**;

(d) Category 4:

**Question 9** which deals with issues of bad faith, mala fides and oppression in the context of **section 106(3) ITA**, and whether the Courts are entitled to consider such a defence as a triable issue or some other reason warranting a trial in the context of **section 106** summary judgment proceedings.

## OUR DELIBERATIONS AND ANALYSIS IN RELATION TO THE QUESTIONS OF LAW IN CATEGORY 1

20. The relevant questions that fall for consideration here are as follows:

(a) **Question 1**:

Whether **section 106(3) of the Income Tax Act, 1967** contravenes **Article 121 of the Federal Constitution**.

(b) **Question 2**:

Whether **section 106(3) of the Income Tax Act 1967** is unconstitutional and/or *ultra vires* as it usurps the judicial power of this Honourable Court guaranteed by **Article 121 of the Federal Constitution**.

(c) **Question 4**:

Whether **Article 121 of the Federal Constitution**, which guarantees the judicial power of this Honourable Court, is relevant in the determination of civil recovery proceedings in tax matters (including in summary judgment proceedings therein).

21. All these questions essentially challenge **section 106(3) ITA** as being unconstitutional on the ground that the provision usurps judicial power under **Art 121 FC**.

## THE APPELLANTS' SUBMISSIONS IN SUMMARY

22. The Appellants submit that the terminology of **section 106(3) ITA** which stipulates that "*the court shall not entertain*" any plea in relation to the assessment renders the court a mere "rubber stamp", whereby the Inland Revenue makes a decision on the tax payable and the court merely "anoints" the decision of the Inland Revenue which offends the principle of judicial power under **Article 121 of the FC**.

23. Their submissions may be summarised as follows:

(a) **Section 106(3) ITA** usurps the judicial powers of the High Court in light of **Art**. **121 FC**;

(b) **Section 106(3) ITA** in effect renders the courts a mere "rubber stamp", whereby the Respondent makes a decision on the tax payable and the courts merely "anoint" the decision of the Respondent which offends the principle of judicial power under **Art**. **121 FC** as highlighted in **Semenyih Jaya**;

(c) The fact that an assessment is appealable to the SCIT and the Court does not justify the conclusion that **section 106(3) ITA** is unconstitutional as there is no nexus between the appealability of an assessment to the **SCIT** and **section 106(3)** as the two provisions are separate and distinct. A civil suit may still be filed after the SCIT and the courts have determined the question of law in which event **section 106(3)** becomes operative;

(d) **Section 106(3) ITA** must be examined in light of the Federal Constitution to determine its constitutionality as per the case of **Datuk Harun Bin Haji Idris & Ors (1976) 2 MLJ 116**;

(e) **Section 106(3) ITA** has the effect of making the rights of a taxpayer "ineffective or illusory" because a person seeking to defend the suit may come to court but he cannot furnish any defences available to him.

(f) **Section 106(3) ITA** elevates the Inland Revenue to the "untouchable" position of having essentially unlimited powers in relation to tax matters. In this sense, it creates a disparity between the rights of the Inland Revenue and those of the normal taxpayer to be treated equally under the law which is guaranteed under **Art**. **8 FC**.

## THE RESPONDENT'S SUBMISSIONS IN SUMMARY

24. The Respondent's answer to this is that the recourse for any party aggrieved by the DGIR's assessment is to appeal to the **SCIT**. The SCIT, being the judges of fact, have the jurisdiction to decide on disputes relating to tax assessments. The Respondent also points out that the SCIT's decision is not final and is appealable to the High Court on a question of law.

25. The Respondent's submissions are as follows:

(a) **Section 106(3) ITA** does not violate **Art**. **121 FC**, as **Art**. **121 FC** must be read with federal laws passed by

Parliament which may prescribe the extent of the jurisdiction and powers of the Court;

(b) **Section 106(3) ITA** being a federal law prevents the Court from deciding any taxpayer's plea that the amount of tax sought is excessive, incorrectly assessed, under appeal or incorrectly increased;

(c) The Court remains the ultimate decision maker and is not precluded from considering matters other than what has been stipulated in **section 106(3) ITA** distinguishing the instant case with **Semenyih Jaya**;

(d) The recourse to any party aggrieved by the DGIR's assessment is to appeal to the SCIT. The SCIT, being the adjudicator of fact, has the jurisdiction to decide on the dispute regarding the tax assessment. The Respondent highlighted that the SCIT's decision is not final and is appealable to the High Court on questions of law;

(e) If the High Court decides on questions of fact it could lead to inconsistent decisions by the High Court and the SCIT as per **Dato' Haji Ghani Gilong**;

(f) **Section 106(3) ITA** does not violate **Articles 5** and **8 FC** as decided by case-law including **Sun Man Tobacco Co. Ltd**;

(g) The tax recovery system in our country is similar to countries such the United Kingdom, Hong Kong and Australia where the appeal on the assessment is to be decided by a specialist tribunal before an appeal to the High Court.

## SUBMISSIONS OF *AMICUS CURIAE*

26. In summary, the *amicus curiae* submitted that:

(a) **Section 106(3) ITA** is unconstitutional and should be struck down for being in violation of **Articles 121, 4, 5** and **8 of the FC** (especially in the light of the recent cases of **Semenyih Jaya, Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545** (**Indira Gandhi**), and **Alma Nudo Atenza v Public Prosecutor and another appeal [2019] 4 MLJ 1 (Alma Nudo)**);

(b) The court's function to decide on the assessment appears to have been delegated to the SCIT with the effect that the High Court, in civil proceedings brought by the Respondent under **section 106(3) ITA**, acts as a mere rubber stamp, being compelled to grant judgment in favour of the Respondent;

(c) The implications of cases such as **Sun Man Tobacco**, **Arumugam Pillai**, **NTS Arumugam Pillai v GOM**

**[1976] 2 MLJ 72 (FC), Chong Woo Yit**, **Dato' Hj Ghani Gilong** and **Kerajaan Malaysia v Mudek Sdn Bhd** are that the Court has "no power" and must "mechanically and blindly" grant summary judgment in favour of Respondent pursuant to **section 106(3) ITA**. This reduces the powers of the High Court such that an inferior tribunal (SCIT) and the Respondent have greater judicial powers than the High Court;

(d) Judgments should not be granted automatically or mechanically in any case, as that would be the very antithesis of the judiciary's constitutional role to sit in judgment of disputes;

(e) The SCIT in exercising their function cannot impinge on the judicial power of the judiciary;

(f) **Section 106(3) ITA** is arbitrary because the measure taken (to oust judicial power) has no rational nexus with the objective of the **ITA**;

(g) **Section 106 ITA** violates **Article 8(1) FC** because the measure taken (to oust judicial power) is disproportionate to the aim the **ITA** seeks to achieve;

(h) **Section 106 ITA** engages **Article 8(1) FC** in two respects. First, it infringes a person's presumption of innocence and right to fair trial under **Article 5 FC**. Second, in civil proceedings, it discriminates against

the taxpayer defendant by putting them in an unequal position in litigation where it can demand judgment in its favour, regardless of the merits of the taxpayer's case.

## OUR ANALYSIS ON THE QUESTIONS OF LAW IN CATEGORY 1 i.e. QUESTIONS 1, 2 AND 4 IN RELATION TO WHETHER SECTION 106(3) ENCROACHES ON JUDICIAL POWER

27. We commence with a consideration of the constitutional principles applicable when a Court is undertaking a review of the constitutionality of a statutory provision or statute under **Art**. **4(1)** and **Art**. **121 FC.**

## CONSTITUTIONAL PRINCIPLES

28. **Art**. **4(1) FC** is the central feature of our Federal Constitution which allows for the review of all legislation including the Constitution itself. (see **Zaidi Kanapiah [2021] 5 CLJ 581**, **Dinesh TanaphII [2022] 5 CLJ 1**). Judicial review is a cardinal feature of judicial power. As recognized by this Court in **SIS Forum (Malaysia) v Kerajaan Negeri Selangor**; **Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339**, judicial review in Malaysia encompasses constitutional judicial review and administrative judicial review.

29. When the validity of a statute is being impugned on the ground that it is in contravention with the **Federal Constitution**, the court exercises its inherent and constitutional powers of judicial review under **Art**. **4(1) FC**.

30. Constitutional judicial review is to be contrasted with administrative judicial review in that the latter involves the supervision of the acts and/or omissions of public law bodies per se without challenging the validity of a specific legislative provision.

31. The determination of the validity of a written law that is challenged as being *ultra vires* the **Federal Constitution** is an exercise of construction which is to be undertaken in accordance with established constitutional principles. This is equally true for tax or fiscal statutes as it is for any other statute.

32. The determination involves a two-fold process of interpretation *vis-à-vis* the Constitution and the impugned statute. The substance and effect of the impugned legislation is to be benchmarked against the breadth and scope of the constitutional provision it allegedly impinges upon. In other words, the process to be undertaken may be summarised as follows:

    (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) The Court then 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 **Art**. **4(1) FC** should be utilised;

(e) To that extent constitutional review of a statute by the Judiciary under **Art**. **4(1) FC** is an iterative process;

(f) 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. (see **B.N.C.B. v Babubhai (1987) 1 SCC 606 (para 4)** where it was held, *inter alia*, that *"...It is an elementary rule that construction of a section is to be made of all parts together. It is not*

*permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section."*

(g) 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;

(h) Where however 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. The function of the Court in this context is to ensure that the other organs of the government do not overstep or overreach their functions so as to contravene the fundamental liberties in **Part II of the FC**. The **Federal Constitution** strikes at any arbitrariness or capriciousness of State action, so as to ensure fairness. The action of the Legislature should ensure that it is based on valid and relevant

principles applicable alike to all similarly situated, and not guided by extraneous and irrelevant considerations.

(i) 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. The State should therefore generally be left with wide latitude in designing and implementing modes of imposing fiscal regulatory measures and the Court should not, unless compelled by the **Federal Constitution**, encroach into this field. However, where such measures are shockingly arbitrary, clearly illegal or unconstitutional, the Court should act under **Article 4(1) FC**. (see **M/S Bajaj Hindustan Ltd. v Sir Shadi Lal Enterprises Ltd. (2011) 1 SCC 640 at 655** and **656)**.

(j) The principle of judicial restraint applied to taxing statutes emphasizes the significance of taxation, which extends beyond its role as a means of generating revenue for government expenditures. Taxation also serves as a mechanism to address economic and societal disparities, aiming to mitigate inequalities within society.

## APPLICATION OF THE CONSTITUTIONAL PRINCIPLES ABOVE TO THE PRESENT CASE

## LIMB (A): WHAT IS THE SCOPE AND AMBIT OF THE CONSTITUTIONAL PROVISION IN ISSUE?

33. When we apply the foregoing process or test to the present facts, the first question that arises for consideration is the full scope and ambit of the constitutional provision in issue. In relation to the instant questions, namely **Questions 1**, **2** and **4**, the Appellants have made reference to **Art**. **121 FC**, meaning that they maintain that judicial power as contained in **Art**. **121 FC** has been encroached or abrogated.

