

TECHNICAL

Indirect Taxation

TAX CASE UPDATE

Determination of the customs value of goods released for home consumption from a Licensed Manufacturing Warehouse

Ketua Pengarah Kastam Dan Eksais & Kerajaan Malaysia v. Pioneer Technology (Malaysia) Sdn Bhd (Court of Appeal) 2013 [Civil Appeal No. W-01-404-2009]

Date of Judgment: 3 January 2013

Facts:

The principal activity of Pioneer Technology (M) Sdn Bhd ("the Respondent") is the manufacture of audio and video products. It has a factory in Muar which is licensed as a Licensed Manufacturing Warehouse ("LMW") under S.65A of the Customs Act 1967. Under S65(3)(b), import duty and sales tax on goods released from the LMW for the local market must be calculated on the basis as if such goods have been imported.

Prior to 1/4/2000, goods for the local market were sold through the Respondent's sole distributor, Hwee Seng (Electronics) Sdn Bhd ("HS"). For the purpose of Customs declaration, the Respondent was the "exporter" and HS the "importer", and the price invoiced to HS was accepted as the value of "imported" goods for purposes of import duty and sales tax.

After 1/4/2000, the Respondent's own Sales Division in KL replaced HS as the distributor for the local market (i.e. the "importer") and the value of the goods for purposes of import was the Respondent's invoiced value to the Sales Division. (Earlier on, Customs had been provided with costs breakdown for the production costs of specific goods which was referred to as the ex-factory price.)

By a letter dated 16/9/2002, the Customs Headquarters in KL stated that whilst the Computed Method was acceptable, the seller and buyer being the same entity, general expenses and costs borne by the Sales Division outside the LMW is part of the cost of production and sale pursuant to regulation 9(3), Customs (Rules of Valuation) Regulations 1999 ("CRVR") [P.U.(A) 507/ 1999]. As such, expenses like payroll, marketing, administration and profits of the Sales Division would be added to computed values submitted from the LMW.

The company then appealed to the High Court against the Customs' decision, which appeal was allowed by that Court. Hence the present appeal to the Court of Appeal.

Issue

The issue was formulated as follows:

Whether, for purposes of determining customs value of the Respondent's goods that are released for home consumption from the Respondent's LMW in accordance with the computed value under Regulation 9 of the CRVR, the Appellants are entitled to include the Sales Division Profits and

General Expenses (payroll, administration and marketing costs) to the ex-factory prices of the Respondent's goods?

Decision:

Appeal allowed with costs. Order of the High Court set aside.

The grounds of the Court's decision are summed up in the Judgment of the Court, and they are quoted below:

- a) The LMW is a facility to allow a manufacture (sic) to import raw materials without customs duty and to export free its products.*
- b) Where a manufacturer releases manufactured goods from the LMW for home consumption, the customs duty on the goods is calculated as if the goods had been imported.*
- c) That section 65A(3)(b) does not provide any qualification to the phrase "had been imported" must mean the goods shall be treated as any other goods imported into Malaysia.*
- d) The rules of valuation of customs value provide that the primary basis of determination of customs value of imported goods is their transaction value: see Regulation 4. Thus, where the goods are sold by the exporter to an importer distributor, the transaction value is the invoice value with the adjustments under Regulation 5.*
- e) Where a manufacturer from an LMW sells to home consumptions he may seek exemption on that ground from the Minister.*
- f) Where such manufacturer has no exemption, the customs value is the transaction value as above.*
- g) Where such manufacturer has no exemption, and no transaction value, the customs value is to be determined under Regulation 7, 8 or 9 as applicable.*
- h) Regulation 9 is applicable in this case, and it includes the payroll, marketing, administration and profits of the sales division.*

The Respondent's cross appeal in respect of interest for the prejudgment period was dismissed.

Members may read the full [Grounds of Judgment](#) from the Official website of the Office of Chief Registrar, Federal Court of Malaysia.

