Ketua Pengarah Kastam v Metrogold Commercial Sdn Bhd

(2023) MSTC ¶30-656

Court of Appeal, Putrajaya

19 December 2023

Goods and services tax (GST) — DG of Customs (DGC) apportioning taxpayer's input tax credit claim — DGC contending taxpayer's purchase occurring before registration as taxable person, input tax claim restricted to taxpayer's period as GST-registered person until repeal of GST Act 2014 — Taxpayer contending incurring of input tax credit after registration as taxable person, entitlement to full claim amount, DGC's apportionment not prescribed under GST legislation — Whether taxpayer registered as taxable person at time of purchase — Whether DGC empowered to apportion taxpayer's claim amount — Goods and Services Tax Act 2014, ss 2, 20, 21, 38, 39 — Goods and Services Tax Regulations 2014, regs 39, 46 — Goods and Services Tax (Repeal) Act 2018, s 4.

This was an appeal by the Director General of Customs (DGC) against the judgment of the High Court, which had allowed a judicial review application by the taxpayer, Metrogold Commercial Sdn Bhd (Metrogold), under O 53 of the Rules of Court 2012 (ROC). The High Court had quashed the DGC's decision to apportion and reduce Metrogold's claim of input tax credit under the repealed *Goods and Services Tax Act 2014* (GST Act).

Metrogold was in the business of property development, which included the buying and selling of land. On 25 November 2015, Metrogold entered into a lease purchase agreement (agreement) with Metrogold Assets Sdn Bhd (M Assets) to acquire the lease of 5 plots of freehold land in Medini Iskandar Malaysia for the purchase price of RM170,650,000. On 5 January 2016, Metrogold paid RM10,239,000 as the goods and services tax amount (GST amount) incurred on the said purchase. Metrogold was registered as a GST-registered person effective 1 March 2016 and made an input tax credit claim (ITC claim) for the GST amount in their first GST return form for the taxable period of 1 March 2016 to 31 March 2016. Subsequently in September 2017, Metrogold sold the lease of 2 plots of the land to Distinctive Industry Sdn Bhd (Distinctive Industry).

Metrogold's ITC claim was rejected by the Customs Department (Customs) via a letter in April 2019 on the ground that there was no approval from the DGC under reg 46 of the Goods and Services Tax Regulations 2014 (GST Regulations). In a subsequent letter from the Customs, Metrogold was informed that their ITC claim could not be processed. The reason given was that Metrogold had not made any taxable supply related to the acquired lease on the lands from the date of GST registration until the repeal of the GST Act on 1 September 2018. Even though Metrogold eventually proved that taxable supplies were made while the company was GST registered, the DGC observed that Metrogold had received only 10% payments related to the sale of the 2 plots of land in September 2017 before the repeal of the GST Act. In August 2020, the DGC notified Metrogold that the allowable ITC claim was only RM2,320,472.55 on the basis that the relief for input tax was restricted to the period Metrogold was a GST-registered person, specifically from 1 March 2016 to 31 August 2018, until the repeal of the GST Act.

The DGC contended that they maintained their position with regard to the assessment of Metrogold's ITC claim because a large portion of the pre-registration GST input tax incurred was not supported by any corresponding taxable supply generated from the sale of the plots of the lands, being no longer a taxable supply post-repeal of the GST Act. The DGC argued that the High Court made a mistake in determining that Metrogold was already a taxable person on 5 January 2016. The DGC contended that the purchase of the 5 plots of lands from M Assets occurred before Metrogold was registered as a taxable person. The DGC asserted that based on the definition under s 2 of the GST Act, the basic rule was that, a taxable person was only entitled to claim ITC to be deducted from any output tax due from them after registration under the GST Act. The DGC further contended that the entitlement of a "taxable person" to input tax recovery was so much that was "allowable" and "reasonable", as per ss 2, 38 and 39 of the GST Act as well as reg 39 of the GST Regulations. The High Court was therefore incorrect to find that the DGC did not have the authority to impose the additional condition with regard to Metrogold's ITC claim because the apportionment formula was not provided for under the GST legislation. The DGC submitted further that the Court of Appeal cases of *Ketua Pengarah Kastam* v *Nobuyasu Sdn Bhd & Anor* (Civil Appeal No: W-01(A)-161-03/2020) (*Nobuyasu*) and *Ketua Pengarah Kastam* v *Jimah East Power Sdn Bhd* (2021) MSTC ¶30-455A; (Rayuan Sivil No W-01(A)-601-11/2020) (*Jimah East*) were in the DGC's favour where the DGC's apportionment of the taxpayers' ITC claims were upheld by the court.

Metrogold contended that they have the right to claim the ITC under ss 38 and 39 of the GST Act because the ITC was incurred when they were already a taxable person. Metrogold's position was that they were entitled to the relief of the full amount of the input tax, as it was attributable to taxable supplies made or to be made for the furtherance of their business during the period they were registered as a GST-registered person. Metrogold further argued that they were still entitled to the ITC claim under reg 46 of the GST Regulations despite the DGC's contention that they were not a taxable person. Metrogold asserted that since reg 46 of the GST Regulations did not specify any apportionment, their ITC claim should not be apportioned. Section 39 of the GST Act further allowed a taxable person to claim credit for input tax that was reasonable and attributable to taxable supplies made or to be made in the course or furtherance of any business in Malaysia, as prescribed by law. Metrogold stressed that under reg 39(2)(b) of the GST Regulations, if the input tax was related to goods used or to be used in making taxable supplies, the entire input tax should be attributed to the taxable supplies made by the taxable person.

The issues requiring determination of the court were whether:

- Metrogold was a taxable person at the time they acquired the lands
- the DGC was empowered to apportion the ITC amount.

Held: appeal dismissed.

1. The DGC's position was not supported by the provisions of the GST Act and the GST Regulations. The definition of a "taxable person" under s 2 of the GST Act was clearly outlined as one who was registered under the GST Act or one who was liable to be registered under the GST Act, with the latter category becoming liable to be registered under s 20(3)(b) of the GST Act. Section 20(3)(b) of the GST Act outlined that a person not registered but engaged in making taxable supplies would become liable to be registered at the end of any month if there were reasonable grounds to believe that the total value of their taxable supplies in that month and the following 11 months would exceed the specified amount, which was RM500,000.00, as per the Goods and Services Tax (Amount of Taxable Supply) Order 2014. Metrogold, having the reasonable grounds to believe that the total value of their taxable supplies at the end of that month and the following 11 months would exceed RM500,000.00 had on 9 December 2015, applied and been approved for GST registration under s 21 of the GST Act. In forming such a belief, Metrogold became liable to be registered and thus fulfilled the definition of a "taxable person" under s 2 of the GST Act even before they incurred the input tax amounting to RM10,239,000 on 5 January 2016 from the acquisition of the lease of the 5 plots of land. As such, the entitlement to claim ITC under s 38 of the GST Act was triggered. In short, Metrogold was a taxable person at the time of acquiring the lease of the plots of land. It was thus inaccurate for the DGC to argue that the purchase of the plots of land was made prior to Metrogold's registration as a taxable person.

2. Contrary to the DGC's contention, s 38(1) of the GST Act simply stated that any taxable person was entitled to claim ITC, with no mention of registration as a taxable person. Furthermore, s 20 of the GST Act did not specify that a taxable person would only be entitled to the ITC claim upon registration as a taxable person. It merely stated that a person making a taxable supply became liable to be registered. Once liable under s 20(3) of the GST Act, the person automatically fell within the definition of a "taxable person" under s 2 of the GST Act. Therefore, when ss 38 and 39 of the GST Act referred to a "taxable person" in relation to ITC claims, it specifically related to the definition provided in s 2 of the GST Act. Thus, a person could be considered a "taxable person" under the GST Act without or before being registered as one under s 21 of the GST Act.

3. Sections 38 and 39 of the GST Act was therefore applicable in respect of the ITC claim incurred by Metrogold. Section 38(1) of the GST Act clearly stated that a taxable person, like Metrogold in this case, could claim credit for their allowable input tax (as determined by s 39 of the GST Act). This credit could be deducted from any output tax owed by the taxable person. Section 39(1)(a) of the GST Act specified that the eligible amount of input tax was determined based on what was deemed allowable and reasonable for the taxable supplies during a specified period, as prescribed. Regulation 39(1) of the GST Regulations reinforces this, stating that a taxable person was entitled to provisionally deduct input tax attributable to taxable supplies in accordance with the regulations.