## WHAT IS JUDICIAL POWER?

34. We return to the age-old question of what judicial power means. The oft-cited definition by CJ Griffith in **Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330**, a decision from Australia, is usually relied upon as a definition of the term:

> *"... I am of the opinion that the words "judicial power" as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision*

*(whether subject to appeal or not) is called upon to take action.*

35. This was affirmed for taxation matters in the Privy Council decision of **Shell Company of Australia v Federal Commissioner of Taxation [1931] AC 275 (at 295-296) ('Shell')**, as pointed out by the Appellants.

36. It is notable that in **Shell** the Privy Council concluded that the Board of Review was held to be exercising an administrative function in reviewing the assessment by a Commissioner, rather than judicial powers. The Privy Council negatived the proposition that the Board of Review was exercising judicial powers. A parallel may be drawn with the SCIT under the ITA – a body that is "not a court stricto sensu" (see: **Andrew Chew Peng Hui, *Tax Appeals in Malaysia: Law and Procedure*, (Malaysia: Thomsom Reuters, 2021)** at page 12) but an inferior tribunal (see: **Puah Bee Hong @ Bee Hong (F) & Anor. v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor. (Robert Teo Keng Tuan, Intervener) & Another Case [1994] 2 CLJ 705** at 713).

37. Coming back to the issue at hand, **judicial power refers to the independent power granted to, or vested in the Courts, by the Federal Constitution**.

38. There are several facets to judicial power. **Art. 4(1) FC** confers the right of constitutional judicial review to the

Judiciary to ensure that the provisions of the Federal Constitution, which are supreme, are not contravened by the Legislature or the executive arms of government. This is the hallmark of a jurisdiction that practices constitutional supremacy.

39. This means that the Judiciary is conferred the power to ensure that the Legislative and executive arms of the government do not encroach beyond the scope of their individual powers under the provisions of the Federal Constitution, as they subsist. This ensures the doctrine of the separation of powers is adhered to. The Judiciary is the guardian of the Federal Constitution in a jurisdiction such as ours which practices constitutional supremacy.

40. Separately, judicial power also refers to and encompasses 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.

41. The other aspect of judicial power which requires mention is that in this jurisdiction the long-raging debate on whether the 1988 amendment to the Federal Constitution in relation to the vesting of judicial power effectively abrogated the judicial power of the Courts, has been settled by the construction of judicial power as subsisting

in both **Article 4(1)** and **121 FC**.(see **Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals [2018] 3 CLJ 145**, **Semenyih Jaya**, **Zaidi Kanapiah** (supra), **SIS Forum** (supra) and **Dhinesh Tanaphll [2022] 5 CLJ 1**).

42. The latter provision by delineating or describing the jurisdiction of the High Court does not abrogate judicial power because such power is also vested in **Article 4(1) FC** which allows the High Court and the superior Courts to strike down legislation passed by Parliament where it does not conform to the Federal Constitution. Such striking out would be impermissible or impossible if indeed judicial power was not vested in the superior Courts. Therefore the lack of the words '*judicial power shall be vested in two High Courts...*" does not abrogate judicial power nor the extent of such judicial power, as borne out by the continuing exercise of judicial power vide the inherent jurisdiction of the Courts.

43. This brings to the fore the distinction between judicial power and jurisdiction. Judicial power is vested in the Federal Court and the superior courts. The inferior courts or subordinate courts created by federal law acquire judicial power (to a limited extent), only as prescribed by federal law.

44. Jurisdiction in relation to the superior courts, refers to the delineation conferred by Parliament and accepted by the

Courts to facilitate or enable their exercise of judicial power. It should be said that the Federal Court enjoys some degree of original jurisdiction. In this jurisdiction, the **Courts of Judicature Act 1964** is the legislation by Parliament facilitating the exercise of judicial power by the Courts. Thus, except for the original jurisdiction of the Federal Court, which flows directly from the Federal Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it, and, second, an act of Parliament must have conferred it.

45. Having deliberated on the meaning of the constitutional provision which is asserted to have been infringed or encroached upon, it is evident that the facet of judicial power being referred to by the Appellants 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.

46. And the controversy in issue here is the claimed abrogation or suspension of judicial power by reason of **section 106(3) ITA**, when the judicial power of the Courts to hear and determine all the defences available to a taxpayer when the Inland Revenue exercises its powers of recovery and collection, are curtailed in several aspects.

47. Having determined the scope and ambit of the constitutional provision in issue, namely the scope and ambit of judicial power under **Art 4(1)** and **Art 121 FC**, we proceed to consider limb (b).

**LIMB (B) WHAT IS THE SUBSTANCE AND EFFECT OF SECTION 106(3) ITA ON ITS TRUE CONSTRUCTION?**

48. In determining this question, it will first be necessary to ascertain **whether section 106(3) ITA is to be construed in vacuo or in the context, purpose and object of the ITA as a whole**.

49. The Appellants effectively postulate that the section should be construed *in vacuo*. This is borne out in the Appellants' submissions (and those of the *amicus curiae*), as throughout their submissions, the Appellants (and *amicus*) have concentrated their arguments purely on **section 106(3) ITA** without once attempting to construe the sub-section in the context of **section 106 ITA** itself or the Act as a whole. The entirety of the argument on the alleged usurpation of judicial power focuses on **section 106(3) ITA**. It is contended by the Appellants as stated earlier, that a literal application of **section 106(3) ITA** would effectively amount to the decision of the Inland Revenue 'usurping' the High Court of its judicial power to effectively determine disputes.

50. However, such an approach which focuses wholly on the sub-section 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. Moreover, the latter approach is the generally accepted mode of statutory construction approved by most jurisdictions.

51. Secondly, the **ITA** does not comprise **section 106(3) ITA** alone. That provision must be read together with the other provisions of the Act including **section 99(1)** of the same. **Section 99(1) ITA** provides for a right of appeal against an assessment by an aggrieved person, to the SCIT.

52. And the existence of the appeal procedure in **section 99(1) ITA** does not preclude or oust the right of judicial review against the determination of a statutory tribunal, namely the SCIT. In other words a construction of **section 106(3) ITA** in the context of the entirety of Act gives a more accurate picture of whether judicial power or function is removed or suspended for the purposes of constitutional review.

53. Apart from **section 17A of the Interpretation Acts 1948** and **1967**, this position in relation to the construction of a statute is borne out by case law. As started earlier, a complete understanding of the words in a statute and the legislative intention for its enactment can only be achieved by carefully examining the entire document and all its

components (see: **BNCB v Babubhai (1987) 1 SCC 606 (para.4)**). In **Canada Sugar Refining Co. v R (1898) AC 735**, it was said at 741 that:

> "*Every clause of a statute should be construed with reference to the context and other clause of the Act, so as, as far as possible, to make consistent enactment of the whole statute*."

54. A similar view was espoused by this Court in **Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal [2023] 2 MLJ 621** (in the context of the **Town and Country Planning Act 1976 ('TCPA')**):

> *"[141] As such s 4(5) of the TCPA must not be read in vacuo, as this would lead to an unnatural meaning and would fail to give effect to the true purport and meaning of this section as envisioned by Parliament. In line with the purposive interpretation of statutes and the aim of giving effect to legislative intent,* ***provisions should be interpreted holistically and should not, as far as possible, be interpreted in a way that would contravene other provisions in the Act****. The Act must be read holistically and its provisions read harmoniously. This was expressly provided in s 4(5) of the TCPA itself. For instance,* ***a provision cannot be interpreted such that it would result in effectively negating the application of another provision****.* ***A*** *provision cannot be used to fetter the legislative intent in enacting other provisions of the Act and the purport of the Act as a whole.*

55. Following on from the legal reasoning above, it follows that the evaluation of the constitutional validity of **section 106(3) ITA** necessitates an understanding of the rationale behind the enactment of the **ITA**. This in turn means that the effect of **section 106(3) ITA** within the statute has to be studied as a whole, as opposed to a construction of the section in vacuo.

56. In order to ascertain the purpose and object of the **ITA** it is appropriate to consider the legislative history of the **ITA**.

## THE LEGISLATIVE HISTORY OF THE ITA 1967

57. The income tax regime in our country was introduced in 1948 under the British colonial era. It was introduced to legitimise the collection of taxes from individuals and corporations. The first income tax legislation introduced in Malaya was the **Income Tax Ordinance 1947**. This Ordinance was substantially based on the **Model Colonial Territories Income Tax Ordinance 1922 (United Kingdom)** (see: **Kasipillai J, A Comprehensive Guide to Malaysian Taxation (McGraw-Hill: Malaysia, 2005)**). Following the formation of Malaysia in 1963, the **Income Tax Ordinance 1947** was repealed and replaced by the **ITA 1967**, which came into effect on 1 January 1968. The **ITA 1967** consolidated the **Income Tax Ordinance 1947**, the **Sabah Income Tax Ordinance 1956** and the **Sarawak Inland Revenue Ordinance 1960**.

58. Significantly, the **ITA** provided for the formation of the SCIT to hear appeals against income tax assessments. This was explained by the then Finance Minister, Tun Tan Siew Sin during the second reading of the Income Tax Bill at the *Dewan Rakyat*:

> *"Appeals against assessments to the Board of Review in West Malaysia and Sabah and to the Commissioner of Inland Revenue in Sarawak will be discontinued with the appointment of Special Commissioners. The appointments will be made by the Yang di-Pertuan Agong and it is intended that at least one of any two Special Commissioners hearing an appeal should be a person with legal or judicial qualifications.* ***Adequate safeguards for the interests of taxpayers are provided in the Bill through a right of appeal to the High Court and, if necessary, to the Federal Court. The new procedure, it is hoped, will expedite the disposal of appeals against assessments to the mutual advantage of both the appellant and the Government.****"*[1]

59. The then Finance Minister further emphasised the aim of the Government to combat tax evasion through the proposed Bill:

> *"Honourable Members will have observed that the penalty provisions in this Bill in certain respects are more severe than those in the existing Ordinances. The justification for these enhanced penalties is that* ***it is the duty of the Government to ensure that the income tax laws of the***

[1] Parliamentary Debates of House of Representatives (Fourth Session of the Second Parliament of Malaysia, 24 August 1967) Vol IV, No. 11, 2259-2260

***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.*** *These penalties are necessary as a deterrent to would-be tax evaders or those who deliberately delay submission of returns of income or omit or understate their income. It is considered that the Government should not condone the sins of those who do not accept their obligations to the country. The honest taxpayer need have no qualms about these penal provisions since there is provision in the Bill to abate or remit the penalties where circumstances warrant such abatement or remission.*

***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. Taking into consideration that there are approximately 213,500 individuals in Malaysia paying income tax out of a population of nearly 10 million and the average reported income of a businessman is only $3,600 per annum, it should be obvious to all and sundry that* ***evasion and avoidance of tax are manifestly rife in this country.*** *These additional powers are, therefore, necessary and will be used with circumspection and fairness by the Inland Revenue Department. I am sure that every honest citizen will support the Government in its fight against tax evasion and the prevention of tax avoidance."*[2]

60. The philosophy behind the introduction of the requirement for payment of tax, notwithstanding any appeal lodged by

[2] ibid, 2260-2261

the taxpayer, was explained by the then Finance Minister during the second reading of the **Income Tax (Amendment) Bill** at the *Dewan Rakyat*:

> *"Broadly speaking, the collection of tax on any assessment cannot proceed so long as there is a valid objection or appeal against the assessment.* ***In many cases, however, taxpayers lodge an objection or appeal merely to delay the payment of the tax. Even one of the strongest critics of this Bill, a lawyer, who wrote a letter to me, admits that the present Section 81 "did give rise to a number of appeals which were brought purely as a matter of delaying tactics", to use his exact words. I can assure the House that even in the past many of these appeals were frivolous. In the future, assuming that our anti-evasion drive is successful, the number of such appeals will rise steeply and without the provision proposed, the Department would be swamped with an unmanageable list of appeals which would take many years to settle. It is obvious that the more successful the drive, the greater the number of appeals, and hence it would be impossible in practice to deter evaders without this provision. Thus, in cases where the tax is substantial, it has been found that taxpayers have deliberately delayed the settlement of their appeals in order to have the use of the money which should have been paid as tax. Clause 10 now requires that the tax charged in any assessment may have to be paid, regardless of any objection or appeal against the assessment.*** *It is not intended, however, that payment of the full amount of the tax shall be demanded in every case where an objection or appeal is lodged. The Comptroller is given discretion to extend the period within which payment of tax may be made in any particular case, and Hon'ble*

*Members may be assured that he will exercise his discretion in a reasonable and responsible manner. Where, for example, it is necessary for the Comptroller to make a protective additional assessment in any case where the 12-year limit in Clause 8 is about to expire, he will not necessarily demand payment of the full amount of the tax in question if the taxpayer and his agent are genuinely co-operating in an effort to bring out the full facts of the case. Similarly, the provisions of Clause 10 will not normally be applied to employees who will, as at present, be able to pay their tax out of their remuneration over the whole of the year of assessment, or within such further period as the Comptroller may determine. In view of the fact that we are now half-way through the year, Government takes the view that the date "1st July, 1960" in proviso (a) should be amended to read "1st September, 1960", as in the case of Clause 6. This amendment will obviate any hardship in meeting the tax due on assessments made prior to 1st January, 1960. This clause, again, is not novel and is based on a similar provision which has been in force in Australia, New Zealand and several other countries for many years."*[3]

61. It is clear therefore that 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.

62. At first blush, **section 106(3) ITA**, taken literally, appears to prohibit the court from taking into account allegedly

[3] Parliamentary Debates of House of Representatives (Second Session of the First Parliament of Malaysia, 20 June 1960) Vol II, N1086-1086

wrongful computations of tax or the fact that the impugned amount is the subject of appeal.

63. The Appellants argue that this restriction of available defences "ousts" judicial power and renders the section unconstitutional.

64. As we have concluded earlier, this narrow consideration of the section is insufficient to enable this Court to ascertain the true intent and purpose of the section and the Act as a whole.

65. As stated earlier, the ITA does not comprise **section 106(3)** alone. That provision 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** which fall within **Part VII of the ITA** entitled "Collection and Recovery of Tax".

66. **Section 106(1)** states:

> *"Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government."*

(Emphasis Ours).

67. The provisions in **sections 103** and **106** enable the Inland Revenue to ensure recovery of the tax assessed to be due by declaring it a statutory debt, or a debt due under

**section 106 ITA** for purposes of collection and recovery only. This is unlike a contractual debt arising from a loan or financing etc.

68. In essence, under the system promulgated by Parliament for the recovery and collection under **Part VII of the ITA**, once the tax is assessed by the DGIR, it has to be paid within a time fixed under the statute. If the taxpayer does not pay, the assessed sum becomes a 'debt' by virtue of **section 106** for purposes of recovery only. If the sum assessed to be a debt pursuant to **section 106(1)** is not paid, then the Inland Revenue may initiate recovery proceedings to ensure collection of the debt.

69. In recovery proceedings, **section 106(3)** comes into play. It expressly obviates certain pleas or 'defences' to the recovery of the debt under **section 106(1)** by providing that:

> *"(3) In any proceedings **under this section** the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsections 106(3), (5) or (7)"*

70. This in turn begs the question why such recovery proceedings of the tax assessed, restrict the defences available to the tax payer. An answer may be gleaned from the manner in which the issues of collection and recovery

are dealt with separately from the resolution of disputes relating to tax matters.

71. The collection and recovery procedure under **Part VII** of the ITA is distinct from the disputes procedure which enables taxpayers to challenge assessments under **Part VI**. Under **Part VI**, the taxpayer exercises his right of challenge or objection under **section 99(1) ITA** and the subsequent relevant provisions, for example in **Schedule 5**.

72. A taxpayer's right of appeal is set out in **section 99(1) ITA**. It is therefore apparent that any person aggrieved with an assessment is to appeal to the SCIT against the assessment by the DGIR within thirty days after the service of the Notice of Assessment.

73. From a construction of the **ITA** at **sections 103 – 107** for example, it is evident that **these statutory provisions fall under the Chapter related to Collection and Recovery under Part VII** of the statute.

74. **Section 103B ITA** provides for recovery of the sum assessed to be due by the DGIR under **Part VII**, notwithstanding the institution of proceedings under any other part of the Act or under any other law. This allows for recovery pending the taxpayer's dispute or challenge on the basis or quantum of the sum so assessed.

75. And in like vein **section 106(3) ITA** restricts or narrows the scope of defending the statutory claim for recovery under **section 106 ITA** in view of the other provisions in the **ITA** allowing for disputes to be brought as established under the Act.

76. When the general scheme of the Act is looked at, it becomes apparent that the **ITA** provides for a mode of resolution of a taxpayer's dispute by way of appeal to the SCIT under **section 99(1) ITA** which provides:

> *"**A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment** by giving to the Director General within 30 days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) **a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.***

77. **Section 99(1)** provides for a reference of the dispute to the SCIT who are qualified to deal with tax issues, more particularly the basis for assessment, the quantum for assessment, the computation of assessment, the liability for assessment under the ITA etc.

78. However, prior to the hearing of such an appeal under **section 99(1) ITA**, **section 101(1) ITA** requires the DGIR to review the assessment against which the appeal is made prior to referring the matter to the SCIT, under **section 99(1) ITA**.

79. If the review is unsuccessful in the sense that no agreement is reached between the DGIR and the taxpayer as to the basis for assessment or quantum of liability, only then is the matter referred for adjudication to the SCIT under **section 99(1)**.

80. Proceedings under the SCIT are dealt with **under section 102(4) which in turn refers to Schedule 5. Schedule 5 sets out the mode of procedure and how the SCIT hears and adjudicates on the matter.** The SCIT after hearing the appeal deliberates on the same and hands down a decision in the form of a deciding order. This deciding order at **paragraph 23 to Schedule 5** is stated to be final. However, a right of appeal lies from the **SCIT** to the High Court on questions of law under **paragraph 34**. Appeals lie from the High Court to the Court of Appeal and the Federal Court as provided under **paragraph 42**.

81. It is therefore 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 in **paragraph 34 of Schedule 5** to **section 102 ITA**.

82. A right of administrative judicial review also subsists, as such a right of administrative review lies against the decisions of all inferior tribunals because the Courts enjoy supervisory judicial powers to do so as explained earlier above. This power is recognised and delineated under of the (**Courts of Judicature Act 1964**) **Sch 1 to section 25**.

83. A right of constitutional judicial review under **Art**. **4(1) FC** also lies where it is contended that a provision of the Act is unconstitutional, as is the case here.

84. The provisions in **sections 103 to 106 ITA**, and in particular **section 106 ITA** *in toto*, relate to the **immediate collection and recovery of tax assessed to be due by the DGIR within a *'pay first dispute later'* system**. On the other hand, objections to, or appeals against the veracity of the sum assessed to be due, are adjudicated on the basis of the system prescribed under **section 99(1) ITA under Part VI, Chapter 2 entitled 'Appeals'**. This means, in effect, that even if adjudication is delayed on the ultimate liability of the tax payer of the sum assessed to be due, immediate payment of the sum is NOT deferred.

85. Any errors in the sum so assessed to be due will be refunded to the tax payer under **section 111 ITA,** after the

full process of adjudication prescribed for objections and appeals in **Chapter 2** and **Schedule 5** is undertaken.

86. Put another way, adjudication of the merits of an assessment fall to be considered by the SCIT under **section 99(1) ITA** with recourse to the superior Courts by way of appeal. However, for purposes of immediate collection and recovery of sums assessed to be due by the DGIR, recourse is made to the Courts under **section 106 ITA** supported by **section 142(1) ITA** and **section 103B ITA** to give effect to the **'Pay first dispute later'** scheme and operation of the **ITA**.

87. 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.

88. And this is consonant with the 'Pay first dispute later' mode of tax imposition by the Government. 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.

89. In short, **section 106(3) ITA** cannot be viewed as abrogating, suspending or removing judicial powers because the Court is only facilitating collection and recovery under the **ITA**. It is not exercising its full judicial powers of hearing, adjudication or determination which arise under the dispute adjudication system stipulated in **Part VI, Section 2, Appeals under the ITA**. The preclusion of issues relating to the quantum of tax payable or the basis of imposition of tax or whether a person is a 'chargeable' person or not are all matters that fall for consideration under the appeals procedure.

90. This is borne out by the **characterisation of the quantum of assessment** (falling due after issuance by the DGIR and expiry of the time period given to make payment) **as a 'debt' under section 106(1)**. This means that **the sum assessed becomes a 'debt' due under the ITA**, **which is recoverable in civil proceedings**.

91. 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.** It follows that the **sum adjudged to be due under section 106 is to facilitate**

**the collection and recovery of the sum assessed under the 'Pay first, dispute later' system**.

92. This mode of construction of **section 106 ITA** is the preferred and correct construction for yet another reason. It is not open to a Court to adjudicate on the same debt twice. If indeed the **section 106 ITA** proceedings are subject to the same level and form of judicial scrutiny as the appeal from the SCIT or judicial review, then *res judicata* and *issue estoppel* would bite, precluding the determination by the SCIT of the dispute under **section 99(1) ITA** and the subsequent right of appeal conferred by Parliament to the superior Courts. Judicial review may also be foreclosed. This in itself provides a coherent basis for explanation as to why **section 106(3) ITA** restricts the areas that the Court may scrutinise in a **section 106 ITA** recovery proceeding.

93. If **section 106 ITA** were construed in a fashion so as to allow the taxpayer to challenge proceedings under that provision by raising certain defences both at court and before the SCIT, it could give rise to inconsistent decisions by the court and the SCIT. As astutely observed by Edgar Joseph Jr FCJ in **Dato' Haji Ghani Gilong**:

> "*If Counsel for the taxpayer were correct in his contention that the plea of limitation based on sub-sections 1 and 3 of s. 91 of the Act is available to him in proceedings for recovery of tax brought in Court as well as in proceedings before the Special Commissioners, then* ***a decision by the High Court***

> ***on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court*** *thereby abdicating their fact finding function of determining whether there has been fraud or wilful default within the meaning of sub-section 3(a) of s. 91 of the Act. Alternatively, even* ***if the Special Commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the identical question of limitation***."

