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TECHNICAL

Indirect Taxation

TAX CASE UPDATE

Whether royalty should be added back to the transaction value of imported goods in accordance to Regulation 5(1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999

Citation

***Colgate-Palmolive Marketing Sdn Bhd v Ketua Pengarah Kastam* (2011) (HC, KL)** (Originating Motion No: R2-25-259-2008)
Date of Judgment: 10 May 2011

Facts

As a result of a post importation inspection conducted, the Royal Malaysian Customs, Federal Territory, Kuala Lumpur contended that the royalty paid by Colgate-Palmolive Marketing Sdn Bhd (the Applicant) to Colgate-Palmolive Co. USA (CP Co.) should be added back to the transaction value of goods imported and be treated as part of the valuation for the purpose of assessment of sales tax and customs duties.

The issue was referred to the Valuation Branch, Technical Services Division of the Royal Malaysian Customs Headquarters (the RMC) which decided that royalties paid by the Applicant to CP Co. was an adjustment element that had to be added back to the transaction value i.e. the price paid or payable because it fulfilled the conditions of Regulation 5(1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999. The relevant gazette Order is appended at the end of this e-CTIM.

The Applicant appealed to the Customs Appeal Tribunal (CAT) which decided in favour of the RMC.

The Applicant then filed an Originating Motion at the High Court of Kuala Lumpur (hereafter referred to as "the Court") to seek (amongst others) the following orders:

a) that the application be deemed to be a Notice of Appeal against the decision of the CAT;
b) that the decision of the CAT for payment of RM756,742.28, being customs duties and sales tax payable on goods imported by the Applicant, be set aside;
c) that the said sum paid by the Applicant as payment of customs duties and sales tax, be refunded to the Applicant.

Issue

Whether the Royalty payment constitutes a condition of sale of goods for export to Malaysia and is liable to be added back to the transaction value of imported goods in accordance to Regulation 5(1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999.

Decision

Application allowed with costs.

Summary of grounds of decision:

1. The Court considered the submissions of both the Applicant and the Respondent which are summarised below:

   Applicant's submission

   - The Royalty adjustment shall be made only if it fulfills all the conditions of Regulation 5(1)(a)(iv) which are fulfilled, i.e. the royalty payment –
     - has been included in the purchase price of goods;
     - is related to the goods that are being imported, paid either directly or indirectly and
     - is a condition of sale of the goods for export to Malaysia
   - The payment of Royalty should not constitute a condition of sale of the goods for export to Malaysia because:
     - The relationship between the Applicant and most suppliers reflected the normal practice adopted by the general business community. It did not influence the sales or purchase price and the Applicant was free to buy goods from any supplier according to its needs and determination.
     - Royalty payment to CP Co was for the right to sell in the territory they represented. It was not a condition of sales for export to Malaysia.
     - The goods were sold to the Applicant without the imposition of any condition that the Applicant had to pay Royalty to CP Co. This was proven when the importation of goods was still allowed even though Royalty was not paid and will only be paid after the goods have been sold.

   RMC's submission

   The RMC's submission was based on its application of the law, and this was set out in the written grounds of decision by the Chairman of the CAT. The following are some salient points:

   - There is no dispute that what is imported were licensed products as defined in the Royalty Agreement (i.e. they bear the trademark, patent or design owned by CP Co.). The obligation to pay royalty was clearly spelt out in the Royalty Agreement [Clause 8(a)]
   - The rights granted to the Applicant was the right to use COLGATE (US) trademarks, patents and designs. This right "to use" was defined in clause 18 as "the right to sell" the Licensed Products within Malaysia.
   - Reading the Royalty Agreement as a whole, it is clear that the Applicant could not import the product without incurring a liability to pay royalty on the product when it was sold. In view of the fact that the underlying purpose of purchasing the product was to sell it, the economic reality is that the ability of the Applicant to purchase the goods was of no benefit to it unless it was able to market and sell the products. Hence it can be reasonably concluded that the royalty payments were "as a condition of the sale for export to Malaysia."