4. Four key points on reg 39(2)(b) of the GST Regulations in relation to the present appeal could be observed. Firstly, it was clear that the amount of input tax considered allowable and reasonable for attribution to taxable supplies under s 39 of the GST Act was prescribed under this regulation to be the whole of input tax on goods exclusively used or to be used by the taxable person in making taxable supplies. Secondly, the taxable person's entitlement to ITC was not limited to goods and services already utilised in making taxable supplies. The DGC's argument suggesting otherwise was unsustainable in light of the clear and specific language of the regulation. Thus, it was not necessary to match the taxable person's purchases, for which input tax was incurred, with the taxable supplies made, consistent with the Customs' GST guide for input tax credit. Thirdly, in relation to this regulation, s 38(3) of the GST Act provided that, with regard to the deduction of the input tax from any output tax owed by the taxable person, if no output tax was due at the end of a taxable period, the amount of the ITC should be refunded to the taxable person by the Customs. Fourthly, there was no provision granting discretion to the DGC to apportion the amount of the ITC claimed by a taxable person under any circumstances.

5. In Metrogold's case, the application of ss 38 and 39 of the GST Act indicated that the whole of the input tax incurred by them on acquiring the lease for the 5 plots of land, intended for use in making taxable supplies in Malaysia, should be attributed to these taxable supplies. Thus, such input tax, without any apportionment, should be refunded to Metrogold.

6. The High Court was correct in determining that the DGC's apportionment of Metrogold's ITC claim was wrong. The formula used by the DGC to calculate the apportionment and reduction on the ITC claim submitted by Metrogold was not based on any legal provisions and are not prescribed under GST laws. The DGC's formula which differentiated between plots sold and unsold in Metrogold's ITC claim was also irrational. The plots of land used to make taxable supplies were erroneously given less input tax than the ones not used to make taxable supplies.

7. Regulation 46 of the GST Regulations relied on by the DGC, clearly did not provide for any apportionment. Additionally, s 4 of the *Goods and Services Tax (Repeal) Act 2018* (GST Repeal Act) did not mention any apportionment or reduction as a consequence of the repeal. Thus, there was no basis for any apportionment to be made.

8. Metrogold submitted their ITC claim within 6 years of the date of supply, leading to a legitimate expectation that their right to a full refund of the input tax was preserved despite the repeal of the GST Act.

9. The repeal of the GST Act did not affect any rights already accrued or vested before the repeal, as per s 30(1) of the *Interpretation Acts 1948 and 1967*. The GST Act could not be construed to retrospectively impair Metrogold's already accrued and vested right to be refunded with their ITC claim in the absence of provisions authorising such apportionment.

10. Metrogold incurred the GST amount and made the claim for the ITC refund under s 38(3) of the GST Act well before the repeal of the GST Act. Metrogold was not wrong in contending that it was unjust that they had to suffer the lower input tax refund due to the repeal of the GST Act over which they had no control. Section 4(1)(b) of the GST Repeal Act essentially meant that, despite the repeal of the GST Act, any overpaid GST might be refunded under the GST Act as if it had not been repealed.

11. The DGC's argument that they were guided by s 39 of the GST Act and reg 39 of the GST Regulations in determining the amount of input tax claimable under reg 46 of the GST Regulations was unacceptable and showed that the DGC had failed to properly interpret and apply the provisions of the GST laws. The said provisions did not permit any apportionment of input

tax where the input tax was for goods used or to be used in making taxable supplies. Instead, reg 39(2)(b) clearly stated that the whole input tax should be attributed to the taxable supplies made by the taxable person, in this case Metrogold, during the relevant period.

12. The DGC's decision not to allow any refund under s 38 of the GST Act, despite the clear provisions authorising the same, and their invoking of reg 46 to apportion Metrogold's ITC claim, resulting in a reduced amount and disallowance of the rest, were erroneous, ultra vires, in excess of authority, unreasonable and illegal. Consequently, the High Court's decision to allow the judicial review against the DGC was justified.

13. The DGC's decision contradicted the well-established rules on the strict interpretation of tax statutes. As per *National Land Finance Cooperative Society Ltd* v *Director General Inland Revenue* (1999) MSTC 3735; [1994] 1 MLJ 99, a taxing statute should be read strictly without any presumption or intendment. As per *NKM Holdings Sdn Bhd* v *Pan Malaysia Wood Bhd* [1987] 1 MLJ 39, the court was not concerned with the policy behind the Act it was interpreting; the court's main duty was to interpret statutory language based on established legal principles. As per *Exxon Chemical (M) Sdn Bhd* v *Ketua Pengarah Dalam Negeri* (2006) MSTC 4,204; [2006] 1 MLJ 428, any ambiguity in tax statutes should be resolved in the taxpayer's favour. As per *Palm Oil Research and Development Board Malaysia & Anor* v *Premium Vegetable Oils Sdn Bhd & Anor* (2005) MSTC 4098; [2005] 3 MLJ 97, the interpretation of a tax statute should not lead to absurdity or injustice. As per *Cheow Keok* v *Public Prosecutor* [1940] 9 MLJ 103, the interpretation of specific words in different provisions of a legislation should be consistent with similar application and not negating the effect of another provision within the same statute.

14. There were no written grounds of judgment released by the Court of Appeal for the cases of *Nobuyasu* and *Jimah East* relied on by the DGC in support of their position. Metrogold's case differed from *Jimah East* primarily because their claim for input tax credit was not based on reg 46 of the GST Regulations for exceptional input tax credit, as was the case in *Jimah East*. Instead, Metrogold's claim was an ordinary one seeking their right to input tax credit under ss 38 and 39 of the GST Act and reg 39 of the GST Regulations.

15. In *Jimah East*, the taxpayer claimed input tax credit under reg 46 for taxable supplies made before GST registration. In contrast, Metrogold made taxable supplies when already GST registered, hence the relevance of s 38 of the GST Act. Additionally, as Metrogold correctly contended, the court in *Jimah East* was not made aware that the amount of input tax attributable was already prescribed in reg 39(2)(b) of the GST Regulations to be the whole of the input tax.

16. In *Primary Goldennet Sdn Bhd* v *Ketua Pengarah Kastam dan Eksais dan Tribunal Rayuan Kastam* (Saman Pemula No WA-24-77-12/2019), the High Court held that reg 46 of the GST Regulations did not provide for any computation method or formula for the DGC to apply in determining the eligibility of the exceptional input tax claim, leading to the DGC's apportionment of such claims wrong in law. This decision was affirmed by the Court of Appeal in *Ketua Pengarah Kastam dan Eksais* v *Primary Goldennet Sdn Bhd dan Tribunal Rayuan Kastam* (Civil Appeal No: W-01(A)-641-12/2020) (*Primary Goldennet*). Metrogold's case aligned more closely with *Primary Goldennet*, as both cases involved taxpayers making taxable supplies while already GST registered. Unlike the cases relied on by the DGC, the taxpayers in these instances were taxable persons when the relevant input tax was incurred.

17. Metrogold clearly had the right to validly claim for ITC based on the express statutory words of ss 38 and 39 of the GST Act read with reg 39 of the GST Regulations. The DGC's decision in not applying these provisions and relying instead on reg 46 of the GST Regulations was wrong. The DGC could only apply what was prescribed under the GST Act and GST Regulations (and the GST Repeal Act). The DGC had acted in excess of their authority by apportioning Metrogold's ITC claim. Since the DGC had improperly considered irrelevant factors and disregarded relevant considerations, judicial intervention was justified, as per *Malaysian Oxygen Bhd* v *Soh Tong Wah and another appeal* [2015] 3 MLJ 730. Therefore, the High Court's decision was affirmed and the DGC's appeal was dismissed.

[Headnote by the Wolters Kluwer editors]

Nur Idayu binti Amir (Senior Federal Counsel) for the DGC.

Vijey Mohana Krishnan and Chang Ee Leen (Messrs Raja, Darryl & Loh) for the taxpayer.

Before: S Nantha Balan, Mohd Nazlan Mohd Ghazali and Choo Kah Sing JJCA.

S Nantha Balan, Mohd Nazlan Mohd Ghazali and Choo Kah Sing JJCA:

Introduction

1. This is an appeal against the judgment of the High Court which had allowed the respondent's judicial review application for a certiorari under Order 53 of the Rules of Court 2012 ("the RC 2012") quashing the appellant's decision in apportioning and reducing the respondent's claim of input tax credit under the now repealed Goods and Services Tax Act 2014.

2. Having heard the appeal - which was conducted by way of a remote communication technology via *Zoom* - examined the appeal records and considered the submissions by parties, we unanimously decided to affirm the decision of the High Court, and therefore dismiss the appeal, for the reasons which we set out herein.

Key Background Facts

3. The respondent company, Metrogold Commercial Sdn Bhd is principally involved in the property development business, which therefore includes the buying and selling of lands. The appellant is the Director-General of the Royal Malaysian Customs Department ("the DG of Customs").

