IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(APPELLATE & SPECIAL POWERS DIVISION)

CIVIL APPEAL NO: R1-14-12-10/2014

BETWEEN

KETUA PENGARAH HASIL DALAM NEGERI … APPELLANT

AND

MARIGOLD INDUSTRIES (M) SDN BHD … RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal by the Director General of Inland Revenue (**DGIR**) by way of a case stated by the Special Commissioners of Income Tax (**SCIT**) for the opinion of the High Court on certain questions of law (**This Appeal**). One of the questions of law which arises in This Appeal concerns the proviso to paragraph 1 (**Proviso to Paragraph 1**) of Schedule 7A (**Schedule 7A**) to the Income Tax Act 1967 (**ITA**). I am unable to find any previous case which has construed the Proviso to Paragraph 1.

B. Background

2. The respondent company (**Respondent**) is incorporated on 1.4.1979 and is in the business of manufacturing and selling rubber gloves.

3. The Respondent has a factory in Kulim (**Factory**).

4. In the Years of Assessment (**Y/A**) of 2001 to 2006, the Respondent claimed reinvestment allowance (**RA**).

5. On 13.2.2009, the DGIR conducted a field audit at the Factory.

6. By way of a letter dated 12.11.2009 (**DGIR's Letter dated 12.11.2009**), DGIR disallowed the Respondent's claim for RA amounting to RM5,388,385.00 (capital expenditure of RM8,980,642.00 had been incurred by the Respondent) for the following items:

   (a) upgrading of the Factory; new scheduled waste store; flammable chemical store; road widening; new "*Research & Development*" (**R&D**) laboratory; new building for compounding; electric mainboard for R&D; partition with half glass and batch dip workshop; and

   (b) plant and machinery in the Factory, namely emergency stop switch; fire sprinkler system; effluent plant; upgrading of chromic acid plant; plant rewiring; fixtures and fittings; air conditioner; environmental air

conditioner; former boxes; divert canteen discharge; sludge dryer and computer equipment

(**Disputed Items**).

7. The DGIR raised –

(a) notices of additional assessment (**Form JA**) with penalties for the Y/A 2003, 2004 and 2005; and

(b) notices of non-chargeability of income (**Form NL**) for the Y/A 2001, 2002 and 2006.

8. On 20.1.2010, the Respondent filed notices of appeal against DGIR's decision to raise Forms JA and Forms NL.

C. <u>Respondent's appeal to SCIT (Respondent's Appeal)</u>

9. The SCIT found that the following facts, among others, had been proved by the Respondent:

(a) the Disputed Items play a necessary and integral role in the Respondent's business. This fact is proven by the testimony of Mr. Sachidanantham Packirisamy, the Respondent's "*Cell Manager*", Prime Manufacturing Department (**AW2**). AW2's evidence regarding

the Disputed Items, had not been challenged during cross-examination by DGIR;

(b) the Respondent incurred capital expenditure for the purposes of expansion and modernization of the Respondent's manufacturing activity;

(c) there are 4 stages in the manufacturing of gloves. To ensure efficiency and to reduce wastage of raw materials, every manufacturing stage is recorded by entering all information into the Respondent's "*Systems, Applications and Products in Data Processing Transaction System*" (**SAP System**) with the help of barcode scanning. The SAP System helps to eliminate human errors which are caused by manual entries of records of all movements of each manufacturing stage. The SAP System enables the Respondent to keep track of its manufacturing activity and ensure efficiency of the same. AW2's evidence regarding the SAP System, had not been challenged by DGIR;

(d) the Respondent upgraded the Factory and purchased new plant and machinery so as to expand and modernize its manufacturing activity. Such an expansion and modernization was due to the following reasons -

(i) there was a good demand for the Respondent's products;

(ii) the Respondent's client pool grew larger over the years;

(iii) the Respondent's expansion and modernization ensured greater efficiency and variety of products; and

(iv) the Respondent's expansion and modernization ensures and improves the quality of the Respondent's products;

(e) the Respondent had incurred capital expenditure in its expansion and modernization of the Factory and the purchase of plant and machinery;

(f) the Respondent's expansion and modernization was in the form of upgrading works to the Factory;

(g) AW2 testified that the Respondent's expansion and modernization was not done for cosmetic reasons;

(h) before the Respondent claimed for RA, the Respondent had sought professional advice from its tax agent, Messrs Ernest & Young Tax Consultants Sdn. Bhd. (**Messrs E&Y**). The Respondent would not have claimed for RA if Messrs E&Y had advised the Respondent not to do so;

(i) the Respondent was not aware of any Public Ruling issued by DGIR regarding the Respondent's RA claims;

(j) Forms NL for the Y/A 2001 and 2002 were raised on 12.1.2010, 6 years after the end of the Y/A 2001 and 2002. Forms NL for the Y/A

2001 and 2002 had therefore been raised after the six-year limitation period which expired on 31.12.2007 and 31.12.2008 for the Y/A 2001 and 2002 respectively. DGIR had not provided any reason for the delay in raising Forms NL for the Y/A 2001 and 2002; and

(k) the Respondent had submitted its tax returns and "*Borang EPS*" within the prescribed time frame for the Y/A 2001 and 2002. The Respondent had also given full co-operation to the DGIR. At all material times, the Respondent had made full and frank disclosure to the DGIR. The DGIR had not complained of any delay on the part of the Respondent. Nor had the DGIR alleged that the Respondent had not extended its co-operation to the DGIR.

