IN THE HIGH COURT OF MALAYA
AT GEORGETOWN PENANG

CIVIL APPEAL NO: 14-4-12/2015

BETWEEN

KETUA HASIL DALAM NEGERI — APPELLANT

AND

NULOGITEC INDUSTRIES SDN BHD — RESPONDENT

GROUNDS OF DECISION

Introduction

1. This is an appeal of the Director General of Income Tax ('DGIT') on a question of law arising from the Deciding Order of the Special Commissioners of Income Tax ('Special Commissioners') dated 4

September 2015 ('Deciding Order') that favoured Nulogictec Industries Sdn Bhd ('NISB').

2. In the Deciding Order, the Special Commissioners stated as follows:

> "*ADALAH DIPUTUSKAN bahawa semua perkara yang dituntut oleh perayu dalam Tahun-Tahun Taksiran 2006, 2007, 2008 dan 2010 layak untuk dibenarkan Elaun pelaburan Semula di bawah Jadual 7A Akta Cukai Pendapatan 1967 seperti berikut:*
>
> *(i) Fire Fighting System*
>
> *(ii) Bangunan Kilang*
>
> *ADALAH DIPUTUSKAN JUGA bahawa panel ini tidak membuat apa-apa perintah di atas isu ketiga iaitu isu yang berkaitan dengan had masa;*

ADALAH DIPUTUSKAN JUGA bahawa Responden tidak wajar mengenakan penalti di bawah seksyen 113(2) Akta Cukai Pendapatan 1967

MAKA DENGAN INI ADALAH DIPERINTAHKAN bahawa rayuan Perayu kecuali isu ketiga, adalah dibenarkan."

3. Accordingly at the DGIT's behest *vide* its notice of appeal dated 9 October 2015 made pursuant to paragraph 34 of the Fifth Schedule to the Income Tax Act 1967, the Special Commissioners have on 30 November 2015 stated a case for the opinion of the high court.

4. The question of law that was posed to me by the Special Commissioners is whether on the facts as stated by them, their decision is correct in law.

5. The hearing of the case stated was held on 20 June 2016. After having read the written submissions filed by DGIT and NISB, I heard oral arguments of counsel on that day.

6. Thereafter I adjourned the hearing for deliberation and decision. I now give my decision together with the supporting grounds thereof.

Salient Facts

7. These are the salient facts that were proved or admitted as found by the Special Commissioners:

(i.) NISB is a private company incorporated under the Companies Act 1965 having its business address at Lot 6, Kawasan Pe`rindustrian Bukit Kayu Hitam, Bukit Kayu Hitam 06050 Jitra, Kedah;

(ii.) NISB is involved in the principal activity of manufacture and supply of different types of sizes of PVC pipes to clients/customers based on specifications provided by them. The PVC pipes were mainly used in construction and drainage projects;

(iii.) NISB carried out its business operation in a rented factory in Jabi, Jitra Kedah since 1 April 1998;

(iv.) NISB is a tax payer and has sought for reinvestment allowance ('RA') from the DGIT since year of assessment 2002;

(v.) The land area of the rented factory at Jabi was 9,473 square metres and the built up area was 24,000 square feet. This factory housed four machines for use in the NISB's manufacturing process, to wit: one unit of Extruder MD115, one unit of Extruder 66-19(A) and two units of Taiwanese Extruder THB 100 and Rex 90 Twin Screw Extruder. NISB kept its raw materials and finished goods in the open space at the factory;

(vi.) In 2004, NISB bought and hence acquired a new factory at Bukit Kayu Hitam at the cost of RM 1,583,074 and relocated its business operation from the old factory at Jabi to this new factory;

(vii.) The land area of the new factory at Bukit Kayu Hitam is 10,056 square metres and the built up area is 37,500 square feet. The four machines at the old factory at Jabi were relocated to the new factory albeit one of them was modified to produce pallet for scrap. NISB further in 2004 acquired a new machine, to wit: an Extruder MD 66-19(B). As the result, there were a total of five machines in operation in the factory;

(viii.) NISB sought for RA for the new factory as an expansion *vide* the submission of its income tax reinvestment form for the year of assessment 2005. Subsequently in the year of assessment 2009 and 2010, NISB sought for RA for the same new factory for modernization and automation instead. However during the years of assessment from 2004 to 2010, NISB only used four extruder machines in its production activities; and

(ix.) There was no increase in NISB's production and sales for the relevant years of assessment of income tax.

