DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

RAYUAN SIVIL NO.14-1-01/2015

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ..... PERAYU

DAN

LATEX MANUFACTURING SDN BHD ..... RESPONDEN

Kes Dinyatakan Oleh Pesuruhjaya Cukai Pendapatan
Bagi Pendapat Mahkamah Tinggi
Menurut Perenggan 34 Jadual 5
Akta Cukai Pendapatan 1967

Dalam Perkara

Pesuruhjaya Khas Cukai Pendapatan di Putrajaya
Rayuan No. PKCP (R) 9/2011

Antara

Ketua Pengarah Hasil Dalam Negeri ..... Perayu

Dan

Latex Manufacturing Sdn Bhd ..... Responden

GROUNDS OF JUDGMENT

INTRODUCTION

1. This is the Inland Revenue Board of Malaysia's (**"Appellant"**) appeal by way of a Case Stated pursuant to paragraph 34 of Schedule 5 of the Income Tax Act 1967 (**"ITA"**) with respect to the Deciding Order made by the Special Commissioner of Income Tax (**"SICT"**) dated 7.5.2014 in favour of Latex Manufacturing Sdn Bhd (**"Respondent"**).

2. There were five issues tendered for determination of the SCIT. However during the hearing before the SCIT, the Appellant had agreed only to three issues for the determination of the SCIT as follows:

    2.1. Whether the Respondent (**"Appellant"**) is time barred under section 91(1) of the ITA from raising an additional assessment on the Appellant (**"Respondent"**) for the Year of Assessment 2000 (Current Year Basis) via a Notice Additional Assessment (Form JA) dated 24.9.2010.

    2.2. Whether the Appellant (**"Respondent"**) has satisfied condition (j) in the Pioneer Certificate of the Appellant (**"Respondent"**) dated 4.5.1993 by exporting its production directly as well as through its holding company and other exporters.

2.3. Whether the Respondent (**"Appellant"**) has correctly and reasonably imposed a penalty under section 13 (2) at the rate of 45% as consequence of disallowing the pioneer status incentive of the Appellant ("Respondent") for the Year of Assessment 2000 (Current Year Basis).

(Note: The parties are described in the Issues as they were described before the SCIT)

THE SALIENT FACTS

3. The facts of the case had been well illustrated at paragraph 7 of the "Case Stated" which was presented to the Court for purposes of this Appeal. The facts could be found under the heading, "Statement of Agreed Facts of the Applicant" (**see paragraph 7.1 at page 6 to 8**) and "Proved Facts" (**see paragraph 7.2 at pages 9 to 22 of the Case Stated**). The salient facts are summarized as follows:

Facts Extracted from the Agreed Facts

3.1. The Respondent is a company dealing with the manufacturing of natural and synthetic rubber gloves;

3.2. The Respondent was issued with the Pioneer Certificate dated 4.5.1993 by the Minister of International Trade & Industry (**"MITI"**) under section 7 (3) of the Promotion of Investments Act 1986 (**"PIA"**), certifying that the Appellant is a Pioneer Company and that the "Examination Gloves" are promoted product (**"Pioneer Certificate"**).

3.3. Pursuant to the Pioneer Certificate, the pioneer status tax incentive commenced on 1.10.1992. This Pioneer Status was extended for five years from 1.10.1997 to 30.9.2002 pursuant to a letter from MITI.

3.4. The Pioneer Certificate contains a condition that *"Syarikat ini hendaklah mengeksport keseluruhan pengeluarannya"*.

3.5. Self-assessment for companies was introduced with effect from the Year of Assessment 2001.

3.6. Prior to the introduction of the self-assessment in 2001, under the formal assessment system, the taxpayers submit account and records including the audited accounts and Form C to the Appellant and the Appellant will sieve through them to ensure the return is correct and raise appropriate assessment.

3.7. Under the self-assessment system, taxpayers are still required to complete and submit Return Forms by the required dates. No Notice of Assessment will be sent to the taxpayers but the taxpayers have to compute their own tax and make payment of the full amount at that time. Tax audits are a fundamental feature of the self-assessment since instead of the Appellant, the taxpayers themselves compute its own tax.

3.8. An audit was conducted by the Appellant on the Respondent and pursuant to that audit, a letter dated 6.7.2010 was issued by the Appellant informing the Respondent that it is a condition of the pioneer status incentive that the Appellant must directly export its production and that the Appellant had failed to comply with this Condition.

