

## PP v. BILLION NOVA SDN BHD &amp; ORS

HIGH COURT SABAH & SARAWAK, MIRI  
STEPHEN CHUNG J[CRIMINAL APPLICATION NO: MYY-44-4-9-2013]  
29 SEPTEMBER 2014

**CRIMINAL LAW:** *Money laundering – Forfeiture – Application to forfeit properties seized – Allegation that first respondent sold cigarettes and liquor to buyers outside duty free port to unknown buyers in Malaysia – Deposits made into first respondent's account were stated as 'cash sale-cigarette' – First respondent transferred several big sums of money into accounts of third, fourth and fifth respondents – Whether respondents engaged in money laundering which entitled prosecution to seize and to forfeit sums in bank accounts – Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 56(1), 61(2) – Customs Act 1967, ss. 135(1)(g), 155(1)(b)*

In the present application, the Public Prosecutor ('PP') applied under ss. 56(1) and 61(2) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') to forfeit the properties belonging to the respondents in 25 bank accounts amounting to RM1,340,737.10, which have been seized under s. 56(1) of the same Act. The sum had been obtained as a result of alleged smuggling activities carried out by the respondents. The PP did not institute any prosecution against the respondents for any offence and none of them had been convicted for any offence under the Customs Act 1967 ('the Act'). The PP submitted that based on investigation by the investigating officer ('IO'), the first respondent sold cigarettes and liquor to buyers at a place outside Labuan, which was an offence under s. 135(1)(g) of the Act. Sixteen deposits made into the first respondent's account were stated as 'cash sale-cigarette'. The first respondent then transferred several big sums of money from its account into the accounts of the third, fourth and fifth respondents which totalled up to RM1,044,480. According to the PP, the respondents could not explain why the accounts did not tally with the buyers' account and statements. The first respondent had allegedly exported or sold duty free cigarettes from Labuan to unknown buyers in Malaysia. The proceeds from the sales were paid in Miri and Kota Kinabalu and the PP submitted that the acts of the respondents in failing to pay tax for the sales formed a case of smuggling and contravened s. 135(1)(g) of the Act. The issues that arose for the court's determination were: (i) whether the respondents sold the cigarettes in contravention of the Act or were engaged in money laundering which entitled the PP to seize and to forfeit the sums in the bank account; and (ii) whether the cigarettes were sold and delivered to the purchasers in Labuan.

**A Held (dismissing application):**

- (1) The freezing or seizures of the accounts were set aside. The PP failed to establish, on a balance of probabilities, that the respondents were involved in money laundering or in unlawful activities or that the proceeds in the bank accounts were or are the proceeds from unlawful activities or for the purpose of money laundering. (para 53)
- (2) There was no explanation as to why the second respondent was included in this application. The PP did not seize any bank account of the second respondent and had not applied to forfeit any money in any bank account of the second respondent. There was no evidence led that the second respondent was involved in selling duty free cigarettes or involved in smuggling them or that he was involved in money laundering. The application against the second respondent ought to be struck out. (para 35)
- (3) Although the PP contended that based on documents exhibited, the cigarettes were sold outside Labuan, no direct evidence was led that the first respondent and/or the other respondents had transported or exported duty free cigarettes from Labuan which were sold in Miri or Kota Kinabalu. There was also no evidence led that the cigarettes were sold in Malaysia and that they were intended to evade customs or import duty. (para 36)
- (4) There was no evidence that the cigarettes in the 16 transactions described as 'cash sale-cigarette' which the IO said were paid for in Miri, were sold or delivered to the purchasers outside Labuan or in Miri or Kota Kinabalu. Furthermore, the PP did not refer to any provision or regulations under the Act or any legislation that duty free cigarettes sold in Labuan must be paid in Labuan or could not be paid for in Miri or elsewhere. Similarly, the PP did not refer to any Bank Negara regulations or directives that duty free cigarettes sold in Labuan must be paid in Labuan or could not be paid in Miri or Kota Kinabalu. (paras 39 & 41)
- (5) There is no provision in the Act against any sale outside Labuan. Section 155(1)(b) of the Act provides that no export duty shall be payable upon any goods exported from Labuan. If the goods were imported or transported to Malaysia from Labuan or Langkawi, then s. 155(1)(c) provides that import duty shall be payable upon all dutiable goods transported to the principal customs area from Labuan or Langkawi to all intents as if such transportation to the principal customs area were importation into Malaysia (para 42).
- (6) The IO did not affirm that he is or was an accountant or an expert in accounts or auditing or accounting or forensic accounting. The IO did not connect with each 'cash sale-cigarette' or each transaction or sale of cigarettes to each smuggling of cigarettes or unlawful sales of cigarettes

or which were in contravention of the Act. The PP did not exhibit any report by any accountant or expert to trace or connect the entries in the ledgers or accounts with any smuggling of cigarettes or unlawful sales of cigarettes or that these proceeds or payments were derived from unlawful activities or for money laundering (para 50).