Contentions of the Parties

8. The DGIT has at the hearing before me conceded with regard to the RA for the fire fighting system of the new factory. The principal contentions of the DGIT are that the cost of NISB's acquisition of the new factory amounting to RM1,583,074 did not qualify for RA pursuant to Schedule 7A of the Income Tax Act 1967 since 2004 and accordingly the DGIT is entitled to impose the penalty against NISB pursuant to s. 113(2) of the Income Tax Act 1967 for the years of assessment 2006, 2007, 2008 and 2010. Hence the Special Commissioners erred in law and the Deciding Order ought to be set aside to that extent.

9. The DGIT emphasized that the Special Commissioners erred by focussing on whether NISB's new factory constituted a factory rather than a qualifying project within the contemplation of the Income Tax Act 1967. In this connection, it is necessary to adopt a two tier analysis as to whether that factory was a reinvestment instead of an initial investment based on the Public Ruling 2/2008 issued by the DGIT and thereafter whether that factory is an expansion, modernization or automation in respect of manufacturing or processing of a product.

10. Apposite to that, NISB in gist replied that the Special Commissioners have correctly construed the aforesaid statutory provisions and properly applied them to the facts of the case as found. In the result, the Deciding Order ought to be upheld.

Findings of the Court

11. In the supreme court case of ***Lower Perak Co-orperative Housing Society v. Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713**, Edgar Joseph Jr SCJ held as follows in respect of the function of the high court in dealing with a case stated emanating from the special commissioner of income tax at 732 -733:

> *"First of all, it would be pertinent to say that in considering this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in Edwards v Bairstow and Harrison, 1 regarding the duty of the court when hearing appeals from commissioners in tax cases. It will be recalled that in that case what Lord Radcliffe said (at pp 35-36) was this:*

I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. ***When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the***

determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. *Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.*

In Chua Lip Kong v Director-General of Inland Revenue 2, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:

... it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in Edwards v Bairstow. It is a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside.

And, in Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue 3, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners. Here is what his Lordship said [at p 169]:

The special commissioners are, of course, as the Federal Court rightly observed, the judges of fact, but in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case *both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.*

In Commissioners of Inland Revenue v Fraser 4, Lord President Normand said this (at p 501):

Then the commissioners, on consideration of the facts and arguments submitted to them, decided by a majority that an adventure in the nature of trade had not been carried on; that an investment had been made and subsequently realized, and that the profit was not assessable to income tax. It is obvious from the way in which the commissioners have stated their conclusion that they were quite aware that they were not stating something in the nature of a primary fact but were stating a conclusion into which argument upon the construction of the Income Tax Act had entered. The respondent's counsel maintained, however, that that finding was a finding in fact and, as such, was not reviewable by this court. I think we have jurisdiction to entertain the question at *law, which is whether the majority of the commissioners were warranted on the evidence in determining as they did. At the narrowest it is always open to this court in a stated case to review a finding in fact on the ground that there is no evidence to support it. That has been stated again and again."* (Emphasis is mine.)

12. In brevity and as submitted by the DGIT, the high court may intervene on the following grounds:

(i.) there is a misconception of law;

(ii.) the conclusion of law cannot be supported by the primary facts; or

(iii.) the conclusion of mixed fact and law that no reasonable special commissioner could have reached if they have correctly directed themselves.

13. Since this appeal primarily touches on RA, it is necessary for me to reproduce the following relevant provisions in s. 133A and Schedule 7A of the Income Tax Act 1967:

*"**133A. Special Incentive Relief***

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

SCHEDULE 7A

[Section133A]

REINVESTMENT ALLOWANCE

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

(a) has been in operation for not less than thirty-six 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 referred to under subparagraph 8(a) or (b),

(c) (Deleted by Act 591:s.13)

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 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) (Deleted by Act 693:s.46)

(c) an agricultural project undertaken by a company in expanding, modernising or diversifying its cultivation and farming business excluding the business of rearing chicken and ducks; or

(d) (Deleted by Act 755:s.38)

as verified by the Minister responsible for agriculture and agro-based industry."

