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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.

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. 02(f)-72-10/2012 (W)

ANTARA

1. MALAYSIA AIRPORTS (SEPANG) SDN BHD … Perayu-
2. **MALAYSIA AIRPORTS (PROPERTIES) SDN BHD Perayu**

DAN

1. FEDERAL EXPRESS BROKERAGE SDN BHD
2. UNITED PARCEL SERVICE (M) SDN BHD … Responden-
3. UPS SCS (MALAYSIA) SERVICES SDN BHD Responden

DAN

PEGUAM NEGARA MALAYSIA … Pencelah

(Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Sivil No. W-02-3327-2010

Antara

1. Federal Express Brokerage Sdn Bhd
2. United Parcel Service (M) Sdn Bhd … Perayu-
3. UPS SCS (Malaysia) Services Sdn Bhd Perayu

Dan

1. Malaysia Airports (Sepang) Sdn Bhd … Responden-
2. Malaysia Airports (Properties) Sdn Bhd Responden)

Coram: Zulkefli bin Ahmad Makinudin, CJ (Malaya)
Richard Malanjum, CJ (Sabah-Sarawak)
Hashim bin Dato' Hj. Yusoff, FCJ
Abdull Hamid bin Embong, FCJ
Hasan bin Lah, FCJ

JUDGMENT OF THE COURT

Introduction

1. This is an appeal by the appellants against the decision of the Court of Appeal given on 13.12.2011 allowing the appeal by the respondents against the decision of the High Court. On 18.9.2012 this Court had allowed the Attorney General of Malaysia to intervene in the proceedings and be an intervener in this appeal. Leave was granted to the appellants and the intervener to appeal against the whole of the decision of the Court of Appeal on the following question of law:

> "*Whether the Minister of Finance has power under the Free Zones Act 1990 (Act 438) to impose charges on activities carried out or for facilities and services provided under the said Act?*"

Background Facts

2. The relevant background facts of the case are as follows:

(i) The Kuala Lumpur International Airport ["KLIA"] Free Commercial Zone ["FCZ"] was declared a free

commercial zone by the Minister of Finance ["the Minister"] pursuant to section 3(1) of the Free Zone Act 1990 ["the Act"].

(ii) The first appellant was appointed by the Minister to administer, maintain and operate the KLIA FCZ under section 3(2) of the Act.

(iii) The respondents are companies that had been operating in the KLIA FCZ carrying out commercial activities since 1997. They are members of the Air Freight Forwarder Association of Malaysia ["AFAM"] as well as the Conference of Asia Pacific Express Carriers ["CAPEC"].

(iv) A free zones charge was imposed on all persons carrying out commercial activities at the KLIA FCZ. The charge is paid to the first appellant which maintains the free zone.

(v) Due to problems of payment of the charges to the first appellant the Free Zones Regulations 1991 were amended vide P.U.(A) 166/2007 to insert a new Regulation 8A which came into force on the 20.4.2007.

(vi) There was a dispute between AFAM and CAPEC as to how the charge was to be established. It was clear that a charge was to be paid but the dispute was on the standard to be established to determine the charge.

(vii) When AFAM and CAPEC could not reach an agreement the Minister made a decision to maintain the charge set at RM5.00 per approved customs declaration and this was conveyed to the AFAM by letter dated 18.5.2007.

(viii) In this letter it was also made known that the first appellant could not continue to maintain and operate the KLIA FCZ if the charges were not paid by AFAM's members.

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

(a) The letter issued by the Ministry of Finance dated 18.5.2007 is void *ab initio* and/or contrary to law;

(b) A declaration that the appellants have no authority to collect the charge; and

(c) A declaration that the first appellant return all monies collected from the respondents from the year 2000.

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

Decision of the High Court

3. The High Court in dismissing the respondent's action *inter alia* held that the Minister had the power to impose conditions in the form of charges based on sections 10(3) and 13(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 that the respondents carried out in the free zone.

Decision of the Court of Appeal

4. The Court of Appeal reversed the decision of the High Court. In arriving at its decision the Court of Appeal applied the principle on the imposition of a tax as stated by the Federal Court in **Palm Oil Research and Development Board Malaysia & Anor. v. Premium Vegetable Oils Sdn Bhd [2005] 3 MLJ 97**. The said principle states that before a tax can be imposed there must be clear words conferring such power to impose tax and that such words must be given strict construction. The Court of Appeal then applied the principle to section 10(3) and section 13(2) of the Act and arrived at the following conclusion:

> "*We are of the view that the language of both sections 10(3) and 13(2) of the Act on the face of it 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*."