10. The SCIT allowed the Respondent's Appeal and made the following "*Deciding Order*" [as understood in paragraph 23 of Schedule 5 to ITA (**Schedule 5**)] on 13.1.2014:

(a) DGIR had failed to discharge the burden of proof under s 91(3) ITA in respect of Forms NL for Y/A 2001 and 2002;

(b) the Respondent was entitled to claim for RA under Schedule 7A for all the Disputed Items stated in DGIR's Letter dated 12.11.2009; and

(c) it was not appropriate for the DGIR to impose penalties under s 113(2) ITA for Y/A 2003, 2004 and 2005.

D. This Appeal

11. By a notice of appeal dated 12.2.2014, the DGIR required the SCIT to state a case for the opinion of the High Court pursuant to paragraph 34 of Schedule 5. Consequently, the question for the opinion of this court is whether on the facts as stated by the SCIT, the SCIT's decision is correct in law.

E. Sole issue

12. In This Appeal, the DGIR is contented to proceed on only one ground of appeal, namely whether the Respondent is entitled to claim under Schedule 7A for RA in respect of expenses for the SAP System amounting to RM1,375,930 for the Y/A 2006.

F. DGIR's submission

13. In support of This Appeal, the DGIR contended as follows:

    (a) the High Court may set aside part of the SCIT's Deciding Order concerning RA for the SAP System on any one of the 3 following grounds -

        (i) there is a misconception of the law on the part of the SCIT;

(ii) the SCIT's conclusion of law cannot be supported by the primary facts found by the SCIT; or

(iiii) the SCIT have made a conclusion of mixed fact and law that no reasonable SCIT could have reached had the SCIT directed themselves correctly.

The DGIR's learned counsel relied on the following cases –

(1) the opinion of the Privy Council in an appeal from Malaysia, **Chua Lip Kong v Director-General of Inland Revenue** [1982] 1 MLJ 235; and

(2) the House of Lords case of **Edwards (H.M. Inspector of Taxes) v Bairstow & Harison** (1955) 36 TC 207;

(b) the Respondent has the legal burden under paragraph 13 of Schedule 5, to prove before the SCIT that the DGIR's Forms JA for the Y/A 2003, 2005 and 2005 are excessive, wrong and also what must be done by the DGIR to put the assessments right. The same legal onus is placed on the Respondent when there is an appeal to the High Court by way of a case stated by the DGIR. Reliance has been placed by the DGIR on the following cases –

(i) the Supreme Court's decision in **Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri** [1994] 2 MLJ 713;

(ii) the Singapore High Court case of **A.B.C. v The Comptroller of Income Tax, Singapore** (1959) 25 MLJ 162; and

(iii) the English High Court's judgment in **Nicholson v Morris (Inspector of Taxes)** [1976] STC 269;

(c) the SCIT have erred in law in respect of the SAP System as follows –

(i) the meaning of paragraphs 1 and 8(a) of Schedule 7A is not the same as the meaning of Schedule 3 to ITA (**Schedule 3**). If Parliament has intended for RA in Schedule 7A to be governed by Schedule 3, Parliament would have made such an intention clear in Schedule 7A. In respect of this contention, the DGIR relied on the Federal Court case of **Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor** [2007] 6 MLJ 571;

(ii) the pre-requisite for the Respondent to claim for RA in respect of the SAP System is that the Respondent must prove that the SAP System is a "*qualifying project*" within the meaning of paragraph 8(a) of Schedule 7A, namely the SAP System is for the purpose of expanding, modernizing or automating the Respondent's existing business. According to the DGIR, the Respondent had failed to prove that the Respondent could claim for RA in respect of the SPA System under paragraphs 1 and 8(a) of Schedule 7A. The DGIR relied on the case of **Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd v Ketua**

Pengarah Hasil Dalam Negeri, Kuching High Court Tax Appeal No. 14-01-2005-I;

(iii) the SCIT have failed to consider the application of the clear and unambiguous words of the Proviso to Paragraph 1. The DGIR's learned counsel cited the Supreme Court's judgment in **National Land Finance Co-operative Society Ltd v Director General of Inland Revenue** [1993] 4 CLJ 339;

(iv) the SCIT have failed to appreciate that the cases of **Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd** (2012) MSTC 30-039 (**Success Electronics**) and **Ketua Pengarah Hasil Dalam Negeri v Firgos (M) Sdn Bhd** (2013) MSTC 30-065 (**Firgos**) do not involve the application of the Proviso to Paragraph 1. According to the DGIR, income tax cases depend on their own peculiar facts and the Federal Court case of **International Investment Ltd v Comptroller-General of Inland Revenue** [1975] 2 MLJ 208, has been cited in support of such a proposition; and

(v) the SAP System was not solely used for the manufacturing of the Respondent's products but was also used for the following purposes –

(1) the Respondent had a factory in Portugal and its headquarters in Paris, France. The SAP System had been

used to communicate with the Respondent's counterparts in other countries. As such, the SAP System had been used for the management and administration of the Respondent (to which the Proviso to Paragraph 1 applies);

(2) the SAP had also been used for the Respondent's "*financial management and reporting*". Since the SAP System had been used for the Respondent's accounting purposes, the Proviso to Paragraph 1 disqualifies the Respondent from claiming RA for the SAP System;

(3) the SAP System had been used by the Respondent's directors, management team and administrative staff, both local and foreign. Hence, the application of the Proviso to Paragraph 1 to the SAP System; and

(4) the use of the SAP System for the Respondent's directors, management team and administrative staff, was proven by the Respondent's own contemporaneous documents;

(d) where a statute provides for a tax relief, the principle that an ambiguity in a taxing statute should be construed in favour of a taxpayer, does not apply. The DGIR relied on the English Court of Appeal case of **Littman v Barron (Inspector of Taxes)** [1951] 1 Ch 993; and

(e) to rely on the tax relief given by Schedule 7A, the Respondent has to bring itself within the words of the tax statute giving such a relief. The following cases have been cited by the DGIR –

(i) the House of Lords case of **Ben-Odeco Ltd v Powlson (Inspector of Taxes)** [1978] STC 460; and

(ii) the Scottish Court of Exchequer's decision in **Maughan (Surveyor of Taxes) v Free Church of Scotland** (1893) 3 TC 207.

