DI MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

RAYUAN SIVIL NO: WA-14-2-01/2017

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BETWEEN

SENTIMAS SDN BHD ... APPELLANT

AND

KETUA PENGARAH HASIL DALAM NEGERI ... RESPONDENT

GROUNDS OF JUDGMENT

INTRODUCTION

1. This is the Appellant appeal against the Deciding Order of the Special Commissioners of Income Tax ("SCIT") dated 20 May 2016. By that Deciding Order, the SCIT had unanimously disallowed the appeal by way of Form Q by the Appellant against the assessment raised by the Respondent.

2. In this appeal the Appellant raised issue whether the RM2, 542,200 incurred in Year of Assessment 2009 as fees paid to "Runners" to a job function that was to clear the cars from customs authority as expeditiously as possible to the end customers is incurred as *"outgoings and wholly and exclusively in the production of income"* under Section 33(1), Income Tax Act 1967 and whether the penalty imposed under section 113(2) Income Tax Act, 1967 is correct in law.

THE SCIT ORDER

3. The material part of the Deciding Order, which can be seen at page 25 to 26 (Appellant's Core Bundle of Document) of the Case Stated, reads as follows –

"ADALAH DIPUTUSKAN SECARA MAJOROTI *bahawa* ***tuntutan bayaran 'express custom duty' berjumlah RM 2,542,200.00*** *tidak boleh dibenarkan di bawah subseksyen 33(1) Akta Cukai Pendapatan 1967 kerana ianya bukan dibuat kesemuanya dan semata-mata di dalam menghasilkan pendapatan ;*

"ADALAH DIPUTUSKAN JUGA SECARA MAJORITI *bahawa tindakan Responden mengenalan penalty di bawah subseksyen 113(2) Akta Cukai Pendapatan 1967 adalah wajar, munasabah dan teratur dari segi undang-undang;*

MAKA DENGAN INI ADALAH DIPUTUSKAN SECARA MAJORITI DIPUTUSKAN *bahawa rayuan ini ditolak;*

PROVED FACTS

4. The proved facts are found at page 4 – 6 of the Case Stated (Appellant's Core Bundle of Document).

    1. The Appellant is a company having a business of importer and dealer of reconditioned motor vehicles.

    2. The imported vehicles will be placed in the warehouse and will be retrieve once there were a buyer. The Appellant has appointed runners to handle matters pertaining to clearance procedures with Customs and Puspakom.

    3. The Respondent has conducted an audit visit on the Appellant on 30.10.2012. The Respondent's finding in the Appellant's Trial Balance was that few items was claimed as an expenses by the Appellant as follows;

Code	Description	Debit
201-0000	Purchase	RM 89,297,759.00
202-0000	Customs Duty	RM 22,266,520.00
203-0000	Sales Tax	RM 3,597,938.43

4. The Respondent has discovered in the Appellant's General Ledger that the said Custom's Duty and Sales Tax was paid by the Appellant. The supporting documents were available for the said expenses.

5. However, the Respondent has discovered doubtful expended under purchased items amounting to RM 89,297,759.00. It became doubtful because a part of the said purchased items was for the expenses of 'Customs Duty' amounting to RM 2,542,200.00 which was paid and claimed earlier in the Appellant's Trial Balance.

6. The Respondent also discovered that the "Express Customs Duty" of RM 8,500.00 claimed by the Appellant was made for a different chassis number for a different vehicle amounting in total RM 2,542,200.00.

7. The Appellant has failed to produce any receipt from customs department in relation to the said *"Express Customs Duty'* to the Respondent.

8. The Appellant has claimed that the expenses for *"Express Customs Duty"* was actually a payment to the 'runners' to handle each cars from Port Klang to the Appellant's showroom. However, nowhere In the Appellant's ledger has stated that the said payment was made to the 'runners'.

9. The Appellant has failed to produce any receipts from the customs for *'Express Customs Duty's* expenses as the payment was not made to the customs but was paid to the 'runners' in cash.