3.9. Due to the said failure, the Respondent has computed the tax for the Respondent for Year Assessment 2000 without any incentive.

3.10. The Appellant via a Notice of Assessment (Form J) for Year of Assessment 2000 (Current Year Basis) dated 24.9.2010 assessed the Respondent to a tax amounting to RM4,562,703.04 and had further imposed penalties under section 113 (2) of the ITA at the rate of 45% amounting to RM2,053,216.37.

3.11. Aggrieved by the said assessment, the Respondent lodged Form Q), a "Notice of Appeal to the SCIT with respect to Year of Assessment 2000" on 20.10.2010.

3.12. Form Q was forwarded by the Respondent to the SCIT on 25.2.2011.

4. With respect to the Proved Facts, the SCIT has come up with an elaborate Proved Facts which could be found at pages 9 to 22 at paragraph 7.2 of the Case Stated. The salient Proved Facts are as follows:

4.1. The Respondent has construed Condition (j) of the Pioneer Certificate to mean that all the products must be exported directly by the Respondent (**see paragraph 7.2(xxxvii) at page 19 of the Case Stated**).

4.2. The Appellant's interpretation of Condition (j) of the Pioneer Certificate, however is a very narrow interpretation, deliberately taken to penalize the Respondent with tax (**see paragraph 10.24(c) at page 50 of the Case Stated**).

4.3. The "pith and substance" of Condition (j) of the Pioneer Certificate on the words *"mengeksport keseluruhan pengeluarannya,"* as the words are consonant with the Long Title to the PIA (**see paragraph 10.24(a) at page 49 of the Case Stated**).

4.4. The Respondent had ensured that all products are exported, be it directly or indirectly via its holding company, Latex Partners Berhad (**"holding company"**) (**see paragraph 7.2(xx), 10.20 and 10.21 at pages 14, 48 and 49 of the Case Stated**).

4.5. The reason for exporting via its holding company was for risk management purposes (**see paragraph 7.2(ii) to 7.2(vi) at pages 9 and 10 of the Case Stated**).

4.6. The intention of exporting via its holding company was not to enable the Respondent's holding company to make profit. In fact, the Respondent's holding company did not make any profit margin from the sales of the Respondent's products (**see paragraph 7.2(vii) to 7.2(viii) at page 10 of the Case Stated**).

4.7. If the Respondent's products had not been exported, sales tax would need to be charged to the Respondent's products sold locally. However, as shown by the Respondent's Sales Tax Record card provided by the Customs Department, the amount of sales tax records show that products not exported are only 0.0064% of the Respondent's total sales and these are usually for samples provided to exporters. 0.0064% in accounting terms after rounding up is nil (**see paragraph 7.2(x) to 7.2(xii) at pages 11 to 12 and 7.2 (xx) at page 14 of the Case Stated**).

4.8. The production of the Respondent's products are undeniably focused on export (**see paragraphs 10.20 at page 48 of the Case Stated**).

4.9. As such, the Respondent has not contravened Condition (j) of its Pioneer Certificate at all material times (**see paragraph 10.25 at page 51 of the Case Stated**).

POINTS RAISED BY THE RESPECTIVE PARTIES

For the Appellant

5. The learned Counsel for the Appellant, amongst others, raised the following arguments:

5.1. The language of the Pioneer Certificate as stated in Condition (j) of the Pioneer Certificate shows clearly that the Respondent shall export all its products *"Syarikat ini hendaklah mengeksport keseluruhan pengeluarannya"*. The Respondent had failed to comply with this condition.

5.2. The Respondent had contravened the provision of the ITA and the PIA when the Respondent had stated its accounting period to be 21 months when they knew the basis period during the transitional period under the ITA is not more than 12 months. The same is with the PIA.

5.3. The Appellant was not barred by section 91 (1) of the ITA as it is the duty of the Respondent to make correct return and provide correct information to the Appellant. The Respondent had concealed its act and the Appellant discovered this negligent act at the time of the audit.

5.4. The Appellant is entrusted by Parliament to determine the tax liability of the Respondent. It has a duty to ensure that the Respondent has succeeded in demonstrating that it is exempted from paying tax by virtue of its pioneer status.

5.5. The Respondent had acted negligently in reporting the accounting period to the Appellant and it had failed to comply with the requirements of the Pioneer Certificate which requires the Respondent to export all its manufacturing products on its own.