14. The relevant findings of the Special Commissioners in their case stated here are as follows:

> *"10.2. The crux issue in this appeal concerns the Appellant's RA claim for the* <u>*factory building*</u> *under para 8(a) of Schedule 7A to the Act, for our deliberation and determination.*

10.3. The facts have been set out hereinbefore in para 7 and we do not intend to repeat them.

10.4 We understand learned Appellant counsel's contentions that the said RA claim should be allowed on the grounds that the undisputed expenses had been incurred; that the incentive given to the taxpayer/Appellant is for the purpose of encouraging either expansion, modernisation or automation; that paragraph 8(a) of the Schedule 7A states that a "qualifying project' is when the taxpayer has incurred expenditure on factory, building or machinery; that the Respondent's argument that the Appellant need to own a factory prior to claiming the reinvestment allowance for the present factory under appeal in Bukit Kayu Hitam , is not contemplated by the legislature based on the clear provisions of para 8(a).

10.5. On the other hand , we are perplexed by the myopic principal contentions of the Respondent in rebuttal that the Appellant must have owned a factory prior to making a claim for RA in respect of the factory building in Bukit Kayu

Hitam; that otherwise, the Appellant has not fulfilled the elements of the term "qualifying project"; that the SETMSB and Firgo cases are distinguishable and not applicable to the present appeal because the disputed items in those cases did not involve any RA claim for a factory building.

...

10.11. Thus from the passages in the SETMSB's case heard before the SCIT, and the remarks of the Y.A. High Court judge as reproduced above, we observe that the appellate High Court judge has, without any shadow of the doubt, agreed and upheld the SCIT's considered judicial decision on the word 'factory' and 'factory building'.

10.12. Now, having regard to the ruling made by the SCIT in SETMSB's case on the word 'factory' and applying the ruling to the proved facts on the factory building in the present appeal before us, crucially that it is a structure erected on land housing 5 machines used in the manufacture of PVC pipes, we safely find and rule, without *fear of contradiction, that the said facts before us completely fit the bill to satisfy the definition of the word 'factory' as provided in para 1 of the Schedule 7A, and also qualify for RA as the elements of a 'qualifying project' as provided in para 8(a) too have been fulfilled, because the new factory in Bukit Kayu Hitam has satisfied the ingredients for automation (as conceded by Revenue), modernisation and expansion, in our considered view. In this regard, we agree with and accept learned counsel's submission on this matter.*

...

*10.14. On the other hand and with respect, we absolutely do not agree nor accept the Respondent's principal reliance on para 7.2.5 in Public Ruling No. 2/2008 as reproduced above because the said Public Ruling No. 2/2008, is **with specific reference to para 7.2.5**, is a piece of subsidiary legislation. Now that the higher courts i.e. the High Court and Court of Appeal in SETMSB's case have ruled on paras 1 and 8(a) of Schedule 7A, para 7.2.5 in the said Public Ruling is rendered void and of no effect, based on* *section 23(1) Interpretation Act 1948 and 1967 (Act 388). In this respect, please refer to the SCIT's decision reported as AVSB v Ketua Pengarah Hasil Dalam Negeri [2011] AMTC 1580 for a clear discussion and understanding that a Public Ruling issued by the DGIR is a subsidiary legislation under the law. So, the High Court decision in SETMSB's as well as the Court of Appeal's decision affirming it, there are what is known as caselaw on the interpretation of para 1 and para 8(a) of Schedule 7A. Caselaw is considered as primary source of law over ruling any piece of subsidiary legislation that is inconsistent with the caselaw. Para 7.2.5 in Public Ruling No. 2/2008 is inconsistent with the higher court's decisions in SETMSB's case, therefore we hold para 7.2.5 void.*

...