2. Before coming to a decision, the Court reviewed the relevant statutory provisions, as well as the principles of interpreting a Taxing Statute.

   Provisions of the law

   The following statutory provisions were referred to:

i. S142 (35B) of the Customs Act 1967 empowers the Minister of Finance to make regulations to determine the customs value of imported goods.

ii. Regulations 4(1) and (3) of the Customs (Rules of Valuation) Regulations 1999 provides for the transaction value as the primary basis of valuation.

iii. Regulation 5 of the Customs (Rules of Valuation) Regulations 1999 stipulates the conditions for adjustment of price paid or payable. Regulation 5(1)(a)(iv) allows the transaction value to be adjusted by adding the royalties paid in respect of the goods, inter alia, if it forms a condition that the sale of the goods are for export to Malaysia.

Principles of interpreting a Taxing Statute.

The Court reviewed the principles established in precedent cases and quoted (with emphasis) the judgment by Gopal Sri Ram in the case of **Palm Oil Research and Development Board & Anor v Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265, as follows**:

> "*Hence, the governing principle is this. When construing a taxing or other statute, the sole function of the court is to discover 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.*"

3. The Court was of the view that the RMC's contention that the Royalty was a condition of the sale of the goods for export to Malaysia because Royalty was paid to CP Co by the Applicant "(*did) not hold water.*" There was no provision in the licence agreement requiring the Applicant to source for products from any related parties. It imposed no condition in relation to the purchase of the products by the Applicant, who had the option to determine how it intended to source its products. "*The decision to choose the source was for pure commercial reasons (sic) such as to achieve better costing….*"

4. In the mind of the learned Judge, "*what seems to be clear is that the Royalty and the purchase price of the products purchased by the Applicant are separate and independent transactions.*"

5. In the case of **Nike Sales Malaysia Sdn Bhd v Jabatan Kastam DiRaja Malaysia & 2 Ors R3(1)-25-03-2004,** the Court concluded that "*if the Parliament had intended that Royalty paid in relation to an export of goods be regarded as an adjustment item for the purposes of calculating customs value, there will be no need to further provide for the conditions in Regulations 5(1)(a)(iv)….*". The Court found no reason to differ from that decision.

6. The Court was of the considered view that the Nike case is relevant as the issues there are more or less similar to the present case.

Members may read the full Grounds of Judgment from the Kuala Lumpur Law Courts Official website.

Appendix

Customs (Rules of Valuation) Regulations 1999 [P.U.(A) 507/1999]

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Transaction value as primary basis of valuation

4.(1) The customs value of imported goods shall be their transaction value, that is, the price paid or payable for the goods when sold for export to Malaysia, adjusted in accordance with regulation 5, provided that-

(a) there are no restrictions in respect of the disposition or use of the goods by the buyer, other than restrictions that:

(i) are imposed by law;

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) the sale of the goods or the price paid or payable for the goods is not subject to some condition or consideration where its value cannot be determined;

(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer is to accrue, directly or indirectly, to the seller; or

(d) the buyer and seller of the goods are not related at the time the goods are sold for export or where the buyer and seller are related at that time but the proper officer of customs is satisfied that their relationship did not influence the price paid or payable for the goods.

(2) In a sale between related persons, for the purpose of showing that the relationship did not influence the transaction value, the buyer shall produce evidence that the transaction value of the goods being valued, taking into consideration any relevant factors including such factors and differences as enumerated in subregulation (4), closely approximates to one of the following values of other goods exported at the time or substantially at the same time as the goods being valued, being-

(a) the transaction value of identical goods or similar goods in respect of a sale of those goods for export to Malaysia between a seller and buyer who are not related at the time of the sale;

(b) the deductive value of identical goods or similar goods; or

(c) the computed value of identical goods or similar goods.

(3) In any case where the proper officer of customs is of the opinion that the relationship between the buyer and seller of any goods influenced the price paid or payable for the goods, the proper officer of customs shall inform the buyer, in writing if so requested, of the grounds on which the proper officer of customs formed that opinion, and shall give the buyer a reasonable opportunity to satisfy the proper officer of customs that the relationship did not influence the price.

