DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W-01-83-06

ANTARA

RUSLAN BAHARIN INDUSTRIES
SDN BHD & 3 LAGI **…PERAYU**

DAN

KERAJAAN MALAYSIA **…RESPONDEN**

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Rayuan dan Kuasa-Kuasa Khas)
Rayuan Sivil No: R1-12-814-03

Antara

Ruslan Baharin Industries Sdn Bhd
& 3 Lagi …Perayu-Perayu/
Defendan-Defendan

Dan

Kerajaan Malaysia …Responden]

CORAM: **SURIYADI HALIM OMAR, JCA**
ZAINUN ALI, JCA
WAN ADNAN MUHAMAD, JCA

JUDGMENT OF THE COURT

The issue before us was whether a triable matter existed that required a full blown trial. Having heard the appeal we found in the affirmative and accordingly allowed the appeal with costs.

To appreciate the reasons for allowing the appeal it is necessary that we briefly discuss the Sales Tax Act 1972 (the Act). Sales tax, introduced by this Act on 29.2.1972, with a single stage taxation in mind, for goods imported into the Federation by any person for home consumption is taxable at points of entry unless exempted. The scope excludes free zones, licensed warehouses, licensed manufacturing warehouses and joint development areas, Langkawi and Labuan *(see s.1(3), 2(A), 2(B), ss 72-90 etc.)*. Sales tax, inter alia is also charged and levied on taxable goods manufactured in the Federation, though raw material or components used in the manufacture of those goods are free from sales tax. Apart from the delineated and territorial exclusions, the relevant Minister may exempt certain persons and manufacturing operations from the licensing requirements, for example manufacturers with annual sales turnover of taxable goods not exceeding RM100,000.00. Such persons will be required to apply for a certificate of exemption.

A licensed manufacturer has certain statutory duties and amongst them is his accountability, as he is duty bound to account for the sales tax payable, by submitting sales tax return to the respondent. Any failure of submission of sales tax returns within a given period may even result in prosecution. If a licensed manufacturer is taxable, he will be subject to the full force of s. 6 of the Act, which lays down what is charged to sales tax whilst s. 22 relates to the incidence of tax. In the event the licensed manufacturer is unable to pay the full sum of the sales tax there are provisions that allow instalment payments. Any failure or default in such instalment payment may

attract a surcharge of 10% on the outstanding sum. The outstanding sum will become due and payable on the default of the instalment payment.

Provisions in the like of s. 23 of the Act empowers the authorities to institute civil proceedings to recover any sales tax due and payable and any penalty accruing under the Act. From 6.7.2001, with the latter provision amended, any penalty or surcharge that would be caught by s.6(4) of the Limitation Act, section 3 of the Limitation Ordinance of Sabah and s.3 of the Limitation Ordinance of Sarawak, are therewith precluded. As section 23 is highly relevant for our discussion, we herewith reproduce it:

> "23. **Sales tax to be recovered as civil debt**.
>
> (1) Without prejudice to any other remedy, and *sales tax due and payable and any penalty or surcharge accruing* under this Act, *may be recovered by the Minister as a civil debt due to the Government*.
>
> (2) In any suit to recover the sales tax penalty or surcharge, if any, under subsection (1), the production of a certificate signed by the Director General giving the name and address of the taxable person and the amount of sales tax penalty or surcharge, if any, due by him shall be sufficient authority for the Court to give judgment for the same amount.

(3) Any penalty or surcharge imposed under this Act shall, for the purposes of this Act and the Limitation Act 1953, the Limitation Ordinance of Sabah [*Sabah Cap. 72*] or the Limitation Ordinance of Sarawak [*Swk. Cap. 49*], as the case may be recoverable as if it were sales tax due and payable under this Act and accordingly section 6(4) of the Limitation Act 1953, section 3 of the Limitation Ordinance of Sabah or section 3 of the Limitation Ordinance Sarawak, as the case may require, shall not apply to that penalty or surcharge.