10.17. On the penalties imposed, it is axiomatic that the Appellant's appeal must be allowed, as the Appellant has discharged the onus of proof under para 13 Fifth Schedule to the Act on its RA claim for the factory building. In addition, we agree with the Appellant's contentions as *reproduced under the sub-heading para 8 (supra) in this Case Stated."*

15. I have carefully reviewed the findings of the Special Commissioners in the light of the challenge and contentions of the DGIT as advanced before me.

16. Generally, the strict literal construction is the approach to be adopted in the interpretation of statutes. Thus in the supreme court case of ***Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35,** Abdoolcader SCJ held as follows at 43:

> *"The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded..."*

However His Lordship then went on and said the following:

"We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. Some three months ago Lord Scarman in delivering the leading judgment of the House of Lords in South West Water Authority v Rumble's [1985] 2 WLR 405 (at page 411), 411 said :

"... the language of the two paragraphs consists of ordinary English words which possess by their very imprecision the flexibility which is the hallmark of the English language, and which is one of the reasons for the survival of English as a living and worldwide tongue. I have no doubt that it would be contrary to the legislative purpose of the enactment to restrict or refine their breadth and flexibility in the context of this legislation, which has to cover a wide range of circumstances and situations present and future. A restrictive interpretation of the legislature's language would defeat the broad purpose of this innovative and reforming statute."

17. By way of the Interpretation (Amendment) Act 1997 that came into force on 25 July 1997, s 17A which reads as follows has been introduced:

> *"**17A. Regard to be had to the purpose of the Act***
>
> *In the interpretation of a provision of an Act, a construction that would promote the purpose or object of the underlying 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."*

18. Subsequently in the federal court case of ***Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd (and Another Appeal)*** **[2004] 4 AMR 202**, Gopal Sri Ram JCA (later FCJ) held as follows at 234-236:

> *"45. The next issue posed by the appellant is whether the 1979 Act as a taxing statute should receive a purposive interpretation. I must be forgiven if I express my astonishment at the need for a question the answer to which*

is so obvious and covered by high authority. Yet, we were regaled by authorities by counsel on both sides, each urging a different resolution of the question. Now, when it comes to a question of statutory interpretation, this court — or indeed any court — is not bound to select one or the other of the rival interpretations advanced by counsel. The court should think for itself and come to its own conclusion because the responsibility to interpret a statute rests with the court.

46. In Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd [1987] VR 529 the court was pressed by counsel not to adopt a construction that was not supported by the appellant in that case. McGarvie J's response merits recall. His Honour said:

During the hearing of the appeals when it was suggested from the bench that the right to be on the register depends on the location of the authorized depot the suggestion received little, if any, support from counsel for the authority. For the respondents, Mr Magee vigorously contested the suggestion. More than once Mr Magee submitted that it was not open to the court to adopt a construction of the legislation *which the appellants had not in argument supported. A pertinent response to that submission is that: "judges are more than mere selectors between rival views — they are entitled to and do think for themselves": Saif Ali v Sydney Mitchell and Co (A Firm) [1980] AC 198, at p 212, per Lord Wilberforce.*

47. Pepper v Hart [1993] AC 593, a case with which the whole if not a substantial number of the legal profession is familiar was a case that had to with a taxing statute, the Finance Act 1976. Lord Griffiths there said:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

48. Further, Parliament via s 17A of the Interpretation Acts 1948 and 1967 requires the court to adopt a purposive approach. That section reads:

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.

49. So, there is no doubt that even a taxing statute must be given a purposive approach. But that is quite different from saying, as learned counsel for the appellant is saying, that a taxing or revenue law statute may be read so as to confer power upon a member of the administration to collect a tax when there is neither an identification of the taxpayer nor conferment of a power to make subsidiary legislation in that behalf. If this court were to accept the argument of counsel for the appellant, then we would not be promoting the purpose or object of the 1979 Act but be defeating it. For, in such event we would, through unauthorised legislative power, be re-writing statute.

50. In my judgment s 17A root has no impact upon the well established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A root 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 p 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 p 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.