(4) Where subregulation (2) applies, the buyer shall, without limiting the generality of subregulation (2), provide the following information-

(a) the nature of the goods being valued;

(b) the nature of the industry that produces the goods being valued;

(c) the season in which the goods being valued are imported;

(d) whether a difference in values is commercially significant;

(e) the trade levels at which the sales take place;

(f) the quantity levels of the sales;

(g) any of the amounts referred to in regulation 5; and

(h) the costs, charges or expenses incurred by a seller when the seller sells to a buyer to whom the seller is not related that are not incurred when the seller sells to a buyer to whom the seller is related.

Adjustment of price paid or payable

5.(1) In determining the transaction value of imported goods under regulation 4, the price paid or payable for the goods shall be adjusted-

(a) by adding thereto amounts, where such amount is not already included in the price paid or payable for the goods, determined on the basis of sufficient information, equal to:

(i) commissions and brokerage in respect of the goods incurred by the buyer, other than fees paid or payable by the buyer to the buyer's agent for the service of representing the buyer overseas in respect of the purchase of the goods;

(ii) the packing costs and charges incurred by the buyer in respect of the goods, including the cost of cartons, cases, and other containers and coverings that are treated for customs purposes as being part of the goods and all expenses of packing incidental to placing the goods in the condition in which they are transported to Malaysia;

(iii) the value of any of the following goods and services:

(A) materials, component, parts and other items incorporated in the goods;

(B) tools, dies, moulds, and other items utilised in the production of the goods;

(C) materials consumed in the production of the goods; and

(D) engineering, development work, artwork, design work, plans and sketches undertaken elsewhere than in Malaysia and necessary for the production of the goods,

determined under subregulation (2) that are supplied, directly or indirectly, by the buyer free of charge or at a reduced cost for use in connection with the production and sale for export of the goods, apportioned to the goods in a reasonable manner, and in accordance with generally accepted accounting principles;

(iv) royalties and licence fees, including payments for patents, trademarks and copyrights in respect of the goods that the buyer must pay, directly or indirectly,

as a condition of the sale of the goods for export to Malaysia, exclusive of charges for the rights to reproduce the goods in Malaysia;

(v) the value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer that accrues or is to accrue, directly or indirectly, to the seller;

(vi) the value of any materials, component, parts and other items incorporated in the goods for the purpose of repair to, or refurbishment of, those goods prior to importation of the goods to Malaysia, and the price paid for the service or repair or refurbishment, as the case may be; or

(vii) the costs of transportation and insurance of, and the loading, unloading and handling charges and other charges and expenses associated with the transportation of, the goods until the goods have arrived in the country of importation;

(b) by deducting therefrom amounts, where such amount is already included in the price paid or payable for the goods, equal to any of the following costs, charges or expenses:

(i) any reasonable cost, charge or expense that is incurred for the construction, erection, assembly or maintenance of, or technical assistance provided in respect of the goods after the goods are imported;

(ii) any reasonable cost, charge, or expense that is incurred in respect of the transportation or insurance of the goods within Malaysia and any reasonable cost, charge, or expense associated therewith; and

(iii) any customs duties or other taxes payable in Malaysia by reason of importation or sale of the goods,

if the cost, charge, expense, duties or other taxes is identified separately from the balance of the price paid or payable for the goods;

(c) in respect of carrier media bearing data or instructions, by deducting the value of the data or instructions from the price paid or payable for the goods if:

(i) the value of the data or instructions is distinguished from the cost or value of the carrier media; and

(ii) the data or instructions are not incorporated in data processing equipment.

