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Can The Inland Revenue Board Appoint A Person As Its Agent?

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
☎ +603 6209 5404
✉ sara@rdslawpartners.com

Many do not know that the Income Tax Act 1967 (ITA) authorises the Director General of Inland Revenue (DGIR) to appoint any person as the DGIR's agent for another taxpayer. Section 68 of the ITA empowers the DGIR to appoint any person as an agent for purposes of the ITA. Once appointed, the person shall act an agent, who will be assessable and chargeable to tax on behalf of the other taxpayer.

Section 68(1) of the ITA reads:

"The Director General may, if he thinks fit, by notice in writing appoint any person to be the agent of any other person for all or any of the purposes of this Act; and, where any person is so appointed for all those purposes, he shall be assessable and chargeable to tax on behalf of that other person."

Recently, the DGIR has been invoking Section 68 to appoint a person who holds or may hold any money belonging or owing to a taxpayer, who has outstanding taxes. In other words, a taxpayer who is in debt to the DGIR but has financial resources or payments due to the taxpayer, the DGIR may appoint the person who owes money to the taxpayer or supposed to pay the taxpayer as an agent. The monies owed or due to the taxpayer by the agent will be utilised by the DGIR to settle the taxpayer's outstanding taxes.

In *RP Sdn Bhd v. Director General of Inland Revenue* (1990) 1 MSTC 3,099, the DGIR appointed a few companies as its agents, who were instructed not to make any payments to the taxpayer without the approval of the DGIR. The taxpayer filed a civil suit against the DGIR alleging that the appointments of the agents were wrongful, ultra vires and an abuse of the DGIR's powers. The High Court held that the DGIR was empowered under Section 68(1) to appoint agents and as such, was not acting ultra vires when the DGIR exercised its power as there was no evidence that the DGIR acted in bad faith.

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Liability Of An Agent

Once a person has been appointed an agent of the DGIR, the agent is assessable and chargeable to tax as if the assessment was raised against the agent. The agent shall be responsible for doing all such acts and things, as required by the ITA, in particular for the payment of any tax due.

Further, the agent must remit to the DGIR any accessible money for the purpose of payment of any tax due from the taxpayer despite the assessment not being made under the agent's name. Accessible money is defined as money due from the agent to the taxpayer as any pension and any salary, wages or other remuneration which:

- (a) From time to time are due from the agent to the taxpayer or are held by the agent in custody and control on behalf of the taxpayer.
- (b) Money of or due to the taxpayer, which are obtainable on demand by the agent.

When Does The Liability Arise?

There are requirements to be fulfilled by the DGIR before appointing a person as an agent/representative (i.e. whether there was a debt owed by the agent to the taxpayer). In this regard, the Supreme Court of New South Wales in *Deputy Commissioner of Taxation (NSW) v Peacock and Other* (1980) 32 ALR 280 laid down the requirements or instances that enable the tax authority to appoint a taxpayer as an agent/representative. The Supreme Court held that there must be a debt due before Section 218 of the Australian Income Tax Act can be invoked. The debt may not necessarily be payable:

- (i) The words "due by the taxpayer" in Section 218(1)(i) of the Australian Act refer to a liability that has arisen, whether the money is payable presently or at a future date.
- (ii) Liability for income tax arises, at the very latest, on delivery of the notice of assessment to the taxpayer.
- (iii) The tax authority's rights in respect of money owed to a taxpayer crystallise when the notice is delivered, and, in

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the case of money “due or accruing” prevail over any attempt by the taxpayer to divest himself of his interest in it.

