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TECHNICAL

Indirect Taxation

TAX CASE UPDATE

Power of the Minister of Finance to impose charges under the Free Zones Act 1990

***Malaysia Airports (Sepang) Sdn Bhd and Malaysia (Properties) Sdn Bhd v Federal Express Brokerage Sdn Bhd, United Parcel Service (M) Sdn Bhd and UPS SCS (Malaysia) Services Sdn Bhd* (FC) 2013** [Civil Appeal No: 02(f)-72-10/2012 (W)]

Attorney General of Malaysia (Intervener)
Date of Judgment: 24 September 2013

Facts

The first appellant, Malaysia Airports (Sepang) Sdn Bhd (MASSB) was appointed by the Minister of Finance ("the Minister") to administer, maintain and operate the Kuala Lumpur International Airport Free Commercial Zone (KLIA-FCZ) under S3(1) of the Free Zone Act 1990 ("the Act"). The respondents were companies that had been operating in the KLIA-FCZ carrying out commercial activities since 1997. They were members of the Air Freight Forwarder Association of Malaysia (AFAM) as well as the Conference of Asia Pacific Express Carriers (CAPEC).

A free zones charge which was paid to MASSB, was imposed on all persons carrying out commercial activities in the KLIA-FCZ. Due to problems of payment of the charges to MASSB, the Free Zones Regulations 1991 (FZR) were amended to insert a new Regulation 8A which came into force on 20.4.2007.

Owing to a dispute between AFAM and CAPEC as to how the charge was to be established, on which they could not come to an agreement, the Minister made a decision to maintain the charge at RM5 per approved custom declaration and this was conveyed to AFAM by a letter dated 18.5.2007. The letter also declared that MASSB could not continue to maintain and operate KLIA-FCZ if the charges were not paid by AFAM's members.

The respondents refused to pay the charges, and commenced an action to seek (amongst others) the following declarations against the appellants:

a) that the letter issued by Ministry of Finance dated 18.5.2007 is void *ab initio* and/or contrary to law;
b) that the appellants had no authority to collect the charge; and
c) that the first appellants return all monies collected from the respondents from the year 2000.

The first appellant counterclaimed the outstanding charges not paid by the respondents.

Issue:

The issue for the determination is whether the Minister of Finance has the power under the Act to impose charges on activities carried out or for facilities and services provided under that Act.

Decision:

Decision of the High Court

The High Court dismissed respondents' action and held that the Minister had the power to impose conditions in the form of charges based on S10(3) and S13(2) of the Act. The commercial activities carried out by the respondents fell within the First Schedule of the Act. The conditions that the Minister may impose were in respect of the activities of the respondents carried out in the free zone.

Decision of the Court of Appeal

The Court of Appeal reversed the decision of the High Court.

The Court applied the principle established in *Palm Oil Research and Development Board Malaysia & Anor. V Premium Vegetable Oils Sdn Bhd (FC) [2005]* 3 MLJ 97 which states that before a tax can be imposed there must be clear words conferring such powers to impose tax and that such words must be given strict construction. Applying this to S10(3) and S13(2) of the Act, the Court of Appeal concluded that the language of both these sections "*does not show any intention on part of the Parliament to confer on the Minister of Finance a discretion or power to impose any charge or levy in respect of activities carried out in the FCZ but merely seeks to provide the types of activities and administration that can be allowed in the FCZ*." It was also held that as a result of this finding of the Court, Regulation 8A of the FZR, by imposing such levy, is null and void being *ultra vires* the Act.

(The Federal Court allowed the Attorney General of Malaysia to intervene in the proceedings and be an intervener in the appeal to Federal Court.)

Decision of the Federal Court

Appeal allowed with costs. The order of the Court of Appeal is set aside and the order of High Court restored.

Summary of Grounds of Decision:

1. Briefly, the main contentions by appellants and respondents are as follows:

   Appellant

   - S10(3) read with S13(2) of the Act is not a taxing statute and the charge that is imposed is not a tax or levy. The principle in Palm Oil Research only applies if the charge falls within the meaning of tax or levy.
   - It is clear from the wordings of Regulation 8A of the FZR, that the charge is levied on persons who carry out activities (business) in a free zone, and not addressed to the public at large or to a class of the public. The payment is enforceable by law and arrear are treated as civil debt.

   Respondent

   - The FCZ charge is in substance and reality a tax, duty, levy or a pecuniary burden and the Court of Appeal was correct in characterizing the charge as such. Regulation 8A of the FZR was intended to legitimize the collection of the FCZ charges and not in consideration of any defined services. It is rather a charge collected as a form of revenue, but this is in fact without legislative basis as it is not provided for under the Act, and the said Act is not a taxing statute.
   - The Court must take a purposive approach in the interpretation of any statute. The plain words of S10(3) and S13(2) of the Act do not show any intention on the part of Parliament to confer on the Minister a discretion to impose any charge or levy in respect

of activities carried out in the FCZ. It follows therefore, that Regulation 8A of the FZR is *ultra vires* the Act.

2. The Court applied the test (as to whether or not a particular written law is a taxing statute) stated by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd [1933] AC* 168 wherein it was declared that "*compulsion is an essential feature of taxation*." Based on the case cited, the Court established that for a "payment" to be a tax, the criteria required to be satisfied is as follows:
   i. The payment is compulsorily imposed.
   ii. The payment is enforceable by law.
   iii. There must be compulsion to pay.
   iv. The imposition of the payment is for a public purpose.
3. On the question of whether the charge is for a public purpose or for purpose of the Federation, the Court referred to S,4 of the Act, and concluded that under that section, no tax is collected for the purpose of activities carried out in a free zone.
4. The Court took into consideration sections 10(3), 13(2) and 47 of the Act, and was of the view that Regulation 8A had been validly enacted under S47 of the Act *("The Minister may make regulations as may be necessary….*").
5. The letter dated 18.5.2007 showed that the appellants were incurring losses and cannot continue to carry on its functions to administer, maintain and operate the free zone. Hence the Court agreed that the Minister was justified in imposing the condition of the charge on persons using the facilities and service provided in the free zone, for which he is powered under S10(3), read together with S13(2) of the Act.
6. On the meaning of "condition" in S.10(3) of the Act, the Court cited the New Shorter Oxford English Dictionary which defines "condition" to mean *"a thing demanded or required as a prerequisite to the granting or performance of something else*." In the context of the present case, the condition is the payment for facilities and services rendered by the Authority, i.e. administering, maintaining and operating in the free zone area.
7. The Court viewed S10(3) of the Act as being of wide import and giving very wide powers to the Minister to impose "conditions" as he deems fit for the purpose of carrying out any activity in the free zone, including imposing a fee or charge for the benefit of the Authority for providing facilities and services there. In the Court's judgment, the charge imposed is not for the public purpose or for the purpose of the Federation. This case can be distinguished from the Palm Oil Research case, as the "cess" or tax levied in that case goes to the Government as its revenue, unlike the present case.
8. In conclusion, the distinction between a tax and a fee is this – *"a tax may be described as the money that a government levies upon an individual or business having performed a particular action or completed a particular transaction, whereas a fee, even if it is a charge paid to the government by individuals or by a business, is specifically applied for the use of a service. Money from the fee is generally not applied to uses other than to providing the service for which the fee is applied. And usually a fee rate is directly tied to the cost of maintaining the service."*

Members may read the full Grounds of Judgment from the Official website of the Office of Chief Registrar, Federal Court of Malaysia.