DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

RAYUAN SIVIL NO: R1-14-01-2010

OPTO SENSORS SDN BHD ... PERAYU

DAN

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDEN

JUDGMENT

Aziah Ali J :

The Appellant appealed to the Special Commissioners of Income Tax ("SCIT") against the assessment raised by the Respondent under the Income Tax Act 1967 ("the Act") in respect of years of assessment 1998, 1999 and 2000.

[2] The facts as found by the SCIT are as follows –

(a) the Appellant was incorporated in Malaysia on 14 July 1994, with the principal activities of manufacturing opto electronics products, printed circuit assemblies, computer peripherals and other related products and servicing of x-ray machines for baggage inspection system;

(b) the Appellant has been granted manufacturing license for the following products :

Optical Mice, Optical Sensors, Musical interface devices, X-ray scanners/systems, Pulse Oximeters

(c) on 6 January 1995, the Appellant applied to the Malaysian Industrial Development Authority (“MIDA”) for pioneer status of the aforesaid products;

(d) only the X-ray scanners/systems and Pulse Oximeters ("Promoted Products") were granted pioneer status by MIDA. The other products, namely, Optical Mice, Optical Sensors and Musical interface devices ("Non-Promoted Products") were not granted pioneer status by MIDA;

(e) MIDA issued a pioneer certificate dated 15 June 1998 to the Appellant for the Promoted Products;

(f) the production day of the pioneer status was fixed on 1 August 1996;

(g) the approved tax relief period was for 5 years commencing from 1 August 1996;

(h) the Appellant continued to manufacture Optical Mice, Optical Sensors and Musical interface devices, i.e. the Non-Promoted Products, even though those products were not granted pioneer status;

(i) it is a statutory requirement for the Appellant to keep separate accounts for the Promoted Products and Non-Promoted Products;

(j) for the years of assessment 1998, 1999 and 2000 (CY), the net profits from the Promoted Products are as follows :

Years of Assessment	Profit (RM)
1998	3,552,987.00
1999	6,592,090.00
2000 (CY)	8,501,920.00

(k) for the years of assessment 1998, 1999 and 2000 (CY), the net profits for Non-Promoted Products are as follows :

Years of Assessment	Profit (RM)
1998	1,608,100.00
1999	1,329,666.00
2000 (CY)	11,255,139.00

(l) the Appellant claimed RA of 60% on the capital expenditure incurred on the Non-Promoted Products for the years of assessment 1998, 1999 and 2000 (CY). The particulars are as follows :

Years of Assessment	Capital expenditure (RM)
1998	181,779.00
1999	327,744.00
2000 (CY)	1,067,234.00

(m) the Respondent had initially granted RA for the above years of assessment. However in 2004, the Respondent had disallowed RA claimed by the Appellant on the capital expenditure incurred for the Non-Promoted Products for the said years of assessment;

(n) the Respondent contended that the Appellant is not entitled to RA as the Appellant has been granted pioneer status under the Promotion of Investments Act 1986 ("PIA");

(o) the Respondent raised the additional assessment for years of assessment 1998, 1999 and 2000 (CY);

(p) the Appellant being dissatisfied with the said assessments, filed notices of appeal in Form Q to the Special Commissioner of Income Tax on 24 June 2004.

[3] The issues for determination by the SCIT are as follows –

(a) whether the Appellant is entitled to claim 'Reinvestment Allowance' ("RA") on capital expenditure incurred in respect of non-promoted products of the company, notwithstanding the Appellant has been granted pioneer status under the PIA for its promoted products;

(b) whether paragraph 7(a) Schedule 7A of the Act restricts a company that has been granted pioneer status on certain eligible products under PIA to claim RA on the non-promoted products;

(c) whether a "Pioneer Status Company" is a company which deals exclusively with the pioneer activities only or it is merely referring to a company that has been granted with the pioneer status to certain of its products.

[4] The SCIT summarized the issues for determination which it said would solve all the issues raised as follows –

> "whether the Appellant is entitled to claim RA on capital expenditures incurred in respect of non-promoted products of the company, notwithstanding the Appellant has been granted pioneer status under PIA for its promoted products."