(4) Where an invoice shows a sale of taxable goods as having taken place with sales tax chargeable on the goods, there shall be recoverable from the taxable person who issued the invoice an amount equal to –

(a) that which is shown in the invoice as sales tax; or

(b) so much of the total amount shown as payable as is to be taken as representing sales tax, if sales tax is not separately shown in the invoice;

for the sale of such taxable goods.

(5) Subsection (4) shall also apply where –

(a) the invoice, in which is stated an amount which purports to be sales tax as

chargeable, is not an invoice issued under section 17 or 17A;

(b) the invoice was issued by a person who was not a taxable person and who had sold either taxable goods or non-taxable goods for which an amount which purports to be sales tax was chargeable; or

(c) the invoice was issued by a taxable person who had sold non-taxable goods for which an amount which purports to be sales tax was chargeable,

and any amount which purports to be sales tax shall be paid immediately by that person and, in default of payment, *may be recovered as a civil debt due* to *the Government* (emphasis supplied)."

The first appellant is a company that was incorporated on 8.1.1997 and a licensed manufacturer under section 13 of the Act. The latter section reads:

"13. **Application for licence, issue, etc**.

(1) Every person who manufactures taxable goods in the course of business shall apply to the senior officer of sales tax in the prescribed form to be licensed as a licensed manufacturer, and subject to section 14, no person shall manufacture taxable goods in the

course of business unless such person is in possession of a licence issued under sub-section (3).

(2) (Deleted by Act 337).

(3) Subject to subsection (4), and to being satisfied that a licence is required in the terms of paragraph (*a*) of section 12 and subsection (1) of this section, the Director General shall issue a licence in the prescribed form."

The first appellant was licensed on 20.3.1997 to manufacture five different types of Malay apparels. It subsequently declared its annual sales turnover for the years of 1995-1997. What with the sales amount declared, and with no exemption given by the Minister, and being a taxable person as defined by section 2 of the Act, the first appellant was accordingly imposed with sales tax.

Appellants 2, 3 and 4 are directors of the first appellant and are parties in the action as they are jointly and severally liable for the sales tax. Such sum is recoverable from them by virtue of s.26 of the Act.

The respondent had filed a writ dated 14.5.2001 at the subordinate court against the appellants, claiming altogether RM145,708.12, comprising sales tax amounting to RM101,807.97, a surcharge of RM10,180.80 and penalty of RM33,719.37 under section 23 of the

Act. The sales tax due from the appellants prior to the issuance of the writ was RM148,255.32. The reduced sum in the writ must have taken into account the instalment payments of RM12,728.00 to the respondent prior to the issuance of the writ to the appellants. With no more payments forthcoming the notices of demand were served on the appellants for the tax and penalty, respectively dated 5.5.1998 (for the sum of RM114,535.95) and 7.5.1998 (for the sum of RM33,719.37). The appellants later filed their defences.

The assessments raised for those years of 1995-1997 as reflected in the writ above, comprised sales tax, penalty and surcharge respectively under sections 23 (*see above*), 24 and. 30(1B) of the Act.

Section 24 reads:

> "24. **Penalty for late payment**.
>
> Where any amount of sales tax remains unpaid after the last day on which it was payable under subsection (2) of section 22 or repayable under section 31D, as the case may be -
>
> (a) a penalty equal to ten per cent of such unpaid amount shall thereupon be payable;
>
> (b) if the sales tax due and payable remains unpaid for more than thirty days after the last day of which it was so payable or repayable the rate of penalty under paragraph (*a*) on such unpaid

> sales tax shall be increased by ten per cent for the second period of thirty days after such last day and for every succeeding period of thirty days or part thereof during which such amount remains unpaid to a maximum of fifty percent."

Section 30 reads:

> "30. **Payment of sales tax etc short paid or erroneously refunded and payments by instalments**.
>
> (1) ….
>
> (1B) If there is a default in payment of any one instalment under subsection (1A) on its due date for payment of the balance of amount payable then the whole outstanding balance shall become due and payable on that date and shall, without any further notice being served on the person liable to pay the amount due, be subject to a surcharge equal to ten per cent of that balance and the surcharge shall be recoverable as if it were due and payable under this Act."