4. On 24 November 2015, in pursuance of its property development activities, the respondent executed a Lease Purchase Agreement ("the Agreement") with Metrogold Assets Sdn Bhd ("M Assets") for the purchase of the lease of five plots of freehold land in Medini Iskandar Malaysia (for present purposes identified as Plots C4, C5, C6, C13 and C14) from the owner, M Assets (" the Lands") for a purchase consideration of RM170,650,000.

5. The respondent had however paid not only the RM170,650,000 as the purchase price but also RM10,239,000 as the Goods and Services Tax ("GST") amount incurred by the respondent in respect of the said purchase.

6. The respondent was registered as a GST registered person effective 1 March 2016. The respondent then made an input tax credit claim ("the ITC Claim") amounting to RM10,239,000, being the GST in the respondent company's first GST Return Form for its first taxable period of 1 March 2016 to 31 March 2016.

7. On 9 September 2017, the respondent entered into two lease purchase agreements with Distinctive Industry Sdn Bhd ("Distinctive Industry") to sell two plots of the lease on the Lands – specifically Plots C13 and C14.

8. By way of a letter dated 10 April 2019, the Royal Malaysian Customs Department (RMCD) rejected the ITC Claim by the respondent on the stated ground that there was no approval from the DG of Customs for an exceptional claim for input tax under Regulation 46 of the Goods and Services Tax Regulations 2014 ("the GST Regulations").

9. The respondent was further notified in a subsequent letter dated 24 January 2020 that the ITC Claim could not be considered because the respondent did not make any taxable supply in respect of the acquired lease on the Lands from the date the respondent was registered as GST registered person until the repeal of the GST Act on 1 September 2018.

10. Although the respondent was later able to demonstrate that there were taxable supplies made during the period that the company was a GST registered person, the appellant separately observed that in respect of the sale of Plots C13 and C14 to DISB on 9 September 2017, the respondent had received only 10% payments before the repeal of the GST Act.

11. The appellant then in a letter dated 21 August 2020 informed the respondent of its decision that the allowable ITC Claim is only RM2,320,472.55. This position of the appellant was arrived at as it had assessed the ITC Claim on the basis that the relief for input tax was restricted to the period the respondent remained as a GST registered person - from 1 March 2016 to 31 August 2018 - until the repeal of the GST Act.

12. This led to the respondent filing its judicial review application which was successful in the High Court quashing the impugned decision. Hence the present appeal before us by the DG of Customs.

Essence of the Rival Contentions of the Litigants

13. Essentially, the DG of Customs maintained the position that the ITC Claim was assessed on the basis that the relief for input tax ought to be restricted to the period the respondent remained as a GST registered person - which was from 1 March 2016 to 31 August 2018 - before the repeal of the GST Act.

14. This meant that a large portion of the pre-registration GST input tax incurred, which according to the DG of Customs was not supported by any corresponding taxable supply generated from the sale of the plots of the Lands, being no longer a taxable supply post-repeal of the GST Act, was as such, disallowed.

15. The respondent's stance on the other hand is that it could claim the ITC Claim as of right under Sections 38 and 39 of the GST Act because the ITC Claim was incurred when the respondent was already a taxable person. The position of the respondent was that the company was entitled to the relief of the full amount of the input tax in the ITC Claim amount of RM10,239,000.00 being attributable to taxable supplies made or to be made for the furtherance of the respondent's business during the period the respondent was registered as GST registered person.

16. Even if the respondent could not succeed in its ITC Claim because it was not a taxable person, it was entitled to do so under Regulation 46 of the GST Regulations.

17. And in both situations, the respondent's position is that there should not be any apportionment given that Regulation 46 does not provide for any apportionment and Section 39 of the GST Act provides that a taxable person is entitled to credit so much of the input tax that is allowable and reasonable to be attributable to taxable supplies made or to be made in the course or furtherance of any business in Malaysia as may be prescribed.

18. The respondent stressed that under Regulation 39(2)(b) of the GST Regulations, where the input tax is for goods used or to be used in making taxable supplies, the whole input tax is to be attributed to the taxable supplies made by the taxable person.

Essence of the Decision of the High Court

19. In allowing the appeal, the learned HCJ held that the respondent was already a taxable person as defined under the GST Act at the time it incurred the ITC Claim on 5 January 2016 for its purchase of the leases on the five plots on the Lands. The respondent was therefore entitled to automatically claim the GST paid as an input tax pursuant to Sections 38 and 39 of the GST Act, read together with Regulation 39 (2)(b) of the GST Regulations.

20. Accordingly, the respondent was entitled to the refund of the entire sum of the ITC Claim under Section 38 (3) of the GST Act. The GST Act did not empower the DG of Customs with the authority to apportion the amount of input tax claimable by the respondent.

21. It was also held that the appellant had ignored the decisions of the High Court in *Primary Goldennet Sdn Bhd v Ketua Pengarah Kastam dan Eksais dan Tribunal Rayuan Kastam* (Saman Pemula No WA-24-77-12/2019) and *Nobuyasu Sdn Bhd* v *Tribunal Rayuan Kastam Diraja Malaysia & Anor* [2020] 11 MLJ 182.

22. The learned High Court Judge (HCJ) found that the impugned decision was *ultra vires,* in excess of the appellant's authority, made without proper purpose, unreasonable and goes against the doctrine of legitimate expectation. The learned HCJ concluded the findings of the Court in the following terms:

> "[41] It is of the considered view that the Respondent's Decision centres at the fact that the GST Act was repealed. It must be borne in mind that the taxpayers must not be permitted to be 'punished' for something that is beyond their control. The Applicant had incurred the GST amount of RM 10,239,000 way before the repeal of the GST Act and therefore legally entitled to a refund of the ITC Claim prior to the repeal of the GST Act.
>
> [42] The Respondent has failed to take into account the express provisions of the GST Act and GST Regulations, the trite principles of interpretation of tax statutes, the concept of GST which is meant to be a tax on consumers and not a cost to businesses, the Applicant's vested rights which are not

impaired by the repeal of the GST Act and the High Court's decision in the *Nobuyasu* (*supra*) and *Primary Goldennet Sdn Bhd* (*supra*).

[43] The Respondent's Decision is therefore tainted with illegality and unreasonable. The Respondent had acted in a clear excess of authority as the Respondent has misconstrued the terms of the GST Act and GST Regulations by disregarding express provisions mandatorily requiring the Respondent to refund input tax credit. There is also a clear lack of jurisdiction for the Respondent to apportion and reduce the Applicant's ITC Claim. The Decision is therefore *ultra vires*, in excess of the Respondent's authority, made without proper purpose, unreasonable and goes against the doctrine of legitimate expectation".

Principal Grounds of Appeal

23. In its Amended Memorandum of Appeal, the DG of Customs listed out a number of grounds for mounting this appeal, the entirety of which is reproduced as follows:

> 1. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam membenarkan permohonan semakan kehakiman ini.
> 2. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa keputusan Responden/Perayu dalam surat bertarikh 21.8.2020 yang membahagikan dan mengurangkan tuntutan kredit cukai input Pemohon dengan hanya membenarkan tuntutan kredit cukai input sebanyak RM 2,320,472.55 dan menolak baki tuntutan kredit cukai input sebanyak RM 7, 918,527.45 ("Keputusan yang Dipersoalkan") yang adalah *ultra vires*, menyalahi undang-undang, tidak sah, bercanggah dengan undang-undang dan melebihi bidang kuasa.
> 3. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa prinsip biasa dalam akta percukaian bahawa seseorang hanya boleh melihat dengan adil pada bahasa yang digunakan dan apa yang dikatakan dengan jelas dan tiada apa-apa yang boleh dibaca ke dalamnya mahupun disiratkan.
> 4. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam apabila gagal mempertimbangkan bahawa terdapat peralihan semasa dalam pendirian badan kehakiman daripada pendekatan literal yang ketat (*strict literal approach*) kepada pendekatan bertujuan (*purposive approach*) dalam mentafsir akta percukaian.
> 5. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa Pemohon adalah 'orang yang kena cukai' ("*taxable person*") semasa membuat permohonan pendaftaran cukai barang dan perkhidmatan iaitu pada 9.12.2015 dan selanjutnya merupakan'orang yang kena cukai' semasa membuat perolehan 5 bidang tanah dan dikenakan cukai barang dan perkhidmatan berjumlah RM10,239,000.00.
> 6. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta dalam apabila gagal mempertimbangkan bahawa peruntukan undang-undang yang terpakai bagi tuntutan kredit cukai input oleh Pemohon/Responden adalah Peraturan 46 Peraturan-Peraturan Cukai Barang dan Perkhidmatan 2014 dan bukan Seksyen 39 Akta Cukai Barang dan Perkhidmatan 2014.
> 7. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa dalam menentukan jumlah kredit cukai input yang layak dituntut oleh Pemohon/Responden, peruntukan-peruntukan berkaitan cukai input iaitu Seksyen 2, 38 dan 39 Akta Cukai Barang dan Perkhidmatan 2014 dan Peraturan 39 Peraturan-Peraturan Cukai Barang dan Perkhidmatan 2014 adalah terpakai dan oleh itu Responden/Perayu berhak untuk membahagikan tuntutan kredit cukai input Pemohon.
> 8. Yang Arif Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa Keputusan yang Dipersoalkan adalah tidak rasional dan tidak munasabah.