51. ***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. Imposing a tax by means of subsidiary legislation on a person not identified in the parent Act produces an absurd and unjust result and therefore does not promote its purpose or object." (Emphasis is mine.)

Subsequently also in the federal court case of ***Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2013] 6 AMR 717**, Suriyadi Halim Omar FCJ held at p 724 as follows:

"***In gist, when interpreting provisions in a taxing Act the intention of Parliament must be construed from the language used and for the Court to interpret it accordingly*** *(Cheatley v The Queen [1972] 127 CLR 291; Attorney-General (Canada) v Hallet & Carey Ltd[1952]*

AC 427; Glaisdale in Farrell v Alexander [1978] AC 59; Hatton v Beanmont [1977] 2 NSWLR 211). ***The matter may be summarily dealt with if the language is plain and unambiguous and admits of only one meaning****. In Kamla Devi v TakhatmalAIR 1964 SC 859 the court remarked: "If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions".*

On the other hand if the words are not so explicit, then it is incumbent upon the court to undertake an exercise to seek out the purpose of Parliament, but without sacrificing justice or importing the absurd*. The purposive approach is not a new concept as way back in AG v Carlton Bank [1899] 2 QB 158, Lord Russel of Killowen CJ shot a salvo when he stated that all Acts ought to be construed no differently, "whether the Act to be construed relates to taxation or any other subject, viz. to give effect to the intention of the legislature."* (Emphasis is mine.)

19. In my view, the DGIT is not wrong in pointing out that the Special Commissioners have concentrated on whether NISB's new factory is a factory within the statutory framework in their making of the Deciding Order. This is necessary so because para. 1(b) of Schedule 7A of the Income Tax Act 1967 on entitlement to RA expressly stipulated capital expenditure incurred by the tax payer on a factory for the purpose of a qualifying project. I do not therefore think that the Special Commissioners have over emphasized that point in reaching their decision.

20. In addition, I am of the view that the Special Commissioners have correctly referred to and relied on the decision of the high court in ***Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformer Manufacturer Sdn Bhd*** **KLHC Rayuan Sivil no. R1-14-14/09 (unreported)** (referred to as the SETMSB case in their case stated) on the meaning of factory. In that case Abang Iskandar J (now JCA) held as follows:

> *"5. Admittedly, the word 'factory' was not defined for the purpose of this RA. In the absence of such express definition to the word 'factory', the SCIT had taken the view that the word should then be given its ordinary meaning as defined in*

some respectable English dictionary, to begin with. This they did by looking up the New Shorter Oxford English Dictionary and from that exercise, they had netted the following definition to the word 'factory', 'A building or buildings with equipment for manufacturing.' They had also referred to the case of Ellerker (H.M. Inspector of Taxes) v Union Cold Storage Co. Ltd [1939] 1 All ER 23 where the word factory the ordinary meaning of factory "is a building used for the manufacture of goods and equipped with machinery and the word is generally understood in that sense." For the meaning of the word 'building' the SCIT had relied on the National Land Code, where under section 2 therein, the word 'building' has been defined as 'any structure erected on land'.

6. Proceeding as it were, on these definitions on the critical word 'factory', the SCIT had gone on to rule, at page 31 of the SCIT as follows: "Based on the above definitions of 'factory' and 'building', we are of the view that a factory is a building that is used to manufacture goods which may contain area for production and non-production."

...

20. I had the occasion to peruse through the records of this appeal mounted by the Revenue and looking at the Case-Stated by the learned Special Commissioners, I was of the view that they did not commit any of the infirmities alluded to by Lord Radcliffe in Edwards v. Bairstow and Harrison, 36 TC 207. I agree with learned counsel for the taxpayer respondent that the learned Special Commission had made unassailable findings and conclusions on the evidence and there is no reason for this court to intervene. ***There was no error made by the learned Special Commissioners in that material regard to the meaning to be assigned to the word 'factory'. Suffice for me to add there that is trite, any ambiguity in a provision that seeks to deprive a citizen of his property ought to be resolved in favour of the citizen, in this case the taxpayer. The ITA has defined factory in Schedule 3, but not in Schedule 7A para (1b). The learned Special Commissioners had derived great assistance on the meaning to be assigned to that word from a distillation of a number of decisions in cases in which the courts had been faced with the***