[5] MIDA had issued to the Appellant a pioneer certificate dated 15.6.1998 under section 7(3) of the PIA for x-ray scanners/systems and pulse oximeters. Section 7(3) of the PIA provides as follows –

> **Pioneer certificate**
>
> 7.(1) ……..
>
> (2) …….
>
> (3) The Minister may ……issue a pioneer certificate certifying –
>
> (a) the company to be a pioneer company;
>
> (b) the factory at which the promoted activity is carried on or the promoted product is produced to be a pioneer factory; and
>
> (c) the production day of the pioneer company.

[6] The certificate issued by the Minister under section 7(3) of PIA reads as follows –

> PADA menjalankan kuasa-kuasa di bawah subsection (3) Seksyen 7 Akta Penggalakan Pelaburan 1986 (Pindaan), adalah dengan ini diperakui bahawa OPTO SENSORS (MALAYSIA) SDN BHD yang menjalankan aktiviti perintis berikut :-

"X-RAY SCANNERS/SYSTEMS" DAN

"PULSE OXIMETERS"

Pada (Hari Pengeluaran) 1 Ogos, 1996 di No.8, Jalan Firma 2/2, Kawasan Perindustrian Tebrau, 81200 Johor Bahru, Johor Darul Takzim, hendaklah disifatkan sebagai suatu **syarikat perintis** untuk menjalankan aktiviti perintis sebagaimana dinyatakan dalam perakuan ini tertakluk kepada syarat-syarat yang telah dipersetujui oleh Menteri Perdangan Antarabangsa dan Industri bersama dengan Menteri Kewangan….(emphasis added)

[7] The SCIT agreed with the Respondent that where the literal meaning of the statute is clear and unambiguous, the strict interpretation applies (*National Land Finance Co-operative Society Ltd v DGIR* [1993] 2 AMR 3581). Where there is ambiguity, the principle is that a statute that provides exemption or relief from tax must be construed strictly against a taxpayer (*Littman v Baron* [1951] 33 TC 373; *Palm Oil Research and Development Board & Anor v Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265).

[8] Paragraph 1 of Schedule 7A provides as follows -

REINVESTMENT ALLOWANCE

[Section 133A]

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)* ,

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.

Paragraph 7 of Schedule 7A provides as follows -

7. This Schedule shall not apply to a company -

(a) for the period during which the company -

(i) has been granted pioneer status under the Promotion of Investments Act 1986 in respect of any promoted activity or promoted product and which is applying or intends to apply for the grant of a pioneer certificate; or

(ii) has been granted pioneer certificate under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and whose tax relief period has not ended or ceased;

[9] The SCIT was of the view that paragraphs 1 and 7 of Schedule 7A are mutually exclusive provisions where paragraph 7 restricts a company from enjoying both incentives at the same time. The SCIT opined that paragraph 1 has to be read together with paragraph 7 of the said Schedule 7A. The SCIT opined that the exemption and exclusion of the exemption under paragraph 7 is stressed more on the status of the company rather than on the promoted activities or products. Once the company is granted pioneer status for whatever product or activity, the company is

excluded from claiming RA as provided under Schedule 7A of the Act.

[10] Based on the facts the SCIT found that the Appellant is entitled to tax incentive under the PIA for its promoted products and enjoys tax relief for a period of five years from 1.8.1966. The SCIT decided *inter alia* that the Appellant being a pioneer company is prohibited by paragraph 7(a)(ii) Schedule 7A of the Act from claiming for RA under paragraph 1 of Schedule 7A. The Appellant cannot enjoy incentives under the PIA simultaneously with RA under Schedule 7A of the Act. Consequently the SCIT unanimously dismissed the appeal. The Deciding Order dated 12.11.2008 reads *inter alia* as follows –

> ***ADALAH DIPUTUSKAN*** *bahawa perenggan 7(a)(ii) Jadual 7A Akta Cukai Pendapatan 1967 menghalang Perayu dari menuntut elaun pelaburan semula di bawah perenggan 1 Jadual 7A Akta yang sama atas perbelanjaan yang berkaitan dengan aktiviti bukan perintis atau produk bukan perintis memandangkan Perayu telah diberikan taraf syarikat perintis di bawah Akta Penggalakan Pelaburan 1986*
>
> ***MAKA DENGAN INI ADALAH DIPERINTAHKAN*** *bahawa rayuan ini ditolak*