G. Relevant provisions in ITA

14. The following provisions in the ITA are pertinent to This Appeal:

"***Special incentive relief***

133A. ***Notwithstanding any other provisions of this Act, special incentive relief shall be given in accordance with Schedule 7A and Schedule 7B****.*

Schedule 3 - Capital Allowances And Charges

Schedule 5 – Appeals

Onus of proof

13. ***The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be on the appellant****.*

Further appeals

34. ***Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to subparagraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court*** *and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.*

Schedule 7A – Reinvestment Allowance

1. ***Subject to this Schedule, where a company which is resident in Malaysia*** *-*

(a) ***has been in operation for not less than twelve months****;* ***and***

(b) ***has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for the purposes of a qualifying project****,*

there shall be given to the company for that year of assessment a reinvestment allowance of an amount equal to sixty per cent of that expenditure*:*

Provided that such expenditure shall not include capital expenditure incurred on plant or machinery which is provided wholly or partly for the use of a director, or an individual who is a member of the management, or administrative or clerical staff*.*

8. ***In this Schedule, "qualifying project" means*** *-*

(a) ***a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing or processing of a product***

or any related product within the same industry or in diversifying its existing business into any related product within the same industry*;*

(b) a project undertaken by a company which is participating in industrial adjustment approved under section 31A of the Promotion of Investments Act 1986, in expanding its existing business or modernising its production techniques or processes; or

(c) an agricultural project undertaken by a company in expanding, modernising or diversifying its cultivation and farming business."

(emphasis added).

H. <u>Who has legal burden and when can High Court intervene in This Appeal?</u>

15. I am of the following view regarding which party has the legal onus:

(a) in a taxpayer's appeal to SCIT, paragraph 13 of Schedule 5 has clearly imposed the legal burden on the taxpayer. This is clear from the Supreme Court's judgment delivered by Edgar Joseph Jr SCJ in **Lower Perak Co-operative Housing Society Bhd**, at p. 733; and

(b) if the SCIT have made a Deciding Order and there is an appeal by way of a case stated by the SCIT for the opinion of the High Court on specified question(s) of law, the appellant (be it the taxpayer or DGIR), has the legal onus to satisfy the High Court that there should be judicial intervention by the High Court in respect of the Deciding Order. This view is supported by the following cases –

(i) in **Lower Perak Co-operative Housing Society Bhd**, at p. 719 and 733-734, the taxpayer's appeal to the SCIT had been dismissed and the taxpayer further appealed to the High Court. For the appeal in the High Court, the taxpayer appellant bore the legal onus to satisfy the High Court - **Lower Perak Co-operative Housing Society Bhd**. It is to be emphasized that the DGIR did not appeal to the High Court in **Lower Perak Co-operative Housing Society Bhd**. Similarly, the taxpayers appealed to the High Court in **A.B.C.** and **Nicholson**. As such, the taxpayers had the legal onus in **A.B.C.** and **Nicholson**; and

(ii) in **Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri** (2013) MSTC 30-056, at paragraph 14 (p. 7,719 and 7,721), Hamid Sultan Abu Backer J (as he then was) decided as follows in the Court of Appeal –

> "*[14] … Our reasons, inter alia, are as follows:*
>
> *…*
>
> *(i)* ***Where the decision of the [SCIT] is appealed to the High Court by way of case stated, the burden lies on the appellant (ie the Inland Revenue) to satisfy the court that the [SCIT's] decision was based on the misconception of the law or their conclusion cannot be supported by the primary facts, and that conclusion on the mixed facts and law in this case was that no reasonable***

> ***[SCIT] could have reached it if they had correctly directed themselves*** *[see* ***Director-General of Inland Revenue v Hypergrowth Sdn Bhd*** *[2008] 4 CLJ 250].* ***The test is much stricter for appellate interference in contrast to Clarke's case or Lee Ing Chin's case.***"
>
> (emphasis added).

16. Based on **Kyros International Sdn Bhd**, the DGIR and not the Respondent, has the legal onus to satisfy the High Court that part of the Deciding Order in respect of the SAP System, should be set aside on any one or more of the following grounds:

    (a) the SCIT had committed an error of law as follows -

        (i) the Respondent was not entitled under paragraphs 1 and 8(a) of Schedule 7A, to claim for RA in respect of the SAP System; or

        (ii) the SCIT failed to apply the Proviso to Paragraph 1;

    (b) the Deciding Order in respect of the SAP System could not be supported by the primary facts found by the SCIT; **or**

(c) the SCIT's conclusion on the mixed facts and law in respect of the SAP System was one which no reasonable SCIT could have reached if the SCIT had correctly directed themselves.