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**IN THE COURT OF APPEAL, MALAYSIA
AT PUTRAJAYA**

[APPELLATE JURISDICTION]

CIVIL APPEAL NO. W-01-404-2009

Between

1. **KETUA PENGARAH KASTAM DAN EKSAIS**
2. **KERAJAAN MALAYSIA** - **APPELLANTS**

And

**PIONEER TECHNOLOGY (MALAYSIA)
SDN BHD** - **RESPONDENT**

**[In the matter of High Court of Malaya at Kuala Lumpur
(Appellate & Special Powers Division)
Originating Motion No: R2-25-36-2005]**

Between

Pioneer Technology (M) Sdn Bhd - **Appellant**

And

1. **Ketua Pengarah Kastam Dan Eksais**
2. **Kerajaan Malaysia** - **Respondents**

CORAM:

**Zainun Ali, JCA
Ramly Hj Ali, JCA
Abdul Wahab Patail, JCA**

Date of Judgment: 6th January 2012

JUDGMENT OF THE COURT

- [1] The KETUA PENGARAH KASTAM DAN EKSAIS and KERAJAAN MALAYSIA (the Appellants) had decided that in relation to payment of duties/taxes under the Customs Act 1967 and Sales Tax Act 1972 that:

"3.1 Kaedah penilaian bagi barangan berduti yang dibawa keluar dari Gudang Pengilangan berlesen syarikat Pioneer Technology (Malaysia) Sdn. Bhd. kepada 'Sales Division' nya di Kuala Lumpur hendaklah menggunakan Kaedah Campuran di mana bagi mencapai nilai kastam melalui kaedah campuran tersebut hendaklah mengambilkira semua perbelanjaan am 'Sales Divison' Syarikat Pioneer Technology (Malaysia) Sdn. Bhd."

- [2] The High Court, on 3/11/2009, allowed the appeal by PIONEER TECHNOLOGY (MALAYSIA) SDN BHD (the Respondent) against that decision of the Appellants.

- [3] The Appellants appealed to this Court.

Background

- [4]** The Respondent has a factory in Muar ("LMW") licensed as a Licensed Manufacturing Warehouse pursuant to Section 65A of the Customs Act 1967. The principal activity of the Respondent is the manufacture of audio and video products and components and parts thereof.
- [5]** The application of section 65A(3)(b) means that if the Respondent's goods are released from the LMW for the home consumption i.e. local market, import duty and sales tax shall be calculated on the goods on the basis as if such goods have been imported.
- [6]** Prior to 1/4/2000, the Respondent "sold" its goods for the local market from the LMW to its sole distributor, Hwee Seng (Electronics) Sdn. Bhd. ("Hwee Seng"). In the customs declarations, the Respondent was the "exporter" and Hwee Seng the "importer". The price the Respondent invoiced Hwee Seng was accepted as the value of the "imported" goods for the calculation of import duty and sales tax.

- [7]** Subsequent to 1/4/2000, the Respondent began to sell to the local market through its own sales division in Kuala Lumpur. The Respondent informed the Royal Customs and Excise Department at Muar, Johor ("Muar Customs") of the arrangement and appended costs breakdown for the production costs of specific goods which also referred to as the ex-factory price.
- [8]** Under this arrangement of "importing" by its sales division from its LMW, the value of the goods stated for the purposes of import was the Respondent's LMW's invoiced value to the Respondent's Sales Division.
- [9]** A year later, after carrying out an investigation into the customs value declared by the Respondent, the Muar Customs by letter 16/8/2001 claimed there had been an under payment of customs duties by the Respondent. This was disputed by the Respondent. By letter dated 16/9/2002, the Customs Headquarters in Kuala Lumpur stated that whilst the Computed Method was acceptable, the seller and buyer being the same entity, general expenses costs borne by the sales division outside the premises (the LMW) is part of the cost of production

and sale pursuant to regulation 9(3) of the Customs Rules of Valuation Regulations 1999 ("CRVR"). In other words, the value of the goods "imported" from the LMW would take into account general expenses of the Respondent's Sales Division. Therefore, payroll, marketing, administration and profits of the sales division would be added to the computed values submitted from the LMW.

