IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

ORIGINATING SUMMONS NO: WA-24-25-05/2017

In the matter of an application by Transmarco Concepts Sdn Bhd for an application for an extension of time to apply for leave to commence judicial review proceedings

And

In the matter of the letter of the Director General of the Royal Malaysian Customs and Excise Department dated 6.12.2016

And

In the matter of Order 3, Order 53 and Order 92 rule 4 of the Rules of Court 2012

And

In the matter of Section 191 of the Goods and Service Tax 2014

BETWEEN

TRANSMARCO CONCEPTS SDN BHD
(Company No. 185981 – W) … PLAINTIFF

AND

DIRECTOR GENERAL OF CUSTOMS AND EXCISE … DEFENDANT

Grounds of Decision

Azizah Nawawi, J:

Application

[1] The plaintiff's application is for an extension of time to apply for leave to commence judicial review proceedings against the defendant's decision vide letter dated 6.12.2016.

[2] The grounds of the application are:

(i) that the plaintiff's delay (if any) in applying for leave is both unavoidable and unintentional and/or without bad faith; and

(ii) that the plaintiff has a prima facie case against the defendant, that is, the plaintiff's application is not frivolous and vexatious.

[3] Having considered the application and the submission of the parties, this court has dismissed the plaintiff's application with costs.

The Salient Facts

[4] The plaintiff is a private limited company that is involved in the footwear industry. The defendant is the Director General of the Customs Department empowered by the Goods and Service Tax Act 2014 (the **'GST Act'**) to have supervision over the said GST Act.

[5] On 28.9.2015, the plaintiff submitted a claim for special refund of sales tax pursuant to s.191 of the GST Act via the Taxpayer Access Point **('TAP System')** for an a sum of RM1,016,593.93 **(the Claim).** The special refund under sections 190 and 191 of the GST Act is a refund of the sales tax duly paid under the Sales Tax Act 1972.

[6] The TAP System is an electronic service provided by the defendant pursuant to section 166 of the GST Act to enable any registered user to file or furnish any application, return, declaration, or any document and for the service of any notice, direction, order, permit, receipt or any document. A registered user is a person who has registered with the defendant's department under section 21 of the GST Act and is therefore authorized by the defendant to gain access to and use the electronic service.

[7] By a letter dated 6.12.2016 uploaded on the TAP System**,** the defendant informed the plaintiff that the plaintiff' Claim was rejected based on the decision of the Director General. No explanation was given for the rejection in the said letter.

[8] The plaintiff only discovered the letter dated 6.12.2016 on 20.1.2017 by chance, when accessing the TAP System to file its goods and services tax for December 2016.

[9] By letters dated 24.1.2017 and 27.2.2017, the plaintiff sought for a meeting with the defendant to discuss the rejection of the applicant's request for the special refund.

[10] On 28.2.2017, the plaintiff had a meeting with the defendant's officer. After the said meeting, the plaintiff issued a letter dated 27.3.2017 to the defendant explaining why it had computed the Claim on the Free On Board ("**FOB**") basis instead of Cost Insurance and Freight ("**CIF**"). In the said letter, the plaintiff also asked the defendant to approve its claim for special refund as soon as possible.

[11] As the plaintiff did not received any response from the defendant, the plaintiff wanted to pursue a judicial review of the defendant's decision to reject the plaintiff's claim. In an abundance of caution, the plaintiff filed this application for an extension of time.

The Findings of the Court

[12] Order 53 r 3(6) of the Rules of Court 2012 (the '**ROC 2012'**) provides that an application for judicial review must be made promptly, within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[13] In **Seruan Gemilang Makmur Sdn Bhd v Pegawai Kewangan Negeri Pahang** [2016] 4 CLJ 100, the Court of Appeal held that:

"[79] The settled law is that the operative time for the ground to have arisen, and which set the timeline which the application is to be made, is the date when the decision was first communicated to the applicant."

[14] In this case, the decision of the defendant which the plaintiff intends to review is dated 6.12.2016. Under Order 53 r 3 (6) of the ROC 2012, the last date to file an application for judicial review is 5.3.2017. From the date of the filing of this application (3.5.2017) for an extension of time, there is clearly a delay of more than 2 months (about 5 months from the date of the decision).

[15] However, it is the contention of the plaintiff that the decision that it seeks to challenge was not communicated to them until the meeting on 28.2.2017. The plaintiff submits that the letter dated 6.12.2016 cannot be deemed as communication of the defendant's decision to the plaintiff as the plaintiff had no notice of it, and therefore had no actual knowledge of the same.

[16] The plaintiff relied on the case of **Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors** [2016] 1 MLJ 200, where Justice Ramly Ali FCJ held at follows:

"[24] … The question that arose pertaining to whether the application by the appellant was out of time vis-a-vis the said decision was communicated to the appellant. This would determine when the

prescribed 40 days' period for the filing of the application for judicial review under O 53 r 3(6) of the RHC 1980 should begin to run.