(2) The value of the goods and services described in subparagraph (1)(a)(iii) shall be determined-

(a) in the case of materials, component, parts and other items incorporated in the goods being valued or any materials consumed in the production of the goods being valued:

(i) by ascertaining-

(A) their cost of acquisition where they were acquired by the buyer from a person who was not related to the buyer at the time of their acquisition;

(B) their cost of acquisition incurred by the person related to the buyer, where the goods were acquired by the buyer from a person who was related to the buyer at the time of their acquisition but who did not produce them; or

(C) their cost of production where they were produced by the buyer or a person related to the buyer at the time of their production;

(ii) by adding thereto-

(A) the cost of their transportation to the place of production of the goods being valued; and

(B) the value added to them by any repairs or modifications made to them after they were so acquired or produced;

(b) in the case of tools, dies, moulds, and other items, utilised in the production of the goods being valued in accordance with subparagraphs (2)(a)(i) and (ii) and by deducting therefrom an amount to account for any previous use of the goods made after the goods were so acquired or produced; and

(c) in the case of engineering, development work, artwork, design work, plans and sketches undertaken elsewhere than in Malaysia and necessary for the production of the goods being valued by ascertaining-

(i) their cost of acquisition or of the lease thereof, where they were acquired or leased by the buyer from a person who was not related to the buyer at the time they were so acquired or leased and are not generally available to the public;

(ii) their cost of acquisition or of the lease thereof incurred by the person related to the buyer, where they were acquired or leased by the buyer from a person related to the buyer at the time they were so acquired or leased, but who did not produce them and are not generally available to the public;

(iii) the cost to the public of obtaining them where they are available generally to the public; and

(iv) the cost of production where they were produced by the buyer or a person related to the buyer at the time of their production.

(3) For the purposes of paragraph (1)(c) – i

"carrier media" does not include integrated circuits, semi conductors and similar devices, or articles incorporating such circuits or devices;

"data or instructions" does not include sound, cinematic or video recordings.

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IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

[APPELLATE AND SPECIAL POWERS DIVISION]

ORIGINATING MOTION NO: R2-25-259-2008

In the Matter of Section 141W of the Customs Act 1967;

And

In the Matter of Regulations 5 (1) (a) (iv) of the Customs Regulations (Rules of Valuation) 1999;

And

In the Matter of Sections 7 (2) and 68 (2) and (3) of the Sales Tax Act 1972;

And

In the Matter of the decision made by the Customs Appeals Tribunal on the 7th Day of August 2008 and communicated orally to the Applicant on the 7th day August 2008;

And

In the Matter of Order 55 Rule 13 of the Rules of the High Court 1980.

BETWEEN

COLGATE-PALMOLIVE MARKETING
SDN BHD …APPLICANT

AND

KETUA PENGARAH KASTAM … RESPONDENT

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] The Applicant is seeking for the following orders:

(a) that this application be deemed to be a Notice of Appeal against the decision of the Customs Appeals Tribunal under Section 141w of the Customs Act 1967 and Section 68 (2) and (3) of the Sales Tax Act 1972;

(b) that the decision of the Customs Appeals Tribunal made on the 7th Day of August 2008 for the payment of RM756,742.28 being customs duties

and sales tax payable on the goods imported by the Applicant into Malaysia be set aside;

(c) that the Applicant, having padi customs duties and sales tax of RM756,742.28, be refunded the said sum;

(d) such further or other relief as this Honourable Court deems fit; and

(e) costs of and incidental to this application be paid by the Respondent.

[2] After considering the rival submissions, the Court allowed this application with costs fixed at RM8,000.00 for the Applicant.

[3] The whole case was a result of the post importation inspection conducted by the Post Importation Branch, Technical Services Division of the Royal Malaysian Customs, Federal Territory, Kuala Lumpur ("Customs WP") back in 2000/2001. Customs WP had interpreted that the transaction value had fulfilled the conditions in Regulation 4(1)(a) to 4 (1)(d) of the Customs (Rules of Valuation) Regulations 1999 ("the Regulations"). Therefore, Customs WP contended that the Royalty paid by the Applicant to Colgate-Palmolive Co. USA should be added back to the transaction value and to be treated

as part of the valuation for the purpose of assessment of sales tax and customs duties.