- (7) The IO did not produce any report from the Inland Revenue or Tax Department that the respondents had evaded income tax or other taxes which contravened any law. There was no report by Bank Negara or any other banks that these bank accounts or the proceeds in the bank accounts were involved in money laundering. Hence, the PP could not show that the transactions or payments into the bank accounts of the third, fourth and fifth respondents were proceeds from unlawful activities (paras 50 & 51).

**Case(s) referred to:**

*PP v. Dragcom Sdn Bhd & Ors and Other Cases* [2013] 10 CLJ 628 HC (*refd*)

*PP v. V Alexandra a/l Chako Vanglise (and another case)* [2010] 8 AMR 159 (*refd*)

**Legislation referred to:**

Anti-Money Laundering and Anti Terrorism Financing Act 2001, ss. 2(1), (2), 4(1), 50(1), 56(1), (2), (3), (4), 61(2), (4)

Customs Act 1967, ss. 119, 135(1)(g), 154, 155(1)(a), (b), (c), 158, 163A, 163B(1)(a), (b)

Sales Tax Act 1972, s. 73(a)

*For the applicant - Noor Zalizan Lazarous (Aida Mastura with her); DPPs*

*For the respondents - Arthur CA Lee; M/s Arthur CA Lee & Partners, Advocates*

*Reported by Najib Tamby*

**JUDGMENT**

**Stephen Chung J:**

[1] On 19 September 2013, by a notice of motion, the applicant applied to the High Court at Miri, that the properties belonging to the respondents in twenty-five (25) bank accounts in Labuan and Miri, which have been seized under s. 50(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) ('Act 613'), be forfeited under s. 56(1) and s. 61(2) of the Act.

[2] In the application it was stated that the Public Prosecutor (PP) was satisfied that the properties seized by the investigation officer (Penguasa Kastam Ahmad bin Talib) (referred to as the IO) from the 'Polis DiRaja Malaysia on 25 June 2012' were properties that had been obtained as a result of or in connection with an offence under s. 4(1) of Act 613. On 4 August 2014 the applicant applied to amend this statement to read instead as the 'Kastam Di Raja Malaysia on 21 September 2012'. The respondents did not object to this amendment and the court allowed the amendment.

- A [3] Based on the affidavits, the monies in the 25 bank accounts amounting to RM1,340,737.10 were seized on 21 September 2012. The PP did not institute any prosecution against any of the five respondents for any offence and none of them has been convicted for any offence under Act 613 nor under the Customs Act 1967. However it was contended that these sums had
- B been obtained as a result of or in connection with smuggling activities carried out by the respondents. The PP accordingly applied under s. 56(1) of Act 613 that the monies in the 25 bank accounts be forfeited because such properties had been obtained as a result of or in connection with an offence of money laundering under s. 4(1) of the Act.
- C [4] Reading the application, affidavits and submissions, the PP submitted that based on an investigation conducted by the IO the first respondent sold cigarettes and liquor to buyers where the transactions occurred at a place outside Labuan and that the respondents had committed an offence under s.135(1)(g) of the Customs Act by knowingly being concerned in fraudulent
- D evasion or attempt at fraudulent evasion of customs duty or in evasion or attempt at evasion of any prohibition of import or export. The grounds of the application were set out in the affidavit in support of the IO affirmed on 18 September 2013 ('first affidavit') and in another affidavit also affirmed on the same date and time marked as exh. 'AT10(4)' ('second affidavit').
- E [5] It must be stated that the marking of the exhibits by the PP was confusing. The exhibits attached to the first affidavit of the IO were marked as exhs. 'AT1', 'AT8 2', 'AT3(a) to (o)', 'AT4(a)-(b)', 'AT5', 'AT6', 'AT7', 'AT8', 'AT9' and 'AT10 (1) to (4)'. The second affidavit of the IO which was affirmed on the same date and time was annexed to the first affidavit and
- F marked as exh. 'AT10 (4)'. However the exhibits attached to the second affidavit were similarly marked as exhs. 'AT1' until 'AT8'. When the IO referred to exh. 'AT1', he did not explain which 'AT1' he was referring to. Any exhibits to be marked must be in running numbers and not be repeated to avoid confusion.
- G [6] Further, the PP exhibited about 1,000 pages of the ledgers, trial balances and balance sheets of the first respondent annexed to the affidavits of the IO. However there was no pagination for easy reference. When the IO referred to a certain entry or entries in the ledger, he did not refer to the page where the entries appeared in the ledger, the significance of the entries and
- H whether these involved or were connected with money laundering.
- I [7] Act 613 is an Act to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of terrorist property and property involved in, or derived from, money laundering and terrorism financing offences, and for matters incidental thereto and connected therewith. Section 2(1) states that this Act shall apply to any serious offence, foreign serious offence or unlawful activity whether committed before or after the commencement date of this Act. "Serious offence" means any of the