I. Can Respondent claim RA for SAP System?

I(1). Decided cases

17. The following High Court cases (in chronological order) have laid down guidelines on when a taxpayer may claim for RA:

(a) **Success Electronics**, at paragraph 20, Abang Iskandar bin Abang Hashim J (as he then was) held as follows -

> "*20. … **The functionality of the claimed items in the overall context of the production in the manufacturing process in the factory ought to be taken as a valid factor to be considered in giving the appropriate meaning to the word 'factory' [sub-paragraph 1(b) of Schedule 7A]**. The [SCIT] were justified, having taken into account the authorities cited by them in the Case-stated, to regard the non-production area as part of the factory in both the buildings for which the Taxpayer had incurred capital expenses. …*"
>
> (emphasis added).

The High Court's decision in **Success Electronics** has been affirmed on appeal by the Court of Appeal. I am however unable to find the written judgment of the Court of Appeal in **Success Electronics**;

(b) See Mee Chun JC (as she then was) ruled in **Ketua Pengarah Hasil Dalam Negeri v Hicom-Suzuki Manufacturing Sdn Bhd** [2012] 1 LNS 667, at paragraphs 4, 6-9, 12, 14 and 16 (**Hicom-Suzuki Manufacturing**) as follows -

> "*4.* ***The primary issue was whether the supervision fees incurred by Hicom for the insfallion of machinery qualifies for reinvestment allowance under paragraph 1 of Schedule 7A to the Act****.*
>
> *…*
>
> *6.* ***At the outset it is clear capital expenditure (capex) is not defined in the Act. Hence resort to case laws and the dictionary should be made****. So for example* ***in Webster Encyclopedic Dictionary of the English Language capex is defined to be "money spent on improvement or additions"****. In KH Aiyers Judicial Dictionary Fourteenth Edition Lexis Nexis capex is defined as:-*
>
> > *"capital expenses. An expenses made by a business to provide a long-term benefit; a capital expenditure. A capital expenses is not deductible, but it can be used for depreciation or amortization."*
>
> *and expenditure and revenue expenditure as:-*

"Expenditure and revenue expenditure. Where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business, it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand, it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure."

7. *The Supreme Court of India in* ***Challapalli Sugar Limited v. Commissioner of Income Tax, A.P. Hyderabad*** *stated that:-*

"it is accepted accountancy rule for determining the cost of fixed assets is to include all expenditure necessary to bring such assets into existence and to put them in working condition-In case money is borrowed by a newly started company which is in process of constructing and erecting its plant, the interest incurred before the commencement of production on such borrowed money can be capitalized and added to the cost of the fixed assets which have been created as a result of such expenditure."

8. *In the regard the Malaysian Accounting Standards Board in its MASB Approved Standards for Private Entities provides:-*

> *"Initial Measurement of Property Plant and Equipment.*
>
> *...*
>
> *2. The cost of an item of property, plant and equipment comprises its purchase price, including import duties and non-refundable purchase taxes, and any directly attributable costs of bringing the asset to working condition for its intended use; any trade discounts and rebates are deducted in arriving at the purchase price. Examples of directly attributable costs are:*
>
> 1. *the cost of site preparation;*
> 2. *initial delivery and handling costs;*
> 3. *installation costs;*
> 4. *professional fees such as for architects and engineers; and*
> 5. *the estimated cost of dismantling and removing the asset and restoring the site, to the extent that it is recognized as a provision."*

9. ***From the above capex includes the cost of bringing machinery into working condition and this would necessarily include supervision fees incurred. The***

supervision fees incurred by Hicom in the installation of machinery and which was capitisalised as part of capex on machinery can rightfully qualify for reinvestment allowance under paragraph 1 of Schedule 7A to the Act*.*

…

12. *Viewed in the light of the above principles expounded in the various authorities DGIT's contention the clear words "on a factory, plant or machinery used" must necessarily exclude supervision fees leaving no room for reading any other interpretation, is not tenable.*

13. ***It was not disputed****:-*

    (a) *DGIT had allowed the Capital Allowance claimed by the Respondent as regards to the cost of machineries, tools and implements and other related expenses ie, installation and commissioning in Year of Assessment 2003.*

    (b) *DGIT had only allowed the Reinvestment Allowance claimed by the Respondent on the cost of machineries, tools and implements only in Year of Assessment 2003.*

    (c) ***DGIT had allowed the Capital Allowance claimed by the Respondent in Year of Assessment 2003 as regard to supervision fees****.*

14. ***This however does not mean reinvestment allowance on the supervision fees cannot be given. This is because Schedule 7A is made pursuant to section 133A whereby is stated "Notwithstanding any other provision of this Act, special incentive relief shall be given in accordance with***

Schedule 7A". This must necessary mean that if for example a Schedule 3 allowance had been allowed it does not preclude a special incentive relief in the form of reinvestment allowance from being given provided it satisfies the criteria provided*.*

…

16. ***Under the circumstances the deciding order of the SC dated 10-05- 2012 was affirmed and the appeal of DGIT way of case stated was dismissed****.*"

(emphasis added);

(c) in **Firgos**, at paragraphs 7 and 8, Zaleha binti Yusof J decided as follows –

"*7.* *The appellant [DGIR] submits that the words "… in respect of manufacturing or processing of a product …" in paragraph 8(b) of Schedule 7A is a phrase that needs to come into heavy consideration in determining the respondent's eligibility to reinvestment allowance. They further submit that manufacturing process/activity is a process of production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine. The appellant then submits that the eligibility of capital expenditure for reinvestment allowance shall be subject to whether that part of building of whether the plant or machinery is involved in the manufacturing process/activity, or transforming raw materials into an end product.*