[4] The issue in determining whether the Royalty payment is taxable was referred to the Valuation Branch, Technical Services Division of the Royal Malaysian Customs Headquarters ("the Respondent"). The Customs Headquarters decided that the royalties paid by the Applicant to Colgate-Palmolive Co. USA was an adjustment element that had to be added to the transaction value i.e. the price paid or payable because it fulfilled the conditions of Regulation 5 (1)(a)(iv).

[5] In disagreeing with the Respondent's view, the Applicant submitted that the Royalty adjustment shall only be made *if and only if* it fulfills all the conditions for adjustment as stipulated in Regulation 5 (1)(a)(iv) which are:

(a) that the Royalty payment has been included in the purchase price of the goods;

(b) that the Royalty payment is related to the goods that is being imported; paid either directly or indirectly; and

(c) that the royalty payment is a condition of sale of the goods for export to Malaysia.

[6] The main issue in contention is whether the condition on the payment of Royalty made by the Applicant to the licence holder Colgate-Palmolive Co. USA would constitute a condition of sale of goods for export to Malaysia. The Applicant submitted that it should not because:

(i) the relationship pattern between the Applicant and most suppliers reflect the normal practice adopted by the general business community even though they are members of the same group. Such relationship does not influence the sales or purchase price and the Applicant is free to buy goods from any supplier according to its needs and determination.

(ii) Royalty paid by the Applicant to Colgate-Palmolive Co. USA is for the right to sell in the territory they represent. There is no requirement for the Royalty to be added back to the transaction value because it is not a condition of sales for export to Malaysia.

(iii) the sales for export to Malaysia by the suppliers of the goods under the Colgate brand have been made without the imposition of any condition by the suppliers or Colgate-Palmolive Co. USA that the Applicant has to pay Royalty to Colgate-Palmolive Co. USA. This was proven when the

importation of goods were still allowed even though the Royalty was not paid and will only be paid after the goods have been sold.

[7] The Respondent gave a detailed explanation of the law that was applied in reaching the decision that it had made. In its well written grounds of decision, the learned Chairman of the Tribunal had this to say:

> "*In arriving at the decision that the royalty payments payable were as a condition of the sale for export, the court gave due regard to the commercial reality or substance of the arrangement between the buyer and the licensor. It also considered the expert opinions of the TCCV (i.e. the advisory opinions of the Technical Committee on Customs Valuation) which the court in the Mattel case (see Canada (Deputy Minister of National Revenue) v Mattel Canada [2001] 2 SCCR 100, 2001 SCC36 ("the Mattel Case") failed to do.*
>
> *Coming back to the present case, there is no dispute that what is imported here are licensed products as defined in the Royalty Agreement (i.e. they bear the trademark, patent or design of which Colgate US is the owner or beneficial owner).*

Hence the royalties paid were in respect of the goods imported. The obligation to pay royalty is clearly spelt out in clause 8 (a) of the Royalty Agreement, which is as follows:

> *8. In consideration of the rights hereby granted to USER, USER shall:*
>
> *a) pay to Colgate (U.S) as Royalty Five Percent (5%) of the difference between the USER's Sales to the trade and purchases of Licensed Products.*

The rights granted to CP Marketing is the right to use COLGATE (U.S) trademarks, patents and designs. This right "to use" is defined in clause 18 as "the right to sell" within Malaysia the Licenced Products.

Reading the Royalty Agreement as a whole, it is quite clear that CP Marketing could not import the product without incurring a liability to pay royalty on that product when it was sold. Although there is no impediment where purchase of the goods is concerned should CO Marketing default in making royalty payments as submitted by the appellant, in view of the fact that the underlying purpose of purchasing the product is to sell it, as expressed so succinctly in Adidas (see Adidas New Zealand

LTD v Collection Customs (Northern Region) [1999] NZAR 39) the ability of CO Marketing to purchase the goods is of no benefit to it unless it is able to market and sell the product. That is the economic reality and that is why it can be reasonably concluded that the royalty payments were 'as a condition of the sale for export to Malaysia'.