offences specified in the Second Schedule or an attempt to commit any of those offences or the abetment of any of those offences. Section 135 of the Customs Act has been included in the Second Schedule as one of the serious offences. Section 2(2) provides that this Act shall apply to any property, whether it is situated in or outside Malaysia.

**[8]** Section 4(1) of Act 613 provides for an offence of money laundering which states that any person who (a) engages in, or attempts to engage in; or (b) abets the commission of, money laundering, commits an offence. In the definition section, money laundering is defined as the act of a person who:

- (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
- (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity;

where:

- (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any 1 unlawful activity; or
- (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity ...

**[9]** There are two parts in this definition. Firstly, the act of a person who *inter alia* engages in a transaction that involves proceeds of any unlawful activity or receives proceeds of any unlawful activity and secondly he knows or has reason to believe that the property is proceeds from any unlawful activity or fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity. The burden is on the PP to prove both these ingredients using the standard of proof required in civil proceedings: see s. 56(4) of Act 613; *Pendakwa Raya v. V Alexandra a/l Chako Vanglise (and another case)* [2010] 8 AMR 159.

**[10]** Under s. 56(1), in respect of any property frozen or seized under this Act where there is no prosecution or conviction for an offence under sub-s. 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of 12 months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under sub-s. 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

A [11] Section 56(2) states that the judge to whom an application is made under sub-s. (1) shall make an order for the forfeiture of the property if he is satisfied:

(a) that the property is the subject matter of or was used in the commission of an offence under sub-s. 4(1) or a terrorism financing offence or is terrorist property;

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(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

C Under s. 56(3) any property that has been seized and in respect of which no application is made under sub-s. (1) shall, at the expiration of 12 months from the date of its seizure, be released to the person from whom it was seized. The bank accounts were seized on 21 September 2012 and this application for forfeiture was made on 19 September 2013. There was no objection or complaint by the respondents that it was outside the 12 months as provided in s. 56 of Act 613: see *PP v. Dragcom Sdn Bhd & Ors and Other Cases* [2013] 10 CLJ 628; [2013] 5 MLJ 594.

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[12] Under s. 61(2) of Act 613 the judge to whom an application is made under s. 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited. After the Gazette was published, no third party had come forward to claim any of the monies in these accounts except the respondents who held these accounts. Therefore the provisions of s. 61(4) are not applicable to this application for the forfeiture of the proceeds in these 25 accounts.

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[13] In his first affidavit, the IO affirmed that the first respondent was incorporated with an address in Labuan and with its business to import and export beers, liquors and cigarettes. The other respondents were the shareholders and directors of the first respondent (see exh. 'AT1').

G [14] He affirmed that from his investigation the 1st respondent had bought cigarettes from two companies ie, Lihan Trading and Syarikat Jayapuri in Miri to be sold in Labuan. He said that under s. 154 and s. 155(1)(a) of the Customs Act, Labuan is a duty free port, all cigarettes imported into Labuan were accorded with the status 'Malaysia Duty Not Paid' and such cigarettes could only be sold in Labuan. He said any cigarettes transported or exported from Labuan into Malaysia would be subject to duties under s. 155(1)(c) of the Customs Act. There are similar provisions in ss. 163A and 163B in respect of the duty free status of Langkawi.

