DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN & KUASA-KUASA KHAS)

RAYUAN SIVIL NO: R1-14-10-2009

ANTARA

OREN-PUBA SDN BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

ALASAN PENGHAKIMAN

The Appellant carries on the business of dealing in diesel and other fuel products. Sometime in May 2006, the Respondent carried out a field audit on the Appellant. During the audit, the Respondent came across certain purchases of diesel amounting to RM1,633,492 made by the Appellant from a diesel supplier called 'Seng & Co.'. The Respondent says that these purchases are "suspicious" because payments for the purchases were not made to the supplier, Seng & Co. Instead payments were made to the joint account of 'Chan Ken Yong' and 'Lai Min Yong', a third party.

2. During the field audit, the Respondent made inquiries to verify purchases from Seng & Co. The telephone number and address of Seng & Co. were furnished by the Appellant to the Respondent. The Respondent's witness RW1 made a phone call to Seng & Co. and testified that personnel from Seng & Co by the name of 'Tan

Seong Eng' said that there was no such dealing between Seng & Co and the Appellant in 2003. This was later confirmed by a letter.

3. Notwithstanding that the Appellant has given to the Respondent all documents supporting the purchases as well as letters of instructions from Seng & Co. to pay the purchase price to the third party, the Respondent maintains its stand. Subsequently, the Respondent raised an additional assessment on the Appellant dated 29 August 2006 by disallowing the purchase of diesel amounting to RM1,633,492. The Appellant being dissatisfied with the said assessment, filed a notice of appeal in Form Q dated 29 September 2006 to the Special Commissioner of Income Tax ("the SCIT").

4. The issue for determination by the SCIT as set out in paragraph 2 of the Case Stated is as follows –

> whether the purchase of diesel, made by the Appellant in year of assessment 2003 amounting to RM1,693,492 from Seng & Co. should be allowed as a deduction in the calculation of the adjusted income of the Appellant or should be disallowed on the ground that the transaction is "suspicious" ("*diragui*") as contended by the Respondent.

4. Before the SCIT the Appellant contends as follows –

(a) the purchase of stock of trade that is diesel is an outgoing laid out in the production of income and is therefore deductible in the computation of the Appellants adjusted income;

(b) that the payments made to the third party was made at the request of Seng & Co.

5. The Respondent contends as follows –

(a) there was no purchase of stock of trade, that is diesel, made by the Appellant from Seng & Co.,

(b) instructions for payment does not come from Seng & Co. and payment was made to a third party who is not working nor employee of Seng & Co.

6. At the hearing before the SCIT, the accounts executive of the Appellant, AW1produced copies of purchase orders, delivery orders, tank chits generated upon the receipt of diesel, payment vouchers and copies of cheques for the payment of diesel (marked as exh.B1, B2 and B3). AW1 testified that no invoices were received from Seng & Co and Seng & Co has instructed the Appellant to pay the purchase price of diesel to the joint account of 'Chan Kui Yang' and 'Lai Min Yong', the third party.

7. The SCIT found that exhibits B1,B2 and B3 i.e. copies of purchase orders, delivery orders, tank chits generated upon the receipt of diesel, payment vouchers and copies of cheques for the payment of diesel purchased were all prepared by the Appellant themselves and that no document whatsoever from Seng & Co was tendered to prove that there were purchases of diesel made by the Appellant from Seng & Co.

8. Based on the facts and evidence adduced, the SCIT agreed with the Respondent that the Appellant has failed to prove that the purchase of diesel from Seng & Co. really occurred. The SCIT found that the purchase of diesel was not deductible from the computation of the Appellant's adjusted income not because the Respondent was "suspicious" but because there was no such purchase from Seng & Co. Accordingly, the SCIT unanimously dismissed the appeal and ordered that the relevant assessment be confirmed. The Appellant now appeals against the said decision.

Submissions for the Appellant

9. For the Appellant counsel submits that the documents exhibits B1, B2 and B3 were duly proved but yet the SCIT attached no weight to the evidence on the ground that they were all prepared by the Appellant. Counsel submits that in so doing, the SCIT has acted upon a view of the facts which could not reasonably be entertained because the nature of the documents i.e. purchase orders, tank chits, cheques, etc., could hardly be produced by a supplier which in this appeal is Seng & Co. and must necessarily emanate from the Appellant.

10. Counsel submits that the absence of invoices from Seng & Co. alone is insufficient to negate the overwhelming documentary evidence of 675 pages to show that there were purchases of diesel made by the Appellant from Seng & Co. It is submitted that the

evidence of AWI was not contradicted because the testimony of RW1, the Respondent's witness was hearsay and inadmissible (*Capital Insurance Bhd v. Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 4 CLJ 1). It is further submitted that the letter from Seng & Co. referred to in Paragraph 8 of the Case Stated is also inadmissible in evidence as being heresay (*Victoria Insurance Co. Ltd v. Aik Teong Trading Co*. [1973] 1 MLJ 15). The Appellant relies on the case of Edwards (Inspector of Taxes) v Bairstow [1956] H.L. (E) 36 where at page 51 Viscount Simonds said as follows –

> *….For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but .are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.*

Submissions for the Respondent

11. For the Respondent it is submitted that the SCIT has correctly directed themselves in law and had arrived at a conclusion which is correct in law. Counsel submits that the primary facts found or proved, amongst others, are -

(a) no documentary evidence whatsoever from Seng & Co. was tendered to prove that there were purchases of diesel made by the Appellant from Seng & Co.,

(b) RW1's testimony that Seng & Co's personnel by the name of Tan Seong Eng had said that there was no such dealing between Seng & Co and the Appellant in 2003.