Therefore, on the balance of probabilities I found that the royalties paid by CP Marketing to Colgate US were paid as a condition of the sale for export to Malaysia. The decision of the Director General of Customs is accordingly affirmed".

The Legal Position

[8] On bare reading of section 142 (35B) of the Customs Act 1967 ('Act 235'), it clearly allows the Minister of Finance to make regulations to determine the customs value of imported goods. Section 142 (35B) reads:

Section142: Power to make regulations.

The Minister may make regulations;

(35B) to determine the customs value of imported goods;

[9] The regulations pertaining to the rules of valuation are detailed in the Customs (Rules of Valuation) Regulations 1999. In Regulation 4 (1) Customs (Rules of Valuation) Regulations 1999, the customs value of imported goods shall be their transaction value. Transaction value is the price paid for the goods when sold for export to Malaysia. The relevant parts of Regulation 4 reads:

> ***Regulation 4: Transaction value as primary basis of valuation.***
>
> *(1) The customs value of imported goods shall be their transaction value, that is, the price paid or payable for the goods when sold for export to Malaysia, adjusted in accordance with regulation 5, provided that-*
>
> *(a) there are no restrictions in respect of the disposition or use of the goods by the buyer, other than restrictions that:*
>
> *(i) are imposed by law;*
>
> *(ii) limit the geographical area in which the goods may be resold; or*

(iii) do not substantially affect the value of the goods;

(b) the sale of the goods or the price paid or payable for the goods is not subject to some condition or consideration where its value cannot be determined;

(b) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer is to accrue, directly or indirectly, to the seller; or

(d) the buyer and seller of the goods are not related at the time the goods are sold for export or where the buyer and seller are related at that time but the proper officer of customs is satisfied that their relationship did not influence the price paid or payable for the goods.

…

(3) In any case where the proper officer of customs is of the opinion that the relationship between the buyer and seller of any goods influenced the price paid or payable for the goods, the proper officer of customs shall

inform the buyer, in writing if so requested, of the grounds on which the proper officer of customs formed that opinion, and shall give the buyer a reasonable opportunity to satisfy the proper officer of customs that the relationship did not influence the price.

[10] Regulation 5 (1)(a)(iv) on the other hand, allows the transaction value to be adjusted by adding the royalties paid in respect of the goods, *inter alia,* if it forms a condition that the sale of the foods are for export to Malaysia. The relevant portion of Regulation 5 reads:

Regulation 5: Adjustment of price paid or payable.

(1) In determining the transaction value of imported goods under regulation 4, the price paid or payable for the goods shall be adjusted –

(a) by adding thereto amounts, where such amount is not already included in the price paid or payable for the goods, determined on the basis of sufficient information, equal to:

(i)…

(ii)…

(iii)…

(iv) royalties and license fees, including payments for patents, trademarks and copyrights in respect of the goods that the buyer must pay, directly or indirectly, as a condition of the sale of the goods for export to Malaysia, exclusive of charges for the rights to reproduce the goods in Malaysia;

The Principles In Interpreting A Taxing Statute

[11] Firstly, it is necessary to lay down the approach that this Court takes in dealing with the interpretation of a provision of an Act. Gunn Chit Tuan, CJ (Malaya) in **National Land Finance Co-operative Ltd v Director-General of Inland Revenue [1993] 4 CLJ 339**, a Supreme Court decision, laid down the three principles in construing the interpretation of taxing statutes. He said:

"Firstly, there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words tax cannot be imposed. (per Rowlatt J. in Cape Brandy Syndicate v. I.R.C. 12 T.C. 358). Another principle is that where the meaning of a statute is in doubt the ambiguity must be construed in favour of the subject. Yet another principle is that an exemption

from tax cannot be removed except by sufficiently clear words to achieve that purpose."