[25] The word 'communicate' is not expressly defined in the RHC 1980. It is also not expressly defined in the LAA. In the New Shorter Oxford English Dictionary, the verb 'communicate' is given the meaning of 'convey or exchange information etc succeed in invoking understanding'. The Oxford Advanced Learner's Dictionary defines ***'communicate' as 'to make something known to somebody'****; 'to pass something on; to transmit something'; 'to make one's idea feelings etc clear to the others…'*

……..

[60] In the present case before we are interpreting O 53 r 3(6) of the RHC 1980, where the key words under consideration are 'when the decision is first communicated to the applicant'. ***The wordings of the Order must be read together with the specific mandatory provisions in the LAA,*** *particularly ss 10, 11, 52 and 53, relating to service of notification or declaration on acquisition of land by the state authority in form E on the registered proprietor, the occupier of such land, or any other interested persons.* ***The clear effect of those provisions is that the relevant notice or declaration relating to the acquisition must be***

brought to the actual knowledge *(as opposed to constructive notice by way of a publication in the Gazette)* ***of the persons concerned****; only then, the interested party can exercise their right to challenge the acquisition decision by way of judicial review proceedings under O 53 r 3(6) of the RHC 1980 within the prescribed time period.*

*[61] …. **The appellant cannot be expected to apply for leave to commence judicial review to challenge the deprivation of its rights to the property unless it has knowledge or is made aware of such deprivation and this could only happen when the appellant is served with the actual or express notice that its right has been infringed**….*

[62] There are a number of authorities to support the above findings ie in applying O 53 r 3(6) of the RHC 1980, the time would start to run against an applicant for judicial review when the applicant had actual knowledge of the relevant decision or that the applicant had been served with the relevant notices in accordance with the relevant provisions of the LAA." (emphasis added)

[17] Applying the reasoning in **Tunku Yaacob Holdings Sdn Bhd** case, this court will have to read Order 53 r 3(6) of the ROC with the relevant provisions in the GST Tax in order to determine when the

prescribed three (3) months period for the filing of the application for judicial review under O 53 r 3(6) of the ROC 2012 should begin to run.

[18] The TAP System is provided by section 166 of the GST Act, which reads:

> "***Use of electronic service***
>
> *166. (1) Notwithstanding any other provision of this Act and subject to regulations made under this Act, the Director General may provide an electronic service to any registered user for –*
>
> *(a) the filing or furnishing of any application, return or declaration or any other document; and*
> *(b) the service of any document, direction, order, permit, receipt or any other document.*
>
> *(2) …*
> *(3) Any electronic notice made and transmitted by the registered user shall be deemed to have been filed, furnished or served at the time the electronic notice is received by the Director General.*

(4) For the purposes of this section, "registered user" means any person who is authorized in writing by the Director General to gain access to and use the electronic service."

[19] Section 167 of the GST Act provides three options to the taxpayer on the manner of the service of the notices issued by the defendant. The three (3) option under section 167(1) are personal service, sending by registered post or by electronic service. Under subsection 167(3), it is provided that where a taxpayer has given his consent for a notice to be served on him through the electronic service, then the notice shall be deemed to have been served '*at the time when the electronic notice is transmitted to his account through the electronic service*.'

[20] Therefore under subsection 167(3) of the GST Act, where a taxpayer has given his consent for a notice to be served on him through the electronic service, then the notice shall be deemed to have been served at the time when the electronic notice is transmitted to his account through the electronic service. As such, the clear effect of reading section 167 of the GST Act with Order 53 r 3(6) of the ROC 2012 means that in respect of service of a decision where the taxpayer has opted for electronic service, the taxpayer is deemed to have knowledge of the notice once the notice had been transmitted to his account through the electronic service.

[21] In the present case, it is not in dispute that the plaintiff is a registered user (see ZY-1(a)). On the option of service, the plaintiff had chosen notification by electronic service, via email and by letter. In fact, the plaintiff's application for the special refund was also made online via the electronic service, the TAP System.

[22] However, the plaintiff submits that the 'publication' or uploading on the letter dated 6.12.2016 onto the TAP System does not constitutes 'communication' under Order 53 rule 3(6) of the ROC 2012 as it was not brought to the actual notice of the plaintiff. Therefore, the plaintiff submits that it did not have actual knowledge of the defendant's decision. Thus, the 3-month period for the challenge of the decision cannot commence on 6.12.2016 (see paragraph 22 of the plaintiff's written submission).

[23] I am of the considered opinion and I agree with learned Senior Federal Counsel for the defendant that the decision dated 6.12.2016 had been communicated to the applicant via uploading it into the plaintiff's TAP System account on 6.12.2016 (see exhibit ZY-3). A notification was also sent by an email on the same date. The email address was provided by the plaintiff upon registering on the TAP System. Therefore, pursuant to subsection 167(3), the letter dated 6.12.2016 shall be deemed to have been served at the time when the electronic notice is transmitted to the plaintiff's account through the electronic service, which was on 6.12.2016.

[24] With regards to the plaintiff's complaint that the decision was not communicated vide a physical letter which was also the plaintiff's chosen correspondence preference, I agree with the defendant that section 167 of the GST Act must be read disjunctively as the said provision uses the word 'or' after each option. Therefore, even though the plaintiff had given two (2) preferences, under s. 167, the defendant is only legally required to serve the decision vide any one of the options provided.