5.6. The Respondent had filed an incorrect return when it provided the accounting period for more than 12 months when the ITA as well as the PIA, state that the accounting period shall be 12 months. By doing so the Respondent had breached his duty of care to the Appellant.

5.7. This is a valid case for penalty. The Respondent's witness admitted that the basis for accounting ought to be 12 months and yet the account was prepared based on 21 months.

5.8. The Appellant's action was lawful and with authority.

By the Respondent

6. The gist of the issues raised by the learned Counsel for the Respondent, amongst others, could be stated as follows:

6.1. At all the material time, the Respondent had pioneer status with 100% exemption on income tax.

6.2. The Respondent had not breached Condition (j) of the Pioneer Certificate. There was also no cancellation of the Pioneer Certificate, at any material times by the giver, MITI.

6.3. The "pith and substance" of Condition (j) fall on the words *"Mengeksport keseluruhan pengeluarannya."* The Appellant has looked at the condition very narrowly. However the SCIT did not accept the narrow approach to the incentive given to the Respondent through MITI. The SCIT had considered all relevant facts and made very strong remarks,*"That the Respondent's (Appellant herein) interpretation of condition (j) is a narrow interpretation deliberately taken to penalize the Appellant (Respondent herein) with tax for having reported and filed a tax return for YA 2000 (PYB) exceeding a 12 month accounting period;")* (see page 50 at paragraph (c)).

6.4. This remark is not made from vaccum but based on precise set of facts recognized and found by the SCIT. In any event, it should be MITI, which should decide if there is compliance with the Pioneer Certificate or not and not the Appellant.

6.5. The Respondent had ensured that its products are exported either directly or export through its holding company. The reason for exporting via its holding company was for risk management purposes (**see paragraph 7.2(ii) to 7.2(vi) at pages 9 & 10 of the Case Stated**). Its purpose was not to

enable the holding company to make profits. In any event the holding company did not make any profit margin (**see paragraph 7.2(vii) to 7.2 (viii) at pages10 of the Case Stated**). There were also findings of fact that the export was done through its holding company to mitigate certain export requirement especially 510k.

6.6. If there was a purported breach of Condition (j) of the Pioneer Certificate, there was only non-compliance with the mandatory statutory provision of section 9 of PIA by MITI rendering the Appellant's raising the additional assessment illegal and as such the assessment void.

6.7. As to whether the Respondent could export through the holding company and/or the products must be exported exclusively by the Respondent, is for MITI to explain to the SCIT. In this case no witness had been called by the Appellant to prove this. Hence the SCIT had invoked the provision of section 114 (g) of the Evidence Act 1950 against the Appellant.

6.8. The Appellant, despite acknowledging that there is a need for section 9 of PIA to be complied with at the time it made recommendation to MITI to cancel the Respondent's Pioneer Certificate, had disregarded the fact that no action was taken by MITI when the Appellant raised additional assessment.

6.9. Even if MITI is vested with the power to cancel or revoke the Respondent's Pioneer Certificate, MITI has a duty to ensure that it accords the Respondent with the right to be heard before making any adverse decision against the Respondent affecting its pioneer status. It has a legitimate expectation that the Pioneer Certificate and the tax incentive be valid for the entire duration granted to it.

6.10. The additional assessment had been raised beyond the period provided by section 91 (1) of ITA. Neither could the Appellant demonstrate the existence of fraud, negligence or willful default on the part of the Respondent to warrant invocation of that section. In any event the burden of proof rests on the Appellant to show existence of fraud, negligence or willful default which the Appellant failed to show. There was no finding of any of these elements by SCIT.

6.11. For the case at hand whether there was fraud, negligence or willful default, the case hinged very heavily on the facts and very little involvement of the law. In order to succeed the Appellant has to urge the Court to rehear and makes its own findings of fact. This could not be done as the facts as found by the SCIT are unassailable. Therefore, there is no ground for this Court to interfere with the findings made by the SCIT.

6.12. The Penalty ought not to have been imposed because there has been no non-disclosure of information as the audited account has been submitted to Appellant and the information pertaining to sales via its holding company had been disclosed.

6.13. Although the Appellant had stated that the basis period for Year of Assessment 2000 had not been computed properly, the Appellant has agreed that whether the Respondent is exempted under the Pioneer Certificate or under waiver year for Year of Assessment 2000, the Respondent is still exempted. Section 91 can only be invoked to "make good any loss of tax". Such situation did not occur under current factual matrix.