10. <u>The existence of 'runners' was never been informed to the Respondent during audit visit, during the Appellant's interview or before the assessment was raised.</u>

THE LAW ON APPEAL

5. It is trite law that the finding of primary facts and inferences by the SCIT are unassailable and can neither be overruled nor supplanted by the court. This principle was considered and applied in the seminal judgment of the Privy Council in ***Chung Lip Kong v Director General of Inland Revenue (1982) 1 MLJ 235*** as follows :

> *"Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplanted by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the questions of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings."*

6. In ***Chua Lip Kong (supra),*** Lord Diplock in delivering the decision of the Board set out the findings of the SCIT which could be challenged on appeal:

> *"From the primary facts admitted or proved the Commissioners may themselves be inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law."*

7. In ***Edwards v. Bairstow*** **1956) AC 14** referred by the Respondent, Viscount Simonds held that :

> *"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that* ***the Commissioners have acted without evidence or upon a view of the facts which could not reasonably be entertained."***

8. Lord Radcliffe in the same case held that :

> *"...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."*

9. The judicial pronouncements in the above cases have been adopted by the Supreme Court in ***Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri (1994) 2MLJ713.***

10. In short, what it means is that an appeal against the decision of the SCIT can only be set aside if the Court is satisfied that:

(a) the SCIT had erred in law;

(b) the decision of the SCIT is not consistent with their finding of facts ; or

(c) there is no evidence to support the decision of the SCIT.

OPINION OF THIS COURT

11. The Appellant and the Respondents have filed their written submissions and submitted orally before this Court. Having read the submissions and the finding of SCIT in the Case Stated and the documents in the Appellant's Core Bundle of Documents, I found that there is no basis for this Court to disturb the finding of facts by SCIT. The decision was made based on the issue that arose and evidence before SCIT. The SCIT's finding was not erroneous in all aspects.

12. The issue before SCIT is different from the issue raised by the Appellant in this appeal. The record shows that the issues raised by the Appellant during the trial before the SCIT was different from the issue raised in Form Q (*See page 2-3 of the Appellant's 1st Bundle of Documents marked as Exhibit B1).* The Appellant's Notice of Appeal to SCIT as follows:

> ***"... merayu kepada Pesuruhjaya Khas Cukai Pendapatan atas alasan berikut :***
>
> ***Perbelanjaan <u>"express custom duty"</u> adalah dibelanjakan dalam proses untuk menghasilkan pendapatan dan patut dibenarkan untuk tolakan cukai di bawah seksyen 33(1) Akta Cukai Pendapatan 1967."***

13. Based on the Notice of Appeal, the main issue as pointed out by the SCIT in paragraph 10.1, page 10 of the Case Stated as follows:

> "10. *Kami, Pesuruhjaya Khas Cukai Pendapatan telah menimbangkan kes ini dan telah memberikan keputusan kami pada 20 Mei 2016 dengan alasan-alasan seperti berikut –*
>
> 10.1 *Mahkamah mendapati isu utama dalam rayuan ini adalah sama ada tuntutan perbelanjaan* ***"Express Custom Duty"*** *berjumlah RM2,542,200.00 yang dibuat oleh Perayu dalam Tahun Taksiran 2009 boleh dibenarkan di bawah subseksyen 33(1) ACP 1967.*
>
> 10.2 *Isu ini timbul apabila pihak Responden menjalankan audit ke atas Perayu dan mendapati dalam Imbangan Duga bagi tahun Taksiran 2009 beberapa item telah dinyatakan sebagai perbelanjaan oleh Perayu seperti berikut…"*

14. The issue before SCIT is all about Appellant's claim for "Express Custom Duty" of RM 2,542,200.00 incurred by the Appellant in Year of Assessment 2009 whether tax deduction is allowable under subsection 33(1) ACP 1967. The SCIT having considered the issue and the evidence before it, decided that the claim for expenditure 'Express Custom Duty" of RM 2,542,200.00 is not allowable under subsection 33(1) of the Income Tax Act 1967 by reason that it is not revenue. The issue raised in this appeal is whether the RM2, 542,200 incurred in Year of Assessment 2009 as fees paid to "Runners" to a job function that was to clear the cars from customs authority as expeditiously as possible to the end customers is incurred as *"outgoings and wholly and exclusively in the production of income"* under Section 33(1), Income Tax Act 1967.

15. The issue is different from one expenditure for "Express Custom Duty" incurred to one "fees paid to "Runners". I agree with the Respondent that the Appellant was trying to misguide the SCIT by introducing new issues (See

para 2.1, page 2 of the Case Stated) when its appeal in Form Q clearly stated that the appeal is for the expenditure for 'Express Custom Duty" should be allowed for tax deduction under subsection 33(1) ACP 1967.

