

20 APRIL 2021

Full Stay Order In A Tax Matter: *SI Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*

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On 15 April 2021, the High Court allowed an application for a stay of proceedings pending the determination of the taxpayer's judicial review application to challenge the legality of the disputed tax assessments raised by the Director General of Inland Revenue (DGIR). On the same day, the High Court also allowed the taxpayer's application to amend the prayers sought in relation to the taxpayer's judicial review proceedings.

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

Brief Facts

The taxpayer is involved in the property development business. The taxpayer had entered into agreements with the Johor State Government, whereby the taxpayer must sell certain number of units of their development to Bumiputera purchasers. However, in the event the taxpayer is unable to do so, the taxpayer may apply to the Johor State Government for a release. The release is subject to a cash contribution from the taxpayer to the Johor State Government. In the present matter, the taxpayer made the cash contribution to the Johor State Government to obtain the release and deducted the cash contribution as a tax deductible expense. Consequent to a tax audit, the DGIR disagreed with the taxpayer's tax treatment and claimed that the cash contributions were capital in nature. The DGIR then proceeded to raise tax assessments for a large sum of money against the taxpayer.

Being aggrieved by the DGIR's decision, the taxpayer, on 17 June 2020, filed an application for judicial review to challenge the legality of the disputed tax assessments on the basis that the cash contributions are deductible under Section 44(6) of the Income Tax Act 1967 (ITA) as it is cash payment to a

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State Government. The taxpayer also applied for a stay order against the payment of the disputed taxes which were in the millions of ringgits. On 30 September 2020, the High Court allowed the leave application to commence judicial review proceedings against the decision of the DGIR as the High Court was persuaded that there were exceptional circumstances for the taxpayer to challenge the DGIR's assessments by way of judicial review.

Separately, in light of the decisions of the High Court in the *Prima Nova Harta Development* case and the *Sovereign Teamwork* case which were decided in favour of the taxpayers on 29.6.2020 and 22.9.2020 respectively, the taxpayer in this case then filed an application to amend its judicial review application to include an alternative prayer that the cash contributions are also a business expense payment under Section 33(1) of the ITA.

The DGIR objected to both the stay application and the application to amend the notice to include the alternative prayer.

The Taxpayer's Submission

The arguments for the taxpayer can be summarised as follows:

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Real Property Gains Tax

Stamp Duty

Anti-Profiteering

GST Disputes

- The law in this matter is settled whereby the Court has inherent jurisdiction to grant stay even in tax cases as enumerated in the *Government of Malaysia* case.
- There are special circumstances that warrants the granting of stay in the present matter, that is, to preserve the integrity of the judicial review application.
- In addition, according to the Auditor General's Audit Report, the DGIR has failed to pay out RM 10.8. billion in tax refunds and this is good reason to preserve the status quo of the parties.
- The taxpayer is asking for a stay of the disputed taxes until the disposal of the judicial review application and not an injunction to prevent the DGIR from performing their statutory duties.

- Section 103(1) and Section 106(3) of the ITA 1967 do not bar the High Court from exercising its inherent jurisdiction to grant a stay.
- The taxpayer is merely adding in a prayer after the taxpayer was made aware of the *Prima Nova* and *Sovereign Teamwork* cases which are similar to the taxpayer's case.
- The application to amend the prayers was filed promptly after *Prima Nova* and *Sovereign Teamwork* were decided.
- The application to amend the prayers does not in any way prejudice the DGIR as the DGIR is already familiar with the subject matter of the additional prayer.

The DGIR's Response

The DGIR argued that there are no special circumstances warranting a stay of proceedings that has been illustrated by the Taxpayer. In this regard, the DGIR relied on a number of authorities such as the *Tan Bun Teet* case, the *Mudek Sdn Bhd* case and the *Nooryana Najwa binti Mohd Najib* case. The DGIR further contended that the granting of stay will prevent the Respondent from performing their statutory duties as provided under Section 103 of the ITA 1967.

Besides that, the DGIR also submitted that the taxpayer's application to amend the prayers is an abuse of court's process as the application was filed months after the High Court had ordered for leave to be granted to commence judicial review proceedings on 30.9.2020. Moreover, the DGIR argued that the application to amend is also an afterthought by the taxpayer as the taxpayer did not plead Section 33(1) of the ITA when the judicial review application was initially filed. In concluding their oral submission, the DGIR relied on the Federal Court case of *Iftikar Ahmed Khan* which held that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded.

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The High Court's Decision

In delivering the decision immediately after the hearing, the High Court dismissed the objections made by the DGIR. The High Court granted the stay of proceedings application pending the full and final determination of the taxpayer's judicial review application in order to preserve the status quo in the present matter. Additionally, the High Court also granted leave to the taxpayer to amend the notice of application for judicial review to include the right to deduct the cash contributions under Section 33(1) as an alternative prayer.

This decision by the High Court reaffirms the position that the High Court is empowered to grant stay of proceedings even in tax matters. Stay orders such as this is a key tool for taxpayers as this is the first layer of protection against arbitrary assessments.

Authored by Nur Hanina binti Mohd Azham, a pupil with the firm's Tax, SST & Customs practice.

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