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I [15] The IO affirmed that from his investigation there were 82 payments made into the first respondent's bank account bearing no. 3-0659180-25 at Public Bank in Labuan. Out of these, 81 payments were made *via* Public Bank in Miri and one *via* Public Bank in Kota Kinabalu. He said these 82



deposits or transactions made into this account in Labuan amounted to RM2,675,090. Out of these, 16 deposits were *via* 'cash sale-cigarette' between 1 July 2009 to 30 June 2011.

[16] He said that he had interviewed one Toh Kah Tiong, who is the son of the second respondent, and the elder brother of the Toh Kah Ming who is the manager of the first respondent. He said Toh Kah Tiong told him that Toh Kah Ming had instructed Toh Kah Tiong to bank in RM68,800 into the account of the first respondent being the proceeds from the sales of cigarettes which he received from a person from Brunei but he did not know where the sales were carried out.

[17] He said from his investigation the first respondent had transferred several big sums of money from this account in Labuan into the accounts of the third, fourth and fifth respondents, for example the sum of RM366,630 into the bank account of the fourth respondent (see para. 18 of his first affidavit). He said the 1st respondent had transferred a total of RM1,044,480 into the bank accounts of the third, fourth and fifth respondents between 2009 and 2011. He said there was no explanation for these transfers or the purposes for these transfers.

[18] The PP submitted that based on the transactions concerning these bank accounts, the respondents did not and could not explain why the accounts did not tally with the buyers' account and statements. It was submitted that if the sales were conducted in Labuan, as the respondents had contended, the evidence showed that the payments were made outside Labuan *via* cash deposit slips made in Miri.

[19] The IO believed that from his investigation the first respondent had exported or sold 'Malaysia Duty Not Paid' cigarettes from Labuan *via* cash sales or fictitious sales to unknown buyers in Malaysia. He said these sales were outside Labuan because the proceeds from the sales were paid in Miri and Kota Kinabalu. The PP submitted that the acts of the respondents in failing to pay tax for the sales conducted outside Labuan had contravened the provisions of s. 135(1)(g) Customs Act and therefore an offence under s. 4(1) of Act 613. The PP submitted that this is a case of smuggling.

[20] The PP submitted that it relied on documentary and circumstantial evidence and that it had established its case against the respondents. The PP submitted that the applicant only need to show that there was a link between the properties seized with the predicate and AMLATFA case in order to establish this application and that it has done so on a balance of probabilities, also referring to s. 56(4) of Act 613.

[21] The PP further submitted that by virtue of s. 119 of the Customs Act, the burden of proof was on the respondents to show that the respondents did not commit the offence as alleged by the applicant.

- A [22] The respondents submitted that it was the duty of the prosecution to prove on a balance of probabilities that the monies in the various bank accounts of the respondents seized were the subject matter of or used in the commission of an offence under s. 4(1) of Act 613.
- B [23] The respondents submitted that the first respondent is a private company with the second to fifth respondents being the shareholders and directors; that the first respondent did not have any third party or parties who have directly or indirectly invested sums of monies in it; and that the 1st respondent's business was purely selling duty free liquor and cigarettes in Labuan.
- C [24] The respondents submitted that Toh Kah Ming had affirmed an affidavit opposing the application stating that the goods at all times were sold in Labuan and Langkawi, both duty free zones. The respondents referred to s. 155(1), s. 158, s. 163B(1)(a) and s. 163B(1)(b) of the Customs Act that no import duty or export duty into Labuan and Langkawi shall be payable and that under s. 73(a) of the Sales Tax Act no sales tax shall be payable upon any taxable goods imported into Labuan or transported into Labuan. The respondents submitted therefore they did not contravene the Customs Act.
- D [25] The respondents submitted that the respondents' case was supported by the investigation of the IO in para. 6 of the IO's first affidavit where he said that from his investigation the first respondent either sold the cigarettes in Labuan or using a Customs Form 8 *via* an associate company Orion Nova in Langkawi. The respondents submitted that the investigation of the IO confirmed the respondents' contention that the cigarettes were sold in Labuan and Langkawi.
- E [26] The respondents submitted that the prosecution was not able to prove that the sales occurred outside Labuan. It was submitted that under Act 613 no presumption could be inferred from the deposits or payments made into the bank accounts of the first respondent in Labuan, which were made from outside Labuan, meant that the sales were therefore made outside Labuan and subject to duties or taxes. It similarly submitted that no such presumption could be inferred from the cash sales that the sales were therefore made outside Labuan.
- F [27] It was submitted that in the absence of such presumptions, it was incumbent on the prosecution to show actual evidence that the goods were sold outside Labuan. The respondents submitted that the prosecution has failed to do so against the respondents and the application to forfeit the properties in the bank accounts of the respondents should be dismissed.
- G [28] In prayer 1(i) of the application, the PP applied to forfeit the sum of RM195,573.67 in the first respondent's bank account no. 3-0659180-25 at Public Bank, Labuan. This sum was seized by the IO on 21 September 2012 under s. 50(1) and pursuant to a notice of seizure under s. 51(1)(a) of Act 613 (see exh. 'AT1' annexed to the second affidavit of the IO). This exh. 1
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referred to the first respondent's bank account no. 3-2 0659180-25 at Public Bank and the fifth respondent's bank account no. 1-2067980-14 at Public Bank. It did not state or refer to the sum of RM195,573.67 or any sum to be seized.