Submissions for the Appellant

[11] Counsel for the Appellant submits that the wordings of paragraph 7(a) Schedule 7A of the Act allows the Appellant to claim RA on non-promoted products because paragraph 7(a) only

precludes RA from being extended to promoted products. Counsel submits that the SCIT was wrong in law in focusing on the 'company' instead of on 'promoted products or promoted services'. In support counsel relied on the decision of the Kuching High Court in the case of *Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd v KPHLDN* (Tax Appeal No:14-01-2005-1). In that case the appellant, like the Appellant herein, manufactures both promoted products as well as non-promoted products. The appellant had been granted a pioneer certificate under the PIA in respect of the promoted products. The appellant does not enjoy tax incentives under the PIA for its capital expenditure in respect of the non-promoted products. However the appellant said it had incurred large capital expenditure in the manufacture of its non-promoted products. The appellant contended that under paragraph 1 of Schedule 7A it is entitled to claim and enjoy RA in respect of the non-promoted products. Similar to the submissions made in the present case, the Respondent submitted amongst others that paragraph 7(a)(ii) is an exclusion clause based on the status of the company and not on the status of the products it manufactures.

[12] The learned judge held that on a proper interpretation of paragraph 7(a)(ii) –

(a) paragraph 7(a)(ii) must be read as a whole in the context in which they appear;

(b) “the company” to be excluded from enjoyment of RA is described not merely as the company which has been granted a pioneer certificate, but as the company which has been granted pioneer certificate “in respect of a promoted activity or promoted product”;

(c) if read in the way proposed by the respondent, it will result in the words “in respect of a promoted activity or promoted product” being ignored and not being given effect to;

(d) the nature of the relief or incentive available to a taxpayer under paragraph 1 and paragraph 7 are very different;

(e) the RA under paragraph 1 acts as an incentive and the relief is granted for expending money on plant and equipment used to manufacture products;

(f) under paragraph 7 relief is granted for undertaking a “promoted activity” or manufacturing a “promoted product”;

(g) the allowance/incentive granted under paragraph 1 Schedule 7A is to increase or promote productivity by giving RA on capital expenditure;

(h) the relief granted under paragraph 7 is to promote a particular activity, trade or product;

(i) the paragraphs are aimed at promoting two different but mutually beneficial purposes;

(j) there is no reason why the incentive/relief granted under the two paragraphs must be mutually exclusive to each other;

(k) paragraph 7(a)(ii) expressly excludes a company which enjoys a rebate of income tax to its statutory income from a promoted product from also claiming RA on plant and machinery used in the manufacture of that product during the

period “the company has been granted pioneer certificate … in respect of a promoted activity or promoted product.”;

(l) the words “in respect of a promoted activity or promoted product” in paragraph 7(a)(ii) means that not every company that has been granted a pioneer certificate is excluded from claiming RA but only those companies which has been granted pioneer certificate in respect of a promoted activity or promoted product and whose tax period has not ended or ceased could claim RA.

[13] The learned judge held that paragraph 7(a)(ii) seeks to prohibit or exclude a company with a pioneer certificate or product from claiming for both RA and tax rebate in respect of the same product or activity. The learned judge further held that where a company granted pioneer certificate conducts a non-promoted activity or manufactures a non-promoted product and incurs capital expenditure on plant and machinery for a qualified project, there is no good reason why the company should be excluded from claiming RA for that capital expenditure which has nothing to do with a tax rebate granted for a promoted product. The learned judge sees no reason why companies engaged in the manufacture of both promoted and non-promoted products should be prejudiced or disadvantaged because of its enterprise by interpreting paragraph 7(a)(ii) in the way the respondent had done. The learned judge opined that the court ought not to adopt an interpretation that produces injustice or absurdity. The learned judge found that the appellant in that case had fulfilled all the conditions under paragraph 7(a)(ii). Counsel for the Appellant

urged this court to follow the decision in the above case. It is submitted that paragraph 7 only precludes RA from being extended to promoted products and not to particular companies.

[14] For the Respondent it is submitted that the learned judge in *Kion Hoong* had erred in applying the purposive approach of interpretation. Counsel refers to the legislative history of paragraph 7 which can be found in the judgment of the learned judge in the case of *Kion Hoong* above.