DUTY OF THE COURT IN A CASE STATED

7. Both the learned Counsels had submitted at length on the duty of the Court in dealing with an appeal by way of a Case Stated. Under the ITA, parties who appeared before the SCIT may appeal to the High Court against the deciding order of the SCIT on a question of law (see paragraphs 34, 39, 41 and 42 of Schedule 5 to the ITA and ***Director General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 1 CLJ (Rep) 91 at 97***). According to the cases submitted by both the learned Counsels, generally, the Appellate courts are particularly slow in interfering with the findings of tribunals specializing in specific fields.

8. In tax cases, the Courts in Malaysia had repeatedly referred to the case of ***Edwards v Bairstow [1955] 3 All ER 48*** where the Court has held that it is the duty of the Court hearing a Case Stated to examine the determination of the SCIT having regard to its knowledge of the relevant law, however this duty is very limited. The High Court cannot reverse the commissioners on their findings of fact except in the following circumstances:

8.1. If the case contains anything *ex facie* which is bad in law;
8.2. which bears upon the determination, it is, obviously, erroneous in point of law;
8.3. if the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal;
8.4. if there has been error in point of law;
8.5. if the case is one where there is no evidence to support the determination;
8.6. if the case is one where the evidence is inconsistent with and contradictory of the determination; or
8.7. the true and only reasonable conclusion contradicts the determination.

9. The court would also observe the caution made by Court of Appeal in the case of ***Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923*** where the Court of Appeal vide the Judgment of His Lordship Abdul Wahab Patail (JCA as His Lordship then was) had stated as follows:

"[24] We make the general observation that courts, ***acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialized bodies such as SCIT. The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance. It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.***

[25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT. *(see Lower Perak Co-operative Housing Siciety Berhad v. Ketua Pengarah Hasil Dalam Negeri, [1994] 3 CLJ 541; [1994] 2 MLJ 713 SC).*

10. Mindful of my functions in a Case Stated as discussed above, upon perusal of all the relevant documents filed herein, having considered the oral and documentary evidence adduced before the SCIT, the findings of facts made by the SCIT, the decision of the SCIT and upon reading the written submissions and hearing the oral submissions of the respective parties, my decisions on the Case Stated are as follows.

DISCUSSION OF THE ISSUES AND DECISIONS OF THE COURT

Issue 1- Whether the Appellant is vested with the authority to disregard the Pioneer Certificate and Pioneer Status of the Respondent for any Year of Assessment, in which a condition in the Pioneer Certificate is allegedly not complied with.

11. It is not disputed that the Respondent had been granted pioneer status and Pioneer Certificate for the production of examination gloves. A 100% exemption had been granted to the Respondent by the Government through MITI. Under Condition (j) of the Pioneer Certificate, the Respondent shall export all its products. Pursuant to an audit conducted by the Appellant, it was discovered that the Respondent did not export all its products but the export was also undertaken by its holding company. In view of this, the Appellant contended that the Respondent had breached Condition (j) of the Pioneer Certificate. Therefore it is not entitled to the tax exemption granted to it by MITI.

12. The Appellant then informed MITI vide its letter dated 17.7.2009 of the alleged non-compliance and suggested to MITI to cancel the Pioneer Certificate granted to the Respondent pursuant to section 9 of the PIA (**see page 175 of Exhibit F**). The letter sent to MITI was not copied to the Respondent.

13. This fact was communicated to the Respondent vide the Appellant's letter dated 31.3.2010 intimating to the Respondent that due to the alleged non-compliance of the condition in the Pioneer Certificate, the Respondent was not entitled to tax exemption for Years of Assessment for 1998 to 2000 (**see pages 158 & 159 of Exhibit D**).

14. The Respondent sought audience with the Appellant to explain that it had in fact complied with the condition of the Pioneer Certificate as it had also exported its product through its holding company. Via a letter dated 5.5.2010, the Respondent explained the reason it had to export through its holding company (**see Exhibit D at pages 223 and 224**).