**[29]** The IO did not exhibit any bank statement or document nor produce any evidence to establish that this sum of RM195,573.67 was in fact in the first respondent's bank account no. 3-0659180-25 at Public Bank, Labuan as at 21 September 2012 which could be seized or could be forfeited. The IO did not explain why he included the fifth respondent's bank account No. 1-2067980-14 at Public Bank in this notice of seizure. He also did not explain the connection between these two accounts which he had seized under 'AT1'.

**[30]** The IO also did not explain whether there was any connection between the first respondent's bank account no. 3-0659180-25 at Public Bank, Labuan and the third respondent's bank account no. 37560035192 at Hong Leong Islamic Bank, because both accounts purportedly contained exactly the same sum ie, RM195,573.67 or whether it was a coincidence (see para. 5(1) of the IO's second affidavit). Again the IO did not exhibit any bank statement to establish that this sum was in these two bank accounts.

**[31]** In respect of prayer 1(ii) of the application, the IO did not exhibit any bank statement to establish that the sum of RM12,763.98 was in fact in the first respondent's bank account no. 515120-201858 at Malayan Banking, Labuan on 21 September 2012 which could be seized or could be forfeited (see 'AT2').

**[32]** Based on paras. 8, 9 and 10 of the IO's first affidavit, the IO did not refer to and there was no evidence of any transaction or connection between the first respondent's bank account no. 3-0659180-25 at Public Bank, Labuan and the first respondent's bank account no. 515120-201858 at Malayan Banking ('Maybank'), Labuan. He did not explain why he seized or wanted to forfeit the money in this Maybank account belonging to the first respondent. He also did not explain the connection between this Maybank account of the first respondent and the Maybank account belonging to the fourth respondent which he seized together as stated in 'AT2'.

**[33]** Similarly, the exhibits marked as 'AT1' to 'AT8' annexed to the second affidavit of the IO merely referred to these bank accounts to be seized without setting out the monies or sums which he had referred to in his affidavits and whether these sums were in fact in these bank accounts. The IO did not exhibit or produce any bank statements or documents to establish that these monies or sums were in the 23 bank accounts belonging to the third, fourth, and fifth respondents and which could be seized as at 21 September 2012 or which could be forfeited in this application. Without such documents to support his allegations or statements in his affidavits, there was no basis for the IO or PP to justify the seizures or forfeitures.

A [34] It was not in dispute that these sums or proceeds were from the sales of cigarettes and liquors. The question is did the respondents sell these cigarettes in contravention of the Customs Act or were engaged in money laundering which entitled the PP to seize and to forfeit the sums in these bank accounts? The PP had contended that the first respondent had sold cigarettes outside Labuan. However there was no allegation that the second, third, B fourth and or fifth respondents had sold cigarettes outside Labuan.

[35] It should be noted that the PP did not set out and did not exhibit any bank account of the second respondent. The PP did not seize any bank account of the second respondent and has not applied to forfeit any money C in any bank account of the second respondent. He did not lead any evidence that the second respondent was involved in selling duty free cigarettes or involved in smuggling of duty free cigarettes or that he was involved in money laundering. There was no explanation why the second respondent was included in this application. There was no basis for the second respondent D to be included in this application and the PP's application against the second respondent ought to be and is hereby struck out.