16. The issue of expenditure for "Express Custom Duty" arose when the Respondent made an audit finding on the Appellant's balance sheet in Year of Assessment 2009. The Respondent has discovered in the Appellant's General Ledger that the said Custom's Duty and Sales Tax was paid by the Appellant. The supporting documents were available for the said expenses. However, the Respondent has discovered doubtful expenditure under purchased items amounting to RM 89,297,759.00. It became doubtful because a part of the said purchased items was for the expenses of 'Customs Duty' amounting to RM 2,542,200.00 which was paid and claimed earlier in the Appellant's Trial Balance. The Respondent also discovered that the "Express Customs Duty" of RM 8,500.00 claimed by the Appellant was made for a different chassis number for a different vehicle amounting in total RM 2,542,200.00.

17. I agree with the Respondent that the Appellant, instead of proving that the payment was made to the customs authority for "***Express Custom Duty'***, the Appellant has tried to adduce other evidence by adducing runners to give statement during trial. This clearly an afterthought action as founded by the SCIT in the Case Stated.

18. Before this Court the same issue related to "fees paid to runners" was brought up as the main issue. I do not think it is fair to allow the Appellant to bring a new issue at this stage when the SCIT had made a finding of facts based on the issue before it and had made decision that the claim for expenditure 'Express Custom Duty" of RM 2,542,200.00 is not allowable under subsection 33(1) of the Income Tax Act.

19. In the midst of hearing of the appeal, I asked the Appellant's counsel, why didn't the Appellant submitted in its balance sheet or in its ledger that the sum RM 2,542,200.00 was fees paid to "runners" instead of maneuvering it as

expenditure for "Express Custom Duty". The Learned Counsel honestly responded that it was the mistake of his client. The existence of 'runners' was never been informed to the Respondent during audit visit, during the Appellant's interview or before the assessment was raised. My view is, had the Appellant declared the said amount as fees for 'runners' and produced the relevant document to support its claim, the case would have been different.

20. In this case, the Appellant has claimed that the expenses for *"Express Customs Duty"* was actually a payment to the 'runners' to handle each cars from Port Klang to the Appellant's showroom. The Appellant called witnesses to prove that the said payment is fees for 'runners'. SCIT had heard evidence from witnesses and made a finding of fact at paragraph 7.2 (i) to (x) of Case Stated. The pertinent fact found by SCIT is that nowhere in the Appellant's ledger has stated that the said payment was made to the 'runners'. It is also proved fact that the Appellant has failed to produce any receipts from the customs for *'Express Customs Duty's* expenses as the payment was not made to the customs but was paid to the 'runners' in cash.

21. The Respondent is not denying that the runner's service was engaged by the Appellant but to match the existence of payment vouchers amounting to RM 2,542,200 and to the runner's service is clearly two different things and would cast more doubt. In this case the Respondent contended that the existence of the said runners only appears during trial and the Respondent was not given an opportunity by the Appellant to make third party finding as regard to the existence of the said runners except during trial. The Appellant has never disclosed any information about their runners during the audit process and during 12 month appeal period. I agree with the Respondent that by calling all the runners to give evidence on the "Express Custom Duty" issue, in my view, it would not be a justification for the said expenses to be allowed. It was clearly an afterthought justification by the Appellant.

22. Be that as it may, in considering the issue in this appeal, regard must be made to **paragraph 13 of schedule 5 of the Income Tax Act 1967** which state as follows –

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

23. It is not disputed that the finding during an audit process was on the payment voucher for *'Express Custom Duty'* amounting to RM 2,542,200 in YA 2009. Therefore, the Appellant's onus of proving is to show that the payment of RM 2,542,200 was actually being made to the **customs authority** for the purpose of *'Express Custom Duty'.* The SCIT has agreed with the issue submitted by the Respondent as stated in paragraph 7.2(iii) – (x) and paragraph 10 of the Case Stated.

24. Reference should be made to **Section 33(1) of ITA** which clearly states :

"(1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings <u>and expenses wholly and exclusively incurred during that period</u> by that person in the production of gross income from that source, including –

(a) subject to subsection (1), any sum payable for that period (or for any part of that period) by way of interest upon any money borrowed by that person and –

(i) employed in that period in the production of gross income from that source ; or

(ii) laid out on assets used or held in that period for the production of gross income from that source;

(b) *rent payable for that period (or for any part of that period) by that person in respect of any land or building or part thereof occupied by him in that period for the purpose of producing gross income from that source;*

(c) *expenses incurred during that period for the repair of premises, plant, machinery or fixtures employed in the production of gross income from that source or for the renewal, repair or alteration of any implement, utensil or article so employed, other than implements, utensils, articles (the expenditure on which would be qualifying plant expenditure for the purposes of schedule 3 or any means od conveyance, excluding the cost of reconstructing or rebuilding –*