[25] The plaintiff also submits that when the plaintiff discovered the letter (dated 6.12.2016) on 20.1.2017, there were no grounds provided by the defendant. Therefore, the plaintiff takes the position that there was no communication of the decision that the plaintiff could challenge until the meeting on 28.2.2017 where the decision to reject the plaintiff's Claim was effectively communicated.

[26] However, a plain reading of section 190 and 191 of the GST Act does not require the defendant to provide the reasons for his decision. Therefore, it cannot be said that there is no effective communication of the defendant's letter dated 6.12.2016.

[27] Under Order 53 r 3(7) ROC 2012, the court may extend time to apply for judicial review if the court considers that there is a good reason for doing so.

[28] In **Tengku Anoomshah bin Tengku Zainal Abidin & Anor v. Collector Land Revenue, North – East District, Penang & Anor** [1995] 3 CLJ 434, the court held that:

> *"On general principles, this court has no inherent jurisdiction to extend time, except where suh power is expressly given to it under the provision of the law ... However, the words "or, ...Except where the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made " in Order 53 r 1A, which deals with the applications, would sufficiently clothe the court with powers to extend the time to enable the aggreived party to apply for leave to issue an order of certiorari.* ***But though the court has an unferred discretion to grant or refuse an extension of time, the rules of court must prima facie be obeyed; and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach would have un fettered right to extension of time which would defeat the very purpose and object of the rules of limitation period.*** *See Ong Guan Teck & Ors v. Hijjas [1982] 1 MLJ 105*."
> (emphasis added)

[29] The grounds given by the plaintiff are not good reasons for an extension of time as the plaintiff takes the position that there was no effective communication of the decision in the first place. The said reasons are not good reasons as to why the plaintiff did not file the review application within the three (3) from the date of the decision, despite having knowledge as early as 20.1.2017 when accessing the TAP System to file its goods and service tax for December 2016.

[30] The plaintiff's contention that the '*delay (if any)*' is both unavoidable and unintentional is not acceptable to this court because the plaintiff's complaints have been the lack of reasons for the defendant's decision. However, from the meeting on 28.2.2017, the plaintiff was informed of the reasons for the decision by the defendant's officer, that is on the issue of computation premised on FOB and not CIF. Yet, the plaintiff did not file the application to review. What the plaintiff did after the meeting was another attempt to make the respondent change his decision vide the letter dated 27.3.2017.

[31] When the plaintiff did not received a response from the defendant after 27.3.2017, the plaintiff did not take any action at all, until the filing of this application about two (2) months later.

[32] The plaintiff also referred to the case of **Tunku Yaacob Holdings Sdn Bhd** (supra) where Zaleha Zahari FCJ took into account the

respondent's failure to reply to the appellant's letter and allowed the application for an extension of time.

[33] However, in this case in paragraph 17 of his affidavit in support, the director of the plaintiff states as follows:

> "*17. In any event, the decision of the Customs and the basis of the same having been communicated to the Plaintiff, the Plaintiff was prepared to file the Claim afresh on a CIF computation. However, the Respresentative were informed by the abovenamed Deputy Director of Customs during the meeting that any changes to the Claim would not be entertained, and* ***if the Plaintiff was dissatisfied with the Custom's decision, the Plaintiff could refer the matter to Court****."* (emphasis added)

[34] Therefore, from the meeting on 28.2.2017, the plaintiff already knew that the defenda nt will not change his decision, and that if the plaintiff was dissatisfied with the defendant's decision, the plaintiff could refer the matter to Court. The plaintiff already knew the position taken by the defendant, yet the plaintiff continued to impress the defendant to change his decision. As such, it cannot be said that failure to reply to the letter dated 27.3.2017 is a good reason to allow the extension of time.

[35] With regards to the plaintiff's contention that it has a good case in respect of the application for special refund, premised on the cases of **Mersing Omnibus Co Sdn Bhd v. Minister of Labour and Manpower** [1983] 2 MLJ 54, **Ravindran v. Malaysian Examinations Council** [1984] 1 MLJ 168 and **Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v. Ketua Pengarah Jabatan Alam Sekitar & Anor** [2013] 4 MLJ 161, the merits of the plaintiff's case for special refund is not relevant. For the purpose of this application, this court is only concerned as to whether there are good reasons to extend time.

[36] Having considered the application and the affidavits, I am of the considered opinion that there are no good reasons for me to exercise my discretion in the plaintiff's favour. As such the application for extension of time is dismissed with costs.

(AZIZAH BINTI HAJI NAWAWI)
JUDGE
HIGH COURT MALAYA
(Appellate and Special Powers Division 2)
KUALA LUMPUR

Dated: 25 October 2017

For the Plaintiff	:	Shanti Mogan and Wong Lien Lien Messrs Shearn Delamore & Co Kuala Lumpur
For the Defendant	:	Farah Ezlin (SFC) and Goh Hsiao Tung Jabatan Kastam Diraja Malaysia Putrajaya.