24. Based on these grounds, the appellant in its written submissions has helpfully grouped the several grounds into two key contentions, which are as follows:

i) Whether the respondent is a taxable person at the time of the purchase of the Lands on 5 January 2016 which would therefore automatically entitle the respondent to claim input tax credit pursuant to Section 38 and 39 of the GST Act; and
ii) Whether the appellant is empowered to apportion the amount of input tax credit.

Analysis & Findings of this Court

Whether the respondent is a taxable person at the time it acquired the Lands

25. The mainstay of the argument of the appellant is that the High Court was in error when it decided that the respondent was already a taxable person on 5 January 2016. The appellant asserted that it is undisputed that the five plots on the Lands were purchased from M Assets on 5 January 2016 which was prior to the respondent being registered as a 'taxable person'.

26. We should first mention that although the appellant stated that the Lands were purchased on 5 January 2016, this is not quite accurate as the relevant agreement as mentioned earlier was executed on 25 November 2015. However the respondent, we observe, is not taking any issue on this as we believe that what the appellant actually meant was that it was on that date of 5 January 2016 that the input tax was incurred as payments of the purchase price and the GST incurred by the respondent were made on that date to M Assets.

27. The respondent had on 9 December 2015 applied and been approved by the appellant under Section 21 of the GST Act for GST registration. The respondent subsequently incurred GST amounting to RM10,239,000 on 5 January 2016 in purchasing the lease on the five plots of the Lands. Thus, in its first GST Return Form for its first taxable period of 1 March 2016 to 31 March 2016, the respondent included the respondent's ITC Claim in respect of the RM10,239,000 that the respondent incurred.

28. It is generally well-understood that the GST, or in some countries known as Value Added Tax (VAT), is a type of tax levied on importation of goods into the country, as well as most goods sold and services supplied for domestic consumption. It is a consumption based tax on goods and services levied on the value added at each stage of the supply chain but with a refund mechanism in favour of all parties in the chain of production other than the final consumer. It is basically paid by consumers and remitted to the government by the businesses selling the goods and supplying the services.

29. An important feature commonly found in GST regime - which is especially pertinent in the instant appeal - is the concept of the Input Tax Credit (ITC). ITC is the tax that a business pays on a purchase and that it can use to reduce its tax liability when it makes a sale. The ITC provisions permit the recoverability of GST incurred by a taxable person on any purchase of goods or services that are used or will be used for business.

30. The ITC is a key feature that makes possible that GST is chargeable only on a value added by a business. Businesses can thus lower their tax liability by claiming credit to the extent of GST paid on purchases given that the ITC component is the tax that a business pays on a purchase - that it can use to reduce its tax liability when it makes a sale. At the same time, the ITC framework ameliorates the cascading effect of taxes.

31. As GST is a tax on final consumption of goods and services, it is not designed to be a cost to intermediaries and businesses which have to account to the DG of Customs the output tax which they charge to their end consumer when providing taxable supplies. This means that when a taxable person acquires goods from another taxable person for the purpose of using those goods to make a taxable supply, the first-mentioned taxable person will incur input tax which can be set-off against any output tax it has. Output tax will result when a taxable person makes a taxable supply and charges GST to its customers.

32. Therefore, if a taxable person has no input tax to set-off against the output tax, the taxable person will need to remit such output tax collected to the DG of Customs. Conversely, if there is input tax but no output tax, the taxable person is entitled to a refund of such input tax from the DG of Customs. Understood and applied in this manner, there is thus no loss to the authorities if input tax is refunded first to a taxable person as the taxable person will need to account to the DG of Customs for any output tax collected thereafter in the course of making taxable supplies.

33. These concepts are found in the GST Act and should accordingly be construed and applied in terms they are legislated into the statute. The GST Act was however repealed by the Goods and Services Tax (Repeal) Act 2018 with effect from 1 September 2018, but any liability arising under the GST Act will remain. This also raises a point especially relevant to this appeal which will be dealt with later.

34. The crux of the dispute in this appeal as it was before the High Court is the position taken by the DG of Customs that the effect of the definitions of 'taxable person' and 'input tax' in Section 2 of the GST Act, is what the appellant says to be the basic rule that a 'taxable person' is only entitled to claim input tax credit to be deducted from any output tax due from him **after registration** under the GST Act.

35. After having examined the appeal record and the submissions, we find that this stance of the DG of Customs is not supported by the provisions of the GST Act and the GST Regulations. We say so for a number of reasons.

36. The starting point is the charging provision of the GST as found in Section 9 (1) of the GST Act which states among others that GST shall be charged and levied on any supply of goods or services made in Malaysia, including anything treated as a supply under the Act, and any importation of goods into Malaysia.

37. Especially pertinently, Section 9 (2) provides that the tax shall be charged on any supply of goods or services made in Malaysia where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

38. It is in this regard apposite to state the relevant definitions of the following key terms as found in Section 2 of the GST Act:

> "taxable person" means any person who is or is liable to be registered under this Act;
>
> "input tax" means—
>
> (a) tax on any supply of goods or services to a taxable person; and
> (b) tax paid or to be paid by a taxable person on any importation of goods,
>
> and the goods or services are used or are to be used for the purposes of any business carried on or to be carried on by the taxable person;
>
> "taxable supply" means a supply of goods or services which are standard-rated supply and zero-rated supply and does not include an exempt supply;……..

39. It is unmistakably clear from the definition of a "taxable person" which means "*any person who is or is liable to be registered under this Act*" that a taxable person is one who is registered under the GST Act **or one who is liable to be registered under the statute**. As for this latter category, one becomes liable to be registered under Section 20(3) (b) of the GST Act.

40. This provision provides that any person who is not registered but who makes any taxable supply is liable to be registered at the end of any month, where there are reasonable grounds for believing that the total value of all his taxable supplies in that month and the eleven months immediately succeeding the month will exceed the amount of taxable supply specified under subsection (1).

41. In exercise of the powers conferred by Section 20(1) of the GST Act, the Minister published the Goods and Services Tax (Amount of Taxable Supply) Order 2014 and specified that the amount of taxable supply for the purpose of registration under Section 20 (1) of the GST Act 2014 is RM500,000.00.

42. As such, although as correctly submitted by the appellant, without exceeding the GST registration threshold of RM500,000.00, one is not a registered 'taxable person' such that all the tax incurred on a supply would be borne by him and no input tax is claimable, the larger point here is that registration is predicated on a reasonable belief of the taxpayer that the value of all his taxable supplies will exceed the specified RM500,000.00 during the relevant period.

43. Crucially, in such a situation, when he forms such a belief, the taxpayer becomes liable to be registered and thus fulfils the definition of a 'taxable person' under Section 2 of the GST Act, such that from that point in time he attains the status of a taxable person, the entitlement to claim ITC under Section 38 of the same Act is triggered.

44. In the instant case, the respondent, having reasonable grounds to believe, pursuant to Section 20 (3) (b) that the total value of its taxable supplies at the end of that month and 11 months thereafter will exceed RM500,000, had on 9 December 2015 applied and been approved for GST registration under Section 21 of the GST Act. In other words, the respondent became a 'taxable person' under the GST Act even before the respondent incurred the input tax amounting to RM10,239,000 on 5 January 2016 from the acquisition of the lease on the five plots on the Lands.

45. This - that the respondent was a person "liable to be registered" - is by reason that the respondent had reasonable grounds to believe that the total value of its taxable supplies at the end of that month and 11 months thereafter will exceed RM500,000. On this basis the respondent became liable to be GST registered under Section 20 of the GST Act. The effective date of the respondent's registration was 1 March 2016.

46. The appellant appears to seek support for its view on the prerequisite of registration by submitting that Section 38 (1) of the GST Act which governs ITC permits such entitlement to claim attributable to "a time when he is a taxable person".

47. For clarity however, we must stress that the provision reads:

38 Credit for input tax against output tax

(1) Any taxable person is entitled to credit for so much of his input tax as is allowable under section 39 to be deducted from any output tax that is due from him.