(i) *any premises, buildings, structures or works of a permanent nature;*

(ii) *any plant or machinery ; or*

(iii) *any fixtures; and*

(d) *such other deductions as may be prescribed."*

25. It has been held that the word ***"expenses wholly and exclusively incurred"*** appearing in S.33 (1) ***include a sum which the taxpayer is under an obligation to pay."*** **See Exxon Chemical (M) Sdn Bhd V Ketua Pengarah Hasil Dalam Negeri (2006)1 MLJ 428.** Therefore I agree with the Respondent that it is for the Appellant to prove before the SCIT that the payment voucher of RM 2,542,200 actually being made for ***"Express Custom Duty"****, and the Appellant was* ***"wholly and exclusively incurred in the production of their income"*** *and the Appellant was* ***"under an obligation to pay"*** *the said amount.*

26. As pointed earlier that the Appellant has failed to prove that the said payment has been made to **"customs authority"** as there was no receipt from customs department or any other documents to support that the payment has been made. The SCIT has made their finding in paragraph 7.2(vii), page 5 of the Case Stated that the Appellant has failed to produce any receipts from Customs department in relation to the said "Express Custom Duty" to the Respondent. Further finding was made in paragraph 7.2(viii) and (ix) that such nowhere in the Appellant's Ledger has stated that the payment was made to the Runners. The SCIT in paragraph 10.5 of the Case Stated has agreed with the Respondent's submission that at this juncture the burden of proving that the express customs duty's expenses lies on the Appellant to prove.

27. In my opinion, for Appellant to succeed in its claim, the Appellant must show that they had any obligation to pay the amount of RM 2,542,200. This is very critical as it would show that certain amount of 'revenue expenditure' has been made by the Appellant in order to produce an income. Although, the few runners gave their statements to justify their claim, my view is, and at the end of the trial it is for SCIT to determine whether their statements are acceptable. In this case, SCIT did not find the witnesses statements as credible statement. The issue of credibility of the Appellant's witness were discussed at paragraph 10.12 to 10.18 in the Case Stated. The SCIT also stated in paragraph 10.20 of the Case Stated that the statements by the Appellant's witness's i.e. the runners (AW1-AW5) has failed to strengthen the Appellant's case.

28. It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (See **China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly**

Known As Maltran Air Services Corp SdnBhd) And Another Appeal [1996] 2 MLJ 517).

29. The SCIT has evaluated the evidence of witnesses and made a finding of fact that the statement by all the runners were merely circumstantial as they themselves cannot determined the amount of fees received and services done for how many cars (See paragraph 10.18-10.30 of the Case Stated). Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (See **Idris v Public Prosecutor (1960) MLJ 96).** It was found that AW-1 also cannot determine how many runners involved with the Appellant. Therefore, I agree that their evidence should not be admissible for the purpose of this appeal.

30. The SCIT has made a finding that the evidence of AW6 as regard to the usage of one chassis number for a few transaction was clearly without any justification to match the amount claimed in the Appellant's ledger (See paragraph 10.27-10.29 of the Case Stated). The SCIT has also agreed with the Respondent's submission that all the statements given by the Appellant's witnesses were on the procedures of imported cars but no evidence was given on why the payment vouchers and the Appellant's ledger has stated that the payment of RM 2,542,200 was made for *Express Custom Duty but not states as "payment to runners"?* (See paragraph 10.30-10.31 of the case stated). AW6 has given the explanation that it is only a *'nickname'*. SCIT rejected the explanation and I would totally agree with SCIT.

31. The finding of SCIT in the Case Stated will show that the Appellant through his witnesses has failed to justify that the amount of RM 2,542,200 was actually received by the runners. I agree with the Respondent that all the payment to the customs authority and related expenses was claimed earlier

by the Appellant and it was allowed by the Respondent. Therefore, there is no reason by the appellant to claim it once more.

32. I find that the SCIT has not misdirected itself on facts and law in coming to its decision. In the Case Stated SCIT has pointed out in paragraph 10.2 that Exhibit B3 and B4 were not consistent with the statement of AW6 and the amount of total sold vehicles was not supported by any documents. The SCIT has referred to the correct case of **Guan Teck Sdn Bhd v Haji Noor Bin Haji Yakob & Ors (2000) 4 MLJ 433** which held that in cases where conflicting evidence are presented before a court, it is a duty of the court not only to weigh such evidence on a balance of probabilities but it also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

33. The SCIT in the Case Stated has also stated that the statement by RW1 was consistently given throughout the trial and consistent with the documentary evidence tendered. This the only admissible evidence was the evidence given by the Respondent's witness.

