IN THE COURT OF APPEAL, MALAYSIA
AT PUTRAJAYA

[APPELLATE JURISDICTION]

CIVIL APPEAL NO: W-01-200-2010

Between

KETUA PENGARAH HASIL DALAM NEGERI - APPELLANT

And

TERAJU SINAR SDN BHD - RESPONDENT

[In the Matter of High Court of Malaya at Kuala Lumpur
Bahagian Rayuan Dan Kuasa-Kuasa Khas
Rayuan Sivil No. R1-14-15-2007

Between

Teraju Sinar Sdn Bhd - Plaintiff

And

Ketua Pengarah Hasil Dalam Negeri - Respondent]

CORAM:

Abdul Wahab Patail, JCA
Linton Albert, JCA
Umi Kalthum Abdul Majid, JCA

Date of Judgment: 21st April, 2014

JUDGMENT OF THE COURT

[1] The Ketua Pengarah Hasil Dalam Negeri (KPH) appealed to this Court against the decision of the High Court upon a requisition dated 25 May 2007 from the Special Commissioners of Income Tax (SCIT) pursuant to paragraph 34 Schedule 5 of the Income Tax Act 1967 (ITA).

Background

[2] Teraju Sinar Sdn. Bhd. (Teraju) had, for the years of assessment 1998, 1999, 2000 and 2002, claimed deductions for payments made to Union Concept Manufacturing Pte. Ltd. (Union Concept), a Singapore company for "handling and repacking" services provided by the latter in Singapore. Though described as "handling and repacking" services, it is a service to dismantle, in Singapore, imported electrical equipment, the component parts of which are then marked, wrapped with other units and exported to Teraju in Malaysia as completely knocked down (CKD) or semi knocked down (SKD) electrical equipment which are then assembled in Malaysia for sale. The Singapore company is owned by the sister

of Mr. Kua Ah Chook who is a director and 50% shareholder of Teraju.

[3] In 2006, the KPH imposed Additional Assessments for the above-mentioned years of assessment after disallowing the deductions under section 39(1)(j) of the ITA, on the grounds that Teraju had failed to deduct withholding taxes under section 109B of the ITA from the payments to Union Concept.

[4] Hereinafter, unless otherwise stated or the context otherwise requires, references to "section" means a reference to a section of the ITA.

[5] Teraju had appealed to the SCIT from the Additional Assessments. The issue put forth to the SCIT for determination was:

> "Whether the Director-General Inland Revenue is correct in disallowing the "handling and repacking" charges paid by Teraju Sinar Sdn. Bhd. to Union Concept Manufacturing Pte. Ltd., a Singapore

Company, under section 39(1)(j) of the Income Tax Act, 1967."

[6] On 7 November 2006, the SCIT issued its Deciding Order that the KPH was right in disallowing the "handling and repacking" charges paid by Teraju to Union Concept, a non-resident Singapore company, but found there was no basis for the fees for Custom Export Declaration to be subjected to the withholding tax.

[7] Upon Teraju and KPH filing their respective notices of appeal, the SCIT stated a case for the opinion of the High Court, with the question whether on the facts stated by the SCIT, its decision was correct in law.

[8] The High Court ï

(i) reversed the decision of the SCIT, holding that the KPH erred in disallowing the "handling and repacking" charges; and

(ii) upheld the exclusion of the Custom Export Declaration fees from withholding taxes.

[9] The KPH appealed to this Court.

Role of an Appellate Court in a Tax Appeal

[10] In his written submissions, the Senior Revenue Counsel submitted that the role of an Appellate Court in an income tax appeal is limited, and wound up this part of the submission by citing the following sentence from **Director-General of Inland Revenue v Lahad Datu Timber Sdn. Bhd. [1978] 1 MLJ 203 FC** at page 208:

> *" ... The learned judge cannot disturb the finding of facts by the Special Commissioners however strongly he may have felt…"*

[11] We think this point ought to be dealt with straight away.