94. It is also pertinent to comprehend that the **section 106 ITA** statutory characterisation of the sum assessed by the DGIR to be due and payable ***'under this Part'*** does not give rise to a final judgment. It provides for an enforcement or recovery mechanism to meet the needs of collecting the sum due from the taxpayer first, while allowing adjudication of the debt on its merits to follow later. All this is in keeping with the 'Pay first, dispute later' system embedded in the **ITA**.

95. This construction is supported by the existence of **section 99(1) ITA**, the appeals procedure, which relates to a full adjudication of the sum assessed to be due and payable by the DGIR. Judicial power is thus preserved in the **ITA** for adjudication of the taxpayer's dispute, notwithstanding an earlier collection mechanism. When this is considered in conjunction with the subsisting supervisory judicial powers of the Court, as well as the statutory entitlement of the taxpayer to a refund of any sum erroneously claimed

or assessed, it follows that it cannot be said that judicial powers are abrogated or removed. Dispute resolution is simply deferred to enable collection first. In other words, the statutory 'judgment' created under **section 106 ITA** does not possess the character of a final judgment obtained after a full adjudication of the tax assessed to be due by the DGIR.

96. We have stated earlier that the purpose of the ITA as outlined in the Hansard is to ensure that there is full and speedy settlement of tax debts and that recalcitrant taxpayers do not utilise objections and the appeal procedure to defer payment of their taxes indefinitely. It is in the public interest that taxes are collected expeditiously and this is a relevant factor for the Court to take into account. The fact that the words 'public interest' are not literally utilised in either the **ITA** or the **Federal Constitution** does not mean that public interest is of no relevance. The **Federal Constitution** subsists in, and for, the public interest and the nation as a whole. The 'Pay first, dispute later' system certainly serves the public interest in terms of the fiscal needs of the public and the nation as a whole.

## OTHER JURISDICTIONS

97. The constitutionality of the 'Pay first, dispute later' system has been considered in other jurisdictions, directly and indirectly.

**CONSTITUTIONAL COURT OF SOUTH AFRICA**

**METCASH TRADING LIMITED v THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE & ORS [CASE CCT 3/2000] ('METCASH')**

98. In Metcash, the primary issue before the Constitutional Court of South Africa was whether **sections 36(1), 40 (2)(a)** and **(5) of the South African Value-Added Tax Act 89 of 1991 (VAT 1991)** were **unconstitutional for limiting the right of access to courts protected by section 34 of the South Africa Constitution (SA Constitution)**.

99. Section 36(1) of the VAT 1991 in essence provided that **payment of an assessment was not suspended by any appeal or pending the decision of a court of law**. This provision evidenced the utilisation of the 'Pay first dispute later' system of tax collection, which is similar to ours. Their provisions in Part V of the VAT 1991 are analogous to our **Part VII namely sections 103 – 106 ITA**, which do not allow for a suspension of payment of the assessment due pending appeal or the institution of any other action (see **sections 103(1), 103B** and **106 ITA**) (unless an exemption is granted by the DGIR).

100. **Section 40(2)(a**) of VAT 1991 empowered[4] the Commissioner (equivalent to our DGIR) to enforce

[4] These tax provisions were repealed after the case and replaced by the Tax Administration Act with new provisions.

payment by **filing a statement with a court which acts as a civil judgment** in the following terms:

> *"40. Recovery of tax.*
>
> *...*
>
> *(2)(a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.*
>
> (Emphasis Ours).

101. **Section 40(5)** of the **VAT 1991**, which is closely analogous to our **section 106(3)**, puts the correctness of the assessment beyond challenge in such proceedings. It stipulates:

> *"(5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment."*

102. The salient facts of the case are that an assessment of R266 million was issued to Metcash by the Commissioner under the statute. Metcash objected to the assessment, but the Commissioner rejected the objection and required Metcash to make payment within 48 hours. Failure to pay would have led to the Commissioner implementing the summary procedure of filing a certificate in terms envisaged under section 40(2)(a) such that it would have the effect of a judgment.

103. Metcash, in response, approached the High Court on an urgent basis. The judge of first instance found that Sections 36(1), 40(2)(a) and 40(5) of the VAT 1991 were invalid by reason of their effective infringement of section 34 of the SA Constitution which guaranteed access to justice. And this was because the courts could not suspend the obligation to pay, while the Commissioner could. To that extent the judge concluded that these provisions excluded the power of a court of law to provide an aggrieved vendor with interlocutory relief irrespective of the merit or demerits of his case.

104. On appeal, the Constitutional Court of South Africa reversed the High Court and held that sections 36(1), 40(2)(a) and 40(5) of the Act **did not infringe the constitutionally protected right of access to the courts and did not oust the jurisdiction of the courts**. The Court dealt with each of these provisions in turn.

105. With respect to **section 36(1)** which held that the payment of an assessment is not suspended by an appeal under the VAT 1991 or the decision of a court of law, the Constitutional Court did not construe section 36(1) in vacuo, but considered its purpose in the context of Part V of their statute, which related to objections and appeals against the assessment by the Commissioner. It held that Part V which allowed *inter alia*, for proceedings before a 'Special Court or Board' and the subsequent resort to a court of law by way of an appeal, amounted to a statutory mechanism specially created for this type of administrative decision undertaken by a specialist panel.

106. Secondly it held that section 36(1) had to be looked at in its textual context and its plain wording which sought to serve 'two separate but related objectives':

(i) to ensure that the disgruntled taxpayer paid their taxes and did not delay the same by pursuing remedies under Part V of their Act; and

(ii) refunds for incorrect assessments would be made later.

107. It was in that context that the amount assessed could not be suspended by appeal or any other pending decision of a court of law. The common law practice of a suspension of execution by virtue of an appeal did not apply to the appellate procedure created under VAT 1991. It could not

of itself have the effect of suspending payment. It was concluded that the non-suspension of the obligation to pay pending appeal only concerned the obligation of the taxpayer to pay first, notwithstanding demur, the assessed VAT chargeable under their statute.

108. It was further concluded that the refusal by the Commissioner to grant relief under section 36(1) could be subject to judicial intervention in certain circumstances. Therefore the fact that there was a relegation of the specialist subject matter to a special court did not in itself oust the jurisdiction of the courts. Moreover the Court considered that judicial review was not ousted.

109. Reverting to our case, in like manner, the provision for the specialist SCIT comprising a tribunal to deal with the objections and challenges of a taxpayer, cannot be said to amount to an ouster of the judicial power of a Court. The Act merely designates an independent and impartial tribunal to deal with the disputed tax case. The fact that there is a right of appeal to the entire hierarchy of the court system further puts paid to any contention that judicial power is ousted.

110. As for the treatment of a certified document of the sum assessed to be due by the Commissioner as a civil judgment, the Constitutional Court found that contrary to ousting the courts, the entire procedure requires the intervention of the court officials and legal rules and

procedures relating to execution. It was held that it sets in train the execution process of the particular court under the ordinary civil process. So it cannot be said that judicial power is ousted.

111. **Again when compared to the statutory mechanism for recovery and collection under the ITA in this jurisdiction, it is clear that contrary to ousting the jurisdiction of the courts, the courts are utilised to enable execution and recovery, in keeping with the need to collect tax first and dispute later**.

112. Finally, as for section 40(5) which is analogous to our **section 106(3) ITA**, the South African Constitutional Court held that while it limited the basis on which an assessment could be challenged it did not prohibit litigation. Nowhere is the word 'ouster' utilised in the language of the sub-section.

113. In like manner there is nothing in **section 106(3)** that expressly ousts the judicial power or jurisdiction of the Court. More importantly as held in **Metcash** the language of **section 106(3)** is narrowly focussed on the correctness of the assessment. While our section stipulates that the Court shall not look at the correctness of the assessment, the then South African legislation precludes the taxpayer from questioning the correctness of the assessment. However, both achieve the same object in narrowing

down the field of inquiry available to the taxpayer and the Court, at this juncture of the entire taxation process.

114. Additionally, similar to the situation in **Metcash**, defences other than those narrowly confined in **section 106(3) ITA** are left undisturbed by our Act. There may well be other procedural or substantive issues that can be utilised by the taxpayer in relation to the tax assessed to be due by the DGIR.

115. Moreover, the effect of **section 106(3)** is temporary. It must be borne in mind that the scheme of the Act allows for the aggrieved taxpayer to have recourse to a fair judicial determination in the course of his dispute with the DGIR through the hearing and adjudication before the specialist SCIT and subsequently the Courts. The judicial powers of review are not ousted. The DGIR retains wide powers to allow for payments by instalments, suspension and even exemption. Judicial intervention in terms of a stay is not ousted either.

116. The fact that there are statutory safeguards for restitution or repayment if the assessed sum is found to be incorrect, ensures that the taxpayer is ensured of his entitlement to a full judicial dispute resolution hearing, such that judicial power is neither suspended nor abrogated.

117. **Metcash** bears out the position in relation to our **ITA** that a system which is founded on a 'Pay first, dispute later'

system, requires, as an essential part of the scheme, that payment is made first and liability deferred. To that extent the obligation to pay first as effected through **sections 103, 103B** and **106 ITA**, provides for collection and recovery immediately upon assessment.

118. However, the obligation to pay and the limitation of available objections pertaining to the correctness of the assessment are limited in scope and temporariness, as these issues remain available to be ventilated under **section 99(1)** and **Schedule 5** of the **ITA**. Judicial review is also not abrogated. Judicial intervention in the form of a stay is not prohibited. To that extent, it cannot be said that judicial power is negated or ousted.

119. In the context of the purpose and object of the Act, it bears reiterating that these provisions serve the public purpose in obtaining full and speedy settlement of tax debts.

120. Another relevant authority is that of **Capstone 556 (PTY Ltd and Commissioner, South African Revenue Services, The Minister of Finance Case No: 26078/2010** which deals with the **South African Income Tax Act 58 of 1962**. It was held there that the filing of a certified statement under **section 40(5)** of their statute did not have *"the rights determining character of a judicially delivered judgment".* Binns-Ward J further held:

> *"Although a statement filed by the Commissioner in terms of section 91(1)(b) has all the effects i.e. consequences of a judgment it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner. It has the effect of a judgment however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable."*

121. This statement, with respect, accurately reflects the nature of a **section 106 ITA** judgment obtained purely for the enforcement of an assessment by the DGIR. It is essential for the execution of the amount assessed to be due by the taxpayer under the 'pay first dispute later' system entrenched in our **ITA**.

**AUSTRALIA**

122. The relevant case is **Deputy Commissioner of Taxation v Danny Buzadzic; Deputy Commissioner of Taxation v Leisa Buzadzic [2019] VSCA 221**

123. Here, the Deputy Commissioner of Taxation brought proceedings against Danny and Leisa Buzadzic ('the Buzadzics') seeking recovery of income tax for a nine-year period, including administrative penalties and interest charges.

124. Similar to the instant appeals, the Commissioner sought summary judgment against the Buzadzics on the basis

that they had no real prospect of success under s. 61 of the Civil Procedure Act 2010 and r. 22.03 of the Supreme Court (General Civil Procedure) Rules 2015.