34. In conclusion, having read through the Case Stated by SCIT, I am satisfied that the decision arrived at by SCIT is correct and justified based on the issue and evidence before SCIT. Therefore, there is no reason for this Court to disturb the finding of facts by SCIT.

Issue of penalty

35. In the circumstances of this case, I agree with the finding of SCIT at paragraph 10.36 of the Case Stated that the penalties was correctly imposed on the Appellant.

36. Subsection 113(2) of the Act clearly provides that a penalty equal to the amount of the tax which has been undercharged may be imposed on the person in two situations –

i. when that person makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another ; or

ii. when that person gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person

37. I agree with the Respondent that it is a discretion of the Director General to impose penalties under subsection 113(2) of the Act after considering all relevant facts and circumstances and in this case. The Respondent has the right to impose penalty under subsection 113(2) equal to the amount of tax which has been undercharged. However, in this case, after taking into account the merits of the case, the penalty imposed by the Respondent is calculated only at 45% of the tax which is undercharged instead of at 100% of the amount of tax which has been undercharged.

38. In this case as pointed by RW1 in his statement that 45% penalty has been imposed on the Appellant based on the reason that the Appellant has gave incorrect information in their tax returns and as a result of that, tax has been undercharged. In the case of **KT Co. V. Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur (1992) 1 MSTC 3255,** Richard Talalla J. stated that -

> *"As I see it subsec.1 of sec.114 is couched in mandatory terms but conditioned whereas subsect. 2 is expressed in terms which are discretionary. The Director General may require payment of the penalty. He is not bound to require such payment. He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration if all relevant facts and circumstances. It seems to me that the Director General would have to consider whether he incorrect return or incorrect information was respectively made or given dishonestly with intention to evade*

<u>payment of tax</u> or possibly even negligently and then, and only then, mate out the punishment which under subsect. 2 is a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information and so on."

39. See also the case of **BR Sdn Bhd V. Ketua Pengarah Hasil Dalam Negeri (2008) MSTC3, 655** Special Commissioners stated that –

"...Therefore the Director General has a discretion to impose penalty under section 113(2) of the Income Tax Act, 1967. 60% penalty was imposed and later was reduced to 25%. For us this shows that the Director General has applied his mind to the facts and circumstance of this case in using his discretionary power and there is no reason for us to interfere with the penalty imposed by him".

40. Therefore, the law is very clear under Section 113(2) of the Act, where when a person makes incorrect return does not matter whether intentionally or not but as long as the amount is incorrect then the Director General of Income Tax has the right to impose a penalty.

DECISION OF THIS COURT

41. The Court finds that the SCIT was correct in holding that the amount of RM 2,542,200.00 is not allowed under section 33(1) of the Income Tax Act 1967 and the penalty imposed on then Appellant under sub-section 113 92) is reasonable and in accordance with law.

42. The Appellant Appeal is dismissed with Costs of RM 2,000.00

Dated: 11th August 2017

(KAMALUDIN BIN MD. SAID)
HIGH COURT JUDGE
KUALA LUMPUR HIGH COURT

Solicitors

Messrs Shanker & Arjunan (Dr. Subramaniam A/L Arjunam) for the Appellant

Lembaga Hasil Dalam Negeri (Abdul Aziz Bin Harun together with Farah Nordin) for the Respondent

Cases Referred to

Chua Lip Kong v Director General of Inland Revenue (1982)1 MLJ 235

Edwards's v Bairstow & Harrisons (1956) A.C. 14

Lower Perak Co-Operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri (1994) 3 BLJ 265

Exxon Chemical (M) Sdn Bhd V Ketua Pengarah Hasil Dalam Negeri (2006)1 MLJ 428

China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly Known as Maltran Air Services Corp SdnBhd) And another Appeal [1996] 2 MLJ 517

Idris v Public Prosecutor (1960) MLJ 96

Guan Teck Sdn Bhd v Haji Noor Bin Haji Yakob & Ors (2000) 4 MLJ 433

KT Co. V. Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur (1992) 1 MSTC 3255

BR Sdn Bhd V. Ketua Pengarah Hasil Dalam Negeri (2008) MSTC3, 655