15. The Appellant responded to the 5.5.2010 letter by intimating to the Respondent, under the Pioneer Certificate, the Respondent ought to export directly which they had failed to do. The Appellant stated that it relied on MITI's decision vide its letter dated 17.7.2009. (**see Exhibit D at pages 158 and 161**)

16. Pertaining to the above issue, the SCIT had made its findings of fact as follows:

    16.1. The Appellant had failed to seek clarification with the Respondent relating to the reasons the sale was made through the holding company before writing to MITI. The letter sent to MITI was couched in a cursory manner. It had communicated to MITI that the Respondent had not exported all of its products on its own and sought for the Respondent's Pioneer Certificate to be cancelled. There

was no supporting documents sent. The person who wrote the letter was not acquainted with the facts of the case as he was not in charge of the audit of the Respondent's account. Even the fact pertaining to the indirect export by the holding company was not communicated to MITI (**see paragraphs 7.2(xxvi) and (xxvii) at pages 16 and 17 of the Case Stated**). Neither was clarification sought from MITI with regards to whether the export must be done by the Respondent exclusively or whether it could also be done by other persons so long as the products leave the country.

16.2. It did not occur to MITI to liaise with the Respondent to seek for clarification on the matter before the letter dated 17.7.2009 was written. No show cause letter was issued to the Respondent by MITI to afford the opportunity to the Respondent to state its version against that of the Appellant and as to why the Pioneer Certificate ought not to be cancelled and / or tax exemption revoked under section 9(1) of PIA.

16.3. MITI had not contacted the Respondent or issued a notice in writing as required under section 9(1) of PIA to require the Respondent to show cause why the Pioneer Certificate should not be cancelled (**see paragraphs 7.2(xxvii) at pages 17 of the Case Stated**).

16.4. The Respondent had no information about the communication between the Appellant and MITI and was left in the dark about the whole affairs until much later, although it was the aggrieved party. Even letters between the Appellant and MITI were not copied to the Respondent. The SCIT found that there was a clear breach of natural justice / procedural fairness in the case.

16.5. The Appellant did not convey to MITI a relevant information pertaining to the export made through the Respondent's holding company. Hence the Respondent was not given all the opportunities to present its version of the case. Neither was MITI fully appraised of the facts surrounding the Respondent's case.

16.6. Further the Appellant was not the proper authority to decide if the export through the Respondent's holding company satisfies the requirement of Condition (j) of the Pioneer Certificate. This fell within the purview of MITI. In view of the foregoing, the SCIT was of the view that the Appellant had exceeded its authority.

16.7. The Appellant had no legal basis to raise additional assessment against the Respondent. Section 24 of the PIA provides that the Appellant may only raise additional tax if there is a direction under section 17 of PIA or if the Pioneer Certificate has been cancelled. As none of these situation had occurred, the Appellant did not have the authority to

raise additional assessment. Section 24 being a specific law overrides the provision of section 91 of the ITA.

17. The SCIT observed that MITI's position pertaining to the Appellant's Pioneer Certificate was merely based on the Appellant's representation with certain relevant information being withheld from the Respondent. All the above facts were as found by the SCIT.

18. Based on the above, I am satisfied that there was nothing wrong with the deciding order made by the SCIT to merit curial intervention. The SCIT was justified in coming to that decision as the mandatory procedure under section 24 of PIA had not been complied with and there was no cancellation of the Respondent's Pioneer Certificate by MITI. The Respondent can therefore continue to enjoy its pioneer status. Therefore the Appellant was wrong in issuing additional assessment herein.

Issue 2- Non-compliance of the Mandatory Requirement Under Section 9 of PIA

19. The Respondent was alleged to have breached Condition (j) of the Pioneer Certificate. In view of this, the Appellant was of the view that the Respondent was not entitled to the tax exemption granted to it by MITI. During the proceedings before the SCIT, it was observed by the SCIT that the decision by the Appellant to impose the additional assessment on the ground that the Respondent no longer enjoys the tax holiday was done in a very lackadaisical manner by the Appellant as well as MITI.

20. Once a holder of a pioneer certificate has been found to be in breach of the conditions in the pioneer certificate, MITI, as the agency involved in granting the tax exemption, has a legal duty under section 9 of PIA to issue a show cause to the holder of the pioneer certificate as to why the pioneer certificate ought not to be cancelled and / or the tax incentive revoked. This is a condition precedent before any action is taken to impose additional assessment.

21. A perusal of section 9 of PIA clearly shows that the section imposes a mandatory requirement for a notice in writing to be issued to the holder of the pioneer certificate if there were claims that the conditions stated in the pioneer certificate had not been complied with, before any action is taken to cancel the pioneer certificate.