The Supreme Court of Western Australia in *Weston v Perkins (WA) PTY LTD* BC202102468 defined the word ‘due’ and ‘payable’ as follows:

- (a) The word ‘due’ in a legal context is sometimes used in the sense of ‘payable’, but prima facie means any sum that a person is legally liable to pay, irrespective of whether the time for payment has arrived i.e. irrespective of whether it is then ‘payable’.
- (b) A debt may be said to be ‘payable’ if it is not only due (in the sense of owing) but is presently payable in the sense that the time for payment has arrived, and an action could be maintained in respect of it. In the expression ‘due and payable’, the word ‘payable’ often means required to be immediately or presently paid.
- (c) Thus, the words ‘due and payable’ may often be tautological in the sense that an amount that is ‘payable’ will at least generally first be owing in the sense of due. In other words, to say that an amount is ‘due and payable’ will often not add anything to a statement that the amount is ‘payable’.
- (d) In ordinary parlance, a debt may be said to be ‘payable’ prior to any admission that it is payable, or any legal adjudication in respect of it.

The English Court of Appeal in *Goldman Sachs International v Videocon Global Ltd and another* [2017] 2 All ER (Comm) 800 held that there is a clear distinction between the word ‘due’ and ‘payable’. There is a clear demarcation between sums that are “due” with those which are “payable”. The former is said to refer to the cut-off point where a debt obligation begins to accrue and that a sum that is due is only payable upon the fulfillment of certain conditions as stipulated in the contract, whilst the latter means “immediately due for payment” or “an immediately enforceable obligation to pay.”

The Western Cape High Court of South Africa in *Oceanic Trust Co Ltd No v Commissioner for South African Revenue Service*

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15 ITLR held that in determining the meaning of the word “due”, it must be construed in favour of the agent:

“The context of s 99 is that it constitutes a permissible method the respondent may use to recover tax and other amounts owing by the taxpayer. Logically, since a money debt can generally only be enforced once it is payable, the tax owing can only be recovered once it is payable. This is the way the respondent seems to have interpreted its powers when regard is had to para 6.3 of the letter of assessment where it is stated that a failure to pay the outstanding amounts by their relevant due dates will result in it instituting legal proceedings, which may include action under s 99 for the recovery of any amount which remains unpaid. Further, the meaning contended for by the applicant is one of the possible meanings of the word ‘due’. The word must consequently be applied in the manner least onerous to the taxpayer. In Cactus Investments (Pty) Ltd v Comr for Inland Revenue 1999 (1) SA 315 at 323 Hefer JA said:

‘Of course, the Act must be interpreted and applied in the least onerous manner which its wording allows.’

In addition, to the extent that the word ‘due’ is ambiguous, it must, in accordance with the contra fiscum rule, be construed against the respondent. Further, on a purposive construction of s 99, the legislature cannot be held to have intended that the respondent can fix a date for payment in an assessment but then be entitled in terms of s 99, to proceed to collect some or all of the assessed tax before the arrival of the date for payment set in the assessment.”

Further, the approach taken by the High Court of Singapore in *Nam Fang Electrical Co Pte Ltd v City Developments Ltd* [1996] SGHC 231 on whether there were in fact monies ‘due’ to the main contractor from the defendants within the meaning of Section 58 of the Singapore Income Tax Act 1947 (which is similar to Section 68 of the ITA) was to scrutinise the contract entered between parties.

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Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdslawpartners.com

S Saravana Kumar
Partner
Tax, SST & Customs Practice
☎ +603 6209 5404
✉ sara@rdslawpartners.com



Hence, in order for the DGIR to appoint a person as an agent on behalf of another taxpayer, there must be a debt owed from the agent to the taxpayer. Based on the *Oceanic* case, the word 'due' can be interpreted in favour of the taxpayer to include 'payable'. Further, in the *Nam Fang* case, the word 'due' in the context of being an agent must be construed pursuant to the contract entered by the parties.

Conclusion

The DGIR has vast powers under the ITA to appoint a person as an agent to make payment of taxes on behalf of another. However, the person who has been appointed as an agent is aggrieved by the appointment may appeal within 30 days upon the appointment being made to the Special Commissioners of Income Tax (SCIT). The onus is on the agent to establish that no money is due and payable to the taxpayer or that the money is not payable to the taxpayer.

Authored by Amira Azhar, Senior Associate with the firm's Tax, SST & Customs practice.

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