DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN SEMAKAN KEHAKIMAN: WA-25-193-07/2017

Dalam perkara sesuatu keputusan Ketua Pengarah Kastam dan Eksais yang menolak permohonan tuntutan pembayaran balik khas cukai jualan bagi barang dalam pegangan melalui surat bertarikh 18.1.2017;

Dan

Dalam perkara seksyen-seksyen 126, 127, 190, 191 dan peruntukan-peruntukan lain yang berkenaan dalam Akta Cukai Barang dan Perkhidmatan;

Dan

Dalam perkara perenggan 1, Jadual Akta Mahkamah Kehakiman, 1964;

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

ANTARA

COACH MALAYSIA SDN BHD … PEMOHON
(No. Syarikat: 185981 – W)

DAN

KETUA PENGARAH KASTAM DAN EKSAIS … RESPONDEN

Grounds of Decision

Azizah Nawawi, J:

Application

[1] Enclosure (1) is the applicant's application for leave to commence judicial review proceedings seeking the following reliefs:

(i) An order of certiorari to quash the Respondent's decision dated 18.1.2017 that the applicant's application for the special refund of sales tax for goods held on hand pursuant to S.190 of the Goods and Services Tax Act 2014 **(**the **"GST Act") (**the **"Decision");**

(ii) An order of mandamus directing that the respondent to refund the sum of RM5,120,368.28 for the special refund of sales tax for goods held on hand to be paid to the applicant by the Respondent upon the final determination of this judicial review;

(iii) If the Applicant's application for judicial review is found to have been out of time, that the Applicant be granted an extension of time by this court pursuant to Order 53 Rule 3(7) of the Rules of Court 2012;

(iv) That the costs of and/or incidental to this application to be costs in the cause; and/or

(v) Such further, alternative, consequential or other relief as this court deems fit and proper in the circumstances.

[2] Before this court proceeds with the application for leave, this court will have to deal with the applicant's application for an extension of time under Order 53 rule 3(7) Rules of Court 2012 (the "**ROC 2012**"), which must be heard inter parte under order 53 r 3(8). Hence the putative respondent, the Director General of Customs (the **'DG'**) was served with the court papers.

[3] Having considered the application and the submission of the parties, this court has allowed the applicant's application for an extension of time. Thereafter, the court proceeded to hear the application for leave and the same was granted. During the leave application, learned Federal Counsel, Tuan Mohammad Sallehuddin bin Md Ali appeared for the Honourable Attorney General and objected to the leave application.

[4] Being dissatisfied with the decision of the court, the DG has filed an appeal against the decision of the court. Bearing in mind that the DG was heard only on the limited issue on the extension of time, the DG's appeal is then limited to the issue of the application for an extension of time. Added to that, the Honourable Attorney General

has not filed any appeal against the granting of the application for leave.

The Salient Facts

[5] From the Statement pursuant to Order 53 rule 3(2) of the ROC 2012, the salient fact is that the applicant is a company incorporated in Malaysia on 22.3.2011. The applicant is in the retail business whereby it imports fashion apparels and accessories under the Coach brand name designed and produced by the applicant's ultimate holding company, Coach Inc. for the purposes of being sold to its Malaysian customers. The Applicant retails its goods through its 18 outlets in various location within Malaysia.

[6] With the introduction of the Goods and Services Tax regime, the applicant applied for registration and became registered under S.20 of the GST Act effective 1.4.2015.

[7] On 29.9.2015, the applicant submitted an application to the DG to apply for special refund of sales tax for goods held on hand pursuant to S.190 of the GST Act **(the 'Special Refund Application').** The applicant claimed that it has satisfied all the requirements required for the Special Refund Application as stipulated under S.190 and S.191 of the GST Act.

[8] Vide an email dated 9.12.2015, the DG requested for additional supporting documents and further information to be submitted for the purpose of a sales tax audit conducted by the DG. The request has been complied with by the applicant via an email dated 16.12.2015 via handing the physical copies of the relevant documents and information to the DG, which was received by the DG on 21.12.2015.