> The SCIT also accepted that this evidence was later confirmed by a letter.

12. Counsel submits that there is no requirement nor duty on the SCIT to state evidence in the Case Stated. In support counsel refers to the case of *UHG v Director General of Inland Revenue* [1974] 2 MLJ 33, wherein Raja Azlan Shah FJ (as His Majesty then was) held that –

> *It is well established that where the appeal is by way of Case Stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The court of appeal is not concerned with the evidence given in the Case Stated but with the facts therein stated and it is points of law upon those facts the court has to decide. The question for the court of appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach.*

Counsel submits that this court cannot review the evidence heard by the SCIT because the evidence is not before the High Court since the Appellant has not asked for any question to be stated as regards the correctness of any finding of fact and for a summary of the evidence or for the evidence to be annexed to the Case Stated (*Ransom v Higgh* [1972] 2 All ER 658 at p. 682). It is further submitted that questions of belief or credibility of witnesses are for the SCIT and the court could not interfere (*Rose v Humbles* [1972] 1 All ER 314). The SCIT heard the testimonies of AW1 and RW2, it considered the exhibits, as well as the submissions of both parties.

The SCIT does not believe the taxpayer's evidence and the SCIT has not erred in doing so. It is submitted that so long as the decision is supported by primary facts the court should not interfere (*Cannon Industries v Edwards* [1966] 1 All ER 456). The Respondent refers to the case of *Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 AMR 1735 wherein Edgar Joseph Jr, SCJ said *inter alia* –

> *We recognise that in an appeal by a tax payer to the Special Commissioners against an assessment made under the Act, the assessment stands unless the taxpayer is able to satisfy the Special Commissioners that the assessment is overcharged. It follows, that in such an appeal the onus is on the taxpayer to demonstrate 'that the assessment should not have been made, (see Norman v Golder 26 TC 293, per Macnaghten J at p 295) and so, the assessment stands unless and until the taxpayer satisfies the Commissioners that it is wrong (per Lord Greene MR at p 295). The taxpayer, therefore, undertakes the same onus when he brings a further appeal to the High Court and yet another appeal to this court.*

Decision

13. In *Sunrise (Pg) Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [1999] 1 LNS 122 Abdul Hamid Mohamad, J (as he then was) said -

> *Something should be said briefly, about the function of the court in an appeal from the decision of the Special Commissioners by way of case stated.*
>
> *The appeal is only on a question of law - paragraph 34, Schedule 5 of the Income Tax let 1967. It follows that the findings of facts of the Special Commissioners are final unless such findings cannot be supported by evidence. The power of the High Court in an appeal by way of case stated is best described by Lord Denning in the House of*

Lords' case of Griffiths (Inspector of Taxes) v Harrison (Watford) Ltd (1962) 1 All ER 909 @ 916:

> *Now the powers of the High Court on an appeal are very limited. The judge cannot reverse the Commissioners on their findings of fact. He can only reverse their decision if it is erroneous in point of law? Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions: and often do. Juries do.. So do judges. And are they not all reasonable men? But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere.*

In Chua Lip Kong v. Director-General of Inland Revenue [1981] 1 LNS 157, Lord Diplock opined :

> *From the primary facts admitted or proved the Commissioners are entitled to draw inferences: such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact: but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law.*

14. The Appellant contends that the SCIT has erred in taking into consideration the evidence of RW1 and the letter from Seng & Co. to the Respondent which confirmed that there was no dealing between the Appellant and Seng & Co. in 2003. From the Case Stated I find that the conclusion reached by the SCIT that the Appellant has failed to prove that the purchases of diesel from Seng & Co. really occurred was not solely based on the evidence of RW1 or the letter from Seng & Co. The SCIT found that the exhibits produced by the Appellant were prepared by the Appellant. No document from Seng & Co. to confirm that the Appellant purchased diesel from them was produced.

15. The onus is on the Appellant to show 'that the assessment should not have been made' (*Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri*, supra) . The Appellant concedes that apart from their own documentary evidence and the evidence of their witness, no other evidence was forthcoming to support its assertion that it purchased diesel from Seng & Co. On the evidence the SCIT was not satisfied that the Appellant has proved its claim. I am unable to find any error on the part of the SCIT in its consideration of the evidence and the conclusion reached. In my opinion on the facts and evidence the SCIT was justified in reaching the conclusion that they did. For these reasons I dismissed the appeal. Costs of RM3,000.00 was awarded to the Respondent.

Dated 29.3.2010

DATO' AZIAH ALI
HAKIM
MAHKAMAH TINGGI MALAYA
KUALA LUMPUR

Counsel :

Francis Tan and Kelvin Ng for the Appellant
(Messrs Azman Davidson & Co.)

Muazmir bin Mohd Yusof, Revenue Counsel for the Respondent
(Inland Revenue Department)