MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

KCH-14-2/12-2015

BETWEEN

YUNG LUNG HOLDINGS SDN. BHD. … … … APPELLANT

AND

KETUA PENGARAH HASIL DALAM NEGERI … … RESPONDENT

BEFORE THE HONOURABLE JUSTICE

DATO RHODZARIAH BT. BUJANG

IN CHAMBER

JUDGMENT

Yung Lung Holdings is a company with a diverse business interests, property development and supply of machineries parts included. It has filed this appeal against the decision of the Special Commissioners of Income Tax ("Special Commissioners") who affirmed the decision of the Director General of Inland Revenue ("The Director General") imposing a penalty of RM85,212.20 against the company for the inadequate payment of tax assessed for the year of assessment 2010. For a chargeable income of RM1,804,242.00, the tax amount assessed for the company was RM426,061.00. However, the company has, by 7th January 20111 i.e before the last due date for submission of the tax return for the said year of 2010, which is **31st July 2011**, paid RM245,000.00. This it did after earlier submitting on **10th November 2009** a Form CP204 wherein the company estimated the tax payable for the year of assessment 2010 as

RM37,000.00 which amount was revised by them to the said sum of RM245,000.00 via submission of Form CP204A.

Nonetheless, the Director General has decided to impose that penalty of **RM85,212.00** which he assessed based on 20% of the tax assessed at RM426,061.00 and not on the difference between that amount and the tax of RM245,000.00 which the company had paid in advance before the due date of **31st July 2011**. The imposition of that penalty is the root of the company's dissatisfaction with the decisions of the taxing authorities and it makes up two out of the three issues framed for my determination in its appeal before me now. For clarity, the three issues are:

(i) Whether the finding of the Special Commissioners that the assessment of the tax made by the Director under section 90 (3) of the Act is correct in facts and in law.

(ii) Whether the penalty of RM85,212.20 imposed under section 112(3) for late submission of the return form is correct in law.

(iii) Whether the imposition of 20% of the taxed amount of RM426,061.00 is justified in law.

It is of course trite that the Director General's power to assess the tax due from the taxpayer is governed by statute, i.e the Income Tax Act 1967 ("The Act"). As per the issues agreed for my determination, the relevant sections here are section 112 (3) on the penalty and section 90 (3) of the Act which I now reproduced below.

"Section 112(3)

(3) Where in relation to a year of assessment **a person makes default in furnishing a return in accordance with subsection 77(1) or 77 A(1)** or in giving a notice in accordance with subsection 77(3) **and no prosecution under subsection (1) has been instituted in relation to that default**:-

(a) the Director General may require that person to pay a penalty equal to treble the amount of that tax which, before any set-off, repayment or relief under this Act, is payable for that year, and

(b) if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1). (emphasis added)

Section 90(3).

"**Where a person for a year of assessment has not furnished a return in accordance with section 77 or 77A**, the Director General may according to the best of his judgment determine the amount of the chargeable income of that person for that year and make an assessment accordingly.

Provided that the making of an assessment in respect of a person under this subsection shall not affect any liability otherwise incurred by that person by reason of his failure to deliver the return." (emphasis added)

The one other relevant section is section 77(1) given its specific reference in the first provision above and which provides as follows:

"77A.(1) Every company, trust body or co-operative society shall for each year of assessment furnish to the Director General a return in the prescribed form **within seven months from the date following the close of the accounting period** which constitutes the basis period for the year of assessment." (emphasis added)

Why I insist on saying that section 77A is relevant is because as I mentioned earlier the company was late in submitting its income tax return for the year of assessment 2010. Since for that year of assessment the company's accounting period was from 1st January 2010 to 31st December 2010, under the said section 77A(1), it must furnish its income tax return to the Director General within seven months after the close of that period i.e by the 31st July 2011 but the company only did so on 7th January 2012 by way of e-filing the same. I need to again stress that this section 77A is specifically mentioned in both section 90 (3) and section 112 (3) which I have reproduced earlier and these two sections are therefore the governing provisions upon which the Director General must exercise his power to assess the company's chargeable income as well as the penalty to be imposed for the late filing of the said return.