[12] There is a noticeable trend towards purposive approach in interpreting a taxing statute (see **Mc Guckian v. IRC [1977] 1 WLR 991** and **Stenhouse Holdings v. IRC [1972] AC 661**). The purposive approach has long been recognized by Malaysian Law as part of the rule in interpreting legislation. Section 17 of the Interpretation Act 1948 ("Act 388") provides:

> **Section 17A: Regard to be had to the purpose of Act.**
>
> 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.

[13] In **Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265** Gopal Sri Ram, JCA (as he then was) had this to say about interperating a taxing statute:

> *"In my judgment s. 17A has no impact upon the well established guidelines applied by courts from*

time immemorial when interpreting a taxing statute. Section 17A 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 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 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.*

In my respectful view, <u>s. 17A of the Interpretation Acts 1948 and 1967</u> neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. <u>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</u>

object underlying the particular statute albeit that such purpose or object is not expressly set out therein.

[Emphasis added]

The Court's Findings

[14] The issue before the Court is whether the Respondent should charge additional Royalty to the transaction value of imported goods in accordance to Regulation 5 (1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999.

[15] With respect, the Respondent's contention that the Royalty was a condition of the sale of the goods for export to Malaysia because Royalty was paid to Colgate-Palmolive Co. USA by the Applicant does not hold water. The license agreement does not contain any provision requiring the Applicant to source for the products from any related parties. It does not make any reference or condition in relation to purchase of the products by the Applicant. The Applicant holds the option to determine how it intended to source its products. The decision to choose the source was a pure commercial reasons such as to achieve better costing through economics of scale, price, commercial friendliness, quality and consistent quality of the products.

[16] To my mind, what seems to be clear is that the Royalty and the purchase price of the products purchased by the Applicant are separate and independent transactions.

[17] The most recent case which had similar bearings to this case is the unreported decision of my learned brother YA Tuan Mohamad Ariff Md Yusof in **Nike Sales Malaysia Sdn Bhd v Jabatan Kastam DiRaja Malaysia & 2 Ors R3(1)-25-03-2004**. In this case, Nike Sales Malaysia ("Nike") filed a judicial review against the decision of the Jabatan Kastam DiRaja Malaysia (which is also the Respondent in this case) against the demand by the Respondent for the payment of RM3,292,076.91 as customs duties and sales tax payable by Nike Malaysia under the same regulation i.e. Regulation 5 (1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999.

[18] In that case, the learned judge had taken the task and had gone in intrinsic detail in explaining the jurisprudence underlying the Regulation 5 (1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999 with reference to authorities in Malaysia, Canada, Australia and New Zealand just to name a few. He even cited the Advisory Opinions of the Technical Committee on Customs Valuation established under the WTO Valuation Agreement called the Agreement on Implementation

of Article VII of the General Agreement on Tariffs and Trade 1994, of which Malaysia is a signatory.

[19] The Court in that case allowed the appeal and concluded that if the Parliament had intended that Royalty paid in relation to an export of goods be regarded as an adjustment item for the purposes of calculating customs value, there will be no need to further provide for the conditions in Regulation 5 (1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999. Be that as it may, the Court in that case was minded that it was indeed necessary to consider both economic reality and the legal relationship underlying the business transaction flow on the facts of that case.

[20] The Court finds no reason to differ from the above decision. The Court is persuaded that His Lordship's decision is correct.

[21] The Respondent tried to distinguish the case with the facts of the present case stating that the conclusion arrived in that case is peculiar to its own facts. This Court however disagrees and is of the considered view that the **Nike Sales Malaysia Sdn Bhd v Jabatan Kastam DiRaja Malaysia & 2 Ors** is indeed a relevant case to be referred to as the issues before it are more or less similar to the issues in this case.

[22] Finding much support from the **Nike Sales Malaysia Sdn Bhd v Jabatan Kastam DiRaja Malaysia & 2 Ors** case and for the reasons above stated, the Court is of the opinion that this appeal ought to be allowed with costs.

Dated: 10 MAY 2011

(DATO' HAJI MOHD ZAWAWI BIN SALLEH)
JUDGE
HIGH COURT MALAYA
KUALA LUMPUR

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