8. *With due respect,* ***I cannot agree with this line of submission. The words "existing business" found before the words "in respect of manufacturing or processing of a product" must be read together as a whole, so that the expression "existing business in respect of manufacturing or processing of a product" is the more probable expression which is consistent with the intention of the Legislature in enacting para 8(a) of Schedule 7A****. … If Parliament had intended reinvestment allowance to be restricted only to "production area", then Parliament would have surely specified this clearly in Schedule 7A. I agree with the respondent that by imposing the condition of "production area" to the meaning of "manufacturing", the appellant had clearly acted ultra vires, illegally and without jurisdiction as such was never the intention of Parliament. The appellant cannot be allowed to usurp the role of Parliament by coining its own definition of "manufacturing" and drafting its own law.*

…

Conclusions

The SCIT was right when they relied on Success Electronics' case as the case binds them. The appellant should have also taken the same step because unless and until the Court of Appeal sets aside the decision in Success Electronics' case, the decision is a binding authority*. …*"

(emphasis added);

(d) Mohd. Amin Firdaus bin Abdullah JC held in **Penfabric Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri** (2013) MSTC 30-069, at pages 7,798, 7,814 and 7,815 -

"***Issues For Determination***

…

2) ***Information Technology Project***

Whether the Respondent is entitled to disallow the Reinvestment Allowance amounting to the sum of RM457,301.64 claimed by the Appellant in the year of assessment 2001 and the sum of RM115,733.40 claimed by the Appellant in the year of assessment 2002, in respect of capital expenditure incurred, to install and implement the Information Technology Project, based on the grounds contained in the Respondent's Letter dated 18 June 2008?

…

Information Technology System

Applying the cases in Yarmouth and Maden & Ireland Ltd, this court views that the Information Technology System is plant as the item/system is used by the Appellant for carrying on their business and it is not stock-in-trade and it is kept for permanent employment in their business based on Hinton (Inspector of Taxes) v Maden & Ireland Ltd's case*.*

The System also fulfils the 'apparatus' test in that it is used by the Appellant to carry on the Appellant's business.

As the learned counsel for the Appellant pointed out, the Information Technology project is to modernize and automate the manufacturing process and operation of the Appellant among other items, the project procured and installed equipment, fibre optic cables, computer service and softwares on factory, plant or machinery in connection with the Appellant's manufacturing process.

The project is the 'brain' of the manufacturing operator of the Appellant and coordinates, monitors and controls the manufacturing operation of the Appellant's products from the time an order is received until the finished goods are manufactured and shipped to the ultimate customer.

The Information Technology Project, among other project items, is not just a mere setting as contended by the learned legal revenue counsel for the Respondent based on the definition of 'setting' as defined in the case of Commissioners of Inland Revenue v Barclay Curie & Company Limited.

…

The project fulfils Schedule 7A 1(a), (b) and 8(a) of the same Schedule 7A *…*"

(emphasis added); and

(e) Zaleha binti Yusof J decided as follows in **Ketua Pengarah Hasil Dalam Negeri v OKA Concrete Industries Sdn Bhd** (2015) MSTC 30-091, at pages 8,092 and 8,093 –

"*In this case, the respondent claimed for reinvestment allowance in the [Y/A] 2003 to 2006 on the capital expenditure incurred on its factory … However this was disallowed by the appellant on the basis that the items were not involved in production activity. … Hence the respondent appealed to the [SCIT] against the assessment raised by the appellant and the SCIT on 7 September 2012 allowed the respondent's claim.*

…

11. ***As submitted by the respondent, the SCIT found as a fact that the said items play a necessary and integral role in the respondent's manufacturing activity. The SCIT recorded in detail the functionality of those items. I am of the view that the SCIT was correct to apply Success Electronics by taking into account the functionality of those items in determining whether those items were involved in the respondent's manufacturing business****.*

12. ***It has been ruled in Success Electronics that the "functionality of the claimed items in the overall context of production … ought to be taken as a valid factor …" Based on the evidence of the witnesses before it, I find that SCIT was correct to hold that those items claimed by the respondent are necessary and integral to the respondent's manufacturing activity, based on the functionality test, that every of such items performs an integral function in the context of the respondent's business of manufacturing ready mixed concrete and precast concrete products.***"

(emphasis added).

I(2). Conditions for Respondent to claim RA in respect of SAP System

18. I am of the following view regarding s 133A, paragraphs 1 and 8 of Schedule 7A:

(a) s 133A ITA has clearly provided that notwithstanding any other provisions in the ITA, special incentive relief "*shall be given in accordance with Schedule 7A*". As such, the meaning of Schedule 7A cannot be confined by any provision in the ITA, including Schedule 3. I rely on **Hicom-Suzuki Manufacturing**, at paragraph 14. On this point, I agree with the submission of DGIR's learned counsel that the meaning of paragraphs 1 and 8(a) of Schedule 7A is not governed by Schedule 3; **and**

(b) for a taxpayer company to claim RA equal to 60% of a capital expenditure under paragraphs 1 and 8 of Schedule 7A, the taxpayer company must satisfy all of the following conditions –

(i) the taxpayer company is resident in Malaysia;

(ii) the taxpayer company has been in operation for not less than 12 months;

(iii) the taxpayer company has incurred capital expenditure in the basis period for the Y/A on a –

(1) factory;

(2) plant; **or**

(3) machinery;

(iv) the factory, plant or machinery is used in Malaysia for the purposes of a "*qualifying project*", namely a project undertaken by the taxpayer company in –

(1) expanding;

(2) modernising; **or**

(3) automating

(1A) the taxpayer company's existing business in respect of manufacturing or processing of a product or any related product within the same industry; **or**

(1B) in diversifying the taxpayer company's existing business into any related product within the same industry

- as understood in sub-paragraph 8(a) of Schedule 7A; **and**

(v) the Proviso to Paragraph 1 does not apply.

