DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
NO. RAYUAN: 14-6-11/2014

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... PERAYU

DAN

THOMSON REUTERS GLOBAL RECOURCES ... RESPONDEN

GROUNDS OF JUDGEMENT

Introduction

1. This is an appeal by the Inland Revenue ("IR") against the decision of the Special Commissioners of Income Tax ("SCIT") who had allowed the appeal of the respondent in this case, Thomson Reuters Global Resources ("Taxpayer"). The SCIT had allowed the appeal of the Taxpayer for the refund of the excess amount of withholding tax amounting to RM1,666,750.00 imposed by IR on the Taxpayer. The IR is dissatisfied with the SCIT's decision to refund the Taxpayer and hence this appeal before this court.

Background Facts

2. The facts not disputed and found by the SCIT are narrated below.

3. The Taxpayer is a tax resident of Switzerland with operations exclusively in Switzerland. It serves as a content and technology owner, developer and provider within the Thomson Reuters Corporation, offering a variety of content and technology products and solutions to Thomson Reuters businesses around the world.

4. The Taxpayer is in the business of compiling, producing, developing and selling "information services and dealing services". The "information services" and "dealing services" are the products of the Taxpayer which include news, financial and economic information as well as the capacity to negotiate and conclude trades in the case of dealing services. The information is compiled by the Taxpayer directly or indirectly through its contractors, as is the associated technology or platform. The services are provided from Switzerland by the Taxpayer. The Taxpayer has no permanent establishment in Malaysia.

5. On 23.11.2010, the Taxpayer and Thomson Reuters Malaysia Sdn Bhd ("TRM") executed the Local Vendor Agreement: Information And Dealing Services ("Agreement"). The Agreement took effect from 1.1.2010. Prior to that a similar agreement was executed between the same parties on 27.10.2008.

6. Pursuant to the Agreement, TRM was appointed by the Taxpayer to market and sell the Taxpayer's products in the form of "information services" and "dealing services" in Malaysia. TRM also provides sales and marketing related services including customer support to its customers in Malaysia.

7. TRM was previously known as Reuters Malaysia Sdn Bhd. TRM and the Taxpayer are related companies as they are ultimately owned by Thomson Reuters Corporation.

8. Pursuant to the Agreement, the Taxpayer receives distribution fee from TRM. The said distribution fee is recorded and treated as business profit of the Taxpayer in Switzerland and the Taxpayer is taxed by the Swiss Tax Authority on this basis.

9. Presently, TRM is the sole distribution intermediary in Malaysia for the Taxpayer. TRM was appointed and authorised by the Taxpayer to distribute, market and sell the Taxpayer's products i.e. the "information services" and "dealing services". TRM also provides sales and marketing services including customer support to its customers in Malaysia.

10. TRM does not have the right to reproduce the products in Malaysia. The distributive rights acquired by TRM are limited to those necessary for TRM as the distribution intermediary in Malaysia. The payment is only for the distribution of the Taxpayer's products in Malaysia and not to exploit any of the intellectual property rights of the products as reflected in Clause 5 of the Agreement.

11. The distribution fee paid by TRM to the Taxpayer is 98% of the revenue derived from the sales of the Taxpayer's products in Malaysia less first the selling and administrative costs and second the licence fee. The remaining 2% of the said revenue is the income of TRM.

12. In the year of assessment 2010, the total amount of distribution fee payable by TRM to the Taxpayer pursuant to the Agreement was RM66,99,655.00.

13. The Taxpayer had always taken the position that the distribution fee is its business profit in Switzerland. The Taxpayer had been taxed by the Swiss Tax Authority on this basis. The business profit of the Taxpayer is not to be taxed in Malaysia as the Taxpayer does not carry on business in Malaysia through a permanent establishment.

14. Except for one payment tranche made on 31.5.2010, the distribution fee paid by TRM to the Taxpayer in the year of assessment 2010 was not subjected to withholding tax.

15. Taxpayer had inadvertently subjected the said distribution fee to withholding tax in Malaysia. On 10.6.2010, TRM erroneously remitted withholding tax amounting to RM 1,666,750.00 to the IR. One of the staff at the regional centre mistook the said sum for software product fee and subjected the said sum to withholding tax.

