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TECHNICAL

Indirect Taxation

TAX CASE UPDATE

Application for judicial review to quash decision of Minister of Finance (MOF) to refuse an application for remission of import duties and sales tax

Citation:

Everise Sprint (M) Sdn Bhd v. Minister of Finance & State Director of Customs, Selangor (Court of Appeal) (Civil Appeal No: B-01-435-12/2013)

Date of Judgment: 13 March 2015

Facts:

This is an appeal against the decision of the High Court, which had dismissed the appellant's [Everise Sprint (M) Sdn Bhd] (ES) application for judicial review, whereby the appellant had sought for an order of certiorari to quash the decision of the Minister of Finance, Malaysia (1st Respondent) (R1) to reject the appellant's application for remission of import duties and sales tax pursuant to S.14A of the Customs Act 1967 (CA) and S.33 of the Sales Tax Act 1972 (STA) respectively.

The appellant carried on a business of buying and selling used prime movers. In 2001, the appellant bought 69 units of used prime movers from (the appellant claimed) Scania Malaysia Sdn Bhd (Scania Malaysia). The supplier or exporter of the prime movers was Scania (GB) Ltd United Kingdom (Scania UK).

The importation of a prime mover required an Approved Permit (AP) issued by the Ministry of International Trade and Industry. In the customs declaration form (Borang K1), the importer was declared to be Red Synergy Corporation Sdn Bhd (RSC S/B) which held the APs used to import the prime movers. Customs duties per unit of prime mover was assessed by Customs to be valued at RM33,000 per unit in accordance with S.13(1) of the CA. Invoices for the customs duties, sales tax and other charges were issued to the appellant by the forwarders engaged to handle the importation. The appellant paid in a lump sum for the invoices and the prime movers were released by customs after payment of the duties by the forwarders.

Subsequently, as a result of an audit on **Scania Malaysia** conducted by the State Director of Customs, Selangor (2nd Respondent) (R2), it was discovered that there was a shortfall in the import duties and sales taxes ("short-paid taxes") paid to Customs. R2 then took steps to recover the short-paid taxes, not from Scania Malaysia, but from the appellant. R2 issued 2 Notices of Demand to the appellant on 25.3.2011 and 1.4.2011 for the amount of RM782,087.19 and RM1,467,340.29 respectively. On 28.03.2012, R2 issued an Amended Notice of Demand claiming the short-paid taxes. The appellant denied liability on the ground that it was not the "importer" of the prime movers.

On 20.4.2012. the appellant applied to R1 for remission of the duties and taxes under S.14A of the CA and S.33 of the STA respectively. The request was refused vide R1's letter dated 25.5.2012. The appellant then filed judicial review application against R1's decision. The High

Court dismissed the judicial review application, hence this appeal by the appellant.

Issues:

The grounds of appeal may be summed up into 2 main issues:-

a. R2 had erred in finding that the appellant was an importer under S.2 of the CA.

b. R1, upon reliance on information provided by R2, had failed to exercise its discretion to remit the duties and taxes within the phrase "just and equitable" in S.14A of the CA and S.33 of the STA.

Decision:

Appeal allowed with costs.

The following is a summary of the Court's findings:

1 Based on the definition of "importer" under S.2 of the CA, it is apparent that who is an "importer" would be based not only on the facts of each particular case, but also on whether the goods had been removed from Customs' control. It was not disputed that R1 had relied on facts and information provided by R2.

2. The Court noted that in issuing the Notice of Demand, R2 had taken into account the following facts:

   a. RSC S/B's APs were used and declared in Borang K1 as the Consignee or importer but it was not the party that paid and RSC S/B did not pay any duty or sales tax on the prime movers.

   b. The invoices for duties and taxes were issued to the appellant by the forwarders, and they were paid by the appellant.

   c. There was a series of communications directly between Scania UK and the appellant *vide* emails which supports the proposition that the appellant was an importer.

3. It was submitted for R2 that it had taken into account the conduct and demeanor of the appellants relying on the above facts and found the appellant to be an importer as envisaged under S.2 of the CA. On the other hand it was submitted for the appellant that R2 and eventually R1 had failed to give a proper appreciation of some of the facts above and further, had failed to take into consideration some other relevant facts in coming to the decision. Since R1 had relied on the same facts presented by R2, R1 had also fallen into the same error as R2.

4. It was further submitted for the appellant that -

   a. Scania Malaysia was the party that paid the price of the prime movers to Scania UK. The appellant in turn paid the full purchase price locally based on local market price to Scania Malaysia (evidenced by invoices from Scania UK, which was made directly to Scania Malaysia).

   b. The email correspondences relied on by the Respondents to support the inference that there was direct dealing between the appellant and Scania UK were in relation to used prime movers in Complete Knock Down (CKD) where the Appellant was a commission agent and not the prime movers bought by the appellant which were imported in Complete Built-Up (CBU) form. The first mentioned deal had nothing to do with the

importation of CBU prime movers in this issue.

5. One of the principles to follow when a reviewing court should scrutinize the decision of a tribunal is "*where the findings of a tribunal had been arrived at by taking into consideration irrelevant matters and failing to take into consideration relevant matters* (Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd) (2010) 6 MLJ 1 [FC]). The Court agreed with the submission for the appellant that the dealing between the appellant and Scania Malaysia was a relevant fact in determining whether the appellant was indeed an "importer". It was also of the view that R2 had wrongly appreciated the email communication between the appellant and Scania UK, the content of which was in fact, not related to the prime movers bought by the appellant which are the subject of this appeal.

6. The Court was particularly concerned that R2 had sought the short-paid taxes from 2 parties, i.e. the appellant and Scania Malaysia (a fact which the Respondents did not deny). It agreed with the submission for the appellant that taxing law must be clear and cannot operate in ambiguity (Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetables Oils Sdn Bhd [2004] 2 CLJ 265). The demand made by R2 on 2 persons for the same short-paid taxes had created ambiguity and serious doubt as to who should be the one liable under the law. Taxing statute must be given strict interpretation as stated by Rowlatt J in the oft quoted judgment in Cape Brandy Syndicate v. Inland Revenue Commission 12 T.C 358. In this regard, the Supreme Court in National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1993] 4 CLJ 339 stated that the courts have refused to adopt a construction of a taxing statute which would impose liability when doubt exists. The Court found that "*It would be absurd and unjust to impose liability on the appellant as well as Scania Malaysia at the same time*."

7. Although R1 is empowered with the necessary discretion to be exercised upon objective appreciation of the evidence presented before him, a decision that is premised on wrong appreciation of facts and failure to consider relevant facts must stand quashed. R1 arrived at his decision after considering all the evidence before him. The Court's finding that R2 had failed to take into account some relevant facts and had taken into account some irrelevant facts means that the decision of the Respondent is one which is tainted with illegality (R Rama Chandran v Industrial Court [1997] 1 MLJ 145).

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