19. In This Appeal, it is not disputed that the Respondent is resident in Malaysia and has been in operation for not less than 12 months.

I(3). How to interpret ITA?

20. The ITA has been revised in 1971. As such, Part I of the Interpretation Acts 1948 and 1967 (**IA**) applies to interpret ITA – please see s 2(1)(b) IA. Section 17A IA provides as follows:

> "***Regard to be had to the purpose of Act***
>
> *17A.* ***In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object***."
>
> (emphasis added).

21. Section 17A IA had been introduced by Parliament by way of the Interpretation (Amendment) Act 1997 which came into force on 25.7.1997.

22. Before the enforcement of s 17A IA, taxing statutes are construed strictly in favour of taxpayers. If there is any ambiguity in a taxing statute, namely there are 2 or more interpretations of a taxing statutory provision, such an ambiguity is resolved in favour of the taxpayer. I cite Gunn Chit Tuan SCJ's judgment in the Supreme Court case of **National Land Finance Co-operative Society Ltd**, at 344 –

> "***There are ample authorities to show that Courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists***. ***In Re Micklewait [1855] 11 Exch 452 it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable Government to administer the country and that the Courts should help in the collection of taxes whilst remaining fair to tax payers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J. in Cape Brandy Syndicate v. I.R.C***. *(supra):*
>
> > *... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...*
>
> ***It has also been said by the Judicial Committee in Oriental Bank Corporation v. Wright [1880] 5 AC 842, 856 "that the intention to impose a charge upon a subject must be shown by clear and unambiguous language".***"
>
> (emphasis added).

23. With the advent of s 17A IA, I refer to the following judgment of the Federal Court in **Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd** [2004] 2 CLJ 265:

(a) Haidar CJ (Malaya) held as follows at p. 272 and 273 -

> "*I have had the opportunity of considering in draft the judgments of Steve L.K. Shim, CJ (Sabah & Sarawak) and Gopal Sri Ram, JCA in respect of the two appeals viz, 03-02-04-2002 (W) and 02-05-2002 (W) before us. ...*
>
> ***I would, in addition, like to expressly state that I agree with the reasons advanced by my learned brother, Chief Judge (Sabah & Sarawak) in answering the questions posed for our consideration. It is clear beyond doubt that in view of s. 17A of the Interpretation Acts 1948 and 1967 there is now a statutory recognition for the courts to take purposive approach in the interpretation of statutes including taxing statutes****.*
>
> ***In England, though there is no equivalent provision of our s. 17A there, the House of Lords in dealing with a taxing statute in Pepper v. Hart [1993] AC 593 (by majority) took a purposive approach****. …*
>
> *…*
>
> ***The case of Pepper v. Hart on the purposive approach was quoted with approval by this court in Chor Phaik Har v. Farlim Properties Sdn. Bhd****. [1994] 4 CLJ 285.*"

(emphasis added);

(b) Steve Shim CJ (Sabah & Sarawak), at p. 274, 275 and 276, delivered the following judgment [concurred by Haidar CJ (Malaya)] –

> "***Now, the Court of Appeal, in the present case, had expressly held that the provisions of a taxing statute should be construed strictly without regard to the purpose, object or intent of the statute, relying, quite obviously, on the Supreme Court case of National Land-Finance Co-operative v. Director-General of Inland Revenue*** *[1993] 4 CLJ 339 when Gunn Chit Tuan CJ (Malaya) said:*
>
> *…*
>
> ***With respect, the principle of strict interpretation of statutes enunciated by Rowlatt, J could not be regarded as the locus classicus on the issue. Indeed as long ago as 1899, Lord Russell of Killowen CJ took a different approach in AG v. Carlton Bank [1899] 2 QB 158, when he said inter alia****:*
>
> > ***I see no reason why special canons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the legislature*** *...*

In Luke v. IRC [1963] AC 557, Lord Reid in the House of Lords, echoed similar views. And much later, Lord Wilberforce expanded the principle in W.T. Ramsay Ltd. v. Inland Revenue Commission [1982] AC 300 when he said as follows*:*

> ***A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act ... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded*** *...*

This is known as the Ramsay Principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach. Undoubtedly, in the United Kingdom, there is currently a more pronounced shift from the strict literal interpretation of a taxing statute. The Ramsay Principle of statutory interpretation seems to have entrenched itself; (see Pepper v. Hart [1993] AC 593). In Malaysia, that principle should apply and it must be applied in consonance with s. 17A of the Interpretation Acts 1948/1967 *which stipulates:*

…

It is pertinent to note that s. 17A was a recent amendment under the Interpretation (Amendment) Act 1997 (Act A996) and became effective on 25 July 1997. This would be after the National Land Finance Co-operative (supra). In my view, the law is now clear beyond doubt. Section 17A above enjoins the purposive

approach to statutory interpretation. This applies to all statutes including taxing statutes*. …*"

(emphasis added); and

(c) Gopal JCA (as he then was) decided as follows, at p. 298 and 299-300 –

"***The next issue posed by the appellant is whether the 1979 Act as a taxing statute should receive a purposive interpretation****. …*

…

Further, Parliament via s. 17A of the Interpretation Acts 1948 and 1967 requires the court to adopt a purposive approach*. …*