[9] On 12.1.2016, the DG requested for the sales price listing for all code items listed in the Special Refund Application. The applicant had emailed the requested information to the Respondent on 2.2.2016. Subsequently the DG, through an email dated 18.3.2016, requested for additional documents and further information to be inputted in a worksheet prepared by the DG which the Applicant had duly complied with on 18.3.2016.

[10] On 23.3.2016, the DG emailed the applicant requesting the location of the code items listed in the Special Refund Application as well as the availability of the applicant for on-site stocktaking.

[11] Following the on-site stocktaking, the applicant received another email from the DG on 29.4.2016 requesting additional documents for the DG's verification process. This was duly complied with by the applicant and the required supporting documentations were emailed to the DG on 9.5.2016. Thereafter, the DG requested for the

applicant to provide them with its inventory roll forward from 30.11.2015 to 15.4.2016, which has been complied by the Applicant on 17.5.2016.

[12] On 8.6.2016, the applicant emailed the DG requesting for a status update on the applicant's Special Refund Application but there was no response from the DG.

[13] However, on 10.6.2016, the Applicant received another emailed from Respondent requesting for additional information and explanation on the stock movement adjustment column of the sales price of selected items and this was duly complied with by the Applicant on 13.6.2016.

[14] The applicant had emailed the DG requesting for a status update on the applicant's Special Refund Application on 27.6.2016, 27.7.2016, 30.8.2016 and 22.11.2016. But there was no response from the DG.

[15] About two (2) months later, the DG issued the Decision through its letter dated 18.1.2017 informing the applicant that the applicant's Special Refund Application has been rejected based on the "Decision of the Director General". The Decision was uploaded to the applicant's account on the online Taxpayer Access Point System of the DG **(the 'TAP System')** on 18.1.2017. A notification

was also sent to the applicant's email coachmalaysiagst@coach.com on 19.1.2017.

[16] The applicant states that the Decision only came to the applicant's knowledge on 2.6.2017 as the applicant only received its login details to the TAP System on 1.6.2017. Therefore, being dissatisfied with the said Decision, the applicant filed this present judicial review action to challenge the Decision on several grounds.

The Findings of the Court

[17] Order 53 r 3(6) 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.

[18] 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."*

[19] In this case, the Decision of the DG which the applicant is seeking to quash is dated 18.1.2017. Under Order 53 r 3 (6) of the ROC 2012, the last date to file this application is 18.4.2017. But the

applicant only filed this application on 2.6.2017. Therefore, there is a clearly a delay of more than 3 months in filing this leave application.

[20] However, it is the contention of the applicant that it is within time to file this application on 17.7.2017 as it only knew about the Decision dated 18.1.2017 on 2.6.2016. The applicant claimed that it only received its login details to its online account on the TAP System from its auditor, Mazars, on 1.6.2017. Therefore, the applicant takes the position that the Decision was only communicated to them once they gain access to the TAP System on 2.6.2017.

[21] The applicant 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)

[22] 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.

[23] 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."

[24] Section 167 of the GST Act provides three options to the taxpayer on the manner of the service of the notices issued by the DG. The three (3) options 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*.'

[25] 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 and 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.

[26] In the present case, when the applicant registered with the DG under section 21 of the GST Act, the registration was made online via the TAP System (see exhibit ST – 1). On the option of service in exhibit ST-1, the applicant had chosen notification by the electronic service, via email as its preference. In fact, the applicant's application for the special refund was also made online via the TAP System (see exhibit ST-2).

[27] I am of the considered opinion and I agree with learned Senior Federal Counsel for the DG that the Decision had been communicated to the applicant via uploading it into the applicant's TAP System account on 18.1.2017. A notification was also sent by an email on 19.1.2017. Therefore, pursuant to subsection 167(3), 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, which was on 18.1.2017 or via email notification on 19.1.2017.

[28] On the applicant's assertion that it had only found out about the Decision on 2.6.2017, after receiving its login details to its online account on TAP System from the audit firm on 1.6.2017, the same cannot be accepted as the Decision was deemed communicated to the applicant in accordance with section 167 of the GST Act.

[29] Since the Decision was deem communicated to the applicant when it was transmitted to its account through the electronic service, via the TAP System on 18.1.2017 or via email on 19.1.2017, then under Order 53 r 3 (6) of the ROC 2012, the last date to file this application is on 18.4.2017. There is a clearly a delay of more than 3 months in filing this leave application.