22. There are ample authorities on point (some had been highlighted by the learned Counsel for the Respondent) to illustrate that when the word "shall" is used in a particular provision of the law, it is a mandatory requirement which has to be adhered to.

23. Therefore the SCIT had correctly ruled that the word "shall' in section 9 of PIA indicates that it is a mandatory provision. Any non-compliance with the conditions of the Pioneer Certificate would result in the pioneer company be deprived of the benefits and incentives accorded to it. As this is something very serious which may even result in the revocation of the pioneer status and imposition of additional assessment as was done in this case, the authority concerned must see that the company which would be adversely affected by such a decision to be given the

opportunity to make its representation as to why its pioneer certificate ought not to be cancelled and / or its incentives revoked.

24. There was clear evidence before the SCIT that the Respondent had invested heavily in order to improve its infrastructure and facilities for the purpose of its business efficacy. This was done as the Respondent had a legitimate expectation that it is entitled to enjoy the tax relieve for its business for the entire term granted to it. If this benefits are to be taken away, the Respondent must be given the right to be heard.

25. Section 9(1) of the PIA is couched in a mandatory nature, unless there is a notice to show cause issued under section 9 of the PIA for the Respondent to show cause as to why its Pioneer Certificate ought not to be cancelled and its tax incentives ought not to be revoked, the Respondent is entitled to continue to enjoy the tax incentives under the Pioneer Certificate. As this is a crucial protection given by the law to the Respondent, justice would demand that there be strict compliance with the said procedure before any adverse action is taken against the Respondent. As the Respondent's Pioneer Certificate had not been cancelled under section 9(1) of the PIA, the Respondent had rightfully claimed for the tax incentive as was done in this case.

26. The Appellant had denied the Respondent to what the Respondent is entitled to without complying with the procedure set by PIA. The action taken by the Appellant is null and void as there existed procedural violations of the mandatory provision of the law which could not be cured.

27. The Appellant was aware that there is a need for MITI to cancel the Pioneer Certificate pursuant to section 9 of the PIA and that was why it has suggested to MITI to cancel the Respondent's Pioneer Status in its letter dated 28.6.2009. However, MITI did not take any action towards that direction.

28. As there was clear violation of the mandatory requirement of section 9 of the PIA, the additional assessment raised by the Appellant is null and void.

29. In view of the aforesaid, the SCIT had rightly held that MITI's letter dated 17.7.2009 is fatally flawed and of no effect.

Issue 3 – Breach of Natural Justice

30. I have touched generally on the procedure stipulated under section 9(1) of the PIA in my discussion of Issue 2 herein. From the facts found by the SCIT, there is no doubt that the Respondent was not accorded with the opportunity to present its case to MITI on an issue which is so crucial affecting the Respondent's right to the tax incentives pursuant to the pioneer certificate granted to it. It is also not disputed that the decision by MITI was unilaterally done without strict adherence to the well set procedure under section 9 of the PIA. The SCIT found that the correspondence only involved MITI and the Appellant. The Respondent was never in the picture and had come to know about the correspondences until the final hearing date of the appeal. In short the

Respondent was not afforded the right to be heard by MITI before any adverse decision is taken affecting its rights to the Pioneer Certificate.

31. There is plethora of cases on what is meant by right to be heard, some of which had been highlighted by the learned Counsel for the Respondent in the learned Counsel's written submission.

32. At this juncture, I would like to refer to the case of ***AG vs. Thomas D' Arcy Ryan [1980] AC 718*** where the Lord Diplock had stated as follows:

"But the requirement that a person who is charged with having done something which, if proved to the satisfaction of a statutory tribunal, has consequences that will, or may, affect him adversely, should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civilized legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement."

33. In the oft quoted case of ***Surinder Singh Kanda vs. Government of the Federation of Malaya [1962] 1 MLJ 169; [1962] 1 LNS 14*** the Privy Council held:

"If the right to be heard which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them".

34. In ***Rohana bt Arifin & Anor vs USM [1989] 1 MLJ 487- 493*** the Federal Court held:

> *"It is well established principle of administrative law that anything that restrict or appear to restrict the defendant's liability to present his case may be held to be a breach of procedural fairness and thereby susceptible to judicial review".*

35. From the plethora of cases, some of which had been highlighted above, it would appear that the right to be heard within the context of natural justice would mean that any person to be affected by the decision of the statutory tribunal has a right to be heard, to know the case or evidence that might assist his case and be given every opportunity to state his version for consideration. If these facts are concealed from the person who would be adversely affected by the said decision, making it impossible and/or difficult for that person to defend himself, then there is clear breach of the basic rule of natural justice / procedural fairness.