…

So, there is no doubt that even a taxing statute must be given a purposive approach*.*

…

In my judgment s. 17A has no impact upon the well established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A and these guidelines co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction. The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in Mangin v. Inland Revenue Commissioner *[1971] AC 739:*

> ***First, the words are to be given their ordinary meaning****. They are not to be given some other meaning simply because their object is to frustrate legitimate tax*

avoidance devices. As Turner J said in his (albeit dissenting) judgment in ***Marx v. Inland Revenue Commissioner*** *[1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.*

Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied*. One can only look fairly at the language used****.' (Per Rowlatt J in* ***Cape Brandy Syndicate v. Inland Revenue Commissioners*** *[1921] 1 KB 64 at 71, approved by Viscount Simons LC in* ***Canadian Eagle Oil Co Ltd v. Regeim*** *[1945] 2 All ER 499, [1946] AC 119.*

Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

In my respectful view, s. 17A of the Interpretation Acts 1948 and 1967 neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. Hence, the governing principle is this. When construing a taxing or other

statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein*. …*"

(emphasis added).

I(4). <u>Had Respondent incurred capital expenditure regarding SAP System under paragraphs 1 and 8(a) of Schedule 7A?</u>

24. In an unreported judgment in the High Court case of **Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd**, at p. 9-10, Clement Skinner J (as he then was) explained the purpose of paragraph 1 of Schedule 7A as follows:

"***The reinvestment allowance under paragraph 1 acts as an incentive to incur capital expenditure on plant machinery and factory for a qualifying project. The relief granted is for expending money on plant and equipment used to manufacture products****. … To my mind the allowance/incentive granted under paragraph 1 of Schedule 7A is to increase or promote productivity through the use of new/modern efficient plant and machinery by giving a reinvestment allowance on capital expenditure …*"

(emphasis added).

25. The High Court's decision in **Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd** has been reversed by the Court of Appeal. In view of such a reversal, from the view point of the *stare decisis* doctrine, no reliance can be placed on the High Court's decision in **Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd**. There is however no written judgment by the Court of Appeal in **Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd**. In **Datuk Haji Harun bin Haji Idris v Public Prosecutor** [1977] 2 MLJ 155, at 170, Suffian LP delivered the following judgment in the Federal Court:

> "***The full judgment in Heah Chin Kim [1954] MLJ xxxiii is not available and it is impossible for us to determine its ratio decidendi.***"
>
> (emphasis added).

26. Based on s 17A IA and the Federal Court's judgment in **Palm Oil Research and Development Board Malaysia**, s 133A, paragraphs 1 and 8(a) of Schedule 7A should be given a purposive interpretation. I am of the view that the purpose of s 133A read with paragraphs 1 and 8(a) of Schedule 7A, is to provide a "*special incentive relief*" to companies resident in Malaysia which have been in operation for not less than 12 months, to invest in the expansion, modernization or automation of their product manufacturing or processing.

27. The SCIT have made the following findings of fact:

(a) the Disputed Items, including the SAP System, play a necessary and integral role in the Respondent's business;

(b) the Respondent had incurred capital expenditure for the purposes of expansion and modernization of the Respondent's manufacturing activity;

(c) the SAP System helps to eliminate human errors which are caused by manual entries of records of all movements of the Respondent's 4 stages in the manufacturing of gloves. The SAP System enables the Respondent to keep track of its manufacturing activity and ensure efficiency of the same; and

(d) the Respondent's expansion and modernization was in the form of upgrading works to the Factory. Such an expansion and modernization was not done for cosmetic reasons.

28. Based on the above findings of fact by the SCIT, I am satisfied that the purpose of s 133A read with paragraphs 1 and 8(a) of Schedule 7A, has been satisfied regarding the capital expenditure incurred by the Respondent for the SAP System. A purposive construction of s 133A read with paragraphs 1 and 8(a) of Schedule 7A does not take into account the following contentions of the DGIR:

(a) the SAP System is not solely used for the manufacturing of the Respondent's products but is also used for the Respondent's management, administration and accounting purposes;

(b) the SAP System is not directly involved in the production of the Respondent's rubber gloves; and

(c) the SAP System is not located in the production area of the Factory.

29. Additionally or alternatively, the Respondent's capital expenditure in respect of the SAP System has satisfied a literal interpretation of paragraphs 1 and 8(a) of Schedule 7A. This is supported by the following reasons:

(a) the Respondent had incurred capital expenditure in respect of the SAP System in the basis period for the Y/A in question as required by sub-paragraph 1(b) of Schedule 7A;

(b) the capital expenditure in respect of the SAP System, had been incurred "*on a factory*" used in Malaysia within the meaning of sub-paragraph 1(b) of Schedule 7A;

(c) the Respondent had undertaken a project in the Factory to expand and modernize the Respondent's existing business in respect of manufacturing of gloves within the same industry as understood in the meaning of a *"qualifying project*" in sub-paragraph 8(a) of Schedule 7A. Such a project clearly included the SAP System; and

(d) the capital expenditure in respect of the SAP System, had been incurred for the purposes of the above *"qualifying project*" within the meaning of sub-paragraph 1(b) of Schedule 7A.

30. A literal construction of paragraphs 1 and 8(a) of Schedule 7A does not require the fulfilment of matters contended by the DGIR as elaborated in the above sub-paragraphs 28(a) to (c).