[12] That statement was made in the course of explaining that the appellate court cannot come to a different finding of fact because

it disagrees with the finding of facts by the SCIT or because it feels that on the evidence the Special Commissioners should not have arrived at the conclusion of facts they did, but that the question it must consider is whether the decision is unreasonable. To take the sentence in isolation is to overstate it beyond the intent of the Federal Court in that judgment. This is clear by the reference made to the decision of the Federal Court in **UHG v Director General of Inland Revenue [1974] 2 MLJ 33 FC** at page 37, paragraph A, left, where Raja Azlan Shah FJ (as His Majesty then was) had said:

> *" The particular issue of fact is whether the service agreements were a sham. That appears to me to be a question of fact which is proper to be decided by the Special Commissioners upon the evidence brought before them. The quantum of evidence necessary to prove this fact would no doubt fall on the respondent who is free to adduce whatever evidence he liked. It would be dangerous to lay down any formula or rule of universal application as to what amounts to sham*

agreements, for it must depend upon the particular circumstances of each case. On the basis of the presumption of law that the apparent state of affairs are real unless the contrary is proved (see Ramkinkar Banerji v. Commissioner of Income Tax) it was contended for the taxpayer company that the service agreements were "real" unless the respondent proved them to the contrary. Therefore the burden of proving the service agreements are a sham is now upon the respondent. The evidence in rebuttal must be sufficiently cogent to persuade the tribunal of fact of the non-existence of the presumed fact. The rebutting evidence is to be considered on the merits of each particular case, and if it is believed, the presumption is displaced. But where there is evidence to consider, the decision of the Special Commissioners is final, even though the court might not, on the materials, have come to the same conclusion. In treating the question I can desire no more apt exposition of the

law than what is contained in Lord Atkinson's speech in Great Western Railway Co v Bater.

> *"Their (Commissioner's) determination of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs."*

[13] This view is reflected in **U. N. Finance Bhd. v Director-General of Inland Revenue [1975] 2 MLJ 224 FC.** In a subsequent decision in **I. Investment Ltd. v Comptroller-General of Inland Revenue [1975] 2 MLJ 208 FC,** at page 212, paragraph F-G, right, His Majesty further elaborated upon the principle as follows:

"... there is no justification for reversing the determination of the Special Commissioners unless they had misdirected themselves in law, or proceeded without sufficient evidence in law to justify their conclusions."

[14] Years later, the Supreme Court, in **Lower Perak Co-operative Housing Society Bhd. v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713,** at page 732 SC, adopted the principle enunciated in **Edwards v Bairstow and Harrison [1956] AC 14 (HL):**

"..... When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person

acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in

themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

[15] In our view, there is no room for superficial dismissal of an appeal upon a question of fact simply upon pasting that label thereon. Respect for the findings and decision of a Court or tribunal charged by Parliament with original jurisdiction means an appellate court ought to be slow to disturb a finding of fact by that Court or tribunal. That is not to say an appellate court must turn a blind eye where injustice is caused when such Court or tribunal:

(i) is wrong in law or principle;

(ii) has so misappreciated the evidence or the facts that its finding is such that no person acting judicially and properly instructed could have come to the determination under appeal; or

(iii) has made a finding of fact wholly unsupported by facts or evidence or without sufficient evidence.

In such a case, obviously the appellate court must correct that injustice.

[16] On the other hand, where there is evidence or facts to support a finding, then it ought not to be disturbed even if another finding is also possible and even if the appellate court might prefer the alternative. In other words, it is not a question of the appellate court agreeing or disagreeing with the finding of fact, but whether in making the finding the Court or tribunal of original jurisdiction erred as above and by so doing, had caused an injustice.

[17] Appellate courts are particularly slow in the case of the findings of tribunals specialising in specific fields. This is for the reason that, like the SCIT in this case, such tribunals develop the ability to give facts and evidence their appropriate weightages and significance specific to the particular field the tribunal specialises in. Hence, interpretation and application of accounting rules and

practices in taxation are unlikely to be disturbed except in the case of manifest error in respect of the above. It is necessary therefore to first examine the alleged error and determine if the finding is within such specialisation.

Observations

[18] The case stated by the SCIT sets out the issue the SCIT was called upon to determine, the admitted facts, the facts proved, the various contentions and submissions by Teraju and the KPH, the authorities referred to by the parties before proceeding to set out its findings, conclusion and decision. This then set the stage for the appeals by both parties to the High Court.

[19] The grounds of decision of the High Court showed that the High Court directed itself adequately as to its role, set out the issues and the contentions of the parties before proceeding to its findings, in the course of which the High Court, at paragraph 7, addressed the inaccuracies by the SCIT.

[20] Since what was to be examined by the High Court is the Case Stated of the SCIT, we proceed by examination of the Case Stated by the SCIT, however at all times keeping in mind the reasoning of the High Court.

