DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN SEMAKAN KEHAKIMAN NO.: WA-25-56-02/2021

Dalam perkara suatu Keputusan Responden seperti yang dinyatakan melalui bil tuntutan bertarikh 19.11.2020 di bawah seksyen 43 Akta Cukai Barang dan Perkhidmatan 2014 dan disampaikan kepada Pemohon pada 23.10.2019;

Dan

Dalam perkara suatu permohonan untuk antara lain suatu Perintah Certiorari;

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012.

ANTARA

BATU TIGA QUARRY SDN BHD **...PEMOHON**

DAN

KETUA PENGARAH KASTAM,
JABATAN KASTAM DIRAJA MALAYSIA **...RESPONDEN**

JUDGMENT

[1] There is before me an application for judicial review to challenge the decision of the respondent, the Director General of Customs ("DG"), in the form of a Bill of Demand dated 19.11.2020 ("BOD"). The Bill of Demand was issued under the Goods and Services Tax Act 2014 ("GST Act").

The factual background

[2] The applicant is in the principal business of operating quarry and trading granite aggregates. Its customers are based in Malaysia and Singapore. For the local supplies of quarry products, the applicant is charged 6% GST.

[3] As for Singapore, the applicant supplies quarry products to YTL Cement Marketing Singapore Pte Ltd ("YTL Singapore") or its customers, all of which are in Singapore. The supply of quarry products arose out of an agreement dated 7.4.2011 signed with YTL Singapore ("the said Agreement"). Cl 4 of the said Agreement provides that products are sold on a delivery basis.

[4] The applicant took the view that the quarry products exported to Singapore are treated as zero-rated supply under s 17(1)(b) of the GST Act. Hence, there is no need to charge GST on the same.

[5] S 17(1)(b) of the GST Act provides that a zero-rated supply is "any supply of goods if the goods are *exported*". The implication is, if a supply is zero-rated, the rate of GST chargeable on the supply shall be zero percent.

The audit exercise and issuance of the BOD

[6] On 15.1.2019, the DG initiated a GST audit on the applicant. After a series of correspondences and round table discussions ("RTD") held between the parties, the DG concluded that the applicant failed to prove export. In the circumstances, the DG issued the BOD to the applicant.

[7] The total amount of GST raised in the BOD is RM1,269,225 and consist of the following:

(a) 6% GST is imposed on all the applicant's export transactions amounting to RM1,196,461.46; and

(b) 6% of GST being imposed for other GST issues amounting to RM72,764.32.

The applicant in this application for judicial review seeks to challenge the DG's decision in respect of item (a) only.

[8] The DG proceeded with raising the BOD on the following grounds:

(a) The applicant failed to comply with s 17(1)(b) of the GST Act.

(b) The Customs export declarations, known as Customs No. 2 ("K2 Forms"), were not declared under the name of the applicant. Consequently, the applicant is not the exporter of the goods and is unable to prove the exportation of the goods.

The Judicial Review

[9] In its application in Encl 1, the applicant seeks *inter alia* for the following reliefs:

(a) An order of certiorari to quash the respondent's decision in issuing the BOD for the taxable period from 1.8.2016 to 31.8.2018 for a total sum of RM1,196,461.46.

(b) A declaration the respondent is bound by and shall give effect to the express wording of s 17(1)(b) of the GST Act that the applicant's supply of quarry products exported to Singapore were zero-rated supplies.

(c) A declaration that taxing legislation must be interpreted strictly, declaring the relevant K2 Forms under the applicant's name, is not a pre-requisite to treat a supply as zero-rated under the GST Act.

(d) An order that the DG shall refund all the applicant's input tax credits totalling RM1,503,939.25 which were offset by the DG against the amount of the penalty imposed.

[10] The application is supported by the affidavit of Patrick James Pereira in Encl 2 ("AIS-2"). Encik Patrick is the director of the applicant company.

[11] Leave to commence the judicial review application was granted by this Court on 5.4.2021.

[12] The grounds of the application for the judicial review are as follows:

(a) Declaring the relevant K2 Forms under the applicant's name is not a requisite condition to treat the supply as zero-rated under s 17(1)(b) of the GST Act. By imposing the additional condition on the applicant, the DG had acted illegally, arbitrarily and contrary to the express provisions of the GST Act.