125. The Buzadzics challenged the constitutional validity of a number of statutory provisions. One was s. 175 of the *Income Tax Assessment Act 1936* (Cth) ('the 1936 Act') which states that:

> "*[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with*." ('the no invalidity provision')

126. The other was **s. 350-10(1) item (2) of sch 1 to the Taxation Administration Act 1953 (Cth) ('the TAA')** which provides that:

> "*production of ... a notice of assessment under a taxation law; ... is conclusive evidence that ... (a) the assessment was properly made; and (b) except in proceedings under Part IVC of [the TAA] on a review or appeal relating to the assessment—the amounts and particulars of the assessment are correct*." ('the conclusive evidence provision')

127. The Buzadzics also challenged the validity of **s. 14ZZM of the TAA** which states:

> "*The fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending*."

128. In summary, the Buzadzics argued that these provisions were contrary to the Constitution of the Commonwealth because they require the Supreme Court of Victoria to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power and they confer upon the taxing authority part of the judicial power of the Commonwealth, and further that those provisions operate to deny the defendant all rights to resist the pleaded assessments by proving in the Supreme Court of Victoria that the criteria of pleaded liability are not satisfied.

129. The applications for summary judgment were dismissed by a judge in the Trial Division on the basis that, if the provisions of the 1936 Act which the Commissioner relied on had the operation for which the Commissioner contended, they would 'impermissibly confer judicial power' on the Commissioner and 'require the Court to act in a manner inconsistent with its position as a repository of federal judicial power'.

130. On appeal, the Court of Appeal of Victoria observed that the prospect of provisions operating in a harsh manner has long been acknowledged as reflective of a *"legislative policy to protect the revenue against the prospect of taxpayers withholding payment and spending the proceeds on speculative appeals"* and further held that **the availability of review and appeal proceedings was**

**fatal to the Buzadzics' argument that the impugned provisions imposed an incontestable tax**.

131. In relation to the recovery proceedings, the Court of Appeal of Victoria observed that:

> *"[91] ... the court must be satisfied of a number of matters before finding that an amount is due and payable. It must determine that the correct parties are before it and, based on relevant assessments, whether there is a tax-related liability and the amount of such a liability. It may also need to consider a prima facie certificate under s 255-45 of sch 1 to the TAA, under which issues of valid service and the amount outstanding may be addressed... the fact that some or all of the matters in issue may readily be determined because of the ease of their proof does not deprive the process of its judicial character*."

132. The Court of Appeal of Victoria further held that:

> "*[95] ... The rule of law is satisfied, not only because the court applies the law to the question whether the statutory debt is established in a particular case, but also because there is elsewhere provided full opportunity for challenging the underlying assessment by way of review or appeal.*
>
> *...*
>
> *[98] ... The assessment is not an exercise of judicial power.* ***It provides the foundation for the creation of a statutory cause of action and the court exercises judicial power to***

***decide whether the conditions for the creation of that cause of action have been established***."

## HONG KONG

133. Next, in **The Commissioner of Inland Revenue v Shelcore Hong Kong Limited [2011] HKCU 143**, the issue confronting the Hong Kong District Court was whether **section 75 of the Inland Revenue Ordinance (IRO)** curtailed the Court's judicial power to hear defences against incorrect or excessive tax assessments in contravention of **Article 35 of the Basic Law ('BL')** and **Articles 10 and 22 of the Bill of Rights Ordinance ('BORO')**.

134. **Section 75 of the IRO** is not in *pari materia* with **section 106(3) of the ITA**, but it is substantially similar in effect. It reads as follows:

> "*(1) Tax due and payable under this Ordinance shall be recoverable as a civil debt due to the Government.*
> *(2) Whenever any person makes default in payment of tax the Commissioner may recover the same by action in the District Court notwithstanding that the amount is in excess of the sum mentioned in* section 33 of the District Court Ordinance (Cap 336)
> *(3)…*
> *(4)* ***In proceedings under this section for the recovery of tax the court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal****, but nothing in this subsection shall be construed so*

*as to derogate from the powers conferred by the proviso to section 51 (4B) (a) to give judgment for a less sum in the case of proceedings for the penalty specified therein.*"

135. The Hong Kong District Court held that the fact that the adjudicating tribunal's decision was subject to subsequent judicial control meant that there was no violation of the Basic Law and BORO.

136. The District Court further held that revenue law is a specialized area of law, wherein the Board of Review is a quasi-judicial tribunal established by law which is independent from the Commissioner of Inland Revenue. The judgment emphasized that taxpayers retain the right of access to court, where objection to the assessment is dealt with by the Board of Review and the High Court and objection to the tax is dealt with by the District Court.

**GHANA**

137. In **Kwasi Afrifa v Ghana Revenue Authority (Reference No.J6/02/2022)** ('**Kwasi Afrifa'**), the Supreme Court of Ghana had to consider the question of whether **section 42 (5) of the Revenue Administration Act, 2016 (Act 915) is inconsistent with and violates the constitutional right to administrative justice guaranteed under Article 23 of the Ghana Constitution 1992**.

138. The impugned **Section 42(5)** states as follows:

> *"(5) An objection against a tax decision shall not be entertained unless the person has;*
>
> *(a) in the case of import duties and taxes, paid all outstanding taxes including the full amount of the tax in dispute; and*
>
> *(b) in the case of other taxes, paid all outstanding taxes including thirty percent of the tax in dispute".*

139. The Supreme Court of Ghana held that the provisions did not contravene the constitutional right to administrative justice under Art 23 of the Ghana Constitution 1992.

140. In doing so, the Ghanaian Supreme Court observed that the structure of **Act 915** which contains avenues for the taxpayer to challenge the decision of the tax authority such as empowering the Commissioner General to waive, vary or suspend the requirements of **section 42 (5)** pending the determination of the objection or take any other action that the Commissioner General considers appropriate including the deposit of security, and allowing appeals to be made to the Tax Appeals Board, did not oust the jurisdiction of the court as such avenues did not preclude the taxpayer from exercising his constitutional right to seek redress for judicial review.

141. The Supreme Court of Ghana was faced with a similar question of law in the case of **Richard Amo-Hene v Ghana Revenue Authority & Ors (Writ No. J1/08/2021)**. The issue was whether:

(i) **Section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915)** which requires a taxpayer to pay all outstanding taxes including 30% of the tax in dispute (in the case of other taxes) before an objection to a tax decision can be entertained by the Commissioner General; and

(ii) **Order 54 rule 4(1) of the High Court (Civil Procedure) Rules, 2004 (C.I 47)** which stipulated that the High Court will not entertain an appeal against a tax assessment unless the aggrieved person has paid 25% of the disputed tax in the first quarter of that year of assessment as contained in the Notice of Assessment violated the presumption of innocence and a person's right of access to the court guaranteed under articles 2(1), 17(1), 19(2)(c), 33(1) & (5), 125(2), 130(1), 132, 133(1) and 140 of the Constitution of Ghana, 1992.

142. In answering this issue, the majority view adopted the reasoning from **Kwasi Afrifa**, holding that the presence of dispute resolution provisions under Act 915 subjecting tax decisions to objection, judicial review and appeal

meant that the tax regime passed the test of constitutionality.

143. From the foregoing we conclude that **neither section 106(3) nor the other subsections of section 106, 103 in its entirety, taken in the context of the ITA, have the effect of ousting, suspending, or abrogating judicial power**. On the contrary when read in context and purposively it allows for judicial intervention and judicial process to take its full course.

144. It bears repeating that the **ITA** allows for:

(a) An appeal process which subsequently leads to a full appeal before the hierarchy of the Courts of Malaysia;

(b) The grant of a stay at the discretion of the Courts exercising judicial power;

(c) The right of judicial review which is not ousted by the **ITA**.

145. Therefore it is only in relation to the immediate collection and recovery of tax due and payable under the **ITA**, that the Court undertakes a recovery function in order to give effect to the purpose and object of the 'Pay first, dispute later' model of tax adopted in this jurisdiction. This cannot amount to a negation, abrogation or suspension of

judicial power which may be exercised in all the circumstances set out in (a), (b) and (c) above. It therefore follows that **section 106(3) ITA** passes the constitutional test and cannot be invalid or unconstitutional.

146. We further conclude that neither **section 106(3) ITA** nor the other subsections of **sections 106** and **103** in its entirety, taken in the context of the **ITA**, have the effect of ousting, suspending, or abrogating judicial power. On the contrary when read in context and purposively it allows for judicial intervention and judicial process to take its full course, as we have explained at length above. Judicial power under the Federal Constitution is left intact, and accordingly **section 106(3)** is not unconstitutional.

147. Having analysed and considered the statutory provisions and scheme contained in the **ITA** we are in a position to answer **Questions 1, 2** and **4**.

(a) **Question 1**:

Whether **section 106(3) of the Income Tax Act, 1967** contravenes **Article 121 of the Federal Constitution**?

**Answer**:

No, it does not contravene **Art**. **121** of the Federal Constitution.

(b) **Question 2**:

Whether **section 106(3) of the Income Tax Act 1967** is unconstitutional and/or *ultra vires* as it usurps the judicial power of this Honourable Court guaranteed by **Article 121 of the Federal Constitution**?

**Answer**:

Question 2 is effectively the same as Question 1. The answer is that **section 106(3)** is not unconstitutional as it does not usurp the judicial power of the Courts guaranteed by **Art**. **4(1)** and **Art**. **121** of the Federal Constitution.

(c) **Question 4**:

Whether **Article 121 of the Federal Constitution**, which guarantees the judicial power of this Honourable Court, is relevant in the determination of civil recovery proceedings in tax matters (including in summary judgment proceedings therein)?

**Answer**:

Yes, **Art**. **121** of the Federal Constitution which relates to the existence and exercise of judicial power is relevant in the determination of civil recovery proceedings in tax matters. Judicial power is not ousted by the recovery proceedings initiated under **sections 103** and **106 ITA which comprise Part VII of the Act** and ensure recovery first prior to the full ventilation of the taxpayer's disputes in relation to the assessment of the DGIR. The determination or adjudication of such disputes are fully provided for in **section 99(1)** and **Schedule 5 ITA** as well as vide the powers of judicial review enjoyed by the Courts.

## OUR DELIBERATIONS AND ANALYSIS IN RELATION TO THE QUESTIONS OF LAW IN CATEGORY 2

148. We now turn to **Questions 3, 5 and 6** which pertain to summary judgment.

(a) **Question 3**:

Whether, by reason of **Sections 103** and **106(3) of the Income Tax Act 1967**, this Court is wholly prevented from considering whether or not there are triable issues and/or some other reason warranting a trial (within the meaning of **Order 14 Rule 1 and**

**Order 14 Rule 3 of the Rules of Court 2012**), before deciding whether or not to give judgment in favour of the Plaintiff, despite the fundamental liberties, rights and powers enshrined in, *inter alia***, Articles 5, 8** and **121 of the FC**?

(b) **Question 5**:

Whether **Order 14 Rule 3 of the Rules of Court 2012**, which provides that a Summary Judgment application may be dismissed if a Defendant can show "some other reason" for a trial to be held, applies in civil recovery proceedings in tax matters?

(c) **Question 6**:

Whether in instances of manifest and obvious errors in calculation of a tax assessment, a court is entitled by virtue of its inherent and judicial powers to consider a Defendant's defence of merit to dismiss or set aside an application for Summary Judgment by a Plaintiff and order full trial on the matter?