16. On 9.8.2010, the Taxpayer, through TRM and TRM's tax agent informed the IR that TRM had inadvertently subjected the Said Sum fee payment to withholding tax. TRM requested for the withholding tax that was inadvertently paid to be refunded to the Taxpayer through TRM.

17. On 18.3.2011, the IR rejected the Taxpayer's application for the refund of the withholding tax. According to the IR, the said distribution fee is subject to withholding tax as it fell under the definition of royalty under the Income Tax Act 1967 ("ITA").

18. On 15.4.2011, the Taxpayer through its representative appealed to the SCIT pursuant to Section 111(1) of the ITA against the decision of the IR. The Taxpayer's position was that the distribution fee is business profit under the Swiss domestic tax law and is not royalty.

19. As explained earlier, the SCIT allowed the Taxpayer's appeal.

Issues

20. Based on the facts as narrated, the issues before this court are;

    1) Whether the findings of fact by the SCIT could be disturbed in this appeal?

    2) Whether the distribution fee amounting to RM1,666,750.00 paid by TRM to the Taxpayer is royalty under Article 12(4) of the Malaysia-Swiss Federal Council Double Taxation Agreement 1974 ("DTA")?

    3) In any event, whether the distribution fee amounting to RM1,666,750.00 paid by TRM to the Taxpayer is the business profit of the Taxpayer and thus, pursuant to Article

7(1) of the DTA, the said distribution fee is only taxable in Switzerland?

IR's Arguments

21. The IR as the appellant in this case submits that the distribution fee is subjected to withholding tax in Malaysia by virtue of the provision in s. 4 (d) of the ITA which considers such fee as royalties. The provision states;

> *Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:*
>
> *(d) rents, royalties or premiums.*

22. The definition of royalty in turn is provided by s. 2 of the ITA which states;

> *"royalty includes*
>
> *(a) Any sums paid as consideration for the use of, or the right to use:*
>
> *(i) copyrights, artistic or scientific works, patents, designs or models, plans secret processes of formulae, trademarks, or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or*

reproduced in Malaysia or other like property or rights;

(ii) know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;"

23. These provisions should according to the IR be read together with s. 3 of the ITA which states;

> *Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.*

24. Collectively these provisions as submitted by the IR are the charging provisions to impose the withholding tax. For the uninitiated, charging provisions here mean the statutory stipulations that allow for the tax to be charged.

25. The IR says because the Taxpayer's products are specialised knowledge, it comes within the definition of royalty as stipulated in s. 2 of the ITA as narrated earlier.

26. The IR further submits that because the Taxpayer retains the intellectual property rights of the products, the distribution fee received by the Taxpayer from TRM is a royalty. Therefore the withholding tax could be imposed on the distribution fee.

27. The IR also submits there is no conflict in the definition of royalty in s. 2 of the ITA and Article 12 (4) of the DTA that reads;

> *The term royalties as used in this Article means payments of any kind received as consideration for the use of or the right to use any copyright of literary, artistic or scientific work, any patent, trade mark, design or model, plan, secret formula process or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.*

Taxpayer's Arguments

28. The Taxpayer as the respondent in this appeal says that the finding of facts of the SCIT cannot be easily disturbed by this court. This proposition is submitted to be well supported by case law.

29. The Taxpayer further submits the distribution fee is not royalty as argued by IR but a business profit to the Taxpayer paid by TRM. Therefore it is not subjected to any withholding tax.

30. The nature of the provisions of the Agreement as found by SCIT also indicates that the products of the Taxpayer could not in any manner be considered to involve royalty and in fact it is stated in the Agreement that the distribution fee is a business profit of Taxpayer in Switzerland.

31. Since the distribution fee is a business profit of the Taxpayer, it is subjected to tax only in Switzerland and not Malaysia. The DTA provides for this.

32. The definition of royalty under Article 12 (4) in the DTA should be applicable in this case. When there is conflict, the definition of royalty in the ITA should not be used.

Court's Findings

33. It ought to be borne in mind that the crux of the arguments by both parties in this appeal revolve on the issue whether withholding tax should be imposed on the distribution fee. Based on the issues as narrated earlier which arose from this appeal, the findings of this court are narrated below.