48. It is clear as day that this provision simply states that any taxable person is so entitled. There is no mention of registration as a taxable person.

49. In addition, the appellant makes the point that a person who is liable to be registered is any person who makes a taxable supply.

20 Liability to be registered

……

(3) Subject to subsections (5) and (6), any person who is not registered who makes any taxable supply is liable to be registered-

(a) at the end of any month, where the total value of all his taxable supplies in that month and the eleven months immediately preceding the month has exceeded the amount of taxable supply specified under subsection (1); or
(b) at the end of any month, where there are reasonable grounds for believing that the total value of all his taxable supplies in that month and the eleven months immediately succeeding the month will exceed the amount of taxable supply specified under subsection (1).
……

50. However, this provision, which has been mentioned, is one which renders a person who is not registered to be liable to be registered if he makes any taxable supply exceeding the prescribed value of RM500,000.00 in accordance with the situations set out in items (a) or (b).

51. This Section 20 does not provide that a taxable person is only entitled to the ITC Claim from its registration as one. It merely states that a person who makes any taxable supply will be liable to be registered. And once the person becomes one who is so liable under this Section 20 (3) of the GST Act, he would automatically come within the scope of the definition of a 'taxable person' under Section 2 of the same Act.

52. Accordingly, when the law in Sections 38 and 39 on ITC Claim refer to a 'taxable person', it must necessarily pertain to the person who is defined as such in Section 2. In other words, one may be a 'taxable person' under the GST Act without or before being registered as one under Section 21.

53. It therefore follows that Sections 38 and 39 of the GST Act apply in respect of the ITC Claim incurred by the respondent. As stated above, Section 38 (1) clearly provides that any taxable person, such as the respondent herein, is entitled to credit for so much of his input tax as is allowable under Section 39 to be deducted from any output tax that is due from him.

54. Regard should now be had to Section 39 the entirety of which reads as follows:

39 Amount of input tax allowable

(1) The amount of input tax for which any taxable person is entitled to credit in any taxable period shall be so much of the input tax for the period that is allowable and reasonable to be attributable, as may be prescribed, to the following supplies made or to be made by the taxable person in the course or furtherance of any business in Malaysia:

(a) any taxable supply, including a taxable supply which is disregarded under this Act;
(b) any supply made outside Malaysia which would be a taxable supply if made in Malaysia; or
(c) any other supply as may be prescribed.

(2) Input tax attributable to any exempt supply shall be treated as input tax attributable to a taxable supply-

(a) where the value of all exempt supplies would be less than the prescribed amount and less than the prescribed proportion of the total value of all supplies; or
(b) in other prescribed circumstances.

[Emphasis added]

55. In essence, Section 39(1)(a) of the GST Act provides that the amount of input tax shall be so much of the input tax for the period that is allowable and reasonable to be attributable, as may be prescribed, to any taxable supplies. This is further emphasised in Regulation 39(1) of the GST Regulations which essentially provides that the amount of input tax which a taxable person shall be entitled to deduct provisionally shall be that amount which is attributable to taxable supplies in accordance with this regulation.

56. It is in Regulation 39(2)(b) of the GST Regulations which sets out the extent of ITC claimable, to the following effect:

…there shall be attributed to taxable supplies the whole of the input tax on the goods which are used or to be used by him exclusively in making taxable supplies.

[Emphasis added]

57. We make four important observations on the provision of this Regulation 39 (2) (b) vis-à-vis the issues raised in this appeal. First, this makes it clear that the amount of input tax that is allowable and reasonable to

be attributable to any taxable supplies made or to be made by the taxable person under Section 39 has been prescribed under Regulation 39 (2) (b) to be **the whole of the input tax** on the goods which are used or to be used by him exclusively in making taxable supplies.

58. Secondly, there is no necessity to limit the entitlement to ITC to a taxable person only to goods and services purchased that have already been used in making taxable supplies. There seems to be a suggestion on the part of the DG of Customs that this ought to be the treatment. However, such an argument cannot be sustained in light of the clear words of the Regulations which so plainly and specifically refer to the attribution of the input tax to taxable supplies on the goods which **are used or to be used** in the making of the supplies.

59. There is thus no necessity for the purchases in respect of which the taxable person incurs input tax to be matched with the taxable supplies made. This is also consistent with paragraph 30 at page 36 of RMCD's GST Guide for Input Tax Credit which does not require such matching be done to be able to claim input tax credit.

60. Thirdly, related to this Regulation 39(2)(b), whilst Section 38 (1) of the GST Act provides, as mentioned earlier, that any taxable person is entitled to credit for so much of his input tax as is allowable under Section 39 to be deducted from any output tax that is due from him, where however no output tax is due at the end of any taxable period, Section 38(3) provides that (subject to subsections (4) and (5)), the amount of the credit shall be refunded to the taxable person by the RMCD.

61. Fourthly, given the above, there is clearly no provision conferring discretion on or requiring the exercise of discretion by the DG of Customs to apportion the amount of the credit of the input tax claimed by the taxable person under any circumstances.

62. As such in the instant case, the application of Sections 38 and 39 of the GST Act would mean that the whole of the input tax incurred by the respondent on the acquisition of the lease on the five plots on the Lands (which are used or to be used by the respondent for making taxable supplies in the course or furtherance of its business in Malaysia) shall be attributed to the taxable supplies, which such input tax, without any apportionment, ought to be refunded to the respondent.

63. It bears emphasis that where taxable supplies have been made, there is no necessity to show that the goods must all have been used in making the taxable supplies before a taxable person is entitled to a credit of the whole input tax. The RMCD's GST Guide for Input Tax Credit also states that (paragraph 32 at pages 37-38) where the amount of input tax exceeds the amount of output tax, the balance will be refunded, which refund will be made within 14 to 28 days after the return is received (paragraphs 30 and 32 at page 36-38).

64. It is thus inaccurate for the appellant to say that the purchase of the plots of Lands was made (on 5 January 2016) prior to the respondent's registration as a taxable person. As shown earlier, the purchase and the incurrence of tax input was made when the appellant was already a taxable person. Further, although it is also not untrue to state that without exceeding the GST registration threshold of RM500,000.00, one is not a registered 'taxable person' and hence all the tax incurred on a supply would be borne by him and no input tax is claimable, in this case the respondent's ITC Claim did clearly exceed RM500,000.00 and in light of Section 21 which made the respondent to be liable to be registered as a taxable person. The respondent had applied for GST registration on this basis and was duly registered by the appellant under Section 21 of the GST Act on 9 December 2015, effective 1 March 2016.

65. Crucially, like the respondent in this instant case vis-à-vis its ITC Claim, there is no need for a person to be GST registered in order to attain the status as a "taxable person". The scheme of the GST Act in this regard is that a registration under Section 21 means that the person is a taxable person at the date it applied for GST registration. And this category of registration under Section 21 must be contrasted with the other type of registration which is for persons not liable to be registered under Section 24(1) of the GST Act.

66. The respondent was already a person who is liable to be registered and hence a taxable person at the time it incurred the input tax on 5 January 2016. Consequently, the general provisions on claims of input tax by a taxable person applied.

67. In fact, we must emphasise again that under Section 38(3), there is an obligation for the DG of Customs to refund the input tax. The provision reads:

> Subject to subsections (4) and (5), where—
>
> (a) no output tax is due at the end of any taxable period; or
> (b) the amount of the credit entitled by virtue of subsection (1) to the taxable person exceeds the output tax,
>
> the amount of the credit or the amount of credit that exceeds the output tax, as the case may be, shall be refunded to the taxable person by the Director General.
>
> [Emphasis added]

68. There is no necessity that the goods purchased must have been used in making taxable supplies before input tax can be credited to a taxable person. The language of this provision simply states that as long as the goods purchased are **to be used** in making taxable supplies, a taxable person is entitled to claim input tax. A taxable person is entitled to credit for so much of his input tax as is allowable under Section 39 to be deducted from any output tax that is due from him. Where no output tax is due at the end of any taxable period, the amount of the input tax credit **shall be refunded** to the taxable person by the Director of Customs. There is no requirement for the respondent to match its purchases to its taxable supplies, and certainly there is no right for the appellant to apportion the input tax claimed. In any event, in this case, the respondent had made taxable supplies during the time it was GST registered.

69. We cannot disagree with the statement by the respondent that under the GST system, a GST-registered business is allowed to claim an input tax credit that it incurs in the course of its business since GST is a consumer tax and is not usually designed to be a cost to businesses. We reiterate that we find it plain as stated in Sections 38 and 39 of the GST Act, when read together with Regulation 39 of GST Regulations that there shall be attributed to taxable supplies the whole of the input tax on the goods or services which are used or to be used by a taxable person exclusively in making taxable supplies and a taxable person is entitled to a credit of the whole of such input tax. This means that on this basis alone, this appeal must clearly be decided for the respondent.