149. The **ITA** has a specific series of statutory provisions for the collection and recovery of the tax assessed to be due by the DGIR. These provisions are contained, as stated above, under **sections 103 - 110 of Part VII of the ITA entitled 'Collection and Recovery of Tax'.** It is not in dispute that this jurisdiction, like many others, operates

on a 'Pay First, dispute later' design of tax imposition as established by Parliament under the **ITA**.

150. It is noteworthy that the questions posed by the Appellants relate solely to **Part VII** on recovery and collection. These questions focus on the rules of civil procedure relating to the recovery of debts in general, rather than the recovery of tax imposed under the specific provisions of the **ITA** read as a whole.

151. 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. This means that the Court considers and ascertains whether a debt exists.

152. But under the **ITA, sections 103** and **106** specify statutorily, for purposes of collection and recovery only, that upon assessment, the sum assessed is due and payable upon the lapse of a specified period of time. It becomes a statutory debt or a debt created by statute.

153. **Section 103(1)** provides: *"Except as provided in sub-section (2) 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."***

154. The section provides for two separate matters:

(a) That by statute the sum becomes due and payable on the due date;

(b) That notwithstanding the taxpayer's right of appeal, the sum becomes due and payable.

155. In other words, while the process of appeal is pending the tax becomes due, putting into effect the 'Pay first, dispute later' system that defers the dispute but requires immediate payment. This is an essential aspect of expeditious and efficient collection of tax which is required to enable the nation to function effectively. Therefore, notwithstanding the taxpayer's right to challenge the tax assessed through the SCIT and subsequently the hierarchy of the courts, payment is not deferred. Any seeming 'inequity' is met by the guaranteed right of repayment under the Act.

156. The deferral of the challenge or dispute as to the tax assessed is further borne out by **section 103B** which provides:

> *'The institution of any proceedings under any other written law against the Government or the Director General shall not relieve any person from liability for the payment of any tax, debt or other sum for which he is or may be liable to pay under this Part.*

157. The Hansard in relation to **section 103B** states that the Government aims to ensure fair treatment between those who pay their taxes on time and those who do not. The latter group while seeking to challenge the tax assessed, are nonetheless required to make payment first while the challenge is deferred, because it would be unfair to those who pay their taxes on time if the latter category of taxpayers were accorded a longer time to meet their tax responsibilities simply by reason of their challenge (see: Penyata Rasmi Parlimen, Dewan Rakyat, (Parliamen Keempat Belas, Penggal Ketiga, Mesyuarat Ketiga, 16 December 2020), Vol. 54, at 26).

158. As stated earlier, the tax assessed is, by way of statute, a debt due from the taxpayer to the Government. The section statutorily deems the sum assessed to amount to a debt recoverable in civil proceedings. The purpose, again is to facilitate recovery of the sum assessed.

159. And to facilitate recovery **section 106(3)** limits the type of challenge that can be made <u>at this juncture, i.e. temporarily</u>. The right to raise those challenges and have them adjudicated upon is neither ousted or prohibited, as the **ITA** provides for such challenges to be taken vide the prescribed mode of appeal under **Part V**.

160. What this all means in relation to recovery is that 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** (**ROC 2012**) gives rise to confusion.

161. **Order 14** provides a summary basis for the collection of a debt in dispute. It provides a comprehensive mode of shortening the full litigation procedure by allowing, in suitable cases, for matters to be adjudicated upon fully, without the necessity for a full trial and witnesses. If the defendant to the summary judgment application however raises a 'triable' issue the matter then proceeds to trial. Whether judgment is granted summarily or judgment is granted after a full trial, the full merits and rights of the parties are litigated and the judgment handed down, is final in nature.

162. If a tax recovery 'debt' as statutorily provided for under **section 106 is subjected to the procedure under Order 14 ROC 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.

163. Even where there is no 'triable issue' found, **it must be remembered that the character and effect of the judgment granted under Order 14 is final**. **However, under sections 103 and 106 the nature of the relief**

**sought for purposes of recovery is plainly interim in character**.

164. The use of the **Order 14** procedure gives rise to a situation where, if the recovery process is found to give rise to 'triable issues', it will result in a full-blown trial which examines the veracity of the statutory debt under **section 106**. Bearing in mind that the section 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**.

165. Once the **statutory section 106 debt** is subject to a full-blown trial, there cannot be another or second attempt at litigation under **section 99(1) ITA** as that would give rise to res judicata and/or issue estoppel. Therefore the entire purport and effect of the **ITA** would be thwarted by a full trial under the **Order 14** civil procedure under the **Rules of Court 2012.** This is in accord with the older case-law which stipulates that such defences are to be remitted to the equivalent of the then SCIT and not considered by the Courts. To that extent there was appreciation of the fact that judgment under **section 106 ITA** was for purposes of ensuring payment of taxes first while disputes were adjudicated later.

166. This then warrants the question whether **Order 14** is indeed the ideal mode to adopt in the course of recovery proceedings under **section 106 ITA**. It would seem from a perusal and construction of the Act in toto, that the procedure set out in **section 106 ITA** itself provides sufficient basis for recovery to be initiated in the civil courts by way of originating summons. The Court is then able to ascertain whether:

(a) An assessment has in fact been made in the form prescribed under the Act;

(b) Whether the tax assessed is due as the relevant time accorded for payment has lapsed;

(c) Whether the DGIR has accorded an exemption or provision for payment by instalments or reached some other agreement with the taxpayer which would warrant the Court refusing to grant judgment.

167. This means that **section 106 ITA** is given its full effect for the purpose of recovery while simultaneously allowing the taxpayer to proceed with his challenge vide **section 99(1) of the ITA**.

168. The **ITA** allows for full judicial intervention and adjudication vide **Part VI**. Additionally, from a constitutional viewpoint, the right of judicial review, as

well as an entitlement to a stay premised on the exercise of judicial discretion, remains.

169. To reiterate, the enforcement provisions in **section 103** and **106** are themselves premised on the exercise of judicial power, so it cannot be said that judicial power is in any way ousted. There is merely a temporary restriction of the taxpayer's rights of challenge, which are deferred while allowing for payment first. The Courts' powers remain unaffected. So when **section 106(3)** provides that the Court shall not consider certain defences relating solely to the tax assessed, **it is the taxpayer's right to raise these issues at that juncture that is deferred, NOT curtailed**. The Court's powers remain untouched as explained above.

170. It is worth reiterating **paragraph 38** of **Capstone Pty Ltd (supra)** where Binns Ward J stated:

> *"Once it is accepted that the filing of a statement in terms of section 91(1)(b) is nothing more than an enforcement mechanism, as distinct from a means of determining liability, there is no basis for distinguishing it from any of the other recovery mechanisms…*
>
> *…It seems to me that the learned judge went awry in Mokoena by apparently regarding the filing of a statement in terms of s91(1)(b) as having the rights-determining character of a judicially delivered judgment. It plainly does not…"*

171. In like manner **the judgment obtained under section 106 using the summary judgment procedure, does not have a rights-determining or liability-determining character, as it merely allows for recovery first for the purposes of enforcement or execution. It serves to give effect to the 'Pay first, dispute later' scheme in the ITA**.

172. Even if a summary judgment procedure is adopted, the curtailing of the defences available as provided for in **section 106(3) ITA** and arguably, **section 103(1) ITA** and **103B ITA**, means that the issues there remain unavailable for adjudication by the Court. This is because those matters would still comprise the subject matter of any appeal under **section 99(1) ITA**. Alternatively judicial review in exceptional cases is also available.

173. We are now in a position to answer **Questions 3, 5 and 6**.

(a) **Question 3**:

Whether, by reason of **Sections 103 and 106(3) of the Income Tax Act 1967**, this Court is wholly prevented from considering whether or not there are triable issues and/or some other reason warranting a trial (within the meaning of **Order 14 Rule 1 and Order 14 Rule 3 of the Rules of Court 2012**), before deciding whether or not to give judgment in

favour of the Plaintiff, despite the fundamental liberties, rights and powers enshrined in, *inter alia*, **Articles 5, 8** and **121 of the Federal Constitution**?

(b) **Question 5**:

Whether **Order 14 Rule 3 of the Rules of Court 2012**, which provides that a Summary Judgment application may be dismissed if a Defendant can show "some other reason" for a trial to be held, applies in civil recovery proceedings in tax matters?

**Answer**:

No, it does not for the reasons we have stated. Pursuant to the 'Pay first, dispute later' scheme under the **ITA**, it follows that the recovery of the sum assessed at this stage is not final and the dispute will be heard by the SCIT and subsequently the Court under the 'Pay first, dispute later' system.

174. As we have reasoned, the claim for judgment by the Inland Revenue is premised on the characterisation of the sum assessed to be due as tax, under **section 106(1)** as a statutory 'debt'. This is for the purposes of recovery and execution only. The judgment obtained under **section 106** is not a rights-determining judgment of finality. The taxpayer's right of challenge is **not** abrogated, as that

right is preserved under **section 99(1) ITA** as well as judicial review.

175. Therefore the 'some other reason' for a trial to be held under **Order 14** does not apply as a basis on which to enforce this statutory debt created by the taxing statute to enable payment to be made first, pending any challenge or dispute as to the sum assessed, which is effectively deferred under the statute. If it is found under the **Order 14** procedure that the matter should go to trial it would render the method prescribed under the Act for adjudication, nugatory. The Act should be construed such that the various sections are harmonious and provide a coherent structure for income tax collection.

176. Therefore the use of other 'some other reason for trial' should not be invoked. It is not tenable for a **section 106** debt to be determined finally at trial, if the taxing statute also prescribes a specific manner of challenging the tax assessed, as is the case under the **ITA**. We have explained above in the body of the judgment that such a judgment does not enjoy the characteristics of a judgment issued after a full exercise of the Court's dispute resolution powers. It is a judgment handed down for the purposes of collection, i.e. to enable recovery first, while the dispute is deferred. It does not enjoy the rights-determining character of finality which is to be found in a judgment delivered after full adjudication in a court of law.

177. All challenges pertaining to those matters set out in **section 106(3)** or otherwise may be fully dealt with under the **appeals portion of the ITA** in **Part VI, Section 2** which allows the taxpayer to ventilate all these issues. Further the remedy of **judicial review** in an appropriate case is also available. All this ensures that the taxpayer is accorded his 'fundamental liberties rights and powers in **Article 5** and **Article 121'**.

178. In short, a judgment granted under **section 106** is treated as a civil judgment lawfully given in favour of the Inland Revenue **for the purposes of collection and recovery only**.

179. Enforcement may involve a writ of seizure and sale or garnishment of any amount due, and if the sum assessed is found to be erroneous after the merits of a dispute have been dealt with in full under the **section 99(1)** challenge, the over-assessed portion will be refunded to the taxpayer. With the latest amendments to the **ITA**, such a refund will carry interest (see: **section 111D ITA**). To that extent, the filing of civil proceedings in terms of **section 106(1)** is nothing more than an enforcement mechanism and is distinct from a means of determining liability.

180. To this end, the DGIR and all authorised officers are designated as public officers to undertake proceedings under the section. This section provides support for the

position that any proceedings instituted should be under **section 106**.