[15] Briefly the legislative history of Schedule 7A and paragraph 7 are as follows -

(a) Schedule 7A was introduced *vide* Income Tax (Amendment) Act 1979 (Act 451);

(b) Schedule 7A contained paragraph 7;

(c) in 1986 *vide* Act A643 paragraph 7 was substituted by a new paragraph 7 which reads as follows –

> 7. This Schedule shall not apply :-
>
> (a) to a pioneer company under the Promotion of Investments Act 1986;
>
> (b) to a company which has been granted pioneer status under the Promotion of Investments Act 1986;

(d) in December 1986 *vide* Finance Act 1986 (Act 328) Schedule 7A was again amended and paragraph 7 was substituted with the present paragraph 7 which reads -

> 7. This Schedule shall not apply to a company -
>
> *(a)* for the period during which the company -
>
> (i) has been granted pioneer status under the Promotion of Investments Act 1986 in respect of any promoted activity or promoted product and which is applying or intends to apply for the grant of a pioneer certificate; or
>
> (ii) has been granted pioneer certificate under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and whose tax relief period has not ended or ceased;

Decision

[16] The issue is whether the SCIT is correct in its interpretation of paragraph 7(a)(ii) of the Act and its finding that the Appellant, having been granted a pioneer certificate under the PIA, comes within the provisions of the said paragraph and is therefore excluded from claiming RA.

[17] In considering the issue at hand, I agree with the Revenue Counsel that where the words of a statute are clear then the court must give effect to it. I am mindful of the judgment of Nik Hashim FCJ in the case of *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673 as follows –

> *In construing a statute the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself.*

[18] Paragraph 7(a)(ii) refers to a company that has been granted pioneer certificate under the PIA. Therefore a cross-reference to the PIA would be appropriate. Section 2 of the PIA defines 'pioneer certificate' as 'a pioneer certificate given under section 7 or any such certificate as amended'. Section 7(3) of PIA provides *inter alia* as follows –

> **Pioneer certificate**
>
> (3) The Minister may ……issue a pioneer certificate certifying –
>
> (a) the company to be a pioneer company;
>
> (b) the factory at which the promoted activity is carried on or the promoted product is produced to be a pioneer factory; and
>
> (c) the production day of the pioneer company.

Subparagraphs (a), (b) and (c) are to be read conjunctively. A certificate under section 7(3) certifies that the company is a 'pioneer company' at whose 'pioneer factory' a 'promoted activity' is carried out or a 'promoted product' is produced. This is fortified by section 2 of the PIA which defines 'pioneer company' as follows -

> "pioneer company" means a company certified by a pioneer certificate to be **a pioneer company in relation to a promoted activity or promoted product** in respect of which the tax relief period has not ended or has not ceased; (emphasis added)

[19] In the case of the Appellant, the certificate issued to the Appellant states that the Appellant is deemed to be a pioneer

company ("*...hendaklah disifatkan sebagai suatu syarikat perintis....*") which by necessary implication means that the Appellant carries out a promoted activity or produces a promoted product.

[20] With reference to the Act, paragraph 7(a) of Schedule 7A provides as follows -

> 7. This Schedule shall not apply to a company -
>
> *(a)* for the period during which the company -
>
> (i) has been granted pioneer status under the Promotion of Investments Act 1986 in respect of any promoted activity or promoted product and which is applying or intends to apply for the grant of a pioneer certificate; or
>
> (ii) has been granted pioneer certificate under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and whose tax relief period has not ended or ceased;

[21] As stated earlier, the carrying out of a promoted activity or the production of a promoted product is an essential requirement for the issuance of a certificate under section 7(3) of the PIA. Viewed against the provisions of section 7(3) of the PIA, to my mind it is apparent that paragraph 7(a) of Schedule 7A of the Act merely repeats and reiterates the position under section 7(3) of the PIA that a pioneer certificate is granted to a pioneer company in relation to a promoted activity or promoted product. The emphasis of paragraph 7(a)(ii) is on the grant of a pioneer certificate, which by virtue of section 2 of the PIA necessarily indicates that the said company carries out a promoted activity or produces a promoted product.

Therefore I agree with the Respondent that for the purpose of paragraph 7(a) of Schedule 7A of the Act the status of the company is relevant as opposed to the issue of promoted activity or promoted product.

[22] For the reasons stated above I find that on the clear and unambiguous words of paragraph 7(a)(ii) Schedule 7A of the Act, the SCIT has not erred in its decision that since the Appellant has been granted pioneer certificate therefore the Appellant comes within the provisions of the said paragraph. For the reasons stated above I dismissed the appeal with costs of RM5,000.00 to the Respondent.

Dated 8.10.2010

AZIAH BINTI ALI
JUDGE
HIGH COURT MALAYA
KUALA LUMPUR

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