(b) The DG adopted a narrow interpretation that only the person whose name is declared in the K2 Forms is the exporter. This approach is contrary to the express definition of an "exporter" under s 2(1) of the Customs Act 1967.

(c) The BOD is liable to be quashed on a further ground that it is unreasonable. According to the applicant, the DG had exercised his authority mechanically without applying his mind to the facts and circumstances of the applicant's case.

(d) The DG had arbitrarily withheld the outstanding input tax credits due to the applicant in respect of the taxable period of 30.9.2016 to 30.4.2018. The refunds were withheld for a period of at least two years. On 24.11.2020, the DG arbitrarily offset the refunds due to the applicant against the alleged GST arising from the impugned BOD.

(e) The DG had exercised his discretionary power to offset the refunds without giving the applicant an opportunity to provide its views and explanation.

(f) The raising of the BOD constitutes a denial of the legitimate expectations of the applicant that the DG would have taken cognisance of the decisions of our superior courts in relation to the interpretation and construction of the relevant legislations.

The respondent's response

[13] The DG filed his affidavit in reply in Encl 18 ("AIR-18"). There are further exchanges of affidavits between the parties, which will be referred to in this judgment as and when the need arises.

[14] According to the learned Federal Counsel, the DG, vide an email dated 14.2.2020, had sought an explanation from the applicant on the export sale invoice document and K2 Forms as follows:

(a) Why the name of the company in K2 Forms is CI Quarrying & Marketing Sdn Bhd ("CIQ") instead of the applicant as the exporter?

(b) What is the relationship between CIQ and the applicant company in the said transaction?

(c) Does the applicant company have an export permit? If the answer is in the negative, why did the applicant company not apply for the permit to export its quarry products to Singapore?

[15] In response to the said queries, the applicant asserted in its email dated 25.2.2020 that CIQ was the permit holder approved to operate the quarry and at the material time, was the quarry owner. The applicant further explained as follows:

> Batu Tiga Quarry Sdn Bhd has been appointed by CIQ to run the operation of this quarry and distributes the quarry products from this quarry (excluding exports). BTQ pays CIQ a service fee for the quarry products sold from this site. Given the permit is in CIQ's name, it makes the royalty payment to PTD, export royalty payment to PTG Johor and applies for the export AP from Kementerian Air, Tanah [dan] Sumber Asli, Putrajaya, the K2 will be issued in CIQ's name.
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> This is the standard commercial practice of the operation of quarries in Johor.

[16] The learned FC submitted that on the facts of the case, the applicant seeks a declaration that it is entitled to zero-rated supply when, in actual fact, the applicant used the export permit of CIQ, which is a separate legal entity, to export the applicant's goods. According to the learned FC, the applicants did not come with clean hands, which disentitles the applicant from seeking a declaratory relief; ***Zulkiflee bin Abdul Samad & Ors v Segi Objektif (M) Sdn Bhd*** [2016] MLJU 1333 CA.

[17] The learned FC's submission is anchored on three main grounds. First, as conceded by the applicant, it does not have an export permit. Instead, the applicant used a permit that belonged to CIQ. In short, the applicant is not eligible to enjoy export supply at zero rate since the goods are not exported by the applicant. In any event, the K2 Forms were not in the applicant's name and as a result, the applicant is not an exporter.

[18] Secondly, the export of quarry stone by the applicant under tariff codes 2517.10.000 and 2517.49.000 is subject to the Customs (Prohibition of Exports) Amendment (No. 2) Order 2007 and Customs (Prohibition of Exports) Order 2017. The Orders require an export license from the Ministry of Natural Resources and Environment ("Ministry of Natural Resources"), which the applicant did not possess.

[19] Finally, since the K2 Forms could not be linked to the details in the applicant's export sales invoice and delivery note, the applicant is not eligible for zero-rated supply tax under the GST Act. It is not in dispute that the CIQ is a subsidiary of the applicant. However, it is equally undisputed that it is CIQ and not the applicant who holds the Approved Permit ("AP") from the Ministry of Natural Resources. CIQ is also the permit holder issued by the Kulai Land Office for extracting and moving rock materials. It also has the approval to export solid rock from the Director of Land and Mines, Johor.

[20] According to the learned FC, what is peculiar is that while the exporter name in K2 Forms is CIQ, the importer name is YTL Singapore. It is for this reason that the learned FC argued that the applicant's export sales cannot be matched with the K2 Forms.