The Court of Appeal then held that as a result of their finding, Regulation 8A of the Free Zones Regulations 1991 by imposing such levy is null and void being *ultra vires* the Act.

The Contention of the Appellants and the Intervener

5. Learned Senior Federal Counsel for the Intervener and learned Counsel for the appellants submitted before us that section 10(3) read with section 13(2) of the Act is not a taxing statute. The charge that is imposed is not a tax or levy. Only if the charge falls within the meaning of a tax or levy would the principle in **Palm Oil Research** then applies.

6. It was also submitted for the appellants and the intervener that from the wordings of Regulation 8A of the Free Zones Regulations 1999 ["the Regulations"], it is clear that the charge is levied on persons who carry out activities in a free zone. It is not addressed to the public at large or to a class of the public. It is only for those who choose to carry out their business in the free zone. The payment is enforceable by law. This is provided by Regulation 8A(2). The arrears are treated as a civil debt and the Authority may enforce it under the law for recovery of such debt. Regulation 8A of the Regulations reads as follows:

> "*(1) Where the Minister so directs, a free zones charge shall be payable by any person or his agent to the Authority in respect of every approved declaration under regulations 5, 21, 22, 23, 24, 25, 26, 27 and 28.*
>
> *(2) Any free zone charge which is not paid within such period as may be prescribed by the Authority, or in*

> *arrears shall be treated as a civil debt owed by the person or his agent to the Authority and the Authority may avail itself of such means under the law for the recovery of such debt.*"

The Contention of the Respondents

7. Learned Counsel for the respondents in support of the decision of the Court of Appeal submitted amongst others that the FCZ charge is in substance and reality a tax, duty, levy or a pecuniary burden. The FCZ charges are not collected pursuant to any agreement and therefore there is no contractual basis for it. It was also the contention of the respondents that the amendment made by the addition of Regulation 8A to the Regulations with effect from 20.4.2007 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. In the circumstances it was submitted that the Court of Appeal was correct in characterizing the FCZ charge as a form of tax duty, levy or a pecuniary burden on a corporate citizen that is purported to have legislative basis when in fact it was not provided for under the Act.

8. It was further submitted for the respondents that the said Act is not a taxing statute. In support Article 96 of the Federal Constitution was referred to which provides as follows:

"*No tax or rate shall be levied by or for the purpose of the Federation except by or under the authority of the Federal law*."

9. It was contended for the respondents that the Courts must take a purposive approach in the interpretation of any statute. The Courts must ask the question whether the Act was intended by Parliament to be a taxing statute. To the respondents the principal operative effect of the Act is to enable goods and services (except prohibited goods and services) to be brought into, produced, manufactured or provided in a free zone without payment of any customs duty, excise duty, sales tax or service tax. The plain words of sections 10(3) and 13(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 is the contention of the respondents that taxing statutes are to be construed strictly. The requirement for clear, expressed and unambiguous language in a taxing statute is well established. [**See the case of Palm Oil Research and Development Board Malaysia & Anor. v. Premium Vegetable Oils Sdn Bhd** [Supra].

10. The respondents further contended that as sections 10(3) and 13(2) of the Act do not confer upon the Minister's powers to impose any FCZ charges, it necessarily follows that Regulation 8A of the Regulations is in turn also *ultra vires* the Act. A subsidiary legislation must be subservient to the principal legislation.

Decision of this Court

11. We are of the view the test whether a particular written law is a taxing statute is as stated by the Privy Council in **Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd [1933] AC 168** at 175 as follows:

> "*In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under section 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the Committee is to be prima facie evidence in all Courts that such amount is due by the dairy farmer (section 11). A dairy farmer who fails to comply with every determination, order or regulation made by a Committee under the Act is to be guilty of an offence against the Act (section 13), and to be liable to a fine under section 19. Compulsion is an essential feature of taxation:* ***City of Halifax v. Nova Scotia Car Works, Ltd [1914] AC 992****. Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes*."

12. From the above cited case, 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.

13. On the question whether the charge is levied for a public purpose or for purposes of the Federation, we are of the view that the legislative scheme of the Act must be considered. Section 4 of the Act expressly provides that goods and services of any kind except those prohibited by law may be brought into, produced, manufactured or provided a free zone without payment of any customs duty, excise duty, sales tax or services tax. Therefore under section 4 of the Act no tax is collected for the purposes of the activities carried out in a free zone.