A) Whether the findings of facts by the SCIT could be disturbed in this appeal?

34. First and foremost, at the risk of repetition, it ought to be emphasised that in this appeal now, the challenge mounted by the IR is against the decision of the SCIT. This ought to be addressed first in order to see the scope upon which the whole decision of the SCIT could be challenged for this appeal.

35. In this regard it must be stressed that challenging the same is a daunting task on the part of the IR because the Federal Court in **I Investment v Comptroller General of Inland Revenue [1975] 2 MLJ 208** held;

> *...It has been said more than once that when we come to deal with income tax cases we must look at all the surrounding circumstances,* ***not for the purpose of considering what one's own conclusion might be, but for the purpose of seeing****, in fact, whether there is evidence both ways –* ***whether there is evidence upon which the Special Commissioners could arrive at their conclusion****...*
> *[Emphasis Added]*

36. In addition, there is the Privy Council's case of **Chua Lip Kong v Director General of Inland Revenue [1982] 1 MLJ 235** where Lord Diplock said;

> ***Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself****... From the primary facts admitted or proved the Commissioners are entitled to draw inferences, such inferences may themselves be inferences of pure fact, in which case they are unassailable as the Commissioners' finding of facts.*
> *[Emphasis Added]*

37. Bearing in mind the above cases from the highest courts, I should refrain from using the slightest reasons to disturb the findings made by the SCIT in the course of hearing this appeal. The findings made by the SCIT should be accorded due respect it deserved. More so when the SCIT heard evidence from witnesses in arriving at these findings.

B) Whether the distribution fee amounting to RM1,666,750.00 paid by TRM to the Taxpayer is royalty under Article 12(4) of the DTA?

38. The first relevant point to consider in answering this issue is whether the provisions in s. 2 of the ITA as narrated earlier on the definition of the word "royalty" should be preferred over the definition of the same word in the Article 12 (4) of the DTA.

39. First I must not lose sight of the Federal Court's case in **Director General of Inland Revenue v Euromedical Industries Ltd [1983] CLJ (Rep) 128**. In this case there is a conflict between the definition of royalty in s. 2 of the ITA and Clause 3 of Article XI of the Double Taxation Relief (United Kingdom) Order 1973 ("Order"). The Federal Court decided in such a conflict the definition under the Order should be applied instead of the definition provided by s. 2 of ITA. Likewise I ought to rule that the definition of the same word in the DTA should prevail over the same definition under the ITA. Although the court then was addressing the issue of double taxation between Malaysia and United Kingdom, the same principle should apply as in the present case where it affects Switzerland.

40. Further, on the same issue, I am of the opinion that I should not depart from the decision of the learned Rohana Yusuf J (as she then was) now JCA in **Damco Logistics Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] MSTC 30 – 033**. The preference of the definition of the word "royalty" in the DTA over the ITA is thoroughly explained in this case. The SCIT also

found that Article 12 (4) of the DTA is similar to Article XII of the Double Taxation Agreement with Denmark, the country concerned in Damco. I can do no better than quoting the relevant part of the judgment of this case as follows;

> *The Applicant contended they are not royalty within Articles XII of the DTA.* ***The definition of royalty in the ITA cannot apply because DTA prevails over the ITA as decided by the Federal Court case of Director General of Inland Revenue v Euromedical Industries Ltd [1983] CLJ (Rep) 128. In that case the Federal Court held that if there is a conflict between ITA and DTA, the provisions in DTA shall prevail****... It was submitted that the definition of royalty in the ITA differs from that in DTA as shown in Article XII. Hence, it was contended that the definition in DTA must apply. The definition of royalty in DTA according to learned counsel for the Applicant is further explained in paragraph II of Article 12 of the Commentary.* ***In essence the charges can only be treated as royalty if there is an element of know-how. The EDP charges cannot be royalty because they are payments for services rendered and they not involve any proprietary know-how, as required by the said definition****.*
>
> *Learned Counsel for Inland Revenue agreed and they are on common ground that EDP charges are business income APMM. However, he contended that EDP charges are royalty under section 2 of the ITA... Learned Counsel for the Respondent further contended that there is no difference between the definition of royalty in the DTA and the ITA. The definition in DTA only applies if there is any difference between the two definitions. Since there is no*

difference he contended, the definition of royalty under s. 2 of the ITA applies. He further contended that by definition in s. 2 of ITA the EDP charges are royalty.