task of deciding what a factory ought to include, rather than falling back on to the narrow meaning assigned to that word by an ordinary dictionary. The functionality of the claimed items in the overall context of the production in the manufacturing process ought to have been taken as a valid factor to be considered in giving the appropriate meaning to the word 'factory'. The Special Commissioners 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. I agree with learned counsel for the Taxpayer and I do not think that the learned Special Commissioners had fallen into any error in so deciding." (Emphasis is mine.)

21. There is then the DGIT's contention that the factory must be a reinvestment and not the initial or first-time investment of the taxpayer. In this regard, the DGIT firstly referred to the Public Ruling no. 2/2008 issued by the Director General on 3 April 2008 wherein para. 7.2.5 provides as follows:

"A company moving from a rented factory to its own factory or buying over a factory previously rented does not qualify for RA on the factory as purchase of assets by itself does not fall under the definition of qualifying project. The capital expenditure incurred on the purchase of the factory is not qualifying expenditure as it is incurred in connection with relocating the manufacturing activity to a new location or change of ownership of factory and not connected to a qualifying project."

22. The Special Commissioners have in this regard dismissed this contention because they held that the aforesaid Public Ruling as void by reason of inconsistency with paras. 1 and 8(a) of Schedule 7A of the Income Tax Act 1967 as interpreted in the SETMSB case.

23. In ***AVSB v. Ketua Pengarah Hasil Dalam Negeri*** **(2011) AMTC 1580**, a decision by the special commissioners of income tax, it was held that a Public Ruling of the DGIT has the status of a subsidiary legislation. I think that is correct in law. It is however clear from the high court case of ***Wong Pot Heng v. Kerajaan Malaysia*** **[1992] 3 CLJ 1497** that the courts have jurisdiction to

declare invalid a delegated legislation if in the making of it, the body whom the power is delegated acted outside the legislative powers conferred on it.

24. However, it is provided in s. 23 of the Interpretation Acts 1948 and 1967 as follows:

> ***"23. Avoidance of subsidiary legislation in the case of inconsistency with Act***
>
> *(1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.*
>
> *(1A) For the purposes of subsection (1), any subsidiary legislation made under an Act is not inconsistent with that Act or any other Act merely by reason of the absence in the Act under which it is made of any provision relating to the commencement, application, operation, interpretation or construction of the subsidiary legislation or to any other matter in connection with such subsidiary legislation if provisions relating to the commencement, application,*

operation, interpretation or construction of, or other matter in connection with, subsidiary legislation generally are contained in this Act.

(2) In this section "Act" includes a federal law styling itself an Ordinance or Enactment."

I observed that Schedule 7A of the Income Tax Act is silent on the definition or meaning of reinvestment and Public Ruling no. 2/2008 seems legislated to fill that gap. Hence, it is my view that the aforesaid Public Ruling is not void pursuant to s.23 (1A) of the Interpretation Acts 1948 and 1967 contrary to the position held by the Special Commissioners.

25. Be that as it may and that notwithstanding, I noted that it is stipulated in para. 13 of the Public Ruling no. 2/2008 that:

"This Ruling is effective for the year of assessment 2008 and subsequent years of assessment."

This must be read with s. 20 of the Interpretation Acts 1948 and 1967 which provides:

> *"**20. Subsidiary legislation may be made retrospective***
> *Notwithstanding the absence of any express provision in any Act or other written law, where such Act or other written law empowers any person to make subsidiary legislation, such subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:*
>
> *Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published."*

26. On this premise, I hold that the Public Ruling no. 2/2008 is inapplicable to NISB's claim for the new factory in Bukit Kayu Hitam that was acquired/ purchased in 2004.

