



Section 4(3), Section 29A, Item 22(1)(a), Item 27(a)

First Schedule

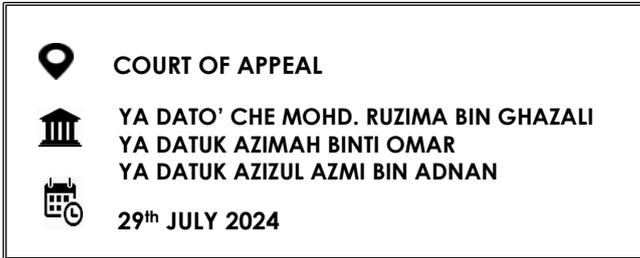
Stamp Act 1949

CIMB BANK BERHAD

v.

PEMUNGUT DUTI SETEM

W-01(A)-719-09/2022



The Court of Appeal had unanimously dismissed the appeal and affirmed the decision of the High Court. The Appellant and Air Asia Berhad (AAB) entered into an International Swaps Derivates Association (ISDA) Master Agreement for the purpose of entering into transactions by way of confirmations from time to time.

The ISDA Master Agreement was duly stamped with fixed duty of RM10. Various amounts had become due and payable by AAB to the Appellant under the said transactions. Due to failure to pay those outstanding amounts, AAB requested to restructure the payment of the said amounts.

The Appellant and AAB entered into Settlement Agreement (SA) dated 18.12.2020 for the said amounts to be amortised under the SA where the amount stated therein will be payable over a series of instalments. The SA assessed to ad valorem duty of RM1,337,565.00 and late stamping penalty of RM66,878.25. The Appellant objected on the grounds that the SA is a subsidiary instrument pursuant to Section 4(3) of the Stamp Act 1949 (the Act) and the stamp duty imposed by the Collector of Stamp Duty (Collector) for the amount of RM1,337,565.00 together with a late penalty of RM66,878.25 on the SA were wrong.

The Appellant mainly argued that the SA is a subsidiary or supplementary document to the ISDA Master Agreement and that the SA does not fall under the category of instruments in Item 22 and Item 27, First Schedule of the Act. The Appellant also relied on the contents of the Association of Banks in Malaysia's letter dated 9.12.1999 (ABIM Letter) sent to the Collector, where it was stated that the stamp duty to be imposed on any ISDA Master Agreement and other documents related to the derivative transaction is RM10 under Item 4, First Schedule of the Act. Alternatively, it was argued that item 27(a)(ii), First Schedule of the Act would apply as the SA is a loan in foreign currency.

In reply, the Collector argued that Section 4(3) of the Act would not be applicable as its application was specific only to sale, lease, charge, settlement, exchange and partition. If the ISDA Master Agreement was the principal agreement, the SA would not be a subsidiary instrument under Section 4(3) as the ISDA Master Agreement did not fall under any of the said categories. Further, even though the SA was termed as a 'settlement', it did not fall within the meaning of settlement under the Act. The SA would fall under Item 22(1)(a), First Schedule of the Act as an "instrument of any kind whatsoever", of an only or principal or primary security for a sum of money at stated periods in which the payment was for a definite and certain period and the total amount ultimately payable can be ascertained. The ISDA Master Agreement merely provided for the terms, conditions and rights of parties when entering into the transactions. Thus, the SA would be an independent instrument as it created a new obligation to pay for the said amounts by way of instalment. Even if ISDA Master Agreement was to be accepted as the principal agreement, Section 29A of the Act would be applicable as the ISDA Master Agreement was not stamped as a primary instrument under Item 22(1) of the First Schedule. The ABIM letter was not law, had no force of law and not an authority to decide on the chargeability of the SA under the Act.

The Court of Appeal agreed that since the SA did not fall within any of the expression of sale, lease, charge, settlement, exchange or partition specific in Section 4(3) of the Act, Section 4(3) of the Act would not be applicable. Independently, even if the SA did come within Section 4(3) of the Act, it created a new payment obligation. Similarly, the SA was not a settlement under the Act as the word "settlement" denoted a transfer or disposition of property, for example to a trustee to constitute a trust or an inter-vivos transfer of property.

On the applicability of Items 22 and 27 of the First Schedule, the Court held that the SA would come within Paragraph (b) of the definition of bond in Section 2 of the Act but the words "instrument of any kind whatsoever" are also sufficiently broad to cover the SA. Thus, Item 22(1)(a) would be applicable. The Collector was not bound by the ABIM Letter and the liability would remain unaffected under the Act. The appeal was dismissed with cost of RM20,000 to the Collector.