At the outset it is clear that the Respondent in the written submission filed in court agreed that EDP charges are business income of APMM. Thus under Article VII of the DTA this income is only taxable in Denmark because APMM does not have a permanent establishment in Malaysia. ***That being the case, the payments made by the Taxpayer on EDP charges would not be subjected to withholding tax in Malaysia****.*

However, in treating the EDP charges as royalty ***I agree with the submission of learned counsel for the taxpayer that the definition of "royalty" under the DTA applies and not ITA. It is difficult to come to terms with the contention of the learned counsel for the respondent that the definition in ITA applies in light of clear authority that the DTA takes precedent over ITA as decided in the Federal Court case of Director General of Inland Revenue v Euromedical Industries Ltd [1983] CLJ (Rep) 128****.*

The DTA modelled after the OECD Model Convention containing Commentary that determines the construction of Article XII (2) of DTA*. In OA Pte Ltd. v Ketua Pengarah Hasil Dalam Negeri [1996] MSTC 2, 752 it was observed that the Commentary of the OECD model has been used to determine the construction of the treaty.* ***This seems to be also the position in other countries using the same model as seen in the decisions of Australian High Court in Thiel v Commissioner of Taxation of the Commonwealth of Australia [1990] 171***

C.L.R. 338, the Supreme Court of Canada in Crown Forest Industries Ltd v Canada [1995] 2 S.C.R. 802 as well as the United Kingdom in the case of Sun Life Assurance Co of Canada v Pearson (Inspector of Taxes) [1986] STC 335, 59 TC 250.

Paragraph 11 of the Commentary explains the difference between contract for provision of services and know-how contract. In fact paragraph 11.3 outlines these distinctions. Examples given are of payments which should not be considered to include know how includes payments, for after sale service, services rendered under guarantee, for technical assistance, professional opinion by engineer, advocate or accountant, payments for advice provided electronically, for accessing through computer network etc.

Coming back to EDP charges here, it is clear that they were not payments for the rights to use a software system. ***The nature of payments in this case could not constitute royalty under this Article because they are merely payments for services rendered by APMM, where the Taxpayer accessed and used the APMM's IT system and communication network. There were no involvement of know-how to allow the Taxpayer to acquire any rights or partial rights in this contract of service.***

Given the facts as they are ***I also cannot see how the EDP charges here can constitute royalty under ITA.*** *"Royalty" in the ITA is defined as follows:*

"(a) any sums paid as consideration for the use of, or the right to use –

(i) Copyrights, artistic or scientific works, patents, design or models, plans, secret processes or formulae, trademarks or tapes for radio or films or videotapes or other means of been or are to be used or reproduced in Malaysia or other like property or rights;

(ii) Know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(b) income derived from the alienation of any property, know-how or information mentioned in paragraph (a) of this definition"

Learned Counsel contended that the EDP charges can constitute royalty under clause (b) above. He contended that the EDP charges are sums paid in consideration for the use of information concerning commercial knowledge. The fact disclosed which are not in dispute clearly shows that these are payments for the use of access to the APMM's IT system and communication network. ***There is no commercial knowledge involve to constitute royalty under the ITA as argued by learned counsel****.*

Having perused through the DTA, ***I am of the view that it is clear that in determining whether the EDP charges here are royalty one has to resort to the definition in the DTA and not the ITA, relying on the Federal Court decision in Director General of Inland Revenue v Euromedical Industries****. By virtue of Article XII supplemented by the Commentary* ***the EDP charges***

cannot be "royalty" as there is no element of know-how involved.
[Emphasis Added]

41. Thus, based on these two authorities, the definition of the word "royalty" as in the DTA should be preferred over the same definition in the ITA.