27. Nonetheless, the DGIT pressed on to contend that the definition of reinvestment should still be looked at in its ordinary, plain meaning and common usage. In this respect, the Longman Dictionary of Contemporary English defines 'reinvest' as:

> *"To use money you have earned from investments to buy additional investments."*

and in the Black's Law Dictionary (10th Ed.) as:

> *"1. The addition of interest earned on a monetary investment to the principal sum. 2. A second, additional, or repeated investment; esp., the application of dividends or other distributions toward the purchase of additional shares (as stock or mutual fund)."*

28. Again, the DGIT is correct in pointing out that NISB's purchase of the new factory in 2004 was their first investment in a factory building. I have however carefully reviewed the express provision in para. 8(a) of Schedule 7A and find that the operative if not also governing words are 'its existing business'. Thus, it is plain to me

that the reinvestment must be in the existing business and not in the existing factory as so contended by the DGIT: otherwise that would be a strained interpretation of the statute that was not contemplated by parliament. On the facts herein, NISB has already invested in the business of manufacturing PVC pipes since 1998 by operating in a rented factory in Jabi. Thus the investment in a new factory at Bukit Kayu Hitam is plainly a reinvestment in its existing business.

29. Moving on to the next contention of the DGIT, the purpose of the reinvestment must necessarily be for a qualifying project. In this respect, it is prescribed in para. 8(a) of Schedule 7A that this must be a project undertaken by the company to expand, modernize or automate its existing business.

30. The Special Commissioners have found in para. 10.12 of the case stated that the DGIT has conceded that NISB has satisfied the aforesaid element of automation. Moreover the Special Commissioners have found therein that NISB has satisfied the components of modernization and expansion too. This is to me largely a question of fact that does not warrant intervention by the high court. Nevertheless the DGIT has before me pitched it in the

sense that there was no evidence to support the findings of the Special Commissioners on modernization and expansion: hence a reviewable point of law. This is principally by reason that the sales or revenue of NISB did not rise but instead plummeted after the acquisition of the new factory.

31. I have also carefully reviewed the provisions in paras. 1(b) and 8(a) of Schedule 7A in this respect and do not find any express stipulation of the need for proof of increased sales or revenue post the reinvestment. I do think that this is intended by parliament on a purposive construction of the statute as well as by reason that it would be unfair to the taxpayer who would be subject to the vaguer of the economic climate. It is my view that the requirement of a qualifying project would have been met if there is evidence adduced by the taxpayer to demonstrate modernization or expansion from an objective viewpoint. On the facts herein, it is plain that the Special Commissioners have correctly found there was expansion by reason of the larger size of the new factory to house the manufactured products based on the definition of factory as held by the high court in ***Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformer Manufacturer Sdn Bhd*** **(supra)** and ***Ketua Pengarah Hasil Dalam Negeri v. Firgos (M)***

***Sdn Bhd* [2014] 1 MLJ 701**. The case of ***Formosa Prosonic Manufacturing Sdn Bhd v. KPHDN* (rayuan No. PKCP(R) 23/2011, 24/2011 dan 25/2011**, a decision of the special commissioners of income tax that was referred to me by the DGIT is distinguishable in that the taxpayer therein merely bought over the existing factory that they rented. There was no increase in size whatsoever. Besides expansion, I am also of the view that it is justified for the Special Commissioners herein to hold that there was modernization too by reason that the factory at Bukit Kayu Hitam acquired by NISB was a new one.

32. In the circumstances, it is my view that the Special Commissioners have not erred in law in their decision that NISB is entitled to RA as claimed. I am mindful that they were wrong in holding that the Public Ruling no. 2/2008 was void but that did not ultimately affect their decision because the Public Ruling was inapplicable to the factory that was acquired/purchased in 2004.

33. Consequently, the decision of the Special Commissioners in allowing NISB's appeal on the penalty imposed by the DGIT is correct. There is no error of law here as well since it is axiomatic that this follows the finding on NISB's RA entitlement.

Conclusion

34. For the foregoing reasons, I hereby dismiss the appeal of the DGIT with costs of RM 8,000.00. The Deciding Order dated 4 September 2015 is confirmed.

Dated this 21 July 2016

LIM CHONG FONG
JUDICIAL COMMISSIONER
HIGH COURT GEORGETOWN PENANG

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