[21] Before us, as well as in the High Court, the parties contented themselves with putting forth various arguments, principles and authorities at each other with no attempt at reconciling the various principles in their application to the particular facts of the case. Such approach provides little assistance to the Court. The argument took centre stage and a fair and just decision on the facts and the evidence became almost merely incidental.

The Issues in Perspective

[22] The initial action of the KPH may be stated thus: the payments for the handling and repacking charges were disallowed as deduction under section 39(1)(j) because the payments to the non-resident company Union Concept were:

(i) made without deducting withholding taxes due under section 109B;

(ii) for services falling under section 4A(ii); and

(iii) for services gross income for which is deemed under section 15A to be derived from Malaysia.

[23] The case for Teraju may be put briefly in the following terms: the payments to Union Concept cannot be disallowed under section 39(1)(j) because there were no withholding taxes due to be withheld under section 109B because:

(i) section 4A(ii) applies only to technical services and is therefore not applicable to payments for handling and repacking;

(ii) services were rendered outside Malaysia and therefore not subject to withholding tax in Malaysia: **Erria Shipping Pte. Ltd. v Cara Timur Transport**

Sdn. Bhd. [1988] 1 LNS 173; SGS Singapore (Pte.) Ltd. v Ketua Pengarah Hasil Dalam Negeri [2000] 7 MLJ 229, and section 15A which deems the gross income from the service as derived in Malaysia did not, before amendment, state itself to apply to services rendered outside Malaysia; and

(iii) even if Union Concept is liable under the ITA, the fact that Article IV of the Double Taxation Agreement (DTA) between Malaysia and Singapore excludes from relief only non-resident companies with a permanent establishment in Malaysia, and Union Concept has no permanent establishment in Malaysia.

[24] It would assist as to brevity and clarity to address the issues as follows:

(i) withholding taxes not deducted and paid over to KPH;

(ii) sections 4A and 15A; and

(iii) Double Taxation Agreement.

Withholding Taxes Not Deducted And Paid Over To KPH

[25] The factual basis that no withholding taxes were deducted and paid over to the KPH by Teraju when making payment to Union Concept is not disputed by the parties. Neither the High Court nor the SCIT erred on this.

[26] If withholding taxes ought to have been deducted and paid over by Teraju, then the appeal by KPH should be allowed since section 109B provides:

> "**Deduction of tax from special classes of income in certain cases derived from Malaysia**
>
> 109B. (1) Where any person (in this section referred to as "the payer") is liable to make payments to a non-resident -
>
> (a) ...;
>
> (b) for technical advice, assistance or services rendered in connection with technical management

or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or

(c) ... ,

which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General .....ò

Sections 4A and 15A

[27] Section 4A provides as follows:

ñ**Special classes of income on which tax is chargeable**

4A. Notwithstanding the provisions of section 4 and subject to this Act, the income of a person not resident in Malaysia for the basis year for a year of assessment in respect of -

(i) ... ;

(ii) amounts paid in consideration of technical advice, assistance or services rendered in

connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;

(iii) ... ,

which is derived from Malaysia is chargeable to tax under this Act.ò

[28] Under section 4A, the income from the 3 categories of special classes of income is chargeable to tax in Malaysia if it is derived from Malaysia. The KPH relied upon section 4A(ii).

[29] The germane question is whether the income is derived from Malaysia, when although it is paid out by Teraju, a resident company in Malaysia, the service is wholly performed for it in Singapore by Union Concept, a Singapore company and not resident in Malaysia.

[30] Section 15A deems certain gross income to be derived from Malaysia. It provides -

Derivation of special classes of income in certain cases.

15A. Gross income in respect of -

(a) ....;

(b) amounts paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;

(c) ... ;

shall be deemed to be derived from Malaysia -

(i) ... ;

(ii) if responsibility for the payment of the above or other payments lies with a person who is a resident for that basis year; or

(iii) if the payment of the above or other payments is charged as an outgoing or expense in the accounts of a business carried on in Malaysia; ....

[31] Section 15A is a deeming provision. If it is wide enough, then the fact the service is wholly performed in Singapore may be irrelevant.

[32] Paragraphs 4A(ii), 15A(b) and 109B(b) of the respective sections are almost identical.