70. The appellant's first main ground of appeal was the question whether the respondent is a taxable person at the time of the purchase of the Lands. The answer is in the affirmative.

71. As such, the answer to the first key question posed by the appellant is that the respondent is indeed entitled to make its ITC Claim as of right under Sections 38 and 39 of the GST Act read together with Regulation 39 of the GST Regulations because its ITC Claim was incurred when the respondent was already a taxable person, even though it was not yet registered as a taxable person at the time. In other words, in this context, the crucial operative phrase for ITC purposes in those relevant provisions in the GST Act is simply "taxable person" and not, "registered" taxable person. The appellant's position that the ITC claim was not permitted because the appellant was not registered when input tax was incurred represents a plainly erroneous interpretation of the law.

Whether the appellant is empowered to apportion the amount of input tax credit

72. As stated earlier, the DG of Customs did allow the claim for tax credit, but that this was predicated on a different provision of the GST law and even then, for a lower amount. The High Court found that this was also wrong, which leads to this second main ground of appeal posited by the appellant, as to whether the appellant is empowered to apportion the amount of input tax credit.

73. Having examined the facts and considered the law, we again agree with the learned HCJ.

74. It may be recalled that the respondent had on 9 December 2015 been approved for GST registration by the appellant under Section 21 of the GST Act. The respondent incurred GST amounting to RM10,239,000 on 5 January 2016 in its purchase of the lease on the five plots on the Lands. The respondent then duly included its ITC Claim for the said RM10,239,000 that the respondent had incurred in its first GST Return Form for its first taxable period of 1 March 2016 to 31 March 2016.

75. About three years later, in a letter dated 21 August 2020 from the appellant, which was received on 15 September 2020, the appellant stated that it did not allow the full amount claimed in the respondent's ITC Claim but only granted the sum of RM2,320,472.55. The balance of RM7,918,527.45 was disallowed. This decision, according to the appellant, was based on Regulation 46 of the GST Regulations and Section 4 of the Goods and Services Tax (Repeal) Act 2018 ("the GST Repeal Act").

76. The GST Regulations were issued in exercise of the powers conferred by Section 177 of the GST Act. Regulation 46 (1) in force at the material time reads as follows:

46 Exceptional claims for input tax

> (1) Subject to sub regulation (2), the Director General may authorize a taxable person to treat as if it were input tax, any tax paid on the supply of goods to the taxable person before the date with effect from which he was, or was required to be registered, or paid by him on imported goods before that date, for the purpose of a business which was carried on or was to be carried on by him at the time of such supply or payment.

77. From the above it may be readily observed that this provision also concerns input tax credit. In what the title to this Regulation 46 describes as exceptional claim of input tax, the DG of Customs is authorised to allow ITC claim in a situation where the input tax is incurred **before the registration** of a taxable person.

78. However, in our view, this provision must be contrasted with the main requirements on ITC in Sections 38 and 39 and the definition of taxable person discussed earlier. The point that has been established earlier is that a taxable person – a status entitling the person to claim ITC - is not only one who is registered as a taxable person but also a person who is liable to be registered as one. One need not be a registered taxable person to be entitled to make such a claim, provided that the person is liable to be registered as a taxable person.

79. Regulation 46 on the other hand operates somewhat differently because it expressly authorises input tax credit claims when the input tax is incurred before registration. In light of the proper interpretation of the definition of taxable person as discussed above, where input tax credit claims may be allowed under Sections 38 and 39 even before registration provided the person is already liable to register before actual registration, Regulation 46 may be taken to extend to a situation where the input tax is incurred even by the taxable person provided he is yet to be registered.

80. In other words, there is no constraint requiring that the person referred to under Regulation 46 who has not registered must have been liable to be registered at the time the tax was incurred. This also means that input tax incurred before registration by a person who is liable to be registered, like the respondent herein, would fall within the scope of this Regulation 46.

81. However, as has been shown earlier, there is no necessity for the appellant to invoke Regulation 46 to address the ITC Claim submitted by the respondent because the latter's claim could have been answered favourably in the affirmative by a direct application of Sections 38 and 39 of the GST Act read with Regulation 39 of the GST Regulations.

82. Now, even if the appellant was correct in its position (which we have shown not to be the case) that Regulation 46 and not Sections 38 and 39 applied in the respondent's ITC Claim, the bigger bone of contention is the question whether the DG of Customs is authorised to apportion the amount that can be

claimed as input tax credit under this Regulation 46. This is the crux of the appellant's second ground of appeal, as the appellant takes the stance that the DG of Customs has the authority to do so.

83. In the first place, the appellant had from the very beginning considered that only Regulation 46, if at all, and not Sections 38 and 39 would be applicable to the ITC Claim made by the respondent. In response to the ITC Claim by the respondent, the appellant in its letters dated 10 April 2019 and 24 January 2020 stated that the respondent was not eligible to claim the exceptional input tax under Regulation 46 since there was no approval from the DG of Customs and because the respondent did not make any taxable supply in relation to the acquired lease on the Lands from the date the respondent was registered as GST registered person until the repeal of the GST Act with effect from 1 September 2018.

84. Pursuant to further clarifying correspondences which disclosed there were taxable supplies made during the period that the respondent was a GST registered person - specifically that it had disposed of Plot C 13 and C 14 on the Lands to Distinctive Industry on 9 September 2017 and received only 10% of the payments before the repeal of the GST Act - the appellant in its letter of 21 August 2020 informed the respondent of the impugned decision that the allowable ITC Claim was only RM2,320,472.55.

85. Essentially the reduction, in the form of an apportionment, came about due to the assessment by the appellant which determined that only the relief for input tax which was restricted to the period the respondent remained as a GST registered person, from 1 March 2016 to 31 August 2018 before the repeal of the GST Act, should be allowed. In consequence, post-repeal of the GST Act, a considerable proportion of the pre-registration GST input tax incurred, which was unsupported by any corresponding taxable supply generated from the sale of the plots of the Lands no longer became a taxable supply.

86. More specifically, the allowed claim sum of RM2,320,472.55 was arrived at by the appellant adopting the following calculation. The first was that for the three plots on the Lands which had not been sold by the respondent, the appellant allowed the sum of RM2,158,592.55, based on the number of days that the respondent was registered for GST purposes.

87. The second is that - and this is crucial - for the two plots on the Lands which were sold, the appellant allowed the sum of only RM161,880. The reason for this, according to the appellant was that the respondent received only 10% payment from its customer in respect of the said plots during the period that the respondent was GST- registered. In other words, the DG of Customs therefore allowed the respondent to claim only 10% of the GST acquisition amount.

88. The apportionment which resulted in the reduction of input tax credit refund was enforced by the DG of Customs on account of the GST Repeal Act. Specifically, the appellant relied on Section 4 of the Act which reads:

4. Continuance of liability, etc.

(1) Notwithstanding the repeal of the Goods and Services Act 2014 —

(a) any liability incurred may be enforced; or
(b) any goods and services tax due, overpaid or erroneously paid may be collected, refunded or remitted,

under the repealed Act as if the repealed Act had not been repealed.
(2) Notwithstanding the repeal of the Goods and Services Act 2014, sections 178, 181 and 191 of the repealed Act shall continue to remain in operation after the appointed date.

89. In our judgment the approach taken by the appellant is flawed for a number of reasons.

90. First, there is no valid justification for the application of the formula employed by the appellant in making the computation that arrived at the apportionment and reduction on the ITC Claim submitted by

the respondent. In other words, the use of such formulas is not based on any legal provisions, and not prescribed under GST laws.

91. The use of the formula by the appellant which treated the situation differently depending on whether the relevant plots on the Lands in the respondent's ITC Claim had been sold has also resulted in an irrationality. This is because it made little sense that the respondent's entitlement to input tax incurred on lands which have already been sold by the respondent should be **less** than its entitlement to input tax for lands which have not been sold. The plots on the Lands which have been used to make taxable supplies are anomalously somehow in this case given less input tax than lands which have not been used to make taxable supplies.

92. Secondly, Regulation 46 clearly does not provide for any apportionment. Section 4 of the GST Repeal Act too makes no mention of any apportionment or reduction as a consequence of the repeal. There is simply no basis for any apportionment to be made.

93. Not only that. The respondent did make its claim for input tax within six years of the date of supply to it. It is therefore not wrong for the respondent to contend that it has the legitimate expectation that its rights to be entitled to a refund of the full amount of the input tax is preserved regardless of the repeal of the GST Act.