14. It is our considered view in enacting Regulation 8A of the Regulations the Legislature has taken into consideration the following provisions of the Act:

(i) Section 10(3) which provided that –

"*Notwithstanding anything to the contrary in any written law, the Minister may allow any activity to be carried out in a free zone subject to such conditions as he may deem fit to impose*."

(ii) Section 13(2) which provided that –

"*The Minister may give to the Authority such directions as he may consider necessary for the proper functioning of a free zone…*"

(iii) Section 47 which provided that –

"*The Minister may make regulations as may be necessary or expedient for giving full effect to the provisions of this Act or the carrying out of the purposes of this Act*."

15. As regards whether Regulation 8A of the Regulations is *ultra vires* the Act, we are of the view Regulation 8A has been validly enacted pursuant to section 47 of the Act. We noted that the very letter issued by the Ministry of Finance dated 18-5-2007 which the respondents sought to declare void provides *inter alia* as follows:

> "*Malaysia Airport (Sepang) Sdn Bhd (MAB) sebagai Pihak Berkuasa Zon di Kawasan Perdagangan Bebas di KLIA telah melaporkan ke Kementerian ini bahawa amaun tertunggak caj pemprosesan FCZ pada 14 Mei 2007 adalah sebanyak RM24,092,834. MAB juga memaklumkan bahawa mereka tidak boleh beroperasi sekiranya menanggung kerugian dan akan hanya terus sanggup menjadi Pihak Berkuasa Zon di FCZ KLIA sekiranya tunggakan tersebut dijelaskan*."

16. The letter dated 18-5-2007 from the Ministry of Finance shows that the appellants are incurring losses and cannot continue to carry on its functions to administer, maintain and operate the free zone. To administer, maintain and operate the free zone the first appellant is required by Part III of the Act to do the following things:

(i) to provide and maintain or allow in the free zone such facilities for the proper and efficient functioning of the zone (section 13(1));

(ii) to provide adequate enclosures for the movement of persons, conveyances, vessels and goods entering and leaving a free zone (section 13(4)):

(iii) no entry or residence in a free industrial zone without permission of the authority (section 15(1)); and

(iv) to order the exclusion or removal of goods or to discontinue activities which are dangerous or prejudicial to public interest, health or safety (section 16(1).

17. We agree with the submission of learned Counsel for the intervener that in view of the appellants' function to administer, maintain and operate the free zone the Minister is justified in imposing the condition of the charge on persons using the facilities and services provided in the free zone. This is in our view allowed under section 10(3) of the Act. This section when read together with section 13(2) of the Act confers on the Minister powers to give directions that are necessary to the relevant authority and in the present case to the appellants for the proper functioning of a free zone.

18. As regards the meaning to be attached to the word "*condition*" in section 10(3) of the Act so as to include a form of payment we would refer to the **New Shorter Oxford English Dictionary** that defines "*condition*" to mean "*a thing demanded or required as a prerequisite to the granting or performance of something else*". In our view in the context of the present case the condition is the payment for the facilities and services rendered by the Authority, that is administering, maintaining and operating the free zone area.

19. It is our judgment section 10(3) of the Act is of wide import and gives the Minister very wide powers to impose "*conditions*" he deems fit for the purposes of carrying out any activity in the free zone. This would include imposing a charge or fee for the benefit of the Authority for providing the facilities and services in the free zone. It is our judgment that a charge or a fee imposed is not for the public purpose or for the purposes of the Federation. The present case can be distinguished from the case of **Palm Oil Research and Development Board Malaysia & Anor. v. Premium Vegetable Oils Sdn Bhd** [supra] cited in support of the respondent's case in that in the **Palm Oil Research's** case the "c*ess*" or the tax levied goes to the Government as its revenue unlike in the present case.

Conclusion

20. Thus, in brief, 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.

21. For the reasons abovestated we would answer the question posed in this appeal in the affirmative. In the result we would allow this appeal with costs. The order of the Court of Appeal is set aside and the order of the High Court is hereby restored. We make an order of costs of RM50,000/- to be paid by the respondents to the appellants and no order of costs to the intervener. Deposit is to be refunded to the appellants.

t.t.
(ZULKEFLI BIN AHMAD MAKINUDIN)
Chief Judge of Malaya

Dated: 24th September 2013

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