[21] As an authority to the said proposition, the learned FC referred me to the unreported judgment of the Shah Alam High Court in ***SE Satu Pelangi Sdn Bhd v Menteri Kewangan & 1 Lagi*** JR BA-25-13-03/2018. In that case, the Customs Declaration for the export of bauxite ore in the K2 Form was made in the name of a third-party permit holder. The High Court held that the application for tax remission did not tally with the documents forwarded, and the DG of Customs, the 2nd respondent, was entirely correct in law in rejecting the application.

The Analysis

[22] Let me begin by identifying the relationship between the applicant and CIQ. As alluded to earlier, it is not in dispute that CIQ is a wholly owned subsidiary of the applicant. This is confirmed by Encik Patrick in para 7.2 of his further affidavit in Encl 20 ("AIS-20"). According to an agreement signed between the parties dated 6.7.2007 ("the 6.7.2007 Agreement"), in particular cl 3(b) thereof, the applicant is allowed to utilise CIQ's AP to export the quarry products to Singapore.

[23] What is the general principle in company law in respect of the relationship between a parent company and its subsidiaries? I believe I state the law correctly in saying that a subsidiary and its holding company are separate entities having a separate existence.

[24] However, in recent years, the court has, in a number of cases, bypassed this principle if not made an inroad into it. Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal in ***Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira &*** **[1996] 4 CLJ 747 CA** remarked that the Courts were quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands. A situation may arise if it can be established, in the circumstances of the case, that a subsidiary company is an agent of the parent company or vice versa.

[25] The main terms in the Agreement dated 6.7.2007 ("the 2007 Agreement") are as follows:

(a) The applicant will utilise its experience and knowledge of the quarry industry to continue to operate the quarry in Kulai, Johor (including drilling, blasting, extraction of rock materials, production and process of quarry products from rock materials extracted, sales of quarry and logistics thereof at the applicant's costs and expense; cl 1.

(b) The applicant will directly pay the tributes with respect to the lands leased from third parties to CIQ; cl 2.

(c) The applicant will bear all costs and expenses in relation to carrying out the quarry operations.

My understanding of the 2007 Agreement is that the applicant had not only acquired the entire equity stake of CIQ but also the operation of the company. As a "prudent quarry operator", the applicant was also responsible for taking out all the necessary insurance.

[26] With respect, after having perused the 2007 Agreement and the role entrusted to the applicant in running the operation of CIQ, I can only conclude that to use the words of Gopal Sri Ram JCA (later FCJ) in *Harris Solid State,* the two companies are indeed "part and parcel of one and the same organisation".

[27] In my considered view, *SE Satu Pelangi* ought to be distinguished since there was no evidence that the applicant, in that case, was the parent company of Kreatif Selaras Mining Sdn Bhd, which appeared in the K2 Form. It was for this reason that the learned Judge held that the whole exercise was done to circumvent the then-existing export permit regime to control the mining and export of bauxite.

[28] In the circumstances, I cannot respectfully accede to the submission of the learned Federal Counsel that the applicant has not come to this Court with clean hands.

[29] The process flow, according to Encik Patrick, is as follows:

(a) YTL Singapore would send a purchase order to the applicant.

(b) CIQ forwarding agents would prepare and submit the K2 Forms and the relevant supporting documents such as Form 4C, PTG Approval and pay the export levy to the Customs.

(c) The quarry product would be loaded onto the truck and a delivery order would be prepared based on the destination instructed by YTL Singapore's end customers.

(d) The forwarding agent would then obtain customs clearance at Tanjung Puteri, Johor Bahru causeway, using the documents referred to earlier.

(e) The Singapore Customs would issue cargo clearance permit for the quarry products to be brought into Singapore.

(f) Upon clearance by Singapore Customs, the quarry products would be delivered to YTL Singapore's end customers.

[30] S 17(1) of the GST Act provides as follows:

> A zero-rated supply is—
>
> *(a)* any supply of goods or services determined to be a zero-rated supply by the Minister under subsection (4); and
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> *(b)* any supply of goods if the goods are exported.