The respondent on 31 July 2001, about 72 days later after having filed the writ, filed a summary application pursuant to O.26A of the Subordinate Rules 1980 for the full sum of RM145,708.12, together with costs. The appellants in response to the summary application

also filed the necessary affidavits in reply. After a hearing the summary application was allowed by the learned Session judge. The appellants being dissatisfied had thereafter filed the relevant notice of appeal. Unfortunately the latter lost the appeal at the High Court hence the matter before us.

Before us the appellants ventilated that the second appellant had declared a sales value of RM114,535.95 in the company's sales tax return for the period of February 1997 to March 1998. On 27.4.1998, the first appellant had applied to the respondent to settle its sales tax and penalty amounting to RM137,704.08 in 12 installments. In response the respondent issued notices of demand dated 5.5.1998 and 7.5.1998 respectively for remittance of sales tax and penalty for the period of February 1995 to March 1998. On 6.5.1998, the first appellant wrote to the respondent, notifying it of a mistake in the return which should be rectified i.e. figures wrongly entered under the wrong column. The relevant portion of the letter reads as follows:

> "Tarikh: 6hb Mei 1998
> Pengarah Kastam Negeri,
> Wilayah Persekutuan,
> Bahagian Cukai Dalaman,
> Aras 4, Blok I Selatan,
> Pusat Bandar Damansara,
> 50590 Kuala Lumpur.
>
> Tuan,

Per: **Kesilapan Dalam Pengikraran didalam Borang Penyata Cukai Jualan**

Kami merujuk kepada perkara diatas.

2. Kami ingin membawa perhatian pihak tuan kepada Borang Penyata Cukai Jualan yang diikrarkan oleh pihak kami dimana pegawai syarikat kami telah mengisi Borang Penyata Cukai Jualan tersebut di ruangan yang salah.

3. Pegawai kami sepatutnya mengisi nilai di ruang ke4 iaitu di ruang bayaran untuk kerja dibuat dan bukannya di ruang ke3(a) kerana syarikat kami hanya menjalankan kerja memotong, mengukur, menjahit dan menerima upah dari pelanggan-pelanggan kami bagi kerja tersebut.

4. Kecuaian pegawai kami adalah amat dikesali dan pihak kami berharap jasa baik pihak tuan dapat membetulkan Borang Penyata tersebut dan kami bersedia melakukan apa yang patut.

5. Segala kerjasama dari pihak tuan amatlah dihargai.

Sekian, terima kasih.

Yang benar,

RUSLAN BIN BAHARIN

Pengarah Urusan Syarikat”

Again no reply came in response to the above letter, except to approve on 21.5.1998 the first appellant's application to pay arrears of taxes amounting to RM114,535.95, by way of 12 monthly installments of RM9,550 per month. Unfortunately the first appellant failed to pay the monthly installments causing the respondent to issue a final reminder dated 15.11.1998 to the second and fourth appellants as directors stating their liability for sales tax of RM125,989.55 and a penalty of RM37,091.31 payable under s. 26 of the Act.

The first appellant then wrote to the Minister of Finance regarding the matter and the Ministry replied on 9.4.1999 clarifying that sales tax was payable. On 12.4.1999, the first appellant wrote to the respondent to be exempted from sales tax on raw materials since only labour charges were imposed on customers. There was no reply. A second letter was also sent to the respondent dated 28.4.1999. On 22.5.2000, the first appellant made a proposal to settle the arrears of sales tax amounting to RM114,535.95 in 36 monthly installments of RM3,182.00 per month and was approved on 13.7.2000. The first appellant made two payments on 30.5.2000 and 3.7.2000 amounting to RM12,728.00 but later failed to remit subsequent scheduled payments. The result was the cancellation of the approval for payment by installments.

On 6.2.2001, the respondent issued a notification of legal action against the second appellant under s. 23 of the Act, and on 14.5.2001 commenced this action against the appellants for the abovementioned sum of RM145, 708.12 being sales tax of RM101,

897.97, surcharge of RM10, 180.80 and penalty of RM33, 719.37 for the period of February 1995 to March 1997.

