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HIGH COURT RULED WAYLEAVE AND RIGHT OF USE AGREEMENT IS TO BE ASSESSED UNDER ITEM 22(1)(b) OF THE FIRST SCHEDULE OF THE STAMP ACT 1949

Case: TTDCSB v Pemungut Duti Setem

On 9 July 2019, Judge Yang Arif Dato' Nordin Hassan dismissed the appeal by TTDCSB against the decision of the Collector of Stamp Duty.

Brief Facts

TTDC Sdn Bhd (the Applicant) who is dissatisfied with the decision of the Collector of Stamp Duty (the Collector) which assessed the Applicant's Wayleave and Right of Use Agreement (Wayleave Agreement) to Ad Valorem stamp duty under Item 22(1)(b) of the First Schedule of the Stamp Act 1949 filed an appeal to the High Court under subsection 39(1) of the Stamp Act 1949.

Issue

Whether the instrument i.e Wayleave Agreement is to be assessed to stamp duty as instrument under Item 22(1)(b) at Ad Valorem or as instrument under item 4 of Schedule 1 of Stamp Act 1949 at nominal value of RM 10.00.

Applicant's Contention

1. Wayleave Agreement is not an instrument that falls within the class of instrument enumerated in Item 22, whether pre or post the 2009 Amendment (made via Finance Bill 2008 and came into operation on 1.1.2009). Instrument in Item 22 post amendment in 2009 – "Bond", "Covenant", "Loan", "Services", "Equipment Lease Agreement" or "Instrument of any kind whatsoever".
2. "Instrument of any kind whatsoever" in Item 22 is not a catch-all phrase that encompasses instrument of any kind and is to be read subject to the *noscitur a sociis* and *ejusdem generis* rule of interpretation.

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3. Wayleave Agreement is a an agreement made between owner and occupier of the land and a supply company to grant license or allow the latter to use the land to run cables or supply line or to place equipment (easement). The supply company pays a fee to the landowner in consideration of the right or license to use the land.
4. The principal object of the Wayleave Agreement is the conferment of right of way by PLUS to the Applicant and right to install and to use the Telecommunication Infrastructure and fibre optic cable on the Applicable Expressway. Payment of Annual Recurring Charge was in consideration for the grant of the right of way and right to install and to use the Telecommunication Infrastructure and fibre optic cable of the Applicable Expressway and acts as an ancillary to the principle object which is the wayleave. The principal object was not to create an obligation for the Applicant to pay a sum of money to PLUS. The provision of such payment does not change or alter the principal object of the Wayleave Agreement.
5. Alternatively, if the Wayleave Agreement is to be subjected to Ad Valorem Stamp Duty, it should be assessed on the yearly sum of payment of RM 10,148,524.05 and not the total sum of the Wayleave Agreement of RM 152,365,240.50.

The Respondent's Contention

1. The Wayleave Agreement is to be assessed as an "instrument of any kind whatsoever" in Item 22(1)(b) and the Respondent is correct in assessing the Wayleave Agreement to Ad Valorem Duty as the said Agreement has the characteristics and elements an instrument for security of payment.
2. The purposive approach should not be adopted by the court in interpreting Item 22(1)(b). The wording of the provision in Item 22(1)(b) is clear & unambiguous therefore literal approach must be adopted. The maxim of *noscitur a sociis* and *ejusdem generis* is only to be used to determine the intent of the legislature where it is in doubt. If the intent of the legislature is clear and the language used in the provision is plain, *noscitur a sociis* and *ejusdem generis* should not be employed.

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3. The Wayleave Agreement, from the facts established in this case, has the characteristics of instrument for security of payment which falls as an “instrument of any kind whatsoever” in Item 22(1)(b).
4. It is important to look at the material terms in the Wayleave Agreement to see the real and true nature of the instrument.
5. All the elements necessary for the Wayleave Agreement to fall as an instrument under Item 22(1)(b) has been fulfilled:
 - i. The instrument is for any sum or sums of money;
 - ii. The sum or sums of money is not an interest for any principal sum secured by a duly stamped instrument; and
 - iii. The sum or sums of money is not rent reserved by a lease or tack.
6. The Wayleave Agreement was entered to consolidate arrangements in relation to fibre optic, telecommunications network, wayleave rights and rights to use by the Applicant. As consideration of granting the right of way and right of use, Applicant has the obligation to pay the Annual Recurring Charges for the Wayleave or right of use on the applicable expressways. There was also an absolute sale of ownership from PLUS to the Applicant of the Telecommunication Infrastructure and fibre optic cable that was laid previously by PLUS.
7. The Wayleave Agreement is not only involving right of way or easement. There are also services rendered by the Applicant in various clauses in the Wayleave Agreement. There are services element in the Wayleave Agreement to be provided by the Applicant to PLUS at no cost. It is submitted that all the costs have been incorporated in the consideration sum in the Wayleave Agreement. Thus, the Wayleave Agreement is an instrument for the security of payment in nature which falls under Item 22(1)(b).
8. The nature of the Wayleave Agreement takes the colour of the preceding words to the “instrument of any kind whatsoever” in which it secures the payment of a sum of money in return for the granting of right by a party to another.

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9. The Wayleave Agreement have the instrument character of security of payment. Even though the Wayleave Agreement was not mentioned in Item 22(1)(b), one must not look at the label per se but to look at the instrument in its entirety.
10. Ad Valorem duty under Item 22(1)(b) is to be assessed on the total amount of the Wayleave Agreement of RM 152,365,240.50 and not the yearly payment to PLUS of RM 10,148,524.05 because the usage of the word in Item 22(1)(b) is “for such total amount”.

Decision

1. The crux of the issue centred on the phrase “or any instrument of any kind whatsoever” in Item 22(1)(b) of the First Schedule of the Stamp Act 1949.
2. The provision in Item 22(1)(b) of the First Schedule of the Stamp Act 1949 is plain and clear. The phrase “instrument of any kind whatsoever” after the word or in light of this provision is not restricted to the particular words which precedes them as contended by the Appellant.
3. The rule of Ejusdem generis rule is of no application in this case. The Wayleave and Right of Use Agreement is also for the sum of money whereby the consideration of the right of way and right of use given by PLUS and other related matters and elements in the agreement which was raised by the Respondent. The Wayleave Agreement falls within the category of an “instrument of any kind whatsoever” for any sum of money under Item 22(1)(b).
4. The Ad Valorem duty under Item 22(1)(b) is for the total amount of the instrument and not on the amount as submitted by the Applicant.
5. The Applicant’s Application is dismissed with cost of RM 6,000.00.

Revenue Counsels for the Respondent

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2. Nik Nur Halina Binti Mohd Kashfi
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