[36] Although the PP contended that based on the documents exhibited that the cigarettes were sold outside Labuan, it did not lead any direct evidence that the first respondent and or the other respondents had transported or E exported duty free cigarettes from Labuan which were sold in Miri or Kota Kinabalu. It did not lead any evidence that the cigarettes were sold in Malaysia, exclusive of Labuan and Langkawi. It did not lead evidence that these sales were intended to evade customs or import duty.

[37] From the affidavits and documents exhibited, the PP could not F establish that these cigarettes were sold in Miri or Kota Kinabalu or in Malaysia, exclusive of Labuan and Langkawi. There was also no evidence to substantiate the submissions of the PP that based on the payments made in Miri that the cigarettes were sold in Miri or Kota Kinabalu.

G [38] In the modern business world, payments can be made or banked in or transferred from any bank account or any part of the world for transactions or sales or purchases made in another part of the world, at the convenience of the parties to the transactions or at the convenience of the payer and payee. The sales and purchases of goods, not in respect of duty free cigarettes transported from Labuan, can be transacted or made in Kuching and the H payments made in Miri. Similarly payments can be made in Miri or Kota Kinabalu for the sales and purchases of duty free cigarettes transacted or made in Labuan.

I [39] The PP did not refer to any provisions or regulations under the Customs Act or any legislation that duty free cigarettes sold in Labuan must be paid in Labuan or cannot be paid for in Miri or elsewhere. Similarly the PP did not refer to any Bank Negara regulations or directives that duty free cigarettes sold in Labuan must be paid in Labuan or cannot be paid for in Miri or Kota Kinabalu.

[40] The more important aspect of the sales and purchases was whether they were carried out in Labuan ie, whether the cigarettes were sold and delivered to the purchasers in Labuan. If the cigarettes were delivered by the first respondent to the purchasers in Labuan, obviously the sales were made in Labuan and the first respondent could not be subject to customs duty on the sales.

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[41] The PP did not lead any evidence and there was no evidence that the cigarettes in the 16 transactions described as 'cash sale-cigarette', which the IO said were paid for in Miri, were sold or delivered to the purchasers outside Labuan or in Miri or in Kota Kinabalu. It did not lead any evidence and there was no evidence that the 82 payments or payments made into the bank account no. 3-0659180-25 of the first respondent in Labuan were from the sales of duty free cigarettes transported from Labuan and delivered and sold in Miri or Kota Kinabalu. It did not lead any evidence and there was no evidence that the 82 payments made into the bank account of the first respondent in Labuan were from the proceeds of sales of duty free cigarettes transported from Labuan and delivered and sold in Miri or Kota Kinabalu.

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[42] Further, in respect of the sum of RM68,800 paid into the first respondent's bank account in Labuan on 1 October 2010 *via* the first respondent's account at Public Bank, Miri, the PP submitted that it had reason to believe that the sales occurred outside Labuan. Again this submission was not supported by evidence. There was no provision in the Customs Act against any sale outside of Labuan. Section 155(1)(b) provides that no export duty shall be payable upon any goods exported from Labuan. However if the goods were imported or transported to Malaysia from Labuan or Langkawi, then s. 155(1)(c) provides that import duty shall be payable upon all dutiable goods transported to the principal customs area from Labuan or Langkawi to all intents as if such transportation to the principal customs area were importation into Malaysia.

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[43] The IO had affirmed that Toh Kah Tiong had said that Toh Kah Ming had asked him to assist to collect this sum from a person from Brunei for the sale and purchase of cigarettes but Toh Kah Tiong was not sure where the sale took place because he was not involved in the business of the first respondent. Toh Kah Tiong had said this person from Brunei paid this sum to him in Miri which he then paid into the account of the first respondent in Labuan. There was no evidence to the contrary.

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[44] In this particular sale, again the PP did not establish that the duty free cigarettes from Labuan were sold in Malaysia. The PP did not establish that these cigarettes were exported from Labuan into Malaysia and were therefore subject to duties in contravention of the provisions of the Customs Act. The PP did not establish that the sale involved the smuggling of these cigarettes from Labuan into Malaysia. The PP did not establish that the cigarettes were not sold in Brunei. It also could not disprove that the cigarettes were exported from Labuan to Brunei and sold in Brunei.