In their defence filed on 23.7.2001, the appellants amongst others, disputed the respondent's claim on the ground that the first appellant did not levy or collect sales tax from its customers since the business was not subject to remittance of sales tax under s. 7 of the Act. The appellants also pleaded that it had a counter claim against the respondent in the form of the sum of RM12,728.00 being sales tax already remitted by the first appellant, payment that was wrong and inappropriate under the law and ultra vires the Act. Further it was admitted that the first appellant had committed an error during the filing of the sales tax return whereby it declared labour charges as sale value. Pursuant to that error the first appellant had appealed to the respondent to rectify the error but received no response. The appellants pleaded that the respondent's claim of penalty and surcharge were time barred under s. 6(4) of the Limitation Act 1953.

Having perused the evidence this panel found no reason to quarrel as regards the law provided for under the Act and its adherence. Had the facts been in order, what with all the steps having been complied with in accordance with the statutory provisions, the processes undertaken by the respondent would have been flawless. Were the sum prayed for in the writ not under scrutiny, it would have been recoverable as a civil debt due to the Government under s. 23 (1) of the Act.

At the conclusion of the appeal we were not satisfied that there were no triable issues. We now identify the specific reasons for allowing the appeal.

i.Prior to the issuance of the writ that prayed for a sum of RM145,708.16, the sum owed by the appellants to the respondent was RM148,255.32. Despite having paid 2 instalments grossing RM12,728.00, the combined amount in the notices still totaled RM148,255.32, instead of RM135,527.32. To confuse matters further the amount in the writ which was for the sum of RM145,708.16, was neither the reduced sum nor the sum in the notices of demand. Some explanation surely must be given to clarify this confusion.

ii. We now touch on a legal issue in the current s.7 of the Act in particular 7(3). This provision reads:

“7. **Determination of sale value.**

(1) In the case of goods –

(a) sold by a taxable person; or

(b) manufactured or acquired under the provision of section 9 by a taxable person and –

(i) used by him otherwise than as materials in the manufacture of taxable goods; or

(ii) disposed of by him otherwise than by sale,

the sale value of such goods shall be determined in accordance with regulations made under this Act.

(2) In the case of goods imported into Malaysia for home consumption, the sale value of the goods shall be the sum of the following amounts, namely –

(a) the value of such goods for the purpose of customs duty determined in accordance with the Customs Act 1967;

(b) the amount of customs duty, if any, payable on such goods; and

(c) the amount of excise duty, if any, payable on such goods.

(3) *Where goods are manufactured on behalf of any supplier* of taxable goods *from taxable goods supplied by him and* the goods so manufactured are *returned to the supplier* of the taxable goods, *the sale value of the goods so manufactured* may, subject to approval of the Director General, *be the* amount that the manufacturer *charges for the work* performed by him."

The previous s.7 had been repealed to be replaced by the above s.7 that came into effect on 1.1.2000. By its legislation a new factor was introduced viz. labour charges for purposes of sales tax. This new provision provides that where goods are manufactured on behalf of any supplier of taxable goods and the goods so manufactured are returned to the supplier, the sale value

of the goods so manufactured, may be the manufacturer's charges for the work performed.

The original s.7(3) was deleted by Act 328, and not replaced until the above new provision was introduced by A.1058/99. This new provision raised several legal questions viz. whether labour charges could retrospectively be introduced for a period which was prior to 2000 i.e. from February 1995-March 1997 (issue of construction). If a taxpayer was already duty bound to collect sales tax on the pre-2000 labor charges why then the need to promulgate s.7(3)? Does it mean that there was no duty before hence the need to legislate that requirement? Surely this question must be unraveled and thus deserving a full discussion in a full trial;

iii. It was not denied by the respondent that it had imposed sales tax on the appellants based on the returns supplied by them. A day before the second set of demand letters arrived, the appellants had written in as per the letter dated 6.5.1998, stating of the error committed by their employee as regards those returns. The question that crossed our minds was why the respondent had refused to accept the truth of the error when it willingly accepted the truth of the very tax returns despite now being disputed by the appellants. No reasons were supplied by the respondent as to why it rejected the assertion of error

by the appellants. In fact from the facts adduced, the respondent has a habit of not responding and replying, to highly relevant queries. A triable issue which is factual in nature can easily be resolved by a full trial.