36. In the case at hand, there is no doubt that the Respondent had been prejudiced by the conduct of the Appellant as well as MITI. The Respondent has a legitimate expectation that it is entitled to enjoy the tax relieve for its business for the entire term granted to it. If these benefits are to be taken away, the Respondent must be given the right to be heard. In ***Law Pang Ching & Ors v Tawau Municipal Council [2010] 2 CLJ 281 at 838*** the Court of Appeal had discussed what is legitimate expectation as follows:

"by depriving him some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

37. In the case before me, the Respondent was deprived of its rights to the tax incentives under its Pioneer Certificate without first being given the right to be heard. Obviously for a company like the Respondent, it has built its business and investment on its pioneer status. By denying the Respondent its tax incentive without being afforded the right to be heard had resulted in the Respondent suffering from grave economic loss. I agree with the SCIT that such act cannot stand as the very basic principle of natural justice had been infringed by the Appellant and MITI.

Issue 4 – No Breach of Pioneer Certificate

38. As I had highlighted earlier on herein, there were no steps taken by MITI to cancel the Pioneer Certificate and/or revoked the tax incentives under the mechanism provided by PIA. Despite the fact that there is a set of procedure to be complied with by MITI under section 9 of the PIA, it had not resorted to the procedure sanctioned by PIA. Instead, MITI had resorted to a procedure which is flawed as found by the SCIT.

39. The Appellant's reason for raising the additional assessment is because the Appellant is of the view that the Respondent has breached Condition (j) of the Pioneer Certificate because it did not exclusively

export the products but part of the export was done by its holding company.

40. The SCIT had the benefit of hearing the witnesses before it and had in clear words stated the facts as found by it, the gist of which has been stated by me under heading "Proved Facts". The same is being repeated herein.

41. Upon scrutinizing the facts as found by the SCIT and upon reminding myself of the limited role the High Court plays in interfering with the deciding order of the SCIT unless under circumstances highlighted by me under heading "Duty of the Court in a Case Stated", I could not find any reason to interfere with the said decision and / or facts as found by the SCIT as the Appellant had not shown any of the circumstances which merits intervention.

Issue 5 – The Appellant is not the Rightful Authority

42. The SCIT found that the Appellant was not the proper or rightful authority to decide on whether indirect export amounts to non-compliance of the Pioneer Certificate. The power lies with MITI pursuant to section 9 of PIA as discussed herein. The SCIT had also found that the Appellant had withheld certain crucial information to MITI to enable MITI to be fully appraised of all the relevant facts surrounding the Respondent's case before responding to the inquiries raised by the Appellant in its letter dated 28.6.2009.

43. From the letter written to MITI, it could be gauged that the Appellant had written the letter in such a manner so as to elicit and prompt a prejudicial response from MITI as follows:

43.1. By stating that there has been breach of export condition for years 1998 to 2000 intimating that for some years the Respondent had exported less of its products;

43.2. Offering its audit conclusion that the Respondent had breached the condition of the Pioneer Certificate;

43.3. The Appellant had interfered with powers vested in MITI by PIA by making recommendations that the Respondent's Pioneer Certificate be cancelled and incentives revoked without even giving the right to the Respondent to be heard;

43.4. By failing to fully appraised MITI of the facts surrounding the Respondent's case;

43.5. Keeping the Respondent in the dark about the communication between the Appellant and MITI until the hearing before the SCIT, despite the fact that the Respondent would be affected by any decision by MITI relating to the status of the pioneer certificate; and

43.6. Failure in not seeking for any clarification of the Respondent who is the party affected by any adverse decision made by the Appellant or MITI.

44. From the above, it is obvious that the Appellant had exceeded the authority granted to it by ITA and had encroached into the jurisdiction of MITI (see ***Palm Oil Research and Development Board Malaysia & Anor v Premiun Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 at page 291***).

45. The Appellant had acted *ultra vires* in disallowing the Respondent's claim for the tax incentives under the Pioneer Certificate. In view of the above and for the reasons I had discussed in the earlier paragraphs, the SCIT was correct to hold that MITI's letter dated 17.7.2009 is fatally and legally flawed and of no consequences due to non-compliance of the provision of section 9 of the PIA, as found by the SCIT.