[33] The High Court held that the service provided by Union Concept wholly in Singapore did not fall under section 4A(ii). The High Court did so not by considering section 4A(ii) itself but allowed itself to consider the meaning of "business income", and held it was business income of Union Concept. The High Court overlooked the fact that sections 4A, 15A and 109B were introduced effective 21 October 1983. We leave aside speculative arguments that the reason for the amendments was due to the decision in **Director General of Inland Revenue v Euromedical Industries Sdn Bhd [1983] 2 MLJ**

57-59. The words of these sections are plain and clear in their ordinary and literal meaning. The inter-relationship of these sections were explained in the Explanatory Statement to the Finance Bill as follows:

> "Clause 5 introduces a new section 4A to the Act which provides that certain classes of income derived ñfrom Malaysia by a non-resident person will henceforth be charged to tax under the new section 4A.
>
> This includes rent or other payments made under any agreement or arrangement for the use of any moveable property, payments for certain services rendered by the non-resident or his employee, and the amounts paid for technical advice or assistance. The rate of tax on income charged under 4A will be 15 per cent (Clauses 6 and 23). The income classified under section 4A will be deemed to be derived from Malaysia if, inter alia, the payments are charged as an outgoing or expenses in the accounts of a business carried out in Malaysia (Clause 9), while Clause 19 introduces a new section 109B to provide machinery for withholding tax payable by non-resident persons in respect

of such payments received by them. Clauses 5, 6, 9, 19 and 23 will come into force on the 21 October 1983."

[34] The SCIT had set out at length the contentions of the parties and held that reading section 4A(ii), 15A and 109B together, and applying the principle in **Mangin v Inland Revenue Commissioner [1971] AC 739 PC** that the words are to be given their ordinary meaning and that one has to look merely at what is clearly said to ascertain the intention of the legislature, assuming that neither injustice nor absurdity was intended, held that the "handling and repacking" charges fell within the definition of paragraph (ii) in section 4A.

[35] The particular service provided was variously described: in the invoices of Union Concept as "servicing and repacking", in journal vouchers of Teraju as "servicing and repacking" and "repacking and servicing", in Teraju accounts as "repacking and handling", in communication with the KPH as "handling and repackaging". We observe neither party took the effort to address the original wording "servicing and repacking", so that the appurtenant implications may be addressed with regard to section 4A(ii).

[36] We find neither evidence nor reason to conclude that the SCIT did not consider the facts and the evidence adduced before it. Indeed in the absence of such evidence, we must hold that the SCIT did so, and then we proceed to consider whether the finding by the SCIT that the service provided fell under paragraph (ii) of section 4A is (a) wrong in law or principle, (b) was such a misappreciation of the evidence or the facts that no person acting judicially and properly instructed could have come to that determination, or (c) the finding of fact was wholly unsupported by facts or evidence or without sufficient evidence. With all of the evidence before the SCIT, and the parties having had the opportunity to address the matter, then even if they did not make use of the opportunity, the SCIT was entitled to, indeed obliged to, make a finding on the evidence before it in order to come to a decision.

[37] In the circumstances, we hold that the High Court erred in disturbing the finding of the SCIT that the service provided fell within paragraph (ii) of section 4A and therefore paragraph (b) of section 15A.

[38] As for whether section 15A applies to deem the gross income of Union Concept from payments from Malaysia for its services in Singapore is subject to the responsibility for the payment lies with a person who is a resident for that basis year; or if the payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia, we find either or both these conditions describe Teraju and the payments it made.

[39] We are not persuaded by the submission that the following amendment to section 15A effective 21 September 2002 showed Parliament had intended the deeming provision in section 15A to apply to services performed in Malaysia. It applies only after 21 September 2002 and not to the assessment years in this case. The fact the amendment was made speaks more of Parliament changing the law rather than making a correction to reflect an intention existing previously but wrongly legislated.

The Double Taxation Agreement (DTA)

[40] It is trite the relationship between the ITA and the DTA is that the charging law is the ITA and not the DTA which only

determines availability of relief from tax: see **Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim (M) Sdn. Bhd. (Federal Court 01(f)-23-09/2012(W))**. In our view, section 132 of the ITA provides the special status described in **United Overseas Bank Ltd v Ketua Pengarah Hasil Dalam Negeri [1997] 3 MLJ 359** as inherent to a DTA that enables the DTA to determine the availability of relief from tax imposed under the ITA.