94. Furthermore, the repeal of the GST Act cannot affect any right already accrued or vested before the repeal. For it is clearly stated to such effect in Section 30(1) of the Interpretation Acts 1948 and 1967, the pertinent parts of which read as follows:

30. Matters not affected by repeal

(1) The repeal of a written law in whole or in part shall not-

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

……..

[Emphasis added]

95. It is our view and this cannot be emphasised enough, the GST Repeal Act cannot be construed to in effect retrospectively impair the respondent's right, already accrued, existing and vested, to be refunded with its claim for input tax credit given the conspicuous absence of any provisions authorising such apportionment.

96. Thirdly, the plain fact is the respondent incurred the GST amount and made the claim for the requisite ITC refund way before the repeal of the GST Act on the basis of its entitlement to a refund under the aforesaid Section 38(3) of the GST Act, before the repeal of the GST Act. It is not an exaggeration for the respondent to say that it is unfair that the respondent had to suffer the lower input tax refund due to the repeal of the GST Act over which it had no control.

97. As can be readily appreciated from its very words, for present purposes, Section 4 (1) (b) of the GST Repeal Act in essence means that notwithstanding the repeal of the GST Act, any GST overpaid may be refunded under the GST Act as if it had not been repealed.

98. Fourthly, and in any event, as the appellant had stated, it was guided by Section 39 and Regulation 39 in determining the amount of input tax claimable under Regulation 46. It is difficult however to appreciate the nexus, but as mentioned earlier, Section 39 and Regulation 39 do not in any case permit any apportionment of input tax where the input tax is for goods used or to be used in making taxable supplies. Instead, it is worthy of emphasis that Regulation 39(2)(b) plainly states that the whole input tax ought to be attributed to the taxable supplies made by the taxable person, of which the respondent was one at the material time.

99. And a true observance of Section 39, as mentioned earlier, would not only mean that a taxable person is entitled to credit so much of the input tax that is allowable and reasonable to be attributable to taxable supplies made or to be made in the course or furtherance of any business in Malaysia, but that what is allowable and reasonable to be attributable is already prescribed under Regulation 39(2)(b) of the GST Regulations. At the clear risk of repetition this provides that, where the input tax is for goods used or to be used in making taxable supplies, the **whole** input tax is to be attributed to the taxable supplies made by the taxable person. Apportionment we reiterate is not envisaged at all.

100. For the above reasons, we are of the view that the decision of the appellant not to allow any refund under Section 38 of the GST Act despite the clear provisions authorising the same, and its decision to invoke Regulation 46 to apportion the respondent's ITC Claim which allowed only the reduced amount of RM2,320,472.55 and disallowed the rest are not only erroneous, but also ultra vires, in excess of the appellant's authority, unreasonable as well as an illegality, the net effect of which more than justified the learned HCJ to have allowed the judicial review of the said impugned decision, against the appellant.

101. We venture to make the important observation that the approach taken by the appellant in arriving at the impugned decision which allowed only the sum of RM2,320,472.55 but disallowed that considerable portion of the ITC claim of the respondent amounting to RM7,918,527.45 - in not directly applying Sections 38 and 39 of the GST Act and Regulation 39 of the GST Regulations, and in resorting to Regulation 46 instead as well as invoking Section 4 of the GST Repeal Act, all in the fashion that the appellant did, as shown and discussed earlier, inescapably demonstrated a manifest failure to properly interpret and apply the provisions of the GST laws.

102. Failure to apply the provisions of the laws aside, this additionally unmistakably runs contrary to the well-entrenched rules on statutory interpretation, especially tax statutes. We restate them here to show how they have not been properly observed.

103. In the first place, a taxing statute ought to be read strictly without reading or implying into it any spirit, intendment or any equities. Only the express words as so legislated matter. In *National Land Finance Cooperative Society Limited* v *Director General Inland Revenue* [1994] 1 MLJ 99 Gunn Chit Tuan CJ (Malaya), for the Supreme Court stated as follows:

> "There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* it was held that a subject was not to be taxed without clear words. We realize that revenue from taxation is essential to enable the Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners*:
>
> > … in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used …
>
> It has also been said by the Judicial Committee in *Oriental Bank Corp v Wright* 10 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language'."

[Emphasis added]

104. Secondly, related to the first is that as stated by the Supreme Court in *NKM Holdings Sdn Bhd* v *Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 the duty of the Court, and its only duty, is to expound the language of the statute in accordance with the settled rules of construction. The Court has nothing to do with the policy of any Act which it may be called upon to interpret.

105. Thirdly, any ambiguity in tax statutes ought to be resolved in a construction that favours the taxpayer. This was made clear by the Court of Appeal in *Exxon Chemical (M) Sdn Bhd* v *Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 which followed *National Land Finance* (supra). Gopal Sri Ram JCA (as he then was) affirmed such interpretation in the following terms:

> "[10] In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see *National Land Finance Co-operative Society Ltd* v *Director General of Inland Revenue* [1994] 1 MLJ 99). The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head".

106. Fourthly, a tax statute ought not to be interpreted in a fashion that would result in absurdity or injustice. In *Palm Oil Research and Development Board Malaysia & Anor* v *Premium Vegetable Oils Sdn Bhd & Anor* [2005] 3 MLJ 97 the Federal Court held that whilst Parliament via Section 17A of the Interpretation Acts 1948 and 1967 requires the Court to adopt a purposive approach, and this includes in respect of a taxing statute, the Court is under a duty to adopt an approach that produces neither injustice nor absurdity, but one that promotes the purpose or object underlying the particular statute. *Palm Oil Research* is also an authority for the other trite principle that a subsidiary legislation cannot conflict with the parent statute.

107. Fifthly, specific words which appear in different provisions of a legislation must be consistently interpreted and applied in the same sense. An important corollary to this is that a statutory provision cannot be interpreted in such a way to negate the effect of another provision of the same statute (see *Cheow Keok* v *Public Prosecutor* [1940] 9 MLJ 103).

108. In light of the above analysis it is abundantly clear that the learned HCJ was entirely correct in her determination that the respondent was a taxable person at the time it incurred the input tax and that in any event, the appellant had no power to apportion the respondent's ITC refund claim under Sections 38 and 39 of the GST Act read with Regulation 39 of the GST Regulations nor under Regulation 46.

109. The appellant made much of its argument that key principles which are derived from the relevant provisions of input tax recovery in Sections 2, 38 and 39 of the GST Act as well as Regulation 39 of the GST Regulation include that the amount of input tax claimable must be 'allowable and reasonable' (Section 39 (1) GST Act); that it must be 'attributable to taxable supplies' (Regulation 39 (1) of GST Regulation); that the attribution must be 'used or are to be used' for a 'taxable supply' (definition of 'input tax' in Section 2 GST Act); and that the 'taxable supply' was 'made by the taxable person in the course or furtherance of any business in Malaysia' (Section 39 (1) GST Act). Essentially, the appellant stressed that the entitlement of a 'taxable person' to input tax recovery is so much that is 'allowable' and 'reasonable'.

110. The contention of the appellant was that it was therefore incorrect of the High Court to find that merely because the formula of apportionment devised and applied by the appellant is not explicitly provided for under the GST Act or the Regulations, the appellant does not have the authority to impose the additional condition such as the length of time one remained a registered/taxable person (in turn due to the repeal of the GST Act) vis-à-vis the determination of the quantum of input tax recoverable by the applicant such as the respondent herein.

111. We cannot agree with this line of argument. This is because the complete answer to the appellant's reliance on the stance that an entitlement to input tax credit should only be so much that is 'allowable'

and 'reasonable' is that that amount of input tax under Section 39(1) of the GST Act that is "allowable and reasonable" to be attributable as mentioned above, is already stated in Section 39(1) to be **"as prescribed in regulations 39 of the GST Regulations"**.

112. Section 39, as stated earlier, specifically states that what is "allowable and reasonable" is qualified by what is prescribed in Regulation 39. Regulation 39 (1) we repeat states that:

> Subject to regulation 43, the amount of input tax which a taxable person shall be entitled to deduct provisionally shall be that amount which is attributable to taxable supplies in accordance with this regulation.

113. Importantly Regulation 39(2)(b) provides, as mentioned earlier, that the attribution to taxable supplies shall be the **whole** of the input tax on the goods or services which are used or to be used by him exclusively in making taxable supplies.

114. For completeness and at the risk of repetition the appellant itself acknowledged that a taxable person could claim input tax without matching his purchases (from which he incurred input tax) with the taxable supplies he made. Moreover, based also on RMCD's GST Guide for Input Tax Credit the appellant acknowledged that where the amount of input tax exceeds the amount of output tax, the balance will be refunded, which is in consonance with Section 38(3) which states that where no output tax is due at the end of any taxable period, the amount of the credit shall be refunded to the taxable person by the appellant.