Issue 6 - Time-Bar

46. The next issue to be considered is whether the Appellant could invoke section 91 of the ITA to justify its imposition of additional assessment on the Respondent.

47. It would appear that the additional assessment raised against the Respondent was for Year of Assessment 2000 (Current Year Basis). This has been made beyond six (6) years, the time within which a claim can be brought as stated in section 91 (3) of the ITA, unless if the

Appellant can prove that fraud or willful default has been committed by or on behalf of any person or there is an element of negligence involved (**see section 91(3) of ITA**; ***Government of Malaysia v Gan Chuan Lian And Anor Action [1992] 1 MLJ 449 at page 453; Government of Malaysia v Ng Song Choon [1989] 1 MLJ 473***).

48. The Appellant contended that the Respondent was negligent in preparing its accounts for Year of Assessment 2000 (Preceding Year Basis) by having more than 12 months in the said basis period. As a result of this the Respondent alleged that this has caused a loss of revenue to the Government of Malaysia. The basis of the Appellant was because the Year of Assessment 2000 (Preceding Year Basis) was a waiver year.

49. The effect of a waiver year is that all income earned in that year of assessment is exempted from tax. A waiver year was declared for Malaysia for the year 1999 which is the Year of Assessment 2000. The Appellant contended that the Respondent has caused a loss of revenue to the Government of Malaysia in that waiver year by having a basis period of more than 12 months for that year of assessment i.e. a basis period from 1 April, 1998 to 31 December, 1999. The Appellant contended that where the basis period is more than 12 months, the income from the additional months will also be waived from tax and thus cause a loss of revenue to the Government.

50. What the Appellant failed to appreciate is that the Respondent has pioneer status from 1.10.1992 to 30.9.2002. The effect of having

pioneer status is similar to that of a waiver year i.e. that all income generated by the company from its pioneer business during the period covered by the pioneer status is exempted from tax. The waiver year declared by the Government, which is the year 1999, is part of the Respondent's pioneer status period. This was a fact found by the SCIT (**see paragraph 7.2(xxx) at page 17 of the Case Stated**). The Appellant's witness, RW-1 agreed with this during cross-examination. Therefore, regardless of whether there was a waiver year or not, the Respondent's income is still exempted from tax during that period.

51. Although the Respondent's basis period was for the waiver year was more than 12 months, the Respondent has not caused any loss of revenue to the Government of Malaysia. Therefore the Respondent's income between 1.4.1998 to 31.12.1999 is exempted from tax, with or without the waiver year (**see paragraph 7.2(xxxi) at page 17 of the Case Stated**).

52. Based on the above, the Appellant's contention that the Respondent was negligent cannot be supported. This point relied by the Appellant has no merits and rejected by this Court. The Appellant could not rely on the provision of section 91(1) of the ITA to justify its claim for additional assessment.

Issue 7 – Whether the Appellant can impose the penalty of 45%

53. Based on the reasons advanced above, the Appellant lacked the legal grounds and authority to raise the additional assessment in the first place. Therefore, the Appellant has no grounds to impose the penalty.

CONCLUSION

54. Bearing in mind of the above said principles, upon perusal of the cause papers, the written submissions of all the relevant parties herein and upon hearing the learned Counsels for the Appellant and the Respondent respectively and upon giving this matter a serious consideration, I am of the view that the decision of the SCIT did not suffer from any of the infirmities as highlighted in the case of ***Edwards v Bairstow [1955] 3 All ER 48*** as well as other cases submitted to this Court to merit curial intervention. For the above mentioned reasons, I dismiss the appeal by the Appellant with costs. After hearing a brief submission on the issue of costs, I have allowed costs of RM7,000 to be awarded to the Respondent.

55. For the purpose of these Grounds of Judgment, I have taken into consideration all the points that were submitted by both the learned Counsels. On the whole, I agreed with the points raised by the learned Counsel for the Respondent and adopt those points herein.

56. I would like to extend my sincere gratitude to all the learned Counsels for their professionalism, diligence and abled submissions in putting across all relevant points for the Court's determination.

(ASMABI BINTI MOHAMAD)
JUDGE
HIGH COURT SPECIAL POWERS
KUALA LUMPUR

Date of Grounds	:	10th May 2016
Date of Decision	:	18th Aug 2015
Date of Notice of Appeal	:	11th Sept 2015

Parties:

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