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- A [45] Based on the statements of Toh Kah Tiong recorded by the IO, an inference could be drawn that the cigarettes were exported from Labuan to Brunei and sold in Brunei because it was paid for by a person from Brunei. If that was the case then no export duty was payable upon the cigarettes exported from Labuan and sold in Brunei. This would contradict the
- B contention of the PP that the cigarettes were sold in Miri. The PP has failed to prove that the proceeds of RM68,800 from the sale of cigarettes had been obtained as a result of or in connection with an offence under s. 4(1) of Act 613 or under the Customs Act.
- C [46] In prayer 1 (iii) to (xxv), the PP applied to forfeit the sums in the 23 bank accounts of the third, fourth and fifth respondents who were the shareholders and directors of the first respondent. The PP submitted that the third, fourth and fifth respondents did not explain why so much monies were paid into their accounts by the first respondent and whether these payments involved money laundering or were derived from unlawful activities.
- D [47] Toh Kah Ming in her affidavits had explained that these were dividend payments to the third, fourth and fifth respondents who were the shareholders and directors of the first respondent.
- E [48] The balance sheet of the first respondent as at 30 June 2010 showed that the revenue for the year amounted to RM10,268,112.60 including cash sales of cigarettes of RM8,124,963.40, the retained profits amounted to RM2,966,884.61 and RM1,100,000 were paid out as dividends to the shareholders (see exh. 'AT4(a)' of the first affidavit of the IO). The balance sheet of the first respondent as at 30 June 2011 showed that the revenue for the year amounted to RM6,900,152.35, the retained profits amounted to
- F RM3,420,619.42 and RM1,600,000 were paid out as dividends to the shareholders (see exh. 'AT4(b)' of the 1st affidavit of the IO).
- G [49] These documents were exhibited by the PP and would explain the several payments into the bank accounts of the third, fourth and fifth respondents as dividends. The PP did not adduce any evidence to the contrary. These documents produced by PP would contradict the contention of the PP that these payments were for the purposes of money laundering or were the proceeds of unlawful activities and raised doubts on the contentions of the PP and the case of the PP against the respondents.
- H [50] The IO did not affirm that he is or was an accountant or an expert in accounts or auditing or accounting or forensic accounting. The IO did not connect with each 'cash sale-cigarette' or each transaction or sale of cigarettes, which he referred to in his affidavits, to each smuggling of cigarettes or unlawful sales of cigarettes or which were in contravention of the Customs Act. The PP did not exhibit any report by any accountant or
- I expert to trace or connect the entries in the ledgers or accounts with any smuggling of cigarettes or unlawful sales of cigarettes or that these proceeds or payments or dividends were derived from unlawful activities or for money

laundering. The IO did not produce any report from the Inland Revenue or Tax Department that the respondents had evaded income tax or other taxes which contravened any law. There was no report by Public Bank, Maybank, Hong Leong Bank or Bank Negara or any other banks that these bank accounts or that the proceeds in these bank accounts involved money laundering.

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B

[51] As stated above, the PP could not show on a balance of probabilities that duty free cigarettes were transported from Labuan or Langkawi and were delivered or sold in Miri or Kota Kinabalu or in other regions in Malaysia. The PP could not show that there were smuggling of cigarettes from Labuan into Miri or Kota Kinabalu in contravention of the provisions of the Customs Act. The PP could not show that these payments for the cigarettes sold and paid into the account of the first respondent at Labuan were proceeds from unlawful activities. The PP could not show that these transactions or payments into the bank accounts of the third, fourth and fifth respondents were proceeds from unlawful activities and not payments as dividends.

C

D

[52] It should be noted that the respondents had not been charged for any offence nor convicted for any offence under the Customs Act. Therefore s. 119 of the Customs Act is not applicable to reverse the burden on the respondents to show that they did not commit the offence or were involved in money laundering under s. 4(1) of Act 613.

E

[53] On the affidavits and documents, the PP has failed to establish on a balance of probabilities that the respondents were involved in money laundering or in unlawful activities or that the proceeds in these bank accounts were or are the proceeds from unlawful activities or for the purposes of money laundering. For the reasons given, the application to forfeit these monies or sums in these 25 bank accounts is hereby dismissed. The freezing or seizures of these accounts are hereby set aside. Each party to bear their own costs in this application.

F

G

H

I