115. For this reason and indeed as a matter of logic, even if the appellant is unable to recover the entire GST due to the repeal of the GST Act, the taxpayer intermediary businesses should not be made to bear the same as that runs contrary to the scheme of GST. If input tax is not allowed to be claimed and refunded, as rightly highlighted by the respondent, it will be the businesses like the respondent who suffers out of pocket. In any event, the GST Repeal Act itself clearly provides that any GST overpaid is to be refunded and any refund for input tax under Section 38 of the GST Act shall be paid by the appellant within six years from the repeal of the GST Act.

116. It should also be appreciated that unlike in certain other provisions in the GST Regulations which do provide for certain method or formula for calculation such as Regulation 33 which prescribes the formula to determine adjustment on input tax or output tax where there is a change in accounting basis; Regulation 39(2)(d) which sets out the formula to calculate the recoverable percentage of residual input tax; Regulation 52 which states the formula to calculate the input tax allowable for certain financial institutions; and Regulation 59 which prescribes the formula for adjustments to deductions of input tax on capital assets, no such formulation is however found in Regulation 46. This further weakens the position taken by the appellant.

117. We are mindful that in support of its stance, the appellant submitted that the Court of Appeal in *Ketua Pengarah Kastam v Nobuyasu Sdn Bhd & Anor* (Civil Appeal No: W-01(A)-161-03/2020) on 20 January 2021 set aside the High Court's finding that the law does not allow the DG of Customs to apportion a taxpayer's claim for input tax credit under Regulation 46 of the GST Regulations (see *Nobuyasu Sdn Bhd* v *Tribunal Rayuan Kastam Diraja Malaysia & Anor* [2020] 11 MLJ 182). In addition, the Court of Appeal has more recently (on 23 June 2023) also allowed the appeal in the case of *Ketua Pengarah Kastam v Jimah East Power Sdn Bhd* (Rayuan Sivil No W-01(A)-601-11/2020) where the High Court in that case had in a judicial review, quashed the DG of Customs' determination that approved only a nominal portion of the taxpayer's claim for exceptional input tax under the Regulation 46 (1) of the GST Regulations.

118. Essentially it was argued by the appellant that its decision in the instant case before us is well in accord with these recent decisions of the Court of Appeal in *Nobuyasu* and *Jimah East*, which according to the appellant, did not strike down the apportionment ordered by the appellant.

119. We observe however that although the decisions of the High Courts in *Nobuyasu* and *Jimah East* have been reversed by the Court of Appeal, there are no written grounds of judgment released by the Court.

120. Perhaps more pertinently, we agree with the submission of the respondent that *Jimah East* can be readily distinguished from the case before us predominantly because unlike in *Jimah East* where the claim for input tax credit was submitted on the basis of Regulation 46 on exceptional input tax credit, the claim by the respondent was an ordinary one for its right to input tax credit under Sections 38 and 39 of the GST Act and Regulation 39 of the GST Regulations.

121. Most importantly, the taxpayer in *Jimah East*, as shown by its claim under Regulation 46, made the claim in respect of its taxable supplies prior to it being GST registered. In sharp contrast, the respondent herein had made taxable supply when it was already a taxable person/GST registered, hence the relevance of Section 38 of the GST Act. We also do not disregard the contention made by the respondent that it was not drawn to the attention of the Court of Appeal in *Jimah East* that the amount of input tax attributable is already prescribed in Regulation 39(2)(b) to be the whole of the input tax.

122. We must nonetheless refer to the decision of the High Court in *Primary Goldennet Sdn Bhd v Ketua Pengarah Kastam dan Eksais dan Tribunal Rayuan Kastam* (Saman Pemula No WA-24-77-12/2019) where the taxpayer in that case, like the respondent in the instant case before us, had incurred tax prior to being registered for GST. There its claim to treat the tax incurred on taxable supplies as exceptional input tax under Regulation 46 was met with a decision by the DG of Customs which like in the instant case before us had similarly apportioned the amount of input tax claimed by the taxpayer based on its own formula.

123. The High Court in *Primary Goldennet* held that Regulation 46 does not provide for any computation method or formula which can be applied by the DG of Customs, such that it does not have the power to determine the eligibility of the exceptional input tax claim without express powers under the law, rendering the apportionment of the exceptional input tax credit being wrong in law. Significantly, this decision has been affirmed by the Court of Appeal in *Ketua Pengarah Kastam dan Eksais v Primary Goldennet Sdn Bhd dan Tribunal Rayuan Kastam* (Civil Appeal No: W-01(A)-641-12/2020).

124. In our view, the case before us therefore has greater affinity with *Primary Goldennet*, especially given the fact that the taxpayers in both cases had made taxable supplies during the time they were already GST registered. In these two cases, they were already taxable persons at the time the relevant input tax was incurred, unlike in cases relied on by the appellant. We repeat that in any event, the provisions on claiming of input tax credit under Sections 38 and 39 of the GST Act and Regulation 39 of the GST Regulations are sufficient to decide the issue at hand on the respondent's ITC Claim without having to resort to Regulation 46 at all.

Conclusions & Decision

125. We are thus satisfied that this is clearly a case that the respondent could validly make out its claim for input tax credit by virtue of the express statutory words of Sections 38 and 39 of the GST Act read with Regulation 39 of the GST Regulations.

126. The appellant's decision not to apply these provisions was one made in error. The appellant plainly did not observe the well-established rules on statutory interpretation - especially on taxing statutes - in having decided the manner it did. Further, the appellant's insistence that the respondent's claim fell under the exceptional input tax claim pursuant to Regulation 46 of the GST Regulations instead is also erroneous - because the respondent had made the requisite taxable supplies when it was already a taxable person, and even GST registered, and not before.

127. In any event, the appellant's decision under the said Regulation 46 to allow only a portion of the respondent's claim based on its own non-legally prescribed formula is also wrongful in the absence of any provisions in GST laws which authorise any form of apportionment.

128. Surely, the DG of Customs can only apply what is prescribed under the GST Act and GST Regulations (and the GST Repeal Act). There is no discretion to direct any apportionment. Its decision to apportion is

ultra vires the GST Act and the GST Regulations. In other words, the appellant had acted in excess of its authority.

129. In light of authorities authorising judicial intervention in judicial review cases such as the Court of Appeal decision in *Malaysian Oxygen Bhd* v *Soh Tong Wah and another appeal* [2015] 3 MLJ 730 we find that in making the impugned decision, the appellant had so manifestly taken into consideration factors that ought not to have been taken into account and had at the same time failed to take into account factors that ought to have been taken into consideration.

130. The appellant did not consider the express provisions of the GST Act and GST Regulations, the well-established principles of construction of taxing statutes, the generally understood concept of GST which is meant to be a tax on consumers and not a cost to businesses; and the respondent's vested rights which are not impaired by the repeal of the GST Act.

131. At the same time, such errors were exacerbated by the appellant having taken into consideration matters it should not have, including its own take on the effects of the repeal of the GST Act which made it disallow a considerable portion of the respondent's ITC Claim despite the respondent having incurred the GST amount of RM 10,239,000 and was therefore already legally entitled to a refund way before the repeal. Similarly, the appellant did not take into consideration provisions of the GST Act and GST Regulations which so clearly state that where input tax credit becomes due to a taxable person at the end of a taxable period, the appellant is required to make the refund of input tax credit to a taxable person.

132. It was accordingly not wrong for the High Court to have found that, given the above analysis, no reasonable authority would have decided in the same manner the appellant did. It has been shown that the appellant had disregarded the express provisions of the GST Act and GST Regulations to refund input tax credit due to taxable persons, the provisions of its own guidelines which provide that a taxable person can claim input tax without matching his purchases (from which he incurred input tax) with the taxable supplies made. And in particular no reasonable authority would have apportioned or reduced the respondent's ITC Claim more so by employing different formulas or methods of calculation for different elements of the claim, especially when that reasonable authority was not empowered to do so under the applicable legislation.

133. We would think that no reasonable authority would have disregarded the express provisions of Section 4 of the GST Repeal Act to refund amounts overpaid as if the GST Act had not been repealed; ignored the respondent's entitlement to input tax incurred on plots of land which have already been sold by the taxpayer to be less than that for plots of land which have yet to be sold; disregarded the respondent's legitimate expectation that it would be entitled to the full refund, also especially that the GST amount was incurred and the claim made before the repeal of the GST Act.

134. The impugned decision of the appellant is therefore ultra vires, in excess of authority, unreasonable and runs contrary to the doctrine of legitimate expectation.

135. For the above reasons, we affirm the decision of the High Court and dismiss this appeal, with costs to the respondent.

For the Appellant

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For the Respondent

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