42. Having decided so, I shall proceed to determine the question is the distribution fee a royalty under the DTA?

43. First there is no reason for this court to discard the findings made by the SCIT that the distribution fee is not a royalty. These findings are stated in the following manner;

> *The business and products of the Taxpayer in the present appeal as stated in sub-para 7.1 (ii) herein, to be very similar in category to the Electronic Data Processing (EDP) Systems developed by APMM in Damco (supra).*
>
> *Secondly, we also rule that the nature of the payment called distribution fee made by TRM under the Agreement in present appeal pursuant to TRM's obligation under the said Agreement as stated in sub-para 7.1(V) herein, is also very similar in category to the nature of payments in Damco (supra)...*
>
> *...but TRM does not have the right to reproduce the products in Malaysia; nor to exploit any of the intellectual property rights of the products; nor did TRM obtain any proprietary right or know-how in the*

Taxpayer's products under Clause 5 of the Agreement. In short TRM is only granted access to the TRN to enable them to offer the products to the customers in Malaysia, see sub-para 7.2 (xvi) herein and that the distribution fee does not permit TRM to exploit or access the copyright embedded in products as seen in sub-para 7.2(xvii) herein.

44. Further there is also no reason to find the distribution fee should be categorised as royalty because the services rendered cannot be considered to involve any special commercial knowledge. The products of the Taxpayer being utilised by TRM does not concern imparting of special commercial knowledge. It is only in respect of providing basically information and business contents to TRM who paid the Taxpayer the distribution fee.

45. There is also no transfer, grant or the use of know–how or propriety rights in consideration of the distribution fee. The services provided by the Taxpayer to TRM are merely information services.

C) In any event, whether the distribution fee amounting to RM1,666,750.00 paid by TRM to the Taxpayer is the business profit of the Taxpayer and thus, pursuant to Article 7(1) of the DTA, the said distribution fee is only taxable in Switzerland?

46. I shall address the next issue above and to begin, it is most relevant to narrate the provision of Article 7 (1) of the DTA which states;

> ***The income of an enterprise of one of the Contracting States shall be taxable only in the Contracting State, unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.*** *If the enterprise carries on business as aforesaid, the income of the enterprise may be taxed in that other Contracting State but only so much of that income as is attributable to that permanent establishment.*
> *[Emphasis Added]*

47. Based on the above provision, it is crystal clear that the income of the Taxpayer in this case, derived from the distribution fee should only be subjected to tax in Switzerland where the Taxpayer operates. More so when the SCIT had found that the Taxpayer operate no permanent establishment in Malaysia. Therefore it is plainly wrong for the IR to impose withholding tax on the distribution fee here in Malaysia.

48. By analogy too Damco is relevant for this issue where it states;

> *The Applicant contended that the EDP charges are business income of APMM and are not subject to income tax in Malaysia by virtue of Article VII of the Malaysia-Denmark Double Taxation Agreement (DTA). Since EDP charges are business income they are not subject to withholding tax.* ***This is in line with Article VII, where business income of APMM shall not be taxable in Malaysia unless APMM carries on business in Malaysia through a permanent establishment. It is a fact that APMM has no permanent establishment. It is***

a fact that APMM has no permanent establishment in Malaysia.
[Emphasis Added]

49. Therefore I am of the considered view that the distribution fee as business income obtained by the Taxpayer in the present appeal must only be taxed in Switzerland and not Malaysia. This is after all the intentions of both countries with the execution of the DTA between the two countries.

Conclusion

50. I do not think that the SCIT's findings could be validly challenged by the IR. There are no cogent reasons advanced to suggest that the findings made are wrong.

51. The distribution fee is not royalty under the DTA. The same is actually a business profit of the Taxpayer and therefore should only be taxable in Switzerland under the DTA executed by Malaysia and Switzerland.

52. Hence no withholding tax can be imposed on the distribution fee. Therefore the order made by SCIT that the same be refunded to the Taxpayer is a correct decision.

53. The appeal by the IR is accordingly dismissed with costs to the Taxpayer.

Dated 19 May 2016

ABU BAKAR JAIS
High Court Judge
High Court NCC 6
Kuala Lumpur

Parties

Duna Mohd Isa and Kevin Hai for the Appellant
Legal Officers Inland Revenue

DP Naban and Jason Tan for Respondent
Messrs Lee Hishamuddin Allen & Gledhill