With respect to the company's counsel, his argument that the assessment of the amount of tax cannot be made under section 90 (1) and (2) because the said section only applies to a taxpayer who has not filed his return cannot be upheld because of the clear wordings in section 90 (3) i.e "……has not furnished a return **in accordance with** section 77 or section 77A……." The clear meaning conveyed by the words which I just highlighted is, in the context of this case, compliance with the timeline prescribed by section 77A on the due date for submission of the tax return. In saying so I am guided by the company's counsel's citation of the decision in **Connaught Housing Development Sdn. Bhd v. Kerajaan Malaysia** [2003] 4 MLJ 755 which though that of the High Court, applied the principle mentioned by the Supreme Court in **National Land Finance**

Co-operative Society Ltd v. Director General of Inland Revenue [1994] 1 MLJ 99 at page 106 as follows:

> "Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J. in **Cape Brandy Syndicate v. Inland Revenue Commissioners** [12 TC 358]:
>
> > **….in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no enquiry about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. On can only look fairly at the language used….**
>
> It has also been said by the Judicial Committee in Oriental Bank Corporation v. Wright [1880] 5 AC 842, 856 **"that the intention to impose a charge upon a subject must be shown by clear and unambiquous language"**. (emphasis added)."

Thus, based on the ratio above, I am inclined to give effect to the literal meaning of the words in the said section as quoted above.

The penalty.

Deriving guidance from the same principle quoted above I am moved to give the same interpretation to section 112 (3) which employs the same words which I will repeat now i.e "…..default in furnishing a return **in accordance with subsection 77 (1) or 77A(1)…..**" This would mean and again I reiterate that the Director General is empowered in the context of this case to impose the penalty for the company's failure to comply with the timeline of seven months prescribed by section 77 A(1). This the Director General was allowed to do because it is not disputed that the company was not prosecuted for failing to submit the return within the specified timeline

stated in section 77A (1). As seen earlier, the amount of penalty that the Director General is allowed to impose according to section 112(3) is "….. equal to treble the amount of that tax……" i.e three times the amount of tax. In this case I stressed again, that the penalty imposed by the Director General was 20% of the tax assessed for the year. The company's counsel has further argued that even that 20% was not fair since the company has paid in advance the sum of RM245,000.00 before the due date of 31st July 2011, which facts I have earlier mentioned in this judgment. Again with respect I am unable to accede to the argument that the 20% penalty should be based on the difference between the tax payable and the tax already paid because that is not what section 112 (3), whether expressly or even impliedly provides. The said provision is to me so clear with no ambiguity which must be resolved in favour of the company as the taxpayer.

The company's counsel has also submitted that section 112 (1) is a compounding provision and should not be treated as a tax assessment provision. In his own words, below is his exact submission:

> "4.24 Section 112 (3) is a compounding provision and not a tax assessment provision. In this section, the respondent may require a taxpayer to pay a penalty if the respondent decides not to prosecute him in court for the offence committed under section 112 (1). Section 112 (3) states that "**If** no prosecution under subsection (1) has been instituted in respect of the offence committed, the respondent may require him to pay the penalty prescribed under section 112 (3)" (emphasis added)

With much respect to learned counsel, when I checked the said sub-section (which I have reproduced earlier) I did not see the word "if" that I have underlined above but the word "and" before the words "no prosecution". Therefore, the contention he made, and I do apologize if I made the wrong assumption here, based on the word "if" in that sentence is rather misleading. The said sub-section pure and simple, gives the Director General the power to impose the penalty to the maximum of three times the amount of tax **when** there is no prosecution for the failure to comply with section 77 (1), 77A(1) and 77 (3) and not "if" there was none. The Director General, in this exercise of his power under section 112 (3) has in fact been very lenient towards the default of the company and despite the fact, as raised by Director General's counsels and mentioned by the Special Commissioners in their written grounds of decision that the company was a repeat offender - it was late in the submission of its tax return for three previous years i.e 1991, 2007 and 2009 as shown in Exhibit WCL-1 of the Director General's affidavit in reply of Wee Cheong Leng filed at the hearing before the Special Commissioners.

For all the above reasons, the appeal is dismissed with cost of RM3,000.00.

Sgd.

(Y.A. DATO RHODZARIAH BT. BUJANG)
Judge
High Court II Kuching

Date of Grounds of Judgment	:	4th day of May 2016
Date of Delivery of Decision	:	25th day of April 2016
Date of Hearing	:	14th day of March 2016

For the Appellant	:	Dr. Dominic Lai Messrs. Arifin, Lai & Kan Advocates No. 2451, 1st Floor, Persiaran Boulevard, Boulevard Centre 98000 Miri, Sarawak.
For the Respondent	:	Mr. Ahmad Ishak bin Mohd Hassan together with Ms. Ruzaidah binti Yaacob Pegawai Undang-Undang Lembaga Hasil Dalam Negeri Malaysia (LHDNM) Unit Undang-Undang Tingkat 11, Wisma Hasil No. 1, Jalan Padungan 93100 Kuching, Sarawak.

Notice: This copy of the Court's Grounds for Judgment is subject to editorial revision.