Issue

[10] From the foregoing, it is our view the High Court formulated the issue it had to address correctly:

"Whether, for purposes of determining customs value of the Respondent's goods that are released for home consumption from the Respondent's LMW in accordance with the computed value under Regulation 9 of the CRVR, the Appellants are entitled to include the Sales Division Profits and General Expenses (payroll, administration and marketing costs) to the ex-factory prices of the Respondent's goods?"

[11] The High Court decided that the profit and general expenses of the Respondent's sales division could not be added to the ex-factory prices for the purposes of determining customs value of the Respondent's goods that are released for home consumption from the Respondent's LMW.

Reasoning and Conclusion

[12] Section 65A (3)(b) provides the subject to subsection (4) which does not apply in this case, if such goods are released from the warehouse for home consumption, the customs duty thereon shall be calculated on the basis as if such goods had been imported. The section does not contain the words "from the warehouse" or "from the warehouse licensed under section 65". Instead, there is a proviso that the Minister may, in any particular case, exempt any person from the payment of the whole or part of such duty which may be payable by such person on any such goods and in granting such exemption the Minister may impose such conditions as he may deem fit.

[13] We observe also that the concept of the LMV is to provide a facility where a manufacturer can import free of customs duty raw materials and to export the manufactured goods. If the

goods are sold for home consumption, the manufacturer is the exporter and the distributor for home consumption is the importer. We conclude, therefore, where the manufacturer is both exporter and importer because it also sells for home consumption, the effect of section 65A is that the goods sold for home consumption, then in the words of section 65A(3)(b) the customs duty on such goods shall be calculated on the basis as if such goods had been imported. That means that the manufacturer operating an LMW is treated in the same position as an exporter of the goods selling into the home market in Malaysia.

[14] In such case, the computed value for the purposes of customs duty is as provided by the Customs (Rules of Valuation) Regulations 1999 PU(A) 507/1999.

[15] The arrangement such as that made by the Respondent to sell through its own sales division is a departure from the usual manufacturer from an LMW as exporter selling to an importer. The alternative arrangements can vary greatly. Alternative arrangements present an issue of an infinite variety of cost, pricing and profit transfers that the Act requires specific

application for exemption to be made. An exemption can be justified on the basis that the costs of administration and marketing for home consumption are purely local costs. The profits of the local sales division could similarly be exempted. But without such exemption being obtained under the proviso to section 65A(3)(b), the customs duty of such of the goods released from the LMV to the warehouse will be calculated as if the goods had been imported.

[16] We sum up our conclusions as follows:

- a) The LMV is a facility to allow a manufacture to import raw materials without customs duty and to export free its products.
- b) Where a manufacturer releases manufactured goods from the LMV for home consumption, the customs duty on the goods is calculated as if the goods had been imported.
- c) That section 65A(3)(b) does not provide any qualification to the phrase "had been imported" must mean the goods shall be treated as any other goods imported into Malaysia.

- d) The rules of valuation of customs value provide that the primary basis of determination of customs value of imported goods is their transaction value: see Regulation 4. Thus, where the goods are sold by the exporter to an importer distributor, the transaction value is the invoice value with the adjustments under Regulation 5.
- e) Where a manufacturer from an LMV sells to home consumptions he may seek exemption on that ground from the Minister.
- f) Where such manufacturer has no exemption, the customs value is the transaction value as above.
- g) Where such manufacturer has no exemption, and no transaction value the customs value is to be determined under Regulation 7, 8 or 9 as applicable.
- h) Regulation 9 is applicable in this case, and it includes the payroll, marketing, administration and profits of the sales division.

[17] We, therefore, allowed the appeal with costs, and set aside the order of the High Court. In the circumstances, the cross appeal

by the Respondent in respect of interest for the prejudgment period must fall. We, therefore, dismissed the cross appeal.

sgd

(DATUK ABDUL WAHAB PATAIL)
Judge
Court of Appeal, Malaysia
Putrajaya

Dated: 3rd January 2013

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