[41] But the party that is relieved of the liability to tax by the DTA is not Teraju but Union Concept. Section 4A created 3 special classes of income derived in Malaysia, of a person not resident in Malaysia may be chargeable to tax. Section 15A deems these three classes to be derived from Malaysia if any one of 3 conditions are met, and the payer in Malaysia is imposed the duty to make deductions of withholding tax to the KPH. That is a responsibility entirely distinct or separate from the liability of Union Concept under paragraph (ii) of section 4A notwithstanding the provisions of section 4. It is then for Union Concept to avail itself of the relief under the DTA.

[42] In **SGS Singapore (Pte) Ltd v Ketua Pengarah Hasil Dalam Negeri [2000] LNS 143**, the appellant was SGS Singapore (Pte) Ltd. It claimed relief under Article IV of the DTA as a company that did not "carry on business" in Malaysia and did not have a "permanent establishment" in Malaysia. It was held that tax withheld should be paid to the appellant SGS Singapore (Pte) Ltd. In **Director General of Inland Revenue v Euromedical Industries Ltd [1983] 1 CLJ 281 FC,** the Federal Court made clear that the payments by Euromedical Industries Sdn. Bhd. to the recipient company Euromedical Industries Ltd., a United Kingdom company, with no permanent establishment in Malaysia for management services was taxable only in the United Kingdom. It may be noted that it was the recipient company that took up the claim against the KPH.

[43] The question rather neatly put emerged in **Erria Shipping Pte Ltd v Cara Timur Transport Sdn Bhd [1988] 1 LNS 173** where Chong Siew Fai J (as he then was) said:

> *"…The central issue therefore is whether the commission earned by the plaintiff company is*

subject to Malaysian withholding tax under s 109B(1) of the Act such that the defendant as the payer thereof is legally obliged or entitled to deduct the tax thereon upon paying the commission to the plaintiff. It must be made clear that the issue for determination is whether the defendant is statutorily entitled to deduct the amount under s 109B(1) and not whether the plaintiff company is liable to pay tax in Malaysia on the commission earned…."

[44] There being no claim for relief by Union Concept, the issue whether Union Concept is relieved of liability does not arise. The starting point before relief is sought therefore remains, that is, the application of the charging provisions sections 4A and 15A. We hold that Terajuû s liability from the failure, its failure to act under section 109B, attracted the operation of section 39(1)(j) and that it is not a matter involving the operation of the DTA.

The KPH Appeal on Customs Declaration Fees

[45] In respect of this issue the High Court held:

> *"In my considered opinion, the SCIT has not misdirected themselves as the Appellant highlighted to the Court that an examination of exh. C2 at p. I top showed "Summary of Union Concept Manufacturing Pte. Ltd. Invoices' and in the middle of the page is the caption "Analysis of Handling Charges on Electrical Items" and to the right of the page is the caption "Export Declaration Fee". On account of this I accepted the Appellant's argument that the term "Handling Charges" in Form Q refer to the body of expenses which are in exh. CZ as the principle is the greater includes the lesser, meaning to say the component of "Handling Charges" in Form Q include "Export Declaration Fee"." [Page 28 Jilid 1] ”*

[46] It was submitted that the SCIT and the High Court erred in law to hold that such fees should be allowed as a deduction. The ground for this submission is as follows:

> *"51. Clearly the issue was never [~~been~~] raised before the SCIT and High Court. In addition the taxpayer did not even file[~~d~~] an appeal against this issue. In other words no Form Q was ever filed by the taxpayer to the SCIT for this issue.*
>
> *52. Therefore, the Revenue further submit that as it was not an issue appealed by the taxpayer and no facts proved by the SCIT that the expenses were wholly and exclusively incurred in the production of the income of the taxpayer under section 33 of the ITA, the Revenue's appeal on this issue should be allowed."*

[47] That there is anything warranting scrutiny in paragraph 51 of the submission is negated by the submission in paragraph 52 "... and

no facts proved by the SCIT ..." It is not for the SCIT to prove anything. Resort to the Courts should not be wasted in this manner.

[48] In the circumstances, we allow the appeal, set aside the order of the High Court and reinstate the Deciding Order of the SCIT in respect of disallowing of payments for "handling and repacking" charges; and dismiss the appeal in respect of the SCIT order regarding the Customs Declaration Fees. We order costs RM 10,000.00 each way unless otherwise agreed, here and below.

Signed

(DATUK ABDUL WAHAB BIN PATAIL)
Judge
Court of Appeal Malaysia
Putrajaya

Dated: 21st April 2014

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