On the issue of interference by the Court of Appeal, *s.69 of Courts of Judicature Act 1964* has to take center stage where it is legislated that an appeal shall be by way of a rehearing. In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987]2 MLJ 183* Hashim Yeop A Sani SCJ had occasion to address the same issue where he said:

> "The approach to be taken by an appellate court in an Order 14 appeal has been settled. The first principle is that the appeal court should not regard the appeal as a reviewing of the exercise of the judge's discretion but should in practice approach the appeal as rehearing. This principle is already accepted by this court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 which was also an Order 14 where this court considered and followed *European Asian Bank v Punjab and Sind Bank* [1983] All ER 508, 516."

In *United Malayan Banking Corporation Berhad v Pembinaan KSY Sdn Bhd & 2 Ors [1993] 2 AMR 2169* likewise the Supreme Court had occasion to discuss the principles of interference by an appellate court in an Order 14 appeal. Mohamed Dzaiddin, SCJ in dismissing the appeal had held:

> "The approach to be taken by an appellate court in an Order 14 appeal has been settled. The appellate court should not regard the appeal as reviewing the exercise of the judge's discretion but approach the appeal as a rehearing. This principle was accepted by this court in *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164, following *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1984] 2 MLJ 300 and *European Asia Bank v Punjab & Sind Bank* (No 2) (CA) [1983] 1 WLR 643; [1983] 2 All ER 508, 516."

Obviously before the Court of Appeal, no witnesses are heard though the court reads the evidence and rehear the counsel, and with the onus on the appellant to satisfy us that the appeal ought to be allowed (*Re Court Hill Canteen; Government of Malaysia v Wan Esah (1972)2 MLJ 257*). For purposes of our appeal, as it emanated from a hearing by affidavits, and witnesses were not seen or gauged our position was no different to that of the High Court judge. In term of numbers we held the advantage though generally, say in a summary application matter, where the High judge finds that a triable case exists, rarely will an appeal court reverse that finding. In *Lyolds Bank Ltd v Ellis-Fewster [1983] 1 WLR 559 CA,* Sir John Donaldson MR (as he then was), stated at p 652 as follows:

> "In a case where the triability of the issue depends upon evidence as opposed to law, I would think it a very surprising situation if the Court of Appeal was prepared to

> disturb the judge's view. If one judge thinks there is a triable issue, it would be surprising if two or three judges think there is not. It is quite different if you are dealing with a triable issue which arises as a matter of law. *When it arises as a matter of evidence and fact it is most unlikely that the Court of Appeal would interfere with the discretion of the judge below.* (Emphasis added)."

But the reverse does not necessarily hold true (*the discussion here only relates to affidavit based trials and not a trial with witnesses*). If the learned judge, on the facts and evidence thinks that no triable issue exists but the Court of Appeal does, what it being a rehearing, and the correctness of the High judge's conclusion is under scrutiny, the advantage must be given to the aggrieved party. It now becomes incumbent upon us to interfere and send the matter down for full trial.

On a question of law, let alone in the current appeal where the Act is not an easy piece of legislation, a Court of Appeal will not hesitate to interfere and make a stand (*Cow v Casey (1949) 1 All ER 197*). As elucidated above the effect of the new s.7(3) ought to be canvassed fully in open court bearing in mind the confusing facts and complexity of the problem.

We were satisfied on the three issues discussed above that the respondent's case against the appellants was not plain and obvious, whereupon we allowed the appeal with costs. The order of the High

Court was set aside and the matter sent back to the Session's Court for full trial.

Dated this 6th day of April 2009

SURIYADI HALIM OMAR
Judge
Court of Appeal, Malaysia

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