181. It should be borne in mind that the statute that allows for recovery of tax is the **ITA**, and not the **Rules of Court 2012**, more particularly **Order 14**. The latter provides a means of recovery of a disputed debt and envisages the determination of liability in full, either summarily or after a full trial if there is a 'triable' issue. Consequentially, it allows for a final judgment after determining liability between the parties.

182. The **section 106 ITA** recovery mechanism under the **ITA** does not require such a final judgment, as we have explained at length.

183. Accordingly, it is the remedy prescribed by statute that must prevail, not the procedure to recover a debt under the **Rules of Court 2012**. Therefore the statute should be accorded effect by allowing for the recovery or enforcement process under **section 106 ITA** to be followed.

## THE USE OF THE SUMMARY JUDGMENT PROCEDURE OVER THE YEARS

184. The bulk of the case-law relating to tax cases discloses that summary judgment has been the mode adopted to recover the tax assessed as a statutorily-deemed debt

under **section 106(1) ITA**. If a summary judgment procedure is adopted as was the case in the present Appeals in the courts below, the purpose and intent of the **ITA** does not envisage the Court undertaking a rights-determining trial under **section 106 ITA** for the reasons explained above. In both appeals here, a summary judgment to obtain recovery of the debt, was adopted by the Inland Revenue and the defences put up by the Appellants dismissed. The Courts below recognised that the merits of the dispute were properly to be determined under **section 99(1) ITA**. Effect was correctly given to **section 106(3) ITA**.

185. As such we are of the view that the result reached by the Courts below is entirely correct, in that enforcement was facilitated by the grant of judgment under **section 106 ITA**. The fact that the Courts below did not analyse the Act in its entirety to arrive at the conclusions we have, in relation to **Order 14** and the **ITA**, does not detract from the correctness of the end result. And that end-result was to dismiss all defences pertaining to matters arising under **section 106(3) ITA**. In any event we have previously concluded that **section 106(3) ITA** is constitutional and does not have the effect of usurping judicial power. So the application of the same by the Courts below cannot be faulted.

186. Having examined the defences put forward by the Appellants, we concur that the defences stipulated there

do not warrant examination under the **ITA** at this juncture. These defences, if raised, are to be the subject matter of full ventilation before the SCIT and after that, the High Court on points of law. As the judgment does not finally dispose of or determine the rights and entitlements of the taxpayer, the taxpayer is not prejudiced. He is however required to make the payment, or arrange for payment to be made in instalments or to reach an agreement with the DGIR on the settlement of the tax due, pending a full adjudication of the matter.

187. The courts in the older cases relating to **section 106 ITA** did not consider the implications of utilising the summary judgment procedure under **Order 14** compared to the statutory provisions relating to the recovery of the tax assessed under **section 106** and **103**. In point of fact, the suitability of the Order 14 process was not considered at all. The focus was on the availability of another avenue of appeal within the statute to mount a challenge against the tax assessed as being a due. As there was another mode of appeal, it was not necessary to raise these challenges in the recovery proceedings. In short, the mode of recovery of the tax assessed was not the focal point of consideration. The recovery of the tax assessed to be due by civil proceedings, was equated with recovery by way of **Order 14**.

188. In **Comptroller of Income Tax v A Co Ltd. [1966] 2 MLJ 282** Choor Singh J summed up the law, and this was relied upon by Gill FJ in **Sun Man Tobacco**:

> *"...The scheme of the Income Tax Ordinance is that if any person disputes the assessment, he may apply to the comptroller to review and revise the assessment made upon him. If the comptroller refuses to amend the assessment, the aggrieved taxpayer may appeal to the Board of Review ... and the board may, after hearing the appeal, confirm, reduce, increase or annul the assessmen or make such order thereon as to it may deem fit. ... A taxpayer has no right to by-pass the Board of Review and take his complaint direct to Court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the Board of Review. The provisions of Order XIV of the Rules of the Supreme Court must be read together with the provisions of the Income Tax Ordinance. If this is not done every unwilling taxpayer will refuse ot pay tax and when sued in court, will challenge the merits of the assessment, thus causing considerable delay in the collection of tax. ..."*

189. This sums up the approach taken in the older cases where the matter of 'triable' issues were required to be laid before the then Board of Review, now the SCIT. But in this challenge the Appellants have questioned the constitutionality of **section 106(3) ITA**, which they allege usurps the Court's power to determine a matter finally under **Order 14 ROC 2012**. And this is answered by a

construction of the recovery section of the **ITA** under **Part VII**, which clearly envisages a judgment to be obtained pursuant to **section 106 ITA** to facilitate enforcement, thus ensuring the tax is paid first and the dispute is dealt with later.

190. As such, the **O. 14** process should not override or supersede the statute-created process outlined in **sections 103** and **106 ITA**, which is for purposes of recovery and enforcement only.

191. We now turn to answer Question 6.

**Question 6**:

Whether in instances of manifest and obvious errors in calculation of a tax assessment, a court is entitled by virtue of its inherent and judicial powers to consider a Defendant's defence of merit to dismiss or set aside an application for Summary Judgment by a Plaintiff and order full trial on the matter?

**Answer**:

In like manner this question centres on dismissing or setting aside a summary judgment which for the reasons set out above ought not to evolve in such a manner.

192. If indeed there is a defence of merit which a defendant is unable to ventilate by reason of **section 106(3)** at the collection and recovery juncture, then this can still be undertaken vide the appeals process under **section 99(1) ITA**. There is no necessity for the Court to resort to its inherent powers or 'judicial powers' when those powers are clearly preserved under the **ITA** because a **section 106** proceeding does not require the Court to undertake or utilise its powers to determine the liability of the taxpayer. These provisions, namely **section 106 and section 103** allow for recovery or execution, pending the dispute being heard on its merits.

## OUR DELIBERATIONS AND ANALYSIS IN RELATION TO THE QUESTIONS OF LAW IN CATEGORY 3

193. We shall now proceed to answer Questions 7 and 8.

(a) **Question 7**:

Whether the Judicial Power of the Federation that is vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a Tax recovery suit filed **under section 106(1) of the Income Tax Act 1967** on the basis of **section 106(3)** of the same Act?

(b) **Question 8**:

Whether the Judicial Power of the Federation vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a Tax recovery suit filed under **section 106(1) of the Income Tax Act 1967** on the grounds that an appeal to the Special Commissioner of Income Tax has been filed under **section 99 of the Income Tax Act 1967**?

**Answer**:

We have answered these questions above in relation to Questions 1, 2 and 4.

194. As we have explained in the course of this judgment there is no question of judicial power being suspended or abrogated as is suggested in **Questions 7 and 8**. Such a conclusion is untenable and does not arise when the **ITA** is construed holistically and purposively.

195. Once again we reiterate that a perusal of the relevant sections bear out the fact that the recovery provided for under **sections 103** and **106** are purely for enforcement purposes. The judgment thus obtained is not final in nature as any instituted appeal remains to be determined in terms of whether such liability exists.

196. Judicial power continues to reside with the Courts, which are required under the statute to exercise their full judicial powers after the SCIT, as a specialist tribunal, has heard and decided on the tax appeal put forward by the taxpayer. To reiterate, the right to have the taxpayer's dispute heard in full, is simply deferred, to enable payment to be made first by way of recovery.

197. Finally, as other forms of judicial intervention are not ousted, the right to seek a stay or to resort to judicial review (which require exceptional circumstances) remains.

198. To that extent the questions put forward fail to appreciate the design and operation of the taxing statute as a whole. It is only if a grammarian construction is adopted in relation to **sections 103** and **106 ITA** in vacuo, such that no regard is accorded to the context in which those provisions sit within the **ITA** read as a whole, that such a conclusion can be reached. If, conversely, the tax statute is read in its entirety, bearing in mind that it prescribes a 'Pay first, dispute later' scheme, it will be clear that the judgment under **section 106** serves to facilitate recovery for purposes of enforcement at this juncture only.

199. We now answer Question 9.

(a) **Question 9**:

Whether a Defendant's defence as to the Plaintiff's conduct of bad faith, mala fide, oppression, unconscionability, irresponsibility, unreasonableness and/or abuse of process falls within the scope of **section 106(3) of the Income Tax Act 1967**, and whether the Courts are entitled to consider such a defence as a triable issue and/or some other reason warranting a trial in the context of civil recovery proceedings in tax matters (including in summary judgment proceedings therein).

**Answer**:

This question asks in effect whether bad faith, mala fides, oppression, unconscionability and unreasonableness or abuse of process fall within the purview of **section 106(3) of the ITA**.

200. For the reasons we have set out in detail above it follows that such issues are not properly dealt with under the statutory **section 106 ITA** civil proceedings, which are for purposes of recovery and execution only.

201. There is however nothing to stop the taxpayer from pursuing these matters under the appeals process in **section 99(1)** to the **SCIT** and the subsequent appeals on matters of law to the High Court and the appellate

Courts. Moreover, judicial review is available in exceptional circumstances.

202. Therefore the answer is no.

## THE ARTICLE 5 ARGUMENT

203. The present arguments in these appeals relate to the constitutionality of a specific provision in the **ITA** in relation to its alleged contravention of **Art**. **121 FC** and seeks the remedy afforded in **Art**. **4(1) FC**. Nonetheless, it is important to outline the features of the **Federal Constitution** that allow for the promulgation of valid tax laws. The **ITA** is validly promulgated pursuant to the **Federal Constitution**. The constitutional power of Parliament to make laws imposing taxation is set out in **Art**. **96 of the Federal Constitution**:

> *"96. No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law."*

204. It is evident that the constitutional power of Parliament to make laws imposing taxation is wide. However, all power is subject to constraints as was recognised *inter alia* in **Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135**.

205. Amongst these constraints is the ability of a citizen to contest the tax levied on him. Legislation which deprives the citizen of this ability would be contrary to, *inter alia*, **Art**. **5(1) FC**. In other words, the assessment of the DGIR should be contestable otherwise it would result in the onerous and oppressive consequence of citizens being subject to an administrative assessment without recourse. And such an administrative power if allowed unchecked would attack the very validity of the law under the **Federal Constitution**.

206. As explained above, the **ITA** does allow for the challenge and contestability of tax imposed, by providing for recourse to the Courts or the exercise of judicial power. Firstly the **ITA** expressly allows for such a contest through its appeals procedure in **section 99(1)**.

207. Secondly, the **Federal Constitution** provides firstly for constitutional judicial review in **Art**. **4(1) FC**. This is the judicial power of the Court to read down or strike out legislation where it is not in conformity with the provisions of the Federal Constitution. This is seen in the present appeals where the very validity of a statutory provision is challenged in the course of an appeal from summary judgment proceedings.

208. Further, the High Court under the **Schedule to subsection 25 (2) of the Courts of Judicature Act 1964(‘CJA’)** delineates the **additional powers of the**

**High Court** apart from those provided under **Art**. **121**. This makes reference to the prerogative writs of certiorari, mandamus and prohibition:

> ***"Prerogative writs***
>
> ***1.*** *Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. "*

209. These prerogative writs afford remedies by which the superior Courts are empowered to ensure that statutory bodies and inferior tribunals conform with provisions of the Federal Constitution and the legislation pursuant to which these entities exercise their powers. It checks abuses of power, and unbridled exercise of statutory power by officials of the government who carry out their duties under specific legislation or other statutory powers. It ensures that these bodies, acting through their officials, adhere to the rule of law. And administrative judicial review achieves this by affording the remedies of the prerogative writs in their many forms to aggrieved individuals or groups.

