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Court Of Appeal Grants Stay Order To Taxpayer

MPSB v Ketua Pengarah Hasil Dalam Negeri

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Yesterday, the Court of Appeal unanimously allowed the taxpayer's stay application pending the determination of its appeal against the High Court's dismissal of leave application for judicial review.

The taxpayer was successfully represented by our Tax, SST & Customs Partner, S. Saravana Kumar together with associate, Chew Ying.

Brief Facts

The taxpayer acquired a piece of land in the year 1997 and carried on the business of oil palm cultivation on the land. The land was consistently classified as the taxpayer's non-current assets in its audited accounts. After holding the land for nearly 16 years, the taxpayer disposed of the land to a related company.

In 2019, the Director General of Inland Revenue (DGIR) issued audit findings letter to the taxpayer, stating that the gains from the sale of the land would be subject to tax under Section 4(a) of the Income Tax Act 1967 (ITA). Vide various letters, the taxpayer explained that the land was its investment property and that the gains from the disposal should be subjected to real property gains tax (RPGT) instead. The DGIR maintained its position as per the audit findings letter and later raised additional assessment for nearly RM 25 million against the taxpayer.

Aggrieved by the DGIR's decision, the taxpayer filed a judicial review at the High Court. The High Court granted an interim stay pending the hearing of the leave application but subsequently dismissed the taxpayer's application to commence judicial review. The High Court also dismissed the formal application to stay the DGIR's decision pending the taxpayer's appeal to the Court of Appeal. Immediately, the taxpayer filed an appeal to the Court of Appeal and a

motion for an interim stay order under Section 44(1) of the Courts of Judicature Act 1964 (CJA).

The Taxpayer's Case

The taxpayer's counsel argued that a plethora of cases have held that the Court has the power under Section 44(1) of the CJA to grant an interim order for a stay of execution and proceedings pending the appeal proper before the Court. Among others, the taxpayer's arguments are as follows:

- the Court of Appeal has the power to grant an interim stay of proceedings pending the appeal to prevent prejudice to the taxpayer.
- the threshold of the test to grant a Section 44(1) of the CJA stay is lower than the usual special circumstances test.
- the Court of Appeal will grant a stay if the following are met:
 - (a) the appeal will be rendered nugatory if no stay is granted;
 - (b) the motion for stay made by the taxpayer is bona fide and is not frivolous; and
 - (c) a stay is required to preserve the integrity of the appeal.
- the issue of whether the taxpayer is involved in an adventure of trade is a question of law.
- there are plenty of case law which are binding on the DGIR that the gains from an investment property should be subject to RPGT instead of income tax.

The taxpayer also submitted in the alternative that there are special circumstances that could warrant a stay of proceedings. Further, the taxpayer highlighted that the Auditor-General's Report 2019 revealed that the DGIR has failed to process the refunds for excess tax payments amounting to RM 3.8billion, which strengthen the taxpayer's argument that there is no guarantee that the taxpayer will receive a full refund within the stipulated time frame, should a stay is not granted.

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The DGIR's Response

The DGIR argued that the taxpayer's appeal is devoid of merits as the matter is a question of fact that needs to be ventilated before the Special Commissioners of Income Tax and that judicial review is not the proper forum of appeal against the additional assessment. The DGIR also highlighted that the income tax recovery in Malaysia operates in a manner where the taxes must be paid first as Section 103(1) of the ITA provides that taxes payable under an additional assessment must be paid regardless whether or not an appeal has been brought against the assessment.

The Court Of Appeal's Decision

The Court of Appeal ruled that there were merits in the taxpayer's stay application and unanimously granted the motion for a stay pending the disposal of the taxpayer's appeal at the Court of Appeal.

Conclusion

This decision further strengthens that notion that a stay under Section 44(1) of the CJA is distinct from a stay granted at the High Court and Federal Court. The special circumstances test is to a lesser role in applications under Section 44(1) of the CJA as nowhere in the CJA specifically require the Court of Appeal to rely on the rule. The main consideration in granting a stay of proceedings under Section 44(1) is whether the integrity of the appeal should be preserved, which is a lower threshold than the special circumstances test. This decision also proves that the Court of Appeal is likely to lean towards the favour of an appellant in a *bona fide* application and grant a stay in a fit and proper case unless the application for stay is indeed frivolous with no chance of success.

Authored by Chew Ying¹

¹ Chew Ying is an associate with the firm's Tax, SST & Customs practice. She read law at the University of Nottingham.

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How can we help you?

We are operating as usual and clients may pose any tax queries including those in relation to stay applications via e-mail to:

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