The same issue arose in ***Jakinta Trading Sdn Bhd v Director General of Customs & Anor*** [2021] MLJU 832; [2021] CLJU 678, where the main ground relied upon by the DG of Customs in arriving at the impugned decision was that the K2 Forms were not declared under the applicant's name thus the applicant was not the exporter of the timber logs. It was for this reason that the applicant was not allowed to zero-rate supplies of its exported timber logs.

[31] Leonard David Shim JC (as his Lordship then was) held as follows:

> [32] All the documents above pointed towards the fact that the timber logs were exported to overseas. Thus, the Applicant is entitled to treat these supplies of timber logs to its overseas buyers as zero-rated supplies pursuant to the express wording of Section 17(1)(b) of the GST Act.
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> [33] Applying the strict interpretation rule which laid down in *National Land Finance* (supra), the Respondents cannot impose additional requirements arbitrarily by insisting that the Applicant must declare its name in the K2 Forms for its export transactions to be regarded as zero-rated supplies under Section 17(1)(b) of the GST.

With respect, I am entirely in agreement with the said proposition.

[32] Under s 35(a) and (b) of the Customs Act, a presumption of law that goods are deemed to be exported is established when the goods have been removed from Malaysia and cleared by the customs officers. What is the proof of such removal? Custom clearance for export, for example, is proof that the goods have been loaded onto a truck, as in this case, heading overseas, in this case Singapore. From the *Sistem Maklumat Kastam* in Exh ALAK-6 of AIR-18, which was affirmed by the DG, it is clear the goods were indeed cleared by the customs officers to enter Singapore. If the DG intends to rebut this statutory presumption, he bears the burden to establish that the said goods were subsequently "found in Malaysia after the date on which they were claimed to have been or were to be exported" as provided under s 17(9) of the Customs Act.

[33] In the absence of such rebuttal, as in this case, such goods are treated as zero-rated supplies under s 17(1)(b) of the GST Act.

[34] In any event, in ***Jabatan Kastam Di Raja & Ors v Apple International Co Ltd (Japan)*** [2017] 8 CLJ 140 CA, the Court of Appeal held that the owner of the goods is one of the factors in determining who is the actual importer and exporter for the purposes of s 2(1) of the Customs Act. The word "exporter" is not defined in the GST Act. Reliance, therefore, has to be made to s 174(1) of the GST Act, which provides that the GST Act shall be construed as one with the Customs Act or the Excise Act 1976 with regard to the exportation and importation of goods.

[35] In the final analysis, the K2 Forms are not conclusive. It is not the only method to prove exportation. It is a general guideline. Certainly, it should not be seen as a determinant factor of who the exporter is. In short, K2 Forms should be seen from a more comprehensive factual matrix so as to include other evidence available at the material time.

Findings

[36] For the aforesaid reasons, my findings are as follows:

(a) Although the applicant is the parent company of CIQ, the evidence shows that for all intents and purposes, it is the applicant who runs the show in so far as the quarry operation is concerned.

(b) I do not think it is disputed that, based on the 2007 Agreement, the applicant pays for the insurance, tributes and all costs relating to the quarry operations.

(c) Under the circumstances, the applicant and CIQ are indeed "part and parcel of one and the same organisation". *SE Satu Pelangi* is, therefore, distinguished.

(d) It is for this reason that this Court holds that, at least on the factual matrix of this case, it does not matter that the K2 Forms are in the name of CIQ since, in the final analysis, the companies are in the same organisation.

(e) In any event, the K2 Forms are inconclusive and are not the only method to prove exportation.

(f) As can be seen from the *Sistem Maklumat Kastam,* the goods were indeed presumed to have been exported to Singapore.

(g) In order to impose the 6% GST on the supplies, the DG has to establish that the said goods were subsequently "found in Malaysia after the date on which they were claimed to have been or were to be exported", as provided under s 17(9) of the Customs Act.

(h) Since the DG has failed to rebut the statutory presumption under s 35(a) and (b) of the Customs Act, the goods are therefore treated as zero-rated supplies under s 17(1)(b) of the GST Act.

[37] The impugned decision in the form of the BOD is tainted with *Anisminic* error and *Wednesbury* unreasonableness, which calls for curial intervention and is hereby quashed.

[38] This application for judicial review is allowed with no order as to costs.

Tarikh: 25 April 2024

(WAN AHMAD FARID BIN WAN SALLEH)
Hakim
Mahkamah Tinggi Kuala Lumpur.

Pihak-pihak:

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