210. The **CJA** confers the jurisdiction to the High Court, in the exercise of its discretion, to afford such prerogative

remedies in appropriate cases. The mode of obtaining such relief is the process of administrative judicial review.

211. In short, the exercise of taxing powers by the Inland Revenue which is administrative in nature is subject to judicial review, both constitutional (where the validity of a specific provision is challenged) and is also amenable to administrative judicial review. However, the grant of these reliefs is rare. In most cases the remedies afforded by judicial review are rarely, if ever granted, largely because a more convenient or satisfactory remedy is available. As in the present appeals, where **section 99(1) ITA** provides a specialist tribunal to assess and determine the taxpayer's grievance and which result is susceptible to appeal and review before the superior Courts.

212. The availability of judicial review in tax is cases is generally confined to rare cases where for example, what is said to be an assessment is not in fact an assessment (see: **Andrew Chew Peng Hui, *Tax Appeals in Malaysia: Law and Procedure*, (Malaysia: Thomson Reuters, 2021)** at 181). In exceptional cases review may be available in cases of deliberate maladministration. It is incumbent on the taxpayer to establish exceptional circumstances of a kind which result in the assessment falling outside the scope of assessments as provided for in **section 106** of the ITA.

213. What is not permissible is allowing collateral challenges to assessments through judicial review, when the appeals procedure is the proper mode to be adopted. This can give rise to abuse of the remedy, by the use of the same to put forward disguised challenges to quantum or the basis of assessment, all of which can and should be more properly dealt with under **section 99(1) ITA** and the appeals process. Judicial review is liable to be utilised as a tactic sought by taxpayers to delay the statutory processes in the Act, until the judicial review proceedings are complete. This may be dealt with by provision for the review and statutory appeals to the High Court to be dealt with together, but inevitably there will be delay. Therefore judicial review is not to be lightly filed and where it is used as a delay tactic, it is clearly an abuse of the court process and should be dealt with accordingly.

214. For these reasons, contrary to the Appellants' and *amicus curiae*'s submissions on this point, we are of the considered view that **section 106(3) ITA** is constitutional and cannot be said to encroach upon judicial power nor contravene **Art**. **5(1) FC** in terms of the right to a fair trial or access to justice. As we have rationalised, judicial power is inherent in the taxation process and is neither abrogated, removed nor suspended.

## THE ARTICLE 8 ARGUMENT

215. The Appellants also 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 FC**. This view is shared by *amicus curiae*.

216. The law in relation to **Art**. **8 FC** has to be applied with considerable prudence and vigilance. As mentioned earlier, the government enjoys a wide latitude in formulating approaches for the execution of fiscal and economic policy. Judicial intervention within this sphere should be exercised sparingly contingent upon statutory provisions or constitutional imperatives.

217. The rationale for such judicial deference in tax matters is explained by **Durga Das Basu, Commentary on the Constitution of India, Vol. 2, 9th ed, (India: LexisNexis, 2019)**, at 2306-2307 in the following terms:

> "*Taxing statutes enjoy more judicial indulgence because picking and choosing within limits is inevitable in taxation. The principle of classification is applied somewhat more liberally in the case of a taxing statute. In* ***Khandige v Agricultural ITO AIR 1963 SC 591****, the Supreme Court said that in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the legislature*

*in the matter of classification, so long as it adheres to the fundamental principles underlying the said doctrine.*

*The power of the legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways. In a subsequent decision, it was observed "when the power to tax exist, the extent of the burden is a matter for discretion of the lawmakers. It is not the function of this court to consider the propriety or justness of the tax or enter upon the realm of legislature policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. (see:* ***Hoechst Pharmaceuticals Ltd v State of Bihar AIR 1983 SC 1019****;* ***Satnam Overseas (Export) v State of Haryana & Anr (Case No. Appeal (Civil) 11174 of 1995)***"

218. Furthermore, the court will not ordinarily interfere with the choice of the Legislature in matters pertaining to the mode and manner of recovery of taxes (see: **Durga Das Basu, Commentary on the Constitution of India, Vol. 2, 9th ed, (India: LexisNexis, 2019)**, at 2309).

219. **Art. 8(1) of the Federal Constitution** provides that:

"*All persons are equal before the law and entitled to the equal protection of the law*."

220. **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 (see: **Public Prosecutor v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116**). This is the test of constitutionality under **Art. 8(1)**.

221. 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.

222. 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 (see: **Singhal and Joshi, The MLJ**

**Manual on the Constitution of India, Vol. 1, (India: LexisNexis, 2016), at 235**).

223. The first point of difficulty is that of classification. Is the Government available for classification as 'a person' and consequently can its levy of tax on the Appellants amount to discrimination under **Art**. **8 FC** in the manner contended by the Appellants? We are of the view that such an argument is without merit.

224. This is because 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. (see **Amraoti Electric Supply Co. Ltd. v N.H. Mujumdar ILR (1952) Nag 830; AIR 1953 Nag 35**). 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 FC** (see **R.M. Seshadri v Second Additional Income-Tax Officer, Salaries Circle, Madras and Another (1954) 2 MLJ 285: ILR (1954) Mad 1236: AIR 1954 Mad 806**), as the Appellants seek to do here.

225. This contention is not therefore available to the Appellants as the Respondent in levying tax on them is carrying out its public function and is in that context not a 'person' within **Art**. **8 FC**.

226. Secondly, 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 FC**.

227. The second limb of the test stipulates that the intelligble differentia must have a rational relation to the object sought to be achieved by the statute. 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** as we have construed it, serves that object most rationally. It 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 FC** too. It passes the constitutional validity test.

## THE INLAND REVENUE'S CERTIFICATE PURSUANT TO SECTION 142 (1) ITA

228. It is contended by the Appellants that contrary to **section 142(1) ITA** the certificate was not signed by the DGIR himself. The section provides as follows:

> *"In a suit under section 106 the production of a certificate signed by the Director-General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount."*

229. It is not in dispute that the Director-General himself did not sign the **section 142** certificates in relation to the Appellants.

230. The certificates are signed by one 'Zainun binti Ahmad' who is the Chief Assistant Director of the Inland Revenue. The Appellants contend that there is no evidence produced by the Inland Revenue that Zainun binti Ahmad possesses the requisite authorisation to sign the certificates. More specifically they state that there is no evidence of delegation of the Director-General's powers in relation to the certificate. Nor is there evidence of Zainun binti Ahmad's name having been gazetted as an officer who is authorised to sign the **section 142(1)** certificate.

231. **Section 136(2)** of the **ITA** provides that:

> *"Any officer appointed under paragraphs **134(2)(b) and (c)** may exercise any function of the Director General under this Act (not being a function exercisable by statutory order or a function exercisable under section 152) except his function under section 44, subsection 137(1) and section 150.*

232. An Assistant Director for Inland Revenue falls within **section 134(2)(b) ITA**. Accordingly, the Assistant Director for Inland Revenue, Zainun binti Ahmad is statutorily entitled to exercise the function of the Director General under **section 142(1) ITA**. The fact that she has done so, is apparent from a persual of the certificate itself. It is therefore in accordance with the provisions of the **ITA**".

233. The Appellants now assert that she has no authority to do so on the basis that no notification by gazette was produced by the Inland Revenue. This contention is misconceived because having produced the **section 142** certificate and bearing in mind **sections 136(2) ITA** and **section 134(2)(b) ITA**, the onus lies on the Appellants as the ones making the assertion to establish otherwise. It is insufficient to simply throw a bare allegation and seek to reverse the onus of proof which lies on them. Therefore there is no merit in this contention.

## THE CONSEQUENCES OF STRIKING DOWN SECTION 106(3) ITA

234. During the course of oral submissions, we questioned counsel about the potential effect of striking down

**section 106(3) ITA** on government coffers. The Appellants' answer to this, which is echoed by *amicus curiae*, is that since collections made under **section 106(3) ITA** form only a small portion of overall revenue collections (ie an average of 1% of total revenue collected based on the Respondent's Annual Reports), government reserves would not be substantially affected even if the Respondent is not able to collect disputed assessments under **section 106(3) ITA**.

235. We are of the view that such an approach is unsustainable, particularly given our construction of the provision. If **section 106(3) ITA** is struck down by this Court, then the special mechanism laid down by the Legislature to question the merits of the assessment before the SCIT would be rendered otiose. It would be open for aggrieved taxpayers to dispute the quantum of the assessment in court instead. Not only will this foreseeably clog up the Judiciary's caseload, but it will also have the undesirable effect of impeding the efficient and expeditious collection of taxes under the **ITA**.

236. We also fail to comprehend how either the Appellants or *amicus curiae* can conclude with no basis that government reserves will not be 'substantially affected' by a delay of possibly years in the collection of taxes which are disputed under **section 106(3) ITA**.

## CONCLUSION

237. It is important to note that the power of constitutional review contained in **Art**. **4(1) FC** 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.

238. In the instant appeals, we are satisfied there is no basis for the contention that judicial power has been in any way abrogated, removed or usurped by the impugned statutory provision, namely **section 106(3) ITA**. The alleged infringement of **Art**. **5** and **8 FC** is not made out. It therefore follows **section 106(3) ITA** is constitutional. In these circumstances we dismiss the appeals with no order as to costs.

**Signed**
**NALLINI PATHMANATHAN**
Judge
Federal Court of Malaysia

Dated: 16 October 2023

**COUNSEL**:

**For the Appellant**:

Tan Sri Muhammad Shafee Abdullah (Dato Seri Rajan Navaratnam, Muhammad Farhan Shafee, Wee Yeong Kang, Wan Mohammad Arfan Wan Othman, Alaistair Brandah Norman, Oazair Tyeb, Mohamed Reza Rahim with him)

MESSRS. SHAFEE & CO
Chambers Twenty-Five
No.25, Jalan Tunku
Bukit Tunku
50480 Kuala Lumpur

**For the Respondent**:

Dr. Hazlina binti Hussain (Norhisham bin Ahmad, Al-Hummidallah bin Idrus, Muhammad Faqrol Syazreen bin Mohd Ghause, Norazilah binti N Hamod@Abdul Hamid, Mohamad Asyraf bin Zakaria, Muhammad Danial Izzat bin Zulbahari, Azleena binti Md Khairuddin, Ainur Mardiah binti Ramli, Qhistina binti Mohd Apandi, Komathi A/P P Karuppanan, Sakinah Najwa binti Hussin with her)

LEMBAGA HASIL DALAM NEGERI
Cawangan Guaman Kuala Lumpur
Aras 1, Blok 10
Kompleks Bangunan Kerajaan
Jalan Tuanku Abdul Halim
50600 Kuala Lumpur

***Amicus Curiae***:

Anand Raj (New Sin Yew, Abhilaash Subramaniam, Foong Pui Chi, Preetha Pillai, Vijey R Mohana Krishnan, Choo Kelly with him)

MESSRS SHEARN DELAMORE & CO
7th Floor, Wisma Hamzah-Kwong Hing
No.1, Leboh Ampang
50100 Kuala Lumpur