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High Court Rules Business Sale Agreement Is Subject To Nominal Stamp Duty

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Recently, in *HLSB v Pemungut Duti Setem*, the High Court ruled in favour of the taxpayer where it was held that a business sale agreement is to be stamped at the nominal rate of RM 10.

The taxpayer was successfully represented by the firm's Tax, SST & Customs partner S. Saravana Kumar together with associate, Nur Hanina binti Mohd Azham.

This alert summarises the arguments advanced by both parties in this matter and the significance of this case.

Facts

On 6.2.2020, a business sale agreement was executed between MB Malaysia and the taxpayer. Under this agreement, the taxpayer agreed to acquire the business assets and liabilities of MB Malaysia. Among others, the assets and liabilities acquired were MB Malaysia's fixed assets such as computer software, computer hardware, fittings, and equipment as well as liabilities under existing business contracts. The list of assets excluded from the transaction was set out in Schedule 2 of the Agreement. Among others, the assets excluded in the transaction is the "goodwill of the Malaysian Business" of MB Malaysia.

The taxpayer submitted the agreement for stamp duty adjudication to the Collector of Stamp Duties on 5.3.2020. Subsequently, on 15.3.2020, the Collector ruled that the consideration paid by the taxpayer to MB Malaysia pursuant to the agreement is the consideration for the purchase of the goodwill of MB Malaysia and raised a stamp duty assessment based on ad valorem rate under item 32 of the First Schedule of the Stamp Act 1949 (the Act). However, the Collector did not state which sub-limb of item 32 which the Collector relied upon to determine the ad valorem rate.

The taxpayer disagreed with the Collector's stance to raise the assessment based on ad valorem rate. On 11.4.2020, the

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taxpayer paid the stamp duty under protest and submitted the notice of objection against the assessment pursuant to Section 38A(1) of the Act. However, on 13.4.2020, the Collector rejected the taxpayer's application and provided no reasons for the rejection. Being aggrieved by the assessment, the taxpayer filed an appeal to the High Court pursuant to Section 39(1) of the Act.

The Taxpayer's Contention

The arguments for the taxpayer can be summarised as follows:

- The Collector failed to specify the sub-limb of item 32 of First Schedule of the Act that it is relying on.
- The Collector failed to provide any reason as to why the agreement should be assessed under Item 32.
- The failure to provide reasons leads to the inference that there are no good reasons for the decisions made by the Collector especially when the taxpayer in their notice of objection have provided a detailed grounds of objection.
- Our superior courts have recognised that failure of a public authority to give reasons for its decision is a sufficient ground in itself for a decision to be liable to be quashed as being bad in law.
- The consideration paid by the taxpayer was for the list of assets stated in the agreement, which excluded the goodwill of MB Malaysia. Schedule 2 of the Agreement clearly stipulates that the goodwill of MB Malaysia's business in Malaysia was excluded from the transaction.
- Section 21(1) of the Act was inapplicable as there was no interest in property in the present matter. There was no conveyance, assignment, transfer of sale of property under the Agreement that warrants the application of Item 32 of the First Schedule of the Act.

Based on the above arguments, the taxpayer submitted that the agreement should be stamped at the nominal rate of RM 10 pursuant to item 4 of the First Schedule of the Act.

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The Collector's Contention

The Collector's main argument was that the stamp duty imposed on the agreement under Item 32 of the First Schedule of the Act was in order because the agreement was a conveyance on sale of business falling under Section 21(1) of the Act. Besides that, the Collector also submitted that the Collector does not have a duty to give reasons for its decision. The Collector added that the imposition of ad valorem stamp duty is based on the value of the consideration in the agreement and the value of goodwill was not taken into account.

Commentary

Upon hearing both parties, the High Court allowed the taxpayer's application that the agreement should be assessed under item 4 of the First Schedule of the Act. The stamp duty assessment by the Collector was ruled to be erroneous. Another significant ruling in this case was the High Court's order that the Collector pay interest at the rate of 8% from the time the stamp duty was paid under protest.

The High Court's decision serves as a reminder that an aggrieved taxpayer by a stamp duty assessment is not left without any recourse. Whilst the Collector has the power to collect stamp duty from taxpayers, the Collector should not exercise his authority arbitrarily. This decision reaffirms the position that a sale of business agreement is to be taxed at the nominal rate of RM10 under item 4 of the First Schedule of the Act.

Authored by Nur Hanina Mohd Azham, an associate from the firm's Tax, SST and Custom department.

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