31. The above purposive and/or literal interpretation of paragraphs 1 and 8(a) of Schedule 7A should be adopted unless there is evidence that the Respondent had intended to evade income tax by any one of the following means as provided in s 140(1)(a) to (d) ITA:

> "***Power to disregard certain transactions***
>
> *140(1)* ***The Director General, where he has reason to believe that any transaction has the direct or indirect effect of*** –
>
> *(a)* ***altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person****;*
>
> *(b)* ***relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return****;*

(c) ***evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act****; or*

(d) ***hindering or preventing the operation of this Act in any respect****,*

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction*.*"

(emphasis added).

In this case, there was no delay on the Respondent's part in submitting its tax returns and "*Borang EPS*". The Respondent had given full co-operation to the DGIR as well as had made full and frank disclosure to the DGIR. More importantly, before claiming RA for the Disputed Items (including for the SAP System), the Respondent had sought professional advice from an independent, competent and reputable tax firm, Messrs E&Y. According to the Respondent, the Respondent would not have claimed for RA regarding the Disputed Items, if not for the professional advice from Messrs E&Y. No evidence had been adduced by the DGIR before the SCIT that in claiming for RA, the Respondent had engaged in a tax evasion scheme envisaged in s 140(1)(a) to (d) ITA. Nor is there such a finding of fact by the SCIT.

I(5). Does Proviso to Paragraph 1 apply in this case?

32. In accordance with s 17A IA and **Palm Oil Research and Development Board Malaysia**, the Proviso to Paragraph 1 should be construed in a manner which promotes the purpose of s 133A, paragraphs 1 and 8(a) of Schedule 7A as stated in the above paragraph 26.

33. The purpose of the Proviso to Paragraph 1 is to disallow RA when the "*capital expenditure is incurred on plant and machinery which is provided wholly or partly for the use of a director, or an individual who is a member of the management, or administrative or clerical staff*". In my view, the Proviso to Paragraph 1 does not apply when the purpose of the capital expenditure is for the use of a taxpayer company's "*factory*" "*for the purposes of a qualifying project*" (as explained in the above paragraph 26).

34. Based on the aforesaid purposive interpretation of the Proviso to Paragraph 1, the DGIR cannot rely on the Proviso to Paragraph 1 in this case. Furthermore, the following reasons fortify the non-application of the Proviso to Paragraph 1 in this case:

    (a) the SCIT did not make any finding of fact that the capital expenditure for the SAP System had been "*incurred on plant and machinery which is provided wholly or partly for the use of a director, or an individual who is a member of the management, or administrative or clerical staff*". To the contrary, the SCIT had made a finding of fact

that the Disputed Items (including the SAP System) play a "*necessary and integral role*" in the Respondent's business. Accordingly, the Proviso to Paragraph 1 cannot apply in this case; and

(b) the DGIR did not advance any contention before the SCIT that the Proviso to Paragraph 1 should apply in this case.

35. The purpose of a proviso has been explained in the following decisions of our apex courts:

(a) in an appeal from Malaysia, **Garden City Development Bhd v Collector of Land Revenue, Federal Territory** [1982] 2 MLJ 98, at 100, Lord Keith delivered the following opinion of the Privy Council -

> "***As a general rule, the purpose of a proviso is to relax to some extent the full rigour of the main enactment****, …*"

(emphasis added); and

(b) in **R Rama Chandran v The Industrial Court of Malaysia & Anor** [1997] 4 MLJ 145, at 221, Edgar Joseph Jr FCJ in the majority decision of the Federal Court, held as follows -

> "***By way of preliminary, there are a few general observations I should like to make regarding the effect of a proviso. As Latham CJ said in Minister of State for the Army v Dalziel*** *(1944) 68 CLR 261 at p 274:*

> ***As a general rule, a proviso should not be interpreted as if it were a substantive provision independent of the provisions to which it is a proviso. Speaking generally, a proviso is a provision which is 'dependent on the main enactment' and not an 'independent enacting clause': cf R v Dibdin*** *[1910] P 57 at 125.*

> *And, as DC Pearce and RS Geddes have observed in their admirable book, Statutory Interpretation in Australia (3rd Ed):*

> *…* ***it may be that a proviso was inserted out of abundant caution to make it perfectly clear that a section is not to apply in certain circumstances or to certain persons when there is little doubt that it would not have done so anyway****. …* ***The proviso may only have been intended to be declaratory of the intention of the section****:* ***Bretherton v United Kingdom Totalisator Co Ltd*** *[1945] KB 555 at p 561.*"

(emphasis added).

36. Based on the above decisions of our apex courts, a proviso is to relax the full rigour of the main statutory provision and cannot be construed so widely so as to render redundant the main statutory provision. In this case, if I have acceded to the DGIR's submission that the Proviso to Paragraph 1 applies when the SAP System is used by any director or member of the management or administrative or clerical staff of the Respondent, I will be giving effect to the Proviso to Paragraph 1 which will undermine, if not defeat, the purpose of paragraph 1 of Schedule 7A.

37. Additionally or alternatively, a literal interpretation of the Proviso to Paragraph 1 indicates that such a proviso only applies to capital expenditure which has been "*incurred on plant and machinery which is provided wholly or partly for the use of a director, or an individual who is a member of the management, or administrative or clerical staff*". A literal construction of the Proviso to Paragraph 1 does not apply in this case when the SAP System plays "*a necessary and integral role*" in the Respondent's business (as found as a fact by the SCIT).

J. Court's decision

38. Premised on the above reasons, this court finds that the SCIT's Decision is correct in law. Accordingly, This Appeal is dismissed with costs.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 19 JANUARY 2016

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