[30] The next issue is on the application for an extension of time pursuant to Order 53 r 3(7) ROC 2012. This can be found in prayer (iii) of enclosure (1), which reads:

"If the applicant's application for judicial review is found to have been out of time, that the applicant be granted an extension of time by this court pursuant to Order 53 Rule 3(7) of the Rules of Court 2012".

[31] 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 10*5." (emphasis added)

[32] In **Tan Siew Peng v OCBC BANK (M) BHD** [1998] 2 MLJ 420, the Court of Appeal held:

> "*The court has power, exercisable at its discretion, to extend the time limited for the filing or service of any document or the doing of any act under the Rules of the Court of Appeal 1994 ('the Rules'). It* ***is trite that the burden is upon an applicant who seeks an extension of time to make available sufficient material upon which the court may exercise discretion in his favour."***

[33] The grounds to support this application can be found in paragraphs 45 and 46 of the applicant's affidavit in support:

> *"(45) The Applicant has consistently followed up with the Respondent via emails to request for a status update on the Refund Application over a period of time. Despite the Applicant's many follow-up attempts and the Respondent's cognizance of the urgency of the Refund Application to the Applicant, the Respondent has failed to notify the Applicant of its decision immediately via email. As observed,*

the Applicant did not sit idly by but has taken a proactive approach in requesting for a status update in respect of the Refund Application from the Respondent. The Respondent had ample opportunity to update the Applicant of its decision via email but has failed to notify the Applicant appropriately.

(46) In the above circumstances, I have been advised by the Applicant's solicitors and verily believe that there are good reasons for the Honourable Court to grant an extension of time."

[34] Having considered the factual matrix of this case, I am of the considered opinion that the circumstances in this case warrant an exercise of the court's discretion to extend time in the applicant's favour. The applicant has not slept on its rights. The applicant had responded to the DG's request for documents and information promptly between 9.12.2015 to 13.6.2016. From 27.6.2016 to 22.11.2016, the applicant has made several inquiries to the DG on the status of its application for a refund, but the DG failed to respond to the same.

[35] On the grounds to extend time for leave under Order 53 r 3(6) of the Rules of High Court 1980, Justice Zaleha Zahari FCJ states as follows in **Tunku Yaacob Holdings Sdn Bhd** (supra):

"[112] Be that as it may I am of the view that the facts and circumstances in this case warrant an exercise of the court's discretion to extend time in the appellant's favour. The state authority's omission to reply to the appellant's letter 30 January 2011 containing the proposal that the appellant be allowed to continue with the development of the Plaza Tunku Yaacob Complex should have been taken into consideration. ***This failure of the state authority to respond warrants the exercise of the court's power to extend time****. In my view the fact that the appellant had attended the inquiry before the land administrator should not be held against them. In this case the appellant had in fact applied for an extension of time. There was sufficient material before the court to extend time. The application for extension should have been allowed."* (emphasis added)

[36] Added to that, the applicant genuinely did not know about the Decision as they were not informed of the same by their former GST provider, Mazars. This can be seen from exhibit A-17, where the applicant's employee had emailed Alicia Chin of Mazars if Alicia Chin would login the customs TAP website and '*check if we have received any response'*. Upon receipt of the TAP login access from Mazars, the applicant then found out about the Decision and filed this application without undue delay.

[37] Therefore, in the circumstances of this case, I accepted the reasons given by the applicant for the delay and the application for an extension of time is allowed.

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

Dated: 26 September 2017

For the Applicant	:	Dato' Arief Emran Ariffin/Kellie Yap/ Kelvin Hong Merrs Wong & Partners Kuala Lumpur.
For the Attorney General:		Tuan Mohamad Sallehuddin Bin Md Ali (Federal Counsel) Jabatan Peguam Negara Malaysia Putrajaya.
For the Putative Respondent	:	Puan Farah Ezlin Yusop Khan (Senior Federal Counsel) / Puan Nurliyana Mohd Jafri (Federal Counsel) Jabatan Kastam Diraja Malaysia Putrajaya.