

INDIRECT TAX

Tax Case Update

Whether products containing extracts of coffee with herbs should be classified as “*extracts or concentrates of coffee*” or “*other non-alcoholic beverages*”?

***Power Root (M) Sdn Bhd & Ors v Ketua Pengarah Kastam* (Originating Summon No.: R1-25-288-2009) High Court [(2011) MSTC 30-032]**

The taxpayers are manufacturers known primarily for the Per'l Café Kacip Fatimah and Alicafé range of drinks, which were originally classified as “preparation with a basis of extracts, essences or concentrates or with a basis of coffee” under HS tariff code 2101.12 900 of the First Schedule to the Customs Duties Order 2007 (“Category A”). Pursuant to the Sales Tax Order (Tax Rates No. 2) 2008, the drinks attracted sales tax of 5%.

Consequent to a Sales Tax audit, the Royal Malaysian Customs (RMC) classified the drinks as “other non-alcoholic beverages” under HS tariff code 2202.90 900 which attracts sales tax of 10% (“Category B”). The taxpayers were required to pay the short fall on sales tax amounting to RM856,599.83

The taxpayers disagreed with RMC’s decision in classifying the drinks under Category B and appealed to the Customs Appeal Tribunal (“CAT”) that the drinks product 'is not a flavored drink' based on the following grounds:-

- (a) The raw material used in their coffee, herbs and honey dates-based products, is an extract from coffee, tea, dates, honey, traditional Malaysian herbs, fruits and vegetables.
- (b) Energy drink products that stimulate the human immune system and strengthen the body is different from other flavoured beverage products.

However, CAT dismissed the appeal on 12 August 2009 based on the following grounds:-

- (a) The taxpayer’s products contain at least 78% water. The addition of water and carbon dioxide had changed the physical property of the products and the ingredients including the coffee were no longer in concentrated form. CAT believes that the dilution of the ingredients changed their character substantially resulting in beverages.
- (b) The drinks containing ginseng, tongkat ali and kacip fatimah were tonic beverages.

The taxpayers further appealed to the High Court which ruled in their favour and ordered that the classification for the drinks be reverted to Category A. The High Court agreed with the taxpayers on the basis of the following grounds:-

- (a) Under paragraph 4 rule 3(a) of the Customs Duties Order 2007, where goods are prima facie classifiable under two or more headings, the heading that provides the

most specific description shall be preferred. Therefore, 'preparation with a basis of coffee' under the Heading 2102.12.900 is the more specific description to describe the taxpayers' products than 'non-alcoholic beverages'. The amount of moisture content is not the only criteria in deciding whether or not a liquid is 'beverage'.

- (b) A consumer's general expectation of the products is that it is a coffee drink containing health and nutritional benefits from the addition of herbs. Thus, to the consumer, the essential character of the products is that is a coffee drink with traditional herbs whether purchased in powder form or in the ready-to-drink liquid form sold in cans.

The RMC then appealed to the Court of Appeal, which affirmed the High Court's decision in April 2012.

Consequently, the taxpayers sought to recover the additional sales tax paid to the RMC in May 2012. The RMC refused on the ground that both the High Court and the Court of Appeal did not order the refund of the additional sales tax. Taxpayers then applied to the High Court for consequential orders to give effect to the concurrent decisions of the High Court and the Court of Appeal.

On 23 July 2013, after hearing the taxpayers' arguments, the High Court allowed with costs the application for consequential orders and made the following orders:

- (i) that the RMC return the additional sales tax of RM856,599.83 to the taxpayers; and
- (ii) that interest shall accrue at 5% per annum on the sum of RM856,599.83 from the date of the High Court decision until the date of full payment.

Application for the conversion of the taxpayers' application for consequential order into a writ of summons by the RMC was dismissed by the High Court.

Members interested in further details and judgement of the case may refer to the [decision of CAT](#) at the CAT website and High Court judgment on *Power Root (M) Sdn Bhd v Ketua Pengarah Kastam (Originating Summon No.: R1-25-288-2009) High Court [(2011) MSTC 30-032]* in Malaysia and Singapore Tax Cases. You may also view the High Court judgment online at the Resource Centre of the Institute during working hours.

The above case note has been prepared, with the assistance of Saravana Kumar of Lee Hishammuddin Allen & Gledhill and Mr Koh Siok Kiat of Ernst & Young Tax Consultants Sdn Bhd. The Institute would like to thank, both abovementioned parties for the assistance rendered to produce this e-CTIM for the benefit of the members. The views and opinions of this case note are not to be imputed to be those of Lee Hishammuddin Allen & Gledhill, Ernst & Young Tax Consultants Sdn Bhd or CTIM. Members are reminded that this case note is intended for purposes of information only. It should not be construed as legal advice or opinion on any fact or circumstances.

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